



Neutral Citation Number: [2020] EWHC 1254 (Admin)

Case No: CO/4180/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd May 2020

Before :

MR JUSTICE FORDHAM

Between :

CRISTINEL OGREANU
- and -
ITALIAN JUDICIAL AUTHORITY

Appellant

Respondent

MARTIN HENLEY (instructed by **AM International Solicitors**) for the **appellant**
TOM HOSKINS (instructed by **CPS**) for the **respondent**

Hearing date: 22 April 2020

MR JUSTICE FORDHAM :

Introduction

1. This is an extradition case, concerning the “retrial” entitlement in section 20(5) of the Extradition Act 2003 and evidence said to fill a “lacuna” in a European Arrest Warrant (EAW). The case came before me as an appeal from the ruling of a district judge (“the judge”) given on 21 October 2019. Permission to appeal was granted by Johnson J on 20 January 2020. This was a remote hearing by telephone conference call. The definition of “live link” in rule 2.2 of the Criminal Procedure Rules (CrPR) has been extended to include telephone, so that the appellant by dialling into the call enjoyed the participatory right described in rule 50.17(3). The hearing and its start time were listed in the cause list, with contact details available to anyone who wished permission to participate. I was addressed by Counsel in exactly the same way as if we were sitting in the court room. I am satisfied that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that insofar as there has been any restriction on a right or interest it is justified as necessary and proportionate.
2. The issue on which permission to appeal was granted concerns retrial-entitlement and section 20(5). That provision poses a question. It arises where (i) the requested person was convicted in absence and (ii) that was not a deliberate absence from trial (see section 20(1) to (4)). The section 20(5) question, arising in those circumstances, is (iii) “whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial”. If the question is reached then, unless the judge is satisfied as to such this retrial-entitlement, the appellant must be discharged (section 20(7)). Question (iii) does not arise where the judge finds against the requested person on questions (i) or question (ii). The present case is one in which the respondent requesting judicial authority took the position in the EAW and at the original oral hearing before the judge that question (ii) should be decided against the appellant, and question (iii) did not therefore arise. That did not persuade the judge, who decided in favour of the appellant on question (ii). In the event, relying on further information not found within the EAW at a further hearing before the judge, the respondent persuaded the judge to make a finding against the appellant on question (iii). The first question on this appeal is whether that finding was “wrong” in a relevant sense such that this appeal should be allowed (section 27(1)(a), (2) and (3)).

Whether to hear from the respondent

3. A procedural point arose on this appeal as to whether I should receive and consider written and oral submissions on behalf of the respondent. Mr Henley for the appellant submitted that I should not. He relied on the respondent’s default in never having filed in this case a respondent’s notice as justifying that course. CrPR r.50.21(1)(a) provides that, in an appeal, a respondent “must” serve a respondent’s notice if it “wants to make representations to the High Court”. It was common ground that I had jurisdiction to permit representations to be made by the respondent at this hearing, notwithstanding that default, if necessary by allowing an oral application at the hearing of the appeal, for the respondent’s skeleton argument to stand as it respondent’s notice, together with an extension of time. I ruled at the hearing, having heard argument on the point, that I would receive and consider the respondent’s

written and oral representations in this case. I said I would give my reasons for that ruling in this judgment, and here they are.

4. I was and am quite satisfied that it is necessary, appropriate and proportionate in the interests of justice, having regard to the overriding objective (CrPR r.1.1) adapted to the extradition context, as well as being in the public interest, to allow the representations to be made. A respondent's notice ought to have been filed, and the respondent has both apologised and explained that the requirement was missed by those with conduct of this case. That occurred in circumstances where perfected grounds of appeal were due and duly received, and permission with extension of time granted pursuant to delegated powers by the administrative court, following which permission to appeal was dealt with on the papers. I was unpersuaded by Mr Henley's suggestions that there was prejudice to the appellant, through the absence of a respondent's notice.
5. In particular, three things are significant. First, although Mr Henley floated the possibility that there might have needed to be an expert report, he was not able to identify any basis for this, still less one connected with the prompt filing, or absence, of a respondent's notice. Having received the respondent's skeleton argument, it was and is not his position that an expert report is, or would have been, justified in this case. No adjournment has been or is being sought. Secondly, Johnson J made an order granting the appellant permission to appeal, but also directing the parties to serve skeleton arguments for this hearing with a sequential timetable. Those directions allowed the respondent to file a skeleton argument within a prescribed timetable. Any default as to the respondent's notice had already arisen at the time of that order. The respondent has filed a skeleton argument in accordance with that direction. Moreover, Johnson J made express provision for an application to vary his directions. The appellant did not, in consequence of that provision, pursue the position that the direction for a skeleton argument was inappropriate absent the respondent's notice. Nor did the appellant pursue any application for an additional direction requiring that a respondent's notice should be directed, to secure fairness to the appellant, so that he and his representatives knew where they stood prior to the preparation of their own skeleton argument. Thirdly, the respondent has not in a skeleton argument sought to introduce anything in the nature of a 'cross-appeal', such as by arguing that the judge was wrong in the way in which he answered question (ii) in the appellant's favour. Mr Hoskins's skeleton argument was explicit about the fact that he was not seeking to reopen that question. Had he sought to do so, the position as regards the absence of a respondent's notice and the question of prejudice and fairness might well have had a very different complexion, and I may well have excluded such an argument, advanced for the first time in a respondent's skeleton argument in the run up to the hearing and after the work on producing the appellant's skeleton argument had all been done.
6. In discussing this procedural point, it is also fair to say that key certain aspects of the appellant's own submissions as found in Mr Henley's skeleton argument and oral argument were unheralded in the grounds of appeal, and in the perfected grounds of appeal. In that respect too, I was satisfied in the interests of justice, having regard to the overriding objective and the public interest, that it would not be right to shut out those submissions. I received them and considered them. I am quite satisfied that there has been no unfairness to either party in my receiving the oral and written submissions relating to section 20(5) and retrial-entitlement, so that the court is fully

informed and fully assisted in seeking to answer the questions arising in this case correctly.

7. A second procedural point arose at the hearing. This concerned two emails which were the subject of controversy (“the controversial emails”). The judge read the controversial emails and referred to them in his judgment. He said this: “I have reached my decision without reference to the emails received from the [requesting judicial authority] to the CPS, identified by Mr Hoskins in his [skeleton argument]. However, if there were any doubt and, for the avoidance of doubt, I do not think there is, those emails confirm the position regarding re-trial rights specific to the [requested person] that he does indeed have the opportunity to appeal his conviction for the reasons set out therein”. Mr Henley submitted as follows: that the judge never formally received the controversial emails in evidence; that the judge never ruled on the admissibility of these, unauthenticated, documents (see section 202(5)); that they are not evidence in these proceedings, unless I were to admit them as fresh evidence on this appeal, which he submitted I should not. I decided at the hearing that I would consider the emails ‘*de bene esse*’, and then rule within my judgment as to what I made of them and their status in the proceedings. I was not prepared to shut out material which the judge had and read, and to which the judgment referred.

This Case in Outline

8. An outline as to the nature and circumstances of the present case can be encapsulated as follows. The appellant was born in Romania in 1973 and is now 46. Extradition is sought pursuant to a conviction EAW issued by the Italian authorities on 11 January 2019 and certified by the NCA on 28 May 2019. The EAW arises out of criminal offending at an Italian jewellery shop on 11 November 2011. There was a trial on 23 April 2015 in the appellant’s absence, and a custodial sentence of 15 months and 15 days was imposed and became final on 14 May 2015.
9. At the time of the extradition hearing before the judge on 15 August 2019, there was before the judge ‘further information’ provided on 8 July 2019 in response to a ‘request for information’ dated 27 June 2019. Such exchanges are formal and familiar in extradition cases. Delivery of judgment was scheduled for 6 September 2019, but an exchange of emails took place from 2 September 2019 onwards, in which the judge invited the respondent to indicate its position on retrial-entitlement, the EAW being silent on that point. The respondent, in those circumstances, asked for the opportunity to provide further information. The judge postponed judgment and a further oral hearing was scheduled which took place on 21 October 2019. Submissions were made by both parties. By that time there were three categories of document, to which I will return. It was in those circumstances that the judge gave judgment, finding in the appellant’s favour on question (ii) (no deliberate absence from trial) but in the respondent’s favour on question (iii) (retrial-entitlement).
10. Mr Henley showed me his email exchange with the judge, objecting at the course being taken by the judge, arguing that it was unfair for the respondent to have a “second bite at the cherry” and advance a new argument not previously relied on, the respondent having squarely previously advanced a case solely in relation to question (ii) (deliberate absence from trial). Although he reminded me of the circumstances, Mr Henley did not pursue for the purposes of this appeal any argument that the procedural steps adopted by the judge constituted an irregularity, rendering the

judge's finding on question (iii) "wrong" on any substantive or procedural ground. Mr Henley was right not to pursue such an argument. The judge was entitled to raise question (iii) (retrial-entitlement) with the parties. Having done so, the judge acted with conspicuous fairness in allowing both parties the opportunity to make further written and oral submissions, and by convening a further oral hearing for that purpose, before deciding what to do and decide regarding question (iii).

11. The issue on this appeal, for me to decide, as Mr Henley rightly recognised, was whether the judge's adverse conclusion on question (iii) was sustainable as one which was open to him, on the law and on the evidence. That is the point on which it is necessary to focus. Having said that, it was relevant and appropriate that Mr Henley drew to my attention the rather unusual circumstances in which question (iii) came to be advanced as a new fallback position, by the respondent, and one which ultimately won the day before the judge.

The Three Categories of Document

12. The three categories of document which the respondent placed before the judge for the reconvened hearing on 21 October 2019 were as follows. First, there was a letter dated 11 September 2019 from the public prosecutor's office (PPO) at the court of Mantova, which letter was in the nature of providing "clarifications", expressly referring to the case of the appellant (giving his name and date of birth), and written by the deputy prosecutor ("the PPO Letter"). It is common ground that this was a duly authenticated document (section 202(4)(a) of the 2003 Act), from the relevant judicial authority. Secondly, there was a letter dated 26 September 2019 from the Ministry of Justice (MOJ) Department for Justice Affairs, Directorate General of Criminal Justice Office II - International Cooperation ("the MOJ letter"). This was in the nature of providing "information on the Italian rules of the code of criminal procedure on trials in absentia, with special reference to the amendments made to article 175 of the code of criminal procedure". It is common ground that this too was a duly authenticated document (section 202(4)(aa)), from the Ministry responsible for justice. It is common ground that it did not emanate from the relevant judicial authority, and that it did not refer expressly to the appellant or his case. Thirdly, there were the controversial emails, to which I have referred already and to which I will return in due course.

The Law: Onus, Ingredients and Gap-Filling

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

involves an entitlement on the part of the extradited person to adduce evidence on the merits. Secondly, that any limitation period on the exercise of the retrial right involves the prospective running of time following extradition surrender. Thirdly, that no burden would be placed on the extradited person to disprove deliberate absence from the original trial, as a precondition to invoking the retrial entitlement; rather, that it was for the prosecution to prove deliberate absence from trial, if the retrial entitlement was to be denied on that basis. I shall call these ingredients, respectively, the “evidence-adducing ingredient”; the “prospective running of time ingredient”; and the “prosecution-burden ingredient”.

15. I interpose this. I have explained that the section 20(5) retrial-entitlement arises as question (iii) where the extradition court is not satisfied as to deliberate absence from trial (question (ii)). It was common ground before me that the retrial-entitlement (question (iii)) can be one which is deniable by the requesting state on grounds of deliberate absence from trial (question (ii)). I did not need to hear argument on the permissibility of this contingent deniability, which was agreed, but it is worth referring to one passage which supports it. In Nastase v Office of the State Prosecutor, Trento, Italy [2012] EWHC 3671 (Admin) at paragraph 44 Rafferty LJ referred to the requested person’s “entitlement to a retrial” as being “excluded only if the [Italian] court is satisfied, on the evidence, that he knew of the proceedings and voluntarily renounced his right to appear or to file [an] appeal”. So far as onus and this contingent deniability, I repeat, it was common ground before me that the requesting state prosecuting authorities would need to bear the onus of proving deliberate absence from trial, with no onus placed on the requested person to disprove it. That is the prosecution-burden ingredient.
16. Next, it was common ground before me that it is, in principle, permissible for a gap in the contents of an EAW, including the content prescribed in section 2 of the 2003 Act, to be filled by appropriate evidence supplied by way of further information by the respondent. Counsel were agreed that such a gap can be filled where it constitutes a “lacuna”; not if it is a “wholesale failure to provide necessary particulars”. The authority which they showed me, supporting those propositions, was Alexander v Public Prosecutor’s Office, Marseilles [2017] EWHC 1392 (Admin) [2018] QB 408 at paragraphs 73 to 75. There, the Divisional Court said this:

[I]t is clearly open to a requesting judicial authority to add missing information to a deficient EAW so as to establish the validity of the warrant... [T]he date place in nature of the offence, and the question of maximum sentence ... are required matters.... [which] may be supplied by way of further information and so provide a lawful basis for extradition.... [T]here must be a document in the prescribed form, presented as an EAW, and setting out to address the information required by the Act... Article 15 (2) of the Framework Decision expressly concerns itself with ‘supplementary’ information, and can properly be implemented with that description in mind. That will of course include resolution of any ambiguity in the information provided. It will include filling ‘lacunae’. The question in a given case whether the court is faced with lacunae or wholesale failure to provide the necessary particulars can only be decided on the specific facts.

Ingredients and Gap-Filling: The Present Case

17. The EAW in the present case contained, at “box (d)”, the opportunity for the issuing judicial authority to communicate its position in relation to the three questions (i), (ii) and (ii) arising in conjunction with section 20. That included the prompt, in the

wording of the pro forma EAW, replicating the form contained in the Annex to EU Council Framework Decision 2002/584/JHA of 13 June 2002 (“the Framework Decision”), to set out whether the person whose extradition is sought:

... will be expressly informed of his or her right to a retrial or appeal, in which he or she 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... The person will be informed of the timeframe within which he or she has to request a retrial or appeal, which will be... days.

No such information was set out on the face of the EAW in the present case. It was common ground that, in relation to the section 20(5) retrial entitlement with its three ingredients, there was a “lacuna”, but not a “wholesale failure to provide... necessary particulars”, so that the gap could in principle be filled by evidence of an appropriate nature and content.

18. The respondent submitted and maintains, and the judge found, that there was evidence of an appropriate nature and content, filling the lacuna and enabling him to be satisfied in relation to question(iii) (retrial-entitlement), as to all three ingredients. Mr Hoskins’s submission before the judge, and before me, was that the three ingredients were all demonstrated by appropriate evidence filling the EAW lacuna. The judge agreed. The judge recorded Mr Hoskins’s submissions as follows:

In short, the [requesting judicial authority] says that the [appellant] does have the appropriate appeal rights because he was convicted in his absence and it is the [appellant]’s case (which I accept) that he did not have actual knowledge of the proceedings against him. Article 175 of the Code of Criminal Procedure therefore permits the [appellant] a re-trial in the time limit for making the application is 30 days from when he is surrendered under the EAW. He submits the requirements are mandatory and it will be for the [requesting judicial authority] to prove, on the balance of probabilities, that the [appellant] had actual knowledge of the proceedings if they wanted to defeat his rights to a re-trial.

The judge recorded his own findings as follows:

It appears to me to be clear from the further information supplied that the burden is not on the [appellant] to disprove that he knew of the proceedings. That burden lies on the [requesting judicial authority] ... It appears to me that the arguments put forward by the [requesting judicial authority] are correct. The [appellant] in this case does have rights of appeal because he was convicted in his absence and did not know of the proceedings. He is entitled to exercise the right of appeal within 30 days of his extradition on the EAW. Whether the appeal is granted is, of course, a matter of the Italian courts but certainly has the right to make an application.

19. Mr Henley submits that it was not open to the judge to conclude that the three ingredients had been met by the further information. He advanced three propositions.

Does Gap-Filling need an RJA Document, referring to the Extraditee?

20. I can take Mr Henley’s first and second propositions together. His first proposition is that lacuna-filling evidence relating to retrial-entitlement can, as a matter of law, only be provided in an authenticated document issued directly by the requesting judicial authority (RJA). His second proposition is that lacuna-filling evidence relating to

retrial-entitlement can, as a matter of law, only be provided in a document which refers specifically to the case of the individual whose extradition is sought. I need to examine whether either or both of those propositions are legally correct. In combination, in the present case, they come to this. They would mean that the agreed lacuna could only be filled by a document in the nature of the PPO letter, and that a document such as the MOJ letter could not, in law, be relied on. Still less could the controversial emails, in law, assist. I will seek now to encapsulate the essence of Mr Henley's argument, in relation to his first and second propositions, with a little embellishment of my own. As I saw it, the essence of the argument comes to the following ten points.

21. First, the principled starting point is the Framework Decision. Article 4a of the Framework Decision deals at 4a(1)(d) with retrial-entitlement. It describes a discretion to refuse the execution of an EAW which is a conviction warrant, in a case involving absence from the trial, where:

... the [EAW] states that the person, in accordance with further procedural requirements defined in the national law of the issuing member state... will... after the surrender... [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... will be informed of the timeframe within which he or she has to request such a retrial or appeal.

That language ("the [EAW] states that") makes explicit that the prescribed source of the confirmation as to retrial-entitlement must be the EAW. It also ("states that the person ... will") makes explicit that there must be specific reference to the position of the extraditee.

22. Second, the Framework Decision also prescribes, by article 6(1), that the EAW must be a document emanating from the "issuing judicial authority", being the "judicial authority of the issuing member state which is competent to issue a European arrest warrant by virtue of the law of that state". This Article 6 guarantee as to source reflects a principled requirement of sufficient independence from the executive including from the Ministry of Justice of the requesting state: see the judgment of the CJEU on 27 May 2019 in the case of OG and PI Joined Cases C-508/18 and C-82/19 PPU at paragraphs 73-74 and 90 in particular. The purpose of requiring institutional independence is directly linked to the 'mutual recognition and confidence' which the court of the requested state can then repose in the formal communications emanating from the requesting state: see OG and PI at paragraph 57.
23. Third, as is well established, the provisions of the Extradition Act 2003 must be given a "conforming interpretation" (unless that is "impossible") with the provisions of the Framework Decision. That means that section 20 must be read compatibly with article 4a. As to this conforming interpretation: see Cretu at paragraphs 18, and 34(iv); Alexander at paragraph 61; and Szatkowski v Regional Court in Opole, Poland [2019] EWHC 883 (Admin) [2019] 1 WLR 4528 at paragraph 21.
24. Fourth, it follows that the prerequisites of the EAW, as prescribed in section 2 of the 2003 Act, read compatibly with Article 4a of the Framework Decision, require that the information confirming retrial-entitlement (prescribed in section 20 of the Act)

must, in principle, emanate from the issuing judicial authority, within the EAW issued by that authority, specifically referable to the individual extraditee.

25. Fifth, that being the case, it must follow, in principle, that any “lacuna” in the content of the EAW can be filled only (1) by formal further information issued by that same authority, and (2) by formal further information referring specifically to the individual in question. In that way, the purpose of the institutional independence which explains the need for the EAW itself and its prescribed contents to be provided by the issuing judicial authority, is promoted and secured, and not undermined.
26. Sixth, Article 15(2) of the Framework Decision, which deals with further information, has to be read in this light. It provides as follows:

If the executing judicial authority finds the information communicated by the issuing member state to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in article 17.

That provision must, in principle, mean and intend that the further (“supplementary”) information be sought from the issuing judicial authority and that communications containing the relevant information must be (1) issued by the judicial authority and (2) referable to the case of the individual. Reinforcement is to be found in Article 15(3) which provides as follows:

The issuing judicial authority may at any time for any additional useful information to the executing judicial authority.

In that provision, the principled emphasis on the issuing judicial authority as the appropriate source for further information is explicitly recognised.

27. Seventh, this principled position is supported by authority. In Cretu, the Divisional Court explained at paragraph 35 the importance of being able to rely on the contents of the EAW, explaining that article 4a “does not contemplate that the executing state will conduct an independent investigation” into retrial-entitlement, and that “[t]o explore all the underlying facts would generate extensive satellite litigation being consistent with the scheme of the Framework Decision”. The Divisional Court added at paragraph 37: “In the event that the requesting judicial authority does provide further information [we] can see no reason why that information should not be taken into account”. In OG and PI the Luxembourg court emphasised at paragraphs 73 and 74 the significance of the issuing judicial authority as first “exercising its responsibilities... without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive”, so that “the issuing judicial authority must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing member state, it acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant”.
28. Eighth, the legislative scheme thus insists that information should (1) emanate directly from the issuing judicial authority, and (2) be expressly referable to the case of the individual. That is the platform on which the ‘mutual trust and recognition’ underpinning the entirety of the scheme, interpreted and applied purposively,

operates. The ability of the court in the requested state being able to rely on information emanating directly from the appropriately independent judicial authority of the requesting state is what saves the court from embarking on an inappropriate enquiry as to the content of the foreign law.

29. Ninth, an exception to this principled position arises, however, in the case of article 3 ECHR arguments and prison conditions. In that situation, it is recognisably appropriate that supplementary information falling within article 15(2) can be supplied by the requesting state's ministry of justice. That exception explains why section 202(4)(aa) refers to receivable documents certified by a ministry for justice. In that particular situation, there is a principled reason why information can emanate from a ministry of justice rather than directly from the issuing judicial authority. The reason is that it is the ministry of justice which can and will be the appropriate authority to speak to issues such as prison conditions and the location where it is being said that the individual facing extradition would be incarcerated.
30. Tenth, for all these reasons, lacuna-filling evidence relating to retrial-entitlement can, as a matter of law, only be provided in an authenticated document (1) issued directly by the requesting judicial authority and (2) which refers specifically to the case of the individual whose extradition is sought.
31. I cannot accept these submissions. I do not accept either of Mr Henley's two propositions, as advanced on this part of the case. I agree with Mr Hoskins that neither proposition is sound in law. My reasoning is as follows.
32. There is no doubt that the EAW itself, and therefore the contents which appear on its face, are required to be issued by the judicial authority. It is also established by the case of Alexander that the issuing judicial authority must have issued a document in the prescribed form, presented as an EAW, setting out to address the required information and that in the case of a "wholesale failure to provide the necessary particulars" the warrant will be insufficient in law, and incapable of being rescued by supplementary information. Once it is recognised, however, that gap-filling information can in principle be supplied, the fact that the EAW must emanate from the issuing judicial authority, and the fact that it is a document expressly referable to the case of the individual, raise – but do not answer – the question as to whether these are legal preconditions of-filling information as well. The answer to that question cannot be found in article 4 or any other provision concerned with the prescribed contents of the EAW.
33. The question which arises is whether there is a prescribed type of lacuna-filling information. In my judgment, Mr Henley has been unable to point to any provision of the Framework Decision or of the domestic 2003 Act which requires that further information must (1) directly emanate from the issuing judicial authority, or (2) specifically refer to the individual case. It would have been very easy for the Decision, or the statute, to say so. Article 15 of the Decision deals expressly with further information at subparagraphs (2) and (3). Mr Henley is right to point out the explicit reference in subparagraph (3) to the issuing judicial authority, but that makes it all the more conspicuous that no such reference is to be found in subparagraph (2).
34. The concession, by reference to prison conditions, that in principle article 15(2) can embrace further information whose source emanates from a ministry of justice is

significant. It was unnecessary for me to hear argument on this point, which was common ground, but I will interpose one reference, treating material emanating from a ministry of justice as evidence to be “evaluated by carrying out an overall assessment of all the information available to the executing judicial authority”: ML Case C-220/18PPU [2019] 1 WLR 1052 at paragraphs 112 to 115. Mr Henley did not dispute that in the context of that issue, further information could be general in its nature rather than referable to the specific individual. Thus, the court would be able to receive, and give appropriate weight, to information emanating from a ministry of justice describing the general position so far as – for example – guarantee of floorspace across the generality of its penal institutions; thus rendering it unnecessary to investigate the specific envisaged locations in which an individual is intended to be incarcerated. What the prison conditions example convincingly demonstrates, in my judgment, is that the reliability of further information received by the court of the requested state can involve questions of weight, including by reference to the source of the information relied on, the content of the information, and the question whether it is general or specific to the case of an individual.

35. It is not just article 15(2) of the Decision which is broad enough to accommodate further information not directly emanating from the issuing judicial authority and not directly referable to the case of the individual. The same is true of the domestic provision in section 202 of the 2003 act. Parliament expressly recognised that receivable documents would not be limited to authenticated documents from the judicial authorities of the requesting state, and specifically referred to documents from a ministry responsible for justice, as well as a ministry or department responsible for foreign affairs.
36. There is in any event a clear pitfall in referring, loosely, to evidence emanating from an issuing judicial authority. The case-law in this area is apt to speak of ‘the issuing judicial authority’, or ‘the requesting judicial authority’, or ‘the requesting state’ as bearing the burden of satisfying the court of the requested state, that certain prerequisites to extradition are satisfied. Such references can be found, for example, in the Alexander case at paragraph 73 (referring to the requesting judicial authority), paragraph 77 (referring to the state) and paragraph 98 (referring to the issuing judicial authority). It is, formally, the issuing judicial authority who is party to the extradition proceedings and, so, the respondent to this appeal before me. It is the respondent who has the burden of satisfying the court on relevant issues, and it is the respondent who will produce materials and evidence to that end. It would, however, be wrong to proceed from that position to one under which evidence can and must only emanate directly from the issuing judicial authority itself. The party may be putting forward the evidence without itself having held the pen, or signed off on, the document which is being relied on. Although it is not necessary to decide the point in the present case, it does not seem to me to follow, even from article 15(3) of the Framework Decision that the “issuing judicial authority” could not “forward... additional useful information” (1) which constituted a document whose direct source was, say, the ministry of justice, and/or (2) which was general information rather than information referable specifically to the case of the individual in question.
37. The position can straightforwardly be tested. Suppose, as in this case, the EAW does not address retrial-entitlement at all. Suppose, there is before the court, material which proves to the satisfaction of the court – which could even be material emanating from

the appellant – that the appellant was convicted on, say, 1 June 2015. Suppose, then, the respondent supplies by way of further information a document issued by the Ministry of Justice, duly authenticated, which convincingly and clearly describes the legal entitlement of all persons convicted after, say, 1 January 2015, setting out how those entitlements are embodied in a domestic statute and have been interpreted by the state’s highest court. Mr Henley’s argument is that, no matter how compelling, straightforward, and plainly reliable that information is, the requested state court would not be able to receive it and treat it as filling the lacuna. And that would not be because the court, in that situation, would be embarking on an inapt enquiry assessing the content of foreign law. Rather, it is because the information – notwithstanding its clear reliability and decisive content – would have to be rejected, and required to be replaced by a document directly issued by the judicial authority and directly referring to the case of the individual.

38. I cannot accept that this is the law. It is a misreading of OG and PI to suggest that the Luxembourg court was there recognising the necessity that all relevant information emanate directly from a judicial authority offering guarantees of independence. That case was squarely concerned with the meaning of issuing judicial authority for the purposes of article 6 of the Framework Decision. The independence rationale supporting the reasoning of the Court squarely related to the function of issuing of the EAW. That is squarely what paragraphs 73 and 74 of that judgment are describing, as is paragraph 46 which describes the relevance of the principle of ‘mutual recognition’ in the context of the issuing of the arrest warrant as a judicial decision. In other words, it is the act of pursuit of the particular named individual, through a judicial warrant, which requires to be a judicial act performed by an appropriate judicial authority. The discussion in the case is not about further guarantees, where this has happened, relating to the supply of information; still less about information which fills a gap and is provided pursuant to Article 15(2), or for that matter (3). There is no direct and inalienable link between judicial independence guarantee, required as to the issue of the warrant for the pursuit of the extradition of a specified individual, and a judicial independence guarantee as to the source or specificity of information in support of such a decision.
39. None of the three domestic decisions cited to me for the purposes of this appeal, in my judgment, assist Mr Henley’s argument. Cretu is a case about whether statements made by the issuing judicial authority in an EAW sufficed to discharge the onus of satisfying the Court in the UK as to the matters which those statements address. This is a classic example of what is sufficient not being misread as being what is necessary. The Divisional Court was explaining that, if the issuing judicial authority has made a clear and unambiguous statement in an EAW referring to the case of the individual relating to retrial-entitlement, that can in principle be taken to be sufficient to discharge the onus; and that it is not then necessary or appropriate for the court to undertake an interrogation or enquiry investigating the matters described by the judicial authority on the face of the warrant. The fact that it can be sufficient for the judicial authority to make a statement on the face of the EAW, does not begin to support the proposition that it is necessary for any reliable gap-filling statement to emanate directly from the judicial authority, and be referable to the case of the individual. Cretu was not addressing that point. The case of Alexander was addressing that gap-filling point. But nothing in Alexander states or, as I read it, suggests that gap-filling information must and can only emanate directly from the issuing judicial

authority, or be directly referential to the case of the individual. Nor does the case of Szatkowski support Mr Henley. Indeed, in the discussion in that case of the position where the UK court is considering evidence where an EAW is ambiguous or confused or omit to make a relevant statement at all, the position is described as being one in which: “it is open to the court considering request to conduct its own assessment... on the evidence before it...”

40. For these reasons, I do not accept propositions 1 and 2 advanced by Mr Henley. The correct position, in my judgment, is that questions and considerations as to the source of information, and the generality or specificity of its content, will all be relevant matters when the court considers what weight and reliance it can place on the evidence; but that there is no rigid legal precondition which mandates the exclusion or rejection of material on the basis that it does not directly emanate from the issuing judicial authority, or that it does not specifically refer to the case of the individual.
41. There are two footnotes to the analysis in relation to Mr Henley’s propositions 1 and 2. The first footnote concerns Mr Hoskins’s argument that, even if Mr Henley were right as to the retrial-entitlement ingredients in Article 4 of the Framework Decision , the prosecution-burden ingredient would still fall outside the ambit of his 2 propositions . The reason for that, given by Mr Hoskins, is that the source of the prosecution-burden ingredient is not the express provision of Article 4a, but rather the external influence in the interpretation and application of that provision by article 6 of the ECHR (and perhaps the equivalent provision in the EU Charter of Fundamental Rights). I would have found against Mr Hoskins on this point, had it arisen. do not accept that the ECHR article 6 origin and influence would have been a reason to exclude the prosecution-burden ingredient from Mr Henley’s analysis as to necessary source and nature of lacuna-filling information. In principle, in my judgment, the influence of ECHR article 6 serves to produce an article 6-compliant interpretation of the retrial-entitlement. That then forms part of the true content of Article 4, properly interpreted. It, in turn, informs the principle of “conforming interpretation” for the purposes of the interpretation and application of the domestic 2003 Act. That approach, in my judgment, is right in principle. But it is also clearly supported by authority: it suffices to refer to Cretu at paragraphs 30 and 34 ii, and to Szatkowski at paragraph 33. So, there would be no escape from Mr Henley’s analysis, were it correct.
42. The second footnote is this. Mr Hoskins submitted that, even if Mr Henley were right that a document must in law be referential to the case of the individual whose extradition is sought, the MOJ letter in the present case was capable of meeting that requirement. Mr Hoskins conceded that the MOJ letter would not have met the other requirement, namely that it emanate from the issuing judicial authority. I cannot accept that the MOJ letter is a document referable to this individual case. It does not purport on its face to describe the position in the present case. As I shall explain further below, its nature and content is effectively an ‘essay’ on the law, including three versions of the legislation, applicable at different times including with transitional arrangements described in the ‘essay’. A substantial portion of the essay addresses the position of those convicted prior to 17 May 2014. Neither the date of the document nor the addressee shows it to be a document referable specifically to the appellant in this case. It is impossible, in my judgment, looking at the content of that letter to regard it as being a description of the law applicable specifically to the

appellant's case. His trial was 23rd of April 2015. A document which intended to assist a judicial authority in the UK by describing the position applicable to an individual case would, in my judgment, have referred to the individual case and then describe the law applicable to it, not provided a general 'essay' about the legislation and its applicability in different classes of case.

The Gap-Filling Information: A Sustainable Basis?

43. Having rejected Mr Henley's first and second propositions, I turned to his third proposition. Mr Henley submits that the PPO letter, the MOJ letter and the controversial emails did not, and do not, constitute material capable of supporting an adverse conclusion on question (iii) (retrial entitlement). He says there is not, as it was put Szatkowski at paragraph 28, a "sustainable basis" for the judge to be satisfied as to any, still less all, of the three necessary ingredients of retrial-entitlement, remembering always that the onus was on the respondent to satisfy the court, on each ingredient, and to the criminal standard.
44. I can deal first with the applicable law. Mr Henley submitted that it was not clear from the further information which of the various versions of the key provision of Italian legislation – article 175 of the code of criminal procedure – described in the MOJ letter, three versions of the provision then being annexed to that letter, was the version being said to be applicable to the appellant's case. On this point, I accept the submissions of Mr Hoskins. A careful reading of the MOJ letter does in my judgment enable the reader clearly to identify three versions of article 175 of the code of criminal procedure. The first of these is described as the original version. The second is described as the version of article 175 as amended on 22 April 2005. The third is described as the "new" provisions introduced on 28 April 2014. The MOJ letter explains that these "new" provisions, the 28 April 2014 law, came into force on 17 May 2014. It explains that the "earlier legislation" applies to defendants "convicted by judgment of first instance before 17 May 2014". Mr Hoskins submits that it is clear that it is the "new" version of article 175, described as such in the annex to the letter, which must govern the appellant's case given that his trial was 23 April 2015 and his sentence became final on 14 May 2015. I accept that submission.
45. I deal next with the prospective running of time ingredient. Mr Henley submitted that, in the case of each of the three ingredients for retrial-entitlement, the further information fails to provide an evidential picture capable of sustaining an adverse conclusion. So far as concerns the prospective running of time ingredient, he is in my judgment wrong. The PPO letter, emanating directly from the public prosecutor's office and written specifically by reference to the appellant's case, appears promising on this point. It describes "the time limit to appeal against a judgment of conviction rendered in absentia" as running "from the knowledge of the order". But it goes on to describe a decision of the Court of Cassation dated 29 January 2018, about a fugitive convicted in absentia whose court-appointed lawyer had appealed against the conviction. The court is described as having decided in that case that, it being the case that the fugitive "did not have actual knowledge of the trial against him", he was "entitled to the restoration of the deadline to appeal" notwithstanding the previous pursuit of an appeal against conviction by the court-appointed lawyer. That is helpful so far as the prospective running of time ingredient is concerned. But I would not have regarded it – standing alone – as sufficiently clear to be capable of supporting a sustainable conclusion that the time for a retrial appeal necessarily always runs

prospectively from the date of extradition surrender. I would have expected to see material by way of a description of the provisions of article 175 itself, in order to see what provisions the court of cassation had been applying, to the circumstances of a fugitive whose court-appointed lawyer had previously appealed. The MOJ letter, which I have described as being in effect an ‘essay’ regarding the various versions of article 175 of the code of criminal procedure, does – in my judgment – provide proper support for a finding that the prospective running of time ingredient is established. The annex to the MOJ letter sets out the 3 versions of article 175. From this, it can be seen that the intermediate version (22 April 2005) involved the introduction of a new “paragraph 2.bis”. That provision states in terms what the time limit is for seeking leave to lodge an out of time appeal. It states: “In case of an incoming international extradition, the term for submitting a request starts on the date of surrender of the convicted person”. That provision is repeated in the “new” version of article 175 (28 April 2014, taking effect from 17 May 2014). The main body of the letter says this: “In case of an extradition procedure (which can certainly be put at the same level as a European arrest warrant), however, the term to lodge the application starts when the convicted person is surrendered”. Given that it is known, from the MOJ letter, that the Italian courts have held that right to be applicable to a person convicted in absence, even if their court-appointed lawyer pursued an appeal at the time, this evidence – read as a whole – provides a sound and secure basis, in my judgment, for the conclusion that the prospective running of time ingredient is met. As the judge put it: “he is entitled to exercise the right of appeal within 30 days of his extradition on the EAW”. There was a sustainable basis for that conclusion by the judge and there is no basis for interfering with it on appeal.

46. At this point, I turn to deal with the controversial emails. Mr Hoskins accepted that the only one of the three ingredients to which the content of the controversial emails could be regarded as providing any assistance was the prospective running of time ingredient. It follows that the judge could only have regarded the controversial emails as being of any reinforcing support so far as the prospective running of time ingredient was concerned, that ingredient already having proper evidential support from the PPO letter and the MOJ letter. Like the judge, and on the only point to which they are capable of assisting, I have concluded that the issue could properly be resolved by the other two categories of document. That means the controversial emails, put forward by the respondent, were and remain incapable of playing any material role in this case. I would put them to one side. On my reading of the judgment, that is what the judge did. If it mattered, which it does not, I would in any event not have placed reliance on them. They are not duly authenticated documents for the purposes of section 202. They could be admitted as unauthenticated documents pursuant to section 202(5). They are very unsatisfactory in their nature, at least as presented to me. They came before me as an edited word document; the text had evidently been blocked and pasted into that document from some other source, with other content deleted and headings added. Mr Hoskins was unable to identify the writer of the emails, or the dates on which they had been written, or to provide the communications to which they were a response. I do not know, and am not going to speculate, as to why. Had it mattered, and had it been a question of the admission of fresh evidence on this appeal, I would have refused permission to rely on this material.

47. So far, on Mr Henley's third proposition, I have dealt with the prospective running of time ingredient. Turning to the other two ingredients, the PPO letter in my judgment went and goes nowhere. It says nothing about the evidence-adducing ingredient. It refers to the right to pursue an appeal in the case of an individual "who did not have actual knowledge of the trial against him", but it says nothing about whether the burden of proving deliberate absence from trial rests on the prosecution or whether any burden of disproving it rests on the individual. Mr Hoskins, rightly, did not submit that the PPO letter is capable of supporting a conclusion in the respondent's favour on either the evidence adducing ingredient or the prosecution-burden ingredient. On those, the MOJ letter is the only show in town.
48. I accepted Mr Hoskins about the MOJ letter so far as concerns the law applicable to the appellant's case, and so far as concerns the prospective running of time ingredient. Mr Henley submits that the evidence-adducing ingredient and prosecution-burden ingredient do not find any clarity of support so as to be a sustainable basis: one capable of underpinning a sustainable conclusion.
49. As I have said, the MOJ letter annexes the provisions of article 175. So far as the evidence-adducing ingredient is concerned, I was shown nothing in the text of article 175 of the code of criminal procedure itself which would support a sustainable conclusion that this ingredient is satisfied. Mr Hoskins submits that the answer is to be found in a passage in the middle of the MOJ letter. That passage describes the "instrument of out of time appeals" as being an instrument which "guarantees that, after having been granted leave to appeal out of time, the convicted person himself may once again call evidence already court during the first instance trial, as well as call new evidence under the already mentioned article 603, paragraph 4, of the code of criminal procedure..." If it is the case that the "instrument" is one which "guarantees" the evidence-adducing ingredient, the reader is immediately wondering where that guarantee is to be found on the face of that instrument. The obvious answer would seem to be to look to article 603 paragraph 4 to which express reference is being made. Earlier on the same page the writer of the MOJ letter describes the position under article 603 paragraph 4, as follows: "A defendant shall also be entitled to a new trial hearing for the taking of evidence under article 603, paragraph 4, of the code of criminal procedure". The fact that that sentence follows immediately after the sentence describing the prospective running of time ingredient is promising.
50. However, what the writer of the 'essay' says about article 603, paragraph 4 is this: "This rule sets forth that: 'the court shall also order a new trial hearing for the taking of evidence when the defendant, in absentia in the first instance trial, so requests and proves that he could not be present for fortuitous events or force majeure or because he had no knowledge of the writ of summons, as long as the said circumstances not through fault of his own or, when the writ of summons for the first instance trial was served on defence counsel in the cases referred to in articles 159, 161, paragraph 4, and 169, and defendant did not voluntarily elude knowledge of the proceedings'". The phrase "the defendant ... proves ..." is unmistakable. As I put to Mr Hoskins, the fundamental difficulty with relying on the passages which he emphasises, in order to provide support for the respondent's position as to the evidence-adducing ingredient, is that those same passages then undermine the respondent's position on the prosecution-burden ingredient.

51. The MOJ letter is detailed and dense. It is not a document which is always easy to follow. But the reader's attention is being drawn to a rule which the reader is also told, on its face, provides for the evidence-adducing ingredient "when the defendant... proves..." that he was not voluntarily absent. In this way, the very passages, invoked by Mr Hoskins to support his position on the evidence-adducing ingredient, come at the cost of undermining his position on the prosecution-burden ingredient.
52. There are many and various references within the MOJ letter to other phrases which appear to indicate that the onus can be differently placed or different in nature under Italian law. I was able to pick out passages in which the writer of the MOJ letter speaks of situations where "the defendant shows that his absence was due to lack of knowledge of the proceedings through no fault of his own"; "when the defendant proves that he was absent because he had no knowledge of the first instance trial through no fault of his own"; "when he proves that his absence was caused by his lack of knowledge of the trial through no fault of his own"; where "the instrument on out of time appeals ... exempts the convicted person from the burden of proving that he did not have time the effective knowledge of the proceedings and/or the relevant concluding decision determining... a sort of presumption of a lack of knowledge, which the Judicial Authority can counter by checking the case file to find evidence of the convicted person's effective knowledge"; where the defendant can "ask leave to file and out of time appeal, provided the competent judicial authority does not find evidence in the case file that the convicted person/applicant had effective knowledge of the proceedings and/or the judgment, or voluntarily waived appealing against the same judgment". Finally, reference is made to cases covered by the original article 175, where it is said that the effect of article 6 ECHR "means that the burden could/should be on the judicial authority of finding in the case file of the proceedings decisive evidence that the person convicted in absentia had effective and timely knowledge of the proceedings and/or the judgment; or decisive evidence that the person convicted in absentia voluntarily decided not to file an appeal against the conviction". The language of "could", together with the "should", is striking.
53. As requested by the parties, I pre-read the MOJ letter in my preparation for the hearing of this appeal. I read passages of it again, during the hearing, with the assistance of Mr Hoskins making submissions as to what he said it meant and what passages were significant and applicable. I have re-read it for the purposes of my post-hearing deliberations and in writing this judgment. I have found it impossible to identify within the letter a clear and reliable statement of the applicable legal position, capable of demonstrating that the evidence-adducing ingredient and prosecution-burden ingredients are each applicable entitlements in the appellant's case. In the end, what matters is whether the judge made sustainable findings, open to him, on this evidence. The judge expressed himself as satisfied, on the basis of the material. He did not, however, describe the evidence-adducing ingredient at all. As to the prosecution-onus ingredient, the judge said: "It appears to me to be clear from the further information supplied that the burden is not on the [requested person] to disprove the team knew of the proceedings. That burden lies on the [requesting judicial authority]". The judge did not, however, explain from what passage or passages in what document or documents he had drawn that conclusion. He did not link the prosecution-onus ingredient, or any passage on it, to the evidence-inducing ingredient, or any passage on it. I have been unable, notwithstanding Mr Hoskins's

assistance, to identify what the passage or passages are that supply the evidential platform for a sustainable finding that the respondent has discharged the onus, to the criminal standard, of establishing the evidence-adducing ingredient, together with the prosecution-burden ingredient, of the retrial-entitlement.

54. Indeed, the very exercise of having to interpret what is being communicated, as relevant for the purposes of an individual case, by a general ‘essay’-style description of the various emanations of article 175 of the code of criminal procedure, has felt very much like embarking on the sort of judicial investigation, into the meaning and effect of foreign law, which is supposed to be rendered unnecessary and inappropriate by the provision of clear and reliable further information. Extradition cases, time and again, refer to the confidence, trust and respect which the UK court properly has for what it is told by the authorities of the requesting state. A key component in that framework of confidence, trust and respect is that the information provided is clear and intelligible. If it is not information referential to the case of the individual, then it must be sufficiently clear that the extradition court can, with confidence, join the dots for itself.
55. It would not be unfair to say that the respondent has brought this problem on itself. In the first place it will be recalled that the respondent did not even take the retrial-entitlement point (question (iii)), even as a fallback at the original hearing. The respondent took and advanced the point only when prompted by the judge, and when given the opportunity to provide further information and submissions at a reconvened oral hearing. Secondly, that was a moment for clarity and focus. It is very difficult to see why the respondent was unable to supply a clear, focused and reliable answer. There was no clear and comprehensive answer which focused on the present case. Thirdly, when the matter was the subject of an order granting permission to appeal on 20 January 2020, the respondent – alongside the respondent’s notice that it ought to have filed – could, had it wished to do so, have sought to put forward on this appeal a clear and focused piece of reliable fresh evidence answering what ought in truth to be a straightforward question. The approach to a respondent adducing fresh evidence on an extradition appeal is more relaxed than that which is applicable to an appellant: see FK v Germany [2017] EWHC 2160 (Admin) at paragraphs 38-40. One reason that the courts have given for this is that it is better that the appellate court should have from the respondent an accurate evidential position, than that “an EAW is discharged on the basis of some defect that could be cured by the provision of further information, only to be reissued with the information included” (FK at paragraph 38). A respondent who does not take the opportunities available to it to supply clear and reliable evidence can hardly complain if what follows is discharge.

Article 8

56. At the hearing before the judge, the appellant advanced an ECHR article 8 argument, contending that extradition would be a disproportionate interference with article 8 rights to private and family life. Permission to appeal was refused on that ground by Johnson J. The appellant renewed his application for permission to appeal on the article 8 grounds, that renewed application being listed to be heard at the same time as the substantive appeal on the section 20 ground. Mr Henley made very brief submissions in his skeleton argument on the article 8 ground, and even briefer submissions orally. In short, reliance is placed on the lapse of time since the offending in November 2011, the fact that the appellant has been settled in the UK since 2012

and the fact that the sentence in respect of which extradition is sought is 15 months. As the judge explained, the appellant's wife is the main breadwinner in the house and their daughter is aged 19, is a student and has a part-time job. The judge carried out the necessary balancing exercise, including the recommended balance sheet approach. Johnson J could see no reasonably arguable basis for overturning the article 8 finding of the judge, and nor can I. The application for permission to appeal on the article 8 ground is refused.

Conclusion

57. For the reasons given above, on the section 20 ground on which Johnson J granted permission to appeal, this appeal is allowed.