Lewicki v Preliminary Investigation Tribunal of Napoli, Italy

[2018] EWHC 1160 (Admin)

Queen's Bench Division (Divisional Court)

Sharp LJ and Sweeney J

Mark Summers QC and **Graeme L Hall** (instructed by **Neumans**) for the **Applicant**

Julian B Knowles QC and **Daniel Sternberg** (instructed by **CPS Extradition Unit**)

for the **Respondent**

Hearing dates: 23 February 2017

Final Written Submissions: 7 & 14 November 2017

Mr Justice Sweeney :

Introduction

1. The Applicant (who is now aged 45) applies, under the provisions of s.26 of the Extradition Act 2003, as amended ("the EA"), for leave to appeal against the decision of District Judge Zani ("the DJ") who, in the Westminster Magistrates' Court on 9 August 2016, ordered the extradition of the Applicant to Italy (a Part 1 territory) pursuant to an accusation European Arrest Warrant ("EAW") issued on 25 February 2010, and certified by the NCA on 23 June 2015, in relation to ten offences (one offence of criminal association in connection with tobacco smuggling, and nine substantive offences of tobacco smuggling) variously said to have been committed in the period between 2005 and 2010.

2. At the rolled-up hearing in this Court on 23 February 2017, the Applicant sought, and the Respondent resisted, the grant of leave to appeal and, if successful, the allowing of the appeal, on five broadly inter-related Grounds (which I have re-numbered for convenience) namely that:

(1) Notwithstanding the decision of the House of Lords in *Caldarelli v Court of Naples, Italy* ("*Caldarelli")* [2008] 1 W.L.R. 1724; [2008] UKHL 51 (which was said to be no longer good law in the light of article 4a of Framework Decision 2002/584/JHA, as inserted by Framework Decision 2009/299/JHA, or was otherwise wrongly decided) the EAW ought, given the Applicant's conviction in Italy on 22 October 2015 for the offence of criminal association, to have been (or be treated as having been) a conviction warrant, and therefore fell foul of s.2(2), (5) & (6) (as well as s.20) of the EA.

(2) In the alternative, if the EAW was correctly an accusation warrant, it was inadequately particularised, contrary to s.2(4)(c) of the EA and/or, because of the Applicant's acquittal of the nine substantive tobacco smuggling offences in Italy on 22 October 2015 (on limitation grounds), and by the application of *Spain v Murua* [2010] EWHC 2609 (Admin), as interpreted by the Supreme Court in *Zakrzewski v The Regional Court in Lodz, Poland* [2013] 1 W.L.R. 324, the DJ should have discharged him, and this Court was required to discharge him, in rela-

tion to those offences, the pursuit of which, and of the original time span of alleged offending (when the Italian proceedings showed it to be much shorter) amounted to an abuse of process.

(3) Surrender would be unjust and/or oppressive, contrary to s.14 of the EA.

(4) Surrender would breach Articles 5 & 6 of the ECHR, contrary to s.21A of the EA.

(5) Surrender would be an abuse of process.

3. A further Ground, that surrender would breach Article 8 of the ECHR, contrary to s.21A of the EA, was not pursued.

4. The issues in Ground 1 and (save for compliance with s.2(4)(c) of the EA) Ground 2 were not raised before the DJ. During the rolled-up hearing in this Court, the Applicant argued that there were four overall issues in the case, namely:

(1) Whether *Caldarelli* applied, and/or was good law.

(2) If so, whether the EAW now contained (if it ever did) an accurate description of the alleged conduct.

(3) Whether proceeding to conviction in absentia, whilst the Applicant was engaged in ongoing extradition proceedings abroad was Article 6 ECHR compliant, or otherwise abusive.

(4) If so, whether the Applicant has an unfettered right to a re-trial.

5. Judgment was reserved - with the parties subsequently providing, at the invitation of the Court, further submissions in writing as to the effect of the Extradition Act (Multiple Offences) Order 2003 (SI 2003/3150) ("the Multiple Offences Order").

6. Thereafter, judgment was stayed, by agreement, to await:

i) The decisions of the Court of Justice of the European Union ("the CJEU") in *Criminal Proceedings against Tupikas* ("*Tupikas"*) and *Criminal Proceedings against Zdziaszek* ("*Zdziaszek*") - as they were likely to involve analysis of the meaning and scope of article 4a of the Framework Decision, which could be significant in the resolution of Ground 1.

ii) The service of further written submissions from the parties in relation to the judgments in those cases.

7. On 10 August 2017, the CJEU gave judgment in both *Tupikas* [2017] 4 W.L.R. 188 and *Zdziaszek* [2017] 4 W.L.R. 189. It is a matter of considerable regret that, owing to administrative error which was not the fault of the parties, the Court did not receive the last of the consequent written submissions until mid-November 2017.

8. At all events, in a Further Note to the Court on behalf of the Applicant (which was re-served on 7 November 2017) it was submitted, in summary, that:

i) Given the decision of this Court in June 2017 in *Alexander v Marseille District Court of First Instance, France* [2018] QB 408 (Admin) (since endorsed in *Kirsanov v Viru County Court, Estonia* [2017] EWHC 2593 (Admin)) it was accepted that the rules concerning "*validity*" under s.2 of the EA had undergone a "*sea-change*" consequent upon the Supreme Court's ruling in *Goluchowski v District Court in Elbag* [2016] 1 W.L.R. 2665 (to which reference had been made in argument at the rolled-up hearing) and that, therefore, whether the EAW fell to be considered as an accusation warrant under s.2(4) of the EA, or as a conviction warrant under s.2(6), the

necessary details could be discerned from the further information supplied by the Respondent, and that accordingly *Alexander* was fatal to substantial parts of Grounds 1 and 2. Nonetheless, the Court was invited to formally rule on the issue.

ii) Although the decision in *Tupikas* did not directly address the situation in the instant case (i.e. the period after first instance judgment but before appeal), it was nevertheless accepted that the analysis by the CJEU of article 4a of the Framework Decision broadly reflected the *Caldarelli* approach to s.20 of the EA, in consequence of which the Applicant could no longer maintain the broad argument advanced in support of Ground 1 that *Caldarelli* was no longer good law.

iii) Nevertheless, there was a significant difference between the *Tupikas* approach and the *Caldarelli* approach (with the former being more nuanced than the latter) such that, applying the more nuanced *Tupikas* approach, article 4a applied to the Applicant's first instance conviction, hence he was finally convicted in his absence, not accused, and therefore s.20 applied and he should be discharged.

9. In its written Submissions in Response (dated 14 November 2017) the Respondent argued, amongst other things, that it was doubtful whether there was a difference in approach between *Caldarelli* and *Tupikas*, but that it was not necessary for this Court to resolve that issue in this case, as Italian law provided for an appeal containing the necessary guarantees in respect of a fair trial, and the Applicant (having not elected domicile in Italy) was still in time to pursue his right of an 'ordinary' appeal.

10. Since then the Respondent has drawn attention to the decision of this Court (differently constituted) in *Imre v District Court in Szolnok (Hungary)* [2018] EWHC 218 (Admin). In that case there was an accusation EAW, after the issue of which the Appellant was convicted in his absence, and had appealed. It was submitted on his behalf that:

(1) Further information provided by the Hungarian Court showed that he had been convicted in his absence at first instance, and that although he had a right of appeal it would not afford him (in particular) an opportunity to test the prosecution evidence which was adduced at the trial.

(2) Applying *Tupikas* (above) the decision at first instance had to be regarded as the final decision determining the Appellant's guilt.

(3) In the result, the Appellant was a convicted person and therefore the EAW, read with the further information, was defective and invalid.

(4) As a convicted person, the Appellant was entitled to the protection of s.20 of the EA, including the right to a full re-trial; or, in the alternative, that it would be contrary to his rights under Article 6 of the ECHR to extradite him.

11. In the result, the Court confirmed or decided, amongst other things, that:

(1) When further information is provided pursuant to article 15 of the Framework decision, it is not to be regarded as "*extraneous evidence*", and the EAW and the further information must be read together.

(2) The information provided by the Hungarian Court showed that there would be a full trial in the appellate court, and therefore (also proceeding on the basis that, as a Part 1 territory, Hungary would comply with its obligation under Article 6 of the ECHR) the Court rejected the premise which formed the starting point for the Appellant's arguments as to why he should be regarded as a convicted person.

(3) Whilst it had been argued, based on *Tupikas*, that a requested person who has been convicted in his absence at first instance, but who has exercised a right of appeal, must be regarded as convicted unless the appeal will be a full re-hearing of his case, *Tupikas* was not concerned at all with whether the requested person should be regarded as convicted or merely accused. In that case there was no doubt that *Tupikas* was convicted - the issue was whether, for the purpose of applying the tests relevant to extradition of a convicted person, the requested court should focus on the first instance decision or the appeal decision. Thus *Tupikas* had little or no bearing on the question of whether the Appellant was to be regarded as convicted or accused.

12. Finally, the Appellant has drawn attention to the decision of the Supreme Court on 23 March 2018 to grant permission to appeal in *Konecny v District Court Czech Republic* [2017] EWHC 2360 (Admin), and to the indication by the Supreme Court that it will require to be addressed as to the effect of s.20(5) of the EA (which is concerned with whether a person who has been convicted in their absence is entitled to a re-trial or, on appeal, to a review amounting to a re-trial). However, in my view, it is not appropriate to further delay the handing down of this judgment to await the outcome of the appeal to the Supreme Court in that case.

Background

13. The Applicant was born in Poland. He left Poland in 1993 and then lived in Italy for some years. Thereafter he returned (he says in 2007, after living in Belgium for some nine months) to live in Poland. He then came to this country in 2010, living in London for a few months and then moving to Blackburn - where he registered with the Accession State Worker Registration Scheme, and lived openly with his partner and their two children (now aged 9 and 6) until his arrest.

14. The EAW was issued by Preliminary Investigation Judge Capozzi of the Court of Naples on 25 February 2010, and included details of the provisions of Italian law alleged to have been infringed. Box B gave details of the preceding order for preliminary custody which had been issued (according to the supplementary information in Form A) in December 2009. Box C recorded that the maximum sentence for the offences on the EAW was 6 years' imprisonment. Box E set out the Italian penal provisions relating to the ten offences for which the Applicant was sought to stand trial. The EAW and Form A, between them, alleged the existence of a criminal cross-border organisation which operated in Italy and Poland. The Applicant's role was alleged to be that, with others, he promoted, set up, directed and organised the criminal organisation - the object of which was to carry out an indeterminate series of offences involving the smuggling of large quantities of foreign processed tobacco into Italy, thereby avoiding the payment of VAT. It was asserted, in particular, that the Applicant had been a permanent and continuative supplier of tobacco originating from outside Italy and destined for the markets of Naples. The nine substantive offences were all ones of smuggling foreign processed tobacco into Italy. The various offences were alleged to have been committed in Poland and Naples from December 2005 onwards, and were alleged to be ongoing at the time of the issue of the EAW in 2010. The Framework List of offences in the EAW was ticked for participation in a criminal organisation.

15. At some point during the preliminary investigations stage the Applicant was declared to be unlawfully at large. On 24 February 2011, the Preliminary Investigation Judge issued a decree ordering trial in the Court of Naples. Thereafter, various interim hearings took place. On 26 July 2011, the Applicant's court-appointed lawyer was notified of the decree of committal and, at a hearing on 3 October 2011, when the Applicant failed to appear, he was declared to be an absconder. On 30 May 2012 the trial hearing (which involved the Applicant and 33 other defendants) was "*declared open*", after which evidence was called or heard. The evidence against the Applicant, and its admissibility, was not challenged by the Applicant's

court-appointed lawyer. The trial panel changed on more than one occasion, and the final renewed trial, before the 6th Criminal Division of the Court of Naples, commenced on 21 January 2015. On 4 June 2015 the proceedings were declared closed. Closing submissions from the defence began on 18 June 2015.

16. The Applicant was arrested in Blackburn on 28 June 2015, and the following day the proceedings against him were formally opened in the Westminster Magistrates' Court. He was granted conditional bail. At that stage, and in ignorance of the Italian trial, the extradition hearing was fixed for 3 November 2015.

17. Meanwhile, the Italian trial continued, with further closing submissions for the defence on 9 July 2015 and 22 October 2015. Judgment was also pronounced on the latter date, and the Applicant was convicted of participating in a criminal organisation, but acquitted of the nine substantive offences (upon the basis that they were time-barred).

18. Thereafter, from 2 November 2015 onwards, the Italian Authorities provided various documents containing further information, as follows:

i) In a document dated 28 October 2015, the Public Prosecutor's Office attached to the Court of Naples indicated that:

a) The case against the Applicant in the Court of Naples 6th Criminal Division had concluded in a first instance judgment that had been delivered on 22 October 2015.

b) The Applicant had been convicted and sentenced to a term of 3 years 8 months' imprisonment, and had been ordered to pay court costs.

c) The panel of judges had reserved the right to file grounds for the decision within 90 days.

d) The Applicant had been declared to be unlawfully at large during the investigation stage of the case (having voluntarily eluded the enforcement of a precautionary measure ordered against him) and subsequently, in accordance with Italian law, documents had been served on his court-appointed lawyer.

e) As to the precautionary measure, information about the Applicant's whereabouts had been gathered at the material time, but he could not be found, and so it could not be enforced.

ii) In a Note dated 26 February 2016, the Court of Naples 6th Criminal Division confirmed that in the judgment of 22 October 2015 the Applicant had been convicted as being unlawfully at large for participation in a criminal association (Count B). The nine substantive offences of tobacco smuggling (Counts B1-5, 7, 11, 13 & 16) had all been dismissed as being time-barred by statute. It was said that any complaint that the Applicant's rights had been infringed would have to be challenged in the appropriate fora.

iii) In a document dated 9 March 2016, Judge Barbara Mendia (who was a member of the three-judge panel that had delivered the judgment on 22 October 2015) indicated, amongst other things, that:

a) The first trial hearing had been on 22 April 2011. The Applicant had been tried as being unlawfully at large, having failed to appear in court. A declaration of failure to appear at the trial had been made at a hearing on 3 October 2011 - following proper notification of the decree of committal to the Applicant's court-appointed lawyer on 26 July 2011. However, the decree declaring the Applicant unlawfully at large was not in the court's case file.

b) The Applicant had not been arrested or interviewed in Italy, nor was he on bail or requested not to leave Italy, nor had he been informed of the proceedings against him. There were no documents in the case file to show that the Applicant had been aware of the trial against him, and the Public Prosecutor had confirmed that the Applicant did not have a domicile, or an appointed defence lawyer of choice, and nor were any seizures against him documented.

c) The declaration that the Applicant had failed to appear in court was made before the coming into force of the law introducing trials *in absentia*, and no trial *in absentia* had been ordered against the Applicant at any time.

d) The chronology of the trial was included in the judgment of 22 October 2015. The records of the trial hearings after 25 June 2015 did not "*absolutely show*" that the court had been informed of the Applicant's arrest abroad (even though the trial had been followed by the Public Prosecutor in charge of the investigation), and nor were there any relevant documents in the case file.

e) The evidence of the Applicant's presence in Italy at the time of the commission of the offence resulted from telephone intercept evidence.

iv) In a document dated 10 March 2016, Judge Antonio Palumbo, the Presiding Judge of the 6th Criminal Division of the Court of Naples stated, amongst other things, that (if issued) the decree declaring that the Applicant was unlawfully at large was likely to be found in the Public Prosecutor's case file.

v) In another document dated 10 March 2016, Vincenzo Ranieri, the Deputy Public Prosecutor attached to the Court of Naples, confirmed that the remand in custody order issued against the Applicant had not been able to be enforced; that the Applicant was recorded as having been nowhere to be found when the decree scheduling the preliminary hearing in the case was made; and that searches were still under way to find the decree stating that the Applicant was unlawfully at large during the pre-trial investigation stage.

vi) In a document dated 14 March 2016, Chiara Paolucci, a Magistrate in the Italian Ministry of Justice, responded to a Report, dated 11 December 2015, from Professor Andrea Saccucci (an expert in Italian law). The report had been served on behalf of the Applicant, and dealt with various issues concerning trial *in absentia* in the Italian legal system. Ms Paolucci opined that:

a) Italian law did not make it necessary to postpone the trial of a person detained elsewhere. However, it was necessary that the judge be informed that the accused was in custody, but that was not the case here.

b) In this case, the first instance judgment had not yet become final and therefore the distinction made by Professor Saccucci between Article 175(2) of the Criminal Code and Article 625*ter* of the Code of Criminal Procedure (introduced in 2014) was irrelevant, because those provisions only applied if a judgment became final. The Applicant was entitled to appeal against the first instance judgment, and could obtain a statement annulling the order committing him to trial if the declaration that he was unlawfully at large was illegitimate. Otherwise, and as Professor Saccucci had stated, he could repeat the preliminary phase of the proceedings in an appeal.

c) The Applicant would not be able to avail himself of the special procedures under the Code of Criminal Procedure if he appealed, as he was declared unlawfully at large before the coming into force of Law 118/2014, and was thus subject to the previous law.

d) However, he could seek a renewal of his trial under Article 603 of the Code of Criminal Procedure, and Article 175 of the Code referred to the possibility of an out of time appeal in cases of final judgment. The previous law did not provide for the right to a new trial, but to the repetition of the preliminary phase in the appeal trial - via the order of a judge under Article 603(4) of the Code of Criminal Procedure, which applied to an accused who was tried in absentia and demonstrated that he could not appear because of a fortuitous event, or *force majeure*, or because he was not informed of the writ of summons (provided that that was not due to his fault). In the instant case the Applicant had the right to the repetition of the preliminary phase.

e) Release on bail was not possible, and revocation or replacement of custody could only be ordered when the precautionary measures on which the remand in custody had been based had ceased or diminished. The Applicant's arrest abroad had caused the cessation of his fugitive status.

f) It was not presently possible to establish whether the means used to declare the Applicant unlawfully at large had been compliant with Article 6 of the ECHR, as the declaration could not be found. However, the Italian Court of Cassation considered domestic provisions on absconding as being compatible with the ECHR (as long as the rules were rigorously construed and standards guaranteed) so that it was possible to establish that the accused was informed of the proceeding and had voluntarily evaded capture.

g) In conclusion, the Applicant was entitled to appeal against the declaration in two possible scenarios:

(a) If the declaration that he was unlawfully at large was adopted illegitimately (in that proof that he was actually informed of the proceeding and voluntarily evaded capture was missing) the order committing him to trial, or the first instance judgment, could be declared null and void and thus, under Article 604(4) of the Code of Criminal Procedure, the Applicant would be entitled to a new first instance trial.

(b) If the declaration was adopted correctly he would be entitled, under Article 603(4) of the Code of Criminal Procedure, to the repetition of the preliminary phase of the proceedings in an appeal.

vii) In a Note dated 5 April 2016, the Italian authorities confirmed that the Italian Court had been unaware of the Applicant's arrest in England at the time of his conviction, and provided 84 pages of extracts (in Italian and English) from the reasoned judgment of the Court, which showed that:

a) The chronology and outcome of the Italian proceedings was as set out above. The Applicant had been tried with 33 others. A man called Taurasi, who was alleged to be the "*head and organiser*", had been tried separately.

b) The Applicant and 11 others had been jointly charged in Count B with:

"...having promoted, formed, directed and organised a criminal association for the purpose of committing an indefinite series of crimes concerning the smuggling of large quantities of foreign processed tobaccos imported from abroad and at all events avoiding border taxes, availing themselves of a permanent, articulated operative structure, with the provision of means, financial resources consisting of the proceeds of sales, and distinction of tasks, in which association the other persons charged participated with diverse roles. Facts committed at Naples and in national territory, from December 2005 with continuing actions.....In particular... Lewicki Marek [and four others] in the role of permanent suppliers of the tobacco of non-national provenance illegally misappropriated from the foreseen State monopolies and intended for markets in the Neapolitan area..."

c) In each of Counts B1-5, 7, 11, 13 & 16 the Applicant had been charged, in all but one instance with one or more others, with having "*brought into State territory, importing it from abroad, and possessed and sold [ ] Kgs of smuggled foreign processed tobacco coming from Eastern European countries.*" The offences in those Counts were variously alleged to have been committed in the period between 16 May 2006 and 8 November 2006, and to have involved amounts of tobacco from 20 Kgs to 573 Kgs.

d) The telephone intercept evidence provided a very strong case against the Applicant.

19. The extradition hearing was ultimately adjourned to, and heard on, 30 June 2016. The bars raised during the hearing were s.2(4) of the EA (insufficient particulars for an accusation EAW); s.12A (decision to prosecute); s.14 (passage of time); Article 5 (pre-trial detention); Article 6 (right to a fair trial); Article 8 (right to a family / private life); and abuse of process (put in three separate ways - the decision to try and convict the Applicant *in absentia*; his inability to rely on s.20 of the EA, whilst also not being entitled to a re-trial, or an appeal amounting to a re-trial, on his return; and the unfair decision to convict and sentence him precluding him from seeking release pre-trial, which he would otherwise be able to do under Italian law).

20. Professor Saccucci (who had provided two reports in all) gave evidence on behalf of the Applicant. The Applicant also gave evidence (adopting his signed proof of evidence). The statements of his partner Katarzyna Mazurek, dated 9 July 2015 and 21 October 2015, were admitted as unchallenged evidence.

21. In cross-examination, the Applicant said that he had instructed a lawyer in Italy to formally lodge an appeal on his behalf, in accordance with Italian procedure, so as to protect his position.

22. After oral argument in relation to the issues raised under ss.2 & 12A of the EA, the case was adjourned for written closing submissions on the remaining issues.

23. In his reserved judgment, dated 9 August 2016, the DJ set out the background (at [1] - [25]), including a summary of aspects of the evidence that he had heard, and then went on to reject each of the bars raised, as follows - s.2(4)(c) (at [27] - [35]); s.12A (at [36] - [64]); s.14 (at [65] - [81]); abuse of process (at [82] - [97]); Article 6 (at [93] - [98]); Article 5 (at [99] - [103]); Article 8 (at [104] - [116]); and s.21A (at [117] - [119]). In the result, he ordered the extradition of the Applicant - who was again granted conditional bail.

24. Shortly after the rolled-up hearing in this Court, the Respondent provided further information from the Court of Naples which confirmed that:

(1) The Applicant had been declared to be unlawfully at large during the preliminary investigations stage. Thereafter he had been duly summoned at his defence lawyer's firm on 26 July 2011 and, on his non-attendance (without providing any legitimate reason for failing to appear) at a hearing on 3 October 2011, had been declared an absconder at that hearing. Hence, after that, he had been referred to as "*unlawful at large, absconder*".

(2) The Applicant had yet to lodge an appeal, but the time limit for him to do so had not expired - as time would only start running once he or his lawyer gave notification of his elected domicile to the Court.

Legal Framework

25. Council Framework Decision 2002/584/JHA on the EAW and surrender procedures between Member States is based on the principle of mutual recognition - itself based upon

mutual trust between Member States with a view to the Union becoming an area of freedom, security and justice. To that end, article 1(2) provides that member states are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision. Therefore, as originally in force and save in exceptional circumstances, executing judicial authorities could only refuse to execute an EAW in the mandatory and optional circumstances (which did not include trial *in absentia*) set out in articles 3 and 4. However, article 5.1 provided that where an EAW had been issued for the purpose of executing a sentence or a detention order imposed by a decision rendered *in absentia*, and if the person concerned had not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender could be subject to the condition that the issuing judicial authority gave an assurance deemed adequate to guarantee that the person who was the subject of the EAW would have the opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment.

26. The EA was enacted to give effect to the UK's obligation under article 34(1) of the Framework Decision. It is well established that, wherever possible, the EA must be interpreted consistently with the Framework Decision. Equally, it is well recognised that, whilst the Framework Decision deals with accusation and conviction cases together, there are important differences between them under the EA as to the matters which the court is required to consider before ordering the extradition of the person.

27. Section 2(4) deals with the information that is required in an accusation warrant, and provides that:

"The information is-

(a) particulars of the person's identity;

(b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the Category 1 territory under which the conduct is alleged to constitute an offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it."

28. Section 2(6) deals with the information that is required in a conviction EAW:

"The information is-

(a) particulars of the person's identity;

(b) particulars of the conviction;

(c) particulars of any other warrant issued in the Category 1 territory for the person's arrest in respect of the offence;

(d) particulars of the sentence which may be imposed under the law of the Category 1 territory in respect of the offence, if the person has not been sentenced for the offence;

(e) particulars of the sentence which has been imposed under the law of the Category 1 territory in respect of the offence, if the person has been sentenced for the offence".

29. Under s.10 the judge must decide whether the "*offence specified in the Part 1 warrant*" is an extradition offence as defined in s.64 (in an accusation case) or s.65 (in a conviction case). Both the latter sections require the judge to consider whether the "*offence constituted by the conduct*" satisfies the dual criminality or framework list requirements of those sections - for which purpose "*the conduct*" means that specified in the warrant.

30. If a judge decides that a person's extradition is not barred by any of the matters set out in s.11(1), and if the person is alleged to have been unlawfully at large after conviction (defined in s.68A as meaning that the person is alleged to have been convicted of an offence and is sought for the purpose of being sentenced, or of serving a sentence of imprisonment / detention) then, via s.11(4), the judge must proceed under s.20. Whereas, if the person is accused but is not alleged to be unlawfully at large after conviction of the extradition offence, and his extradition is not barred by any of the matters set out in s.11(1), then, via s.11(5), the judge must proceed under s.21A.

31. One of the matters set out in s.11(1) is the passage of time bar under s.14, which applies if it appears that it would be unjust or oppressive to extradite the requested person by reason of the passage of time since he is alleged to have committed the extradition offence, or (when he is alleged to have been convicted of it) since he became unlawfully at large.

32. Section 20 requires the judge to consider a series of questions, the upshot of which is that if the person was convicted in his presence, or when he had deliberately absented himself from the trial, or in circumstances such that he would be entitled to a retrial, or (on appeal) to a review amounting to a retrial, the judge must go on to proceed under s.21A. However, if the judge decides that the person was not tried in his presence, did not deliberately absent himself, and would not be entitled to a retrial or, on appeal, a review amounting to a retrial, he must order the person's discharge.

33. Under s.21A the judge is required to consider whether the requested person's extradition would be compatible with his Convention rights; and whether, taking into account only the matters specified in subsection (3), the requested person's extradition would be disproportionate. However, to succeed, for example, under Article 6, the requested person needs to demonstrate that he risks suffering a "*flagrant denial of justice*" - see e.g. *Government of USA v Montgomery (No.2)* [2004] 1 WLR 2241 and *Othman v UK* (2012) 55 E.H.R.R. 1.

34. The Multiple Offences Order (above) came into force on 1 January 2014, and modified the EA in certain respects. In particular, paragraph 1(1) of the Schedule to the Order provides that: "*Unless the context otherwise requires any reference in the Act to an offence (including a reference to an extradition offence) is to be construed as a reference to offences (or extradition offences)".* By way of examples of specific modifications made by the Schedule:

(1) Section 10(2) is modified to provide that: "*The judge must decide whether* ***any of the offences*** *specified in the Part 1 warrant is an extradition offence*".

(2) Section 10(3) & (4) are substituted to provide that:

"*(3) If the judge decides the question in sub-section (2) in the negative in relation to an offence he must order the person's discharge in relation to that offence only.*

(4) If the judge decides that question in the affirmative in relation to one or more of the offences he must proceed under Section 11".

(3) Section 11(3) is modified to provide that: "*If the judge decides any of the questions in subsection (1) in the affirmative in relation to* ***an offence, he must order the person's discharge in relation to that offence only***".

35. *Caldarelli* (above) had been found guilty in Italy in his absence (having deliberately absented himself, but having been represented throughout the trial by lawyers who he had appointed) of a drugs offence for which he had been sentenced to a term of imprisonment. His lawyers had lodged an appeal on his behalf but, at that time, there was no unqualified right in Italian law to a fresh hearing on the merits, only a judicial discretion as to whether or not to grant a rehearing of the evidence. Subsequently, an accusation EAW was issued and his extradition was ordered. He appealed to the House of Lords on the ground that the EAW should have contained a statement that he had been convicted, in accordance with s.2(5) of the EA, and was therefore invalid.

36. Giving the principal speech, Lord Bingham said:

"24. .....Here, as is common ground, the foreign judge has treated the appellant as an accused and not a convicted person. This seems strange to an English lawyer, familiar with a procedure by which a defendant sentenced to imprisonment at the end of a jury trial goes down the steps from the dock to the cells. But such is not the practice in Italy where the trial is indeed a continuing process, not yet finally completed in this case, and not an event. On the evidence the appellant falls within s.11(5) of the Act as a person accused of the commission of an extradition offence but not alleged to be unlawfully at large after conviction of it, not within section 11(4) as a person alleged to be unlawfully at large after conviction of it. In terms of recital 1 of the Framework Decision he has not been "finally sentenced" and (article 8(f)) no "final judgment" has been given as to the penalty imposed.

25. In Migliorelli v Government of Italy (No 1) (unreported) 28 July 2000 the government sought the return of a fugitive who had been tried and convicted in his absence. The issue, arising under the 1989 Act, was whether the warrant should have been issued against the fugitive as a convicted person and not, as it had, as an accused person. Morison J, with whom Judge LJ agreed, held that the warrant had been correctly issued since the trial process had not yet come to an end. As Judge LJ put it, the process in Italy was incomplete not only in relation to sentence but also conviction. This was on the evidence a correct decision.

26. In La Torre v HM Advocate 2006 SCCR 503 the Appeal Court of the High Court of Justiciary had a number of issues to decide on an application for extradition of the appellant to Italy. As in the present case the appellant had been tried and convicted at a trial which he had not attended but at which he had been represented. One of the issues was whether the extradition of the appellant should have been sought as a convicted rather than (as was the case) an accused person. The question arose under section 70(4)(a) in Part 2 of the 2003 Act, applicable at the time, but the language of that paragraph closely follows that of section 2(3)(a), which has not been amended. The appellant

contended that he should have been treated as a convicted person. For the Lord Advocate it was submitted (para 126) that the appellant was not unlawfully at large after conviction because his sentence was not yet enforceable; that he must therefore be an accused person in terms of section 70(4)(a); that there was no category other than those two; that the categorisation had to be made as at the date of the request, even if the appellant's status later changed; and that the appellant was not, at the date of the request, said to be unlawfully at large after conviction. The Appeal Court, at para 127, rejected the appellant's argument as misconceived. The Lord Advocate's submission was, as I respectfully think, sound.

27. The extradition of this appellant was properly sought as an accused person...."

37. Council Framework Decision 2009/299/JHA recognised that the various Framework decisions implementing the principle of mutual recognition of final judicial decisions did not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person, and had resulted in unsatisfactory solutions in a number of instances, including in relation to trial *in absentia*. Against that background, recital (4) indicated that it was necessary to provide clear common grounds for the non-recognition of decisions rendered following a trial at which the person concerned did not appear in person, and that the aim was to refine the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence. Recitals (7) - (12) set out the new approach.

38. For present purposes, the most significant amendment of Framework Decision 2002/584/JHA was the introduction of article 4a, which is entitled "*Decisions rendered following a trial at which the person did not appear in person*", and provides (emphasis added) that:

"The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order ***if the person did not appear in person at the trial resulting in the decision****, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing member state: (a) in due time: (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and (ii) was informed that a decision may be handed down if he or she does not appear for the trial; or (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the state, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or (c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: (i) expressly stated that he or she does not contest the decision; or (ii) did not request a retrial or appeal within the applicable time frame; or (d) was not personally served with the decision but: (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant."*

39. *Zakrzewski* (above) was the subject of a conviction warrant, issued in Poland, which specified that he was required to serve four sentences of imprisonment totalling 45 months. After his arrest in this country, he applied in Poland to have the four sentences aggregated, and was successful to the extent that that total sentence was reduced to one of 22 months. The Is-

suing Judicial Authority so informed the judge in this country. It was submitted on *Zakrzewski's* behalf that either the warrant no longer gave the particulars required by 2(6)(e) of the EA and had thus become invalid, or that the court should exercise an inherent jurisdiction not to proceed with the extradition on the ground that the warrant no longer gave proper, fair or accurate particulars. The judge rejected those arguments and ordered extradition. *Zakrzewski's* appeal to the High Court succeeded, but the Supreme Court decided that it should have failed, upon the basis that the difference in sentence was immaterial to the operation of the statutory scheme - albeit that because, by the time of judgment, *Zakrzewski* had surrendered and the EAW had been withdrawn, the appeal to the Supreme Court was dismissed.

40. Having examined aspects of the combined operation of the Framework Decision and Part 1 of the EA, Lord Sumption JSC (who gave the judgment of the Court) continued at [8]:

"*It follows that the scheme of the Framework Decision and of Part 1 of the 2003 Act is that as a general rule the court of the executing state is bound to take the statements and information in the warrant at face value. The validity of the warrant depends on whether the prescribed particulars are to be found in it, and not on whether they are correct. It cannot be open to a defendant to challenge the validity of a warrant which contains the prescribed particulars by reference to extraneous evidence tending to show that those statements and information are wrong. If this is true of statements and information in a warrant which were wrong at the time of issue, it must necessarily be true of statements which were correct at the time of issue but ceased to be correct as a result of subsequent events. Validity is not a transient state. A warrant is either valid or not. It cannot change from one to the other over time.*"

41. Lord Sumption went on to conclude that it did not follow that nothing could be done if the prescribed particulars in the warrant were, or had become, incorrect - but that the remedy had to be found at the stage when the judge was considering whether to extradite. He identified two. The first and main one (at [10]) being the mutual trust between states party to the Framework Decision, and their ability to withdraw a warrant, or to forward, or to request, further information to correct the position. The second (at [11] - [13]) being the inherent right of an English Court to ensure that its process is not abused - but limited to circumstances in which:

i) The statements in the warrant comprise statutory particulars that are wrong or incomplete in some respect.

ii) The true facts required to correct the error or omission are clear and beyond legitimate dispute (and the application is not being used as an indirect way of mounting a contentious challenge to the factual or evidential basis for the conduct alleged in the warrant - that being a matter for the requesting court).

iii) The error or omission is material to the operation of the statutory scheme - which, in some instances, will depend upon its impact on the decision whether or not to order extradition.

42. In accordance with Criminal Procedure Rule 50.17(4)(b), the test in relation to an application for permission to appeal is whether the Court finds any Ground(s) to be reasonably arguable.

43. Under s.27(2) of the EA the court may allow an appeal only if the conditions in subsection (3) (that the judge ought to have decided a question before him at the extradition hearing differently, and that if he had decided the question in the way that he ought to have done he would have been required to order the person's discharge) or subsection (4) (an issue was raised that was not raised at the extradition hearing, the issue would have resulted in the judge deciding a question before him at the extradition hearing differently, and if he had decided the issue in that way he would have been required to order the person's discharge) are met. If

there are multiple offences, the effect of the Multiple Offences Order (above) is that each offence must be considered and s.27(5) is modified so that if the court allows the appeal, it must order the person's discharge and quash the order for his extradition "*in relation to the relevant offence*(s) *only*".

Ground 1 - *Caldarelli* / the EAW should be treated as being a conviction warrant

The submissions advanced at the rolled-up hearing

44. Combining his oral and written arguments, Mr Mark Summers QC, on behalf of the Applicant, submitted, in broad outline, that:

i) Section 20 applied only to persons "*unlawfully at large after conviction*", not to "*accused*" persons.

ii) *Caldarelli* was distinguishable as he was not alleged to be "*unlawfully at large after conviction*", whereas the Applicant plainly was - in the sense that the further information confirmed that he had been convicted, and he was wanted for the enforcement of the detention order made against him. Thus, against the background of article 1(1) of the Framework Decision, and in the terms of ss.11(4) and 68A of the EA, he was alleged to be convicted of the offence and was sought "*for the purpose of his serving.....a sentence of imprisonment in respect of the offence*".

iii) In any event, *Caldarelli* had dealt with the position of someone deliberately absent from his first instance trial, but where there was an outstanding appeal. *Caldarelli* had argued that he was "*unlawfully at large after conviction*", and thus able to rely on s.2(5) - (6) & s.20. However, the House of Lords had held that, until an individual was "*finally*" convicted, and the conviction was enforceable, with no possibility of further appeal, he remained "*accused*" for the purposes of extradition law and so s.20 did not apply. Such an individual had to rely on Article 6 of the ECHR and s.21A(1)(a) of the EA (and surmount the flagrancy threshold, imposed by cases such as *Rexha v Italy* [2012] EWHC 1274 (Admin)), to litigate "*trial in absence*" issues.

iv) The decision in *Calderelli* had been driven by two significant factors. Firstly, that the concept of the "*trial*" in s.20 was a broad one that included the entire prosecution process, up to and including the final appeal. Secondly, that had his case been deemed to be a "*conviction*" case, not only would s.20 have applied, but so also would the (then stricter) s.2(6) validity requirements for a conviction EAW have been in play, such that the EAW would not have survived, and that to permit such an outcome would have frustrated the EAW scheme.

v) In contrast, article 4a made no distinction between "*accused*" and "*convicted*" persons, nor did it refer to "*final*" convictions.

vi) The Applicant was, like *Caldarelli,* a person who had been convicted at first instance (albeit that, unlike *Caldarelli*, he had not been deliberately absent), but where there may exist the possibility of further appeal. Therefore, if *Caldarelli* was still good law, his was an accusation case, he could not rely on s.20, and had instead to resort to Article 6 of the ECHR.

vii) However, as limited by the *Caldarelli* construction, s.20 did not properly reflect, implement, or give effect to, article 4a. Therefore, it had to be recognised (by reference to the EU principle of conforming interpretation, which since December 2014 had governed Part 1 again - see *Cretu v Local Court of Suceava, Romania* [2016] 1 WLR 3344) that the decision in *Caldarelli* had been overtaken by article 4a. In the result, persons such as the Applicant were "*convicted*" (their trial having been conducted) not accused, and so s.20 applied to them.

viii) The idea (propounded by the House of Lords in *Caldarelli*) that, in this context, a trial was an ongoing "*process*" was at odds with Framework Decision 2009/299/JHA itself (preambles 7-8 and article 4a) and with the decision of the CJEU in *Dworzecki* (2016) C-108-16 PPU at [45] - [47] - both of which expressly referred to "*the trial*" as a scheduled event with a specific date and place (of which notice had to be given in person).

ix) In addition, the s.2 validity concerns which had influenced the House of Lords to the contrary view in *Caldarelli* no longer existed, via the "*sea change*" resulting from the decision in *Goluchowski* (above) in consequence of which treating someone like the Applicant as being convicted did not raise insuperable validity problems - as any validity problems could be dealt with by way of further information from the Respondent.

x) Given the incompatibility of *Caldarelli* and its approach to s.20 of the EA (convictions in absence), with article 4a of the Framework Decision, the EAW should be treated as being a conviction warrant - in which event the particulars provided in the warrant were insufficient to comply with s.2(6), so the warrant was invalid, and nor was s.20 complied with.

xi) In the alternative, *Caldarelli* was wrongly decided, regardless of article 4a, as the House arguably erred in its assessment of "*final judgment*" (which was critical to its ultimate decision) and which imported injustice in the Italian context - as the term could equally arguably be interpreted as meaning a decision by a competent judicial authority which convicted a requested person and on which surrender can be sought. If so, leave was sought so that the Applicant could preserve his future appeal rights.

xii) At all events, if *Caldarelli* did not preclude recourse to s.2(6) of the EA then the EAW would not survive examination by that route. Equally, if recourse to s.20 of the EA was not precluded, then this was a straightforward case under that section and article 4a, given that UK courts are bound to apply the principle of conforming interpretation, and that:

(i) In *Dworzecki* (above) the CJEU confirmed that, absent a re-trial, proceedings in absence predicated on no proof that the defendant had actual knowledge of the proceedings were not capable of founding a lawful extradition order.

(ii) In *Balaz* (2014) 2 CMLR 17 (GC) the Grand Chamber confirmed that a re-trial court must have full jurisdiction to examine the case as regards both the legal assessment and the factual circumstances and must have, inter alia, the opportunity to examine the evidence and to determine on that basis the responsibility of the person concerned, and the appropriateness of the penalty.

xiii) The Italian Authorities ought to have issued a new conviction warrant - in which event the Applicant would have had access to s.20 of the EA, and the Respondent would have borne the burden of satisfying the court to the criminal standard that the Applicant had deliberately absented himself from his trial, or that he was guaranteed a re-trial with a full evidential hearing. Instead, via a side effect of *Caldarelli,* the burden was on the Applicant to surmount the high threshold involved under s.14, or to show that there had been a flagrant denial of his Convention rights - which was not enough protection.

xiv) The Applicant was in a twilight zone where he faced a high burden and presumptions of compliance, and the core argument on his behalf was that justice required that s.20 of the EA should be in play - in which event there was plainly a case for his discharge.

45. On behalf of the Respondent, Mr Julian Knowles QC argued that:

i) When the EAW was issued the Applicant was an accused person, and he was properly characterised as such in the warrant. In *Caldarelli*, the accusation warrant had been issued

after *Caldarelli* had been convicted and the issue therefore was whether the EAW in his case had been flawed *ab initio*. Accordingly, no *Caldarelli* issue actually arose in the Applicant's case. Rather, *Zakrzewski* made clear that an EAW which was correct and valid when it was issued did not become invalid by reason of a subsequent change in the factual position in the requesting state. Thus, in this case, the EAW did not lose its jurisdictional basis just because the Applicant had been convicted (albeit not finally). In any event, *Caldarelli* was correctly decided, its correctness could not be challenged in this Court, and there was no substance in the Applicant's argument that it could no longer be regarded as correct in the light of subsequent EU developments.

ii) The Applicant was wrong to submit that absence of consideration under s.20 deprived a person who was not finally convicted of any mechanism for raising their conviction in absence at an extradition hearing - since the Applicant himself raised several alternative routes, namely breach of Articles 5 & 6; injustice and oppression such as to give rise to a s.14 bar (which was said to be flexible enough to remedy the injustice in this case); and abuse of process.

iii) At the time that the EAW was issued in 2010, the EAW Framework Decision 2009 had not been implemented in Italian law - indeed, it was not implemented until 1 January 2014. At the time of issue, the CJEU case law (see *I.B.,* [2011] 1 WLR 2227) was that a person who was sentenced in absentia, who had a right to a re-trial, was properly considered an accused person - which showed that *Caldarelli* was right, and (given the duty of conforming interpretation) would have to be followed by the Supreme Court.

iv) Given the judgment of the Supreme Court in *Zakrzewski*, and its conclusion (at [8] of the judgment) that the validity of a warrant is not a transient state, the changes introduced by the Framework Decision could not invalidate a warrant that was valid before the changes came into force - see also e.g. *Goluchowski* (above) at [44].

v) All that Framework Decision 2009/299/JHA had done, against a background of inconsistency in approach prior to its coming into force, was to provide common grounds for non-recognition of decisions rendered following a trial at which the person concerned had not appeared in person. It did not provide a basis upon which to assert that *Caldarelli* was wrongly decided, since the EA had to continue to give effect to the Framework Decision and thus to cater flexibly for persons who have been convicted but whose conviction is not final, who have a right to a retrial, and are therefore considered 'accused' under the law of the requesting state - see the decision of this Court in *Istanek v District Court of Prerov* [2011] EWHC 1498 (Admin) at [21] - [28]. The reasoning of Lord Bingham at [23] & [24] in *Caldarelli* was, and remained, Mr Knowles submitted, correct.

The judgments of the CJEU in Tupikas and Zdziaszek

46. *Tupikas* had been brought before a district court in the Netherlands for the execution of a conviction EAW issued by a regional court in Lithuania. The EAW asserted that he had appeared in person at his trial and had thereafter unsuccessfully appealed against the judgment. However, it contained no information about the appeal proceedings - in particular as to whether he had appeared at the appeal hearing and, if not, whether there had been compliance with one or more of sub-paragraphs (a) - (d) of article 4a(1) of Framework Decision 2002/584/JHA. Given that, under article 4a, the executing judicial authority is entitled to refuse to execute a conviction EAW if the person did not appear in person at the "*trial resulting in the decision*", unless the warrant indicates that one of the conditions set out in sub-paragraphs (a) - (d) was met, the Dutch court sought a preliminary ruling from the CJEU as to whether the concept of the "*trial resulting in the decision*" in article 4a(1) included appeal proceedings.

47. Having identified the underlying principles, the CJEU opined that:

"54. As is apparent from the very wording of article 4a(1) of Framework Decision 2002/584, the executing judicial authority is entitled to refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant indicates that the conditions set out, respectively, in sub-paragraphs (a) to (d) of that provision are met.

55. It follows that the executing judicial authority is obliged to execute a European arrest warrant, notwithstanding the absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in article 4a(1)(a),(b),(c), or (d) of that Framework Decision is verified

.....

58. As the court has already held, Article 4a(1) of Framework Decision 2002/584 seeks to guarantee a high level of protection and to allow the executing judicial authority to surrender the person concerned despite that person's failure to attend the trial which led to his conviction, while fully respecting his rights of defence; Openbaar Ministerie v Dworzecki (Case C-108/16PPU) EU :C:2016:346, para 37.

.....

63. Consequently, Framework Decision 2002/584 must be interpreted in such a way as to ensure compliance with the requirements of respect for the fundamental rights of the persons concerned, without, however, calling into question the effectiveness of the system of judicial co-operation between the member states of which the European arrest warrant, as provided for by the Union legislature, is one of the key elements."

48. In the light of those considerations the CJEU went on to interpret the concept of a "*trial resulting in the decision*" in article 4a(1), concluding (at [70]) that it had to be determined by placing it in context and with the other provisions of the Framework Decision being taken into account. Having considered various articles and recitals, the CJEU concluded that:

"74. It must therefore be held that the concept of "trial resulting in the decision", within the meaning of article 4a(1) of Framework Decision 2002/584, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European arrest warrant."

49. Having further concluded that that interpretation was consistent with the decision in *Dworzecki* (above), and with the case law of the European Court of Human Rights, the CJEU continued (emphasis added):

"81. Consequently, in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given in absentia, it is appropriate to understand by "trial resulting in the decision", within the meaning of article 4a(1) of Framework Decision 2002/584, the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate the taking account of the individual situation of the person concerned.

.....

83.

It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned, since it directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served*.*

84. Accordingly, it is at that procedural stage that the person concerned must be able to fully exercise his rights of defence in order to assert his point of view in an effective manner and thereby to influence the final decision which could lead to the loss of his personal freedom. The outcome of that procedure is irrelevant in that context.

85. In those circumstances, even assuming that the rights of the defence have not been fully respected at first instance, such a breach may validly be remedied in the course of the second instance proceedings, provided that the latter proceedings provide all the guarantees with respect to the requirements of a fair trial.

86. In other words, when the person concerned appeared before the judge responsible for a fresh assessment of the merits of the case, but not at first instance, the provisions of Article 4a of Framework Decision 2002/584 do not apply. Conversely, the executing judicial authority must carry out the checks provided for in that article when the person concerned was present at first instance, but not in the proceedings concerned with a fresh assessment of the merits of the case."

50. Having further concluded that that interpretation was the best way to ensure the facilitation and acceleration of judicial co-operation between member states; that it would avoid prolonging or seriously impeding the surrender procedure; and that the relevant information to be provided by the issuing authority related only to the last procedural step during which the merits of the case were examined, the CJEU continued:

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

91. Consequently, in a case such as that in the main proceedings, it is in relation to appeal proceedings of that kind that (i) the issuing judicial authority must provide the information referred to in article 8(1) of Framework Decision 2002/584, and (ii) the executing judicial authority is empowered, in accordance with article 15(2) of that Framework Decision, to request additional information which it considers necessary to enable it to take a decision on the surrender of the person concerned."

51. Having indicated that it was for the executing judicial authority, in a case in which the person concerned had not appeared in person in the proceedings leading to final disposal, to verify whether the situation before it corresponded to one of (a) - (d) of article 4a(1); and that even if it was found that none of (a) - (d) covered the requested person's situation, the executing court could take into account other circumstances that enabled it to ensure that the surrender of that person did not entail a breach of his rights of defence, the CJEU concluded (and repeated in its formal ruling at the end of the judgment) that (emphasis added):

"98.

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

99. An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It is none the less up to the referring court to satisfy itself that it has the characteristics set out above."

52. *Zdziaszek* (above) had been brought before a Dutch Court for the execution of a conviction EAW that had been issued by a court in Poland, so that he could serve two custodial sentences. He had not been present during any relevant stage of the proceedings in Poland - including the final proceedings when the sentences had been commuted into a single sentence. In deciding the case the CJEU applied *Tupikas* and concluded that the concept of a "*trial resulting in the decision*" in article 4a(1) referred not only to the proceedings which gave rise to the decision on appeal where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the defendant, but also to subsequent proceedings, such as those which led to a judgment handing down the cumulative sentence, at the end of which the decision that finally amended the initial sentence was handed down - inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard, and notwithstanding the fact that the cumulative sentence was more favourable to the requested person.

53. Further, the CJEU underlined that the checks required by article 4a(1) of the Framework Decision had, in principle, to relate to the last instances in which the merits of the case were examined and which led to the final conviction of the defendant; that the executing judicial authority was entitled to refuse to execute a European arrest warrant if the defendant had not appeared in person at the "*trial resulting in the decision*", unless the warrant indicated that the conditions in sub-paragraphs (a) to (d) of article 4a(1) were met; that if the executing judicial authority took the view that it did not have sufficient information it was incumbent on it, pursuant to article 15(2), to apply for it; and that the Framework Decision did not prevent it from taking account of all the circumstances characterising the case before it in order to ensure that the rights of the defence of the defendant were respected during the relevant proceedings.

The revised submissions following the CJEU judgments in Tupikas and Zdziaszek

54. As touched on above, in the Applicant's Further Note to the Court, delivered after the handing down of the judgment in *Tupikas* (above), Mr Summers conceded, by reference to various paragraphs of the judgment, that the CJEU had held that article 4a:

i) Is concerned with final convictions and sentences ([70] - [74]).

ii) Is engaged by decisions which result in (final) findings of guilt, and also by those which result in the (final) imposition of penalties ([77] - [79]). (Hence in *Zdziaszek* (above) the CJEU had held that proceedings for the purpose of aggregating, cumulating, amending or consolidating prior sentences engaged the application of article 4a.)

iii) Applies, where a first instance conviction has been appealed, to the instance which led to the last of those decisions ([81]) - as it is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive ([83], [87] - [90]).

55. In the light of that, and although *Tupikas* did not directly address the Applicant's situation (i.e. the period after first instance conviction, but before appeal) Mr Summers also conceded, in the Further Note, that the *Tupikas* analysis of article 4a broadly reflected the *Caldarelli* approach to s.20 and that therefore the broad argument that he had advanced at the rolled-up hearing in this Court could no longer be maintained.

56. However, Mr Summers further submitted that there was, nevertheless, a significant difference between the *Tupikas* approach and the *Caldarelli* approach in that, whereas the *Caldarelli* approach was rigid (no defendant is ever "*convicted*" until all appellate processes are finally concluded), the analysis of the CJEU was much more nuanced - as only those appeals which include *"an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned"* ([81]) attract the application of Article 4a - i.e. only appeals which themselves *"provide all the guarantees with respect to a fair trial"* ([85]). Thus, if the appellate procedure does provide a *"fresh assessment of the merits of the case"*, then article 4a will apply to it rather than to the first instance conviction. Whereas, if that is not the case, then article 4a will apply to the first instance conviction.

57. The proper approach, Mr Summers submitted, was therefore, contrary to *Caldarelli*, to examine the nature of the Italian appellate process to ascertain whether article 4a applied to it or to the first instance proceedings - relying on the observation of the CJEU at [99] of the judgment in *Tupikas* that:

"...An appeal proceeding, such as that at issue in the main proceedings, in principle falls within the concept [of a re-examination, in fact and in law of the merits of the case]. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above..."

58. This Court, Mr Summers submitted, had to adopt the CJEU's nuanced approach in *Tupikas*. That was because of the obligation of the EU law principle of conforming interpretation, the strength of which had been reiterated in *Poplawski* (2017) C-579-15, in which the CJEU had repeated that the principle obligates national courts to disapply rulings of national Supreme Courts where necessary:

"...in a situation where a national court claims that it is impossible for it to interpret a provision of domestic law in a manner that is compatible with a framework decision, on the ground that it is bound by the interpretation given to that national provision by the national Supreme Court in an interpretative judgment, it is for that national court to ensure that the framework decision is given full effect, and if necessary to disapply, on its own authority, the interpretation adopted by the national Supreme Court, since that interpretation is not compatible with EU law..."

59. Therefore, Mr Summers submitted, applying the nuanced *Tupikas* approach, and examining the nature of the prospective Italian appellate process, the evidence before the court, and particularly that of Professor Saccucci, showed that (as found by the German Federal Constitutional Court in *Re:R* [2017] 2 CMLR 2 at [9] - [19], [109] - [124]) the prospective Italian process did not necessarily involve an assessment, in fact and in law, of the incriminating and exculpatory evidence, or provide all the necessary guarantees with respect to a fair trial.

60. Mr Summers thus submitted that article 4a applied to the Applicant's first instance conviction, and that in consequence the Applicant was no longer accused, but rather was finally convicted - therefore s.20 applied and should result in his discharge.

61. In the Respondent's Written Submission in Response, Mr Sternberg underlined the aspects of [83] and [98] of the judgment in *Tupikas* that I have emphasised above.

62. Against that background, Mr Sternberg submitted that the judgment in *Tupikas* clearly confirmed that article 4a is concerned with final convictions and sentences where there are no ordinary avenues of appeal left available - whereas the Applicant had not reached that stage.

63. Mr Sternberg pointed out that, as the Applicant's own summary (see [54] & [55] above) had confirmed, the judgment in *Tupikas* was plainly compatible with the decision in *Caldarelli*, and did not assist the Applicant in his argument that the latter must be reconsidered. It was abundantly clear from the material before the Court that the Applicant has not been finally convicted, and that he has a right of appeal which he has yet to exercise.

64. In any event, Mr Sternberg submitted, it remained the case that this Court is bound by *Caldarelli*, and that even if this Court accepted the Applicant's arguments on this issue it could only dismiss the appeal and (if appropriate) certify a point of law of general public importance.

Conclusions - Ground 1

65. It is clear that:

(1) As indicated by Judge Mendia in her further information document dated 9 March 2016, there is no evidence that the Applicant was aware of the proceedings against him - whether the order for preliminary custody which preceded the issue of the EAW; the decree (if issued) that he was unlawfully at large; the decree of 24 February 2011 ordering his trial in the Court of Naples; the interim hearings thereafter, including the hearing on 3 October 2011 at which he was declared to be an absconder; or the various trial hearings from 30 May 2012 onwards.

(2) At the time of his arrest on the EAW on 28 June 2015 the Applicant was on trial, in his absence, in the 6th Criminal Division of the Court of Naples.

(3) Although it should have been, that Court was not made aware of the Applicant's arrest at that stage.

(4) The Court was still unaware of the Applicant's arrest on the EAW when, on 2 October 2015, it convicted him of participation in a criminal association and sentenced him to 3 years 8 months' imprisonment.

(5) There is no evidence that the failure to inform the Court was the product of bad faith.

66. As this Court observed in *Imre v District Court in Szolnok (Hungary)* (see [10] & [11] above) there is no doubt that *Tupikas* (who was the subject of a conviction warrant) had been convicted. The issue in that case was whether, for the purpose of applying the tests relevant to the extradition of a convicted person, the requested court should focus on the first instance decision or the appeal decision. This Court therefore concluded that *Tupikas* had little or no bearing on the question of whether *Imre* was to be regarded as convicted or accused.

67. Nevertheless, in my view the concessions made by Mr Summers (as summarised in [54] & [55] above) were rightly made. In particular, that the *Tupikas* analysis of article 4a broadly reflected the *Caldarelli* approach to s.20.

68. Against that background, and in accordance with the Respondent's arguments and the combination of the decisions in *Caldarelli* and *Zakrzewski* (which remain binding on this Court), I have no doubt that the EAW in this case was rightly issued as an accusation warrant on 25 February 2010, and still remains an accusation warrant - notwithstanding the Applicant's subsequent conviction for the offence of participation in a criminal association.

69. In any event, and whether or not *Tupikas* imports a more nuanced approach, the critical assertion made on behalf of the Applicant (upon which this Ground and much of the rest of the proposed appeal is ultimately premised) namely that the prospective Italian process will not necessarily involve an assessment, in fact and in law, of the incriminating and exculpatory evidence, or provide all the necessary guarantees with respect to a fair trial is, in my view, misconceived.

70. The DJ was plainly entitled, as he did at various points in his reserved judgment, and as I do, to prefer the evidence of the Italian authorities to that of Professor Saccucci and to:

(1) Conclude that the relevant Italian law that had to be applied was that in force prior to the January 2014 amendments.

(2) Accept the further information from the Italian authorities that the 6th Criminal Division of the Court of Naples had been unaware of the Applicant's arrest when it continued with his trial and that there was no abuse of process in respect thereof.

(3) Conclude that the Applicant had a right of appeal, which he had yet to exercise, from the decision of that Court.

(4) Accept the further information from the Italian authorities that, upon return, and if the declaration that he was unlawfully at large was adopted illegitimately, the order committing the Applicant for trial, or the first instance judgment, could be declared null and void, and that thus Applicant would be entitled to a new first instance trial (under Article 604(4) of the Code of Criminal Procedure); or, if the declaration was adopted correctly, that he would be entitled (under Article 603(4) of the Code of Criminal Procedure) to a repetition of the preliminary phase of the proceedings that would be a sufficient equivalent to a re-trial.

(5) Proceed upon the basis that the Italian authorities are aware of their obligations under the European Convention on Human Rights to provide the Applicant with a fair trial, and that nothing that had been raised persuaded him that they would not do so.

(6) Conclude that, given the Applicant's assertions of innocence, any loss of plea-bargaining rights would have little relevance, and that nor did the fact the Applicant may not be able to obtain bail render the instant proceedings an abuse of process.

71. In addition, I accept the evidence of Magistrate Paolucci, in her further information document dated 14 March 2016, that Italian law did not make it necessary to postpone the trial of a person detained elsewhere, and that (even if the declaration that he was unlawfully at large was adopted correctly) the Applicant has the right to the repetition of the preliminary phase. I also accept the latest further information that the time limit in relation to an appeal would only start running once the Applicant or his lawyer gave notice of his elected domicile to the Italian court and that (at the time that information was provided) he had yet to lodge an appeal.

72. Nor, against the background of the above-mentioned evidence and of the authorities cited by the Respondent in relation to Ground 3 (see [102(3)] below), does the decision of the German Federal Constitutional Court in *Re:R* (see [59] above) add any arguable weight to the Applicant's ultimate submissions.

73. Accordingly, in my view, and whether as originally or ultimately advanced, Ground 1 is not reasonably arguable. Therefore, no question of compliance or otherwise with s.2(6) of the EA arises. Hence, I would refuse permission to appeal on this Ground.

Ground 2 - Failure to comply with s.2(4)(c) of the EA / abuse of process

The DJ's ruling

74. As already touched on, the s.2(4)(c) issue was raised before the DJ. It was submitted that the EAW contained insufficient detail of the conduct ascribed to the Applicant; that his specific role was vague and undefined (with the EAW doing little more than state that he was an accused co-conspirator); and that the period of his involvement was not clear. In the result, it was submitted, the warrant failed to comply with the requirements of s.2(4)(c).

75. The DJ ruled (at [33] - [35] of his reserved judgment) that, having considered the EAW as a whole, he was entirely satisfied that it fully complied with the requirements of s.2(4)(c). It asserted that the criminal association (conspiracy) related to an agreement to smuggle tobacco, thereby evading duty payable to the Italian authorities; it adequately set out the role of the Applicant as having been a permanent and continuing supplier of the tobacco in question that originated from outside Italy and was destined for the markets of Naples; and it stated on its face that the time period was from 2005 through to the issue of the EAW on 25 February 2010.

The submissions

76. Combining his oral and written submissions on behalf of the Applicant, Mr Summers argued, in summary, that:

i) By reference to s.207 of the EA and the Multiple Offences Order (above) the court had to be satisfied that each of the ten alleged offences had been adequately particularised as an extradition offence (see e.g *Zengota v Poland* [2017] EWHC 191 (Admin)), but the current description rendered that impossible. The particulars were manifestly deficient - the criminal scheme was entirely opaque, the Applicant's alleged role was wholly vague, and the ten offences were entirely unparticularised. At best, the particulars asserted that there was a conspiracy, and that the applicant conspired with others to do whatever the end result of the offence was, which was inadequate - see e.g. *Pelka v Poland* [2012] EWHC 3989 (Admin).

ii) The EAW failed entirely to inform the Applicant as to the scope of his speciality rights. He knew only that he faced ten alleged offences. There was nothing in the EAW to restrict the Italian authorities, and the Applicant should have been discharged on that ground. Whilst the possibility of being prosecuted for them may be remote, it was not known how time limits work in Italy and the Applicant was entitled to be protected against further prosecution by the discharge of those offences.

iii) There was a wholesale failure to provide the level of particularity required in a fraud case, and the EAW was the very definition of a "*broad amorphous*" or "*omnibus*" description of alleged tax evasion that was disapproved of in cases such as *Von Der Pahlen v Government of Austria* [2006] EWHC 1672 (Admin) at [21] - [23]. The EAW said nothing about the quantities of tobacco in question, their projected worth, or amount of the duty evaded or the "*border taxes*" not paid.

iv) In *Ektor v National Public Prosecutor of Holland* [2007] EWHC 3106 (Admin), Cranston J correctly identified the composite requirements of s.2(4)(c) as being that the description must include when and where the offence is said to have happened and what involvement the per-

son named in the warrant had; that a balance must be struck between the need for an adequate description to inform the person and the object of simplifying extradition procedures; that the person sought needs to know what offence he is said to have committed and to have an idea of the nature and extent of the allegations made against him in relation to that offence; that the language of the EA does not connote the specificity or lack of it required in the particulars of a count on an indictment; that the amount of detail may turn on the nature of the offence; and that allowance must be made where the EAW has to be translated.

v) The importance of compliance was underlined in *Dhar v National Office of the Public Prosecution Service, the Netherlands* [2012] EWHC 697 (Admin) in which it was emphasised that the particulars must be sufficiently clear to enable the requested person to consider whether any statutory bars may apply, and to enable the person to invoke the principle of speciality, including as to the nature of his role.

vi) In accordance with *Dabas v Spain* [2007] 2 AC 31 the court could not look to the further information to cure the s.2 deficiencies, and to any extent that that approach had been modified in *Goluchowski* (above) the defects were plainly "*substantive*" rather than "*formal*" (see Lord Mance at [45]) - which also precluded reliance on the further information. Hence the EAW wholly failed to comply with s.2(4)(c) and was invalid.

vii) In any event, and on any view, the EAW had been overtaken by subsequent events, such that the descriptions of the statutory particulars in it had become misleading and inaccurate, in that:

a) The Applicant now stood prosecuted for only one offence (Count B) and the other nine offences (Counts B1-5, 7, 11, 13 & 16) had been dismissed as being time-barred.

b) The dates were now wrong, as the Italian judgment made clear that the Applicant's role was limited to the period between May and November 2006 (rather than the period from December 2005 to February 2010). Hence time should have been assessed as running from 2006, and the Applicant and his now partner had had their first child in 2008 - all of which should have affected the way in which the DJ approached the passage of time issue - see *Campbell v Public Prosecutor of the Grande Instance Tribunal of St-Malo, France* [2013] EWHC 1288 (Admin) at [12] & [25] - [30].

viii) Thus, pursuant to *Spain v Murua* [2010] EWHC 2609 (Admin) as interpreted by *Zakrewski,* abuse of process should be invoked as the true facts were clear and beyond dispute - namely that the applicant is sought only for the offence of criminal association and in relation to events between May and November 2006, and it is equally clear that the misleading and inaccurate aspects of the EAW are material to the operation of the statutory scheme - in that it presently permits extradition in relation to offences that are time barred and incapable of prosecution, and requires bars to extradition to be approached on the basis of a five year period of alleged offending, rather than a six month period.

ix) The Multiple Offences Order provides the legal basis for the court's power to sanction partial extradition, with the purpose of the Order being made clear in the Explanatory Note, namely that it is to: "*...allow for the partial execution of the Part 1 warrant...in cases where the judge...must consider more than one offence for which extradition is sought. It is possible that extradition will be refused in relation to some offences but not all, allowing for extradition to take place in relation to some offences only*". Its effect is to "*require the court to consider the validity of the individual offences in the warrant*" - see e.g. *Taylor v Germany* [2012] EWHC 475 (Admin) at [8].

x) Under s.2(3)(a) of the EA the court is concerned with the foreign "*offence specified in the [Part 1] warrant*", and all subsequent references in s.2, including in s.2(4)(c), to "*the offence*" are references back to s.2(3)(a) and the foreign offence specified in the warrant.

xi) In any event, in a multiple offences case, by virtue of the Multiple Offences Order, separate consideration of each offence is carried through the remainder of the scheme of the EA and the questions that the judge is required to consider and, ultimately, if the judge is required to order extradition, whether under s.21A (accusation cases) or s.21 (conviction cases) he does so severally in respect of each offence specified in the warrant. Likewise, under s.27(5), as modified by the Order, this court's duty is to discharge "*in relation to the relevant offence only".*

xii) The Respondent's argument to the effect that extradition was for "conduct" not "offences", and that therefore extradition should be ordered on the EAW as it stood, was wrong. It found its origin in the EA, confusingly, using the word "offence" in two different respects, namely:

i) As referring to "the [foreign] offence" specified in the EAW.

ii) As part of the expression "extradition offence" - which is the notional UK criminal offence against which, for example, under s.10(2), "the [foreign] offence" is checked for dual criminality. The concept of "extradition offence" is then used, where appropriate, in the various bars in ss.11-21A. The concept is defined by ss.64 & 65 and is determined by the conduct which underlies (rather than the juristic elements of) the foreign offence specified in the EAW.

xiii) Hence the "extradition offence" is irrelevant for the purposes of s.2 of the EA, and is not the offence(s) in respect of which extradition is ultimately ordered.

xiv) Viewed correctly, the DJ ordered extradition for ten individual Italian offences, whereas the nine substantive offences should have been discharged - whether under s.2(4)(c) and/or under *Zakrzewski.* Whilst, consistent with speciality, Italy could prosecute the remaining offence of participation in a criminal association by reference to any of the conduct specified in the EAW, the eventuality of resurrecting a prosecution, and potential punishment, for any of the substantive offences by reference to the same conduct should be excluded by the terms of the extradition order.

77. On behalf of the Respondent, Mr Knowles argued that the EAW was valid and, in particular, that it complied with the requirements of s.2(4)(c) of the EA. He submitted, in summary, that:

i) The EAW appropriately specified (see [53] of the speeches in *Dabas v High Court of Justice of Madrid, Spain* (above)) the relevant provisions of Italian law said to have been broken, in consequence of which the question of what offences, or how many offences, the conduct was alleged to have constituted was a matter for the judicial authority. It was not necessary to particularise each offence - see e.g. *Islam v Paphos District Court of Cyprus* [2009] EWHC 2786, *Gilun v Poland* [2011] EWHC 3123 (Admin) at [9], and *Tappin v Government of the United States* [2012] EWHC 22 (Admin) at [44] - [46].

ii) Complaints about lack of particularity required focus on the narrative of the conduct said to give rise to the foreign offences. Hence, in *King v Public Prosecutors of Villefranche Sur Saone, France* [2015] EWHC 3670 (Admin) at [18] and [22] Collins J had made clear that the same level of particulars is required in the narrative of conduct in accusation and conviction warrants - no great detail is required, provided that sufficient information is given to enable any available point on a bar to be taken, and (if needed) whether the offence is properly listed in the Framework list, and whether dual criminality can be shown. The EAW in this case more than

satisfied that test, and it was fallacious to suggest that the Applicant was sought for an indeterminate number of offences because the criminal association of which he was a member had sought to perpetrate an indeterminate series of offences.

iii) The EAW focussed on the alleged conduct and the black letter identification of the relevant law and maximum sentences. Equally, it clearly identified the Applicant's role in the criminal organisation, and provided sufficient detail of what he was said to have done such that it was plain that the conduct disclosed an extradition offence - the equivalent of which in this country would be an offence contrary to s.170 of the Customs and Excise Management Act 1979. The conduct alleged was clear, and the Applicant could be under no misapprehension as to why he was sought - see e.g. *Sandi v Romania* [2009] EWHC 3079 and *Ektor v National Public Prosecutor of Holland* (above)

iv) Likewise, the aims and objects of the conspiracy, overt acts in pursuit of it, and the role and conduct of the Applicant were all set out in detail, in the combination of the EAW and the Form A attached to it - namely that it was a conspiracy to import tobacco into Italy evading duty and VAT; and that he was a permanent and continuing supplier of tobacco originating outside Italy that was destined for the markets of Naples. Hence the EAW went significantly beyond merely alleging the existence of the conspiracy, and that the Applicant was a member of it - which, it was accepted, by reference to cases such as *Pelka v Poland* (above), would have been unlikely to suffice had it been the case.

v) It was also important to note that the conspiracy was not limited to the overt acts involved in the alleged commission of the nine substantive offences.

vi) Neither the Framework Decision, nor s.2 of the EA, required more specific details of time than those set out in the EAW - namely that the offending had started in 2005 and was still continuing at the time of the issues of the EAW in 2010. The fact that the judgment convicting the Applicant in Italy focussed on a narrower period of time did not mean that the particulars were inaccurate.

vii) The level of detail argued for by the Applicant was entirely unnecessary, including as to the amounts of duty and VAT evaded, and the Applicant had been unable to point to any bar to extradition that he was unable to raise consequent on lack of detail in the EAW. Rather, he had raised bars under s.12A (since abandoned) and under s.14, and the fact that the judgment of the Italian court inevitably contained more detail did not undermine the sufficiency of the particulars provided in the EAW.

viii) As to specialty rights, all that the court had to be satisfied of was that specialty arrangements existed - which they clearly did. Hence, it was submitted, the nine substantive offences were now dead - although it was made clear that that submission was not advanced on instructions.

ix) In any event, consequent on the decision in *Goluchowski* (above), further information could potentially be considered in order to address defects in an EAW - on which basis any asserted lack of knowledge suffered by the Applicant had been cured by the provision of the decision of the Italian Court.

x) The Applicant's argument that changes since the issue of the EAW had made it invalid had been rejected in *Zakrzewski* (at [8] & [15]), which had also decided that an abuse of process could only be established if any change was material to the statutory scheme. In the Applicant's case the particulars were not incomplete and the fact that, at trial, he had been convicted of only one offence, with a range of dates of offending that was shorter than in the EAW, was to his benefit and caused him no prejudice or unfairness, quite the opposite - whereas, in accordance with the decision of this Court in *Belbin v The Regional Court of Lille, France*

[2015] EWHC 149 (Admin) at [59], it was necessary to establish prejudice or unfairness to make out an abuse of process.

xi) The DJ dealt with the issue at [27] - [35] of his judgment, and his conclusions that the EAW met the requirements of s.2(4)(c) of the EA, and that it properly set out the Applicant's role, the period of time and the places in which the offence occurred, were all properly open to him. Hence, permission should be refused on this Ground.

xii) The effect of the modifications made by the Multiple Offences Order (above) to ss.2, 10, & 11 of the EA was to require the judge to consider each separate episode of conduct said to constitute the foreign offence(s), and to decide whether extradition for that conduct is barred.

xiii) The important section was s.11(3) which (as indicated above) provides that:

"*If the judge decides any of the questions in subsection (1) in the affirmative in relation to an offence, he must order the person's discharge in relation to that offence only*".

xiv) Offence there plainly meant the 'the conduct alleged to give rise to the foreign offence', not 'the foreign offence'

xv) Taking the passage of time bar as an example, s.14 of the EA provides that:

"*A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have-*

(a) committed the extradition offence (where he is accused of its commission).....".

xvi) That section directs attention to the "*extradition offence*" which is defined in ss.64 & 65 of the EA in terms of the conduct said to give rise to the foreign offence. Thus under s.14, and where there is more than one episode of conduct, the judge's enquiry under s.14 is directed to each of the episodes and the question whether extradition for that conduct is barred by the passage of time. If it is, then the defendant's extradition for that conduct (rather than the foreign offence) that is barred.

xvii) In this case the conduct in question is an extradition offence, and would constitute the offence under s.170 of the Customs and Excise Management Act 1979 in equivalent circumstances. The effect of the Multiple Offences Order was not to require the Applicant's discharge on nine of the ten Italian offences. Rather, the Applicant fell to be extradited for the conduct set out in the EAW. How he then fell to be dealt with in Italy was a matter for the Italian criminal justice system.

xviii) That outcome was wholly consistent with the principles set out by Lord Hope in *Dabas v High Court of Justice, Madrid* (above) at [52] - [54], where he made clear that the judge is not concerned with the foreign law in relation to either s.2 or s.10. Equally whilst, in *Taylor v Germany* (relied upon by the Applicant above) Collins J had spoken in terms of discharging on different German offences, it was clear that in that case there were three distinct episodes of conduct alleged, which were said to give rise to three groups of numbered offences. Hence Collins J was simply using the numerical designation of the offences by way of shorthand. He was not, as the Applicant argued, discharging on some but not all of the foreign offences said to be constituted by a single episode of conduct.

xix) Therefore, the Applicant's argument that he should be discharged on the nine substantive offences should be rejected.

78. As already indicated, the Applicant has since accepted that the decision of this Court in June 2017 in *Alexander v Marseille District Court of First Instance, France*, as subsequently endorsed in *Kirsanov v Viru County Court, Estonia* (both above), is fatal to the relevant aspects of Grounds 1 & 2. Nevertheless, he invited the Court to formally rule on the issue.

Conclusions - Ground 2

79. I agree with the Applicant that the DJ had to be satisfied that each of the ten offences had been adequately particularised as an extradition offence. In his reserved judgment the DJ found that, taken as whole, the EAW fully complied with the requirements of s.2 of the EA. That involved an express finding in relation to the offence of participation in a criminal association, and an implicit finding in relation to the substantive offences. In my view, given the content of the EAW and of the Form A appended to it, and for the reasons advanced on behalf of the Respondent (as summarised at [77(1) - (8) & (11)] above) the DJ was clearly entitled to reach the conclusion that he did, and thus to reject the challenge made under s.2(4)(c) of the EA. In my view, it is not reasonably arguable that he erred in doing so.

80. Accordingly, I decline the Applicant's invitation to formally rule as to the effect of *Alexander* and *Kirsanov* (above). It is not necessary to do so.

81. Mr Summers accepted (see [76(14)] above) that, consistent with specialty (for which, I would add, arrangements plainly exist) Italy could prosecute for the offence of participation in a criminal association by reference to any of the conduct specified in the EAW. However, I reject his contention that the Applicant's alleged participation in that offence must be limited to the time period and overt acts involved in the alleged commission of the substantive offences. Rather, I agree with the Respondent that the Applicant's alleged involvement in the offence of participation in a criminal association is not so limited. Nothing in either the EAW, Form A or the further information (including the extracts from the judgment of the 6th Criminal Division of the Court of Naples) so limits it. On the contrary, for example, Form A clearly states that the overall period during which the offending took place was "FROM DECEMBER 2005 AND UNTIL NOW" (i.e. February 2010 not November 2006), and the extracts from the judgment make clear that the last two authorisations for interception in relation to the Applicant were obtained after the last of the alleged substantive offences.

82. However, I am persuaded, for the reasons advanced by Mr Summers (see [76(1), (9) - (13)] above) that extradition is ultimately ordered for the foreign offence(s) specified in the EAW. I reject the arguments to the contrary advanced by Mr Knowles (see [77(12) - (18) above). In particular, in *Kubun v Poland* [2012] EWHC 3036 Collins J followed his judgment in *Taylor v Germany* (upon which the Applicant relies) variously stating that:

"*8.It is clear beyond any doubt that the purpose of the 2003 Order is to enable the court to direct the extradition for one or more of a number of offences even if one or more of them is not properly to be regarded as an extradition offence for any reason....*

9. ....If one goes to section 10 one sees the reason for that modification because what it does is simply to ensure that at the initial stage of the extradition hearing the judge has to decide whether the offences, or any of the offences (this is the amendment) is an extradition offence. If he decides that any of the offences are not extradition offences, he must order the discharge in respect of those offences, but only those offences....

11. The whole purpose of (the Order) *quite clearly is to enable a court to decide whether any of the offences charged in a war-*

rant which seeks return is a proper extradition offence. If it is then - on that - return can take place. If it is not then - on that and that alone - return cannot be directed."

83. There is no evidence that the prosecution in Italy has sought to appeal against the acquittals in relation to the nine substantive offences. However, although Mr Knowles submitted (see [77(8)] above) that those offences were now dead, he was careful to make clear that that submission was not advanced on instructions, and there is therefore no formal guarantee in place that that is the case.

84. Against that background, and although I do not accept Mr Summers' argument as to the limited scope in time and conduct of the offence of participation in a criminal association, it is, in my view, reasonably arguable, in accordance with *Spain v Murua* as interpreted by *Zakrewski*, that it would be an abuse of process to extradite the Applicant for the nine substantive offences of which he was acquitted as being time barred.

85. Accordingly, on this Ground, I would grant permission to appeal on that limited basis, and will deal with the outcome under the heading "Overall Conclusions" below.

Ground 3 - Surrender would be unjust or oppressive, contrary to s.14 of the EA

The DJ's ruling

86. At [65] - [72] of his reserved judgment, the DJ set out extracts from *Kakis v Government of Cyprus* [1978] 1 WLR 772 and *Gomes v Government of Trinidad & Tobago* [2009] 1 WLR 1038, and aspects of the factual background and arguments - including the Applicant's assertion that the Italian authorities should have sought his return much earlier and that, as a result of changes in his domestic circumstances, it would now be oppressive to order his return.

87. The DJ went on to say, at [73] - [81], that whilst he accepted that there would be a degree of hardship caused to the Applicant, his partner and their children (and to a lesser extent to the Applicant's two older children who were said to be living abroad) it was not sufficient to prevent extradition from being ordered. The DJ continued that whilst the Applicant was not suggested to be a fugitive, the Judicial Authority had stated that, upon return, he had a right to appeal to the Court of Appeal (when he would be able to challenge the prosecution evidence and call evidence on his own behalf) and, if unsuccessful, a potential further appeal to the Court of Cassation, and that cases such as *Nastase v Italy* [2012] EWHC 3671 (Admin) had made clear that under Article 175(2) of the Italian Penal Code, as amended, a defendant who was absent from his first trial would be granted a fresh merits hearing without strings or conditions, unless he had deliberately evaded the first trial.

88. The DJ went on to record that the Applicant had said in evidence that he had instructed a lawyer in Italy to formally lodge an appeal on his behalf, so as to protect his position, and continued that whilst there had been changes in the Applicant's life since he was said to have committed the offences, the DJ also had to consider that the alleged offending was serious (such that in the event of conviction in the UK a prison sentence of some length may well be imposed), and had thus concluded that the Applicant had not vaulted the hurdle necessary to succeed under s.14.

The submissions

89. Mr Summers submitted that s.14 provided a statutory route that was flexible enough to remedy what he submitted was the injustice of this case, namely (against the background set out in [12] - [17] above) that the Applicant had been tried, without notice, in his absence; that the trial had continued to conviction on the criminal organisation charge after he had been ar-

rested (which arrest was either known about, or should have been known about); and that in consequence he had been deprived of basic rights.

90. Mr Summers placed reliance on the evidence of Professor Saccucci to the effect, amongst other things, that Italian law at the time permitted trials in absentia without proof that the defendant had actual knowledge of the proceedings; but that where an individual was arrested abroad, that amounted to a "legitimate impediment" to his attendance at the trial, which should therefore have been stayed. Equally, the fact that the Applicant had been declared to be unlawfully at large (if he was, given that the declaration could not be found) did not mean that he had any actual knowledge of the criminal proceedings. Such a declaration could be made if the police had done no more than searched the places where he was supposed to be found. Mr Summers further submitted that there were question marks in relation to the information provided by the Italian authorities, as to whether the court had been aware of the Applicant's address, and whether Italian law permitted the continuation of a trial when a defendant was detained abroad.

91. Mr Summers reminded the Court of the well-known principles involved under s.14, including that:

i) The question posed by s.14 is whether, under the EA, it would be unjust or oppressive to extradite the Applicant - see e.g. *Knowles v Government of the United States of America* [2007] 1 WLR 47 at [31].

ii) "*Unjust*" in s.14 is "...*directed primarily to the risk of prejudice to the accused in the conduct of the trial itself*..."; and "*oppressive*" is "...*directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration*", but "...*there is room for overlapping, and between them they would cover all cases where to return [the accused] would not be fair*" per Lord Diplock in *Kakis v Government of Cyprus* (above) at p.728H-738A.

iii) The test for injustice is lower than the test of a "*flagrancy*" under Article 6 of the ECHR - see *Gomes v Government of Trinidad & Tobago* (above) at [36].

iv) Oppression is primarily concerned with what would not have happened had the Applicant been prosecuted with reasonable promptitude, and includes an assessment of the requested person's wider circumstances, including the impact on his family - see *McKenzie v Examining Court No.9 Palma de Mallorca (A Spanish Judicial Authority)* [2008] EWHC 3187 (Admin) at [32].

v) Culpable delay can weigh in the balance, especially in a borderline case, and an overall cumulative judgment on the merits is required, unshackled by rules with too sharp edges - see *La Torre v Republic of Italy* [2007] EWHC 1370 (Admin) at [32].

92. In this case, Mr Summers argued, the conviction judgment made clear that the Applicant's role in the offending had ended by November 2006, and therefore the Court was permitted to act upon events that had occurred in the decade since that time - during which the trial in Italy had taken its unfair course whilst at the same time the Applicant had established an extensive private life, including young children, in this country, whilst entirely ignorant of the proceedings in Italy.

93. As to injustice, Mr Summers submitted that, following unfair proceedings *in absentia*, the Applicant faced an uncertain, and in any event inadequate, retrial in which, even if granted, a complete review of the evidence will not be available; he will not be permitted pre-trial bail; he will not have recourse to procedures that could reduce his sentence exposure; and he will not

be able to appeal on the merits if re-convicted. However, none of that would be the case if he had been summonsed properly in the first place.

94. Whilst, in the further information document dated 14 March 2016 (see [18(6)] above) it was suggested that there were two possible avenues of appeal open to the Applicant, under Articles 604(4) and 603(4) of the Code of Criminal Procedure, the evidence of Professor Saccucci showed that the Article 604(4) route had only a modest prospect of success, and that the Article 603(4) route involved an uphill task for the Applicant to show that he had been unaware of the proceedings. Equally, there was no promise from Italy that the Applicant would be returned to an appropriately fair position. Rather, the Respondent's further information spoke in terms of the "possible" application of Article 604, and of the Applicant being "entitled to apply" under Article 603. In any event, Mr Summers submitted, success on appeal would not provide the same as a first instance trial in the sense that the evidence would not be the same; there was no automatic right to recall or to call witnesses; there was no right to bail (albeit that the Applicant could apply); there could be no plea bargain; and there was a restricted right of appeal.

95. Indeed, Mr Summers submitted, absent proper assurances as to the scope of the re-trial, this Court has discharged under s.14 in similar circumstances - see *Emberson v France* [2015] EWHC 3030 (Admin) at [7], [9], [15] & [21], and *Emberson v France (No 2)* [2015] EWHC 3955 (Admin). Mr Summers underlined, in addition, that the "*unlawfully at large order*", if any, had been lost, and with it, according to Professor Saccucci, any residual ability for the Applicant to challenge it.

96. Mr Summers further submitted that, in this case, "*overlapping*" considerations of oppression included the effect on the Applicant's family, and especially his young children - as, had the Italian prosecution proceeded properly, the case would have been behind him by the time that his children were born (in July 2008 and August 2011 respectively) and thus would have had no effect on them.

97. Mr Summers continued that this could all be contrasted with the operation of s.20 of the EA, which was relatively straightforward. Equally, cases in which extradition to Italy had been approved were all fact specific. On the facts of the Applicant's case Italy could not begin to satisfy the requirements of s.20 of the EA, because of the lack of guarantee of a full automatic re-trial, which amounted to injustice under s.14 of the EA. Thus, even though the burden was on the Applicant, s.14 applied and he should be discharged.

98. On behalf of the Respondent, Mr Knowles pointed out, by reference to the Applicant's notes of the evidence given before the DJ (albeit that the notes were not agreed in their entirety), that:

i) Professor Saccucci had accepted in cross-examination that:

a) There was no reason to say that the Italian Court had been aware that the Applicant had been arrested in this country, and that in those circumstances it did not have to stop the trial.

b) The Applicant was in time to lodge an 'ordinary' appeal against conviction under Article 604(4) of the Italian Criminal Code and, if he was out of time, he could make use of article 175 of the Italian Criminal Procedure Code (see [18(6)iv)] above).

c) The Applicant could challenge the declaration that he is unlawfully at large in the course of an appeal against his conviction.

d) If the Applicant succeeded in challenging the decision that he was unlawfully at large he would obtain a new first instance trial by annulment of the order committing him for trial.

e) In any event, under Article 603(4) of the Italian Code the Applicant had the right to ask for a renewal of the evidence.

f) The Applicant could challenge the remand in custody order and seek provisional liberty, or release subject to precautionary measures, as an alternative to custody.

ii) During his subsequent evidence, the Applicant, in answer to the DJ, stated that he had instructed an Italian lawyer to lodge an appeal, and that the lawyer had told him that he had done so in time.

99. In the result, Mr Knowles submitted, the short point in answer to the Applicant's submissions in relation to s.14 was that he was entitled to an appeal under Italian law amounting to a re-trial, and that he had exercised (or had the opportunity to exercise) his rights of appeal.

100. In addition, Mr Knowles submitted that:

i) The Applicant's trial had started in 2011. Therefore, in accordance with the information provided by the Italian authorities, he was subject to Italian law as in force at that time - not the law that came into effect in January 2014. Therefore, there had been no trial *in absentia*. In the result, the points relied upon by the Applicant and based on Professor Saccucci's evidence (which was itself erroneously premised on the Applicant having been tried *in absentia*, and not being able to benefit from the January 2014 changes) did not assist.

ii) There was nothing to suggest that the Applicant had ever been arrested for the offences, or was otherwise aware of them, save for his arrest in this country. Thus, as the further information from the Magistrate, Ms Paolucci, dated 14 March 2016 made clear, he will be entitled to an automatic appeal to the Court of Appeal and to the Court of Cassation. Indeed, in the Court of Appeal he will be able to challenge the declaration that he is a fugitive (which meant no more than that he was avoiding service of the arrest warrant), and the prosecution's evidence, and will also be able to call evidence in his defence. Therefore, he would not suffer any injustice consequent on extradition, and his argument that he cannot rely on s.20 of the EA did not assist him in showing injustice or oppression.

iii) The further information from Judge Mendia, in the document dated 9 March 2016, made clear that the trial had begun and concluded without the Italian Court being aware that the Applicant was in England, or that he had been arrested here. It was also clear that the Italian prosecutor did not know either. There was thus no basis for the assertion that the Applicant had been tried despite it being known that he was in this country.

iv) Whilst the Respondent did not allege that the Applicant was a fugitive, and there had been changes in the Applicant's life since the time of the commission of the alleged offences, they did not render his extradition oppressive now. The offence for which he was sought was serious (as shown by the sentence imposed), and any ultimate requirement to serve the sentence could not give rise to injustice. Equally, the fact that the Applicant had become a father in the intervening period, although potentially meaning that the Applicant's extradition would cause hardship, did not give rise to oppression.

v) The Applicant's reliance on *Emberson v France* (above) was misplaced - as that case did not concern Italy and, in any event, turned on very different facts, including this Applicant confusing the judge's request in that case for further information from the French authorities (as to the requested person being allowed to return to the UK pending a re-trial) with the position in this case.

101. Further, Mr Knowles underlined that:

i) The further information dated 14 March 2016 made it clear that, if returned, the Applicant would have either a completely new trial (under Article 604 of the Code of Criminal Procedure), or (provided that his non-appearance was not his own fault) a re-hearing amounting to a new trial on appeal (under Article 603 of the same Code). In either event, his Article 6 right to a fair trial would be vindicated. It was also significant that, as a Part 1 territory, the Italian authorities would be presumed to vindicate the Applicant's Article 6 rights - especially against the background of the improvements made to the Italian justice system.

ii) In *Gomes* (above) at [35] Lord Brown said that:

"Council of Europe countries in our view present no problem. All are subject to article 6 of the Convention and should readily be assumed capable of protecting an accused against an unjust trial - whether by abuse of process jurisdiction like ours, or in some other way."

iii) The instant case was very far from being the first time that the issue of the compatibility of Italy's pre-2014 law with the right to a retrial had been considered by the Courts in this country. Italian law has been held, in cases in this Court, namely *Gradica v Public Prosecutor's Office Attached to the Court of Turin* [2009] EWHC Admin 2846 (at [35]), *Ahmetaj v Prosecutor General Attached to Court of Appeal Genoa* [2010] EWHC 3924 (Admin) (at [10], [12] & [14]), *Rexha v Office of the Public Prosecutor, Court of Rome* [2012] EWHC 3397 (Admin), and *Nastase v Office of the State Prosecutor, Trento, Italy* [2012] EWHC 3671 (Admin), to be compliant with Article 6 of the ECHR (albeit that *Gradica* and *Ahmetaj* each involved the operation of Article 175). Indeed, as confirmed in *Nastase* (at [42] - [45]), this Court has consistently found that Italian law, before its amendment in 2014, complied with s.20 of the EA and Article 6, including after the coming into force of the amending Framework Decision in 2009.

iv) Those authorities provided a complete answer to the Applicant's s.14 and Convention complaints.

v) Indeed, the Applicant was in a better position than the majority of those who had been considered in the earlier decisions of this Court - as, on instruction, his lawyer had already lodged (or still had the opportunity to lodge) an in-time appeal, and so the Applicant would not have to use the Article 175 procedure to obtain an extension of time.

vi) Professor Saccucci's evidence as to the prospects of a challenge to the declaration of being unlawfully at large was, as he accepted, hypothetical; and his comments about the content of the declaration, and how it was obtained, were speculation. In contrast, the Italian authorities had accepted that the available documents did not show that the Applicant had ever been informed of the proceedings against him, nor that he was ever arrested or interviewed in Italy, nor that he was ever on bail or requested not to leave Italy, and therefore the Applicant's appeal in relation to the declaration that he was unlawfully at large was highly likely to succeed as, without the Order, it would not be possible to show that the declaration was properly made (not the other way around), and thus he would obtain both the annulment of the order committing him for trial and a retrial.

vii) Likewise, Professor Saccucci's evidence that a person who was aware of their conviction because of their arrest on an EAW had no chance of appealing out of time, because they knew of the proceedings, could not stand in the light of the repeated findings of the High Court, over several years, that those convicted in Italy in their non-deliberate absence are entitled to a retrial under Article 175 of the Italian Criminal Procedure Code, which complies with s.20 of the EA. It was also settled law that the right of the Italian courts to control the evidence obtained

and admitted under article 603 (the renewal of 'the trial evidentiary') complied with s.20(8) of the EA and Article 6 ECHR - see *Nastase v Office of the State Prosecutor, Trento, Italy* (above) at [47] - [52]. For the same reasons, even if the Applicant had not lodged an appeal in time, and had had to make use of the procedures under Article 175 for an extension of time, that also would have been consistent with s.20 and Article 6. Those aspects could not give rise to any injustice or oppression.

viii) Nor did the loss of the special procedures available under Italian law. The Applicant was not in a different position to any other person convicted in their absence in Italy who had lost access to those procedures. Nor did the DJ err by observing that, practically, the Applicant would not seek to use the procedures, because he denied guilt. Given the burden on the Applicant to show oppression, and his protestations of innocence, the loss of a right to use irrelevant procedures, such as plea bargaining, could not advance his position.

ix) In any event, Professor Saccucci had confirmed that the Applicant could challenge the remand in custody order and seek provisional liberty or release on precautionary measures, even if bail was not a familiar concept in Italian law. Even if the Applicant was remanded in custody pending an appeal or retrial, such a remand would be consistent with Article 5 ECHR.

x) It was not necessary for the Italian authorities to give any additional assurances since they would apply their law to him - which (given the clear and consistent state of English law with respect to the remedies available to a person tried in their non-deliberate absence in Italy, and the information provided by the Italian authorities) was sufficient. The Italian authorities had already made clear that the annulment of the order declaring the Applicant unlawfully at large would lead to a new trial, and that even if the order was not annulled the Applicant would be entitled, under Article 603(4), to a repetition of the preliminary phase on appeal, and to call evidence. Therefore, established law and the further information sufficed to show that the Applicant would not be exposed to injustice or oppression if he was extradited to Italy.

xi) The Applicant's reliance on *Sedjovic* (above) had to be seen in the light of the fact that Italian law was now very different.

102. Finally, Mr Knowles submitted that the DJ had been correct, whilst accepting that extradition would cause hardship to the Applicant and his family, to conclude that it would not lead to oppression. As to injustice, the DJ had properly applied English law in relation to the Applicant's appeal rights following his conviction in absence. There was no error in his citation of *Nastase* (above), which was clearly in point. At all events, the DJ had reached conclusions that were properly open to him on the facts and the law. The arguments advanced by the Applicant did not give rise to any basis upon which to grant permission to appeal.

Conclusions - Ground 3

103. As I made clear above when considering Ground 1, the Applicant's critical assertion that the prospective Italian process will not necessarily involve an assessment, in fact and in law, of the incriminating and exculpatory evidence, or provide all the necessary guarantees with regard to a fair trial is, in my view, misconceived. Likewise, when considering Ground 2, I made clear that the offence of participation in a criminal association is alleged to have taken place in the period from December 2005 to February 2010, and is not limited to the conduct underlying the nine substantive offences of which the Applicant was acquitted as being time barred.

104. Against that background, and for the reasons advanced on behalf of the Respondent (see [[98] - [102] above) it is not reasonably arguable that the DJ's erred in his conclusions as to lack of oppression or injustice, and that the Applicant had not vaulted the hurdle necessary to succeed under s.14. Accordingly, I would refuse permission to appeal on this Ground.

Ground 4 - Surrender would breach Articles 5 & 6 ECHR

The DJ's ruling

105. As to Article 6, at [93] - [96] of his reserved judgment the DJ made reference to a number of cases, including *Government of USA v Montgomery (No.2)* (HL) (above); *Rexha v Italy* [2012] EWHC 1274 (Admin); *Othman v U.K.* (above); and *RB(Algeria) v Secretary of State* [2010] 2 AC 110, in support of the proposition that, in order to succeed on Article 6 grounds, the Applicant would have to show a "flagrant denial of justice" - i.e. that a prospective breach of the principles of a fair trial was so fundamental as to amount to a nullification of the very essence of that right.

106. At [97] & [98] of his judgment the DJ went on to rule that he was not persuaded that the Applicant had come close to establishing that he would suffer a flagrant denial of a fair trial; that the Italian Criminal Code enabled him to challenge the conviction and to avail himself of other remedies; and that he was satisfied that the Italian authorities were aware of their Convention obligations to provide the Applicant with a fair trial, and that nothing had been raised that persuaded him that they would not do so.

107. As to Article 5, at [101] - [103] of his judgment the DJ recognised that, in a number cases (two of which he cited) Italy had been the subject of adverse criticism in respect of pre-trial custody delays. However, he observed (by reference to decisions of this Court, including *R (Klimas) v Lithuania* [2010] EWHC 2076 (Admin), and *Lewczuk v Poland* [2010] EWHC 2960 (Admin)) that consideration of breaches of certain Convention rights (including Article 5) were generally matters initially for the requesting domestic courts.

108. In any event, and notwithstanding the Applicant's case that he had been wrongly convicted at a time when he had a legal impediment for his non-appearance (because he was the subject of extradition proceedings); that he was thus prejudiced because he would inevitably be detained until the conclusion of any retrial or appeal; and that the Italian Judicial Authority must have known about his arrest in the UK and had an obligation to pass that to the Italian Court which should have stayed the proceedings, pending the conclusion of extradition; the DJ had concluded that the Applicant had been convicted by a competent court of first instance in circumstances where he was satisfied that the court was unaware of the Applicant's arrest in the UK. Thus, by reference to *Romania v Ceausescu* [2006] EWHC 2615 (Admin), the DJ rejected the submission that the Applicant's extradition, either to serve the sentence imposed, or to proceed to challenge his conviction, raised a breach of Article 5.

The submissions

109. Mr Summers accepted that, in this case, extradition will only be incompatible with Article 6 if there are substantial grounds for believing that there is a real risk that the Applicant has suffered, is suffering, or (in the event of a re-trial) will suffer, a flagrant denial of justice in the requesting state.

110. There was, Mr Summers submitted, an obvious overlap with Article 5 in relation to which extradition would be incompatible if there are substantial grounds for believing that there is a real risk that the Applicant has suffered, is suffering, or will suffer a flagrant violation - which, in accordance with *Othman v United Kingdom* (above) might occur if the Applicant would be at risk of being imprisoned for a substantial period in Italy, having previously been convicted after a flagrantly unfair trial.

111. Mr Summers submitted that the burden on the Applicant was no more than to show that there were "substantial grounds for believing" that there was "a real risk" (past, present or future) of a flagrant denial of justice, and submitted that, in the Applicant's case, what had happened (from the issue of the unlawfully at large decree onwards), and what was likely to happen in the future, amounted to just that.

112. Mr Summers submitted that the trial conviction and sentence of the Applicant, in his absence, should never have happened for two reasons, namely that:

(1) It was not disputed that he had been unaware of the proceedings, and therefore the pre-January 2014 Italian law under which he had been declared a fugitive was fundamentally unfair (whatever Italian law said about it). Indeed, Professor Saccucci had been adamant that all that was required was that the Italian police had not been able to find the Applicant - see *Sejdovic v Italy* ECtHR Grand Chamber application no. 56581/00.

(2) It was doubly unfair that that the Applicant had been convicted and sentenced after he had been arrested in this country, and it had to be the case that someone on the Italian side knew what the position was. Indeed, given that the Applicant had served evidence and argument in the extradition proceedings prior to his conviction and sentence, it was inconceivable that that had not been passed on to Italy. At best, it was a case of the right hand not knowing what the left hand was doing, with resultant unfairness to the Applicant. Article 6 did not require bad faith, the issue was prejudice, and someone in Italy must have known what the position was. After all, it was not disputed that there was a duty on the authorities to inform the Italian court. At all events, the Applicant had clearly suffered prejudice in consequence.

113. Mr Summers relied, in addition, on the decision of the European Court of Human Rights in *Baratta v Italy* (2015) 28263/09 at [114] - [119] (to which the DJ did not refer). In that case the defendant had been detained in Brazil, but the trial judge in Italy had refused to stop his trial in absentia, which resulted in conviction and the imposition of a life sentence. The Court held that detention pending extradition proceedings was a legitimate reason for absence and, against that background, that both the initial trial in absentia (where it was not established that the defendant had waived his right to be present, or that he had intended to evade justice) and the refusal to restart proceedings after his detention in Brazil, had breached Article 6 and that his subsequent imprisonment had been arbitrary, and thus a breach of Article 5.

114. Mr Summers submitted that *Caldarelli* had deliberately absented himself, and was thus not entitled to a re-trial, and that therefore the issue in that case was a narrow one as to what form the EAW should take. Mr Summers underlined that, in his partly dissenting opinion in *Caldarelli*, Lord Mance had been alive to the potential problems that could arise, if there had been a conviction in absence without the defendant having deliberately absented himself, but with no right to a re-trial or equivalent, and an accusation warrant was all that was required, he could (instead of s.20) rely on "...*the (not inconsiderable) benefit of his basic entitlement to have the executing court consider whether his extradition is compatible with the Convention rights*...".

115. Mr Summers further submitted, relying on the evidence of Professor Saccucci, that the appeal options suggested by the Respondent in the further information document dated 14 March 2016 (see [18(6)] above) did not provide the necessary safeguards.

116. Mr Knowles submitted that the Applicant had not advanced any cogent reason as to why the DJ had been wrong to reject this ground of challenge. He relied on his earlier submissions in relation to Ground 3 (see [98] - [102] above), and submitted that there was no substance in this Ground, as Italian law provided the necessary guarantees in the appellate and subsequent trial processes that were available to the Applicant, and the Applicant's arguments largely involved the repetition of arguments advanced under Ground 3.

117. As to Article 6, Mr Knowles submitted that, given that the Applicant had a right to challenge his conviction and to employ the remedies available to him under Italian law (and was doing so), there was no arguable nullification of his right to a fair trial such as to prevent extradition under Article 6 - see *Othman v UK* (above).

118. Mr Knowles further submitted that *Baratta v Italy* (above), which was relied upon by the Applicant, did not assist because it concerned a 'domestic' breach of Article 6 (and thus a different test). Equally, unlike the Applicant's case, it involved applications to stop his trial, to annul the declaration that he was a fugitive, or not to proceed in his absence (which matters were critical to the establishment of a breach of Article 6). In contrast, in this case, the evidence showed that the Applicant had adequate protection of his Article 6 rights in Italy in both the appellate process, and thereafter. In particular, and plainly, the loss of the Applicant's right to an accelerated trial or to a guilty plea procedure did not give rise to a total nullification of his right to a fair trial - the more so when he asserted his innocence and intended to contest his re-trial.

119. As to Article 5 Mr Knowles, citing *Romania v Ceauesescu* [2006] EWHC 2615 (Admin), submitted that any detention would be by a competent court, and that therefore the Applicant's extradition could not give rise to a breach of the Article.

120. Mr Knowles further submitted that the DJ had applied the correct legal principles in relation to both Articles, and had been right to find that the matters relied upon by the Applicant had come nowhere near to establishing that he would suffer a flagrant denial of justice.

Conclusions - Ground 4

121. As I have indicated above, the critical assertion made on behalf of the Applicant as to the prospective Italian process is, in my view misconceived. For the reasons advanced by the Respondent (see [116] - [120]), I have no doubt that the DJ was entitled to reach the conclusions that he did, and that this Ground is not reasonably arguable. Accordingly, I would refuse permission to appeal in relation to it.

Ground 5 - Surrender would be an abuse of process

The DJ's ruling

122. The DJ recorded that the challenge was put in three ways, namely that:

(1) The decision to try and convict the Applicant *in absentia*, when he was unaware of the proceedings and where (in Italian law) he had a legitimate impediment not to appear at trial (because he was contesting the extradition proceedings) was tantamount to an abuse of process.

(2) The Applicant had fallen between two legal stools as he was regarded as an accused person (and so could not rely on s.20 of the EA), but at the same time was said not to be entitled to a re-trial, or appeal amounting to a re-trial, on his return.

(3) The unfair decision of the Italian court to convict and sentence the Applicant precluded him from seeking release pre-trial, as would otherwise be the case under Italian law.

123. The DJ concluded that none of those challenges came close to establishing an abuse of process, given that:

i) He accepted the information from the Italian authorities that their court at first instance had been unaware that the Applicant had been arrested in this country; that the Applicant was entitled to appeal against the decree declaring him to be unlawfully at large (which could not be found) and, if successful, would obtain a declaration that the order committing him to trial, or the first instance judgment, was null and void (in which event he would be entitled to a new first instance trial); and that even if the decree declaring the Applicant to be unlawfully at large was found to be lawful, the Applicant would still be entitled to the repetition of the preliminary phase of the case under Article 603(4).

ii) The Applicant was to be treated as an accused person, and the DJ was satisfied that he would be entitled to a re-trial, or to an appeal that would be a sufficient equivalent to a re-trial, on his return.

iii) The fact that the Applicant might not be able to secure bail did not render the extradition proceedings an abuse.

The submissions

124. Mr Summers argued, by reference to *R (Bermingham) v Director of the SFO* [2007] QB 727 and *Italy v Barone* [2010] EWHC 3004 (Admin), that an abuse of process primarily occurs where there has been a usurpation of the EA, or where the behaviour of the requesting state involves deliberate oppression or unfair prejudice to the requested person. He relied on cases including *Belgium v Bartlett* [2012] EWHC 2480 (Admin), *Campbell v France* [2013] EWHC 1288 (Admin) and *McKinnon v USA* [2008] 1 WLR 1739, HL as illustrations of when continuation of an underlying trial in the absence of the accused had been found to be an abuse of process.

125. Mr Summers then argued, by reference to the evidence of Professor Saccucci, and the information provided by the Italian authorities, that:

(1) Given the relevant Italian case law, it was unlikely that the Applicant would be able to mount a successful appeal against the decree that he was unlawfully at large.

(2) Italian law prior to the 2014 reforms applied to the Applicant's case.

(3) Therefore, there was no right to a re-trial but only 'an extraordinary appellate remedy' with a heavy burden placed on the applicant to prove that he was unaware of the trial proceedings.

(4) Even if granted, the renewal of the trial evidentiary hearing would be limited in a number of respects - including that he would not have the right to be released on bail, that he would not be able to enter into a plea bargain, and unable to appeal unless an issue of constitutional law arose.

126. Against that background, Mr Summers submitted that:

(1) If the Applicant had not been convicted at first instance, he would have been entitled to all his defence trial rights.

(2) The conviction *in absentia* during the extradition proceedings, even if permitted by Italian law, was patently unfair.

(3) The first possible route of appeal, against the "unlawfully at large" decree had a negligible prospect of success.

(4) The second possible route of appeal, by way of appeal against conviction, or appeal from that appeal, had very significant shortcomings (as already illustrated above), and it was a striking feature that Italy had provided no clear assurance of an unfettered re-trial.

(5) Section 20 of the EA provided a robust and human-rights-based mechanism for dealing with such situations, but the *Caldarelli* approach meant that its safeguards were not in play in a case of this type - which, he repeated, was something that Lord Mance, in his partly dissenting opinion in *Caldarelli*, had been alive to, along with the potential for challenge as to compatibility with Convention rights.

(6) Therefore, it was also appropriate for the court to consider, and to find, an abuse of process.

127. In his submissions, Mr Knowles underlined that the test for establishing an abuse of process is a high one, namely whether the court's process is being usurped which results in extradition being unfair and unjust to the requested person - see *Belbin v France* (above) at [43] - [44] & [59]. The jurisdiction is a residual one, and is not apposite if the challenge that is raised can be dealt with in the context of other bars to extradition, whereas the Applicant's grounds of challenge were essentially the same as those raised under Grounds 3 & 4 - as to which it was clear that there was no arguable injustice, oppression, or breach of Articles 5 or 6.

128. In any event, Mr Knowles submitted:

i) As a matter of Italian law, the Applicant had clearly not been tried *in absentia*, and nor were the Italian authorities responsible for prosecuting and trying him aware that he was in the UK. Professor Saccucci's assertion that "*someone was aware in Italy"* was unexplained supposition.

ii) The assertion that the Applicant suffered unfairness by being unable to rely on s.20 of the EA ignored the appeal rights and remedies available to him in Italy, and the fact that he will be treated as an accused in Italy is very far from the circumstances of the cases relied on by the Applicant - for the important and obvious reason that he was not tried *in absentia*, and nor was a decision taken to try or convict him, or to continue his trial, knowing that he was in the UK or had been arrested here.

iii) The necessary steps set out in *R (Government of the USA) v Bow Street Magistrates' Court ex parte Tollman* [2007] 1 WLR 1157 had not been met and the Applicant had failed to establish either that the process of the court, or of the EA, was being usurped, nor that there was any injustice or unfairness in his return to Italy to participate in the ongoing case in relation to him.

iv) The DJ had correctly applied the law and had explained his reasons for finding that there was no abuse of process - which, given the evidence before him, was a proper conclusion. In particular, he had been entitled to accept the further information provided by the Italian authorities in relation to the Applicant's retrial rights; and to conclude that the fact that the Applicant might not obtain bail on return to Italy did not render his extradition an abuse of process. There was no reasonably arguable basis to assert that he ought to have found differently.

Conclusions - Ground 5

129. This Ground also proceeds upon the same critical, but misconceived, assertion as to the prospective Italian process.

130. At all events, for the reasons advanced on behalf of the Respondent (see [127] - [128] above) this Ground is not reasonably arguable, and I would refuse permission to appeal in relation to it.

Overall conclusions

131. For the reasons set out above, I would refuse permission to appeal on Grounds 1,3,4 & 5, but would grant permission to appeal on Ground 2 - strictly limited to the abuse of process argument in relation to the ultimate order to extradite the Applicant in respect of all the offences set out in the EAW.

132. Whilst that was not an argument that the DJ was invited to consider, it seems to me that, in the particular circumstances of this case, which include the undoubted acquittal of the Applicant by a competent court in relation to the nine substantive offences, and the absence of any undertaking on instructions, or other viable guarantee, as to the non-resurrection of those offences (which creates a risk of prejudice or unfairness), the *Zakrzewski* criteria (see [41] above) are met. Accordingly, in my view, in the terms of s.27 (4) of the EA, had this issue been raised before the DJ it would have resulted in him deciding a question before him (namely what offences to order extradition for) differently - in that he would have ordered the Applicant's discharge in relation to each of the nine substantive offences.

133. In the result, I would allow the appeal on the limited aspect of Ground 2 that I have indicated, and would quash the order for the Applicant's extradition in relation to the nine substantive offences. However, the order for the Applicant's extradition in relation to the offence of participation in a criminal association stands, and (I underline again) that offence covers the period from December 2005 until the issue of the EAW on 25 February 2010 and, whilst it includes (as is accepted) the conduct underlying the nine substantive offences, it is not confined to that conduct.

Lady Justice Sharp

134. I agree.