



Neutral Citation Number: [2022] EWHC 1401 (Admin)

Case No: CO/741/2020

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 08/06/2022

Before :

LORD JUSTICE HOLROYDE

MRS JUSTICE MCGOWAN

Between :

DOREL TIGANESCU

Appellant

- and -

**THE COUNTY COURT OF SUCEAVA,
ROMANIA**

Respondent

JAMES HINES QC AND ÉMILIE POTTLE (instructed by **Lloyds PR**) for the **Appellant**
CATHERINE BROWN (instructed by the **CPS Extradition Unit**) for the **Respondent**

Hearing date: 07 December 2021

Approved Judgment

This judgment was handed down by Mrs Justice McGowan remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 11.00 on 08.06.2022

Mrs Justice McGowan :

Introduction

1. The appellant, Mr Dorel Tiganescu, is a citizen of Romania. He was born on 31 July 1980. His extradition is requested pursuant to a European Arrest Warrant, (“EAW”). Romania is a category 1 country for the purposes of the Extradition Act 2003, (“the 2003 Act”).
2. On 19 October 2016, the Respondent, the County Court of Suceava, Romania, issued an EAW. It was certified by the National Crime Agency (“NCA”) on 20 October 2016. It is a conviction warrant. The warrant seeks the extradition of the appellant to serve the whole period of a custodial sentence of seven years and six months for an offence of “qualified murder”. This is an extradition offence under s.65 of the 2003 Act.
3. On 23 February 2020 District Judge Goozée, sitting at Westminster Magistrates’ Court, ordered the appellant’s extradition pursuant to s.21(3) of the 2003 Act.
4. The appellant appeals against that order pursuant to s.26 of the Act. By s.27(2), this court can only allow an appeal if:
 - “(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;*
 - “(b) if he had decided that question in the way he ought to have done, he would have been required to order the person's discharge.”*
5. The appeal is now being pursued under s.20(2) of the Act, on the sole ground that the District Judge erred when he found that the appellant had deliberately absented himself from his trial, notwithstanding the fact that he had left Romania before the trial commenced.
6. This court is asked to consider whether the District Judge erred in his application of articles 4a(i) and (ii) of the Council Framework Decision 2002/584/JHA (“the 2002 Framework Decision”) (as amended by Council Framework Decision 2009/299/JHA (“the 2009 Framework Decision")), and the 2003 Act, in the context of his findings on the facts.
7. Leave to appeal was granted on this sole ground by Lane J on 10 December 2020.
8. There is also an application by the appellant to adduce fresh evidence.
9. Two further grounds, namely a ground under s.2(2) of the Act and an article 3 argument on prison conditions are no longer pursued in the light of this court’s decision in [*Wozniak v The Circuit Court in Gniezno, Poland \[2021\] EWHC 2557 \(Admin\)*](#) and the receipt of further assurances dated 21 May 2021.

10. Mr James Hines QC and Miss Émilie Pottle appeared for the appellant and Miss Catherine Brown for the respondent. The court is very grateful to them for their helpful written and oral submissions.

The Facts

11. On the night of 16 January into the morning of 17 January 1999 in Horodnic, Suceava County, Romania, a man called Senegeac Sarin was assaulted and received serious, life-threatening wounds. He was treated in hospital over many weeks for severe injuries, which were described as having, “put his life in danger”. The appellant was not formally arrested.
12. However, he was detained soon after the incident. He was held in custody for questioning. He denied the offence. He admitted in cross-examination before the District Judge that he had been held in detention until 18 March 1999.
13. After his release he was required to attend the Regional Court in Suceava for questioning, he did not attend. At some point he moved to the UK and has remained here, living under the name of Ion Balan, describing himself as a citizen of Moldova. He gave evidence that he had arrived in the UK in 2000, although the authorities in Romania believed he had left that country in 1999. The District Judge found that he had left Romania in 1999.
14. After the appellant left Romania a series of six summons was served at his former home address on his mother and sister. They were served on his mother on 23 October 2002, 15 January 2003, 17 February 2003 and 17 March 2003, and on his sister on 19 May 2003 and 7 July 2003. He gave evidence that after he had left Romania he had had no contact with his family there and was not aware that any summons had been served or that he was required to attend the trial. His sister also gave evidence in support of his case.
15. He was represented at his trial in Romania by a duty solicitor appointed by the state.
16. On 7 July 2003 the County Court in Suceava pronounced his conviction and imposed a penalty of seven years and six months. That became final on 28 July 2003.
17. He has an established family life in the UK, he lives with his wife and their child in North London. He also has two adult children in the UK from a previous relationship. When asked about changing his name, he said that he done that to avoid any possible association between his original surname and the gypsy community.
18. The appellant was arrested at a residential address in Colindale, North London on 18 November 2019.

Application to Adduce Fresh evidence

19. Since the grant of leave in this case there have been further proceedings in Romania. The appellant applied to the court there for a re-trial. The judgment refusing that application was handed down on 6 April 2021.
20. The appellant applies for leave to adduce that judgment in these proceedings and to raise a fresh ground of appeal based on article 6 of the European Convention on Human Rights, (“ECHR”).
21. It has not been necessary for this court to determine that application. It is agreed that the appellant does not have a right to a re-trial in Romania and this appeal must be determined solely on the issue of the appellant’s absence from his trial and whether the District Judge was correct in concluding that it was deliberate.

The EAW

22. The EAW describes the offence in the following terms:

“On 16/17.01.1999 while leaving the Community Cultural Centre of Horodnic Town, Suceava County, Romania, defendant Tiganescu Dorel hit the injured party Senegeac Sarin with a penetrating body, in the belly and caused him a belly wound with transfixiant jejunal (sic) perforation and perforation of the ascendant mesocolon, injuries that needed 30-35 days of medical care and that put his life in danger”

23. The offence falls into the category of “murder and grievous bodily injury”.
24. After his release from custody the authorities summoned him to appear before the court by written subpoena. He was not found at his home address and, in accordance with domestic law, the authorities therefore served the summons to appear on his family members, (see above).
25. The EAW sets out the following account of the proceedings:

“The person concerned has been summonsed in person and consequently informed of the date and place of the hearing, which led to the decision rendered and has been informed that a decision may be rendered in absentia.....

.....[X] being aware of the hearing established, he authorised a lawyer who was appointed either by the person concerned, or officially, to defend him during the hearing and was indeed defended by the respective lawyer during the hearing.”

26. It is agreed that the appellant did not appoint the lawyer himself, rather it was a court appointed lawyer.

“Tiganescu Dorel was personally summoned and informed by other means about the date and place of the trial, respectively he was summoned at his place and the

summons was affixed at the Local Council of Horodnic town, Suceava County (the place where the criminal offence was committed). Therefore, he was summoned for the following days of trial: 21.10.2002, 27.11.2002, 15.01.2003, 17.02.2003, 17.03.2003, 14.04.2003, 19.05.2003, 16.06.2003, 07.07.2003.

Tiganescu Dorel was summoned to appear before the judge, pursuant the legal provisions in force, respectively art 177 of the Romanian Procedural Code of 1968, through a written summons and, because he was not found at home, that summon was given to another person (his mother-Tiganescu Elena-for the trial days of 23.10.2002, 15.01.2003, 17.02.2003, 17.03.2003, and to his sister-Tiganescu Lacramioara-for the trial days of 19.05.2003, 07.07.2003-at that date being ruled the conviction order), according to art 179 of the Romanian Procedural code of 1968, in which was stated that 'if the summoned person is not find at home, the court agent gives the summon to the husband/wife, to a relative or to any other person that lives with the summoned person or to a person who regularly receives the mail'.

At all the days of trial, Tiganescu Dorel was represented by the duty solicitor, lawyer Ciubotaru Vasile."

27. In the first piece of further information, dated 9 December 2019, it was confirmed that the appellant had not been arrested and therefore no conditions were attached to his release from prison after his detention. He had not been required to notify the authorities of any change of address.
28. A further request for information was answered in a document dated 7 January 2020, (the date is accepted to have been incorrectly translated as 7 December 2019 on the face of the document). That further information sets out the history of proceedings in Romania in greater detail.

".....2. Initially, the investigations in the case were carried out by the Bacau Military Prosecutor's Office, which by the resolution of 17.01.1999 given in the file no. 26/P/1999 ordered the initiation of criminal prosecution against Tiganescu Dorel. Subsequently, the competence lied on the Prosecutor's Office attached to the Suceava Regional Court, which through the indictment no. 288/P/2000 of 12.09.2002 ordered the referral of Tiganescu Dorel for committing the offense of attempt to the offense of qualified murder, provided by art. 20, 174, 175 lit. 1 Criminal Code of 1969.

In the course of criminal prosecution, the Bacau Military Prosecutor's Office by ordinance no. 25/P/1999 ordered on 18.01.1999 to 17.03.1999 will be deducted from the applied sentence of 7 years and 6 months in prison. Heard during the criminal prosecution, Tiganescu Dorel did not acknowledge the offence, and in court did not show up to be questioned, avoiding the judgment.

3.a) The first court term was set for 23.10.2002, Tiganescu Dorel being summoned before the court by a written summons.

b) Tiganescu was notified for each court term, respectively for the data (sic) 23.01.2002, 27.11.2002, 15.01.2003, 17.02.2003, 17.03.2003, 14.04.2003, 19.05.2003, 16.06.2003 and 07.07.2003, according to the legal provisions by a written summons at the home address of Horodnic commune, Horodnic de Sus village, no. 190, Suceava county, Romania.

Also, for the trial terms of 27.11.2002, 17.02.2003, 17.03.2003, it was ordered to summon Tiganescu Dorel with bench warrant by the Horodnic Commune Police Station, Suceava county, Romania, by which it was requested to ensure his presence in the court.

c) The convicted Tiganescu Dorel was questioned during the criminal prosecution on 17.01.1999, but he did not acknowledge committing the offence and in court – at the Regional court Suceava he did not show up to be questioned, avoiding the judgment.

d) From the indictment no. 288/P/2000 of 12.09.2002 prepared by the Prosecutor's Office attached to the Suceava Regional Court, it appears that at the end of 1999, the named Tiganescu Dorel left the country illegally, the members of his family saying he would be in Canada.

Subsequently, as a result of the police going to his home address in order to execute the bench warrants, it was found that he was, and a report drawn up in this regard, which results that the one in question was "left home for a longer time, to work abroad."

4) An ex officio defender was appointed, who provided legal assistance for the entire duration of the criminal trial.

5) At the trial term of 19.05.2003, the appointed defender requested the summoning of Tiganescu Dorel with a bench warrant, considering that he was avoiding the trial.

6) According to art. 179 of the Code of Criminal Procedure of Romania of 1968, which stipulates that "if the cited person is not at home, the agent will hand over the summons to the husband, a relative or to any person who lives with him or who regularly receives his correspondence." The summons was given to the family members, considering that it is not at home.

7) Tiganescu Dorel uses a false identity of "Ion Balan" as a citizen of the republic of Moldova, according to the information by the County Police Inspectorate Suceava-Criminal Investigation Service.

8) According to art. 466 of the Criminal Procedure of Romania – the person with a final conviction, who was tried in absentia, may apply for the criminal proceedings to be re-opened, no later than one month since the day when informed,

through any official notification, that criminal proceedings took place in court against them.

Paragraph 2 of the same normative act stipulates that- it is considered tried in absentia the convicted person who was not summoned to appear in court and had not been informed thereof in any other official manner, respectively, the person who even though aware of the criminal proceedings in court, was lawfully absent from the trial of the case and unable to inform the court thereupon.

.....”

29. An earlier EAW had been issued in 2010, the appellant was arrested under that warrant and was discharged. It appears that he was discharged on the basis of the validity of that warrant pursuant to s 2 of the 2003 Act.

The Decision of the District Judge

30. At the final hearing before the District Judge, extradition was challenged on three grounds:
- i) Section 2 of the 2003 Act. It was argued that the terms of the EAW were not sufficiently particularised.
 - ii) Section 20 of the 2003 Act. It was argued that the appellant had been convicted in his absence and he could not be deemed to have been present by representation.
 - iii) Section 21 of the 2003 Act and Article 8. It was argued that extradition would be a disproportionate interference with his right to a family life.
31. The appellant gave evidence before the District Judge, who made the following findings.

“65. I find the RP’s evidence unreliable. I do not believe he has told the truth about the proceedings in Romania and the circumstances of his departure from the country. In his proof of evidence, he simply says he was questioned by the Police about the incident and then released. *“I was released and the matter concluded as far as I was concerned”*. He failed to mention in his proof of evidence that he was held in custody from 18th January 1999 to 18th March 1999, albeit he accepted he had under cross examination. Despite being held in custody for two months, under cross-examination he was vague about what had occurred in that time. The further information dated 7th January 2020 confirms a prosecution had started in Romania. During the criminal prosecution, the prosecutor’s office had ordered the RP’s remand in custody. In addition, the further information states that the RP was questioned and then did not show up to be questioned at Court. The information from the JA further confirms that at the end of 1999 he had left the country illegally and the members of his family stated that he would be in Canada. I find that the

criminal prosecution had started in 1999. I do not accept the RP's evidence that he believed the matter had concluded to be credible. I place greater reliance on the further information from the Court in Suceava.

66. I do not accept the RP left Romania in 2000. I accept the information from the JA that the RP left Romania illegally in 1999. In his evidence in chief, the RP says he left Romania in 2000 and came to the UK to look for work. However, in cross examination he accepted he had gone to several other countries before coming to the UK which he did not mention in his proof of evidence.

67. I am satisfied so I am sure the RP is a fugitive. Knowing that a criminal prosecution had already started in Romania in 1999, he left Romania and travelled to several other countries before arriving in the UK. His family told the authorities he was in Canada. The further information states he used a false identity of "Ion Balan" as a citizen of the Republic of Moldova. On his arrival into the UK he states he immediately changed his name. In evidence he says he applied for asylum, however, no evidence has been produced to support that and his own wife was unaware of the circumstances of the application and has been unable to locate any paperwork. Despite having a stable family life in Romania living with his mother, brother and sister, he effectively disappeared and had no contact with his mother or sister for several years. I find the evidence overwhelmingly supports a finding that the RP was a fugitive and fled Poland (sic) knowing he was being prosecuted by the authorities for a serious violent offence. His conduct demonstrates a concerted effort to live under the radar of the Romanian authorities and avoid detection.

68. I find that the RP was convicted in his absence and find that it cannot be unequivocally established he was aware of the trial dates. There is overwhelming evidence that the JA had diligently endeavoured to serve the summonses on the RP to give him notice of the hearing dates between 2002 and 2003. They left the summonses with his mother and sister. I cannot be satisfied so I am sure that the RP ever received those summonses. However, by virtue of the RP's own conduct and in view of my findings in paragraph 65 - 67 above, there was a manifest lack of diligence on the part of the RP. In accordance with my findings, he fled Poland (sic) knowing that a criminal prosecution had started. He never contacted his family and he never contacted the authorities in Romania. The fault was his own conduct in leading him to be unaware of the date and time of his trial. I find that the JA have satisfied me so I am sure that by the RP's own conduct he deliberately absented himself from the proceedings in Romania and from his trial. I therefore do not need to make any further findings in relation to re-trial rights.

69. I find that the RP changed his name to Ion Balan to evade the authorities and has used a false identity. I do not accept his evidence that he changed his name to avoid association with the gypsy community. Of note, his brother's unchallenged statement describes how unfairly his family was treated in Romania and that is why he came to the UK. Despite this, his brother never changed his name and has retained Tiganescu as his family name, despite the same fears as the RP."

32. The appellant's sister gave evidence that summonses had been served on her but that she had kept them unopened and had never told her brother. The District Judge did not find the evidence of the appellant's sister could be relied upon as being true.
33. The District Judge found that the EAW fully complied with the requirements of s.2 of the 2003 Act and that finding is not challenged on appeal. He also went on to conduct the necessary balancing exercise in assessing whether the impact of extradition would be a disproportionate interference with the appellant's right to a family life, his conclusion that it would not is also not challenged.
34. At [79] he concluded that the appellant, by leaving Romania, had deliberately absented himself from his trial and went on to proceed under s.21 of the Act.

Ground of Appeal

35. The sole ground being pursued is that there was not sufficient evidence for the District Judge to reach the conclusion that the appellant was deliberately absent from his trial.
36. In summary that ground was developed as follows:
 - i) That the District Judge erred in his application of the Framework Decision 2202/584/JHA, article 4a(i) and did not address article 4a(ii) at all. It is argued that the District Judge should have done more than assess the appellant's state of knowledge of the proceedings but should have gone on to consider whether his absence was an unequivocal and informed waiver of his right to be present.
 - ii) That the District Judge incorrectly found that the appellant had unequivocally waived his right to attend his trial. It is submitted that he was not deliberately absent from his trial because at the time he left Romania he had not been charged or notified of the date of any trial proceedings.
 - iii) That the District Judge erred in granting extradition, notwithstanding the fact that the appellant was not under an obligation to notify the authorities of any change of address. That he had not been informed that if he did not appear at his trial he could be tried in his absence. Further that the appellant had could not have been told of the date of his trial, given that the decision to proceed with the prosecution was not taken until 2002, after he had left Romania.
 - iv) That the appellant was released from custody without condition and under no obligation to notify the authorities of any change of address. Therefore, he cannot have been lacking in diligence when he left Romania. The appellant submits that he when he left Romania in 1999 he could not have waived his right to attend his trial which did not take place until 2002.
 - v) That the District Judge wrongly applied the test when concluding that the appellant's absence from his trial was deliberate as a result of a 'manifest lack of diligence' on his part. It is submitted that the absence of any conditions on

the appellant's release from custody in March 1999 preclude a finding of any lack of diligence on his part. In any event a manifest lack of diligence is only part of the test and should not be conclusive proof of a deliberate waiver.

- vi) That the District Judge was wrong, on the evidence, to conclude that it was inconceivable that the appellant had no contact with his mother and sister after he left, and further that they would not have told him of the service of a series of summonses requiring his attendance at his trial.
- vii) That the District Judge was wrong to conclude that the appellant was a fugitive and wrong not to accept that he had changed his name to avoid association with the gypsy community rather than to avoid detection.
- viii) It is further argued that because question 2 in the further information supplied on 9 January 2020 (incorrectly dated 9/12/19), [C/B p.79], uses the term "serious bodily harm" rather than qualified murder, there is uncertainty about the offence charged and the test in *R v Hamou [2019] EWCA Crim 281* is not met.

Ground of Resistance

37. It is submitted that the District Judge made findings of fact which were properly open to him, having heard the evidence and that it is not for this court to upset those findings:
- i) It was open to the District Judge on the evidence to find that the appellant left Romania knowing that the process had begun and in a deliberate attempt to avoid his trial.
 - ii) It was open to the District Judge to find that having spent two months in custody on this allegation that his leaving the country on his release was in order to avoid the proceedings. He could conclude that the criminal investigation began at the date of the appellant's detention for questioning even if the trial itself was not commenced until after he had left Romania.
 - iii) It was open to the District Judge to reject the evidence of the appellant and his sister about the service of the summons. He was entitled to find it incredible that the fact of the delivery of the summons was never mentioned to the appellant by his sister or mother. That service of the summons on a family member resident at the address was sufficient under domestic law.
 - iv) That when the appellant left Romania in 1999 he knew that the process had begun, and his departure was the reason that he was not informed of the precise date of trial or that a finding could be handed down in his absence.
 - v) Further that the District Judge was entitled to find that his use of a false name and date of birth was an attempt to avoid detection.
 - vi) Notwithstanding the fact that a date and place of trial was not communicated directly to the appellant it was open to the District Judge to conclude that the

appellant had not exercised diligence and had left the jurisdiction to avoid the proceedings.

- vii) Further, that the appellant was represented in the proceedings in accordance with domestic law. He had waived his right to a mandated lawyer. The proceedings in Romania were Article 6 compliant.

The Law, The Framework Decision 2002 and The 2003 Act

38. In *Domi v Public Prosecutor's Office of Udine (Italy)* [2021] EWHC 923 (Admin) at [55], Carr LJ encapsulates the purpose and effect of the 2003 Act, as follows.

“The 2003 Act was enacted against a background of domestic and European developments in international criminal law. In particular, the EU was to be established as an area of freedom, security and justice. Mutual recognition of judicial decisions was intended to become the cornerstone of judicial cooperation in both criminal and civil matters. 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.”

39. The 2003 Act sets out the safeguards by which a requested person's rights are protected, s.20 deals with extradition in cases where the requested person has been convicted and his return is being sought to serve a sentence following that conviction.

Section 20 Case where person has been convicted

20. (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.

(2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.

(3) If the judge decides that question in the negative, he must decide whether the person deliberately absented himself from his trial.

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

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

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

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

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

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

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

40. **Section 21 Person unlawfully at large: human rights**

(1) If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.

(4)

41. Following the steps set out in s.20, if a judge concludes that the requested person was not present at his trial, then the next stage is to determine whether the person deliberately absented himself from his trial. If the judge concludes that the absence was deliberate then he must proceed to s.21, which requires him or her to go on to consider whether extradition would be compatible with the Requested Person's Convention rights. If the judge considers that extradition would be compatible, then he must extradite "to the category 1 territory in which the warrant was issued".

42. The Framework Decision 2002 was drafted to facilitate extradition between states. Article 2 of the 2009 Framework Decision inserted article 4a into the 2002 Framework Decision. Article 4a provides that 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, if they were

(a) (i) either was summoned in person.....and

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

(b) being aware of the scheduled trial, had given a mandate to a legal counsellor,

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

43. In *Domi (supra)* Carr LJ defines the interplay between the Framework Decision and the 2003 Act, [67 to 74]

“67.Member States were required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the 2002 Framework Decision.

68. Accordingly, execution of the European arrest warrant 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

71.The executing judicial authority is entitled to 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 one (or more) of the conditions set out in subparagraphs (a) to (d) are met. Article 4a allows the executing authority to surrender the person concerned despite his personal absence at trial, whilst fully respecting his rights of defence.

72. The EU legislature therefore adopted the approach of providing an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered in absentia must be regarded as not infringing the rights of the defence. It follows that the executing judicial authority is obliged to execute a European arrest warrant, notwithstanding the personal absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in Article 4a(1)(a), (b), (c) or (d) is verified.

74. No amendment to the 2003 Act has at any time been thought necessary as a result of the 2009 Framework Decision. S. 20 is consistent and can be applied in conformity with Article 4a. The 2002 Framework Decision and the 2003 Act thus provide for judicial cooperation between the UK and other Member States with differing procedural regimes. It is this relationship that calls for an internationalist, cosmopolitan approach when construing domestic extradition statutes and instruments (see *In re Ismail* [1999] AC 320 (at 326 per Lord Steyn); *Caldarelli v Court of Naples* [2008] UKHL 51; [2008] 1 WLR 1724 (at [7] and [23] per Lord Bingham)). These statutes and instruments do not fall to be viewed through a purely insular, common law domestic legal lens.”

44. The impact of the 2009 Framework Decision on the form of an EAW was considered in *Cretu v Romania* [2016] EWHC 353, which remains the leading authority on the point. Burnett LJ (as he then was) said at [23],

“The structure of the 2002 Framework Decision establishes three different broad classes of case. First, cases where the state receiving a request to surrender must

do so. That is the default position. Secondly, cases where it is mandatory to refuse to execute an EAW. Those are described in article 3. Thirdly, cases where the state receiving the request may refuse to execute. Article 4 identifies various circumstances when that may happen. Article 4a provides an additional non mandatory ground to refuse to surrender, where a trial has taken place in the absence of the defendant unless one or more of the four circumstances are established. If they are not then the default position applies and surrender must follow. In short, paragraph 1 of article 4a allows, but does not require, the state in receipt of a request to refuse to surrender if the person did not appear at "the trial resulting in the decision" unless at least one of the four exceptions is established." (emphasis added).

45. At [32] Burnett LJ makes clear that it is not for the court here to investigate whether the trial was article 6 compliant.
46. At [34 ii)] he went on to deal with the specific issue of a deliberate absence from trial,
"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;"
47. It was set out in *Cretu*, that actual knowledge is not required, although in this case the District Judge found that the Appellant did know and deliberately did not attend. In any event, article 4a has added a non-mandatory ground of refusal to surrender.
48. Recital 8 states that a person's awareness of a trial is ensured by domestic arrangements provided they are Convention compliant.
49. In *The Court in Mures, Romania v Zagrean* [2016] EWHC 2786 (Admin) Cranston J sets out that article 4(a)(i)(a) provides an executing state with an optional basis upon which to refuse a request for extradition. The court should, even where the conditions in article 4(a)(i)(a) are not met, consider all the circumstances to determine that return would not mean a breach of his article 6 rights. If there is no breach of his article 6 rights, it is open to a court to order return. At [77],

"Our reading of the decision of the Luxembourg Court in Dworzecki is that it does not alter the principles enunciated in Cretu v. Local Court of Suceava, Romania [2016] 1 WLR 3344. The overall objective of Article 4a(1) of the Framework decision is to ensure the right to a fair trial by a person summoned to appear before a criminal court by requiring that he has been informed in such a way as to allow him to organise his defence effectively. The list in Article 4(a)(1)(i) is designed to that end so that if one or more of the conditions set out there are satisfied, an executing judicial authority under an EAW must extradite the requested person, even if he did not appear in person at the trial resulting in the decision."

50. In *Dziel v District Court in Bydgoszcz, Poland* [2019] EWHC 352 (Admin) a similar factual situation to this case arose. The court had to consider whether the Requested Person was “deliberately absent”, if had not attended his trial but contended that he had not been informed of the date and place of the trial nor, that if he failed to attend, he could be tried in his absence. Ouseley J reviewed the earlier authorities and concluded at [28] et seq,

“The upshot of the authorities is quite clear. The relationship between the proper interpretation or application of “deliberate absence” and the fair trial rights in article 6 ECHR is referred to in [34(ii)] of Cretu and [80-81] of Zagrean. S20 is intended to ensure that a person whose extradition is sought to serve a sentence after a conviction in his absence has the right to a retrial unless he has already been present at his trial or was properly notified of it and deliberately absented himself. Its purpose is to ensure that no one is surrendered where that would mean a breach of their fair trial rights. A person will be taken to have deliberately absented himself from his own trial where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him. This includes breaching his duty to notify them of his changes of address, deliberately ignoring the court process. In such circumstances, there is no need for the further questions in s20(4) and onwards of the Extradition Act to be considered. Extradition follows.

29. *The decision in Zagrean confirms that the amendment to the Framework Decision in article 4a (i)(a) is an optional basis upon which the courts of the executing state may decide to refuse an extradition request. It is not an obligatory basis for refusal. However, the option to refuse extradition is removed if the condition in (a)(i) and (ii) are satisfied. The other conditions which have a similar effect are immaterial here. The conditions in article 4.1 (a)(i) are not met here. They envisage the defendant having actual knowledge of the date and place of trial. Mr Dziel did not have that knowledge. But all that that means is that there is no bar to the executing judicial authority refusing to extradite the requested person; the executing authority may still decide to extradite him if that would be compatible with article 6 ECHR, and in conformity with domestic law.*

30. *The concept of a “manifest lack of diligence” covers the concept of “deliberate absence”; see [81] of Zagrean. It may go wider with its connotations of negligence and inefficiency; but that cannot broaden the meaning of “deliberate absence” in the Extradition Act. “A manifest lack of diligence” only illustrates one set of circumstances in which EU law permits but does not require the executing authority to order or to refuse to order the extradition of a person who was not present at his trial. S20 is not in conflict with it; s20 may lawfully restrict the Framework's discretion to order extradition; it cannot and does not permit a refusal of extradition, where the article 4a bars to the refusal of extradition bite. In any event, this notion of a “manifest lack of diligence” drawn from [51] of Dworzecki, may need to be read with [52] in which the CJEU discusses the availability in Poland of re-trial rights in the sort of circumstances which arose in that case.*

31. There is nothing in ECtHR jurisprudence to suggest that, where a defendant deliberately breaches his obligations to inform the authorities of his changes of address so as to prevent the authorities informing him of the date and place of trial, as here, a subsequent trial in his absence is in breach of article 6. That may be seen as a waiver of the right to attend his trial or as a deliberate decision not to exercise the right to attend his trial.”

51. In *R v Hamou [2019] EWCA Crim 281* it was argued that an indictment should not have been amended after the Defendant had absconded. Holroyde LJ said it was a question of fact and degree but that joinder on the facts of that case meant that the Defendant was tried in his absence on an indictment alleging an offence on which he had not previously been arraigned. It was not an alternative or lesser charge to the one he had originally faced.

Analysis

52. There are a number of principles to be distilled from the authorities, among which are the following:
- i) The accused person has a right to attend his trial which, is not absolute. That right can be waived, expressly or tacitly, provided it is done unequivocally.
 - iii) That the right to attend can only be exercised or waived if notice of the proceedings is given in such a way that allows effective participation.
 - iv) That the rules governing effective service are a matter of domestic law provided they are Convention compliant.
 - v) That a person may be deliberately absent from their trial if they, knowing of proceedings, leave their country in order to put themselves beyond the reach of the authorities.
 - vi) The court assessing whether article 4 operates to prevent a person’s return by the executing authority may take into account any manifest lack of diligence on the part of the Requested Person, when an avoidance of service is under consideration.
 - vii) Article 4a(1)(a)(i) provides an optional but not mandatory ground for refusal to execute a request for extradition.
53. The principle of mutual recognition is at the core of extradition proceedings based on the execution of EAWs. The domestic law of a state is always to be respected. In this case service of the summons was properly effected under Romanian law. In accordance with domestic requirements the summons to attend were properly served on his sister and mother, at his home address.
54. The Appellant spent two months in custody during the early investigation into the offence before he was released without conditions. As Aikens LJ said in *Podlas v Koszalin District Court Poland [2015] EWHC 908* at [23] the question of whether a

trial process has been initiated is a question of fact in each case and further, how the accused person knew of his trial is not relevant, it is his knowledge of the process that is material.

55. Accordingly, the question simply stated is, was he *effectively summoned* to his hearing and, in the language of s.20(3), did he *deliberately absent himself from attending his trial*?
56. In his findings of fact, the District Judge found that the appellant did know of the trial process and deliberately failed to attend. He found that the further information showed that the appellant was aware of the “trial proceedings”.
57. He found that service had been effected within domestic requirements and that the appellant had deliberately left Romania to avoid the process. He did not accept the evidence of his sister that she had never told the appellant of the delivery of the summons. The District Judge further found that the appellant had changed his name to avoid detection by the Romanian authorities.
58. He was entitled to conclude that the appellant knew that proceedings had commenced following his detention for two months and the requirement that he should attend court for questioning following his release. Although he was not satisfied that the appellant knew of the precise date of trial or that he had been told that a decision could be handed down in his absence, it was open to him to find that the appellant had deliberately left Romania to avoid being given that information and thereby to avoid attending his trial. He was entitled to reach the conclusion he did on the evidence and submissions and this court should not find that he erred.
59. This court must accept that the domestic court in Romania complied with the requirements of article 6 to ensure that the trial process did not breach the appellant’s rights. Under domestic law the summons to appear was effectively served. In his findings on the evidence the District Judge found that he had deliberately left the country to avoid the proceedings.
60. There is no substance in the complaint that the allegation was changed from qualified murder. At no stage was the charge before the court amended. The finding of guilt was in clear terms, he was convicted of an offence of qualified murder. There is a reference to a “serious assault” in a reply to a request for further information but that does not demonstrate an amendment in the charge. In any event, even if there had been an alteration in the formulation of the charge to reduce its seriousness it is difficult to see what prejudice would result.

Conclusion

61. Accordingly, I do not accept that the findings of the District Judge were wrong in law or fact. I would dismiss the appeal.

Lord Justice Holroyde:

62. I agree that this appeal must be dismissed. I add only brief observations of my own.
63. The District Judge's findings come to this: that the appellant, knowing in 1999 that criminal proceedings had been commenced against him in relation to the violent incident about which he had been questioned, and expecting that he would therefore have to face trial, deliberately left Romania and took determined steps to avoid the Romanian authorities, thereby disabling himself from knowing of any trial date. The District Judge was entitled to make those findings: he accepted the respondent's evidence as to the commencement of the criminal proceedings; he heard the appellant's evidence but disbelieved him on vital matters of fact, in particular the appellant's assertion that he thought the matter had been concluded; and he concluded that the evidence of the appellant's sister was unreliable, and so did not cast any doubt on his findings.
64. The fact that the appellant had been released from custody in March 1999 without being made subject to any requirement to notify the Romanian authorities of any change of address is nothing to the point: the District Judge was entitled to find that he knew of the proceedings and was deliberately avoiding them. Moreover, as Miss Brown pointed out in her oral submissions, the appellant did in fact notify the authorities on 2 September 1999 of a change of his address in Romania, an act which is plainly inconsistent with his assertion to the District Judge that he thought the matter had been concluded six months earlier.
65. It is accepted on the appellant's behalf that the Romanian authorities summoned him to his trial in accordance with domestic law, even if the appellant himself had deliberately avoided receiving any information about that summons.
66. In those circumstances, the District Judge was entitled to conclude that the appellant had waived his right to be present at his trial, whenever it was heard. That conclusion was consistent with the clear statement of principle in *Cretu* at [34(ii)], that an accused person must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4(a)(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 of the Convention. It was also consistent with the statement of principle in *Zagrean* at [81], that a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial.
67. It follows, in my view, that the District Judge was also entitled to conclude that the appellant had waived his right to be informed that his trial could proceed in his absence.
68. I am unable to accept the oral submission of Mr Hines QC that the appellant's conduct in 1999 could not be taken as a waiver of rights which (he submits) did not arise until 2002. The effect of the District Judge's findings is that, having fled Romania, the appellant knew of the proceedings and thereafter persisted in his determined efforts to avoid being informed of his trial date. I see no reason why the appellant should gain an

advantage by his own conduct in fleeing the jurisdiction sooner rather than later in the course of the proceedings of which he was aware.

69. For those brief reasons, and for the reasons more fully expressed by McGowan J, the District Judge was not wrong to find that the appellant was deliberately absent from his trial. The sole ground of appeal therefore fails.