APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 31
HCA/2021/000007/XM

Lord Justice Clerk
Lord Turnbull
Lord Matthews

OPINION OF THE COURT

delivered by LORD TURNBULL

in

CROWN APPEAL UNDER SECTION 28 OF THE EXTRADITION ACT 2003

by

THE LORD ADVOCATE ON BEHALF OF THE OFFICE OF THE PROSECUTOR GENERAL OF THE ITALIAN REPUBLIC, COURT OF TRIESTE

Appellant

against

SHKELQIM DAJA

Respondent

Appellant: Dickson, Sol Adv, representing the Lord Advocate on behalf the Italian Authorities; Crown Agent
Respondent: Mackintosh QC; Scullion Law, Glasgow

22 June 2021

[1] This is an appeal by the Lord Advocate brought under section 28 of the Extradition Act 2003 ("the 2003 Act") on behalf of The Office of The Prosecutor General of the Italian Republic, Court of Trieste. The appeal challenges the decision of the sheriff at Edinburgh, dated 3 March 2021, to order the respondent's discharge under section 20(7) of the 2003 Act.

Background

[2] The respondent, an Albanian national, was arrested on 18 June 2019 under section 4 of the 2003 Act in respect of an European Arrest Warrant ("EAW") issued by the Italian Judicial Authorities on 8 May 2017.

[3] The EAW sought the respondent's extradition to serve a sentence of 15 years imprisonment imposed on 24 September 2014 by the Court of Appeal at Trieste, Italy following review of the decision of the Court of Pordenone of 12 October 2012, to convict him of framework list offences characterised under Scots law as two charges of attempted murder and one of assault to severe injury and danger of life.

[4] The Italian criminal proceedings had been commenced following an incident in Pordenone Italy on the night of 9/10 December 2006 in which two males were victims of stab wounds. The respondent had been tried (along with 4 other accused) and convicted in his absence. He had never been arrested nor made any appearance before the courts, having left Italy two weeks after the incident and never returned. At the trial, a court appointed lawyer appeared on his behalf.

[5] Following his conviction in absence another lawyer, Mr Pardo, had acted for the respondent, under a mandate engaged via a power of attorney purportedly signed by the respondent. He acted in three appeals in relation to the conviction, one of which had been successful in reducing the sentence from an initial 18 year period to 15 years.

The EAW

[6] The EAW was presented on the basis that the respondent was a fugitive from justice, who, having been aware of the scheduled trial, had given a mandate to a legal counsellor, appointed by himself or by the state, to defend him at trial. It narrated that in the appeal the

lawyer, Mr Pardo, did not contest the respondent's absence and lodged a further appeal on his behalf to the Court of Cassation. Proceeding on this basis the EAW made no reference to the possibility of a retrial.

The extradition hearing

[7] At the extradition hearing the sheriff permitted counsel appearing for the respondent to lead evidence concerning the circumstances in which he came to be convicted in his absence. Evidence was led from the respondent's brother Dorian, who was accused with him and was acquitted after the trial, at which he attended, from the Italian lawyer Mr Pardo who came to act for the respondent, and from a handwriting expert Dr Evelynn Gillies. The respondent gave evidence as well.

[8] In light of this evidence the sheriff determined that the respondent had been tried and convicted in his absence, but that he had not deliberately absented himself from trial, having had no notification of the Italian proceedings until 2015. He held that the state appointed lawyer appeared for him at trial without having met the respondent, as was then possible under Italian law, and that Mr Pardo appeared for the respondent under a mandate which had not been signed by the respondent but had been fraudulently supplied by his father, with a forged signature. Mr Pardo had no direct dealings with and did not meet the respondent. These findings are not challenged in this appeal.

[9] Separately, the sheriff also allowed evidence to be led on behalf of the respondent from a practising Italian defence attorney, Nicola Canestrini, as to the effect of Italian law and procedure. Having done so he made what he described as findings in law based on this evidence:

1. Mr Daja would be entitled, on return to Italy, to a review on appeal amounting to a retrial, in accordance with Italian procedure. That procedure would only involve the rehearing of evidence, or the leading of new evidence, if the appeal court so permits. The appeal court will place importance on the evidence at the original hearing. It is likely that the evidence at the original hearing was not properly tested. There are evidential restrictions on whether new evidence will be permitted. In such cases it is rare for a retrial to be permitted de novo. It is accordingly very unlikely that Mr Daja will be entitled to test the existing evidence or lead new evidence on his behalf.

2. In any review or retrial proceedings, Mr Daja would not have the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf on the same conditions as witnesses against him. The terms of section 20(8) of the 2003 Act are not satisfied. Accordingly the question in section 20(5) must be decided in the negative.

Having arrived at these conclusions the sheriff held that section 20(7) of the 2003 Act required him to order the respondent's release.

Submissions for the appellant

[10] On behalf of the appellant, it was submitted that the circumstances of the present application for extradition were highly unusual. The ordinary rule was that the court of the requested state should accept the terms of the EAW at face value and not carry out its own investigation of the merits of the request - *Cretu* v *Local Court of Suceava, Romania* [2016] 1 WLR 3344, para 35, *Domi* v *Public Prosecutors Office at the Court of Udine, Italy* [2021] EWHC 923 (Admin), paras 73 and 79.

[11] In the present case the status of the respondent as a fugitive had been put in issue before the sheriff based upon a claim of fraud. It had been correct in those circumstances for the sheriff to have heard evidence and to have assessed that status. Although no objection had been taken to the evidence given by Mr Canestrini, the evidence which he gave about the quality of any retrial available to the respondent was not relevant. Relying on the case of *Nastase* v *Italy* [2012] EWHC 3671 (Admin) it was submitted that the question of the nature of the retrial available was for the Italian authorities to determine but that it was to be assumed that the procedure available was compliant with Article 6 ECHR. While the sheriff rightly noted that section 20(8) of the 2003 Act required to be read in conformity with Article 4a of the Council Framework Decision 2002 (as amended), he erred in not reading the requirements in section 20(8)(b) so as allow the procedural law of Italy to take effect (*Dumitrache* v *Prosecutor Generals Office of the Court of Pordenone, Italy* [2021] EWHC 958 (Admin) at para 82-84).

[12] Mr Dickson for the appellant contended that in his submission to the sheriff he had argued that Mr Canestrini's evidence on this issue was irrelevant. He drew attention to paragraphs 98 and 105 of the sheriff's judgement as supporting this proposition. He submitted that the sheriff had not dealt with this point in his reasoning.

Second chance to extradite

[13] Mr Dickson also drew attention to paragraph 120 of the sheriff's report where he explained that his findings did not preclude a further attempt to extradite the respondent based on a corrected version of the facts. It was submitted that the sheriff was wrong in this assumption. He had not invited parties to address him on this issue. The Italian authorities could not issue another request as the proceedings in Italy were final.

Submissions for the respondent

[14] On behalf of the respondent, Mr Mackintosh QC observed that the appellant had not objected to the leading of evidence as to whether the respondent had instructed his own lawyer at trial and/or in the appeal, nor had he objected to the evidence concerning the nature and extent of any right to a retrial or appeal. The appellant had presented and sought to rely upon two letters to the sheriff from the Italian authorities. One dated 26 September 2019 and the other dated 20 August 2020. Each contained additional information from the requesting authority in respect of the issue of the nature of any retrial available to the respondent. Since section 9 of the 2003 Act provides that the procedural rules of a summary trial are to be followed in an extradition hearing, and taking account of section 192(3) of the Criminal Procedure (Scotland) 2003 Act 1995, it was now not open to the appellant to argue that the sheriff was wrong to make findings in fact on the basis of evidence led before him without objection.

[15] The respondent submitted that, on the evidence heard, the sheriff was persuaded that he was convicted in his absence and had not deliberately absented himself from his trial. Having made these findings the sheriff proceeded, correctly, to act under section 20(5) of the 2003 Act. That subsection required him to decide whether the requested person would be entitled to a retrial or to a review amounting to a retrial. Subsection (8) required the sheriff to decide this question on the basis of the rights which would be available to the respondent in any such retrial. Since the EAW proceeded upon a different factual basis it was silent on the question of any right to a retrial. The EAW was therefore defective in an evidential sense. In these unusual circumstances the sheriff had been correct to look to the expert evidence he heard in order to determine how to answer the section 20(5) question.

No error had been identified in the sheriff's decision making process and the appeal ought to be refused.

Discussion

[16] The 2003 Act was intended to create a quick and effective domestic framework in which to extradite a person to the country where they are accused or have been convicted of a serious crime, providing that this does not breach their fundamental human rights. Mutual recognition of judicial decisions was intended to become the cornerstone of judicial cooperation. Execution of the EAW therefore constitutes the rule. A refusal to extradite is an exception to that rule and one to be made only by reference to criteria which are to be interpreted strictly (see Minister for Justice and Equality (Deficiencies in the system of justice) C 216/18 PPU, EU:C:2018:586 at [41]).

[17] Part 1 of the 2003 Act applies as between Member States of the EU, described as "category 1 territories", and thus between Italy and the UK (at the relevant time). Section 9 of the 2003 Act provides for a hearing at which the court must decide certain questions. If the court decides that extradition is not precluded by any of the bars mentioned in section 11, it is required to proceed under section 20 if "the person is alleged to be unlawfully at large after conviction of the extradition offence". That is the position concerning the requested person in the present case. Section 20 provides as follows:

> "20 Case where person has been convicted
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.

(4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.

(5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

(6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.

(7) If the judge decides that question in the negative he must order the person's discharge.

(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—

(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

(b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[18] Section 20 of the Act requires to be interpreted in conformity with Article 4a of the 2002 Framework Decision, as amended:

"1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) in due time:

(i) either was summoned in person … and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the

State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal…:

(i) expressly stated that he or she does not contest the decision; or

(ii) did not request a retrial or appeal within the applicable time frame; or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal….;

and

(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal …"

[19] The interplay between section 20 of the 2003 Act and Article 4a of the Framework Decision was considered by Burnett LJ in the case of *Cretu*. At paragraph 34 he explained this as follows:

"In my judgment, when read in the light of article 4a, section 20 of the 2003 Act, by applying a *Pupino* conforming interpretation, should be interpreted as follows:

(iii) An accused who has instructed ("mandated") a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it.

(iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5), is to be determined by reference to article 4a(1)(d).

(v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW."

[20] At paragraph 35 he explained:

> "It will not be appropriate for requesting judicial authorities to be pressed for further information relating to the statements made in an EAW pursuant to article 4a save in cases of ambiguity, confusion or possibly in connection with an argument that the warrant is an abuse of process. The issue at the extradition hearing will be whether the EAW contains the necessary statement. … To explore all the underlying facts would generate extensive satellite litigation and to be inconsistent with the scheme of the Framework Decision. Article 4a provides additional procedural safeguards for a requested person beyond the provision it replaced in the original version of the Framework Decision, but it does not call for one member state in any given case to explore the minutiae of what has occurred in the requesting member state or to receive evidence about whether the statement in the EAW is accurate. That is a process which might well entail a detailed examination of the conduct of the proceedings in that other state with a view to passing judgment on whether the foreign court had abided by its own domestic law, EU law and Convention. It might require the court in one state to rule on the meaning of the law in the other state …."

[21] Accordingly, in ordinary circumstances, the information within the EAW will be treated by the requested state as setting out the basis upon which the mutual duty of extradition is to be undertaken and will provide the necessary basis upon which the burden of proof is discharged. However, as was recognised in the case of *Cretu*, there may unusually be cases which raise issues such as entitle the court in the requested state to hear evidence about statements made in an EAW. In the present case the sheriff was invited to consider a claim, supported by a body of other evidence, which suggested that a fraud had been perpetrated on the Italian court. We accept that he was entitled to hear that evidence in support of the claim that the respondent did not know of the existence of the case and was not a fugitive from justice. The problem for the sheriff was that he did not limit the use of the evidence to this legitimate purpose.

[22] Having begun the process of addressing the section 20 questions, the sheriff decided that the respondent was not convicted in his presence and had not deliberately absented himself from his trial. He was then required to consider whether he would be entitled to a

retrial or a review on return. Since the EAW was presented on a different factual basis, the answer to this question was not to be found within its terms. At that stage it would have been open to the sheriff to adjourn the hearing and seek further information from the Italian authorities as to what procedure would be available in light of the information which had been provided to him and the conclusions which he had reached upon it. Alternatively, he could have proceeded upon the basis of the two letters which were relied upon by the Lord Advocate and arrived at a decision one way or the other. Instead, the sheriff decided to take account of the evidence led from Mr Canestrini.

[23] This appears to have led to a tortuous examination of the various amendments and changes which had been made over time to Article 175 of the Italian Code of Criminal Procedure, the provision governing the circumstances in which a defendant would be entitled to an out of time appeal, and whether this would constitute a retrial. This exercise included an explanation that the original version of Article 175, which required the defendant to prove that he had not been aware of the proceedings conducted in his absence, had been found not to be compliant with Article 6 ECHR by the European Court of Human Rights in the case of *Sejdovic* v *Italy* [2006] 42 EHRR 17. As a consequence, Article 175 had been amended with effect from 2005 to switch the burden of proof of effective knowledge of the trial onto the judicial authorities. It had apparently been amended again to move the burden back to the defendant with effect from 2014.

[24] All of this caused the sheriff to weigh anxiously and at length questions concerning which version of Article 175 would apply in the respondent's case, although he became satisfied that the last amendment did not affect the respondent's position, and whether he might be denied a retrial if the Italian authorities took the view that he was at fault for fleeing the country.

[25] These considerations appear all to have been intermingled in evidence with a detailed exposition of Mr Canestrini's opinion as to how the Italian courts of appeal would apply the discretion available to them as to the extent and content of any retrial or review. At paragraph 57 of his judgement, the sheriff noted Mr Canestrini's evidence that any retrial available to the respondent would not be a new trial but would instead be an appeal with a request to hear further evidence in which the appeal court retained the discretion to allow or refuse further evidence.

[26] The sheriff set out a summary of this evidence, and the submissions made thereon, over many pages of his judgement but at paragraph 97 he expressed his conclusion as follows:

> "In my view, however, Mr Canestrini was clear. There would be a retrial, of some description. The nature and content of that retrial would not be dictated by the respondent, but rather by the appeal court. That course was not one of unfettered discretion, but was in accordance with the Italian criminal procedure."

[27] Having reached this stage of his analysis the sheriff was able to return to the section 20(5) question. He was now content that there would be a retrial. However, he considered that he had to be satisfied that the quality of that retrial was commensurate with the provisions of section 20(8)(b). Again he looked to the evidence of Mr Canestrini. It is not at all clear why he did so.

[28] Section 20(8)(b) of the 2003 Act reflects the terms of Article 6(3)(d) of the ECHR. The sheriff had already concluded that the retrial available would be conducted in accordance with Italian criminal procedure. Italy is a category 1 territory and has incorporated the European Convention on Human Rights.

[29] In the case of *Tous* v *District Court in Nymburk, Czech Republic* [2010] EWHC 1556 (Admin) Cranston J said:

> "12. The upshot of *Murtati* v *Albania* [2008] EWHC 2856 (Admin) and other authorities such as *Gradica* v *Deputy Public Prosecutor of Turin, Italy* [2009] EWHC 2846 (Admin) is that, in cases where a person has been tried in his absence, evidence that Article 6 has been incorporated into the law of the requesting state and that that state recognises the case law of the European Court of Human Rights supports a finding that the requirement of section 20(5) of the 2003 Act is satisfied. The statutory safeguard in section 20(8) is satisfied where the requesting state can show that its law complies with Article 6. For a requested person to succeed in an argument that he should be discharged under section 20, he must show that subsequent proceedings would not comply with Article 6."

[30] It is perfectly clear from what the sheriff says in paragraphs 52, 53 and 54 of his judgement that the evidence laid before him was to the effect that Article 6 ECHR was incorporated into the law of Italy and that the decisions of the European Court of Human Rights were not only recognised but given effect to. It was that court's decision in the case of *Sejdovic* which led to the amendment of Article 175. One might have thought that would be sufficient. In addition though, the sheriff was also satisfied that the letter of 26 September 2019 relied upon by the appellant guaranteed a new trial (paragraphs 76 and 77 of his judgement).

[31] What seems to have troubled the sheriff was Mr Canestrini's evidence about the extent of the discretion available to the Italian appeal courts as to whether the original evidence should be re-heard and as to whether further evidence may be led (see paragraphs 58, 60, 62, 68, 73 and 95). As he records at paragraph 57, Mr Canestrini gave evidence that, in his view, the margin of discretion available to the Court of Appeal was so wide as to be non-Article 6 compliant.

[32] In *Nastase* v *Italy* [2012] EWHC 3671 (Admin) the questions of whether a requested person convicted in his absence would be entitled to a retrial under Article 175 if returned to Italy, and whether such a retrial or appellate proceedings would satisfy the requirements of section 20(8) of the 2003 Act, were both considered. In setting out the principal opinion in

the case Rafferty LJ reviewed the decisions in various other cases in which the same, or similar questions had arisen.

[33] Three of those cases also involved extradition to Italy of requested persons convicted in their absence – *Gradica* v *Public Prosecutor's Office Attached to the Court of Turin* [2009] EWHC Admin 2846, *Ahmetaj* v *Prosecutor General Attached to Court of Appeal Genoa* [2010] EWHC 3924 (Admin) and *Rexha* v *Officer of the Prosecutor, Court of Rome* [2012] EWHC 3397. In *Nastase* and each of the other three Italian cases the court had been concerned with the effect of Article 175 of the Italian Code. As in *Nastase*, in both *Gradica* and *Rexha* the submissions had included arguments suggesting that the extent of discretion available to the Italian appeal court meant that the terms of section 20(8) of the 2003 Act were not satisfied. In *Gradica* the appellant relied upon expert academic evidence to the effect that the extent of the discretionary power available did not satisfy the requirements imposed by article 6 of the Convention, or section 20(8) of the 2003 Act.

[34] At paragraphs 45 and 48 of her judgement in *Nastase* Rafferty LJ noted that:

> "The existence of procedural steps does not remove the entitlement to a retrial. Rather, the Italian authorities must be permitted to regulate their own proceedings by imposition of their own rules. Section 20 may create entitlements, but procedural rules set parameters within which such rights are exercisable…"
>
> "A tribunal re-opening proceedings and renewing the evidence should be permitted to regulate evidence as it sees fit. Such a course would plainly be Article 6 compliant."

[35] In the hearing before us it was not suggested that either of these statements was incorrect and we endorse them. In the case of *Dumitrache* v *Office of the Prosecutor of the Republic attached to the Court of Pordenone*, Italy [2021] EWHC 958 (Admin) the court referred to the same passages in *Nastase* and observed, at paragraph 75:

> "Thus the existence of a procedural step did not detract from the unconditional nature of the legal right to a re-trial."

In *Nastase* Rafferty LJ also referred to the judgement of the Court of Cassation in Judgement 1805/2010 delivered on January 20, 2011, in which it was explained that Article 175 was amended to comply with dicta of the ECHR and to add safeguards. That chimes with the evidence given by Mr Canestrini. At paragraph 42 of her judgement Rafferty LJ said:

> "An insuperable difficulty confronting the appellant is that UK jurisprudence has consistently found article 175 compatible with section 20. In addition to *Gradica*, in *Ahmetaj* the court said 'under Article 175 (2) as amended, a defendant who is absent from his first trial will be granted what may be called a fresh merits hearing without strings or conditions unless he deliberately evaded the trial on the first occasion.'"

[36] In each of *Nastase* and the three other Italian cases canvassed, the court was satisfied that the section 20(5) 2003 Act question should be answered in the affirmative. This conclusion can only be arrived at if the conditions set out in section 20(8) are met. The statement that UK jurisprudence has consistently found Article 175 to be compatible with section 20 extends to the whole of that section. What this court therefore requires to identify is the reasoning which led the sheriff to conclude that the respondent would not have the same rights under Article 175 as the requested persons who advanced the same, or similar arguments as he did, in the other cases mentioned.

[37] The starting point is to look to the legal position which the respondent would be in if returned to Italy. The sheriff's conclusion on this can be found under the heading of findings in law at pages 4 and 5 of his judgement. The relevant findings are at paragraph [9] above.

[38] These findings are set out as positive conclusions, rather than an explanation that the evidential burden has not been met. Since section 20(8) replicates the terms of Article 6(3)(d) of the Convention, they carry the implication that the Italian procedure specified in the

opening sentence of the first finding is not Article 6 compliant. As noted, that was the evidence given by Mr Canestrini, although at no stage in his judgement does the sheriff explain in clear terms what he made of, or what effect he gave to, that evidence. It is a highly significant step for a sheriff to conclude that the statutory procedure put in place by a category 1 state does not comply with Article 6. Such a conclusion is inconsistent with the general statement about the terms of Article 175 made in *Nastase* and with the observations in the case of *Tous* referred to at paragraph [29] above.

[39] The basis upon which the sheriff distinguished the case of *Nastase* seems to be set out at paragraph 119 of his judgement, where he states:

> "I have had regard to *Nastase*, on which the applicant's case was founded. That case cannot assist in a situation, as this, where the EAW proceeds on the wrong grounds and therefore does not provide the assurances which underpins Article 4a1(d). In any event, the court in *Nastase* had the benefit of evidence which it found indisputably met the test of reopening the case and calling new evidence (paragraph 48). There is no such evidence here, and accordingly *Nastase* does not assist in finding section 20(8) to be met in the present case. In fact, although *Nastase* mentions the 'insuperable difficulty' that UK jurisprudence has consistently found Article 175 compatible with s20 that jurisprudence is displaced when the facts show that the EAW proceeds on the wrong assumptions and applies the wrong law as a result."

[40] There are a number of difficulties with what is said here. As was explained in *Cretu,* the evidential burden on the requesting state will be discharged by a statement in the EAW explaining that the Article 4 Framework Decision conditions will be met. In the present case that evidential route was not available. That simply means that the court must look elsewhere. This in fact was the situation in *Nastase* where, as is made clear at paragraph 10, the EAW was silent as to relevant Italian law. Whilst it is true that there was evidence in the form of further information provided by the Judicial Authority in that case, the decision was not a fact sensitive one and proceeded on principle. The suggestion that the jurisprudence set out in *Nastase* and the other cases mentioned is displaced when the EAW proceeds on the

wrong assumptions is unsupported by any authority and cannot be correct. The reason for assessing whether the respondent would have a right to a retrial was because the EAW proceeded on a basis which was inconsistent with the findings which the sheriff made. It was therefore incapable of providing the ordinary evidential basis upon which the section 20 questions could be answered. *Nastase* and the other cases provide guidance on the meaning of Article 175 of the Italian Code and only require to be applied where the EAW is deficient on the question of retrial . Nothing is said by the sheriff about how he distinguished the case of *Tous* or why he declined to follow the approach described there.

[41] The reasoning which underpinned the sheriff's findings in law is set out at paragraphs 116 and 117 of his judgment.

> "116. I cannot find, on the evidence, that it is proven that Mr Daja would have the necessary rights under section 20(8)(b) to 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf'. It follows that I am forbidden to make an affirmative finding under section 20(5). I must answer the question posed in the negative and, in terms of section 20(7), must order Mr Daja's discharge.
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> 117. The main reason for so finding, is that, following *Dziel* and *Cretu*, the position is regulated by Article 4a 1(d) of the Framework Directive. That is in the terms I have set out. The EAW gives no reassurance that a retrial will be available. That is enough to permit refusal of extradition for a requested person who was absent at trial. The position is made much worse, however, by the fact that the EAW actively misstates the facts. Any Italian prosecutor proceeding on the basis of the EAW would be materially misled into considering Mr Daja had no rights of retrial or review. There is no guarantee that an Italian prosecutor would prioritise the findings of a Scots court over what is stated by his own judicial authority. There is a material risk that the rights under section 20(8) would not be available, *not because of any procedural shortcomings, but because they would be actively be removed by a decision made in obedience to the wrong procedure, as a result of misunderstanding the facts* (emphasis added). I do not doubt the EAW is tendered in good faith, and that the facts as set out therein might be based on a justified inference of fact, but that inference is incorrect."

[42] In our opinion, it can be seen that the sheriff has again failed to separate out the relevant issues which apply depending upon whether he is proceeding upon the basis of

what is said in the EAW or on the basis of the evidence which he heard. It would not have been enough to permit refusal of extradition that the EAW did not mention the availability of a retrial where other evidence was led on that issue. The sheriff's reasoning appears to have become infected with a concern about what he thinks the Italian authorities will make of his findings on the factual circumstances. He accepts and recognises the presence of appropriate procedural processes in the Italian system but fails to give effect to these because of a concern that the wrong procedure might be followed as a result a misunderstanding about the facts. Why there would be any such risk, or put another way, why the Italian authorities would be any less able than the sheriff was accurately to assess the facts is impossible to understand. In our opinion, the sheriff has fallen into the same error of approach as was described by Lady Justice Carr in the case of *Dumitrache* at paragraphs 82 to 84 of that decision:

> "82. There appears to me to be force in the submission that the judgment confuses what are properly to be treated as two distinct issues: first, who bears the burden of proof in establishing the various matters identified in s. 20 (as necessary on the facts); secondly, who bears the burden in Italy as a matter of Italian law of bringing him or herself within the conditions for obtaining a retrial.
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> 83. As to the first, the burden lies on the requesting authority (to the criminal standard) (see *Cretu* at [34]). This, however, does not impose a burden of proof to be discharged in the Italian courts (or in the courts of any other requesting state). The material issue of Italian law (or issue of foreign law in the case of any other state) is whether there is an entitlement to a retrial. This may be a contingent entitlement, as was confirmed in *Nastase*. The second issue, namely who bears the burden of proof in Italy as a matter of Italian law, is irrelevant and not for the English courts to consider.
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> 84. This analysis is consistent with the cosmopolitan approach identified in *Caldarelli* v *Court of Naples [2008] UKHL 51*".

[43] In arriving at his conclusions the sheriff explained that he found the decision of the Federal Constitutional Court of Germany in the cases of *Proceedings on the Constitutional Complaint of R, Re* [2017] 2 CMLR 2, which was relied upon by counsel for the respondent in

the hearing before him, to be of assistance. No analysis of this case was undertaken in the hearing before this court. On our own reading of this decision it seems perhaps to be in conflict with aspects of the jurisprudence set out in the cases of *Nastase*, *Cretu*, *Tous* and *Dumitrache*. In the absence of any detailed analysis by the parties, or by the sheriff, we are not persuaded that it was appropriate for him to decline to follow the guidance set out in the various appellate cases interpreting extradition law in the United Kingdom on the basis of a case concerning the application of German law.

[44] In our opinion, the sheriff was not entitled to arrive at the conclusions which he set out in his findings in law. They are inconsistent with the law as explained in the cases of *Nastase* and *Tous* and are not supported by the evidence which he heard.

Disposal

[45] For the reasons set out above the court will grant leave to the Lord Advocate to appeal the sheriff's decision under section 28(4) of the 2003 Act. Thereafter, being satisfied in terms of section 29(3) that the sheriff ought to have decided the section 20(5) question differently, and that if he had decided that question in the affirmative, as he ought to have done, he would not have been required to order discharge, the court will allow the appeal. Accordingly the order discharging Mr Daja will be quashed and the case will be remitted to the sheriff with a direction that he must order Mr Daja to be extradited as required by section 21(2) of the 2003 Act, he having already decided that the question arising under section 21(1) falls to be answered in the negative. The court continues bail on the conditions extant since 17 September 2020.