Hilary Term
[2024] UKSC 10
On appeal from: [2022] EWHC 1507 (Admin)

JUDGMENT

Merticariu (Appellant) *v* Judecatoria Arad, Romania (Respondent)

before

Lord Hodge, Deputy President
Lord Sales
Lord Burrows
Lord Stephens
Lord Burnett

JUDGMENT GIVEN ON
6 March 2024

Heard on 29 November 2023

Appellant
Ben Cooper KC
Malcolm Hawkes
Mary Westcott
(Instructed by ITN Solicitors (Cheapside))

Respondent
Helen Malcolm KC
Stefan Hyman
(Instructed by Crown Prosecution Service Appeals and Review Unit (Westminster))

LORD STEPHENS AND LORD BURNETT (with whom Lord Hodge, Lord Sales and Lord Burrows agree):

1. Introduction

1. The key issue in this appeal is, when all is said and done, a very short point concerning the proper construction of section 20(5) of the Extradition Act 2003 ("the 2003 Act"). Section 20(5) imposes a dutyon the judge at an extradition hearing to decide whether a requested person, convicted in their absence, would be entitled after extradition to a retrial (or on appeal to a review amounting to a retrial) in the requesting state. The appellant submits that there must be *an entitlement to a retrial* in the requesting state, which is not dependent on any contingency, except for purely procedural matters such as making an application in the manner and in the time prescribed in the requesting state. By contrast, the respondent submits that it is sufficient for there to be *a right to apply for a retrial* to a court in the requesting state even if the success of that application is contingent on the court in the requesting state finding that the requested person was not present at, or was not deliberately absent from, their trial.

2. We will briefly outline the circumstances in which this issue arises. A European arrest warrant ("EAW"), issued on 7 May 2019 and certified by the National Crime Agency on 8 July 2019, sought the surrender of Ionut-Bogdan Merticariu ("the appellant") to Romania, a category 1 territory to which Part 1 of the 2003 Act applied, to serve a sentence imposed on 11 April 2019 for a burglary committed on 5 March 2016. The appellant was arrested pursuant to the EAW on 25 September 2019. At that time, the United Kingdom's withdrawal from the European Union had not yet come into effect pursuant to the European Union (Withdrawal) Act 2018 (as amended), with the consequence that the 2002 Council Framework Decision 2002/584/JHA of 13 June 2002 ("the FD 2002"), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 ("the FD 2009"), continued to apply to the United Kingdom through the 2003 Act as then in force. Accordingly, the request to extradite the appellant is governed not only by the 2003 Act but also by the FD 2002 as amended by the FD 2009 ("the Amended Framework Decision"). Furthermore, since 1 December 2014 domestic courts are obliged by the principle of conforming interpretation to give effect to the Amended Framework Decision when interpreting the 2003 Act, to the extent that it is possible to do so without contradicting the clear intent of the legislation: see *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin); [2016] 1 WLR 3344,("*Cretu*"), paras 13 to 18 and *Criminal Proceedings against Maria Pupino* (C-105/03);[2006] QB 83, para 43. Although not applicable to these proceedings, the EU-UK Trade and Cooperation Agreement 2020 sets out arrangements applicable following the coming into effect of the United Kingdom's withdrawal from the European Union for (among other things) an extradition system between the United Kingdom and the European Union, which in large part reflects the EAW system. Those arrangements are

implemented into domestic law by the European Union (Future Relationship) Act 2020 and by amendments to the 2003 Act.

3. The extradition hearing took place on 21 August 2020 before District Judge Ezzat sitting at Westminster Magistrates' Court. There were several issues before the district judge not all of which are relevant to this appeal. In his judgment dated 26 October 2020 and in relation to the issues relevant to this appeal, the judge held that the appellant: (a) had not been convicted in his presence; (b) had not deliberately absented himself from his trial; and (c) had a right to a retrial in Romania: section 20(1), (3) and (5) of the 2003 Act. The district judge ordered the appellant's extradition.

4. The appellant was given permission to appeal to the High Court against the extradition order on three grounds, including the ground that the District Judge had erred in finding, pursuant to section 20(5) of the 2003 Act, that the appellant was entitled to a retrial upon his surrender to Romania.

5. The appeal was heard by Chamberlain J on 8 June 2022. The submissions of the appellant's counsel were set out by Chamberlain J, at para 23 of his judgment dated 17 June 2022: [2022] EWHC 1507 (Admin). The submissions were:

> "(a) The starting point must be the language of section 20 of the 2003 Act. Parliament could have said that the judge must consider whether the person would be entitled to a retrial unless the courts of the requesting state decide that he was deliberately absent from his original trial. It did not. Instead, it posed three distinct questions, each of which was to be answered separately by the UK judge, applying the criminal burden and standard of proof. In a case such as the present, where the UK judge is not satisfied that the requested person deliberately absented himself from his trial, section 20(5) requires the UK judge to decide only one question, namely 'whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial'. On a natural reading of the words Parliament used it may be argued that, if the answer is contingent upon some other decision whose outcome cannot be predicted to the requisite standard of certainty, the question must be answered in the negative.
>
> (b) Whether a person is 'entitled' to a retrial depends on whether he has the 'right under law' to a retrial: *Da An Chen v Romania* [2006] EWHC 1752 (Admin), [8] (Mitting J). A right to a retrial has to be automatic and is inconsistent with

> the existence of a discretion whether to grant a retrial: *Bohm v Romania* [2011] EWHC 2671 (Admin).
>
> (c) A requested person may have the right to a retrial even if the domestic law of the requesting state requires him to take 'procedural steps' in order to invoke the right: see eg *Benko v Hungary* [2009] EWHC 3530 (Admin) (where, on the evidence, a retrial would be granted if applied for, but would not take place unless requested: [18]). But if the entitlement to a retrial is conditional on a preliminary finding that the requested person was not deliberately absent from his trial, the proceedings leading to that finding would not naturally be referred to as a 'procedural step'; it may be argued that those proceedings should be regarded as involving a decision on a substantive issue."

6. Chamberlain J stated, at para 23 of his judgment, that subject to *Zeqaj v Albania* [2013] EWHC 261 (Admin) and *BP v Romania* [2015] EWHC 3417 (Admin) there was "considerable force" in the appellant's submissions. However, referring to *R v Greater Manchester Coroner, Ex parte Tal* [1985] QB 67, 81, he considered that he was bound by judicial comity to follow the reasoning of the Divisional Court in *BP v Romania* that section 20(5) of the 2003 Act will be satisfied even if the right to a retrial is conditional on a finding by a court in the requesting state that the requested person was not deliberately absent from their trial. Accordingly, he dismissed this ground of appeal. He also dismissed the other grounds of appeal, none of which are relevant to this appeal.

7. On 22 June 2022 the appellant applied to Chamberlain J to certify points of law of general public importance arising from his decision dated 17 June 2022 and to grant leave to appeal to this court pursuant to section 32 of the 2003 Act. In a judgment delivered on 20 July 2022 ([2022] EWHC 3648 (Admin)) Chamberlain J refused leave to appeal but certified the following questions:

> "In a case where the appropriate judge has decided the questions in section 20(1) and (3) of the Extradition Act 2003 in the negative, can the appropriate judge answer the question in section 20(5) in the affirmative if (a) the law of the requesting state confers a right to retrial which depends on a finding by a judicial authority of that state as to whether the requested person was deliberately absent from his trial; and (b) it is not possible to say that a finding of deliberate absence is 'theoretical' or 'so remote that it can be discounted'? If so, in what circumstances?"

8. On 13 December 2022 a panel of this court granted permission to appeal in relation to the certified points of law and the appellant now appeals to this court.

2. Section 20 of the 2003 Act

9. Section 20 of the 2003 Act, headed "Case where person has been convicted" and contained in Part 1 (concerning category 1 territories) provides:

> "(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."

10. The effect of section 20 of the 2003 Act is that before ordering extradition, under section 21, of the requested person to the category 1 territory in which the EAW was issued, the judge must be sure of any one of the circumstances in section 20, namely under section 20(1) that the requested person "was convicted in his presence" or under section 20(3) that the requested person "deliberately absented himself from his trial" or under section 20(5) that the requested person "would be entitled to a retrial or (on appeal) to a review amounting to a retrial." If the judge is sure of any one of those circumstances, then the judge must proceed under section 21 and order the requested person's extradition if extradition is compatible with their Convention rights within the meaning of the Human Rights Act 1998. However, the judge must not decide the question in section 20(5) in the affirmative unless, the judge is sure that the requested person would, in the retrial or review amounting to a retrial, have the rights specified in section 20(8)(a) and (b).

11. On each of these questions in section 20, the requesting authority bears the burden of proving the relevant matter to the criminal standard: section 206 of the 2003 Act.

3. The FD 2002, the FD 2009 and the Amended Framework Decision

12. The EAW 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: article 1(1) of the FD 2002.

13. The Amended Framework Decision provides time limits for the final decision to execute the EAW. The time limit is 10 days after consent where the requested person consents to his surrender and 60 days after arrest in other cases: article 17(2) and (3). Those time limits may be extended: article 17(4) and (7). However, the overarching requirement contained in article 17(1) is that "[a] European arrest warrant shall be dealt with and executed as a matter of urgency."

14. The information contained in the EAW is required to be set out in accordance with the form contained in the Annex to the Amended Framework Decision ("the EAW pro forma"): article 8(1). The EAW and the information contained in it play a central role in relation to the decision to be made by the executing judicial authority as to whether to order the surrender of the requested person.

15. Article 15(2) allows for requests for supplementary information. It provides:

"*Article 15*

Surrender decision

> 2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to articles 3 to 5 and article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in article 17."

16. Article 9 of the Amended Framework Decision provides for the transmission of an EAW. When the location of the requested person is known, the issuing judicial authority (referred to interchangeably in this judgment as "requesting judicial authority") may transmit the EAW directly to the executing judicial authority: article 9(1). Article 9(2) provides that the issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System. In this case the issuing judicial authority did issue such an alert by using a Form A: for the content of Form A in this case see para 34 below.

17. The structure of the Amended Framework Decision establishes three broad classes of case. First, cases where the state receiving a request to surrender must do so. That is the default position under article 1. Secondly, cases where it is mandatory to refuse to execute an EAW. Those are described in article 3. Thirdly, cases where the state receiving the request may refuse to execute. Article 4 identifies various circumstances when that may happen. However, the non-mandatory grounds in article 4 do not include cases in which the requested person had been convicted in their absence. Prior to its amendment by the FD 2009, article 5(1) of the FD 2002 dealt with cases in which the convicted person had been convicted in their absence. It is appropriate to set out article 5(1) in full.

"*Article 5*

Guarantees to be given by the issuing Member State in particular cases

The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if 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, surrender may be subject to the *condition* that the issuing judicial authority gives *an assurance deemed adequate to guarantee* the person who is the subject of the European arrest warrant that he or she *will have an opportunity to apply for retrial* of the case in the issuing Member State and to be present at the judgment; …." (Emphasis added).

Accordingly, as emphasised pursuant to article 5(1), "surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the EAW that he or she will have an opportunity *to apply for retrial* of the case in the issuing Member State and to be present at the judgment; …."

18. Prior to its amendment by the FD 2009 the EAW pro forma as annexed to the FD 2002 set out, in box (d), the information required to be provided in the EAW by the issuing judicial authority in relation to decisions rendered in absentia. In completing box (d) the issuing judicial authority could address the issue of an assurance to guarantee that the requested person *will have an opportunity to apply for retrial* of the case in the issuing Member State and to be present at the judgment after surrender. The legal guarantees could be "given in advance" so that it did not have to await the imposition of a condition by the executing judicial authority. Box (d) in the EAW pro forma, prior to its amendment by the FD 2009, provided:

"(d) Decision rendered in absentia and:

— the person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia,

or

— 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 but has the following legal guarantees after surrender (such guarantees can be given in advance)

Specify the legal guarantees

……
……

……
……

……
……"

19. It is apparent from the recitals to the FD 2009 that article 5(1) of the FD 2002 did not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person: recital (2). Recital (2) also states that "[t]his diversity could complicate the work of the practitioner and hamper judicial cooperation". It was therefore considered 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: recital (4). The recitals also recognised that, because the adequacy of an assurance given under article 5(1) of the FD 2002 to guarantee an opportunity for the requested person to apply for a retrial in the issuing Member State was a matter to be decided by the executing authority, it was "difficult to know exactly when execution may be refused": recital (3).

20. The recited aim of the FD 2009 was to refine the definition of the common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person: recital (4). To further that aim:

(a) article 1 of the FD 2009 which is headed "Objectives and scope", provides:

> "The objectives of this Framework Decision are to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States."

(b) a new article 4a was inserted into the FD 2002 by article 2(1) of the FD 2009: the new article 4a(1) is set out at para 21 below; and

(c) paragraph 1 in article 5 was deleted: article 2(2) of the FD 2009.

The deletion of article 5(1) meant that the phrase "an opportunity to apply for retrial" is no longer part of the Amended Framework Decision. Rather it has been replaced by "right to a retrial" in article 4a(1)(d)(i). For the purposes of this appeal, we consider this deletion, and its replacement with the phrase "right to a retrial", to be a highly significant amendment to the FD 2002. There is a fundamental difference between "a right to" and "a right to ask for", a retrial.

21. Article 2 of the FD 2009, which is headed "Amendments to Framework Decision 2002/584/JHA", provides:

> "Framework Decision 2002/584/JHA is hereby amended as follows:
>
> 1. The following article shall be inserted:
>
> '*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.

2. In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes

only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.';

2. in article 5, paragraph 1 shall be deleted;

3. in the annex (EUROPEAN ARREST WARRANT), point (d) shall be replaced by the following:…"

We set out, at para 30 below, point (d) as replaced in the annex to the FD 2002 by article 2(3) of the FD 2009.

22. In understanding article 4a of the Amended Framework Decision and a conforming interpretation of section 20 of the 2003 Act more fully, we make several points.

23. First, article 4a provides additional procedural safeguards for a requested person beyond the provisions in the FD 2002: *Cretu* at para 35. The most significant additional procedural safeguard for the purposes of this appeal was brought about by the deletion of paragraph 1 of article 5 and the insertion of article 4a(1)(d). Article 4a(1)(d) protects a person's right to be present at their trial, in circumstances where the person was convicted in absentia. The protection is achieved by providing a 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.

24. Second, paragraph (1) of article 4a contemplates that the exceptions in article 4a(1)(a)-(d) will be established by statements in the EAW itself. Paragraph (1) does not envisage a general evidential inquiry into those matters, and it does not call for one Member State in any given case to explore the minutiae of what has occurred in the

requesting Member State or to receive evidence about whether the statement in the EAW is accurate. The requesting judicial authority is expected to convey the relevant information in the EAW itself, including information relating to absence from trial and the possibility of retrial, which is necessary to determine whether the executing judicial authority has the power to refuse to execute the warrant under article 4a. If the information set out by the requesting judicial authority in the EAW meets the requirements of article 4a that will provide the evidence upon which the executing judicial authority will act. If a requested person is surrendered on what turns out to be a mistaken factual assertion contained in the EAW relating to article 4a, then they will have the protections afforded by domestic, EU and Convention law in that jurisdiction: *Cretu* at paras 4, 24, 32, 35, 36 and 42.

25. Third, article 4a does not require the executing judicial authority to refuse to order extradition if the requested person did not appear at their trial, even if none of the exceptions applies. In those circumstances whether surrender is ordered remains optional at the discretion of the executing judicial authority: *Cretu*, at paras 23, 35 and 36 and *TR v Generalstaatsanwaltschaft Hamburg* (C-416/20 PPU), at paras 51-52. Article 4a does not specify the circumstances in which discretion must be exercised. This means that there is no requirement for a conforming interpretation except in so far as an extradition order must not contravene the person's rights under the European Convention on Human Rights ("the Convention"). Accordingly, the discretion is to be exercised in accordance with domestic law as contained in section 20 of the 2003 Act. So, in this case if the circumstance in article 4a(1)(d) is not made out then the discretion to order surrender must be exercised in accordance with section 20(5) of the 2003 Act and in compliance with the Convention.

26. Fourth, sections 20 and 206 of the 2003 Act, interpreted in conformity with article 4a, require that the burden of proof to the criminal standard will be discharged by the requesting judicial authority if the information required by article 4a is set out in the EAW. The issue at the extradition hearing will be whether the EAW contains the necessary statement: *Cretu* at paras 34(v) and 35. For the purposes of section 20(5) of the 2003 Act a conforming interpretation means that if the requesting judicial authority has ticked box 3.4 of point (d) on the EAW then the executing judicial authority will be obliged to conclude that the appellant would be entitled to a retrial: *Cretu* at para 41.

27. Fifth, it will not be appropriate for the requesting judicial authorities to be pressed for further information relating to the statements made in an EAW pursuant to article 4a save in cases of ambiguity, confusion or possibly in connection with an argument that the warrant is an abuse of process: *Cretu* at para 35. However, if the requesting judicial authority does provide further information there is no reason why that information should not be taken into account in seeking to understand what has been stated in the EAW: *Cretu* at para 37.

28. Sixth, the right to a retrial or an appeal in article 4a(1)(d)(i) is not an automatic right. Rather, the requested person must take the procedural step of requesting a retrial or an appeal within the specified time frame: article 4a(1)(d)(ii). The requirement to take a procedural step to invoke the substantive right to a retrial or an appeal is an ordinary feature of any application to invoke a substantive right.

29. Seventh, in circumstances where a person is surrendered under article 4a(1)(d), article 4a(3) requires that a retrial or appeal shall begin in the requesting state within due time after surrender. Accordingly, if box 3.4 in point (d) of an EAW is ticked by the issuing judicial authority and the requested person is surrendered on the basis of article 4a(1)(d) the only scope for the courts in the requesting state to decide that the requested person is not entitled to a retrial or on appeal to a review amounting to a retrial, would be on procedural grounds. If the requested person complies with the procedural steps, then there is an obligation to begin the retrial or the appeal. In this way the issuing judicial authority binds the court in the requesting state to begin the retrial or the appeal.

4. The pro forma EAW in relation to decisions rendered following a trial at which the person did not appear in person

30. As we have indicated, the requesting judicial authority is required to complete the EAW in accordance with the form contained in the Annex to the Amended Framework Decision. In relation to decisions rendered following a trial at which the person did not appear in person, the Annex to article 8(1), as amended by article 2(3) of the FD 2009, specifies that the EAW shall contain the information set out in accordance with point (d) of the form. The language of point (d) closely follows the language of article 4a(1) of the Amended Framework Decision. It is appropriate at this stage to set out point (d) in the pro forma.

> "(d) Indicate if the person appeared in person at the trial resulting in the decision:
>
> 1. □ Yes, the person appeared in person at the trial resulting in the decision.
>
> 2. □ No, the person did not appear in person at the trial resulting in the decision.
>
> 3. If you have ticked the box under point 2, please confirm the existence of one of the following:

☐ 3.1a. the person was summoned in person on … (day/month/year) and thereby informed of the scheduled date and place of the trial which resulted in the decision and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

☐ 3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;

OR

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

OR

☐ 3.3. the person was served with the decision on … (day/month/year) and was expressly informed about the right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

☐ the person expressly stated that he or she does not contest this decision,

OR

☐ the person did not request a retrial or appeal within the applicable time frame;

OR

☐ 3.4. the person was not personally served with the decision, but

— the person will be personally served with this decision without delay after the surrender, and

— when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and

— the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be … days.

4. If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met:

.....
.....
.....
.....”

5. The information provided in this case by the issuing judicial authority

31. In this case the issuing judicial authority ticked the box under point 2 of point (d) of the EAW, thereby stating that the appellant did not appear in person at the trial resulting in the decision to convict him. Having ticked the box under point 2, the issuing judicial authority was then required to confirm the existence of one of circumstances in the boxes under points 3.1-3.4. The issuing judicial authority ticked the box under point 3.2 and then deleted the words accompanying that box, substituting them with the following:

> "Being aware of the scheduled trial, he had instructed a lawyer who was either appointed by the person concerned or ex-officio, to defend him at the trial, and was indeed defended by that lawyer at the trial."

Having ticked box 3.2 the issuing judicial authority was required under point 4 to provide information about how the condition in point 3.2 has been met. The information provided under point 4 was:

> "The defendant Bogdan Ionut-Merticariu was not present in court during the trial, he was represented at the hearings by public defender appointed by the court."

None of the other boxes was ticked including the box under point 3.4.

32. The EAW pro forma does not request any legal pledges from the requesting judicial authority. However, a legal pledge was added to this EAW as follows:

> "According to article 466 Penal Procedure Code: Reopening criminal proceedings in case of an in absentia trial of the convicted person par. (3) 'In the case of a person with a final conviction, tried in absentia, related to whom a foreign state ordered extradition or surrender based on the European arrest warrant, the time frame provided under par. (1) shall begin from the date when, following their bringing into country, they receive the conviction verdict.'"

33. In this case, the information provided by the issuing judicial authority in the EAW as summarised above demonstrates the following:

(i) It confirms that the appellant was not present at the trial resulting in the decision.

(ii) The combination of the answers at points 3.2 and 4 is ambiguous as to the context surrounding the appellant's representation at trial. The answers show that the appellant was represented by a lawyer at his trial, but they state that the lawyer could have been appointed by the appellant rather than having been appointed "by the court". Furthermore, the answer at 3.2 states that, irrespective of who had appointed the lawyer, the appellant had *instructed* him. This would explain why the box under point 3.4, which is intended to confirm that a retrial will be afforded to the appellant on surrender, was not ticked, because if the appellant was aware of the scheduled trial and had instructed a lawyer to defend him at the trial (whether appointed by him or by the state) he would not be entitled to a retrial and the executing judicial authority would be required to order his surrender: article 4a(1)(b) of the Amended Framework Decision.

(iii) The ambiguity was not resolved by the legal pledge which does not state that the appellant is entitled to a retrial. Rather, the pledge identifies a date from which time runs leaving it to be assumed that a period, which is unspecified, is relevant to an application by the appellant to reopen the criminal proceedings. Furthermore, the legal pledge refers to some of article 466 of the Romanian Code Criminal Procedure ("the Romanian Code") without reproducing it in full.

34. Form A accompanied the EAW and, under the heading of "Service of summons, subject tried in person or decision rendered in absentia", the box headed "Summons served by other means" was ticked and in relation to relevant conditions it was stated that:

> "ACCORDING TO ART. 466 OF THE ROMANIAN PENAL PROCEDURE CODE, THE SUBJECT HAS THE RIGHT TO ASK FOR RETRIAL OF THE CASE." (Upper case in the original).

Form A provides further evidence from the issuing judicial authority that the appellant is entitled to apply for a retrial rather than being entitled to a retrial.

6. The procedural history in relation to the extradition proceedings before the District Judge including the requests for further information from the issuing judicial authority and the response to those requests

35. Following the appellant's arrest on the EAW on 25 September 2019 the appellant appeared before the Westminster Magistrates' Court on 26 September 2019. The Extradition Unit of the Crown Prosecution Service ("the CPS") represented the issuing judicial authority. At the initial hearing on 26 September 2019 the appellant was admitted to conditional bail.

36. An extradition hearing on 25 February 2020 was adjourned to 19 May 2020 at the request of the CPS for it to make a request for further information from the issuing judicial authority as to the appellant's retrial rights in Romania. It was not until 18 May 2020 that in a form entitled "Romania v Ionut-Bogdan Merticariu" an employee on behalf of the CPS requested further information from the issuing judicial authority. In that form the employee identified the ambiguities in the EAW as being that it stated that the requested person was not present at the trial in Romania but that box 3.4, which relates to the right to a retrial, had not been ticked. She stated that it therefore could not be said that the requested person had a right to a retrial if extradited. She asked the issuing judicial authority:

> "**Please can you confirm if he has a right to a re trial?**"
> (Emphasis in the original).

The form was sent to the Romanian Liaison Magistrate by email on 18 May 2020 explaining that it was an urgent enquiry and noting that:

> "It's one question and should be quick and easy for the [issuing judicial authority] to answer."

37. The Romanian Liaison Magistrate did not reply to the question posed. Instead on 18 May 2020 the Romanian Liaison Magistrate sent to the CPS provisions of the Romanian Code translated into English. Those provisions included article 466 of the Romanian Code headed "Reopening criminal proceedings in case of an in absentia trial of the convicted person". The provisions also included articles 467 to 470 of the Romanian Code dealing with the procedure to be followed for the reopening of the case. The translated provisions were not served on the appellant or made available to the District Judge. Rather, the CPS sought to rely upon the citation of article 466 of the Romanian Code in *BP v Romania*. In our view the citation in *BP v Romania* did not mean that the terms of article 466 were in evidence before the District Judge.

38. The extradition hearing was relisted for 21 August 2020. On 20 August 2020, the day before the relisted hearing, a prosecutor at the CPS sent officials at the Ministry of Justice in Romania a copy of the request for further information dated 18 May 2020 which had previously been sent to the Romanian Liaison Magistrate. The accompanying email again asked, "whether the requested person will have the right to a re trial?", adding that although the CPS had been provided with the Romanian legislation it "would like a specific response to this requested person's individual rights as it is not clear from the EAW". No reply to this request has been made available by the CPS and we proceed on the basis that there was no response.

39. At the extradition hearing on 21 August 2020, counsel on behalf of the CPS submitted that further information was not required as the EAW was sufficient to answer the questions in section 20 of the 2003 Act. At this stage the only information available to the district judge from the issuing judicial authority in relation to the issue of retrial was contained in the EAW and in Form A. The hearing concluded with the district judge reserving judgment and relisting for judgment on 1 September 2020.

40. On 1 September 2020 the district judge, rather than delivering judgment, requested that further information should be provided by the issuing judicial authority as to the retrial rights of the appellant. On 2 September counsel for the CPS asked the District Judge to clarify whether his request was from the executing judicial authority pursuant to article 15(2) of the Amended Framework Decision or whether he was giving the issuing judicial authority a further opportunity to forward supplementary information under article 15(3) of the Amended Framework Decision: see the provisions of article 15 set out at para 15 above. Article 15(2) applies if the executing judicial authority finds the information communicated by the issuing member state to be insufficient to allow it to decide on surrender. If so, then the executing judicial authority shall request the necessary supplementary information be furnished as a matter of urgency and may fix a time limit for the receipt thereof. The district judge replied on 6 September that the request was from the executing judicial authority under article 15(2). Accordingly, the district judge must have found that the information communicated by the issuing member state was insufficient to allow him to decide on surrender. The question posed by the district judge in his request for further information was simply:

> "[Does] the requested person have a right to a retrial?"

The district judge fixed 22 September 2020 as the time limit for the receipt of the supplementary information. Unfortunately, the CPS did not transmit the district judge's question until 11.42 pm on 21 September 2020.

41. The issuing judicial authority in its reply dated 24 September 2020 did not answer the simple question posed by the district judge nor did it confirm that the appellant would have a right of retrial. The reply stated:

> "Regarding your message received by us on 23.09.2020, regarding Merticariu Ionut Bogdan, we specify that in accordance with the provisions of article 466 of the Romanian Code of Criminal Procedure, *the convicted person may request the reopening of the criminal proceedings*, under the conditions of article 466 paragraphs 1-4 of the Code of Criminal Procedure.
>
> In the case of trial in the absence of the convicted person based on article 466 para (3) 'For a person convicted *definitively tried in absentia* against whom a foreign state has ordered his extradition or surrender on the basis of the European arrest warrant, the term provided in paragraph (1) shall run from the date on which, after being brought into the country, he was communicated the conviction decision'". (Emphasis added).

Accordingly, the only information in relation to the retrial issue from the issuing judicial authority before the District Judge was contained in the EAW, in Form A and in this reply that the appellant could request the reopening of the criminal proceedings.

7. The judgments of the lower courts

(a) The district judge's judgment

42. There was no issue before the district judge that the answer to the question posed in section 20(1) of the 2003 Act was that the appellant had not been convicted in his presence. The next question addressed by the district judge was that posed in section 20(3) as to whether the appellant deliberately absented himself from his trial. In the EAW the issuing judicial authority had ticked box 3.2 in point (d). However, the district judge noted, at para 15 of his judgment, that despite box 3.2 being ticked, no evidence had been provided on how the appellant had been informed of the trial. We would observe that such evidence is required to be included in the EAW as requested in box 4 of point (d) of the EAW. The district judge also noted, at para 15 of his judgment, that the issuing judicial authority did "not appear to be arguing that the [appellant] was properly informed". The district judge held, at para 16, that:

> "I cannot be satisfied on the evidence before the court that the [appellant] was properly informed of proceedings. Therefore, I cannot and do not make a finding that the [appellant] was deliberately absent from proceedings."

43. Having answered the second question in section 20 of the 2003 Act in the negative the next question addressed by the district judge was that posed in section 20(5) as to whether the appellant would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

44. On this question, the district judge noted that box 3.4 had not been ticked and that it was common ground that the legal pledge in the EAW did not show that the appellant would be entitled to a retrial. Absent the further information from the issuing judicial authority dated 24 September 2020 the district judge was of the provisional view that the EAW did not "adequately address the issue of full retrial rights." The district judge accepted that the further information "could have been more helpfully phrased." However, he found the submissions on behalf of the CPS directing him to *BP v Romania* and *Cretu* to be "of significant assistance". He then cited a passage from the judgment of Burnett LJ in *Cretu* at para 42, in which the Divisional Court said that:

> "… it is common ground that art 466 [of the Romanian Code of Criminal Procedure] was introduced by way of amendment to transpose into Romanian law the relevant parts of article 4a of the Framework Decision. It can be assumed that Romanian law will provide the right to a retrial in appropriate cases."

Relying on those authorities the district judge concluded, at para 22, that "[article] 466 has been found to confer a right to a retrial for defendants tried in absentia." He therefore found, at para 23, that "the [appellant] has a right to a retrial and that his extradition should not be prevented because of a lack of retrial rights." Thereafter, the district judge ordered the appellant's extradition to Romania under section 21(3) of the 2003 Act.

(b) The judgment of Chamberlain J

45. The issue before the judge in relation to section 20 of the 2003 Act was limited to the question posed in section 20(5) as to whether the appellant would be entitled to a retrial. There was no challenge before the judge to the district judge's findings in answer to the questions posed in section 20(1) and (3) of the 2003 Act that the appellant was convicted in his absence and had not deliberately absented himself from his trial.

46. In relation to the issue under section 20(5) there was no further information from the issuing judicial authority. Accordingly, the only evidence on behalf of the issuing judicial authority was contained in the EAW, in Form A and in the further information dated 24 September 2020.

47. The judge referred, at para 14 of his judgment, to the legal pledge contained in the EAW which in turn referred to but did not spell out in full article 466 of the Romanian Code. The judge noted, at para 15, that it was common ground that the material provisions of article 466 include those cited by the Divisional Court in *BP v Romania*, at para 38:

> "Reopening criminal proceedings in case of an in absentia trial of the convicted person
>
> (1) The person with a final conviction, who was tried in absentia, may apply for the criminal proceedings to be reopened no later than one month since the day when informed, through any official notification, that criminal proceedings took place in court against them.
>
> …
>
> The convicted person who had appointed a retained counsel or a representative shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court…
>
> (4) The criminal proceedings in court may not be reopened when the convicted person had applied to be tried in absentia."

48. The judge having considered the information in the EAW, the further information dated 24 September 2020 and the terms of article 466 of the Code of Criminal Procedure, as set out in *BP v Romania*, held, at para 26, that:

> "In this case … there is no evidence to indicate that a retrial would be granted if the appellant requested one."

The judge continued by stating that:

> "The EAW contains a positive indication that, in the view of the Romanian judicial authority, the appellant had instructed a lawyer who defended him at his trial. The further information provides an assurance that the appellant can 'request' a retrial, but says nothing about the likelihood of the request being granted."

49. The judge then proceeded to review the authorities including *Nastase v Italy* [2012] EWHC 3671 (Admin), *Zeqaj v Albania* [2013] EWHC 261 (Admin) and *BP v Romania* [2015] EWHC 3417. At para 31 the judge set out para 44 of the judgment of the Divisional Court in *BP v Romania*. He concluded, at para 32, that:

> "In my judgment, this passage makes clear that the Divisional Court in *BP* regarded *Nastase* and *Zeqaj* as authority for the proposition that a right to a retrial which is conditional on a finding by the judicial authority of the requesting state that the requested person was not deliberately absent is sufficient to satisfy section 20(5)."

The judge held, at para 33, that there was no relevant distinction between this case and *BP v Romania*. He held that he was required by judicial comity to follow the Divisional Court's reasoning. Accordingly, he dismissed the appellant's appeal and upheld the district judge's finding that the appellant was entitled to a retrial in Romania.

8. The proper construction of section 20(5) of the 2003 Act

50. The short point in this appeal concerns the proper construction of section 20(5) of the 2003 Act. The point arises in circumstances where box 3.4 in point (d) of the EAW was not ticked by the issuing judicial authority. If it had been ticked, then subject to the appellant's extradition being compatible with the Convention rights within the meaning of the Human Rights Act 1998, it would have been mandatory for the executing judicial authority to extradite the appellant. However, where, as here, box 3.4 has not been ticked there remains discretion for the executing judicial authority to order the appellant's extradition: article 4a(1). The discretion is to be exercised in accordance with section 20(5) of the 2003 Act and in compliance with the Convention. In so far as relevant section 20(5) provides:

> "… the judge … must decide whether the person would be *entitled* to a retrial or (on appeal) to a review amounting to a retrial." (Emphasis added).

51. We consider that the natural and ordinary meaning of the words in section 20(5) are plain. The judge must decide whether the requested person is "entitled" to a retrial or (on appeal) to a review amounting to a retrial. Section 20(5) does not require the judge to decide a different question, namely whether the requested person is entitled to apply for a retrial. Furthermore, the answer to the question in section 20(5) cannot be "perhaps" or "in certain circumstances" the appellant is entitled to a retrial or (on appeal) to a review amounting to a retrial: see *Bohm v Romania* [2011] EWHC 2671 (Admin), at para 5. Accordingly, an entitlement to a retrial cannot be contingent on the court in the requesting state making a factual finding that the requested person was not present at or was not deliberately absent from their trial. Accordingly, we consider that the Divisional Court in *BP v Romania* [2015] EWHC 3417 (Admin), at para 44, incorrectly construed section 20(5) of the 2003 Act and in *Zeqaj v Albania* [2013] EWHC 261 (Admin), at para 12, incorrectly construed the equivalent provision in section 85(5) of the 2003 Act.

52. We agree that a requested person may have the right to a retrial even if the domestic law of the requesting state requires him to take "procedural steps" to invoke the right. But if the entitlement to a retrial is contingent on a finding that the requested person was not deliberately absent from his trial, the proceedings leading to that finding would not naturally be referred to as a "procedural step". Rather, those proceedings in the requesting state should be regarded as involving a decision on a substantive issue. We consider that the Divisional Court in *BP v Romania,* at para 44, incorrectly characterised as a procedural step an application for a retrial which was contingent on the court in the requesting state determining whether the requested person had or had not instructed a lawyer to represent her at her trial.

53. As the phrase "an opportunity to apply for retrial" in article 5(1) of the FD 2002 was replaced by a "right to a retrial" in article 4a(1)(d)(i) in the Amended Framework Decision we consider that the construction of section 20(5) of the 2003 Act that the requested person is entitled to a retrial rather than entitled to apply for a retrial is consistent with the United Kingdom's obligations under the Amended Framework Decision.

54. We also consider that the construction of section 20(5) of the 2003 Act that the requested person is entitled to a retrial rather than entitled to apply for a retrial is consistent with the right of a criminal defendant to be present at trial guaranteed by article 6 of the Convention. In *Sejdovic v Italy* (Application No 56581/00), [2006] 3 WLUK 1 the Grand Chamber of the European Court of Human Rights ("the Strasbourg Court") reiterated, at para 84, the importance of "the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial –". The Strasbourg Court stated that it "ranks as one of the essential requirements of Article 6." Accordingly, the Strasbourg Court restated, at para 84, the principle that:

> "… the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a '*flagrant denial of justice*' rendering the proceedings 'manifestly contrary to *the provisions of Article 6 or the principles embodied therein*'…." (Emphasis added).

Construing section 20(5) as requiring the executing judicial authority to decide whether there is a right to a retrial is consistent with the UK's obligation to avoid a flagrant denial of justice which would render the criminal proceedings manifestly contrary to the provisions of article 6. The phrase in section 20(5) of the 2003 Act that the requested person "would be entitled to a retrial or (on appeal) to a review amounting to a retrial" is synonymous with "the principles of Article 6 or the principles embodied therein."

55. It was submitted on behalf of the respondent that for six years, between the enactment of the 2003 Act and the making of the FD 2009, section 20(5) operated in parallel with article 5(1) of the FD 2002. Accordingly, it was submitted that section 20(5) should be construed in conformity with article 5(1) of the FD 2002 to refer to a right to apply for a retrial. The respondent also submitted that, as section 20(5) of the 2003 Act was not amended after the making of the FD 2009, this construction of section 20(5) remained the true construction. We reject those submissions for two reasons.

56. First, prior to the FD 2009 the United Kingdom had gone further than the terms of article 5(1) of the FD 2002. The United Kingdom did not restrict the "assurance [under article 5(1) to an assurance] to guarantee that a person who has been convicted in absentia has a right to apply for a retrial and be present at the judgment". Rather, the UK requested "additional assurances" as section 20(5) of the 2003 Act required "the District Judge to discharge a requested person [convicted in absentia] where … he is not satisfied that they have a right to a retrial or (on appeal) a review amounting to a retrial": see the explanatory memorandum presented by the United Kingdom which appears in the Annex to the Council of the European Union report dated 30 January 2008, 5213/08. In short, prior to the FD 2009 the UK required an assurance under article 5(1) of the FD 2002 that there was a right to a retrial and not a right to apply for a retrial. Accordingly, it was unnecessary to amend section 20(5) of the 2003 Act after the making of the FD 2009 as the additional protection afforded by the FD 2009 was already contained in section 20(5).

57. Second, the principle of conforming interpretation only applied since 1 December 2014 so that between 2003 and 2009 there was no obligation to construe section 20(5) of the 2003 Act in conformity with article 5(1). In any event article 5(1) enabled member states to determine what guarantee as to retrial was sufficient. So, the determination in the UK that the guarantee should be of a retrial rather than of a right to apply for a retrial was in conformity with article 5(1).

58. It was also submitted on behalf of the respondent that respect for the independence of the courts in the requesting state supports a construction of section 20(5) of the 2003 Act that the executing judicial authority must only decide whether the requested person is entitled to apply for a retrial rather than being entitled to a retrial. It was said that if further information was sought by the executing judicial authority in the UK as to "whether a retrial will be granted in the requesting state" this would place judges, courts and prosecutors in the requesting state in a difficult position. It is said that if the issuing judicial authority was a judge or a court then the issuing judicial authority would be asked to pre-determine their (or their colleagues') application of domestic law to facts which had not yet been found by the court in the requesting state. It was also said that this problem would be even more acute in several states which had appointed prosecutors as the issuing judicial authorities: see *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471. If the issuing judicial authority was a prosecutor, then in providing information in response to a request from the executing judicial authority they would be asked to give an opinion on what an independent court in their state may conclude. This, it was submitted, would obviously trespass on the independence of the court in the requesting state. It is suggested that these problems would be overcome, if the true construction of section 20(5) guaranteed not the granting of, but the right to apply for, a retrial.

59. We reject those submissions. First, subject only to completion of procedural steps, there is an obligation on the requesting member state to begin the retrial or appeal if the issuing judicial authority, whether a judge, a court or a prosecuting authority, ticks box 3.4 in point (d) of the EAW and thereby secures the surrender of the requested person under article 4a(1)(d): see para 29 above. The Amended Framework Decision is structured on the basis that a retrial or appeal will begin based on information provided by the issuing judicial authority in box 3.4 in point (d) of the EAW. So, equally if the issuing judicial authority provides further information pursuant to article 15, subject only to completion of procedural steps, there is no reason why the court in the requesting state is not obliged to begin a retrial or an appeal.

60. Second, before the executing judicial authority in the UK decides whether the requested person would be entitled to a retrial, it must first have decided that the requested person was not convicted in his presence and had not deliberately absented himself from his trial. The issuing judicial authority participates in those decisions as it is represented at the extradition hearing by the CPS and the decisions are based on information provided by it in the EAW or in response to requests for further information. The issuing judicial authority will also have participated in the decision as to whether the requested person was entitled to a retrial. In those circumstances it would be in accordance with the principle of mutual trust and confidence, and also in accordance with the objective in article 1 of the FD 2009 of improving mutual recognition of judicial decisions, if the courts in the requesting state recognised the decisions of the executing judicial authority that the requested person was not convicted in his presence, had not deliberately absented himself from his trial and was entitled to a retrial in the requesting member state, subject only to completion of procedural steps.

61. It was also submitted on behalf of the respondent that, if the right in section 20(5) of the 2003 Act was a right to apply for a retrial in the requesting state, then because of a provision of European Union law ("EU law") the executing judicial authority would have confidence as to an appropriate outcome of any application for a retrial regardless of the particular provisions of domestic law in the requesting state. The provision of EU law relied on is Directive 2016/343 of the European Parliament and Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings ("the Directive"). As a directive confers directly effective rights in EU law so that individuals can rely upon them after the transposition period it was submitted that it would not be necessary to consider the terms of article 466 of the Romanian Code. Rather, it was submitted that article 9 of the Directive provides that Member States shall ensure that, where suspects or accused persons were not present at their trial, "they have the right to a new trial, … which may lead to the original decision being reversed." However, article 9 read with article 8(2) provides that in certain circumstances the right to a new trial is not available if the member state concerned has provided that a trial of a suspect or accused person can be held in his or her absence. The circumstances are either:

> "(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused or by the State."

62. Accordingly, if a member state has provided that a trial may take place in the absence of the accused, then any directly effective right under the Directive is also a right to apply for a new trial contingent on the court in the requesting state finding that neither of the circumstances in (a) or (b) apply. If the issuing judicial authority considered that the contingencies did not apply, then it was a simple matter for it to have provided information to that effect either in the EAW or in further information pursuant to article 15 of the Amended Framework Decision. The appellant in this case can rely on the Directive as well as upon article 466 of the Romanian Code but that does not alter the contingent nature of the right to a retrial under the Directive.

9. The answers to the certified questions

63. We consider that the answer to part (a) of the certified question (see para 7 above) is that the appropriate judge *cannot* answer section 20(5) of the 2003 Act in the affirmative if the law of the requesting state confers a right to retrial which depends on a finding by a judicial authority in the requesting state as to whether the requested person was deliberately absent from his trial.

64. The qualification in part (b) of the certified question suggests that the appropriate judge could still answer in the affirmative if a finding by a judicial authority in the requesting state that the person was deliberately absent from his trial was "theoretical" or "so remote that it can be discounted". We consider that the question in part (b) does not arise for determination on this appeal as it cannot be said in this appeal that such a finding is theoretical or so remote that it can be discounted. However, even though the matter does not arise for determination we consider it appropriate to observe that the answer to the question as to whether the requested person is entitled to a retrial or an appeal amounting to a retrial is to be determined in accordance with the law of the requesting state and it is for the issuing judicial authority to provide information in the EAW in box 3.4 in point (d) or in response to a request for further information under article 15. The executing judicial authority should not engage in a mini trial as to whether on the facts and the law of the requesting stage a finding is theoretical or so remote that it can be discounted. The Amended Framework Decision is crafted to avoid that type of dispute.

10. Application of section 20(5) of the 2003 Act to the present case

65. In the EAW the issuing judicial authority did not tick the box under point 3.4 of point (d). Rather, it gave a legal pledge. However, the pledge did not state that the appellant was entitled to a retrial. Thereafter, the issuing judicial authority was asked to, but did not, confirm that the appellant had a right to a retrial: see paras 36-41 above. The only further information was dated 24 September 2020 in which the issuing judicial authority stated that the appellant could "request the reopening of the criminal proceedings." The further information did not state that the appellant was entitled to a retrial. Accordingly, we consider that there is no evidence from the issuing judicial authority in the EAW or in the further information that the appellant would be entitled to a retrial on his surrender to Romania. Accordingly, the district judge ought to have answered the question in section 20(5) in the negative and should have ordered the appellant's discharge pursuant to section 20(7) of the 2003 Act.

66. The decision in *BP v Romania* meant that the district judge was bound, and Chamberlain J was bound by judicial comity, to apply an incorrect construction of section 20(5) of the 2003 Act to compel them to answer the question in section 20(5) in the affirmative. Indeed, Chamberlain J in his insightful judgment recognised the force of the appellant's submissions on section 20(5).

67. We add for completeness that, in arriving at his decision, the district judge relied on a passage at the end of para 42 of the judgment of the Divisional Court in *Cretu*: see para 44 above. We consider that he was wrong to have done so. In *Cretu* the issuing judicial authority had ticked, among other boxes, box 3.4 in point (d) of the EAW so that the district judge was obliged to conclude that the requested person was entitled to a retrial for the purposes of section 20(5). The issuing judicial authority had not relied on

article 466 of the Romanian Code. Rather, the requested person submitted that the consequence of article 466 was that he would not be regarded as having been tried in absentia and so would not have a right to a retrial, a submission which conflicted with the confirmation provided by the judicial authority when it ticked box 3.4. The Divisional Court stated, at para 42 of its judgment, that the requested person's submission illustrated the type of dispute which article 4a of the Amended Framework Decision is crafted to avoid. The Divisional Court rejected the requested person's submission, instead holding that the statement in the EAW should be taken at face value and was sufficient to satisfy the requirements of both article 4a and section 20(5). The Divisional Court then observed, at the end of para 42, that it was common ground that article 466 had been amended to transpose the relevant parts of article 4a of the Amended Framework Decision and that it can be assumed that Romanian law will provide the right to a retrial in appropriate cases. That passage reflects the position in that particular case, having regard to the information provided in the EAW and having regard to the matters which were agreed as common ground between the parties to those proceedings. The passage is not authority for a general conclusion that article 466 of the Romanian Code provides a right to a retrial in all cases, even in the absence of information in the EAW or in cases of ambiguity in the EAW.

11. Conclusion

68. We would allow the appeal. Pursuant to section 33(3)(a) and (b) of the 2003 Act, we would order the appellant's discharge and we would quash the extradition order made by the district judge.