Case No: CO/5226/2016

Neutral Citation Number: [2018] EWHC 269 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2018

Before:

SIR STEPHEN SILBER
(Sitting as a Judge of the High Court)

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Between:

	Ovidu TICU	**Appellant**
	- and -	
	TRIBUNALUL BACAU (ROMANIA)	**Respondent**

- -
- -

Adam Payter (instructed by **Kingsley Napley LlP**) for the **Appellant**
Julia Farrant (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 1 February 2018
Further written submissions served on 5 February 2018

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Judgment**Sir Stephen Silber:**

Introduction

1.Ovidiu Ticu ("the Appellant") appeals against an order made by District Judge Grant on 7th October 2016 by which he ordered the Appellant's extradition pursuant to a conviction EAW issued by Tribunalul Bacau in Romania ("the Respondent") on 29th February 2016 and certified by the National Crime Agency on 9th March 2016. The Appellant is

wanted to serve a sentence of 7 years' imprisonment for tax evasion.

2. The Appellant is now only pursuing one ground of appeal which is that the District Judge was wrong to find that the Appellant was deliberately absent from his trial in accordance with section 20(3) of the Extradition Act 2003 ("the 2003 Act") and that he should be discharged as he was not entitled to a retrial in Romania. His alternative case was that even if the Appellant was deliberately absent, he should have been discharged on account of the reasons for his absence and the want of a right to retrial in accordance with section 21(2) of the Act and Article 5 of the European Convention on Human Rights ("ECHR"). The Respondent's case is that the District Judge was correct to order extradition and that the appeal should be dismissed.

The Judgment of the District Judge

3. The findings of the District Judge were that:

a) The Appellant's evidence was that he became involved with a Mr. Relu, who asked the Appellant to assist with his business of importing cars; with the Appellant acting as an agent for a company called Loxam. The Appellant said that it transpired that the vehicles purchased on behalf of Loxam were not registered in the company name and that neither VAT nor tax was paid on the profits from the resale of the vehicles.

b) The Appellant had said in evidence that he was interviewed by the police in 2008 in relation to non-payment of VAT. The Appellant said that he was never told about charges but that "we understood all of us what was done was illegal… Me and all the other witnesses decided that the money should be paid back" (page 8).

c) The Appellant said in evidence that he had paid €5000 to his solicitor Codrin Andoniu, a criminal solicitor, and that there were €81,000 owing to the tax authorities and "his one-third share of that liability was €27,000". According to the Appellant, "Mr Andoniu assured him that he would not have to make any more payments after that" (page 8).

d) The Appellant said that "nothing happened until December 2014 when everyone said he [the Appellant] was the person who was lying and that they were innocent" (page 8). The Appellant said that "he had not contacted the police, the prosecutor or Mr Andoniu between 2010 and 2014" (page 9). He said that "after he heard about the court case in December 2014 he contacted Mr. Andoniu on Facebook" and that "Mr Andoniu told him that 'there is a court case on 18th December'". The

Appellant said that he "replied 'I am sure that I will not attend, is it important that I should be there?'" (page 8).

e) The District Judge stated that the Appellant "made a surprising decision not to travel to Romania in December 2014 when he was informed of the hearing on 18 December", and that "it was also surprising that he made no enquiries about the progress of his case from December 2014 until May 2015 when he claims he discovered that he had been convicted and sentenced" (page 10).

f) The District Judge "treated what [the Appellant] said about his state of knowledge of the court proceedings after December 2014 with considerable caution" (page 11).

g) He noted that "what is clear from the documents is that successful applications for adjournments were made on 27 January 2015, 24 February 2015 and 24 March 2015" and that "it is difficult to believe that those applications were made without instruction and that the [Appellant] remained oblivious to the progress of the criminal proceedings in early 2015" (page 11).

h) The District Judge "concluded from hearing [the Appellant's] evidence that when [the Appellant] learnt in December 2014 that his trial was on foot, he should have immediately taken an active part in that trial" and that "[f]urther, [the Appellant] should have taken steps to ensure that all procedural steps that had taken place were challenged as [the Appellant's Romanian law expert] suggested that was he was entitled to do including challenging any evidence taken by the court" (pages 12-13).

i) According to the District Judge, "there were hearings on 28 October 2014, 25 November 2014 and 18 December 2014 at which evidence was heard, [the Appellant] was not present but he was represented by the duty solicitor" (page 16).

j) He also found that the Appellant "instructed his lawyer, Codrin Andoniu to represent him in the proceedings" and this lawyer "instructed his assistant Ms. Andreea Amarinoiaie [who is a qualified solicitor] to attend the hearings in his place on 27 January 2015, 24 February 2015 and 24 March 2015". According to the District Judge, "although [the Appellant] states that he was not aware that Mr Andoniu's assistant had been asked to attend court in his place that is apparently a matter which [the Appellant] could complain about to the Romanian Bar Association but it is not a matter that entitles [the Appellant] to challenge the fact that he was legally represented at those three hearings or that the standard of

representation fell below the standard of representation he was entitled to expect" (page 16).

k) The District Judge concluded that "[h]aving considered both the written evidence and the oral evidence, I find that [the Appellant] knew of the proceedings in Romania at the latest on or before 12 December 2004 (the date when text messages with Mr Antoniou [sic] were exchanged) but chose not to return to Romania to participate in those proceedings or for the subsequent appeals and he was legally represented throughout those proceedings" (page 17). I interject that this conclusion is challenged by the Appellant at the present hearing.

l) He also concluded, in dismissing the section 20 challenge, that "the [Appellant] was deliberately absent from the trial certainly from 18 December 2014 and that he was represented at his trial with effect from that date" and that "[the Appellant] was in theory able to challenge all the evidence received by the court prior to 18 December 2014 according to Mr Mares [the expert Romanian lawyer] and he continued to be represented while the trial continued and throughout the appeal process" (page 17). I add that this conclusion is also being challenged by the Appellant at the present hearing.

Statutory Provisions

4. This appeal requires consideration of section 20 of the 2003 Act and article 4(a) of the 2002 Framework Decision 2002/584/JHA of 13th June 2002 introduced by way of amendment by Council Framework Decision 2009/299/JHA ["the 2009 Framework Decision"].

5. Section 20 of the 2003 Act provides that:

> *"Case where person has been convicted*
>
> *(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."

6. Section 21 of the 2003 Act, which is referred to in section 20, provides that:

"Person unlawfully at large: human rights

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

(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.

7. Section 20 of the Act must be construed in the light of the 2009 Framework Decision: *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin) per Burnett LJ (as he then was) at [13]. Article 4a of the 2009 Framework Decision provides that the executing judicial authority may refuse to execute a conviction EAW if the requested person was absent from his trial unless under national law one of four exceptions

applies. These exceptions are not an exhaustive list: *The Court in Mures and Others v Zagrean and Others* [2016] EWHC 2786 (Admin) at [78]. The relevant exception in Article 4a(1)(b) is as follows:

> *"Being aware of the scheduled trial, he [the Requested Person] had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial."*

The Grounds of Appeal

8. Mr Adam Payter, counsel for the Appellant, contends that the appeal should be allowed because the District Judge:

   i) erred in holding that the Appellant was represented throughout the criminal proceedings and therefore effectively present;

   ii) erred in making the overall finding that the Appellant deliberately absented himself from the trial in accordance with section 20(3); and

   iii) should have concluded that the Appellant had not waived his right to attend the trial even if the District Judge was right to conclude that Appellant was deliberately absent from the trial.

Was the Appellant correctly regarded as represented throughout the criminal proceedings and therefore effectively present?

9. Mr Payter contends that the District Judge erred in finding that the Appellant was represented throughout the criminal proceedings and therefore effectively present.

10. Mr Payter submits that in respect of the hearing on 18th December 2014, the District Judge was wrong to conclude that the Appellant was represented by a lawyer of his choice because the mandate and the court records show that a substitute lawyer represented him from the 27th January 2015 hearing onwards. The significance of this is, according to Mr. Payter, that the lawyer mandated by the Appellant had to be the same lawyer who represented him at the trial for a defendant to be considered present pursuant to the Framework Decision. This authority for this submission is said to be Article 4a (1) (b) of the Framework Decision, which I have set out in paragraph 7 above.

11. He points out that at the hearing on 27th January 2015, the Appellant was represented by

Amarinoiaie Andreea, a solicitor who the District Judge after hearing evidence said was Mr Andoniu's "assistant". She is also described as Mr Andoniu's assistant by Mr Andoniu's present solicitor, Stefania Irmia. In answer to a question from me at the hearing of this appeal, Mr. Payter said that Amarinoiaie Andreea worked in the same law firm as Mr Andoniu, but after that hearing he wrote to tell me that that information was incorrect as she worked in a different firm. I will assume that this is correct but what is important is the statement that the court record describes Amarinoiaie Andreea as "the solicitor… replacing the chosen solicitor Mr Andoniu Codrin were [sic] present in court". There is a document of 27th January 2015 which shows that Mr Andoniu "empowers" Amarinoiaie Andreea in what is described as a "Document for Substitution" and there is also an undated document which is translated as a "Power of Attorney" for the appointment of Mr Andoniu by the Appellant in "the contract for legal representation".

12. At the hearing on 24th February 2015, it was stated in the court records that "the solicitor Amarinoiaie Andreea, replacing the chosen solicitor, Andoniu Codrin, was present in court". Similar wording was in the court record for 24th March 2015 at which the hearing was adjourned at Amarinoiaie Andreea's request as "[r]egarding the fact that the defendant's counsel has a substitution function, the Court shall adjourn the pronouncement for the main counsel to file written submissions".

13. Mr. Payter stresses that the wording of Article 4a (1) (b) of the Framework Decision which provides that the person who defended the defendant at trial must be the same person who had received a defendant's mandate to defend him.

14. The response of Ms Farrant was that the District Judge was correct to find that the Appellant was represented and so effectively present from 18th December 2004 onwards in the light of statements by Burnett LJ in *Cretu* [35] which show first, that the executing state is bound to accept what is stated in the EAW, and second, that it should not investigate whether the statements in it are correct. Ms Farrant relies on Burnett LJ' s statements in *Cretu* [35] (with emphasis added) that:

> *"35…The issue at the extradition hearing will be whether the EAW contains the necessary statement. Article 4a is drafted to require surrender if the European arrest warrant states that the person, in accordance with the procedural law of the issuing Member State, falls within one of the four exceptions. <u>It does not contemplate that the executing state will conduct an independent investigation into those matters</u>."*
>
> *[…]*
>
> *"The EAW system is based on mutual trust and confidence. Article 1 of the 2009 Framework Decision identifies improvement in mutual recognition of judicial decisions as one of its aims. It*

> *also contemplates surrender occurring very shortly after an EAW is issued and certified. To explore all the underlying facts would generate extensive satellite litigation and be inconsistent with the scheme of the Framework Decision. Article 4a provides additional procedural safeguards for a requested person beyond the provision it replaced in the original version of the Framework Decision, but it does not call for one Member State in any given case to explore the minutiae of what has occurred in the requesting Member State or to receive evidence about whether the statement in the EAW is accurate."*

15. Burnett LJ had previously explained at [34] that:

> *"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."*

16. The principles set out in *Cretu* were followed and upheld by the Divisional Court (Sharp LJ and Cranston J) in *The Court in Mures* at [77], having found that the CJEU had not altered the *Cretu* principles in its decision on 24 May 2016 of *Openbar Ministrie v Dworezeki* (C-108/16 PPU).

17. In the joint judgment in the matters of *Alexander v Public Prosecutor's Office*, *Marseille District Court of First Instance (France)* and *Bernedetto v Court of Palermo, Italy* [2017] EWHC 1392 (Admin) at [20], this Court held in respect of EAWs that "missing required matters may be supplied by way of further information and so provide a lawful basis for extradition". It is common ground that in the light of that decision, all the references in *Cretu* to the EAW should now be read as if they also included matters contained in the further information. The stark fact is that the scheme of the Framework Decision is that the requested state is entitled and obliged to regard statements in the EAW and the further information as correct and not to carry out any investigation into what occurred in the requesting state.

18. Against that background, Ms Farrant contends that the wording of the EAW and the further information show clearly that the Appellant was represented and present at the trial. She relies on Box D of the EAW, which provides that:

> *"YES, the person personally attended the lawsuit following which the sentence was given and he was assisted by his chosen attorney at law."*

19. Box E of the EAW states that the Appellant was "sued while missing" by means of an

indictment lodged on 24th April 2014.

20. Importantly and crucially, the factual position was explained more fully in the further information received from the Judicial Authority which clearly states that the Appellant "did not attend the trial but was represented by his chosen attorney at law before the court of first instance and the appeal court". In addition, the further information states that "[b]etween January 27 2015 and March 24 2015, when the debates took place before the court of first instance, [the Appellant] was represented by his chose [sic] attorney at law, Mr Andoniu Codrin".

21. These statements show that the Appellant was represented by his chosen lawyer and that he was therefore deemed present, particularly in the light of the observation of Burnett LJ in *Cretu* (supra) [34] that:

> *"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."*

22. I accept the submission of Ms Farrant that although the Appellant did not physically attend the trial, he was deemed present as he was represented by a lawyer of his choice. None of the submissions of Mr Payter show that this is incorrect.

23. In the light of that finding, it is unnecessary to reach a conclusion on Ms Farrant's further submission, which was not raised before the District Judge, and which was based on the fact that the Appellant accepts that he had lodged an appeal against his conviction using different lawyers while not attending the appeal hearings. Her submission is that the Appellant's obvious knowledge of the appeal proceedings together with the use of counsel to represent him might well show that the conditions of article 4a(1)(b) of the 2009 Framework Decision were satisfied especially as the EAW made it clear that the conviction only "became final" at the conclusion of the appeal. In addition, if the appeal procedure involves a fresh determination of the law and facts (as appears to be the case from the EAW and the evidence of the Appellant's lawyer, Ms Irimia) it is to be construed as "the trial resulting in the decision" for the purposes of article 4a of the 2009 Framework Decision.

Was the Appellant deliberately absent from his trial?

24. Mr. Payter submits that for a number of reasons the District Judge was wrong to conclude that the Appellant "was deliberately absent from his trial certainly from 18 December 2014 and that he was represented at the trial with effect from that date". He contends that the Appellant was not deliberately absent from the subsequent hearings in December 2014 because he was informed of it unofficially a few days before the hearing and because he then accepted erroneous advice not to attend. So it is said by Mr Payter

that he was not deliberately absent from at least two of those four hearings at which five of the eleven prosecution witnesses were called. I am unable to accept this submission for two reasons.

25. First, there is no finding that the Appellant was given advice or information (whether erroneous or otherwise) not to attend the hearings in December 2014 or indeed any of the hearings.

26. Second, even if the Appellant had received erroneous advice or information that he should not attend these hearings that would not mean that he was not or could not be deliberately absent. Although for some years there was some uncertainty about the circumstances in which a person could be regarded as being "deliberately absent", it is now clear and it is not now disputed that "a person was deliberately absent if he made a conscious decision not to attend even if that conscious decision was based on erroneous advice or information from his lawyer" (per Aikens LJ in *Mohammed Elashmawy v Court of Brescia, Italy* [2015] EWHC 28 (Admin) [35]). This was adopting the approach of the Divisional Court in *Atkinson v Supreme Court of Cyprus* [2010] 1 WLR 570 [34]. Therefore, even if the Appellant's absence was a result of erroneous advice, this was will not prevent his absence from the court being regarded as "deliberate".

27. Mr Payter also complains that the District Judge was wrong because the Appellant was not deliberately absent from the hearing in November 2014. His absence from that hearing is not disputed, but there is substantial material to show that the Appellant had no interest in the proceedings. The District Judge did not attach any importance to this absence as he focused on the Appellant's absence on and after 18th December 2014. This is not surprising because there was evidence from Mr Mihai Mares, who is a Romanian lawyer and who explained that when a lawyer is appointed in a Romanian trial, that lawyer can challenge everything that has gone before. The District Judge explained, correctly in my view, that when in December 2014, the Appellant learnt that "his trial was on foot, he should have immediately taken an active part in the trial [and in the light of Mr. Mares' advice] taken steps to ensure that all procedural steps that had taken place up to that time were challenged". The Appellant's failure to do so amounted to a deliberate decision not to participate in the trial, especially as the District Judge stated of the Appellant that he "made a surprising decision not to travel to Romania in December 2014 when he was informed of the hearing on 18 December".

28. Mr Payter contends that that the District Judge also erred as he did not say whether the Appellant was deliberately absent from his trial as a whole. The District Judge did say that the Appellant was "deliberately absent from his trial certainly from 18 December 2014 and that he was represented at his trial with effect from that date" and that "it was also surprising that he made no enquiries about the progress of his case from December 2014 until May 2015 when he discovered he had been convicted and sentenced". I construe these statements as meaning that the Appellant was deliberately absent for the whole trial. In any event, the failure of the Appellant to exercise his right to challenge

matters which had taken place at the trial before 18th December 2014, fortifies the conclusion that the Appellant took a deliberate decision not to participate in the trial especially as the District Judge found that the Appellant "was an intelligent and articulate witness".

29. I agree with Ms Farrant that there was ample evidence to support that conclusion that the Appellant was deliberately absent from the trial. First, there was the further information supplied by the Judicial Authority which states that before his trial began, the Appellant was heard in the "pre-proceedings process", that he "avoided the penal proceedings" and that "shortly after finding that penal charges had been brought against him… [the Appellant] left Romania".

30. Second, the Appellant's evidence supported the contention that he was aware of at least the possibility of criminal proceedings from an early stage; probably from 2007 because his evidence was that he had paid a criminal lawyer €5000 before leaving Romania for the UK in 2007. The Appellant's purpose in making this payment to a criminal lawyer must have been to ensure that he was represented at forthcoming trial.

31. Third, the Appellant had said in evidence that he was interviewed by the police in 2008 in relation to non-payment of VAT, and that "we understood all of us what was done was illegal".

32. Fourth, the Appellant stated that he later found out in 2014 that he was subject to criminal proceedings and when he contacted his lawyer in December 2014, he was informed of a hearing on 18th December 2014, which he chose not to attend. Fifth, the Appellant gave evidence of a message sent to his lawyer about this hearing in which he said in terms that "I am sure I will not attend."

33. Sixth, the Appellant accepted that he gave a mandate to that lawyer to represent him in the first instance proceedings between January and March 2015. Seventh, the District Judge disbelieved his evidence that he was not in touch with his lawyers in this period leading up to his conviction at first instance and this evidence of the Appellant has not been corroborated by his lawyers.

34. Finally, the District Judge made the perceptive observation that:

> *"it made no sense that [the Appellant] had apparently shown so little interest in the progress of his case despite the sums involved and the discovery in 2009 that Mr. Relu [who was one of his associates in the venture which led to the prosecution and conviction of the Appellant] had acted dishonestly and was not to be trusted. It must have been clear to [the Appellant] from then that he needed to take an active part in the criminal proceedings*

to protect himself from any possible shifting of blame from Mr. Relu to him and from the other prospective defendants to him bearing in mind the ease with which an absent defendant can be blamed for the troubles of those present in court."

35. I have concluded that the District Judge was entirely correct to conclude that the Appellant was deliberately absent from the trial certainly from 18th December 2014 when he was aware of it and when he could have challenged all the evidence adduced both before and after that date. None of the Appellant's submissions show any errors in that conclusion.

Should the District Judge have concluded that the Appellant had not waived his right to attend the trial even if that Appellant was deliberately absent from the trial?

36. Mr. Payter contends that even if the Appellant was deliberately absent at the hearing, the District Judge should still have concluded that he has not waived his right to attend the trial as prescribed by Article 6 of the ECHR.

37. His case is that the Appellant's failure to attend the trial was based on four matters. First, it is said that he was never given official notification of the trial hearing in November 2014 and unaware of it. As I have explained, he knew of the existence of the trial in December 2014 and he chose not to attend. So, it is very likely that he would not have attended in November 2014 if he had been told about the hearing. In any event, his lawyer instructed in December 2014 was entitled under Romanian procedure to challenge the limited evidence received by the court before then, but he or she did not do so. Consequently, the failure to give him official notification of the trial hearing in November 2014 has not prejudiced him and nor has the fact that he was unaware of it.

38. Second, Mr. Payter contends that the Appellant says that he had insufficient notice of the next hearing on 18th December 2014 following informal notification through the news and a friend. It is not said, let alone established, that if the Appellant had received proper notice he would have taken any part in the proceedings; especially as the evidence is that when he knew of the criminal prosecution against him, he chose not to return to Romania but instead to stay in the United Kingdom while he was represented in the Romanian criminal proceedings.

39. Mr. Payter's third point is that the Appellant acted on "erroneous and insufficient legal advice" in December 2014 and thereafter. This allegation is not particularized and therefore cannot be accepted. Mr. Payter's final point is that the Appellant was not represented by the lawyer he instructed. If that is right, I cannot understand why or how this caused the Appellant not to appear at trial. In any event, he can complain about that matter to the Romanian Bar Association (as the District Judge found). So, I reject each of the four points made by Mr Payter as justifying the decision of the Appellant not to

attend the trial.

40. The next step in the argument of Mr. Payter is that there would be great unfairness to the Appellant in the absence of a retrial. That submission fails to appreciate five very important factors. The first is that, as the District Judge explained, the Romanian judicial system has afforded the Appellant the opportunity of applying for a retrial "as it is required to do and unusually this application has apparently been pursued to the highest court in Romania prior to [the courts in this country] deciding whether to order extradition". The Supreme Court in Romania rejected the Appellant's application to reopen his criminal proceedings and according to the District Judge "it appears that there are no remaining avenues available to him in seeking a retrial".

41. Second, it is not suggested, let alone established, that there was not an adequate remedy available to the Appellant in Romania to seek a retrial. Third, it has not been shown that there was no case against the Appellant. Indeed, the Appellant in his evidence before the District Judge said that during his questioning by the police that "[w]e realized all of us what was done was illegal", that "[m]e and all the witnesses decided that the money should be paid back"; and that everyone else said that the Appellant was lying and that they were innocent.

42. Fourth, this is not a case where it has been alleged, let alone proved that the trial leading to the Appellant's conviction was unfair. Finally, Romania, as a signatory to the ECHR, can be presumed to ensure that Convention rights will be respected in the absence of contrary evidence; of which there is none.

43. I am quite satisfied that for all these reasons the Appellant's extradition would in the words of s. 21 (1) of the 2003 Act "be compatible with the Convention rights within the meaning of the Human Rights Act 1998" and so I must order the Appellant's extradition to Romania.

Conclusion

44. Notwithstanding the able submissions of Mr. Payter, the appeal has to be dismissed.