**Hilary Term**

**[2019] UKSC 8**

On appeal from: [2017] EWHC 2360 (Admin)

**JUDGMENT**

**Konecny ( Appellant ) v District Court in Brno-Venkov, Czech Republic ( Respondent )**

**before**

**Lord Kerr**

**Lord Hodge**

**Lady Black**

**Lord Lloyd-Jones**

**Lord Kitchin**

**JUDGMENT GIVEN ON**

**27 February 2019**

**Heard on 6 December 2018**

| Appellant | Respondent |
|---|---|
| Mark Summers QC | John Hardy QC |
| Benjamin Seifert | Jonathan Swain |
| (Instructed by Freemans) | (Instructed by CPS Appeals and Review Unit) |

**LORD LLOYD-JONES: (with whom Lord Kerr, Lord Hodge, Lady Black and Lord Kitchin agree)**

History of proceedings

1.

On 12 May 2008, Mr Karel Konecny ("the appellant"), a Czech national, was convicted in his absence by the District Court in Brno-Venkov, Czech Republic ("the District Court") of three offences of fraud, committed between November 2004 and March 2005, and was sentenced to eight years' imprisonment. It was alleged that the three offences concerned a total sum of approximately £120,000.

2.

The extradition of the appellant has been requested by the District Court by a European Arrest Warrant ("EAW") dated 17 April 2013 pursuant to the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between member states (2002/584/JHA) ("the Framework Decision"). The Czech Republic is a designated Category 1 territory pursuant to section 1 of the Extradition Act 2003 ("the 2003 Act"), by the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (SI 2003/3333), as amended by the Extradition Act 2003 (Amendment to Designations) Order 2004 (SI 2004/1898). Part 1 of the 2003 Act, as amended, applies in this case. The EAW states that it is based on an enforceable judgment, namely the judgment of the District Court dated 12 May 2008, confirmed by the resolution of the Regional Court in Brno dated 23 July 2008.

3.
The EAW specifies that the appellant will be afforded an unqualified right to be re-tried upon return in the event that he makes an application to be re-tried. A letter from the District Court dated 17 March 2017 confirms that:

(1)
The appellant was never arrested in connection with the offences;

(2)
He was never questioned in connection with the offences;

(3)
He was never informed that he had been sought for questioning; and

(4)
He was never subject to a restriction from leaving the Czech Republic.

4.
The EAW was submitted to, and received by, the National Crime Agency ("NCA"), an authority designated by the Secretary of State for the purposes of Part 1 of the 2003 Act. On 2 March 2017 the EAW was certified by the NCA under sections 2(7) and (8) of the 2003 Act. The appellant was arrested pursuant to section 3 of the 2003 Act on 2 March 2017. The initial hearing took place at Westminster Magistrates' Court pursuant to section 4 of the 2003 Act. The appellant was remanded in custody to the extradition hearing.

5.
The extradition hearing took place before District Judge Ashworth at Westminster Magistrates' Court on 10 April 2017. One of the issues raised was whether, under section 14 of the 2003 Act, extradition would be oppressive or unjust given the passage of time since the offences. In reliance on section 14(a) of the 2003 Act, the appellant argued that he was an accused person facing a prospective trial and that it would be unjust and oppressive to order his extradition taking into account the delay since 2004 and events and changes in his personal circumstances within that period. The appellant also maintained that his extradition would infringe his rights under article 8 of the European Convention on Human Rights ("ECHR").

6.
In his judgment dated 24 April 2017 District Judge Ashworth ruled that it was the conviction provisions in section 14(b) which were the operative provisions and that, as a result, the passage of time to be considered under section 11(1)(c) and section 14 was restricted to the period from 12 May

2008 (the date of conviction by the District Court) onwards. He concluded that the circumstances of the delay did not justify a finding that it would be unjust or oppressive to return the appellant to the Czech Republic. He went on to consider whether the return of the appellant would infringe the appellant's article 8 rights and, in that context, considered the delay since the offences were committed. He, nevertheless, concluded that the public interest factors in favour of extradition outweighed the considerations relating to the appellant's family and private life, even when the delay was taken into account. The appellant's surrender to the Czech Republic was ordered pursuant to section 21(3) of the 2003 Act.

7.
The appellant sought to appeal against the order for his extradition. On 21 June 2017 Collins J granted permission to appeal. On 27 September 2017 Sir Wyn Williams, sitting as a judge of the High Court, upheld the District Judge's ruling that it was the conviction provisions of section 14(b) which were applicable, with the result that the passage of time to be considered under section 11(1)(c) and section 14 was restricted to the period since conviction on 12 May 2008. The judge concluded that the extradition of the appellant would not be unjust or oppressive. He did, however, address the issue of delay further in the context of the article 8 challenge. He noted that the District Judge was fully aware of the very long delay between the offending and the hearing before him. Sir Wyn considered that the delay which had occurred was a powerful factor militating against extradition. However, he could not conclude that the District Judge's decision on the article 8 issue could be said to be wrong. Accordingly, he dismissed the appeal pursuant to section 27(1)(b) of the 2003 Act.

8.
On 7 November 2017 the High Court certified the following point of law of general public importance:

"In circumstances where an individual has been convicted, but that conviction is not final because he has an unequivocal right to a retrial after surrender, is he 'accused' pursuant to section 14(a) of the 2003 Act, or 'unlawfully at large' pursuant to section 14(b) for the purposes of considering the 'passage of time' bar to surrender?"

On the same date the High Court refused permission to appeal to the Supreme Court.

9.
On 23 March 2018 the Supreme Court (Lord Mance, Lord Hughes and Lady Black) granted permission to appeal to the Supreme Court.

The relevant legislation

10.
The European Union system for the surrender of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order is established by the Framework Decision as amended. The recitals in the preamble make clear that its objective is to abolish extradition between member states and replace it by a system of surrender between judicial authorities. It was intended that the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution should make it possible to remove the complexity and potential for delay inherent in previous extradition procedures (recital (5)). The mechanism of the EAW is based on a high level of confidence between member states (recital (10)). In relations between member states the EAW was intended to replace all the previous instruments concerning extradition (recital (11)).

11.
Article 1 of the Framework Decision provides in relevant part:

“Article 1

**Definition of the European arrest warrant and obligation to execute it**

1. The European arrest warrant is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member states shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision. …”

Article 3 sets out grounds for mandatory non-execution of an EAW and article 4 sets out grounds for optional non-execution.

Article 8 provides in relevant part:

“Article 8

**Content and form of the European arrest warrant**

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

…

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of articles 1 and 2;

…

(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing member state; …”

12.
Council Framework Decision 2009/299/JHA of 26 February 2009 amends the Framework Decision. Its full title states that its purpose is “enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial”. Recital (6) of the Preamble states:

“(6) The provisions of this Framework Decision amending other Framework Decisions set conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant or of the relevant certificate under the other Framework Decisions, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition.”

It inserts article 4a into the Framework Decision which provides in relevant part:

“Article 4a

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

1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing member state:

(a) in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

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

or

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

or

(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:

(i) expressly stated that he or she does not contest the decision;

or

(ii) did not request a retrial or appeal within the applicable time frame;

or

(d) was not personally served with the decision but:

(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;

and

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

Article 2(3) of Council Framework Decision 2009/299/JHA of 26 February 2009 sets out the amended requirements of the information to be included in an EAW in such a case.

13.

The Framework Decision as amended is implemented in the United Kingdom by Part 1 of the Extradition Act 2003 as amended.

14.
Section 2 provides in relevant part:

“**2. Part 1 warrant and certificate**

(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.

(2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains -

(a) the statement referred to in subsection (3) and the information referred to in subsection (4), or

(b) the statement referred to in subsection (5) and the information referred to in subsection (6).

(3) The statement is one that -

(a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.

(4) …

(5) The statement is one that -

(a) the person in respect of whom the Part 1 warrant is issued has been convicted of an offence specified in the warrant by a court in the category 1 territory, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence.

…”

Section 10 provides:

“**10. Initial stage of extradition hearing**

(1)(1) This section applies if a person in respect of whom a Part 1 warrant is issued appears or is brought before the appropriate judge for the extradition hearing.

(2) The judge must decide whether the offence specified in the Part 1 warrant is an extradition offence.

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

(4) If the judge decides that question in the affirmative he must proceed under section 11.”

Section 11 provides in relevant part:

“**11. Bars to extradition**

(1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of -

…

(c) the passage of time;

…

(2) Sections 12 to 19F apply for the interpretation of subsection (1).

(3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.

(4) If the judge decides those questions in the negative and the person is alleged to be unlawfully at large after conviction of the extradition offence, the judge must proceed under section 20.

(5) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 21A."

Section 14 provides:

"**14. Passage of time**

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), or

(b) become unlawfully at large (where he is alleged to have been convicted of it)."

Section 20 provides:

"**20. Case where person has been convicted**

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

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

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

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

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

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

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

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

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

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

Section 21 provides in relevant part:

"**21. Person unlawfully at large: human rights**

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

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

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

…"

Section 21A provides in relevant part:

"**21A Person not convicted: human rights and proportionality**

(1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ('D') -

(a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;

(b) whether the extradition would be disproportionate.

(2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.

(3) These are the specified matters relating to proportionality -

(a) the seriousness of the conduct alleged to constitute the extradition offence;

(b) the likely penalty that would be imposed if D was found guilty of the extradition offence;

(c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.

(4) The judge must order D's discharge if the judge makes one or both of these decisions -

(a) that the extradition would not be compatible with the Convention rights;

(b) that the extradition would be disproportionate.

(5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions -

(a) that the extradition would be compatible with the Convention rights;

(b) that the extradition would not be disproportionate. …"

Section 68A provides:

"**68A. Unlawfully at large**

(1) A person is alleged to be unlawfully at large after conviction of an offence if -

(a) he is alleged to have been convicted of it, and

(b) his extradition is sought for the purpose of his being sentenced for the offence or of his serving a sentence of imprisonment or another form of detention imposed in respect of the offence.

(2) This section applies for the purposes of this Part, other than sections 14 and 63."

The EAW

15.
The EAW in this case was issued by the District Court on 17 April 2013. It states that it is based on an enforceable judgment, namely the judgment of the District Court dated 12 May 2008, confirmed by the resolution of the Regional Court in Brno dated 23 July 2008. It states that the length of the custodial sentence imposed was eight years. In compliance with article 4a of the Framework Decision as amended it states in Box (d) that the decision was reached in absentia and that the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia. However, it specifies legal guarantees as follows:

"After surrendering, the convict will have the right for a new process in his presence. Such right is ensured by the provisions of section 306a para 2 of the Code of Criminal Procedure. The provisions of section 306a para 2 of the Code of Criminal Procedure say:

Section 306a

(1) If reasons for the proceedings against the escaped person cease, it will be proceeded in the criminal procedure based on general provisions. If the defendant requires so, the evidence already given in the previous court proceedings, the nature of which allows so or the repetition of which are not hindered by any significant fact, shall be given again in the proceedings in front of the court. Otherwise the protocols on giving of such evidence will be read out to the defendant or the video and audio recordings made on the acts made via videoconference facilities shall be played to him and he will be allowed to make his statement on them.

(2) If the proceedings against the escaped person were ended by a legally effective conviction and subsequently the reasons ceased, for which the proceedings were lead against the escaped person; based on the application of the convict filed within eight days as of the delivery of the conviction, the court of the first degree shall revoke such a conviction and the main hearing will be done repeatedly, in the scope stipulated under para 1. The convict must receive instructions on the right to file an

application for revocation of the legally effective conviction when the conviction is delivered. The court reasonably proceeds if it is required by an international treaty by which the Czech Republic is bound.

(3) The period from the legal effectiveness of the conviction until its revocation pursuant to para 2 shall not be counted in the statute of limitations.

(4) In the new proceedings there cannot be any change in the resolution to the disadvantage of the defendant."

The EAW then sets out a description of each of the three offences of fraud of which the appellant was convicted.

Accusation warrants and conviction warrants

16.
Part 1 of the 2003 Act gives effect in national law to the Framework Decision as amended. The choice of form and methods to achieve that result is left to member states. In this instance, the United Kingdom has departed significantly from a direct implementation of the scheme of the Framework Decision. The provisions of Part 1 of the 2003 Act must, nevertheless, be interpreted as intended to give effect to the Framework Decision and, so far as possible, construed consistently with its terms and purpose. ( Criminal proceedings against Pupino (Case C-105/03) [2006] QB 83, paras 43, 47; Office of the King's Prosecutor, Brussels v Cando Armas [2005] UKHL 67; [2006] 2 AC 1 per Lord Bingham at para 8; Dabas v High Court of Justice in Madrid, Spain [2007] UKHL 6; [2007] 2 AC 31 per Lord Hope at para 25; Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy [2008] UKHL 51; [2008] 1 WLR 1724 per Lord Bingham at para 22, per Lord Mance at para 42.)

17.
The Framework Decision defines the EAW as a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person for the purposes of conducting a criminal prosecution (an accusation warrant) or executing a custodial sentence or detention order (a conviction warrant) (article 1(1)). In general, the Framework Decision deals with accusation and conviction cases together although the respective formal requirements of the two types of warrant differ. The 2003 Act distinguishes between an accusation warrant (section 2(3) and (4)) and a conviction warrant (section 2(5) and (6)). This distinction is particularly pronounced under the 2003 Act because not only do the formal requirements of the respective warrants differ but the statute also sets out separate routes which must be followed in those respective cases. On the face of the Act's provisions, the judge at the extradition hearing must initially in both cases decide under section 10 whether the offence specified in the Part 1 warrant is an extradition offence. If it is, he must then consider whether extradition is barred by any of the matters set out in section 11. Most of the bars apply equally to accusation and conviction warrants but two ("absence of prosecution decision" and "forum") apply only to accusation warrants. The bar arising by reason of the passage of time is amplified in section 14 which draws an important distinction between an accused person (where the relevant period will be the passage of time since he is alleged to have committed the extradition offence) and a convicted person (where the relevant period will be the passage of time since he is alleged to have become unlawfully at large). If extradition is not barred, the different routes diverge further at this point. The statute provides that if the person is alleged to be unlawfully at large after conviction of the extradition offence the judge must proceed under section 20 (section 11(4)). Under section 20, the court must be satisfied that, where the person has been convicted, he was convicted in his presence, or he deliberately absented himself from his trial, or he would be

entitled to a retrial or (on appeal) to a review amounting to a retrial. If section 20 is satisfied the judge must proceed under section 21 which addresses the compatibility of the person's extradition with Convention rights under the Human Rights Act 1998 ("HRA 1998"). By contrast, if the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, section 11(5) directs that the judge must proceed under section 21A. Section 21A is discrete from section 21 and requires the judge to address both Convention rights under the 1998 Act and the issue of proportionality.

18.
At the heart of the present appeal lies the issue of the characterisation of the appellant as an accused person or a convicted person. The application in an individual case of the distinction drawn by the Framework Decision between these two cases may often be far from straightforward given the inevitable differences in criminal procedure among member states. However, the EAW system is founded on the high level of mutual trust and confidence between member states and, as a result, in seeking to give effect to this distinction when applying implementing legislation, a national court will usually attach considerable weight to the description by the requesting judicial authority in the EAW of the position in its own national law. In Caldarelli Lord Bingham expressed the matter in this way:

"Under article 1 of the Framework Decision the EAW is a judicial decision issued by the requesting state which (by article 2) this country (subject to the provisions of the Decision) must execute on the basis of the principle of mutual recognition. It might in some circumstances be necessary to question statements made in the EAW by the foreign judge who issues it, even where the judge is duly authorised to issue such warrants in his category 1 territory, but ordinarily statements made by the foreign judge in the EAW, being a judicial decision, will be taken as accurately describing the procedures under the system of law he or she is appointed to administer." (para 24)

Similarly, in Istanek v District Court of Prerov [2011] EWHC 1498 (Admin) Laws LJ, observed:

"The statement of information, having its source in the judicial authority in the requesting state, is ordinarily in our courts to be taken at face value. It may exceptionally be appropriate to initiate further inquiry of the requesting state's authorities." (para 25)

The view of the requesting judicial authority expressed in the EAW will, therefore, not always be conclusive. However, it will normally be influential and, in the absence of evidence to the contrary, it is likely to be followed. (See the discussion in Caldarelli , per Lord Mance at para 42.)

The appellant's case

19.
On behalf of the appellant, Mr Mark Summers QC submits that the category of convicted persons is limited to persons who are finally convicted and that all other persons are to be treated as accused. He further submits that, while the content of the EAW in the present case would satisfy the requirements of either an accusation warrant or a conviction warrant under section 2 of the 2003 Act, the appellant, despite manifestly not being finally convicted, was treated as a convicted rather than an accused person for the purpose of his extradition proceedings and that this radically changed the substantive content and course of those proceedings. In particular, he points to the following consequences:

(1)

The appellant's EAW was measured against the less exacting conviction requirements of section 2(5)-(6) of the 2003 Act as opposed to the accusation requirements of section 2(3)-(4).

(2)
He was treated as being "unlawfully at large" from that conviction rather than still "accused" of the offences, for the purposes of the passage of time assessment under section 14. Mr Summers submits that, as a result, consideration of delay prior to conviction and consideration of injustice were precluded.

20.
Mr Summers seeks to advance his case on two distinct bases. First, he submits that, as a matter of EU law, the appellant is required to be categorised as a person whose return is sought "for the purposes of conducting a criminal prosecution" within article 1(1) of the Framework Decision. Secondly, he submits that, as a matter of domestic law, the appellant is not to be categorised as "convicted" under the 2003 Act. These submissions will be considered in turn.

EU law

21.
Mr Summers places at the forefront of his submissions on EU law the decision of the CJEU in Proceedings concerning IB (Case C-306/09) [2011] 1 WLR 2227. IB, a Romanian national had been convicted of criminal offences in Romania and sentenced to four years' imprisonment to be served under a system of supervised release. That sentence was upheld on appeal. However, on further appeal the Supreme Court ordered that the sentence be served in custody. The decision of the Supreme Court was rendered in absentia and IB was not notified of the date or place of the hearing. The sentence was never executed. IB fled Romania and settled in Belgium where he obtained a residence permit and was joined by his wife and children. The Romanian requesting authority issued an EAW for his arrest with a view to executing the sentence. At the relevant time, prior to Council Framework Decision 2009/299/JHA, article 4(6) of the Framework Decision authorised the executing judicial authority to refuse to execute the warrant "if the [EAW] has been issued for the purposes of execution of a custodial sentence" where the person is resident in the executing member state and that state undertakes to execute the sentence in accordance with its domestic law. Article 5(1) provided that where the EAW had been issued "for the purposes of executing a sentence" in absentia without notice to the person concerned, surrender might be subject to a condition that the issuing judicial authority give an assurance that the person will have an opportunity to apply for a retrial. Article 5(3) provided that where a person whose return is sought "for the purposes of prosecution" is a resident of the executing member state, surrender may be subject to the condition that the person is returned to the executing member state to serve there any sentence passed against him in the issuing member state. Article 18 of the Belgian Law on Transfers, which governed the execution in Belgium of sentences imposed abroad, did not apply to sentences imposed in absentia save in specified cases where the sentence had become final.

22.
The Belgian Court of First Instance, Nivelles, found that under Romanian procedural law, due to the fact that he had been sentenced in absentia , IB was entitled to be retried. That court took the view that it was a warrant for the execution of a sentence and that therefore there were no legal grounds for refusing execution or making it conditional on the later return of IB to serve his sentence in Belgium. It held that IB could not rely on the Belgian law implementing article 4(6) of the Framework Decision because it only applied to final decisions and IB had the right to request a retrial. The court

referred the matter to the Belgian Constitutional Court which, in turn, made a preliminary reference to the CJEU. Its first two questions were as follows:

“(1) Is a European arrest warrant issued for the purposes of the execution of a sentence imposed in absentia, without the convicted person having been informed of the date and place of the hearing, and against which that person still has a remedy, to be considered to be, not an arrest warrant issued for the purposes of the execution of a custodial sentence or detention order within the meaning of article 4(6) of Framework Decision [2002/584], but an arrest warrant for the purposes of prosecution within the meaning of article 5(3) of the Framework Decision?

(2) If the reply to the first question is in the negative, are article 4(6) and article 5(3) of the Framework Decision to be interpreted as not permitting the member states to make the surrender to the judicial authorities of the issuing state of a person residing on their territory who is the subject, in the circumstances described in the first question, of an arrest warrant for the purposes of the execution of a custodial sentence or detention order, subject to a condition that that person be returned to the executing state in order to serve there the custodial sentence or detention order imposed by a final judgment against that person in the issuing state?”

23.
Mr Summers places particular reliance on the following passage in the judgment of the CJEU in response to the first two questions:

“56. If the sentence imposed in absentia - which, in the case in the main proceedings, provides the basis for the arrest warrant - is not yet enforceable, the surrender would serve the specific purpose of enabling a criminal prosecution to be conducted or the case to be retried, that is to say surrender would be for the purposes of criminal prosecution which is the situation envisaged by article 5(3) of Framework Decision 2002/584.

57. Given that the situation of a person who was sentenced in absentia and to whom it is still open to apply for a retrial is comparable to that of a person who is the subject of a European arrest warrant for the purposes of prosecution, there is no objective reason precluding an executing judicial authority which has applied article 5(1) of Framework Decision 2002/584 from applying the condition contained in article 5(3) of that framework decision.”

24.
The CJEU concluded in relation to the first two questions:

“61 In the light of all of the foregoing considerations, the answer to the first and second questions is that articles 4(6) and 5(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing member state has implemented article 5(1) and article 5(3) of that Framework Decision in its domestic legal system, the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed in absentia within the meaning of article 5(1) of the Framework Decision, may be subject to the condition that the person concerned, who is a national or resident of the executing member state, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing member state.”

25.
Mr Summers submits that this decision and, in particular, the passage at paras 56 and 57 establish that, in all cases where a person whose surrender is sought under an EAW following conviction in

absentia of which he had no notice and, as a result, is entitled to a retrial, the EAW must be characterised as "for the purposes of conducting a criminal prosecution" and not "for the purposes of … executing a custodial sentence". I am unable to accept this submission.

(1)
The referring court expressly asked by its first question whether in circumstances where there was a right of retrial the EAW should be treated not as a warrant for the purposes of the execution of a custodial sentence but as a warrant for the purposes of prosecution. The CJEU did not answer that question directly.

(2)
Instead it stated that if the sentence imposed in absentia is not yet enforceable the surrender would serve the purpose of enabling a criminal prosecution to be conducted or the case to be retried and the surrender would be for the purposes of criminal prosecution. It did not say that that consequence followed if the sentence was enforceable but subject to an application to set it aside.

(3)
The CJEU then went on to say (at para 57) that the situation of a person sentenced in absentia and who could apply for a retrial was comparable to that of a person who was the subject of a prosecution warrant. On that basis, it was able to conclude that there was no objective reason precluding an executing judicial authority from applying the condition contained in article 5(3). The court was extending the application of article 5(3). It was not saying that such a warrant was or was to be treated for all purposes as if it were a prosecution warrant.

(4)
The CJEU concluded (at para 57) that the condition contained in article 5(3) could be applied by an executing judicial authority which had applied article 5(1). The warrant must, therefore, have been "issued for the purposes of executing a sentence or detention order".

(5)
Had the CJEU intended to draw the conclusion for which the appellant contends, it would have effected a fundamental change in the operation of the EAW scheme. I am confident that, had this been intended, such a development would have been expressed by the court in the clearest terms possible.

(6)
I accept that there are certain passages in the opinion of Advocate General Cruz Villalon which go some way to support the proposition for which the appellant in this case contends. In particular, at paras 49-51 the Advocate General considers that an EAW which allows the person sought to be retried is formally a warrant for execution of a sentence which, once the person states that he or she wishes to be retried, becomes in substance a warrant for the purposes of prosecution. Accordingly, he says, entry into play of article 5(1) changes the form of the arrest warrant but does not affect the rights accorded to the person concerned under EU law. However, there is no trace of such reasoning in the judgment of the court. Moreover, it is inconsistent with the dichotomy between accusation warrants and conviction warrants established by the Framework Decision, a dichotomy which has been maintained since the decision in IB.

26.
When asked by the court during the course of his submissions whether there was any other Luxembourg authority to support his submission, Mr Summers very frankly accepted that there was no such direct authority. He did, however, refer the court to Criminal proceedings against Tupikas

(Case C-270/17PPU) [2017] 4 WLR 188. This case, it seems to me, is concerned with a different issue. There, the EAW mentioned an enforceable judgment sentencing the defendant to a term of imprisonment and further stated that he had unsuccessfully appealed against that judgment. He had appeared in person at the trial at first instance but the EAW provided no information as to whether he had appeared at the appeal hearing. The CJEU held that where the criminal procedure of the issuing member state gives rise to successive judicial decisions, at least one of which has been handed down in absentia , the concept of "trial resulting in the decision" in 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, following a re-examination, in fact and in law, of the merits of the case (at para 98). The decision was therefore concerned with ascertaining which stage or stages of proceedings constitute the "trial resulting in the decision" for the purposes of article 4a. Criminal proceedings against Zdziaszek (Case C-271/17PPU) [2017] 4 WLR 189 addresses the same issue and applies Tupikas . This is a distinct question from that before us, namely whether the present case is to be treated as an accusation case or a conviction case. (I note that the same conclusion was drawn by the Divisional Court (Treacy LJ and Males J) in Attila Imre v District Court in Szolnok (Hungary) [2018] EWHC 218 (Admin), para 57.)

27.

In particular, Tupikas and Zdziaszek do not support the proposition that for an EAW to be issued for the purpose of executing a custodial sentence it must be a final judgment of conviction in the sense that it is irrevocable. On the contrary, the court in Tupikas observed:

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

I note that article 1(1) of the Framework Decision identifies the two categories of warrant without including any reference to a final decision. The references in the Preamble of the Framework Decision to abolishing the formal extradition procedure "in respect of persons who are fleeing from justice after having been finally sentenced" (recital 1) and "a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions" (recital 5) are merely incidental. Article 8(f) does require that a warrant should state the penalty imposed "if there is a final judgment". By contrast, article 8(c) requires a warrant to contain evidence of "an enforceable judgment" and "any other enforceable judicial decision having the same effect". We now have an authoritative statement from the CJEU in Tupikas (para 71) that while it is appropriate to pay attention to the final nature of the decision or judgment for the purposes of interpreting article 4a(1), it is enforceability which is "decisive in determining the time from which a European arrest warrant may be issued". (See also, in this regard, IB at para 56.)

28.

I have, accordingly, come to the clear conclusion that the appellant's case founded on EU law is not made out. In these circumstances, I would refuse the application on behalf of the appellant, made during the oral hearing, to refer this issue to the Court of Justice of the European Union for a preliminary ruling.

Domestic law

29.
On behalf of the appellant it is submitted that, because he has a right to be retried, he is required to be treated as an accused person for the purposes of Part 1 of the 2003 Act.

Contumacious convictions

30.
Mr Summers submits that a conviction where a defendant has an unfettered and unconditional right to have the conviction set aside and to obtain a retrial has always been regarded, as a matter of English law, as a conviction in contumacy ( conviction par contumace ) and not a final judgment. He submits that courts in this jurisdiction have consistently held that the categorisation of such a case depended upon a factual assessment of whether, upon return, the defendant would enjoy an unqualified right to a retrial on the merits notwithstanding the conviction. If so, that person's extradition had to be sought as an accused person, the conviction being contumacious. If not, the person's extradition had to be sought as a convicted person. In this regard we were referred to a large number of decisions concerning contumacious convictions.

31.
It is clear that courts in this jurisdiction, applying legislation previously in force, have been willing to treat a person convicted in his absence as an accused person, provided that the whole matter can be reopened as of right in the event of his subsequent surrender and appearance. (See, for example, R v Governor of Pentonville Prison, Ex p Zezza [1983] 1 AC 46, per Lord Roskill at p 55D-E.) This approach has also been reflected in the legislation itself. (See, for example, section 26 Extradition Act 1870; section 19(2), Fugitive Offenders Act 1967; Schedule 1, paragraph 20 to the Extradition Act 1989.) However, the appellant's reliance on these authorities fails to take account of the fact that the EAW was intended to be a new departure introducing a simplified scheme for the surrender of accused and convicted persons. The Framework Decision sets out a relatively detailed scheme which distinguishes between an accusation warrant and a conviction warrant without giving any indication that a principle of contumacious convictions resembling that developed in this jurisdiction was to play any part. On the contrary, provision was made originally in article 5(1) and is now made by article 4a(1) for cases of conviction in absentia without requiring or permitting a person with a right of retrial to be dealt with under the scheme as an accused person. Indeed, the original article 5(1) contemplated that cases of conviction in absentia would be dealt with under a conviction warrant, as does recital (13) in the Preamble to Framework Decision 2009/299/JHA. Recital (4) in the Preamble to that Framework Decision provides:

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

Lest the contrary be suggested, I consider that the final sentence of this recital leaves no room for the application of a principle which would be inconsistent with the common scheme.

32.

In the same way, in the implementing legislation in Part 1 of the 2003 Act section 20 is clearly intended to make comprehensive provision for cases of conviction in absentia without requiring or permitting a contumacious conviction to be treated as an accusation case. I consider that the principles relating to contumacious convictions developed in the case law under previous legislation can have no application under the current scheme. For courts in this jurisdiction now to impose this concept unilaterally on the EAW scheme by requiring accusation warrants in such cases would be highly disruptive of the EAW scheme and inconsistent with the obligations of the United Kingdom under it.

33.
The principle of contumacious convictions described above is likely to be the origin of an observation of Lord Brown in Gomes v Government of the Republic of Trinidad and Tobago [2009] UKHL 21; [2009] 1 WLR 1038 in relation to section 82 of the 2003 Act, a provision in Part 2 of the Act, which is in substantially identical terms as section 14.

"The final question discussed before the House was the period of time for consideration under section 82. It starts, of course, with the date of the alleged offence (section 82(a)) or when the fugitive became unlawfully at large (section 82(b)) (a fugitive tried in his absence without having deliberately absented himself from his trial falling for this purpose under section 82(a))." (para 38)

Whatever may be the current relevance of the principle of contumacious convictions as developed in this jurisdiction to extradition proceedings under Part 2 of the 2003 Act, I consider that it has none under Part 1.

The statutory scheme

34.
More generally, I consider that the appellant's case that, because of his right to be retried, he is required to be treated as an accused person for the purposes of Part 1 of the 2003 Act is inconsistent with the EAW scheme and the express provisions of the statute.

35.
Mr Summers submits that, when section 11 is applied in this case, if none of the bars to extradition applies the case falls within section 11(5) because the appellant is a person accused. However, even if the appellant were required to be treated as a person accused for this purpose, which I would not accept, that subsection applies only where the person is accused of the commission of an extradition offence "but is not alleged to be unlawfully at large after conviction of it". Section 68A defines "unlawfully at large" for the purposes of section 11. Here, the appellant clearly falls within that definition. He is alleged to have been convicted of the relevant offences and his extradition is sought for the purpose of his serving a sentence of imprisonment imposed in respect of those offences. His case does not fall within subsection 11(5) but within subsection 11(4) because he is alleged to be unlawfully at large after conviction of the extradition offence. As a result, the judge is directed to proceed under section 20 and not under section 21A.

36.
Mr Summers then submits that if section 20 is applied to the case of this appellant, he would enter section 20 as a convicted person but should leave as an accused person. He would have been recognised by the extradition court as entitled to an unfettered and unconditional retrial. In these circumstances, it is submitted, fairness ought to dictate that he now be recategorized as an accused person and that all of the antecedent statutory questions that have been answered on the false

premise that he was a convicted person be re-examined. I am unable to accept this submission. First, section 20 is intended to provide protection in the specific case of a person convicted in his absence and the sequential application of its express provisions achieves precisely that. In the present case, it is common ground that the appellant was not convicted in his presence within subsection 20(1) and that he did not deliberately absent himself from his trial under subsection 20(3). However, it is also common ground that he would be entitled to a retrial under subsection 20(5) which meets the requirements of subsection 20(8). If the last issue were not resolved in that way, the appellant would have to be discharged. In this case, however, the judge is directed by subsection 20(6) to proceed under section 21 which addresses the human rights of persons unlawfully at large. Secondly, I am unable to accept the submission that section 20 is the successor to section 6(2) of the Extradition Act 1989 and therefore was never intended to apply to persons with a right of retrial. In this regard I note the decision of the Divisional Court in Foy v The Governor of HM Prison Brixton and the Government of France (unreported) 14 April 2000 on the earlier provision. However, whatever may have been the position under the 1989 Act, it is clear that section 20 is intended to make comprehensive provision for cases where a convicted person was convicted in absentia . Thirdly, Mr. Summers submits that if a person convicted in absentia subsequently disavows his right to a retrial his status would revert to that of a convicted person. However, nothing in the statutory scheme contemplates or makes provision for such changes of status.

37.
Mr Summers accepts that section 20(6), which requires the judge to proceed under section 21 which addresses the human rights of persons unlawfully at large, appears to preclude the approach for which he contends. It does indeed. If a person whose surrender is sought emerges from section 20 as an accused person his or her case should, surely, thereafter be dealt with under section 21A which addresses the human rights and proportionality of a person not convicted. Mr Summers' response was that this was an oversight in the drafting of the legislation. He submits that it would still be open to the extradition court at any stage to recognise that the warrant was no longer valid as a conviction warrant within the meaning of section 2 and to cause it to be re-appraised and re-issued if necessary as an accusation warrant. Further, he submits that the fact that EU law requires a defendant in such circumstances to be re-treated as an accused person requires the court to adopt a reading of section 20 which achieves that result or to find a common law solution which achieves that result. Here he relies on Criminal proceedings against Pupino . For reasons stated earlier in this judgment, I do not accept that EU law requires the result for which he contends. Moreover, it seems to me that this proposed reading of section 20 cannot be correct and, on the contrary, that subsections 20(6), (7) and (8) make it entirely clear that a person with a right to a retrial which meets the requirements in (8) is to be treated as convicted not as accused. The express provisions in their natural meaning provide a coherent structure within which to address all cases of trial in absentia .

Authorities

38.
We have been referred to a number of authorities which, it is said, support the appellant's case.

39.
Mr Summers places considerable reliance on the decision of the House of Lords in Caldarelli . In that case, Mr Caldarelli had been convicted by an Italian court of a drugs offence and sentenced to a term of imprisonment. He had deliberately absented himself from the trial but was represented by lawyers appointed by him personally. His lawyers lodged an appeal on his behalf. While that appeal was still pending an Italian judge issued an EAW which stated that he was accused in Italy of a drugs offence.

He was arrested in the United Kingdom under the warrant and his extradition to Italy ordered. He appealed on the ground that the warrant ought to have included a statement that he had been convicted of an offence in accordance with section 2(5) of the 2003 Act and was therefore invalid. The appeal was dismissed on the ground that his extradition was sought for the purposes of his being prosecuted for an offence within section 2(3)(b).

40.
Contrary to what might appear at first sight, however, the decision does not assist the appellant in the present case. Under Italian law the first instance judgment and sentence were neither final nor enforceable until the criminal appeal process was concluded and Mr Caldarelli was not regarded as convicted until his conviction became final. Furthermore, he was not entitled as of right to a retrial or to a review amounting to a retrial. As Lord Bingham explained:

"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 section 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." (para 24)

41.
We were also referred, on behalf of the appellant, to the decision of the Divisional Court (Sharp LJ and Sweeney J) in Lewicki v Preliminary Investigation Tribunal of Napoli, Italy [2018] EWHC 1160 (Admin). That decision was, however, an application of Caldarelli (see Sweeney J at paras 67-68) and therefore does not assist the appellant.

42.
The appellant also relies on a line of relatively recent authority in which it was held that persons convicted in absentia who had a right to request a new trial could be dealt with as persons accused. In R (Bikar) v The Governor of HM Prison Brixton [2003] EWHC 372 (Admin), a case on the Extradition Act 1989, the applicants, who had been convicted in absentia in the Czech Republic resisted their extradition under an accusation warrant on the ground that autrefois convict applied. Henriques J held that as they had a right to request a new trial this was not a final judgment and accordingly they could be dealt with as persons accused as in Foy v Governor of HM Prison Brixton where the Divisional Court had held that a person who would be entitled to have his conviction set aside was rightly regarded for the purposes of section 6(3) of the Extradition Act 1989 as a person accused.

43.
In Usti Nad Labem Regional Court (Czech Republic) v Janiga [2010] EWHC 463 (Admin) Mr Janiga had absconded after the start of his trial in the Czech Republic. An EAW was issued. In the period between the issue of the warrant and the extradition hearing in the United Kingdom he was convicted and sentenced in his absence, although lawyers attended the hearing on his behalf. His lawyers lodged an appeal against conviction and sentence. On appeal the conviction was upheld but the sentence reduced. At the extradition hearing the District Judge ordered his discharge on the ground that the accusation warrant was defective as he had been convicted. The Divisional Court (Waller LJ and Swift J) allowed the appeal. Further information provided by the issuing authority established a

right to apply for reversal of the judgment and this “puts it completely beyond doubt in our view that the conviction and sentence were not final and enforceable” (at paras 49-53).

44.

In Ruzicka v District Court of Nitra, Slovakia [2010] EWHC 1819 (Admin) the Divisional Court (Elias LJ and Keith J) held that an accusation warrant issued by the Slovakian judicial authority was valid notwithstanding the fact that Mr Ruzicka had already been convicted and sentenced in Slovakia because he had appealed against the conviction and sentence in circumstances in which the appeal had caused the conviction and sentence to cease to be valid. In these circumstances the court considered it plain that the conviction and sentence was not a final determination of the criminal process. Until the expiry of time within which to appeal the judgment was neither final nor enforceable. Accordingly, the accusation warrant was in correct form. The court approved the similar conclusion in Janiga .

45.

Bikar , Janiga and Ruzicka should, however, be contrasted with Sonea v Mehedinti District Court, Romania [2009] EWHC 89 (Admin); [2009] 2 All ER 821 and Istanek v District Court of Prerov [2011] EWHC 1498 (Admin).

46.

In Sonea the appellant was arrested under a conviction warrant which stated that in his absence he had been tried and convicted in Romania and sentenced to ten years’ imprisonment. He appealed against an order for his extradition contending that because he had a right to a re-trial in Romania the warrant should have been drafted as an accusation warrant and was therefore invalid. This submission was rejected by the Divisional Court (Scott Baker LJ and Maddison J). Scott Baker LJ, delivering the only judgment, considered (at para 9) that it was necessary to follow carefully and chronologically the structure of the 2003 Act and that it was liable to be misleading to pick out observations by judges concerned with earlier legislation.

“The structure of Part 1 of the Extradition Act 2003 envisages a step-by-step approach by the judge. Each step requires consideration of a particular question and its answer determines the next move that the judge is required to make. It is to be noted that it is only when the step-by-step exercise takes the judge to section 20 that he is required to consider whether the person was convicted in his presence, whether he deliberately absented himself from his trial and whether he would be entitled to a retrial or (on appeal) to a review amounting to a retrial. As Ms Mannion, for the respondent, observes section 20 is only reached where a person has been convicted and if Ms Freeman’s argument is correct none of the steps set out in such detail in section 20 would be relevant.

…

Ms Freeman’s argument, as it seems to me, puts the cart before the horse. It seeks to extract questions that Parliament has said fall to be dealt with under section 20 and make them issues that determine the nature of the warrant, whereas the legislation clearly sets out a step-by-step process that the judge must follow.” (paras 16, 18)

The fact that the appellant had an unfettered right to a retrial did not stop the warrant from being a conviction warrant.

47.

A similar approach was adopted by the Divisional Court (Laws LJ, Collins and Stadlen JJ) in Istanek . The appellant had been convicted in the Czech Republic in his absence. He was entitled to a full retrial by virtue of section 306a of the Czech Penal code, the same provision which applies in the present case. A conviction EAW was issued for his surrender and his return was ordered. On behalf of the appellant it was argued that he was, in truth, an accused person and not a convicted person and that the warrant was, accordingly, invalid. Laws LJ, delivering the only judgment, noted the apparently conflicting authorities and observed (at para 29) of Bikar , Janiga and Ruzicka that all three were cases where the result arrived at was in fact in conformity with the requesting state's position on the question whether the proposed extraditee was to be treated as accused or convicted. However, in his view there was no reason to hold that in the result any of those cases was wrongly decided on its facts. He considered it plain that Sonea was correctly decided.

48.
Laws LJ considered (at para 23) that it was inherent in the scheme of the 2003 Act that courts in this jurisdiction will proceed on the basis of the statements in the warrant and will properly categorise the relevant facts according to the procedures and law of the foreign state. Applying Caldarelli , he observed (at paras 23-25) that information in an EAW, having its source in the judicial authority of the requesting state, is ordinarily in our courts to be taken at face value although it may exceptionally be appropriate to initiate further inquiry of the requesting authority. With regard to finality, he noted (at paras 26-27) that the definition of the EAW in article 1(1) contained no reference to finality although there was a reference to it in article 8(1)(f). He considered that insofar as finality is an incident of conviction for the purposes of a conviction EAW, the warrant will reflect the meaning of finality applied in the criminal jurisdiction of the requesting state. Furthermore, he considered (at para 28) that the existence of a right of retrial cannot be treated, as a matter of law, as systematically inconsistent with the fugitive being a convicted person. To apply such a "one size fits all" approach would be inconsistent with his general approach and with section 20. The issue of characterisation was not to be decided by courts in this jurisdiction by their own lights. That would be contrary to the position taken by the Czech judicial authority which had explained that if a fugitive convicted in absentia did not ask for his case to be reopened, the judgment would remain legally binding and enforceable, as the entire proceedings had already taken place and the judgment was already legally valid.

49.
I find the reasoning of the Divisional Courts in Sonea and Istanek compelling. The scheme of Part 1 of the 2003 Act is restrictive in that the judge at an extradition hearing is directed to follow particular routes through the statute depending on his answer to each question the statute requires him to address. This step by step approach is entirely incompatible with the appellant's case. If and to the extent that Sonea and Istanek are inconsistent with the approach adopted in other cases, in particular Bikar , Janiga and Ruzicka, I consider that Sonea and Istanek are to be preferred.

The process of characterisation

50.
The criteria for determining what constitutes a criminal conviction for the purposes of the Framework Decision and implementing legislation within member states must be derived from the Framework Decision. Those criteria must be applied to the position as it exists under the law and practice of the member state of the requesting authority. I consider, therefore, that the following principles should be applied by a court in this jurisdiction when seeking to characterise a case as an accusation case or a conviction case.

(1)

The dichotomy drawn by the Framework Decision between accusation warrants and conviction warrants is a matter of EU law. The Framework Decision does not have direct effect but national implementing legislation should, so far as possible, be interpreted consistently with its terms.

(2)

The court should seek to categorise the relevant facts by reference to their status and effects in the law and procedure of the member state of the requesting judicial authority.

(3)

Ordinarily, statements made by the requesting judicial authority in the EAW or in supplementary communications will be taken to be an accurate account of its law and procedure but evidence may be admitted to contradict them.

(4)

A person may properly be regarded as convicted for this purpose if the conviction is binding and enforceable under the law and procedure of the member state of the requesting authority.

(5)

For this purpose, it is not a requirement that a conviction should be final in the sense of being irrevocable. In particular, a convicted person who has a right to a retrial may, nevertheless, be properly considered a convicted person for this purpose, provided that the conviction is binding and enforceable in the law and procedure of the member state of the requesting authority.

(6)

While the view of the requesting judicial authority on the issue of characterisation cannot be determinative, the question whether a conviction is binding and enforceable will depend on the law of that member state.

Disadvantage to the appellant?

51.

Complaint is made that treating the appellant as a convicted person as opposed to an accused person disadvantaged him in the extradition proceedings in two respects. First it is said that the EAW was measured against the less exacting requirements of a conviction case in section 2(5)-(6) as opposed to those of an accusation case in section 2(3)-(4). The particular point made here concerns particularity. In Sandi v The Craiova Court, Romania [2009] EWHC 3079 (Admin) Hickinbottom J observed (at para 33), when delivering the judgment of the Divisional Court, that there is no reason why the same level of particularity of the circumstances of the offence is needed for a conviction warrant as for an accusation warrant. However, he went on to point out (at paras 34-36) that, while the appropriate level of particularity to satisfy section 2(6)(b) will depend on the circumstances of each case, in a conviction case the requested person will need to have sufficient details of the circumstances of the underlying offences to enable him sensibly to understand what he has been convicted of and sentenced for and to enable him to consider whether any bars to extradition might apply. In the present case it has not been suggested that there is any specific deficiency in the particulars contained in the warrant which would disadvantage the appellant if he exercises his right to a retrial. On the contrary, the EAW contains in Box (e) full particulars of the three relevant offences.

52.

Secondly, it is said that the appellant is prejudiced in the consideration of the bar to extradition on grounds of passage of time under section 11(1)(c) and section 14 because the relevant periods of time differ in an accusation warrant and a conviction warrant. Section 14 provides that a person's extradition is barred by reason of the passage of time if it would be unjust or oppressive to extradite him by reason of the passage of time (a) in an accusation case, since he is alleged to have committed the offence; and (b) in a conviction case, since he is alleged to have become unlawfully at large. "Unjust" is directed primarily to the risk of prejudice to the accused in the conduct of the trial itself; "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 ( Kakis v Government of the Republic of Cyprus [1978] 1 WLR 779 per Lord Diplock at pp 782H-783A).

53.

To my mind, there is more substance in this complaint. This bar to extradition operates very differently depending on whether the requested person is categorised as an accused person under section 14(a) (in which case he may rely on the entire passage of time since the date of the offence to found injustice or oppression) or as a person unlawfully at large after conviction under section 14(b) (in which case he may rely only on the passage of time since the date of the conviction). Mr Summers submits that in the present case this precluded any consideration of injustice in relation to the retrial and coloured the court's assessment of oppression.

54.

If, as I consider to be the case, a person with a right to a retrial is correctly classified as a convicted person for the purposes of the 2003 Act, I accept that this could work to his disadvantage in the operation of section 14 because the passage of time prior to his conviction is excluded from consideration. It seems to me that this is a deficiency in the drafting of the statute which requires consideration by the legislature at an early opportunity.

55.

This is a matter which has troubled judges in a number of cases concerning convictions in absentia . In Campbell v Public Prosecutor of the Grande Instance Tribunal of St Malo, France [2013] EWHC 1288 (Admin) Keith J was inclined to think that the appellant could not rely on the passage of time since the date of commission of the alleged offence because he faced a conviction warrant, but he nevertheless examined whether the delay from that date would have been oppressive for the purposes of section 14 and concluded that it would now be an abuse of process to insist upon his return. In R (Cousins) v Public Prosecution of the Grande Instance Tribunal of Boulogne sur Mer, France [2014] EWHC 2324 (Admin) at para 12 Ouseley J expressed his concern that where there has been a delay prior to a conviction in absentia the requesting judicial authority could, in effect, prevent section 14 from being argued. In his view it would be an unfair and prejudicial outcome if there were no other means whereby the section 14 facts could be given full rein. He had reservations about using article 8 "as some sort of kitchen sink for all aspects of extradition that cannot properly be considered under other headings" (at para 14). However, he dealt with the matter on the basis that there would be no injustice to the appellant through consideration of injustice and oppression to the full extent using the article 8 framework. Similarly, in Wisniewski v Regional Court of Wroclaw, Poland [2016] EWHC 386 (Admin); [2016] 1 WLR 3750 the Divisional Court (Lloyd Jones LJ and Holroyde J) considered that in such circumstances the human rights examination under section 21 would provide a safety net which would permit the effect of passage of time to be brought into account.

56.

In Farzal Rahman v County Court of Boulogne sur Mer, France [2014] EWHC 4143 (Admin) Blake J adopted a rather different approach. There a conviction warrant was founded on a conviction in absentia . It was common ground that Mr Rahman had had no notice of the proceedings leading to conviction and that the conviction could be set aside on his demand. The judge was referred to Campbell and Cousins and was invited by counsel for the appellant to look at the full period of the delay either on abuse of process grounds or on article 8 grounds. The judge said that he shared the reservations of Ouseley J about simply proceeding down the article 8 route as a catch-all where the central point the appellant wanted to make was the change of circumstances caused by the passage of time since the offence was first committed. Noting that the definition of "unlawfully at large" in section 68A of the 2003 Act did not apply to section 14, he considered that it was necessary to give it a meaning which avoided the absurdity of effectively preventing the appellant from pleading delay at all. He concluded that:

"… [I]n effect a person remains accused of a crime for the purposes of the oppression limb of section 14 unless or until there has been a conviction from which he was required to participate from which he has absconded himself and is therefore a fugitive from justice. Such an approach avoids having to shoehorn the present problem either into abuse of process questions, where there is a more rigorous test and a requirement generally of absence of good faith or simply leaving it to a factor in the article 8 balance." (sic)

I sympathise with the judge's wish to find an interpretation of section 14 which would enable him to do justice in the particular case. However, I consider that this strenuous reading is inconsistent with the scheme of the Framework Decision and Part 1 of the 2003 Act.

57.

It seems to me that until such time as section 14 can be amended by Parliament, article 8 provides an appropriate and effective alternative means of addressing passage of time resulting in injustice or oppression in cases where the defendant has been convicted in absentia . Passage of time is clearly capable of being a relevant consideration in weighing the article 8 balance in extradition cases. (See H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening) [2012] UKSC 25; [2013] 1 AC 338 per Baroness Hale JSC at paras 6, 8.) It is capable of having an important bearing on the weight to be given to the public interest in extradition. In the article 8 balancing exercise, the relevant period of time will not be subject to the restrictions which appear in section 14. I note that in Lysiak v District Court Torun, Poland [2015] EWHC 3098 (Admin), a conviction case, the Divisional Court (Burnett LJ and Hickinbottom J) attached great weight to the nine years the criminal proceedings in Poland took to come to trial and the further two and a half years it took for the conviction to be confirmed in appeal proceedings, when concluding that it would be disproportionate under article 8 to return the defendant to Poland. Furthermore, in cases where it is maintained that passage of time would result in injustice at the retrial to which the defendant is entitled, this consideration could also be brought into account under article 8. The risk of prejudice at a retrial would be highly relevant in the balancing exercise which the extradition court would be required to undertake. Moreover, the threshold test to be satisfied would not be one of injustice or oppression but the lower one of disproportionality. This feature also makes reliance on article 8 a more effective solution than abuse of process where the burden on an appellant would be a much heavier one.

Application to the present case

58.

On behalf of the appellant it is submitted that he should be treated as an accused person rather than a convicted person for the purpose of his extradition proceedings.

59.

The EAW states in Box (b) that the enforceable judgment on which the warrant is based is the judgment of the District Court dated 12 May 2008, confirmed by the resolution of the Regional Court on 23 July 2008. It states in Box (d) that the decision was rendered in absentia and that the appellant had not been summoned or otherwise informed of the hearing. However, it also states that after surrendering the appellant will have the right to a new process by virtue of section 306a of the Code of Criminal Procedure. I note that subsection 306a(2) refers to "an application for revocation of the legally effective conviction" and that subsection 306a(3) refers, in the context of limitation, to "the period from the legal effectiveness of the conviction until its revocation". The letter from the requesting judicial authority dated 17 March 2017 confirms that the appellant will have "an unqualified right for complete retrial before court". There was no evidence before the District Judge to contradict the statements of the requesting judicial authority as to the relevant law and procedure in the Czech Republic.

60.

In these circumstances District Judge Ashworth correctly characterised the EAW as a conviction warrant. Furthermore, he was correct in characterising this as a conviction case. The EAW indicated that there was an enforceable judgment and a legally effective conviction which would remain such until revoked. There was no evidence before him as to the law and procedure of the Czech Republic on which he could have concluded that this should be characterised as an accusation case.

61.

The District Judge proceeded by following the appropriate channel in the case of a conviction warrant as required by the 2003 Act. It was common ground that the offences specified in the warrant were extradition offences as required by section 10. Under section 11(1)(c), as amplified by section 14, he considered whether extradition was barred by reason of the passage of time since the appellant was convicted in 2008 and concluded that it was not. So far as section 20 is concerned, it was common ground that the appellant had been tried, convicted and sentenced in absentia , and that the appellant had not deliberately absented himself from his trial, but that he would be entitled to a retrial meeting the requirements of subsection 20(8). The District Judge therefore, correctly, proceeded to consider under section 21 the appellant's ground founded on his right to respect for his family and private life under article 8 ECHR. Having decided that the appellant's extradition would be compatible with his Convention rights, the District Judge ordered his extradition to the Czech Republic as required by section 21(3).

62.

In the present case the appellant was convicted on 12 May 2008 of three offences alleged to have been committed between November 2004 and March 2005. The conviction was confirmed by the Regional Court on 23 July 2008. The EAW was issued on 17 April 2013. It was certified by the National Crime Agency on 2 March 2017 and the appellant was arrested on the same day. At the extradition hearing the appellant relied on evidence as to changes in his personal circumstances. He also maintained that in 2005 the police in the Czech Republic had spoken to him and removed documents relevant to his defence to the current offences. The documents, which he claimed would exculpate him, had not been returned.

63.

At the extradition hearing the District Judge considered the passage of time under section 11(1)(c) and section 14. At this point in his judgment he confined his attention to the passage of time since the date of conviction in 2008.

64.

In 2003 the appellant had been convicted and sentenced to four years' imprisonment in the Czech Republic. That conviction related to the same building project to which the 2008 convictions related. He had been aware in November 2005 that the police were once again conducting investigations. He came to the United Kingdom in June 2007. In November 2007 the Office of the District Public Prosecutor had issued a consent to his detention. The District Judge noted that as there was no direct evidence that the appellant knew of the proceedings against him, it was common ground that he could not be considered a fugitive for the purposes of section 14.

65.

During the period since 2008 the appellant had been working as a lorry driver in the United Kingdom. His partner had suffered a workplace accident in 2012 which had impaired her ability to work although she now works full-time at her own jewellery making business.

66.

The District Judge considered that the long period between conviction and arrest on the EAW had not been a time of particular change in the appellant's life. The offending was particularly serious, repetitive and followed closely his release for a similar offence. Mr Konecny had been termed a particularly dangerous recidivist by the Czech authorities. So far as the documents given to the police in 2005 were concerned, there had been a trial in 2008 and there was no evidence to suggest that the documents had been lost or destroyed. If they had been, the magistrate was entitled to assume that the retrial to which the appellant was entitled would be compliant with article 6 ECHR and that that would take account of that potential unfairness. Having regard to all these factors he concluded that the circumstances of the delay did not justify a finding that it would be unjust or oppressive to return the appellant. This was not, in his assessment, a borderline case where culpable delay on the part of the judicial authority would tip the balance in the appellant's favour.

67.

However, the District Judge returned to the issue of delay when carrying out the balancing exercise under article 8 ECHR. He listed this among the factors militating against extradition. He noted that "the delay since the crimes were committed" could both diminish the weight to be attached to the public interest and increase the impact upon private and family life. Here the offending had been some 12-13 years earlier when the appellant had been considerably younger. The passage of time would have served to mature him and in the intervening period he had worked peaceably. There was no evidence he had any knowledge of the proceedings against him. There was no explanation for the considerable delay in finding him, bearing in mind that he was living openly in another member state. Nevertheless, the public interest factors in favour of extradition outweighed his family and private life considerations, even when the delay was taken into account.

68.

On appeal, Sir Wyn Williams considered that the District Judge had been correct in considering that, when assessing whether the passage of time rendered his return unjust or oppressive under sections 11(1)(c) and 14 of the 2003 Act, the relevant period of time commenced on 12 May 2008. He referred to the fact that throughout that period the appellant had led a settled life in the north of England and that this was a marked change from the time when he was apparently committing serious offences in

the Czech Republic. The District Judge was not to be criticised for his observations in relation to the possibly exculpatory papers. There was no real basis for a conclusion that extradition would be unjust. He could not conclude that the District Judge was wrong to conclude that extradition of the appellant would not be oppressive.

69.
Sir Wyn returned to the issue of delay in the context of article 8. He considered that the District Judge was entitled to approach the case on the basis that there had been long delays in the processes leading to the certification of the EAW which were unexplained. The District Judge was not wrong in failing to infer from the length of the delay that the requesting judicial authority or the National Crime Agency were guilty of culpable delay. The District Judge was right to consider that there were very powerful factors supporting an order for extradition. While Sir Wyn observed that he might have been more troubled than was the District Judge about the length of the delay, he was unable to say that his ultimate decision that extradition was not an unwarranted interference with article 8 rights was wrong. Accordingly, he dismissed the appeal.

70.
I am satisfied that in this case full and appropriate account was taken of the entire passage of time since the offences were allegedly committed, albeit in the context of section 21 of the 2003 Act and article 8 ECHR as opposed to sections 11(1)(c) and 14 of the 2003 Act. I am also satisfied that this appellant has not been disadvantaged in any way as a result. Like Sir Wyn, I might have been more troubled than the District Judge about the length of delay in this case, but I am unable to say that the decision of the District Judge was wrong.

71.
Finally, I should record that in his case Mr Summers points to what he says are further instances of substantive unfairness which might result from the characterisation of a case as a conviction case where the person whose return is sought has a right to a retrial. These relate to double criminality, prematurity, issues of forum and proportionality. However, as it is accepted on behalf of the appellant that they do not arise in this case and as they were not developed in argument, I do not propose to address them.

Conclusion

72.
For these reasons, I would dismiss the appeal.