Neutral Citation Number: [2021] EWHC 3345 (Admin)

Case No: CO/4716/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2021

Before :

LORD JUSTICE BEAN
and
MR JUSTICE JAY

- -

Between :

CEZAR GALUSCA	**Appellant**
- and -	
ITALIAN JUDICIAL AUTHORITY	**Respondent**

- -
- -

Martin Henley (instructed by **AM International**) for the **Appellant**
Alex du Sautoy (instructed by **CPS**) for the **Respondent**

Hearing date: 30 November 2020

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Approved Judgment

Lord Justice Bean :

1. This appeal by Cezar Galusca against an order for his extradition to Italy raises the question of the meaning of the words “entitled to a retrial” in section 20(5) of the Extradition Act 2003.

2. Mr Galusca was born in Romania on 19 March 1986. On 15 February 2017 he was convicted by the Court of Termini Imerese in Palermo, Italy of four offences all committed in 2010. As described in the European Arrest Warrant and further information provided by the Italian authorities, these were as follows.

    a) In February 2010, the Appellant threatened Ezaru Vasile and Ezaru Ionela and forced them to give him €150. Acting with Dragos Ioan Galusca, Tiberiu Galusca, and Valerio Galusca, he went to their house and asked for payment of that sum to pay for the medical expenses incurred following an injury allegedly sustained by the Appellant, saying “*Give us the money immediately or we’ll catch you outside and stab you to death*”.

    b) On 31 July 2010, the Appellant and Sorin Panainte forced entry to and entered the house of Ezaru Vasile and Ezaru Ionile.

    c) On 31 July 2010, the Appellant damaged a Peugeot 206 owned by Ezaru Vasile and Ezaru Ionela, by scratching the bodywork and puncturing 4 tyres.

    d) In February 2010, the Appellant attempted to stab Dorin Tencu.

3. Mr Galusca did not attend this hearing; his interests were apparently represented by a state-appointed lawyer. His case is that he was unaware of the hearing and had been resident in the UK since 2013. He states:

> “The first time I became aware that I had been subjected to criminal proceedings in Italy was when I was arrested under the European Arrest Warrant. Until that point I had no idea that I had been charged with and convicted for a criminal offence in Italy…… While I was still living in Italy I did not receive any letters or notifications about any criminal complaint or proceedings against me. I was never arrested or interviewed by the police, and I was not informed of any obligation on me not to leave the country.”

4. On 5 March 2018 the judgment against him was made final: the Italian word in the warrant is “irrevocabile”. In 21 August 2018 he was sentenced in his absence to 5 ½ years’ imprisonment.

5. A European Arrest Warrant was issued on 15 June 2020 and certified by the National Crime Agency on 25 June 2020. (The warrant also referred to a separate conviction in Italy for an offence of possession of a bladed article for which he had been sentenced to three months’ imprisonment. It was common ground that because of the provisions of s 65(3) of the Act the relevant conduct did not constitute an extradition offence and he was discharged in respect of that conviction).

6. On 28 July 2020 Mr Galusca was arrested and brought before the Westminster Magistrates' Court, since when he has been in custody. I note that, since this arrest and initial hearing occurred before 31 December 2020, the UK's withdrawal from the European Union makes no difference to the present case.

7. On 8 December 2020 the final hearing of the request for Mr Galusca's extradition took place before District Judge Tempia. Counsel on each side were the same as before us, namely Mr du Sautoy for the Requesting state and Mr Henley for Mr Galusca. By a reserved judgment handed down on 15 December 2020 the District Judge ordered Mr Galusca's extradition for the four convictions I have set out above. An application for permission to appeal to this court was refused on paper by Sir Ross Cranston but granted on a single ground by Swift J on 24 June 2021. The ground on which permission was granted was described succinctly as "the s 20 ground". Permission to appeal on ECHR Article 8 grounds was refused.

Extradition Act 2003 section 20

8. The 2003 Act reads as follows:

> "(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 allege 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."

9. It is not suggested that the Appellant was convicted in Italy in his presence. So the first question which the District Judge had to decide was whether the Requesting state had proved to the criminal standard that the Appellant had "deliberately absented himself from his trial". DJ Tempia held that she could not make that finding on the evidence before her and Mr du Sautoy has not sought to go behind that element of her judgment. The next and critical question, therefore, was whether the Appellant, if returned to Italy would be "entitled to a retrial or, on appeal, to a review amounting to a retrial" within the terms of subsection (5).

10. The Italian Deputy Public Prosecutor at the Court of Termini Imerese, Daniele Di Maggio, was asked to give further information by answering a number of questions, including:

> "(11) If Cezar Galusca was not present at trial:
>
> a) is there an unqualified right to a retrial on surrender
>
> b) at any trial would Cezar Galusca be entitled to
>
> `````i) represent himself or to be represented by a lawyer
>
> ii) call evidence on his behalf
>
> iii) examine the witnesses who give evidence against him?"

11. The reply, in paragraph (11) of the further information dated 24 September 2020 stated:-

> "In accordance with Article 629 *bis* of the Code of Criminal Procedure Mr GALUSCA would be entitled to a retrial if he can prove that his absence was due to a blameless lack of knowledge of the proceedings. In this case he would be entitled to be represented by a lawyer to submit evidence in his favour and to examine the witnesses who gave evidence against him."

12. This is agreed to be an accurate translation of the relevant Italian statute. We were not told of any authoritative interpretation of its first sentence by an Italian court, still less by a court in this jurisdiction. We therefore have to decide for ourselves what it means. (I shall refer to the person whose extradition is sought as the requested person rather than as the fugitive, since in a case such as the present one the term "fugitive" begs the question.)

13. Mr Henley's central submission is that a person convicted *in absentia,* whom the requesting state cannot prove to have deliberately absented himself from the trial (in which case s.20(3), rather than s 20(5), would be applicable), cannot be extradited

unless his entitlement to a retrial is unqualified. It cannot be made subject to a requirement on him to prove his blamelessness or lack of knowledge, or indeed to prove anything. Mr du Sautoy, however, submits that the condition which Article 629 *bis* places on the requested person's entitlement to a retrial is consistent with a series of decisions in this jurisdiction and in Scotland, save for one which he argues was wrongly decided.

The Framework Decision

14. Article 4a of the EAW Framework Decision of the European Council dated 13 June 2002 provides that the executing judicial authority may refuse to execute an EAW if the requested person did not appear in person at his trial, unless the EAW states that "in accordance with further procedural requirements defined in the national law of the issuing Member State", one of four exceptions applies. The relevant one is subparagraph 1(d), which requires that the person sought was not personally served with the original decision but will be personally served with it without delay after the surrender and also 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".

Previous decisions

15. The earliest decision to which we were referred was *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] 1 WLR 1724, HL. In the leading speech Lord Bingham of Cornhill said at [22]-[24]:-

> "22. While a national court may not interpret a national law *contra legem*, it must "do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues and thus comply with article 34(2)(b) EU" (*Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83, paras 43, 47: see *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31, paras 5, 39-40, 75-77). As I suggested in *Cando Armas*, above, para 8, the interpretation of the 2003 Act must be approached on "the twin assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of cooperation by the United Kingdom than the Decision required, it did not intend to provide for less".
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> 23. Providing as they do for international cooperation between states with differing procedural regimes, the Framework Decision and the 2003 Act cannot be interpreted on the assumption that procedures which obtain in this country obtain elsewhere. The evidence may show that they do not…….The need for a broad internationalist approach signalled by Lord Steyn in *Re Ismail* is reinforced by the need to pay close

> attention to whatever evidence there is of the legal procedure in the requesting state.
>
> “24. Under article 1 of the Framework Decision the EAW is a judicial decision issued by the requesting state which this country (subject to the provisions of the Decision) must execute on the basis of the principle of mutual recognition. It might in some circumstances be necessary to question statements made in the EAW by the foreign judge who issues it, even where the judge is duly authorised to issue such warrants in his category 1 territory, but ordinarily statements made by the foreign judge in the EAW, being a judicial decision, will be taken as accurately describing the procedures under the system of law he or she is appointed to administer……….”

16. In his skeleton argument Mr Henley drew attention to the observation of Lord Bingham that “it might in some circumstance be necessary to question statements made in the EAW by the foreign judge who issues it”. He did not, however, return to this point in oral argument, and was right not to do so. This is not a case where it is necessary to question the further information given by the foreign judicial authority. There is no dispute that Mr Di Maggio’s answer to question (11) in the request for further information accurately describes the applicable Italian law.

17. In *Nastase v Office of the State Prosecutor, Trento, Italy* [2012] EWHC 3671 (Admin) the Divisional Court had to consider the very question which is before us, namely the meaning of “entitled to a retrial” in s.20(5) of the 2003 Act, but at a time when Article 629 *bis* had not been introduced into the Italian Code of Criminal Procedure. At that time the relevant provision of the Code was Article 175(2). This stated that a defendant convicted *in absentia* should on his request be allowed to lodge an appeal out of time “except when has had actual knowledge of the proceedings or order and he voluntarily renounced to appear or to file an appeal or opposition”. It was accepted in this court that it was the responsibility of the judge in Italy to demonstrate actual knowledge on the part of the applicant before an application under Article 175 could be refused. Indeed, this court was informed of a judgment of the Court of Cassation in Italy that “a person tried *in absentia* and not aware of the proceedings shall always have the right to obtain the renewal of the trial”. Against that background Rafferty LJ said [44]-[45]:-

> “44. Applying my interpretation of the authorities to the facts in 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 that 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 and appeal. Where there is no evidence of his knowledge there is no basis on which his appeal could be excluded.
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> ...

> 45. The existence of procedural steps does not remove the entitlement to a retrial. Rather, the Italian authorities must be premitted 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. In my view the evidence demonstrates that s.20(5) is satisfied by the provisions recited in the material provided to this court and to the District Judge."

18. Lord Bingham's statement in *Caldarelli* that the 2003 Act must be approached on the assumption that Parliament did not intend the provisions of Part I to be inconsistent with the Framework Decision was followed in the specific context of s 20(5) in *Cretu v Romania* [2016] EWHC 353 (Admin); [2016] 1 WLR 3544. Burnett LJ (as he then was) said at [34]-[36]:

> "34. 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:-……….
>
> > 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 paragraph 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.
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> 35. 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. Article 4a is drafted to require surrender if the European arrest warrant states that the person, in accordance with the procedural law of the issuing Member State, falls within one of the four exceptions. It does not contemplate that the executing state will conduct an independent investigation into those matters. That is not surprising. The EAW system is based on mutual trust and confidence. Article 1 of the 2009 Framework Decision identifies improvement in mutual recognition of judicial decisions as one of its aims……………
>
> 36. Should a requested person be surrendered on what turns out to be a mistaken factual assertion contained in the EAW relating to article 4a, he will not be helpless. He would have the

> protections afforded by domestic, EU and ECHR law in that jurisdiction. Furthermore, article 4a does not require the executing judicial authority to refuse to surrender if the person did not appear at his trial, even if none of the exceptions applies. *No doubt that is because it can assumed that whatever may be the circumstances of a requested person on his surrender, he will be treated in accordance with article 6 ECHR in an EU state."* [emphasis added]

19. In *Taranenco v Bucharest Section 1 Court, Romania* [2020] EWHC 1198 (Admin*),* a judgment handed down on 13 May 2020, Dove J followed *Nastase*, saying at [32]:

> "…The fact that the entitlement to a retrial may be subject to procedural requirements which must be satisfied before the right to retrial arises does not mean that the appellant is not entitled to a retrial or the requirements of section 20(5) and (8) have been breached. The respondent is not precluded from having procedural rules governing the admissibility of an application of a retrial, including as here the question of whether the appellant was not in fact summoned to the hearing in accordance with the relevant law and procedure governing the appeal which led to his conviction."

20. Nine days after Dove J handed down his decision in *Taranenco*, Fordham J gave his judgment in *Ogreanu v Italian Judicial Authority* [2020] 1 WLR 4080, on which Mr Henley, who also appeared for the appellant in that case, strongly relied. Mr Ogreanu had been convicted *in absentia* in Italy. The District Judge had ordered extradition, finding that he would be "entitled to a retrial" for the purposes of s.20(5). Article 629 *bis* was not referred to and I assume it was not in force at the relevant time. Fordham J allowed Mr Ogreanu's appeal, but the value of the case as an authority on whether a burden of proof on the requested person to prove anything in order to secure a retrial contravenes s.20(5) is greatly diminished by the fact that the point was conceded. The judge said:-

> "13. There was a lot of helpful common ground between the parties as to the applicable legal principles which are relevant for the purposes of considering retrial-entitlement in this case. It was common ground before me that the onus rests on the respondent to satisfy the UK extradition court, to the criminal standard, that the various questions arising under section 20, including the necessary ingredients of retrial-entitlement under section 20(5), are to be answered adversely to the individual whose extradition is being sought. As to that, see section 206 of the 2003 Act and paragraph 34(v) of the judgment of the Divisional Court in *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin) [2016] 1 WLR 3344.
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> 14. It was also common ground before me that, for the purposes of the present case, question (iii) (retrial-entitlement) required the respondent to satisfy the judge in relation to three necessary ingredients. They were as follows. First, that the retrial involves

> an entitlement on the part of the extradited person to adduce evidence on the merits. Secondly, that any limitation period on the exercise of the retrial right involves the prospective running of time following extradition surrender. Thirdly, that no burden would be placed on the extradited person to disprove deliberate absence from the original trial, as a precondition to invoking the retrial entitlement; rather, that it was for the prosecution to prove deliberate absence from trial, if the retrial entitlement was to be denied on that basis. I shall call these ingredients, respectively, the "evidence-adducing ingredient"; the "prospective running of time ingredient"; and the "prosecution-burden ingredient".
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> 15. I interpose this. I have explained that the section 20(5) retrial-entitlement arises as question (iii) where the extradition court is not satisfied as to deliberate absence from trial (question (ii)). It was common ground before me that the retrial-entitlement (question (iii)) can be one which is deniable by the requesting state on grounds of deliberate absence from trial (question (ii)). I did not need to hear argument on the permissibility of this contingent deniability, which was agreed, but it is worth referring to one passage which supports it. In *Nastase v Office of the State Prosecutor, Trento, Italy [2012] EWHC 3671 (Admin)* at paragraph 44 Rafferty LJ referred to the requested person's "entitlement to a retrial" as being "excluded only if the [Italian] court is satisfied, on the evidence, that he knew of the proceedings and voluntarily renounced his right to appear or to file [an] appeal". So far as onus and this contingent deniability, I repeat, it was common ground before me that the requesting state prosecuting authorities would need to bear the onus of proving deliberate absence from trial, with no onus placed on the requested person to disprove it. That is the prosecution-burden ingredient."

21. *Ogreanu* was considered by a Divisional Court (Carr LJ and Cheema-Grubb J) in *Dumitrache v Office of the Prosecutor of the Republic attached to the Court of Pordenone, Italy* [2021] EWHC 958 (Admin). The court affirmed a finding of the District Judge that the Appellant had on a proper analysis and sentenced in his presence of the offences in question. It followed that the arguments about deliberate absence for the purpose of s.20(3) and entitlement to a retrial for the purpose of s.20(5) did not arise. However, the court had been addressed on those issues and Carr LJ devoted part of her judgment to them, while emphasising that she did so as *obiter dicta.* She cited the observations of Rafferty LJ in *Nastase* at [45] 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 procedings in the imposition of their own rules. Section 20 may create entitlements, but procedural rules set parameters within which such rights are exercisable".

22. Carr LJ (with whom Cheema-Grubb J agreed) went on to summarise the relevant parts of the judgment of Fordham J in *Ogreanu* and the submission of counsel for the Appellant that "if the burden lies on the accused person under Italian law, then s.20(5)

cannot be satisfied, since it is for the requesting authority (and not the extraditee) to prove that the requirements of s.20 are made out)." She said:

> "81. Given that it is not necessary for me to determine the issue, and not having had the benefit of full argument on the point, I prefer not to express any concluded or firm view on the correctness of the decision in *Ogreanu*. However, I do hold the provisional view that *Ogreanu* was wrongly decided, for the summary reasons set out below.
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> 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; [2008] 1 WLR 1724 (at [7] and [23] per Lord Bingham). Surrender under the 2003 Act is a form of international co-operation between member states with different procedural regimes. It is not for the English courts to impose English practices on other member states before extradition can take place. As it is put succinctly for the Respondent, Italian criminal procedure is not to be treated as if it were English; this is not what s. 20 requires.
>
> 85. Further, I would not accept that *Nastase* no longer represents good law or has in some way been "superseded" by *Ogreanu*. Whilst referred to early on in the decision in *Ogreanu*, *Nastase* was not analysed in any detail but identified in passing only: Fordham J said in terms that he did not need to consider the question of the permissibility of a contingent entitlement to a retrial. He at no stage stated that he was departing from (or disagreeing with) the decision in *Nastase*: indeed, he treated it as correct on the issue that he was then addressing."

23. Finally, we were referred to the opinion of the High Court of Justiciary delivered on 22 June 2021 in *Lord Advocate v Daja* [2021] HCJAC 31. In the opinion of the court delivered by Lord Turnbull the decision of a sheriff at Edinburgh to order the Respondent's discharge under s.20(7) of the 2003 Act was reversed. *Nastase* was held to be good law, and the court agreed with the observations of Carr LJ in *Dumitrache* at [82] and [83]. Paragraph [16] of the judgment should also be cited:-

> "[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])."

Discussion

24. I disagree with the statement of the law presented as common ground to Fordham J in *Ogreanu* that in order to satisfy s 20(5) of the 2003 Act the requesting state must show that "no burden would be placed on the extradited person to disprove deliberate absence from the original trial, as a precondition to invoking the retrial entitlement". Fordham J can hardly be blamed for acting on the basis of a concession by the prosecution in that case, but the concession was in my view wrongly made. The prosecution does have to prove deliberate absence from the original trial if the District Judge is to be asked to give an affirmative answer to the question under s 20(3). What the prosecution has to prove under s 20(5), however, is that under the law of the requesting state the extradited person, if surrendered, will be "entitled to a retrial". The question for us is what that phrase means.

25. Like the Scottish court in *Daja*, I consider that Rafferty LJ in *Nastase* was right to say that a person may be entitled to a retrial even though he will have to satisfy procedural requirements under the law of the requesting state. I would not go so far as to endorse with what appears to have been the provisional view of Carr LJ at paragraph 83 of *Dumitrache* that *any* burden of proof imposed on the applicant for a retrial by the law of the requesting state is irrelevant. If that law were to place on the applicant a burden impossible to discharge in practice (such as, arguably, a requirement to prove lack of knowledge of the hearing beyond reasonable doubt), it would be difficult to say that the requested person is in reality "entitled to a retrial".

26. But this is very far from the present case. Italy is both a member of the EU and a Member State of the ECHR. As Burnett LJ observed in *Cretu*, we should proceed on the assumption that such a state will act in accordance with its obligations under ECHR Article 6, and I would interpret Article 629 *bis* with that assumption in mind. In any event Article 629 *bis* seems to me, on its natural construction, to place no more than an

evidential burden on the accused person to put forward a case of blameless lack of knowledge of the original trial.

27. The Appellant's witness statement set out at paragraph 3 above puts forward such a case unequivocally. If there is any evidence to the contrary it will be for the Italian court to evaluate it. If there is no evidence to the contrary then I do not see how any court could properly fail to allow him a retrial. Such an evidential burden does not in my view infringe Mr Galusca's rights under ECHR Article 6, nor does it go beyond what Rafferty LJ in *Nastase* described as a procedural requirement.

28. District Judge Tempia was therefore right to hold that Mr Galusca, if surrendered to Italy, would be "entitled to a retrial" within the meaning of s 20(5) and to order his extradition. I would dismiss his appeal.

Mr Justice Jay:

29. I agree.