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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 01/02/2019*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

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IN THE MATTER OF THE EXTRADITION ACT 2003

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Between:

JAN RYSZARD KIJEK

Appellant

-v-

THE DISTRICT COURT OF SLUPSK
IN THE REPUBLIC OF POLAND

Respondent

_____

Before: Treacy LJ and McBride J

_____

TREACY LJ (giving the judgment of the Court)

Introduction

[1] Pursuant to the grant of leave by McAlinden J the requested person ("RP") appeals against the extradition order made by HH Judge Devlin on 20th June 2018. Leave was granted solely in relation an issue arising under section 20 of the Extradition Act 2003 ("the 2003 Act").

[2] The European Arrest Warrant ("EAW") is a conviction warrant. The extradition is sought to require him to serve the remainder of a sentence of 2 years imprisonment imposed upon him on 25th September 2012 for the offence of burglary which was originally suspended for 5 years with a condition that he remain under the supervision of a probation officer during this period. On 25th April a competent Polish Court made an order activating the conditionally suspended sentence on account of his failure to engage with probation services.

[3] When interrogated whilst in custody in Poland on 2nd August 2012 he indicated his guilt to the burglary and submitted an application for sentencing and an "agreed" penalty without the need for a trial. The RP maintains that the suspended sentence had been agreed but that he was unaware of any probation element. A sentencing hearing for the imposition of the "agreed" penalty was to be arranged which the RP was not required to attend. A sentencing hearing was scheduled for 25th September 2012, notice of which was given to the RP's mother on 3rd September. This form of service was at that time deemed appropriate under Polish law. On that date the RP was sentenced as earlier set out. Correspondence setting out the terms of the penalty and the time limits for appeal was collected by the RP's mother on 4th October 2012.

[4] One of the grounds upon which the RP resists extradition is the contention that pursuant to section 20 of the 2003 Act the Court is required to order his discharge as (i) he was convicted in his absence, (ii) had not deliberately absented himself from his trial and (iii) was not entitled to a retrial. For the sake of brevity we shall refer to this as "the section 20 issue". There is no dispute that the RP would not be entitled to a retrial. Accordingly the focus in this judgment is on (i) and (ii).

[5] This appeal was adjourned on a number of occasions to enable the parties to obtain further information relevant to the section 20 issue and we would like to record our gratitude to the authorities in the Requesting State for their prompt responses.

Section 20(1) - Was the RP convicted in his presence?

[6] Section 20 provides as follows:

> "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."

[7] The effect of section 20 was summarised in Caldarelli v Italy [2008] UKHL 51 at paragraph [14]:

> "14. Section 20, directed to the case where a person has been convicted, requires the judge to address a series of questions. The upshot is that if the person was convicted in his presence, or when he had deliberately absented himself from the trial, or in circumstances such that the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial, the judge must proceed under section 21. But if the judge decides that the person had not been tried in his presence, and had not deliberately absented himself and would not be entitled to a retrial or (on appeal) a review amounting to a retrial, he must order the person's discharge."

[8] Before the Divisional Court on 14th September 2018 the Respondent conceded that if the "date of conviction" was indeed 25th September 2012 then the RP was convicted in his absence. We consider that this date is the relevant date which is also correctly recorded on his Polish criminal record as the date of his conviction which

states:

> **Conviction 2**
> **Convicting country: POLAND**
> **Convicting court: DISTRICT COURT IN CHOJNICE**
> **Date of conviction: 25/09/2012**

[9] This information and conviction history was provided directly by the Requesting State which plainly regarded the date of conviction as the date of the court hearing on 25th September 2012. Mr Ritchie was correct in accepting that if the date of conviction was 25th September (as we have held) that the RP was convicted in his absence. This approach accords with the decision of the CJEU in Tupikas [2017] 4 WLR 188 which at paragraph [78] confirms the definition of "conviction" as encompassing conviction and sentence:

> "78. As is clear from the case-law of the European Court of Human Rights, the term 'conviction' within the meaning of the ECHR refers to both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty (see, to that effect, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 123, and the case-law cited)."

This approach also accords with Article 4a(1), and Article 8(1) of the Framework Decision and the concept of "trial resulting in the decision" as determined in Tupikas at paragraphs [74] and [75]:

> "74 It must therefore be held that the concept of 'trial resulting in the decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant.
>
> 75 Such an interpretation of the concept of 'decision' is also consistent with that of 'trial which led to [the] conviction' which the court had already adopted in paragraph 37 of its judgment of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346), for the purposes of the interpretation of Article 4a(1) of Framework Decision 2002/584."

Moreover, the Requesting State in its EAW relies on the "enforceable judgment" of

25th September to ground these extradition proceedings (see Box B of the EAW).

[10] It is common case that the RP was not present on this date and that his presence was not required. This is confirmed within the IJA letter dated 19th March 2018. In light of the above we are satisfied that the RP was not convicted in his presence.

Section 20(3) – Did the RP deliberately absent himself from his trial?

[11] It is agreed that the burden of showing that the RP deliberately absented himself from his trial lies upon the Requesting State, which must prove this matter to the criminal standard (see Tyrakowski [2017] EWHC 2675 Admin at paragraph 20). In JK v District Court of Lublin, Poland [2018] EWHC 197 (Admin) the English Divisional Court recently examined the issue of section 20. At paragraph 49 the Court stated:

> "The position was recently and helpfully summarised by my Lord, Mr Justice Julian Knowles, in Tyrakowski Regional Court in Poznan, Poland [2017] EWHC 2675 (Admin): in particular see paragraphs 19, 22, 25 and 34. In particular, I would note two points. First, the burden lies on the requesting state to prove to the criminal standard that the respondent person did deliberately absent himself from his trial. Secondly, what is required is ultimately an answer to the question whether the requested person has knowingly waived his right to a trial. Questions of manifest lack of diligence, for example, can be taken into account, but are evidential matters which go to answering that ultimate question."

[12] In C-108/16 PPU, Openbaar Ministerie v Dworzecki the CJEU held that it was not sufficient compliance for the issuing judicial authority to prove that a summons had been left with a relative in order to prove that the defendant "actually" received the summons. In the present case the Requesting State relies upon the collection of the relevant documents including the notification of hearing by the RP's mother - see Box D of the EAW. We note that not only has this practice been discontinued by the Polish authorities but is also contrary to the decision of the CJEU in Dworzecki referred to above. The RP disputes that he was aware of the hearing date and that probation was going to be imposed in addition to the suspended sentence which had been agreed with the prosecutor following his earlier acceptance of guilt. Furthermore there is no evidence that the documents collected by his mother were actually given to him. There was therefore no proof that he had actually received the documents. In Stryjecki [2016] EWHC 3309 (Admin) at paragraph 50 Hickinbottom J stated that if there had not been personal service the requesting

authority must unequivocally establish to the criminal standard that the person actually received the relevant information as to time and place. We consider that the Requesting State has failed in the present case to unequivocally establish to the requisite criminal standard that the RP actually received the relevant information regarding the hearing on 25th September. Furthermore we have now received the transcript of the "interrogation record" of the RP of 2nd August 2012 during which, following his admission of guilt, the conditions of penalty were agreed between the prosecutor and the RP. There is no reference in this record to the probation supervision aspect of the sentence which was later imposed in his absence on 25 September. This is consistent with the RP's case that he was unaware of the probation supervision. In all of these circumstances we therefore hold that it has not been established that the RP deliberately absented himself from his trial.

Conclusion

[13] Pursuant to section 20 of the 2003 Act the Court is required to order the RP's discharge as this Court finds that he (i) was convicted in his absence, (ii) had not deliberately absented himself from his trial and (iii) was not entitled to a retrial. Accordingly we order his discharge.

[14] The RP relied upon other grounds in resisting his extradition notably article 8 of the ECHR and his particular family circumstances supported by expert evidence. This ground was rejected by the judge below and leave was not granted by the Single Judge. In light of our clear conclusions on the section 20 issue it is not necessary for us to determine the other grounds save to record, without deciding the article 8 issue, that there appears to us to be persuasive force in some of the article 8 submissions.