SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 16

EDI-E30-19

JUDGMENT OF SHERIFF N A ROSS

in the cause

LORD ADVOCATE on behalf of the Office of the Prosecutor General of the Republic, Court of Trieste

Applicant

against

SHKELQIM DAJA

Respondent

Applicant: Dickson, procurator fiscal depute
Respondent: McCluskey, advocate

EDINBURGH, 1 March 2021

The Sheriff, having resumed consideration of the cause, finds in fact as follows:

1. The respondent ('Mr Daja') is an Albanian national who was involved in an incident in Pordenone, Italy on the night of the 9/10 December 2006. During that incident two males were victims of stab wounds. The Italian authorities commenced proceedings for attempted murder. Mr Daja was tried and convicted in his absence.

2. The Italian criminal proceedings comprised: (28 December 2006) preliminary investigation judge ordered pre-trial detention; (14 March 2007) preliminary investigation judge ruled Mr Daja a fugitive, and ordered a trial; (12 October 2012) hearing before the preliminary hearing judge: Mr Daja was absent and represented by Gerin, a lawyer appointed by the Court; Mr Daja was found guilty and sentenced to 18 years imprisonment; (20 December 2012) Aldo Pardo was appointed in terms of

the mandate signed in Tirana on that date before Miranda F Xhelmace before whom Mr Daja's passport is exhibited (said passport being reproduced in defence production number 1); (4 May 2012) Court appoints expert from the Institute of Legal Medicine; (22 May 2014) motion by Mr Pardo to have the pre-trial detention order revoked; (29 May 2014) motion by Mr Pardo refused by the Court; (11 June 2014) Mr Pardo appoints an independent expert (Perini) on behalf of Mr Daja; (23 June 2014) Mr Pardo engages with the court-appointed expert; (24 September 2014) appeal hearing: conviction upheld but sentence reduced to 15 years; (20 October 2014) appeal lodged by Mr Pardo; (2 February 2017) appeal refused; (8 May 2017) European Arrest Warrant issued.

3. Mr Daja was never arrested and made no appearance before the Italian courts. He left Italy approximately two weeks after the incident and returned to Albania. From there he travelled to Greece and then Italy, before travelling onwards to the UK. He did so on false documents. He subsequently cut off all contact with his family. He did not tell anybody, including his family in Italy, that he was in the UK. As a result, he never received notification of Italian criminal proceedings against him.

4. Only in about July 2015 did Mr Daja make contact with his family, as he had learned of his father's terminal illness. His father and brother, Dorian Daja, travelled to Glasgow. At that time Mr Daja became aware for the first time of the Italian legal proceedings.

5. The present proceedings are in respect of an arrest warrant dated 8 May 2017 issued by the Office of the Prosecutor General of the Republic attached to the Court of Trieste (the 'EAW'). As such, the EAW was issued by a judicial authority of a

category 1 territory which has the function of issuing arrest warrants, as certified in terms of section 2(7) of the Extradition Act 2003 (the '2003 Act') by the National Crime agency certificate dated 25 July 2017. Mr Daja accepts that he is the person named in the EAW.

6. The EAW states that Mr Daja was represented during the Italian criminal proceedings by virtue of having instructed a lawyer to appear on his behalf. That statement is incorrect. Mr Daja did not instruct any appearance.

7. Mr Pardo was instructed to represent Mr Daja in both sets of appeal hearings but, unknown to him, those instructions did not come from Daja. Mr Pardo was instructed by a power of attorney purportedly signed on 20 December 2012 by Mr Daja before a notary in Albania (the '2012 power of attorney') which he received shortly after 20 December 2012. Two copies of the 2012 power of attorney are lodged as defence productions 9 and 11. The first appeal concluded on 24 September 2014. The second appeal concluded on 8 May 2017. In the first appeal the court heard additional evidence from an expert from the Institute of Legal Medicine concerning Forensic Medical issues with respect to danger of life in respect of the complainers. In relation to the first appeal, Mr Pardo lodged submissions on 22 January 2013 in which he asked the Court of Appeal in Trieste to fix new evidentiary hearings in order to hear again the complainers and all the other witnesses heard during the first instance proceedings. This request was refused by the Court of Appeal in Trieste. No further evidence was heard in relation to the second appeal. Defence production 13 is a true and accurate translation of the appeal file of the said Aldo Pardo.

8. The 2012 power of attorney was obtained by fraud, probably by Mr Daja's father. Mr Daja did not sign it, and was unaware of its existence throughout the proceedings.

9. Mr Daja's flight and subsequent opposition to the EAW was due to fear of reprisals from those involved in the incident.

10. Mr Daja did not deliberately absent himself from his trial. He was not represented at trial. The EAW, in stating at part 3.2 that he instructed appearance by a lawyer, is in error. The EAW does not, as a result, contain any guarantee that Mr Daja would have a right of retrial or review.

11. Were Mr Daja to be extradited to Italy, he would have a right to a review of the evidence as part of an appeal. He would have a right to appear or be represented. He would not have the right to examine witnesses against him, or to obtain the attendance and examination of his own. These are no more than possibilities. They depend entirely on the discretion of the Italian court. He may be refused permission to challenge evidence against him, or to lead and examine his own witnesses, without right of appeal. He has no right to insist on these evidential safeguards.

12. Mr Daja's extradition would not unduly interfere with his family life except to the extent inevitable in extradition.

And finds in law as follows:

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.

3. Accordingly, under section 20(7) of the 2003 Act, the court must order Mr Daja's release.

4. Mr Daja's Article 8 rights would not be infringed by extradition.

THEREFORE refuses extradition in terms of the arrest warrant dated 8 May 2017 issued by the Office of the Prosecutor General of the Republic attached to the Court of Trieste; orders the release of Mr Daja forthwith from that warrant.

NOTE

[1] The requested person ('Mr Daja'), is an Albanian national who formerly resided in Italy. The EAW describes the facts on which it proceeds. In summary: on the night of 9/10 December 2006 there was a quarrel in the parking lot of 'Planet Bingo' in Pordenone, Italy between Mr Daja and others. He left the area, armed himself with a knife, and returned with his brother to "get revenge of the offense received from Doda Besmir". They entered

the building and attacked all those who were with Doda Besmir. He tried to kill Doda Besmir (25cm stab wound with intestine protruding; stab wound to left gluteus), Doda Aleksander (10cm wound to lumbar region) and wounded Doda Petrit (stab wound to groin). The wounds to Doda Besmir and Doda Aleksander would have been fatal but for causes beyond Mr Daja's control.

[2] Mr Daja accepts there was an incident in which he was involved. His brother Dorian, who was also involved, drove him away from the scene. Mr Daja asked him to stop the car, and got out. They did not see each other again until 2015. Shortly thereafter Mr Daja ran away to Albania, entering the country illegally by boat from Bari. He went to his family home. They knew nothing of the incident in Italy. He was scared, and left the family home in the new year to go to southern Albania. He left his passport at home. After 5 or 7 months he left through Greece, using a fake passport. He went to Athens by taxi and took a flight to Milan. Because those involved in the incident were Albanian, he was scared of people in Albania. There is a "special law" of blood feud, and he anticipated retaliation. He was worried for himself and his family. He crossed Europe and arrived in the UK. He has lived in Scotland since 2008.

[3] He cut off all contact with his family. They did not know where he was and had no means of contacting him.

[4] Meanwhile, a criminal case was commenced in Pordenone. Mr Daja and two brothers were accused. A trial took place, which only Dorian Daja attended, and Mr Daja and the remaining brother were tried in absence. In 2006 Dorian was acquitted but the others were convicted in absence. Mr Daja was sentenced to 18 years custody. For Mr Daja, several appeals were instructed, resulting only in the sentence being reduced to 15 years.

[5] Mr Daja claims to have been unaware of legal proceedings in Italy until 2015. He only became aware when he made contact with his family. He made contact because, having made contact with a cousin via social media, he learned of his father being seriously ill. Dorian and their father travelled in 2015 to Glasgow to meet Mr Daja, when he learned of the legal proceedings for the first time. Their father died later that year.

[6] Mr Daja opposes extradition to Italy to serve the sentence. He relies on the terms of section 20 and 21 of the 2003 Act. In particular, he says that he did not deliberately absent himself from his trial (s20(3)) and that he "would not be entitled to a retrial or (on appeal) to a review amounting to a retrial" (s20(5)) if he were to be extradited to Italy. If he is correct, this court must order his discharge (s20(7)). These were the issues at the hearing.

Whether Mr Daja deliberately absented himself from trial.

[7] On behalf of the applicant, the procurator fiscal depute submitted that Mr Daja knew of the Italian criminal proceedings, and therefore his absence was deliberate. He relied on two evidential features. The first was his reaction upon being arrested in Scotland in 2019. The second was the existence of a mandate, bearing to be signed by Mr Daja and dated 2012, instructing a lawyer to represent him at appeal proceedings in Pordenone, Italy. He also relied on the content of the EAW together with correspondence from the Italian judicial authorities. For Mr Daja, the evidence was led from the lawyer named in the mandate, a handwriting expert in order to dispute the provenance of the mandate, from Mr Daja and from his brother, Dorian Daja.

Events on arrest in Scotland

[8] On 18 June 2019 Mr Daja was arrested in Edinburgh on the basis of the EAW. The two arresting officers, PCs Sarah Petrie and Immigration Officer Maxwell Gibb, gave evidence. PC Petrie informed him that he was being arrested for an offence in Italy some 13 years before, involving a stabbing. Mr Daja nodded and understood, and confirmed his identity. He confirmed that he was aware of the case, and of the charges. He was not asked, and did not state, how he knew of Italian criminal proceedings. He seemed "almost relieved" it was being dealt with. IO Gibb was present because Mr Daja was marked as an immigration offender. I accept their evidence was credible and reliable, but also uninformative. Their evidence did not assist in ascertaining when and how Mr Daja became aware of the Italian proceedings. It is consistent with Mr Daja's position that he was first informed of the criminal proceedings in 2015. It is not possible to conclude from this evidence that he was aware of, far less involved in, the criminal proceedings in Italy. No further witnesses were led for the applicant.

Whether Mr Daja signed a mandate in 2012 to instruct appearance

[9] The EAW relies on the instruction of a lawyer during the proceedings. The respondent lodged (production 9) a document, in Albanian, together with English translation and various reports, addenda and supporting documents from a handwriting expert, Dr Evelyn Gillies.

[10] Production 9 (the '2012 power of attorney') is a single page of typed Albanian. It bears two ink stamps, a stamped impression bearing the notary's name, designation as 'noter' and double-headed eagle, and a postage stamp. It also bears two signatures, of the notary and of 'Shkelquim Daja' respectively. The document bears the date 20 December

2012. The accuracy of the English translation (document 10) was not challenged and I accept it as accurate. It bears to narrate that Shkelquim Jusuf Daja (Mr Daja) appeared before the notary, Miranda F Xhemalce, member of the Tirana Chamber of Notaries, and requested the drafting of the "Special Power of Attorney". It narrates that he was identified by his passport, and that he appointed as his legal representative the Italian attorney Aldo Pardo, granting full rights to represent him and defend him at every instance of the criminal courts in Pordenone, Italy. The document regulates various rights between the granter and Mr Pardo, and selects Mr Pardo's office as the address of Mr Daja.

[11] The parties agreed by joint minute that document 9 is a power of attorney and the translation, document 10, is accurate. They further agree the accuracy of a passport produced by Mr Daja, and ancillary matters relating to the production of the handwriting opinion. The procedure for comparison is not disputed to have been properly followed, and the details are agreed in the first joint minute.

[12] Self-evidently, if Mr Daja truly appeared before the notary in 2012 and signed the 2012 power of attorney, and thereby appointed a lawyer, Mr Pardo, to represent him in the Italian prosecution, then Mr Daja cannot claim to have been unaware of those criminal proceedings. He denies he did any of these things.

[13] His denial is supported by the expert opinion of Dr Evelyn Gillies, a handwriting expert whose report dated 20 November 2019, and addendum report dated 7 November 2020 are produced. Her credentials as an expert witness were not challenged and I accept them. The reports narrate, in appropriate and convincing detail, the results of handwriting comparisons between the 2012 power of attorney, a copy thereof and known signatures, including from Mr Daja's passport. I refer to those documents, but it is unnecessary for me to discuss them in detail, as Dr Gillies' evidence was the subject of discussion but not

challenged in cross-examination, and was not challenged in submissions. I accept that it is proved that the purported signature on the 2012 power of attorney is not that of Mr Daja, and that the 2012 power of attorney is a fraudulent document that does not provide evidence that he was aware of the Italian criminal proceedings against him, or that Mr Pardo was appointed to appear on his behalf.

What the Italian judicial authorities say about knowledge

[14] The EAW, in translation, states:

> "being aware of the scheduled trial, the person 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; in the grounds of appeal and in the appeal trial the defence counsel of his choosing Aldo Pardo has never contested the absence of the defendant in the first instance trial; that same defence counsel lodged an appeal to the Court of Cassation in the defendant's interest against the appeal judgment."

[15] The Lord Advocate has obtained further information, in the form of a letter dated 26 September 2019 from the Office of the Prosecutor General of the Republic (the '2019 letter'). It states, as translated:

> "In my opinion the content of the affidavit of solicitor Pardo does not correspond to the acts included in the case file since Daja Shkelqim conferred him the office of defence counsel of his choosing with a power of attorney … Solicitor Pardo further more actually assisted Mr Daja in that he lodged an appeal against the first instance judgment … Since Mr Daja appointed solicitor Pardo as defense counsel of his choosing with the aforesaid power of attorney, it is clear that he was informed of the proceeding otherwise he would not have designated solicitor Pardo as his defense counsel. Mr Daja has been fugitive during the entire trial since he escaped to avoid being apprehended ... nonetheless with the power of attorney mentioned above he elected domicile at the law office of solicitor Pardo …"

[16] From these documents, it is evident that the Italian authorities cannot and do not give direct evidence about service of proceedings, or any direct contact with Mr Daja. The 2019 letter amounts to an opinion, not evidence of fact, and explains the basis for that

opinion. These documents appear to be based on the same evidence which is before this court, namely the existence of the 2012 mandate, and the appearance of Mr Pardo at various appeal proceedings on Mr Daja's behalf. The EAW and the 2019 letter represent inferences from fact, and are therefore periled on whether that information is correct. It follows that if the 2012 power of attorney is the evidential basis on which the EAW states that Mr Daja "had given a mandate to a legal counsellor", then the EAW is in error in this respect.

Witnesses to fact about Mr Daja's knowledge

[17] For Mr Daja, evidence was led by video link from Mr Daja's brother Dorian, and from the Italian lawyer who represented his interests. Mr Daja also gave evidence.

[18] Dorian Daja ('Dorian') gave evidence from his home in Italy, through an Edinburgh court interpreter. He had been present at the incident on 9 and 10 December 2006, and had been tried and acquitted in relation to that incident.

[19] He is 38 years old and has lived in Italy since 2000. He confirmed that he, together with Mr Daja and a third brother, were accused in relation to an incident dating from December 2006. Only Dorian attended trial, and was acquitted. The two brothers who did not attend were convicted, as they did not have a defence. Mr Daja was sentenced to 18 years custody.

[20] A lawyer, Aldo Pardo, was appointed to represent the respondent at an appeal. Mr Pardo was instructed by their father, who died in 2015. Their father had obtained the 2012 power of attorney. He did not know how, or that it was purportedly signed by Mr Daja. Dorian had no involvement with instructing appeal proceedings, but had contact with Mr Pardo later, as his father asked him to. He knew about the 2014 appeal which

reduced the sentence from 18 years to 15 years. After that, Dorian instructed Mr Pardo to lodge a further appeal.

[21] Dorian had no contact with the respondent from the night of the incident until 2015. Until 2015 Dorian did not know where the respondent was living. Mr Daja had left Albania and was no longer in contact, and left no contact number or address. Mr Daja was not aware of the criminal proceedings. Only when their father was very ill and about to die did Mr Daja contact them. Mr Daja, Dorian and their father met up in Glasgow in 2015. At that stage they told Mr Daja about the criminal proceedings and that he had been convicted. Mr Daja had no prior knowledge of the proceedings, and took it badly. They did not discuss the criminal proceedings, because the purpose of the visit was to meet his father before his death. Dorian told his brother that there was another appeal underway.

[22] Cross-examination consisted largely of propositions of fact, and there was little direct challenge. Dorian confirmed the names of his own and his brother's lawyer. He was the only one of five accused who was present at the trial. He confirmed some of the trial procedure, and that he gave evidence. His evidence was that he saw both of his brothers involved. He confirmed he saw various incidents. They had driven away from the incident with Mr Daja in the car. Mr Daja had told him to stop the car, had alighted, and Dorian had not seen him again. He was aware the Mr Daja was a fugitive. Mr Pardo was appointed 9 days following the trial verdict, after Dorian had told their father of the verdict. Their father was in Albania, and he hired Aldo Pardo, who was thereafter instructed by Dorian. Mr Daja knew nothing about this process.

[23] They met in 2015 as a result of their father finding out where Mr Daja lived. Dorian did not know how that came about. The reason for the visit to Glasgow was their father's terminal illness, not the criminal case. He thought contact had been made through friends

via Facebook. They had not previously been in contact, and his brother took the news badly. He accepted that his father had lied to a lawyer in Albania that Mr Daja was giving a mandate to the Italian lawyer. His father must have forged the signature.

[24] The limitations of video link from Italy and interpreted evidence meant that demeanour was difficult to assess. It is not possible to regard Dorian's evidence as impartial because of family ties. The evidence was, however, entirely consistent with Mr Daja's own. I accept this evidence as credible because I have accepted Mr Daja's evidence.

[25] Mr Daja gave evidence in court. His full name is Shkelquim Jusuf Daja. He is the requested person and is 44 years old, of Albanian heritage and resides in Glasgow. He confirmed that he was now aware of the criminal proceedings, but had only found out in June 2015 when he was visited by Dorian and their father. They told him there had been a court case, and that his father had engaged a lawyer to appeal. In June 2015 his father had cancer, and died later the same year. They did not discuss the case much as a result. He had never met Aldo Pardo, the lawyer who had, he now understood, been engaged by his father.

[26] On 20 December 2012, the date of the 2012 power of attorney, Mr Daja was living in Beith in Ayrshire. He was not aware of the document. It must have been signed by his father, without authority.

[27] There was an incident in 9 and 10 December 2006 in Italy. A couple of weeks later he ran away to Albania, entering the country illegally from Bari. He was assisted in passing through Bari, and returned by boat to Albania. He left his passport in Albania. His family in Albania knew nothing of the incident in Italy. He was scared, and left the family home in the new year to go to southern Albania. After 5 to 7 months he left through Greece, using a fake passport. He went to Athens by taxi and took a flight to Milan. Because of those involved in the incident, he was scared of people in Albania. There is a "special law"

amongst Albanians of blood feud, and he anticipated retaliation. He was worried for himself and his family. He crossed Europe and arrived in Scotland in 2008. He was unaware of legal proceedings in Italy until he was told in 2015. He had lived in Scotland ever since. He did not follow the 2017 appeal.

[28] He confirmed his arrest in Scotland in 2019. He was upset as he has a family now. He is worried about his family. He could not argue with the EAW, as he knew he had been involved in a fight in 2006. He did not know what the charges were until he read the EAW. His partner is Polish and they met in Edinburgh. They can't get married as Mr Daja does not have a legitimate passport. They have a two year-old daughter who requires specialist care. He described living in different parts of Scotland and has lots of friends here.

[29] In cross-examination he admitted previous convictions in Italy. He admitted being in a fight in 2006, as he had been threatened. The fight was with Albanians from a single family. He left Italy out of fear for his family from a feud. He did not contact Italian police, which was his fault, but he was scared. He did not believe in receiving justice in either Italy or Albania. The incident itself arose from his being attacked. His primary concern was not justice – "If I have to pay the price, I pay it". Rather, he feared for his life. He had thrown his fake documents away, and entered the UK by lorry. He did not socialise with any Albanian community, as the worldwide community was small. There are only two million Albanians worldwide. He knew if he went back to Italy or Albania he would be killed. He was hiding from these people, not from justice. He now also wanted to be here for his baby. He was aware of his brother being prosecuted, but did not contact him. He had cut every tie with his family.

[30] He had searched Facebook in 2015 and found his cousin, who had posted about Mr Daja's father being unwell. Mr Daja then made contact via the cousin.

[31] Aldo Pardo gave evidence, also by remote link from Italy, interpreted by an Edinburgh interpreter. He is the lawyer who was instructed under the 2012 power of attorney. He is based in Treviso and is a criminal lawyer. He was appointed 8 days after the finding of guilt at first instance. He represented Mr Daja at the first, second and third grade appeals. The first appeal was refused on October 2014. An appeal to the Supreme Court was refused on 2 February 2017.

[32] He had never had direct dealings with Mr Daja. He had received a mandate from Albania, and had spoken to Mr Daja's father, and his brother. Under Italian law at the time, it was permissible to act for someone without having met them, although the rule was now changed.

[33] Mr Daja's father had come to meet Mr Pardo, as had his brother Dorian. Mr Pardo had been at the original trial for Dorian, when he had been acquitted. Dorian was his ongoing source of instructions. At appeal, Mr Pardo lodged additional evidence, and asked for the evidence at first instance to be heard again. That application was refused. His further appeal to the Supreme Court had also been refused.

[34] In 2014, at the first appeal, some expert evidence was heard, together with legal arguments. The 2017 appeal resulted in the papers being sent back to another appeal court. He did not cross examine witnesses at the original trial.

Submissions on whether Mr Daja deliberately absented himself

[35] For the applicant, it was submitted that the bare fact that Mr Daja had accepted involvement in the incident, and had fled the country, was enough to confer fugitive status upon him. If that were accepted, then s20(3) of the 2003 Act meant that extradition was required and it would not be necessary to consider issues of retrial. Further, when Mr Daja

had, by his own admission, discovered in 2015 the existence of the trial and appeal proceedings, he had done nothing. The explanation that he was fearful of revenge from an Albanian family did not remove the fact that he had fled justice. It was not possible that he was unaware that criminal proceedings would follow the events of 9/10 December 2006. While it was accepted that Mr Daja did not know the specifics of what proceedings were raised and when any trial date was, he must have been aware as a generality that he would require to stand trial. Most legal systems allow trial in absence.

[36] For Mr Daja, counsel submitted that the evidence was clear he did not know about the trial proceedings. The signature on the 2012 power of attorney had been clearly shown to be forged, probably by Mr Daja's father. He referred to a single paragraph of *Government of Albania* v *Bleta* [2005] 1 WLR 3576, a decision of the Queen's Bench Division. At paragraph [48] the court considered the meaning of "deliberately absented himself from his trial". It stated:

> "Consideration must be given to the concept of deliberate absence and to the concept of a trial. The defendant has deliberately absented himself from Albania but there is no evidence that he knew of the existence of a trial or of any proceedings which might lead to a trial … Article 6 confers the right to a fair trial and the word 'trial' would not have been used by Parliament in section 85(3) if a wider view of absence had been intended. (c) The subsection must be construed in a context in which capital importance is attached to the appearance of a defendant at his trial. The focus is on a specific event at which the defendant could expect to be present … The expression 'his trial' contemplates a specific event and not the entire legal process …"

[37] In *Dziel* v *District Court in Bydgoszcz, Poland* 2019 EWHC 351 (Admin) the Queen's Bench Division, at paragraph [12] quoting *Cretu* v *Local Court of Seaceava, Romania* 2016 EWHC 353 (Admin), stated:

> "'Trial' in section 29(3) of the 203 Act must be read as meaning 'trial which resulted in the decision' in conformity with article 4a paragraph 1(a)(i) [i.e. of the Framework Decision 2002] That suggests an event with a 'scheduled date and place' and is not referring to a general prosecution process … ii) An accused must be taken to be

> deliberately absent from his trial if he has been summoned as envisaged by article 4a paragraph 1(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate Article 6 ECHR."

[38] Counsel did not further examine the Framework Directive or the cases cited. On the basis of these excerpts from *Bleta* and *Cretu*, he submitted that it was not enough simply to anticipate prosecution. The accused person must have been summoned to a trial. There was no evidence that had had happened in the present case. This did not by itself serve to defeat extradition, because if the applicant state provided a right to retrial the requested person would be extradited to face trial of new (s 20(5)).

Decision on deliberate absence from trial

[39] In my view the proposition that fugitive status, created by fleeing the scene of a crime, would be sufficient, is not correct. It is not enough to be a fugitive, in general terms. Section 20(3) of the 2003 Act requires that Mr Daja must have "deliberately absented himself from his trial", not simply left the country, even in incriminating circumstances.

[40] What that phrase means is persuasively discussed at length in both *Bleta* and *Dziel*, above. *Bleta* is particularly significant because it involved a requested person who fled the scene without being arrested, charged or informed of any judicial proceedings. Mr Bleta was accused of murder by shooting, and fled to England. The requesting state took a similar position to the present, namely that:

> "he must have known that the shot was fatal and that a trial was inevitable. In leaving the country in those circumstances he was waiving his right to be present at the trial and was deliberately absenting himself from that trial" (paragraph 17).

That proposition was rejected, in the terms set out above. In the present case, counsel's submission was not challenged on this point by the procurator fiscal depute, and I accept it.

[41] It follows, therefore, that unless Mr Daja knew of the specific criminal proceedings raised against him, he cannot be found to have deliberately absented himself from trial.

[42] From the foregoing cases, if in fact the applicant had served, in a procedurally competent manner, a summons to attend court to face criminal charges, then Mr Daja could be found to have deliberately absented himself. The applicant has not claimed that any such summons was served. On a plain reading of the EAW and the letter of 26 September 2019, quoted above, the applicant infers rather than demonstrates knowledge, by relying on surrounding evidence. These inferences rely on the appearance of a lawyer who represented Mr Daja, and the exhibiting of a mandate which bore to be signed by Mr Daja.

[43] The evidence available to the applicant, in compiling the EAW, appears to be no better than the evidence available to this court. Taking these two matters in turn:

[44] For the reasons given by Dr Gillies, I am persuaded that the 2012 power of attorney is a forgery. I have discussed this above. In submissions the procurator fiscal depute did not demur, or place any reliance upon the 2012 power of attorney. I do not consider the forgery to amount to positive evidence in Mr Daja's favour, only that it is rejected as a support for the inferences drawn by the applicant and for the case for extradition.

[45] I also accept the evidence of Mr Pardo, a practising attorney, that he never met Mr Daja and was instructed only by Dorian and their father. I can accept that he is independent, credible and reliable. His belief that he was instructed by Mr Daja's is credibly explained by his accepting in good faith (as the Italian rules permitted) the 2012 power of attorney which was supplied to him by a third party, without ever meeting his nominal client. There was no reason to doubt his evidence. That serves to remove the remaining basis for the applicant inferring knowledge.

[46] Accordingly, there is no information before me which would justify a finding that Mr Daja deliberately absented himself from his trial, in the sense which that phrase is analysed in *Bleta* and *Dziel*. He fled the country in incriminating circumstances, but that is not enough. I am able to accept as credible and reliable the account which Mr Daja gives. He feared for his life, and fled the likely consequences from the other parties. He did so as swiftly and covertly as possible, and remained out of contact with his family to avoid detection. He appeared to be frank when he said that he was prepared to be answerable before a court for what he had done. His position was that he refused consent to extradition because he feared being murdered in a revenge killing. The fact that he ought reasonably to have anticipated criminal proceedings is not enough to satisfy the section 20(3) test.

[47] Mr Daja did not deliberately absent himself from his trial. He is accordingly entitled to the protection of section 20(5), and can only be extradited if the applicant will provide him with certain legal protections in the form of a retrial or review.

Whether Mr Daja would get a retrial

[48] Section 20(5) provides:

> "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".

[49] On behalf of Mr Daja, evidence was led from an expert witness, another practising Italian defence attorney. The case for the applicant relied on correspondence from the Italian judicial authorities.

[50] Nicola Canestrini spoke to Italian law and procedure. He is an attorney experienced in domestic criminal matters and in extradition cases. He has not been involved in Mr Daja's case. Mr Canestrini was an impressive witness who spoke fluent English and

gave insightful evidence about Italian criminal and extradition law. Two documents are lodged outlining his extensive experience throughout Italy, a number of publications written by him and his qualifications. I accept his expertise is genuine and his knowledge of Italian domestic criminal and extradition law established in evidence.

[51] He had been provided with the outline of Mr Daja's case. He explained there are three instances in appeal, and appeals were very common. An appeal would be filed even if there was no contact with the defendant, as an ethical duty. There could be two appeals on the merits, and a Supreme Court appeal if there was an error of law. This procedure had been exhausted for Mr Daja. The only possibility of appeal for him would be if he had not deliberately absented himself from the process.

[52] If that were the case, the law is complex and has changed twice in recent years. A person can be tried in absence under Article 175 of the Italian Criminal Code. That had historically led to contraventions of Article 6 of the European Convention of Human Rights in cases where there was no effective knowledge of proceedings. Italy had lost cases before the European Court of Human Rights. As a result of that experience, Article 175 had been amended twice. The original version was amended in 2005, a second version which Mr Canestrini described as the intermediate version applied between 2005 and April 2014, and the current version applied since April 2014.

[53] The main effect was to switch the burden of proof of effective knowledge of the trial. Originally, it was for the defendant to prove that he had not been aware of the proceedings. That was found in the case of *Sejdovic* v *Italy* [(2006) 42 EHRR 17] not to be Article 6 compliant, partly because it is difficult to prove a negative. The intermediate version of Article 175 had switched the burden of showing effective knowledge to the judicial authorities. In addition, the timescale for applying for a retrial upon return to Italy had been

lengthened from 10 days to 30 days. The latest, 2014 version of Article 175 had switched the burden back to the defender, raising the same Article 6 concerns. Mr Canestrini had written papers about this.

[54] Mr Daja's rights upon a return to Italy depended on which version of Article 175 applied to his case. Mr Canestrini's view was that, the original trial date being December 2012, that the intermediate version would apply in this case. It was not beyond doubt, because there were earlier judicial proceedings. In March 2007 the judge declared Mr Daja a fugitive and ordained a trial. Much would depend on whether Mr Daja was formally declared la capitanza, formally declared a fugitive, as that may mean the original Article 175 applied. However, the original Article 175 required to be read down to comply with Article 6 ECHR, so the rights would be substantially the same.

[55] Accordingly, either way Mr Daja would have the protection of the reversal of burden of proof. The judicial authorities would require to demonstrate effective knowledge. If Mr Daja applied for a retrial within 30 days of return, the judge would check if there was sufficient evidence of effective knowledge. If a retrial were refused, an appeal would lie to the supreme court. If granted, an appeal would be taken to a lower court.

[56] There are, however, two potential problems. The first is that only effective knowledge need be shown. Appointment of an attorney would be sufficient. It was enough to prove knowledge of the proceedings, not of the trial hearing.

[57] A much greater problem is the extent of any retrial. It would not be a new trial. It would instead be an appeal with a request to hear further evidence. The appeal court retained a discretion to allow or refuse further evidence. The extent of such a retrial was, in Mr Canestrini's view, non-Article 6 compliant, and he could cite German and Italian ECHR cases which held that the margin of assessment afforded to the appeal court was so wide

that it infringed Article 6. Accordingly, the point was not whether Mr Daja would get a retrial, but the fact he would not necessarily get a chance to defend himself properly.

[58] On appeal, each piece of new evidence requires to be specified so the appeal judge can decide whether it should be permitted. The court is not obliged to rehear evidence already given, although it can assess whether further evidence should be taken. Mr Daja's case would go to the first appeal court in Trieste. It would decide whether he may appeal, then the appeal could be lodged. The original decision of the court of appeal would then be null. Mr Daja would then ask for the evidence of further witnesses to be heard, and rehearing of original witnesses, and the court would assess that application. It is likely the prosecution would oppose any such application. There is therefore no guarantee of complete, or even partial, review. If new evidence is allowed, the case would revert to the court of first instance. If the application is refused, the matter would be decided by the appeal court.

[59] A further issue is the quality of evidence at the original trial. If an accused does not appear at trial, the court will appoint a lawyer to represent the defence. The defence and the prosecution frequently agree that the police evidence will be accepted without cross-examination. That is in part because the court-appointed lawyer doesn't get paid, and doesn't want to spend time on the case. The effect is that the original evidence may never have been properly tested. Mr Canestrini did not have access to Mr Daja's court file, so could not say what had happened in this case. The appeal court may simply rely on the original evidence.

[60] If the appeal court refuses to hear new evidence, any further appeal to reverse that decision will be refused. In the event that a new witness became available, the appeal court retains complete discretion under Article 603 of the Italian Criminal Code as to whether to

hear that witness. There is a right to lead evidence only discovered after the first trial, but the appellant has to prove it did not exist at the time of trial.

[61] In Mr Canestrini's 20 years of experience in the Court of Appeal of Trieste, the relevant appeal court, it is impossible to predict what it will do. It may decide any new evidence is not relevant, or may allow new evidence. Alibi evidence would probably be admitted at the appellate stage. There would be a problem if the new evidence clashed with evidence heard at the trial. It is not clear that the original evidence would be re-examined. There was no clear right to have the original evidence challenged. In his experience, it was "practically never" that an appeal resulted in evidence being reheard from all the witnesses at the first trial.

[62] Accordingly, where the appellant was absent at trial, there is no guarantee of a rehearing, and no entitlement to fresh evidence. In addition, where evidence was reheard and a witness could not remember, high importance was given to the original statements. Fresh evidence appeals were the exception, although not possible to predict.

[63] In Mr Daja's case, if evidence was heard at the original appeal, that would be unusual, except in the case of expert evidence.

[64] Mr Canestrini was referred to a production, a letter dated 19 August 2020 from the Prosecutor's Office of the Court of Appeal in Trieste (the '2020 letter'). In his view it was inaccurate in saying Mr Daja would get a new trial. That is because the author was applying the current law, which does not apply to Mr Daja's case, and there is a right to retrial only if Mr Daja proves he did not know of the original proceedings, which is the same, non-Article 6 compliant, law. He discussed again the three versions of Article 175 and which would apply. He was clear the intermediate version applied, unless Mr Daja was not declared a fugitive, in which case the new 2014 version applies. The prosecutor's letter

(above) indicates that he was. It is accordingly likely the intermediate version applies. The reference to Article 629 "bis" is to the last version.

[65] In cross-examination, Mr Canestrini confirmed that under Italian procedure the prosecutor leads the investigation. The file is copied to the court, although not the witness statements, unless parties agree. At trial the judge has powers to question witnesses, and lead new witnesses. The parties propose witnesses and the judge assesses whether the witnesses are sufficiently relevant and necessary to be heard. The judge relies on what the parties have said in summaries of what each witness's evidence contains. He will not hear what he considers to be unnecessary or repetitive evidence. In retrial at appeal, evidence will only be allowed if the party was not aware of it at the trial. The court retains a discretion. The defence is given a copy of the prosecutor's case file, but not vice versa. This applies to appeals also.

[66] In the present case, Mr Daja would have access to the evidence found by the appeal court. While it is possible to challenge the evidence on appeal, the problem is that the Supreme Court would not go into the merits of the case, but would only check if the reasoning was correct. Only in very few cases will the first appeal court reopen the evidentiary stage. Even if this were done, in the event the witness does not recollect events, the prosecutor can read out their earlier statement. The challenge is to have a new assessment of the facts. Often there has been no real challenge in the first trial.

[67] Article 175 allows a reopening of the case, but the problem isn't prevention of the appeal. As human rights law requires rights to be practical, not theoretical, it is not enough to be allowed to lodge the appeal, when permission is required within the appeal to lead or challenge evidence. The ordinary rules of Italian procedure do not allow fresh evidence, or a new trial on the merits. That is particularly difficult where the evidence was led at a trial

in absence, and therefore was probably not challenged by the defence. An appeal might allow a fresh assessment of the existing evidence, but not a fresh determination of proof of the crime.

[68] In Mr Daja's case, the court of appeal would become the trial court. The lawyer would have the original papers and could ask for the court to exercise its discretion. In Mr Canestrini's experience, however, it would have to be an exceptional case for this to be allowed. There are a lot of procedural hurdles before new evidence will be admitted. The main thing is that the appeal court will not engage in gathering the evidence again. They will rely on the evidence on file. The appeal judge will not allow the defence to lead evidence which has already been taken in the original proceedings.

[69] The applicant led evidence on this point, in the form of two letters supplied by the Italian judicial authorities. Although the provenance was not included in the joint minutes, it is customary in extradition proceedings that such documents are accepted as what they bear to be, or genuine copies thereof, and I do so.

[70] The first letter is a response to a request by the Lord Advocate for information, in the form of a letter dated 26 September 2019 from the Office of the Prosecutor General of the Republic (the '2019 letter'). It states:

> "In any case if the requirements under Article 629 bis of the Code of Criminal Proceeding are met, that is if Mr Daja demonstrates that his absence at the hearing was due to lack of knowledge of the trial that was not his fault, the sentenced person will have the right to obtain an annulment of the judgment and therefore to a new trial."

[71] The second letter is dated 20 August 2020 from the Italian Ministry of Justice Directorate General of Criminal Justice (the '2020 letter'), already discussed by Mr Canestrini. It is not specific to this case, but bears to be a learned discourse on the effect of Italian law on the right to retrial following trial in absence. I discuss these below.

Submissions on right to retrial

[72] For the applicant it was submitted that the issue is not the nature of the retrial, but whether there was an entitlement to a retrial. Reference was made to *Nastase* v *Office of the State Prosecutor*, Trento, Italy [2012] EWHC 3671 (Admin), a decision of the Queen's Bench Division of the High Court in England. The issue there was the meaning of "entitled" under section 20(5), and the effect of Article 175 of the Italian Criminal Code. *Nastase* involved the original Article 175 entitlement only where the requested person could prove he was not intentionally absent from trial, and here the procurator fiscal depute accepted that this was old law not applicable in the present case. *Nastase* otherwise was a useful review of the case law.

[73] For Mr Daja, reliance was placed on Mr Canestrini's evidence that the nature of any retrial was discretionary, and the appeal court could refuse to hear new evidence. There was accordingly no guarantee of a review or a retrial. Counsel relied on Proceedings on the Constitutional Complaint of *R, Re* [2017] 2 CMLR 2, a decision of the Federal Constitutional Court of Germany, at paragraphs 109 to 124. This appeared to cut across *Nastase*, and to show that the court had to be satisfied that there would be a retrial de novo, before extradition could be ordered.

Decision on right to retrial

[74] I have not found this straightforward, because the letters produced for the applicant raise issues which were not directly addressed in evidence, including provisions of the Italian Criminal Code which were not the subject of evidence or submission. I have resolved this question on the evidence led. The starting point is the evidence for the applicant.

[75] The 2019 letter has already been referred to in relation to absence from trial. However, it ends:

> "In any case if the requirements under Article 629 bis of the Code of Criminal Proceeding are met, that is if Mr Daja demonstrates that his absence at the hearing was due to lack of knowledge of the trial that was not his fault, the sentenced person will have the right to obtain an annulment of the judgment and therefore to a new trial."

[76] The 2019 letter appears absolutely to guarantee a new trial, but only if Mr Daja discharges the onus of proof upon him about absence. Parties agree the reference to a burden of proof on Mr Daja is a reference to an inapplicable version of Article 175, and is misleading. From Mr Canestrini's evidence, that burden only arises from a version of Article 175 which either pre- or post-dates Mr Daja's case, and no such onus exists in this case, which would be regulated by the intermediate version (2005 to 2014). Accordingly, on the face of the assurance contained in that letter, there is no obstacle to a retrial.

[77] However, the 2020 letter introduces some doubt. It is a general guide to Article 175 and is not specific to this case, and contains a detailed discourse on the effect of Italian law on the right to retrial following trial in absence.

[78] The 2020 letter was not analysed in detail by either party. It refers primarily to the new rules ("By law no. 67 of 28.4.14") rather than the intermediate rules. Copies of the two versions of Article 175 are attached. From Mr Canestrini's evidence, the differences of note are (i) a 30 day time limit for applying for a review, rather than 10 days, and (ii) the reversal of the burden of proof of effective knowledge, which is not relevant to the issue of what remedy is available.

[79] Mr Daja's case does not fall under the 2014 version, and nor does it qualify as "proceedings that are somehow in between Article 175 c.c.p. as first drafted and Article 175 c.c.p. as amended by Decree Law no 17 of 21.02.05 …" (see page 4, paragraph 3). The latter

appears to be a reference to cases which fall between the original, non-Article 6 compliant law and the intermediate version. Accordingly, the relevant parts of the 2020 letter are between page 2, last paragraph, and page 4, paragraph 3. This quotes the intermediate version of Article 175 (at page 2/3), and is unequivocal:

> "When a judgment or conviction decree is pronounced in absentia, then the defendant, at his request, shall be given leave to lodge an out of time appeal or opposition except when he has had effective knowledge of the proceedings or the decision and has voluntarily waived to appear or to lodge an appeal or opposition. For the said purposes the judicial authority shall make all the necessary verifications."

[80] There is accordingly a right to lodge an out of time appeal or opposition in Mr Daja's case, if he follows the procedure. The timescale starts when he is surrendered.

[81] If the matter ended there, then provided an "out of time appeal or opposition" could be held to amount to Mr Daja being "entitled to a retrial or (on appeal) to a review amounting to a retrial" (2003 Act s20(5)), then the latter provision is satisfied.

[82] Notably, however, the letter continues:

> "A defendant shall also be entitled to a new trial hearing or the taking of evidence under Article 603, paragraph 4, of the code of criminal procedure. This rule sets forth that: the court shall also order a new trial hearing for the taking of evidence when the defendant, in absentia for the first instance trial, so requests and proves that he could not be present for fortuitous events or force majeure or because he had no knowledge of the writ of summons, as long as the said circumstance is not through fault of his own …"

[83] Article 603, as described (Article 603 was not lodged) appears to introduce the same issue already discussed in relation to Article 175, namely the burden on the defendant to prove no effective knowledge. I was not told that this had been resolved. Article 603 however, appears not only to introduce the same burden, but also to go further. While it is possible, as discussed above, to conclude that Mr Daja had no effective knowledge of proceedings, because this required knowledge of the specific trial procedure, and he was

absent from Italy before any procedure could be commenced, it does not follow this was due to "no fault of his own". Mr Daja can claim to have no effective knowledge of the trial, and the judicial authorities would not be able to demonstrate otherwise. That is a different question as to whether his want of knowledge was due to "fault of his own".

[84] This point was not brought out in evidence, which concentrated on Article 175, not Article 603. I do not have a copy of the latter. The case and argument is uninformative. Mr Canestrini's evidence about reversion of burden of proof of effective knowledge was focused on Article 175 under reference to effective knowledge. It did not include "through no fault of his own". I note that "fault" appears in the "old" (pre-2005) version of Article 175, but not in the "intermediate" version (2005 to 2014) or the "new" version. Even if the burden of proof were to be reversed, and it were for the judicial authorities to prove lack of effective knowledge, the further qualification of being through no fault of Mr Daja would appear, without prejudging matters, to introduce a further hurdle which Mr Daja is at significant risk of failing to clear. It is difficult to be clear that an Italian court would not consider deliberate flight abroad, in secrecy, followed by cutting of communication, to amount to "fault of his own". It would depend to some extent on what view the Italian court took of what comprised "fault". If it covers fleeing the country, then Mr Daja would lose his right to retrial or review.

[85] I have required to resolve this point on the basis of the evidence heard at proof. Neither party identified fault as a different concept to lack of effective knowledge, and it was not the subject of submissions. Accordingly the matter was not the subject of evidence and falls to be disregarded following the basic tenets of procedure and evidence, the question being one of fact, requiring evidence on non-domestic law, which is not established.

[86] More positively, the tenor of Mr Canestrini's evidence was not that there was no remedy, but that the remedy was in some respect ineffective or defective. For this point Mr Canestrini did not found on Article 603 for the purposes of showing no right to a retrial. I accept his evidence and that Article 603 does not prevent a retrial. I do not accept that it is proved that Article 603 remedies the defects described by Mr Canestrini. I make that finding on the basis that the effect of Article 603 was not discussed in evidence, was not put to Mr Canestrini in terms, and that Mr Canestrini's evidence was detailed and clear on the overall entitlement upon an appellant who was tried in absence. The effect of Article 603 is, for these proceedings, unproven, as a question of foreign law requires to be. For the present case, the effect is simply to remove Article 603 as an available prop for the applicant's case.

[87] That does not affect whether s20(5) of the 2003 Act is satisfied. It is necessary again to consider Mr Canestrini's evidence. His evidence was given in relation to the remedy of lodging an out of time appeal or opposition, and that remedy is regulated by Article 175.

The case law on retrial in Italy

[88] It was submitted on behalf of the applicant that the matter is regulated by the case of *Nastase* (above), which focused on the nature of "entitled" under s20(5) of the 2003 Act in relation to Italian criminal procedure. The Queen's Bench Division of the High Court of Justice delivered a powerful statement at paragraph 42: "An insuperable difficulty confronting the appellant is that UK jurisprudence has consistently found Article 175 compatible with section 20". That court relied on *Gradica* v *Public Prosecutor's Office Attached to the Court of Turin* [2009] EWHC Admin 2846 and *Ahmetaj* v *Prosecutor General Attached to Court of Appeal Genoa* [2010] EWHC 3924 (Admin) in accepting that where the appellant had

never had any contact with the Italian Judicial authorities and had been represented, his right to a retrial was unconditional, notwithstanding the theoretical possibility of its refusal.

[89] *Nastase* continues at paragraph 43:

> "These decisions in my view show a difference between on the one hand an exercise of what one might term pure discretion when considering an application for retrial (*Bohm*) and the application of the law to the facts in accordance with a criminal code on the other. The latter is the approach of the Italian Court since at least *Daniele* v *Governor of Wandsworth Prison* [and others] [2006] EWHC 3587 (Admin).
>
> 44. Applying my interpretation of the authorities to the facts of this case, I do not doubt that the Italian Court will comply with the provisions of its own Code and re-open the appellant's case in the appellate phase. He is entitled to a retrial if he can show he was absent from the original proceedings: Gradica. No more is required from the appellant. His entitlement to a retrial is excluded only if the court is satisfied, on the evidence, that he knew of proceedings and voluntarily renounced his right to appear or to file an appeal … The Italian Courts can be expected to apply their own law and decisions of the Court of Cassation …"

[90] In so finding, the court repelled the ground of appeal (paragraph 3) that "entitled" meant enjoyment of an unfettered right under law not subject to discretion and not where there were reasonable doubts whether the appellant would be entitled to a retrial if extradited. In the present case, the procurator fiscal depute submitted that *Nastase* entirely resolved question, and there was an entitlement to retrial.

[91] Counsel for the respondent sought to counter that position by reference to the case of *Re R* (cited above) a case from the Federal Constitutional Court in Germany. I shall return to consider these below.

The nature of any retrial

[92] Against that background, Mr Canestrini's evidence requires to be examined for material which would support a conclusion that there was no right to retrial. In my view his evidence does not support that conclusion.

[93] I have rehearsed his evidence above. Mr Canestrini, as a practising defence attorney, clearly had concerns about the ECHR compliance of certain aspects of Italian procedure. I accepted his concerns were genuine and rational, but it was evident that he was not prepared to go as far as to say that there was no right to a retrial. His evidence was primarily related to the quality of that retrial. There is therefore a live question whether there is sufficient evidence to find that the requirements of s20(5) are not made out.

[94] Mr Canestrini gave interesting and informative evidence on Italian appeal procedure and the history of the evolution of Article 175. The latter took in three versions, namely pre-2005, the intermediate version in effect from 2005 to 2014, and the new version from 2014 onwards. His view, that the intermediate version of Article 175, applied to Mr Daja's case, was not challenged and I accept it. It was acknowledged that this version is the most favourable to a requested person, due to the removal of the burden of proof of effective knowledge.

[95] Mr Canestrini described as "a much greater problem" the extent of any retrial. It would not be a new trial. It would be an appeal with a request to hear new evidence. The appeal court retained a discretion to allow or refuse further evidence. Accordingly, he said, the point was not whether Mr Daja would get a retrial, but the fact that he would not necessarily get to defend himself properly.

[96] His concerns related to both the discretionary nature of the new evidence and the quality of the evidence available at retrial. On the latter point, the original evidence was often poor quality as it had not been challenged at first instance, and on a review at appeal would be given high importance if witnesses could not now remember their evidence. The introduction of new evidence required various hurdles to be cleared. While it was

impossible to know what the appeal court would do, it was only very few cases that a case was reopened in the evidentiary stage.

[97] I accept this evidence is credible and reliable, but in my view it does not displace the evidence led for the Crown. Although Mr Canestrini commented in general terms on the two letters from the Italian authorities, his challenge related to the burden of proof issue, not whether a retrial would be possible. Indeed, by the end of his evidence my impression was that the respondent's case was almost entirely focused on the burden of proof case. It was only by submissions that the wider issues were considered. 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.

[98] It follows that I accept the evidence led by the applicant, and while I also accept the evidence led by Mr Daja, it has not been sufficient to displace or undermine the applicant's position. Mr Canestrini did not say that Mr Daja was not entitled to a retrial. The applicant's evidence is clearly that he is so entitled. Section 20(5) would appear to be met, and had the matter ended there, on the evidence I would require to be satisfied in its terms.

[99] Had it not been for section 20(8), I would have found section 20(5) to have been satisfied. That is because of the assurances in the two letters from the Italian judicial authorities, and the acceptance by Mr Canestrini that review of evidence on appeal was part of basic Italian criminal procedure, applying in all cases. In my view, however, the terms of section 20(8) are determinative of this question.

Section 20(8) – the right to examine witnesses

[100] The court must not decide section 20(5) in the affirmative without reference to section 20(8). That provision is peremptory in its terms, and is framed as a prohibition which requires to be displaced. I have no note of it or any authorities being mentioned in submissions. Counsel referred to, without discussing, the cases already mentioned and also *Colozza* v *Italy* 1985 7 EHRR 516. None of these provides direct guidance on section 20(8), because they did not require decision as to the nature of any retrial.

[101] I accept subsection (a) of s20(8) is satisfied. It is not in dispute that Mr Daja would have the right to defend himself or be represented.

[102] Section 20(8)(b) is not as straightforward. It requires any retrial or review to allow the defendant to examine or have examined witnesses against him, and to obtain the attendance and examination of his own witnesses under the same circumstances. Although the thrust of the questions asked of Mr Canestrini related to the entitlement to trial, it emerged during his evidence that his concerns were focused on the quality of the retrial or review, not its existence. These might be categorised under section 20(8) rather than section 20(5), although parties did not analyse this.

[103] I note this matter was resolved in *Nastase*, but I discuss this further below.

[104] Mr Canestrini's evidence was that the ordinary rules of Italian procedure do not allow fresh evidence, or a new trial on the merits. He described a system quite different from the Scots system, whereby the prosecutor's file is copied to the court, and the judge has power to question witnesses and lead new witnesses. The parties propose witnesses and the judge assesses whether those witnesses are sufficiently relevant and necessary to be heard. In doing so, the judge relies on what the parties have said in their witness summaries.

Mr Canestrini referred to Italian procedure having elements of both adversarial and inquisitorial systems, for historical reasons.

[105] The procurator fiscal depute submitted, albeit in relation to entitlement rather than under s20(8), that it is for Italy to regulate its own procedure. Once it was recognised that a retrial, or a review amounting to a retrial, was provided, it was not permissible to conduct an assessment of the merits of that procedure. It was relevant that Mr Daja was not facing any difficulties that a first-instance accused would not face – on Mr Canestrini's evidence, no appellant has an absolute right to fresh evidence, or to a new trial on the merits.

[106] I agree with that submission, which is effective under s20(5) but not under s20(8). The latter demands an answer to whether there is a right to examine witnesses and to obtain the attendance and examination of his own. The evidence of Mr Canestrini was very firmly that there was no such right.

[107] The procurator fiscal depute did not present the evidence by reference to this statutory provision. I can only revisit the letters and attempt to find any provision discussing such a right. I note the following:

> "The instrument of out of time appeals, in fact, on the one hand exempts the convicted person from the burden of proving that he did not have timely effective knowledge … On the other hand, it guarantees that, after having been granted leave to appeal out of time, the convicted person may once again call evidence already called during the first instance trial, as well as call new evidence under the already mentioned Article 603, paragraph 4, of the code of criminal procedure, the limitations of which – under more recent but already well-established case law – do not even apply to an appellant convicted in absentia who has been granted leave to appeal out of time …" (2019 letter, page 3/4)

and

> "In any case, if the requirements under Article 629 bis of the Code of Criminal Proceeding are met, that is if Mr Daja demonstrates that his absence at the hearing was due to lack of knowledge of the trial that was not his fault, the sentenced person will have the right to obtain the annulment of the judgment and therefore to a new trial" (2020 letter).

[108] The second of these assurances is qualified by factors such as fault that, for the reasons discussed above, I cannot say that Mr Daja will meet. It also appears to be expressed in relation to an Article 629 bis upon which I have heard no evidence. I cannot place reliance on this statement because, although I do not doubt it is intended to correctly reflect the law, I do not have material sufficient to ascertain whether it refers to the relevant law for Mr Daja's case, or that it provides the assurance necessary for section 20(8). Parties were agreed that it appeared to be the wrong version of the law.

[109] The first extract, in the 2019 letter, is quite different. It is clear in its terms, and quite capable of providing that assurance. That remains in conflict with Mr Canestrini's evidence.

[110] In my view the matter falls to be resolved by analysis of the overall legal position of Mr Daja, under reference to *Dziel* (above, at paragraph 12), quoting *Cretu*, (above, at paragraph 34(iv)), in the following terms:

> "The question whether an accused is entitled to retrial or a review amounting to a retrial for the purposes of section 20(5) is to be determined by reference to article 4a paragraph 1(d) [of the Framework Decision 2002]"

[111] In my view that proposition is sound. Article 4(a) states:

> "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 the further procedural requirements defined in the national law of the issuing Member State: … (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, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed …"

[112] Article 4(a) requires regard to be had to the specific content of the EAW. What, then, does the EAW state? It gives no such reassurance. It is predicated on the assertion that:

> "being aware of the scheduled trial, the person 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; in the grounds of appeal and in the appeal trial the defence counsel of his choosing Aldo Pardo has never contested the absence of the defendant in the first instance trial; that same defence counsel lodged an appeal to the Court of Cassation in the defendant's interests against the appeal judgment."

[113] There are several errors in that statement. The first is the assertion that Mr Daja was aware of the scheduled trial. He was not. The second is the assertion that he gave a mandate to a legal counsellor. He did not. The third is that he was defended at trial by the counsellor who held the purported power of attorney, namely Mr Pardo. He was not – Mr Pardo was only appointed 10 days or so after the trial had concluded. He was defended only formally by a court-appointed attorney who he had never met and who was not paid. A fourth issue is that Mr Pardo did not contest absence at trial: that is misleading, because Mr Pardo wrongly believed he was acting with Mr Daja's express mandate, and therefore there was no reason to contest absence because Mr Daja was aware (in Mr Pardo's necessary but wrong judgment) of the trial proceedings.

[114] Accordingly, the Framework Decision permits ("may refuse") this court to refuse to execute a European arrest warrant where the requested person did not appear at trial. The assurances which remove that discretion are not present in this case. The EAW is fundamentally defective in that respect. It proceeds on the wrong assumption, and gives no such assurances. That must form the basis on which s20(8)(b), and in turn s20(5), are applied.

Decision on application of section 20(8)

[115] 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.

[116] 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. 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.

[117] I also do not doubt the bona fides of the letters from the Italian judicial authorities, set out above. I do, however, doubt that they have been prepared with a clear view of the actual facts of Mr Daja's case. The author of the 2020 letter has in mind exactly the incorrect facts upon which the EAW relies, and draws inferences from these. It would explain why Mr Canestrini was able to criticise its terms. I prefer the evidence of Mr Canestrini, directed as he was to the correct factual background in this case.

[118] 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 4a 1(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. I am assisted in this approach by *Re R*, from the Federal Constitutional Court, to which counsel referred. In *Re R*, the court discussed the requirement to investigate and establish the facts, against a background of it being difficult to have an overview of Italian penal code (at 124), a situation very like the present. The court was presented with a series of assurances, but the extent to which these preserved the appellant's rights were not clear (at 125), again similar to the present. The court considered that the Italian assurances of a thorough examination of the merits on the factual and legal issues, together with a hearing on further evidence being "not impossible", fell short of the relevant standards (123). Again, that closely reflects the position with which this court is faced, and led to a similar disposal.

[119] I would observe that my findings do not preclude a further attempt to extradite Mr Daja, based on a corrected version of the facts, but that is not a matter to be discussed further here.

Article 8

[120] It is unnecessary to deal with the remaining Article 8 point, that extradition is incompatible with the rights of Mr Daja and his family. The evidence was distinctly limited

on this point, and counsel made only passing reference to the argument, under reference to *Polish Judicial Authority* v *Celinski* 2016 1 WLR 551. I find that the balancing exercise in that case would not come down in Mr Daja's favour. The charge is a serious one and the extradition of Mr Daja would not cause interference beyond that inevitably to be caused by extradition. I would not have refused extradition on that ground.

Disposal

[121] On the basis of section 20(8), I require to decide the question posed in section 20(5) in the negative. In terms of section 20(7) I must order Mr Daja's discharge, which I do.