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CO/293/2019
CO/299/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2019

Before :

LORD JUSTICE HAMBLÉN
MR JUSTICE LANE

Between:

ALEX FOSTER TAYLOR
VICTORIA FOSTER TAYLOR

First Appellant
Second Appellant

- and -

THE PROSECUTOR GENERAL'S OFFICE
OF FLORENCE

Respondent

Jonathan Hall QC, Benjamin Seifert and Emily Wilsdon (instructed by **Lansbury**
Worthington Solicitors) for the **Appellants**

Hannah Hinton (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 17 October 2019

Approved Judgment

Mr Justice Lane:

A.

INTRODUCTION

1. The first appellant, Alex Foster Taylor, previously known as Pasquale Di Noto, and the second appellant, Victoria Foster Taylor, previously known as Catia Cannarozzo, appeal against the decision of District Judge Grant, sitting at Westminster Magistrates' Court who, on 17 January 2019, ordered the extradition of the appellants to Italy, pursuant to three European arrest warrants (EAW1, 2 and 3). EAW1 and EAW3 concern both of the appellants, whereas EAW2 concerns only the first appellant. Since EAW2 is not the subject of challenge in this court, the first appellant will, in any event, be extradited under it, in order to serve a sentence of imprisonment.
2. Permission to appeal was granted by Andrews J on 15 April 2019 in respect of two of the three grounds advanced by the appellants. On 8 October 2019, Sir Wyn Williams, sitting as a High Court Judge, ordered the application for renewal in respect of ground 1 (on which permission had been refused by Andrews J), to be "heard before the same court as considers the substantive appeal and, if permission is granted, the appeal shall be heard on all grounds". In the event, the appellants did not seek to pursue before us the application in respect of ground 1.
3. EAW2 relates to the first appellant's conviction for offences which fell to be categorised as "swindling", "racketeering and extortion" and "forgery of administrative documents and trafficking therein". In short, the first appellant created a false British Hong Kong passport and false British Hong Kong driver's licence; he defrauded the members of a musical band; and he extorted money from individuals by making threats of violence.
4. EAW1 and EAW3 relate to convictions of both of the appellants in respect of offences committed in 2008 and 2009. EAW1 concerns the bringing of a female victim "into a state of continual subjection, forcing her to perform (even illegal) activities entailing her exploitation". The appellants took advantage of the victim's "particular credulity and psychological acquiescence" by, amongst other things, forcing her to have sex under the pretence that they were testing the victim's "physical and psychological resistance during the kind of training aimed at recruiting her as a secret service agent" (page 3 of the District Judge's decision). EAW3 concerns further offences committed against the victim, including forcing her to set up a sham company to cover the unlawful activity of the appellants; forcing the victim to commit multiple frauds; and submitting her to beatings, cigarette burns and other physical abuses.
5. The first instance court, the Assize Court of Florence, had acquitted the appellants in respect of certain offences relating to the victim, because that Court took an adverse view of the victim's credibility. On appeal to the Assize Court of Appeal, however, the Appeal Court took a different view of the victim's credibility and, as a result, convicted the appellants of offences in respect of which they had been acquitted by the first instance court.
6. The appellants then appealed to the Court of Cassation in Rome. In its judgment of 18 July 2017, the Court of Cassation found no error in the Appeal Court's assessment of the victim's credibility. The Court of Cassation did, however, find that the judgment of the Appeal Court regarding the offence of abduction of the victim fell to be set aside since, on the facts found

by the Appeal Court, the victim could not be said to have been deprived of her physical freedom by actions attributable to the appellants (Cassation judgment, paragraph 5).

7. Criminal offences in Italy may be subject to limitation periods. In the present case, it is common ground that relevant limitation periods would continue to run, up to the time of the judgment of the Court of Cassation, notwithstanding the earlier convictions, provided that the grounds of challenge thereto were not found to be manifestly unfounded. This serves to explain the last part of the judgment of the Court of Cassation, which was as follows:-

“7. The fact that some of the proposed grounds are not manifestly unfounded means that the offences of fraud, personal injury, violence or threats to compel the commission of crimes and slander are now time-barred, and therefore, also with regard to them, but only to their criminal effects, the judgment must be set aside without delay in the aforementioned case. The remaining complaints must be dismissed, while in the light of the annulment granted the penalty imposed by the contested judgment must be re-calculated, without the need to refer the matter back to the court. In fact, the punishment for the relevant offences was calculated as an increase in its continuation. Therefore, the sentence for [the first appellant] must be re-calculated to eleven years and nine months of imprisonment while for [the second appellant] to five years and nine months of imprisonment.

FOR THESE REASONS

The contested judgment is set aside without delay only for the offences of fraud, personal injury, violence or threats to compel the commission of crimes and slander, as they are time-barred, and for the offence of abduction on the ground that there is no case to answer. The complaints regarding the civil effects in relation to the time-barred offences are dismissed.

The remaining complaints are dismissed and the sentences are re-calculated as follows:-

Eleven years and nine months of imprisonment for [the first appellant]; five years and nine months of imprisonment for [the second appellant].

So order, 18 July 2017.”

B. LEGISLATION

(1) Extradition Act 2003

8. Section 20 of the Extradition Act 2003 (case where a person has been convicted) provides 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 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.”

9. Section 21 of the 2003 Act (human rights) provides as follows:-

- “(1) If the judge is required to proceed under this section (by virtue of section 11 or 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) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
- (5) If the person is remanded in custody, the appropriate judge may later grant bail.”

(2) The Framework Decision

10. The Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States, defines the European arrest warrant and the obligation to execute it as follows:-

“Article 1

...

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
2. A Member State shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
3. This Framework Decision shall not have the effect of modifying the obligation in respect of fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”

11. The Framework Decision 2009/299/HA of 26 February 2009 amended the 2002 Framework Decision in respect of decisions rendered in the absence of the person concerned at their trial. The following recitals are noteworthy for our purposes:-

“(1) The right of an accused person to appear in person at the trial is included in the right to a fair trial provided for in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights. The Court has also declared that the right of the accused person to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right.

...

(4) It is therefore necessary to provide clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person. This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person’s right of defence. This Framework Decision is not designed to regulate the forms and methods, including procedural requirements, that are used to achieve the results specified in this Framework Decision, which are a matter for the national laws of the Member States.

...

(7) The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused if either he or she was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received, by other means, official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial. In this context, it is understood that the person should have received such information ‘in due time’, meaning sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence.

(8) The right to a fair trial of an accused person is guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights. This right includes the right of the person concerned to appear in person at the trial. In order to exercise this right, the person concerned needs to be aware of the scheduled trial. Under this Framework Decision, the person’s awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that Convention. In

accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her.

...

- (10) The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused where the person concerned, being aware of the scheduled trial, was defended at the trial by a legal counsellor to whom he or she had given a mandate to do so, ensuring that legal assistance is practical and effective. In this context, it should not matter whether the legal counsellor was chosen, appointed and paid by the person concerned, or whether this legal counsellor was appointed and paid by the State, it being understood that the person concerned should deliberately have chosen to be represented by a legal counsellor instead of appearing in person at the trial. The appointment of the legal counsellor and related issues are a matter of national law.

...

- (15) The grounds for non-recognition are optional. However, the discretion of Member States for transposing these grounds into national law is particularly governed by the right to a fair trial, while taking into account the overall objective of this Framework Decision to enhance the procedural rights of persons and to facilitate judicial cooperation in criminal matters.”

12. Article 2 of the 2009 Framework Decision amended the 2002 Framework Decision by inserting Article 4a as follows:-

“Article 4a

Decisions rendered following a trial at which the person did not appear in person

1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
- (a) in due time:
- (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;
- and
- (ii) was informed that a decision may be handed down if he or she does not appear for the trial;

or

- (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;

or

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

- (i) expressly stated that he or she does not contest the decision; or
- (ii) did not request a retrial or appeal within the applicable time frame;

or

- (d) was not personally served with the decision but:
 - (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, 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;

and

- (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.”

13. Article 8 (content and form of the European arrest warrant), so far as relevant, provides:

“ 1. The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

...

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect ...”

C. THE DECISION OF THE DISTRICT JUDGE

14. The appellants challenged EAW1 and EAW3 before District Judge Grant on the basis that they were entitled to be discharged under section 20(7) of the 2003 Act because the relevant court for the purposes of section 20(1) was the Court of Cassation; neither of the appellants had been present at the hearing of that court on 18 July 2017; they had not deliberately absented themselves from the hearing; and they would not be entitled in Italy to a retrial or (on appeal) a review amounting to a retrial.

15. District Judge Grant held as follows:-

“I concluded that the relevant hearing for the purposes of section 20 was the Appeal Court hearing in respect of EAW1 and EAW3 which took place on 24 March 2016. I know of no authority which would permit me to say that the provisions of section 20 relate to the hearings before the Court of Cassation or a similar court in another European jurisdiction especially where the appellants have no right to appear in front of that court and the attendance of advocates on their behalf is optional.

Both requested persons made arrangements to be legally represented before the Court of Cassation but their lawyer chose to join a lawyers’ strike on the day of the hearing rather than attend court. Mr Capeluppo (sic) gave evidence that compliance with a lawyers’ strike is not compulsory and that he does not go on strike because of the risk involved.

In respect of the Appeal Court hearing on 24 March 2016 I find that Mr Foster-Taylor was deliberately absent. He was aware of the hearing and he was legally represented at the hearing. In respect of Ms Foster-Taylor it is not clear from the papers whether she was present at court on that date. If she was present the provisions of section 20 do not apply to her; if she was not present I find that she was deliberately absent as she aware of the hearing and was legally represented at that hearing.

I reject the section 20 argument.”

16. Avv. Capellupo is an Italian lawyer who gave expert evidence to the District Judge. I shall have more to say about his evidence in due course. The District Judge also heard evidence from the appellants. The first appellant said that he did not know there was a lawyers’ strike on 18 July 2017 and had only heard some days after the hearing that the Court of Cassation had proceeded with the appeal in the absence of the appellants’ lawyer. Evidence to the same effect was given by the second appellant.

17. Having made his finding under section 20, the District Judge turned to consider whether the extradition of the appellants would be compatible with their rights under Article 6 of the ECHR (right to a fair trial). The appellants contended that Article 6 gave them a right to be legally represented before the Court of Cassation, which they had been denied.

18. The District Judge quoted from the judgment of the ECtHR in Othman v United Kingdom (Application No. 8139/09). The passages relied upon by the District Judge include “That an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country”. In Othman, the ECtHR considered that, in its caselaw “the term ‘flagrant denial of justice’ has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein” (paragraph 2). At paragraph 3, the court noted that “What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification or destruction of the very essence of the right guaranteed by that article”.

19. The District Judge held as follows:-

“The requested persons, through their legal representative Avv. Pecorini, argued that the Court of Cassation fell into error by refusing to adjourn the appeal hearing on 18 July 2017 by miscalculating the limitation period in respect of one of the offences. The limitation argument

was rejected by the Court of Cassation in the extraordinary appeal hearing on 21 September 2018 albeit the appeal was ruled inadmissible by the court. The differing views of Avv. Capeluppo (sic) and the Court of Cassation are not ones I am able to resolve.

The offences described in EAW1 and EAW3 were the subject of lengthy first instance proceedings and were the subject of appeals to the Assize Court of Appeal, the Court of Cassation and subsequently an extraordinary appeal again to the Court of Cassation. The requested persons were legally represented throughout the proceedings albeit their legal representatives voluntarily chose not to attend the Court of Cassation hearing on 18 July 2017.

Whilst I heard evidence from Avv. Capeluppo, there is no evidence before this court from Avv. Stefani and Avv. Casini who represented the requested persons up to the Court of Cassation and no evidence from Avv. Pecorini who was instructed by the requested persons to represent them at the Court of Cassation.

The evidence before me falls far short of a “*flagrant denial of a fair trial*” and I dismiss this challenge.”

20. The appellants’ ground 2 contends that District Judge Grant erred by finding that the relevant hearing, for the purpose of section 20, was the Assize Court of Appeal, instead of the Court of Cassation. Ground 3 asserts that, pursuant to section 21 of the 2003 Act and Article 6 of the ECHR, the District Judge erred in finding that there had been no flagrant denial of justice. In their skeleton argument, Counsel for the appellants accept that “in reality this ground of appeal stands or falls with Ground 2”.

D. CASELAW

21. In Cretu v Local Court of Suceava, Romania [2016] EWHC 353 (Admin), Burnett LJ (as he then was) explained the effect of section 20 of the 2003 Act, in the light of the insertion of Article 4a into the 2002 Framework Decision: -

“34. In my judgment, when read in the light of article 4a section 20 of the 2003 Act ... should be interpreted as follows: -

- (i) "Trial" in section 20(3) of the 2003 Act must be read as meaning "trial which resulted in the decision" in conformity with article 4a(1)(a)(i). That suggests an event with a "scheduled date and place" and is not referring to a general prosecution process, Mitting J was right to foreshadow this in *Bicioc's* case.
- (ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(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.
- (iii) An accused who has instructed ("mandated") a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it;

- (iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5), is to be determined by reference to article 4a(1)(d).
 - (v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW.”
22. The leading case of the Court of Justice of the European Union (CJEU) on the interpretation of Article 4a(1) of the Framework Decision is Criminal proceedings against Tupikas (Case C-270/17PPU), in which judgment was delivered in August 2017. The Lithuanian authorities sought the extradition of the defendant from the Netherlands. The defendant had appeared in person at his trial at first instance in Lithuania but the arrest warrant did not contain any information containing the appeal proceedings, in particular as to whether the defendant had appeared at his appeal hearing and, if not, whether there had been compliance with Article 4a(1) of the Framework Decision in relation to the appeal proceedings. The Dutch court referred to the CJEU the question of whether the concept of the “trial resulting in the decision” within the meaning of Article 4a(1) included the appeal proceedings.
23. The following passages of the CJEU’s judgment record the views of the Dutch court, which bear upon issues that we must decide: -
- “33. The referring court takes the view that there are several factors which argue in favour of the interpretation that Article 4a(1) of Framework Decision 2002/584 applies equally to the appeal proceedings, since the substance of the case is re-examined as part of those proceedings.
 - 34. That Court relies in that regard on the wording of subparagraphs (c) and (d) of Article 4a(1) of the Framework Decision, which refers in particular to ‘a retrial, or an appeal ... which allows the merits of the case, including fresh evidence, to be re-examined’.
 - 35. In the view of the referring court, it follows from that wording that that provision refers to the situation in which the criminal court has ruled on the merits of the case, in that it ruled on the guilt of the person concerned in relation to the alleged infringement and, where appropriate, imposed a penalty on him for the offence committed. On the other hand, that is not the case where the judge merely ruled on questions of law, such as in an appeal in cassation.
 - 36. The referring court adds that the wording of Article 4a(1) of Framework Decision 2002/584 does not restrict the scope of that provision to the proceedings at first instance, subparagraphs (c) and (d) thereof expressly referring both to a ‘retrial’ and an ‘appeal’.
 - ...
 - 38. The referring court states that the rights of the defence are part of the right to a fair trial within the meaning of Article 6 of the ECHR and Article 47 of the Charter, with the result that once a Member State has established an appeal procedure, it is required to ensure that the person concerned enjoys, within the framework of that procedure, the fundamental guarantees laid down in those provisions. Thus, although the person concerned has the

right to waive his rights of defence, the fact remains that, as the European Court of Human Rights has held, the criminal court which is called upon once more to rule on the guilt of the person concerned may not issue a ruling without a direct assessment of the evidence presented in person by the accused who wishes to prove that he did not commit the purportedly criminal act. In such a case, the mere fact that the person concerned was able to exercise his rights of defence at first instance is, therefore, insufficient for it to be concluded that the requirements laid down in Article 6 ECHR and Article 47 of the Charter have been met.”

24. Mr Hall drew attention to the opinion of Advocate General Bobek in Tupikas:-

- “55. The concept of ‘enforceable judgment’ within the meaning of Article 8(1)(c) of the Framework Decision must be distinguished from that of ‘trial resulting in the decision’ within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision.
56. As the Commission pointed out at the hearing, the latter concept encompasses all the stages of criminal proceedings in which a court has examined the merits of the case, that is to say either the issue of guilt or that of the penalty.
57. However, I consider that, in view of the structure and logic of the EAW form, the issuing judicial authority must provide information on the procedural stage which made it possible immediately to pronounce an enforceable criminal conviction. Consequently, it is for the executing judicial authority to ensure compliance with the requirements of Article 4a of the Framework Decision only in relation to that *last stage* of the procedure, during which the merits of the case, as understood above, were examined.
58. It should be recalled that, according to Article 1 of Framework Decision 2009/299, the prohibition on convictions *in absentia* pursues the objective of safeguarding the effectiveness of the rights of defence of the person concerned.
59. The key elements of such an examination are: (i) knowledge of the existence of the trial on the part of the person concerned and (ii) the possibility for the person concerned to defend himself effectively and to put forward all the arguments in his favour regarding *the merits* of the case, that is to say the question of *guilt* or question of the *penalty*.
60. With regard to that second aspect, it is imperative that the person concerned is in a position fully to assert his rights during the last stage of the criminal proceedings leading to the enforceable judgment. In practice, they may be (i) proceedings at first instance, if the particular procedural system does not afford an opportunity for an appeal on the substantive issues in their entirety or if such an opportunity exists but no appeal has been brought, or ii) proceedings at second instance, where an appeal was brought and the applicable law allows an examination of all the substantive issues. 17
61. It is in relation to the part of the proceedings immediately preceding the enforceable judgment that the executing judicial authority has to verify, in accordance with the detailed rules of Article 4a of the Framework Decision, the circumstances of the trial at which the person concerned did not appear.
62. In the context of an appeal examining the substantive issues in their entirety, the foregoing considerations mean that where the person concerned did not appear at the proceedings at first instance but appeared at the appeal proceedings, it must be concluded

that he appeared in person at the trial resulting in the decision within the meaning of Article 4a of the Framework Decision. Conversely, where the person concerned appeared at the proceedings at first instance but did not appear at the appeal proceedings, execution of the EAW may be refused if the executing judicial authority concludes that, in that particular case, the person's procedural rights were not respected, unless the situation at issue is one those described in Article 4a(a) to (d) of the Framework Decision.

...

64. Furthermore, it is appropriate to highlight the importance of the principle of mutual trust in that context. The judicial cooperation mechanism established by the Framework Decision would not be functional if the executing judicial authority had to carry out a lengthy examination to verify whether respect for the procedural rights of the person concerned had been guaranteed at each prior stage of the proceedings. The need to ensure that the system remains operational means, in my view, that the review of whether the rights of the defence were respected must be limited to the stage immediately preceding the moment at which it becomes possible to execute the custodial sentence. The earlier stages are, for their part, covered by the principle of mutual trust. That implies the need for the executing judicial authority to trust that the judicial system in the Member State of the issuing judicial authority is able to remedy any earlier procedural shortcomings.
65. In the light of the foregoing considerations, I consider that appeal proceedings in which the question of guilt or the question of the penalty were examined constitute a 'trial resulting in the decision' within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision. It is that procedural step which determines whether the conviction underlying the EAW is enforceable. It is therefore in the light of that procedural step that the executing judicial authority must ensure that the procedural rights of the person concerned are respected with a view to implementation of an optional ground for refusal as provided for in Article 4a(1) of the Framework Decision."

25. Footnote 17 to paragraph 60 of the Opinion reads as follows:-

"I would add that subsequent proceedings which are a type of 'extraordinary' appeal, such as an appeal in cassation or a constitutional appeal, are, in principle, excluded from the definition of proceedings leading to the enforceable judgment. This is due to the fact that their possible introduction does not in principle allow an examination of the substantive issues in their entirety or a postponement of the moment at which the person concerned is deprived of his liberty in execution of the sentence imposed. However, those stages must still fulfil the requirements of Article 6 of the ECHR."

26. In its judgment, the CJEU held that the expression "trial resulting in the decision" in Article 4a(1) "must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union, irrespective of classifications in the Member States" (paragraph 67). The CJEU then considered the nature of this autonomous concept:-

"69. ... it must be stated that the wording of Article 4a(1) of Framework Decision 2002/584 does not, of itself, make it possible to define more precisely the concept of 'trial resulting in the decision' set out therein. That term is neither defined nor otherwise specified there and the title of that article merely refers to 'decisions rendered following a trial at which the person did not appear in person'.

70. In those circumstances, the scope of the concept in question must be determined by placing it in context. To that end, the other provisions of that Framework Decision, including Article 4a(1), should, thirdly, be taken into consideration.
71. In that regard, it should be pointed out that although Article 8(1)(c) of Framework Decision 2002/584 uses the terms ‘enforceable judgment’ or ‘any other enforceable judicial decision having the same effect’ and although such enforceability is decisive in determining the time from which a European arrest warrant may be issued, that enforceability is of lesser relevance under Article 4a(1) of that Framework Decision. However, it is appropriate to pay attention to the ‘final’ nature of the ‘decision’ or ‘judgment’ for the purposes of interpreting Article 4a(1), as is apparent from other relevant, convergent provisions of the Framework Decision.
72. Thus, Article 3(2) and Article 8(f) of Framework Decision 2002/584 use the phrase ‘final judgment’ which has imposed a penalty. Article 2(1) thereof refers to ‘sentences’, while Article 4(3) of that Framework Decision uses the term ‘final judgment’ and Article 4(5) refers to a ‘person [who] has been finally judged’.
73. The same is true of several recitals of Framework Decisions 2002/584 and 2009/299. Thus, the term ‘finally sentenced’ is used in recital 1 of Framework Decision 2002/584, whereas recitals 2 and 5 of Framework Decision 2009/299 use the term ‘final judicial decisions’.
74. It must therefore be held that the concept of ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Framework Decision 2002/584, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant.
75. Such an interpretation of the concept of ‘decision’ is also consistent with that of ‘trial which led to [the] conviction’ which the Court had already adopted in paragraph 37 of its judgment of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346), for the purposes of the interpretation of Article 4a(1) of Framework Decision 2002/584.
76. Moreover, although the final sentencing decision may, in certain cases, be indissociable from the enforceable criminal decision, that aspect is still governed by the various national procedural rules, in particular where several decisions have been taken at the end of successive proceedings.
77. Thus, where, as in the case in the main proceedings, the issuing Member State has instituted a two-tier system of jurisdiction, with the result that the procedure in criminal matters involves several instances and may give rise to successive judicial decisions, it is important to establish, fourthly, which of these must be regarded as containing the final sentence within the meaning of paragraph 74 of the present judgment.
78. As is clear from the case-law of the European Court of Human Rights, the term ‘conviction’ within the meaning of the ECHR refers to both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty (see, to that effect, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 123, and the case-law cited).
79. Moreover, the European Court of Human Rights has held on several occasions that, where appeal proceedings are provided for, they must comply with the requirements flowing from Article 6 of the ECHR, in particular where the remedy available against the decision

given at first instance is a full appeal, the second-instance court having jurisdiction to re-examine the case, by assessing the merits of the accusations in fact and in law, and thus to determine the guilt or innocence of the person concerned on the basis of the evidence presented (see, to that effect, judgments of the ECtHR of 26 May 1988, *Ekbatani v. Sweden*, CE:ECHR:1988:0526JUD001056383, § 24 and 32; 26 October 2000, *Kudła v. Poland*, CE:ECHR:1988:0526JUD001056383, § 122; 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 64 and 65; 25 April 2013, *Zahirović v. Croatia*, CE:ECHR:2013:0425JUD005859011, § 56; and of 14 February 2017, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD003074912, § 56 and 58).

80. It is also clear from that case-law of the European Court of Human Rights that where two instances are provided for, the fact that the person concerned was actually able to exercise his rights of defence at first instance does not automatically lead to the conclusion that he necessarily enjoyed the guarantees laid down in Article 6 of the ECHR if the appeal proceedings took place in his absence (see, to that effect, judgment of 14 February 2014, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD003074912, § 57, 58 and 61).
81. Consequently, in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given in absentia, it is appropriate to understand by ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Framework Decision 2002/584, the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned.
82. That interpretation is fully in line with the requirements of respect for the rights of the defence which Article 4a of Framework Decision 2002/584 precisely seeks to uphold, as is apparent from paragraphs 58 and 59 of the present judgment.
83. It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned, since it directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served.
84. Accordingly, it is at that procedural stage that the person concerned must be able to fully exercise his rights of defence in order to assert his point of view in an effective manner and thereby to influence the final decision which could lead to the loss of his personal freedom. The outcome of that procedure is irrelevant in that context.
85. In those circumstances, even assuming that the rights of the defence have not been fully respected at first instance, such a breach may validly be remedied in the course of the second-instance proceedings, provided that the latter proceedings provide all the guarantees with respect to the requirements of a fair trial.
86. In other words, when the person concerned appeared before the judge responsible for a fresh assessment of the merits of the case, but not at first instance, the provisions of Article 4a of Framework Decision 2002/584 do not apply. Conversely, the executing judicial authority must carry out the checks provided for in that article when the person concerned was present at first instance, but not in the proceedings concerned with a fresh assessment of the merits of the case.
87. The interpretation of the concept of ‘trial resulting in the decision’ set out in paragraph 81 to 84 of the present judgment is, moreover, such as to best ensure the objective pursued by that Framework Decision, which is to facilitate and accelerate judicial cooperation

between Member States on the basis of the principles of trust and mutual recognition, since it focuses on the procedural phase which, following a fresh assessment of the substance of the case, is decisive for the sentencing of the person concerned.

...

89. Furthermore, as is apparent from paragraph 57 of the Opinion of the Advocate General, the reading of point (d) of the form setting out a uniform template for a European arrest warrant annexed to Framework Decision 2002/584 confirms that the information which must be provided by the issuing judicial authority in it relates only to the last procedural step during which the merits of the case were examined.

90. With regard, more specifically, to a case such as that at issue in the main proceedings, in which the trial took place at two successive instances, namely a first instance followed by appeal proceedings, it is the instance which led to the decision on appeal which is therefore solely relevant for the purposes of Article 4a(1) of Framework Decision 2002/584, provided that those proceedings led to the final decision which is no longer subject to an ordinary appeal and which, accordingly, finally disposes of the case on the merits.

...

98. In the light of all of the foregoing, the answer to the question referred is that, where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down in absentia, the concept of ‘trial resulting in the decision’, within the meaning of Article 4a(1) of the Framework Decision, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.

99. An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above.”

27. In Criminal proceedings against Zdziaszek (Case C-271/17PPU), in which judgment was given in August 2017, the CJEU considered another reference from the Netherlands concerning Article 4a of the Framework Decision. A Polish court had imposed on the defendant a cumulative sentence, commuting into one single custodial sentence a separate custodial sentence previously imposed on him. He had not appeared in person during the Polish proceedings which finally determined his sentence.

28. The CJEU held that the imposition and cumulative sentence, resulting in a new determination of the level of the sentences imposed previously, could be relevant for the application of Article 4a(1):-

“88. This is the case with respect to specific proceedings for the determination of an overall sentence where those proceedings are not a purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances (see ECtHR, 15 July 1982, *Eckle v. Germany*,

CE:ECHR:1983:0621JUD000813078, § 77, and 28 November 2013, *Dementyev v. Russia*, CE:ECHR:2013:1128JUD004309505, § 25 and 26).

...

93. In the light of the grounds set out above, it must be held that, in a case such as that at issue in the main proceedings, where, following appeal proceedings in which the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on him, the level of which was however amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of Article 4a(1) of Framework Decision 2002/584.”
29. The CJEU in *Zdziaszek* made reference to the ECtHR judgment in *Kremzow v Austria* (Application no. 12350/86), given on 21 September 1993. The applicant had been a judge who, after retirement, worked for a lawyer named P, whom he killed. After trial before the Court of Assize, a jury found the applicant guilty of murder and sentenced him to twenty years’ imprisonment, ordering him to be committed to an institution for mentally-deranged criminals. The applicant filed a plea of nullity with the Supreme Court, complaining that his trial had not been fair. The Public Prosecutor also appealed the sentence, contending that a life sentence should be imposed because of the planning involved in the offence.
30. The applicant’s petition to appear in person before the Supreme Court, rather than being represented by his official defence counsel, was rejected and, at the hearing before that court, the applicant was represented by his counsel. The court rejected the pleas of nullity and sentenced the applicant to life imprisonment, annulling the order committing him to a mental institution.
31. The ECtHR found that there was no violation of Article 6 in relation to the nullity proceedings in the Supreme Court. It observed that:-
- “Under Austrian law the Supreme Court in dealing with nullity proceedings is primarily concerned with questions of law that arise in regard to the conduct of the trial and other matters. While the Supreme Court is bound by the findings of fact made by lower courts, it may be required, as in the present case, to examine whether a motion to take evidence has been properly refused by the trial court and whether the excluded facts might have influenced a jury’s verdict.
- In the court’s view, taking into consideration that the applicant was legally represented, neither paragraph (1) nor (3)(c) of Article 6 required his presence at such proceedings. (paragraph 63)”.
32. The prosecutor’s appeal against sentence was, however, another matter:-
- “67. The court observes that the Supreme Court was called upon in the appeal proceedings to examine whether the applicant’s sentence should be increased from 20 years to life imprisonment and whether the sentence should be served in a normal prison instead of a special institution for mentally-deranged offenders. In the event, the Supreme Court answered both questions in the affirmative. Unlike the jury which had been unable to establish a motive for the offence, it also found that the applicant had carried out the murder to cover up his own ‘financial misdeeds’.

These proceedings will thus have crucial importance for the applicant and involve not only an assessment of his character and state of mind at the time of the offence but also his motive. In circumstances such as those of the present case, where evaluations of this kind were to play such a significant role and where their outcome could be of major detriment to him, it was essential to the fairness of the proceedings that he be present during the hearing of the appeals and afforded the opportunity to participate in it together with his counsel.”

33. The ECtHR accordingly found that the applicant had suffered a violation of his Article 6 rights, in that he should have been able “to defend himself in person” as required by Article 6(3)(c) and that Austria was under a positive duty, notwithstanding his failure to make a request, to ensure his presence in court in such circumstances (paragraph 68).
34. Belziuk v Poland (Application No. 23103/93) is another Strasbourg judgment of the 1990s, which sheds light on how Article 6(3)(c) of the ECHR (“to defend himself in person or through legal assistance ...”) operates in the context of an appeal against conviction. The applicant, who had been convicted of theft, filed an appeal against his conviction with the Tarnów Regional Court. After a hearing before that court, in which the prosecutor was present but the applicant was not, the latter’s appeal was dismissed.
35. The ECtHR set out the following general principles:-
 - “37. The Commission recalls that the right of an accused person to participate in person in the trial is a fundamental element of a fair trial. The criminal proceedings form an entirety and the protection afforded by Article 6 does not cease with the decision at first instance; indeed, a state which institutes courts of appeal is required to ensure that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in this Article.”
36. The Court then applied those principles to the facts of the case before it:-
 - “38. The Commission also recalls that even when an appeal court has full jurisdiction to review the case on questions both of fact and law, Article 6 does not always require a right to a public hearing and *a fortiori* a right to be present in person. However, in assessing this issue regard must be had to the fairness of the entire proceedings. Regard must also be had to the scope of the appellate court’s powers, the manner in which the applicant’s interests were actually presented before this court, particularly in the light of the nature of the issues to be decided by it and the seriousness of the offence and what was at stake for the applicant.
 39. The Commission further recalls that the principle of equality of arms, which is one of the features of the wider concept of a fair trial, also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed by the other party. In particular, it should be ensured that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon.
 40. The Commission observes that in the present case the Regional Court had full jurisdiction and could make a full assessment of the applicant’s guilt or innocence. Indeed, in his appeal the applicant challenged the District Court’s findings in this respect. He

maintained in particular that the court had disregarded his explanations and only considered the evidence for the prosecution as being credible. He submitted that he was not guilty and further requested that certain evidence be taken which he considered as crucial for the assessment of his guilt.”

37. Konecny v District Court in Brno-Venkov [2019] UKSC 8 is a recent authority of the Supreme Court, which examined the relationship between the requirement in Article 8(1)(c) of the Framework Decision for the warrant to contain evidence of “an enforceable judgment” and the requirements of Article 4a of that Decision. Before the Supreme Court, the appellant argued that, because he had an unqualified right to a retrial, the warrant pursuant to which he had been arrested was an accusation warrant, rather than a conviction warrant, with the consequence that, pursuant to section 14 of the 2003 Act, the question of whether it would be unjust or oppressive to extradite him by reason of the passage of time was to be determined by reference to the amount of time that had passed since he had allegedly committed the offences. The Supreme Court held that a person could properly be regarded as convicted for the purposes of the Framework Decision and the 2003 Act if the conviction was binding and enforceable under the law of procedure of the Member State of the requesting authority; and that there was no requirement for the conviction to be final, in the sense of being irrevocable, so that a person with a right to a retrial might nevertheless be properly considered a convicted person, so long as the conviction was binding and enforceable in the law and procedure of the Member State concerned.
38. Lord Lloyd-Jones, giving the judgment of the Court, observed that Tupikas involved “a distinct question from that before us, namely whether the present case is to be treated as an accusation case or a conviction case” (paragraph 26). He continued as follows:

“27. In particular, *Tupikas* and *Zdziaszek* do not support the proposition that for an EAW to be issued for the purpose of executing a custodial sentence it must be a final judgment of conviction in the sense that it is irrevocable. On the contrary, the court in *Tupikas* observed [2017] 4 WLR 189, para 71:

“In that regard, it should be pointed out that although *article 8(1)(c) of Framework Decision 2002/584* uses the terms ‘enforceable judgment’ or ‘any other enforceable judicial decision having the same effect’ and although such enforceability is decisive in determining the time from which a European arrest warrant may be issued, that enforceability is of lesser relevance under *article 4a(1) of that Framework Decision*. However, it is appropriate to pay attention to the ‘final’ nature of the ‘decision’ or ‘judgment’ for the purposes of interpreting article 4a(1), as is apparent from other relevant, convergent provisions of the Framework Decision.” (para 71)

I note that *article 1(1)* of the Framework Decision identifies the two categories of warrant without including any reference to a final decision. The references in the Preamble of the Framework Decision to abolishing the formal extradition procedure “in respect of persons who are fleeing from justice after having been finally sentenced” (recital 1) and “a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions” (recital 5) are merely incidental. Article 8(f) does require that a warrant should state the penalty imposed “if there is a final judgment”. By contrast, article 8(c) requires a warrant to contain evidence of “an enforceable judgment” and “any other enforceable judicial decision having the same effect”. We now have an authoritative statement from the CJEU in *Tupikas* (para 71) that while it is appropriate to pay attention to the final nature of the decision or

judgment for the purposes of interpreting article 4a(1), it is enforceability which is “decisive in determining the time from which a European arrest warrant may be issued”. ...”

39. In Caldarelli v Judge for Preliminary Investigations of Court of Naples, Italy [2008] UKHL 51, the appellant had been convicted at first instance in Italy of a drug offence and sentenced by that court to eleven years’ imprisonment and other penalties. The appellant was arrested in the United Kingdom pursuant to an EAW and a District Judge ordered his extradition to Italy. The appellant appealed on the ground that the warrant ought to have contained a statement that he had been convicted of an offence, in accordance with section 2(5) of the 2003 Act, and was invalid for not doing so.
40. On appeal, the House of Lords rejected the appellant’s challenge to the EAW. In paragraph 3, Lord Bingham observed that, since the appellant had appealed against conviction and sentence to the Court of Appeal in Naples, and that appeal remained outstanding, the “first instance judgment and sentence are not under Italian law either final or enforceable until the criminal appeal process is concluded ... Under Italian law a defendant is not regarded as “convicted” until his conviction becomes final”.
41. At paragraph 24, Lord Bingham observed that:-

“This seems strange to an English lawyer, familiar with the procedure by which a defendant sentenced to imprisonment at the end of a jury trial goes down the steps from the dock to the cells. But such is not the practice in Italy where the trial is indeed a continuing process, not yet finally completed in this case, and not an event.”
42. The final case to which reference must be made is Industrial Diamond Supplies v Luigi Riva [1978] 1 C.M.L.R.349. This concerned the meaning of the expression “ordinary appeal” in Articles 30 and 37 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Article 30 of the Convention provided that:-

“A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against a judgment has been lodged.”
43. Article 38 provided that:-

“The court with which the appeal under the first paragraph of Article 37 is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State in which that judgment was given or if the time for such an appeal has not yet expired; ...”
44. In 1976, the Turin Civil and Criminal Court ordered Industrial Diamond Supplies to pay a sum to Mr Riva, together with the cost of the action. Mr Riva then sought enforcement of this judgment in Belgium. Industrial Diamond Supplies lodged an appeal in the Court of Cassation in Italy against the judgment of the Turin Court.

45. At paragraph 17 of its judgment, the Court of Justice recorded the submission of Industrial Diamond Supplies that under the law of the Italian Republic “there is no doubt that in appealing cassation ... must in fact be considered as an ordinary appeal”.
46. The court nevertheless decided that the expression “ordinary appeal” in the Convention fell to be given an autonomous meaning.
47. For our purposes, the critical part of the court’s judgment is as follows:-

“The meaning of the expression 'ordinary appeal' within the framework of the Convention

- [29] The meaning of the expression 'ordinary appeal' may be deduced from the actual structure of articles 30 and 38 and from their function in the system of the Convention.
- [30] Although, as a whole, the Convention is intended to ensure the rapid enforcement of judgments with a minimum of formalities when those judgments are enforceable in the State in which they were given, the specific purpose of Articles 30 and 38 is to prevent the compulsory recognition or enforcement of judgments in other Contracting States when the possibility that they might be annulled or amended in the State in which they were given still exists.
- [31] For this purpose Articles 30 and 38 reserve to the court before which a request for recognition or an appeal against a decision authorising enforcement has been brought in particular the possibility of staying the proceedings where, in the State in which the judgment was given, the judgment is being contested or may be contested within specific periods.
- [32] According to the Convention, the Court before which recognition or enforcement is sought is not under a duty to stay the proceedings but merely has the power to do so.
- [33] This fact presupposes a sufficiently broad interpretation of the concept of 'ordinary appeal' to enable that court to stay the proceedings whenever reasonable doubt arises with regard to the fate of the decision in the State in which it was given.
- [34] It is possible by applying this criterion alone to decide the outcome of a request for recognition or enforcement based on a judgment which, in the State in which the judgment was given, is at present the subject of an appeal which may lead to the annulment or amendment of the judgment in question.
- [35] A court may be required to make a more difficult appraisal whenever a request for a stay of the proceedings is lodged before it under Article 38 of the Convention when the periods for lodging appeals have not yet expired in the State in which the judgment was given.
- [36] In that case, it is also necessary to bear in mind, in addition to the criterion based on the possible effect of an appeal, all the relevant considerations arising from the nature and conditions for the application of the judicial remedies in question.
- [37] Considered from this point of view, the expression 'ordinary appeal' must be understood as meaning any appeal which forms part of the normal course of an action and which as such, constitutes a procedural development which any party must reasonably expect.

...

[42] It is therefore necessary to reply that, within the meaning of Articles 30 and 38 of the Convention, any appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement according to the convention and the lodging of which is bound, in the state in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an 'ordinary appeal' which has been lodged or may be lodged against a foreign judgment.”

E. DISCUSSION

Ground 2: What was the “trial resulting in the decision” for the purposes of section 20(1) of the 2003 Act (construed compatibly with Article 4a of the Framework Decision)?

48. As Burnett LJ held in Cretu, section 20(1) of the 2003 Act must be construed so as to give effect to Article 4a of the Framework Decision. The issue at the heart of ground 2 is, accordingly, whether District Judge Grant was right to treat the proceedings in the Assize Court of Appeal of Florence as the “trial resulting in the decision” for the purpose of Article 4a or whether, as the appellants contend, he should have held that the relevant proceedings comprised the hearing that took place on 18 July 2017 in the Court of Cassation in Rome, at which neither the appellants nor their chosen representative were present.

49. Subject to what I say later regarding the sentencing of an offender, it is plain from paragraph 81 of the judgment in Tupikas that where there have been “successive decisions, at least one of which was given in absentia”, it is only “the last of those decisions” that falls for consideration under Article 4a(1),

“Provided that the court at issue made a final ruling on the guilt of the person concerned ... **following an assessment, in fact and in law, of incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual’s situation of the person concerned.**” (my emphasis).

50. It is evident that the appellants’ appeal to the Assize Court of Appeal was a full “merits” appeal against both conviction and sentence. Ms Hinton likened the Assize Court of Appeal to the Crown Court in England and Wales, hearing an appeal against conviction in the Magistrates’ Court. For my part, I consider that analogy to be sound. The Court of Appeal of Florence is also, for this purpose, analogous with the Tarnów Regional Court in Poland, as can be seen from the ECtHR judgment in Belziuk.

51. Proceedings in the Court of Cassation in Rome are, however, in my view, of a significantly different nature. As is apparent from the further information obtained from the respondent, which was before the District Judge, in the Court of Cassation “only issues on points of law are examined”. This is confirmed in the report of Avv. Capellupo, also before the District Judge, which describes the present proceedings in the Court of Cassation as “proceedings heard in public in the judgment of legality” where “it is pertinent to specify that the attendance of the defence advocate in the debate before the Court of Cassation is merely a possibility”. Avv. Capellupo expanded upon this in his addendum report, as follows:-

“Whilst judgement on the merits of a case (first instance and appeal) cannot legitimately take place without the defence advocate, by the outcome of the debate, having been in attendance to

present his/her argument and submissions, this condition is not provided for in cassation judgments (whose debate comprises consideration of the appeal) in which defence advocates may attend to discuss the reasoning of the appeal, but without their attendance being in the central requirement for a valid judgment upon the appeal itself.” (original emphasis)

52. In oral evidence before the District Judge, Avv. Capellupo reiterated the substantive differences between proceedings in the Assize Court of Appeal and the Court of Cassation. The following exchanges are instructive:-

“290. So ... is there a difference between the role of the defence lawyer in the Court of Cassation and elsewhere?

291. Yes, in the Court of Cassation there is no need even of the lawyers attending.

292. In these proceedings there were lengthy written submissions made to the Court of Cassation submitted in advance? No, they filed the recourse of cassation according to the law, following the conviction of second instance – 24 March 2016. ...They filed an appeal in the Court of Cassation.

293. ... No new documentation is filed with the court, They just used what is used in first and second instance trial.

294. In fact it is a trial of legitimacy and not of the merits of the case. The court will have a decision either by rejecting an appeal or declaring it inadmissible or it will void it and adjourn it or he can void it for no adjournment.

...

297. The proceedings which led to the decision of 24 March 2016 and also the first instance in those hearings, is a defendant able to give evidence in his own defence? Absolutely yes. It is not giving evidence it is an examination. As it is not a proper giving evidence he is also entitled not to tell the truth because he does not incur penalties if he doesn't. And I should say that it is the defence lawyer himself when the defence chooses to follow who advises his client, the defendant to go through the examination.

298. Some choose to and some choose not to?

299. Yes, but usually it is for the first instance trial not in in the appeal.

300. It is at that stage that the witnesses can be examined? Absolutely yes.

301. Are those same procedures available before the Court of Cassation? Absolutely no.”

53. I have already described certain aspects of the judgment of the Court of Cassation in the appellants' case. As we have seen, the Court rejected the appellants' challenges to the finding of the Assize Court of Appeal that the appellants' victim was (contrary to the conclusion of the first instance Assize Court) credible. The fact that the Court of Cassation went into considerable detail in examining the evidence that had been before the Assize Court of Appeal, extending over several pages of its judgment, does not, in my view, mean that the Court of Cassation is thereby to be regarded as having made its own findings of fact, in order

to reach its conclusions. On the contrary, as is apparent from the judgment, the Court of Cassation was looking (albeit in detail) at the evidence before the Assize Court of Appeal in order to see whether the latter Court was entitled to draw the conclusions it did from that evidence or whether, on the other hand (to use our domestic terminology), the Assize Court of Appeal had fallen into legal error.

54. Likewise, in annulling the conviction for the offence of abduction of the victim, the Court of Cassation was not, in my view, making its own finding on the merits. Rather, it was deciding that the evidence before the lower courts simply did not support the finding that the offence of abduction had been committed. The victim's own testimony did not show "typical actions of deprivation of her physical freedom attributable to the defendants, who instead obtained her obedience by deception" (paragraph 5). Mr Hall likened this to a finding of "no case to answer" before a first-instance criminal court in England and Wales. Whilst the analogy is, I consider, sound it does not mean we should for that reason treat the Court of Cassation as a court of first instance or that, in setting aside the conviction for abduction, we must assume that the Court stepped outside its role as a body that exists to correct the legal errors of subordinate courts.
55. Having made these findings about the nature of the proceedings in the Court of Cassation, it is now necessary to consider Mr Hall's submissions, by reference to the caselaw, in order to determine whether those proceedings amounted to "the trial resulting in the decision" for the purposes of Article 4a.
56. It is convenient to begin with the judgment of the European Court of Justice in Industrial Diamond Supplies. Mr Hall prays this case in aid in order to turn in the appellants' favour what Advocate General Bobec said at footnote 17 to paragraph 60 of his opinion in Tupikas.
57. As I have earlier recorded, footnote 17, on its face, favours the respondent's case that the relevant proceedings for the purpose of Article 4a were those in the Assize Court of Appeal, rather than in the Court of Cassation. In the footnote, Advocate General Bobec categorises a "cassation or constitutional appeal" as "a type of 'extraordinary' appeal" which, in principle, is "excluded from the definition of proceedings leading to the enforceable judgment".
58. In paragraph 83 of the judgment in Tupikas, the ECtHR used the expression "ordinary appeal" as a descriptor of the type of proceedings that constitute a "trial resulting in the decision":-

"It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned ..."
59. In Industrial Diamond Supplies the Court of Justice expressly found that an appeal to the Court of Cassation in Italy was a "ordinary" appeal. Mr Hall submits that this means appeals to the Court of Cassation in criminal matters must be treated as "ordinary appeals" for the purposes of Article 4a of the Framework Decision.
60. I am unable to accept this submission. The autonomous meaning given to the expression "ordinary appeal" by the European Court in Industrial Diamond Supplies was, manifestly, limited to the Brussels Convention on Jurisdiction. As can be seen from the Court's judgment, there was obvious good sense in construing an "ordinary appeal" for the purposes of that Convention as including any appeal that could result in the annulment or amendment of the judgment to be enforced, including by an appeal limited to errors of law. Time and effort would be wasted attempting to enforce in another country a judgment that could still be

annulled or amended in the domestic court, by whatever means. Those considerations, however, have no place when it comes to construing Article 4a of the Framework Decision; in particular, when determining which set of appellate proceedings are to count, for the purpose of giving effect to the right of personal attendance at a criminal trial. The purpose of the Brussels Convention is wholly different from that of the Framework Decision. Accordingly, footnote 17 remains a useful source of support for the respondent's position.

61. Advocate General Bobec's observations about cassation proceedings need to be read in the context of the reference of the District Court of Amsterdam in Tupikas, which was confined to asking whether appeal proceedings, in which there had been an examination of the merits and which resulted in the passing of a new sentence, amounted to a "trial resulting in the decision". That restriction does not, in my view, limit the force of the judgment in Tupikas. It is not possible to read the judgment as affording any assistance to the proposition that appeals on points of law, where no new findings of fact are made, are somehow to be equated with "merits" appeals. If such a possibility had been in the CJEU's mind, it is difficult to see how, notwithstanding the terms of the reference, it would not have found some expression in the judgment. Overall, I do not regard the terms of the reference from the District Court of Amsterdam as affecting the CJEU's findings in Tupikas, regarding the need for the "trial resulting in the decision" to be "an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, and taking account of the individual situation of the person concerned" (paragraph 81).
62. That this is the correct way of interpreting Tupikas is, I consider, underscored by the Strasbourg caselaw. In Belziuk, the ECtHR regarded it as significant that the Tarnów Regional Court "was empowered to consider questions of both fact and law" (paragraph 38). Although Mr Hall attempts to draw support from paragraph 39, in which it was held that the Public Prosecutor, although present at the appeal hearing "as the guardian of the public interest", made submissions that "were directed at having the applicant's appeal dismissed and his conviction upheld", it was not the mere fact of the prosecutor's presence at a hearing at which the appellant was not present or represented that was determinative. What mattered was the fact that the prosecutor had been present at and taken part in a hearing which involved a "merits" appeal.
63. Some further support for this approach is to be found in the wording of Article 4a itself. Ms Hinton draws attention to Article 4a(1)(c). As can be seen above, this provides that, even though there may not have been the requisite appearance at the trial resulting in the decision, the requirements of the Article may be satisfied if, after being served with notice of that decision and being expressly informed about the right for a re-trial or an appeal, the person concerned expressly stated that he or she did not contest the decision or did not request a retrial or appeal within the applicable timeframe. Article 4a(1)(c) categorises the retrial or appeal as one "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".
64. Ms Hinton submits that this accords with the judgment in Tupikas and provides further support for finding that the Court of Cassation proceedings were not, for this purpose, the relevant proceedings but that these were, in fact, the proceedings of the Assize Court of Appeal. In reply, Mr Hall points out that, although the referring court in Tupikas had drawn attention to Article 4a(1)(c), the CJEU did not draw upon this provision in its judgment.

65. I do not consider that omission to be material. I agree with Ms Hinton that Article 4a(1)(c) is indicative of the fact that the expression “trial resulting in a decision” in Article 4a(1) means a trial that has the characteristics described in Article 4a(1)(c).
66. As has already been seen, in the case of the appellants the limitation period for the relevant criminal offences continued to run after the handing down of the judgments of the Assize Court of Appeal of Florence. Mr Hall submits that this indicated it was the judgment of the Court of Cassation which had, for the purposes of Article 4a, finally ruled on the guilt of the appellants and imposed penalties on them. This point is similar to the appellants’ submission that it was only after the cassation hearing on 18 July 2017 that the respondent was able to issue the EAWs, since it was only at that point that the convictions and sentences of the appellants became “enforceable” for the purposes of Article 8(1)(c) of the Framework Decision.
67. In my judgment, both the “limitation” point and the submission concerning enforceability involve the impermissible conflation of concepts which are, in reality, distinct. The danger of doing this in the law of extradition has been highlighted by Lord Lloyd-Jones in paragraph 27 of Konecny, albeit in a different context (see above).
68. The fact that in Italy limitation periods continue to run until the Court of Cassation judgment (if there be one) has no determinative bearing on the identification of the relevant “trial” for the purposes of Article 4a. Both the Strasbourg and the Luxembourg caselaw demand attention to be focussed on the nature of the task to be undertaken by the court at that trial.
69. By the same token, when we turn to enforceability under Article 8(1)(c) of the Framework Decision, the CJEU in Tupikas was at pains to say “that enforceability is of lesser relevance under Article 4a(1) of that Framework Decision” (paragraph 71). Whilst the Court went on to state that “it is appropriate to pay attention to the ‘final’ nature of the ‘decision’ or ‘judgment’ for the purposes of interpreting Article 4a(1)”, this is not a sufficient basis for this court to categorise the Court of Cassation proceedings as the “trial resulting in the decision”, notwithstanding that those proceedings lacked what I consider to be the essential characteristic of a “merits” appeal.
70. Tupikas makes it plain that where conviction at trial at first instance is followed by an appeal on fact and law against that conviction, it is only the proceedings on appeal that comprise “the trial resulting in the decision” for the purposes of Article 4a. The fact that a person may have appeared in person at first instance is, for this purpose, irrelevant.
71. In my view, this puts the appellants’ case before this court in serious difficulty. If the appellants are correct then, notwithstanding that the Court of Cassation was confined to determining whether the Assize Court of Appeal had erred in law in its conviction decisions, and notwithstanding the resulting limitations on what their lawyer could have done on their behalf before the Court of Cassation if the appellants had been legally represented there on 18 July 2017, the fact they might not have been present or represented before the Assize Court of Appeal would be irrelevant for the purpose of determining compliance with Article 4a and section 20(1) of the 2003 Act. In my view, such an outcome would wholly subvert the intention of Article 4a in seeking to give effect to the Article 6 ECHR right of a person to appear in person at their trial, at which facts are found and their guilt or innocence determined.

72. So far, I have concentrated upon criminal proceedings relating to the determination of guilt or innocence. It is, however, necessary to examine the second strand in such proceedings; namely, the imposition of a sentence or penalty.
73. As can be seen from paragraph 7 of its judgment (as set out in paragraph 7 above), the finding of the Court of Cassation that some of the appellants' grounds were not manifestly unfounded meant the offences to which the grounds related were time-barred. The Court also found that the offence of abduction had not been made out. In the light of these two sets of findings, the Court proceeded to re-calculate the sentences of the appellants "without the need to refer the matter back to the court".
74. The CJEU's judgment in Zdziszek was handed down after that in Tupikas. The Court in Zdziszek reached the conclusion that the expression "trial resulting in the decision" within the meaning of Article 4a(1) "must be interpreted as covering the appeal proceedings that led to the decision which, after a new examination of the merits of the case in fact and in law, finally determined the guilt of the person concerned and imposed a penalty upon him, such as a custodial sentence, even though the sentence handed down was amended by a subsequent decision" (paragraph 82). The CJEU's emphasis upon examination of the merits in fact and in law reinforces the correctness of the interpretation of Tupikas that I have set out above. So far as the issue of the sentences is concerned, Zdziszek acknowledges that whilst (compatibly with Tupikas) there will only be one relevant "trial" for the purposes of determining guilt, it may be necessary to look at a different set of proceedings for the purpose of construing Article 4a(1), as it applies to the sentencing aspect of the criminal process.
75. In reaching that conclusion, the CJEU took account of the judgment in Kremzov which, as we have seen, involved the re-determination of a sentence based upon the Supreme Court of Austria's view of the applicant's responsibility for the criminal offence he had committed.
76. At paragraph 88 of Zdziszek, the CJEU identified the sentencing proceedings which involve the right of the person concerned to be present. They are:

"... specific proceedings for the determination of an overall sentence where those proceedings are not purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances ..."
77. Accordingly, notwithstanding what I have found to be the nature of the proceedings in the Court of Cassation concerning the guilt of the defendants, in the light of Zdziszek it is necessary also to consider the sentencing aspect of the Court of Cassation's judgment. If that aspect involved the exercise of discretion, then Article 4a(1) will operate so as to make the cassation proceedings a "trial resulting in the decision", along with those of the Assize Court of Appeal.
78. It is evident from paragraph 7 of the Court of Cassation's judgment that no such discretion was exercised in the case of the appellants. Rather, the Court merely "re-calculated" the appellants' sentences in the light of its conclusions regarding the time-barred sentences and the annulment of the conviction for abduction.
79. For these reasons, I would reject ground 2.

Ground 3: Article 6 of the ECHR

80. Both in counsels' skeleton argument and in Mr Hall's oral submissions, the appellants accept that ground 3 in reality stands or falls with ground 2. I agree. The purpose of Article 4a is to ensure compliance with that part of Article 6 ECHR, which confers upon an individual a right to defend himself or herself and, accordingly, to be present and/or represented at the trial. Applying Article 4a to the facts of the appellants' case, by reference to the relevant caselaw, the respondent has shown that there has been no violation of Article 6 in relation to the proceedings comprising "the trial resulting in a decision" within Article 4a(1).
81. On a number of occasions during the hearing, Mr Hall took issue with Ms Hinton's submission that, in order for there to be a breach of Article 6 of the ECHR, a "flagrant denial" of that right had to be demonstrated. As District Judge Grant noted in his decision, the jurisprudence of the ECtHR has consistently found that Article 6 may exceptionally be raised as a reason for resisting an expulsion or extradition decision, where the person concerned has suffered or risks suffering a flagrant denial of justice in the requesting country. The District Judge referred in this regard to the judgment in Othman. The origin of the jurisprudence is to be found in Soering v United Kingdom (Application No. 14038/88) where, at paragraph 113, the ECtHR said that it did "not exclude that an issue might exceptionally be raised under Article 6 ... by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial ..".
82. It is therefore clear that the ECtHR jurisprudence requires "flagrancy" to be shown, in an expulsion case, not just in respect of a real risk of future occurrences but also as regards what has happened already. Mr Hall's point, however, as I understand it, is that no "flagrancy" threshold falls to be applied when one is looking at Article 4a of the Framework Decision. I would respectfully agree. In introducing Article 4a, what the Council of the European Union has done is to make compliance with the relevant elements of Article 6 ECHR as to presence at trial a requirement for the operation of the European arrest warrant system. Although we are, of course, concerned with extradition, Article 4a requires no finding of flagrancy.
83. Once, however, one steps outside Article 4a, the flagrancy requirement comes into play. Section 21 of the 2003 Act requires a judge to decide whether a person's extradition will be compatible with the Convention rights within the meaning of the Human Rights Act 1998. This requirement, however, applies only if the judge is required to proceed under section 21, by virtue of section 11 or section 20. If the judge concludes that the person concerned "did not appear in person at the trial resulting in the decision" for the purposes of Article 4a(1), and that none of the other questions in section 20 falls to be answered against the person concerned, then the judge must order the person's discharge. In such a case, section 21 will not be reached. If, on the other hand, the judge makes a finding, such as answering section 20(1) in the affirmative, then the judge has to proceed under section 21. At that point, any Article 6 ECHR challenge has to meet the "flagrancy" threshold if it is to succeed.
84. This is precisely how District Judge Grant approached his task in the decision under challenge. He proceeded to section 21, having made his finding that the relevant proceedings for the purpose of section 20(1)/Article 4a(1) were those in the Assize Court of Appeal of Florence. Having looked at the evidence regarding what had transpired at the Court of Cassation, and its aftermath, he concluded that the evidence before him fell far short of a

“flagrant denial of a fair trial” and dismissed the section 21 challenge. In my view, he was right to do so and, as I have indicated, the appellants do not contend otherwise.

85. I would, accordingly, reject ground 2.
86. I would dismiss the appellants’ appeal.

Lord Justice Hamblen:

87. I agree.