Neutral Citation Number: [2019] EWHC 351 (Admin)

Case No: CO/5807/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2019

Before :

MR JUSTICE OUSELEY

- -

Between :

MR RAFAL DZIEL	**Appellant**
- and -	
DISTRICT COURT IN BYDGOSZCZ, POLAND	**Defendant**

- -
- -

MR JONATHAN SWAIN
(instructed by **SONN MACMILLAN WALKER SOLICITORS**) for the **Appellant**
MS CATHERINE BROWN
(instructed by **CPS EXTRADITION UNIT**) for the **Defendant**

Hearing dates: 13 FEBRUARY 2019

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Approved Judgment

MR JUSTICE OUSELEY :

1. This is an appeal against the order of District Judge Goozee, at Westminster Magistrates' Court, on 11 December 2017. He ordered Mr Dziel's extradition to Poland on a conviction EAW to serve all but one day of the eight months' imprisonment imposed for two offences of assault committed in November 2013. The issue on the appeal, which I gave leave to argue, is whether Mr Dziel, for the purpose of s20 of the Extradition Act 2003, was "deliberately absent" from his trial, which took place on 21 January 2016. He contended that he did not actually receive notice of the trial date and place, nor more particularly was he actually informed that, were he not to attend, he could be tried in his absence.

2. He left Poland in February 2014, under an obligation to inform the Polish authorities of any changes of address; he breached this obligation. In February 2014, there was no provision in Polish criminal procedure for a trial to take place in his absence. That was not introduced until July 2015. The EAW makes no reference to a retrial on his return to Poland. If he was not deliberately absent, he must be discharged. If deliberately absent, his appeal must be dismissed. Notwithstanding the number of Polish extradition cases, this issue arising from the change in the law on trials in the absence of the defendant appears not to have arisen before.

3. The case has taken some time to come on because, like so many others, it was stayed behind the Divisional Court decision in *Lis and Others v Regional Court in Warsaw and Others* [2018] EWHC 2848 (Admin), in relation to article 6 ECHR and changes to the law governing the Polish judiciary.

The statutory provisions

4. Section 20 of the 2003 Act 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."

5. This case turns on s20, but Article 4a of the Framework Decision, so far as is relevant and the two cross-fertilise at times, provides that:

> "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;"

The facts

6. I can take these from the EAW, which states:

> "Rafal Dziel knew about the pending criminal proceedings against him. On November 16, 2013 he was detained in relation with the criminal offences committed by him and on November 17, 2013 he gave explanations. Then also, he was informed about his obligation as a suspect to appear whenever requested during the course of criminal proceeding and notify the authorities conducting the proceedings of any change of address or change of stay exceeding 7 days. He was informed, that in case of unjustified failure to appear he may be detained and forcibly brought. It was stressed, that in case he stays abroad, he shall be required to indicate an address for service in the country, and in case he does not do that, any letter sent to the last known address in the country, or when there is not such address, submitted to the case file, shall be accepted as duly delivered to him. He was also informed, that unless he indicates his new address and changes his place of residence or does not stay at the given address, then the letter sent to this address during the course of proceedings shall be accepted as duly delivered.

> On June 18, 2014 an indictment against Rafal Dziel was brought to the Regional Court in Bydgoszcz, in which he was charged with committing the crimes described above. Owing to the fact that the person did not appear in person on the fixed dates of the trials, the Regional Court in Bydgoszcz with the decision dated October 8, 2014 in the case files reference number III K 301/14, applied against him preventative measures in the form of pre-trial detention for the period of 3 months from the date of detention and ordered the arrest warrant search. Then with the decision of July 16, 2015 the Regional Court in Bydgoszcz in the case files reference number III K 84/15 suspended the proceedings in the case due to the long-term barrier preventing form conducting proceedings."

I pause there to note that it is clear that Mr Dziel did not comply with his obligation to attend his trial, having been notified of the date in the manner he had been told he would be, having been warned that failure to attend could lead to his detention, but not that it could lead to a trial in his absence, as that was not then possible under Polish law. The EAW then continued:

> "Next the Regional Court in Bydgoszcz with the decision dated December 10, 2015 in the case files reference number III K 84/15, resumed the suspended proceedings, waived the applied against Rafal Dziel preliminary custody and abolished the issued for him arrest warrant. The grounds for this decision was the entry into force on July 1, 2015 the amendment of the provision of Article 374 paragraph 1 of the Code of Criminal Procedure, which enabled to conduct the criminal proceedings in the absence of the accused.
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> Once again Rafal Dziel was sent to the indicate by him at the stage of preparatory proceeding residence address – Bydgoszcz, 90 Nakielska Street – advised on November 16, 2015 and November 24, 2015, and then due to the failure of its reception by the addressee it was returned to the Regional Court in Bydgoszcz. Under article 133 of the Code Criminal Proceedings, it was recognized, that the indictment had been delivered effectively to the person as well as the summons for a hearing.
>
> The accused did not appear in person at the trial January 21, 2016 and that is why it was held in his absence and a judgement of conviction was imposed on him, which was sent to the mentioned address. That correspondence was not accepted by Rafal Dziel either and after having been notified on February 5 and 15, 2016, it was returned to the Court. The said judgement became final as of the end of March 1, 2016.
>
> The sentence was also sent to this address a notice to appear on March 29, 2016 at the Bydgoszcz Custody Suite in order to

> serve there the sentence passed against him. The correspondence was not accepted by the addressee either."

7. The EAW does not suggest that Mr Dziel would have any retrial or appeal rights on his extradition.

8. The District Judge found as follows, dealing first with whether Mr Dziel was a fugitive, and deliberately absenting himself from the proceedings, which obviously are reflected later in his conclusions on s20:

> "34. By his own admission in evidence I find the RP knew about the pending court proceedings in respect of the assault charges subject to the EAW. When he left Poland for the UK in February 2014 he did not think about his obligations to keep the police and prosecution informed of any new address abroad. He also had just been arrested on 10 February 2014 for a further theft offence and by 28 February 2014 he had left Poland. In his own words in answer to questions in cross-examination, he said "I left without letting them know. I was just hoping they would let me know. I hoped it would not happen". In these circumstances, I find that it was a deliberate act by the RP to leave Poland in order to avoid his problems there. He was naïve in believing his Probation Officer will have kept the authorities informed. In any event, he accepted that the Probation Officer was not appointed until 2015 after he had been convicted of the theft offence. He made assumptions his Probation Officer will have kept the authorities informed but he accepted he never made specific enquiry about the proceedings for the assault. He deliberately absented himself from any potential court hearings and any correspondence from the courts. I am satisfied so that I am sure that the RP is a fugitive.
>
> "35. I am satisfied on the evidence that the RP was unaware of the court hearing dates in June 2014 and December 2015 when the proceedings were reinstated and the subsequent hearing on January 21 2016. He did not attend any of the hearings. I am satisfied on the further information from the JA that summonses were served correctly at his home address in Bydgoszcz. Indeed there is evidence that the summons sent on 3 July 2014 was indeed collected by an adult from his home address. However, I am satisfied that despite the RP's wish to leave Poland and find work and accommodation for his family, his state of mind at the time would have been very much to avoid criminal proceedings in Poland. At the time he left Poland, he had been arrested and sentenced for a criminal damage charge, he had been arrested for the assault charges and was aware criminal proceedings would be started. He had also been arrested for a further theft offence a matter of weeks before he left. He left Poland following a spree of offending. I do not accept his evidence that his sole purpose was to find

> work so that he could afford accommodation for his partner and child. It was his own fault he did not know about the court dates. He did not tell anyone he was leaving Poland and never contacted the prosecution or police again to let them know where he was living.
>
> "41. In relation to s.20 EA 2003 the RP was not convicted of the offences subject to the EAW in his presence. I must therefore determine whether the RP deliberately absented himself from his trial. In line with my findings above, I am satisfied that he was aware he faced prosecution for the assault offences and that at no stage had he been given any indication the prosecution would not proceed. He was informed by the prosecutor that he must notify any change of address and indeed was placed under the supervision of the police in order to ensure he was notified of the court proceedings at his address. He was instructed in the course of the preparatory proceedings of his obligations to notify change of address and to attend court in answer to summons. He was warned of the consequences in his failure to comply with those obligations. The RP ignored that obligation when he came to the United Kingdom in February 2014, about three months after his arrest. He had also just been arrested for a further theft offence. He accepted he did not tell the authorities he was leaving Poland. Although he provided his address to a Probation Officer in 2015 in relation to his supervision for the theft offence, he made no enquiry with the officer about the assault charges and there is no evidence to indicate the Probation Officer was even aware of those proceedings. By moving to the UK and not complying with his obligations to notify his change of address he had made it effectively impossible for the JA to communicate with him in relation to any court proceedings. I am satisfied so I am sure that it was the RP's own fault and lack of due diligence that led him being absent from his court hearing on 21 January 2016 and any previous court hearings. I am satisfied by his own conduct he was ignoring the court process having been made aware by the consequences during the preliminary proceedings. I am satisfied so I am sure he deliberately absented himself from the trial process. I reject that challenge and therefore proceed under s.21 EA 2003."

9. On the facts found by the District Judge here, Mr Dziel was not summoned in person, thereby being informed of the date and place of the trial in 2014, nor did he actually receive official information about the date and place of trial by other means. Nor, in 2014, could he have been told that the trial could take place in his absence, because in 2014, no such a process was possible in Poland. This is not the trial that matters since it did not proceed in his absence. It is material to the sequence of events which led to the findings which he made about the trial which does matter in 2016.

10. The District Judge addressed it in [35]. He found that Mr Dziel was unaware of any of the court dates in 2014, 2015 and 2016. The EAW does not state that he was informed of the date and place of the trial in 2014, and its narrative confirms that he could not have been told that the trial could take place in his absence. Indeed, the Further Information of 7 February 2019, if admissible, says that the letters that were sent, but not received, told him "that the proceedings could not proceed at his absence." It is the Further Information of 8 February 2019 which states of the letter about the forthcoming 2016 trial, sent to the address which Mr Dziel had given to the prosecutor, that:

> "Detailed instructions relating to the amended code of criminal procedure which entered into force in July 2015, among others on the possibility to decide in the non-appearance of the convict and on consequences resulting from that, had been attached to these documents."

The Further Information

11. I am prepared to admit this Further Information, applying the approach in *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin), Hickinbottom LJ with whom Green J agreed. He draws the important distinction between the admissibility of further evidence on behalf of an appellant, and the reasons for the restrictions on it, and the admissibility of further evidence on the part of a respondent, at [38-40]. I am satisfied that it would not be in the interests of justice for this further information to be excluded. This court should not proceed on a false assumption as to what information would have been available to Mr Dziel, had he maintained proper contact, as required, with the Polish prosecutor or courts. If it is important information, as potentially it is, it would be a waste of time for the issue to be reopened on a further EAW following discharge on the current one. It comes later than it should have done, but I cannot see that it prejudices Mr Dziel, who has never suggested that he has taken any steps to obtain or read correspondence from the Polish courts or prosecutor, notwithstanding the order for his extradition by the District Judge.

The case law

12. In *Cretu v Local Court of Seceava, Romania* [2016] EWHC 353 (Admin), Burnett LJ, with whom Irwin J agreed, stated:

> "34. In my judgment, when read in the light of article 4a section 20 of the 2003 Act, by applying a *Pupino* conforming interpretation, should be interpreted as follows:-
>
> i) "Trial" in section 20 (3) of the 2003 Act must be read as meaning "trial which resulted in the decision" in conformity with article 4a paragraph 1.(a)(i). That suggests an event with a "scheduled date and place" and is not referring to a general prosecution process, Mitting J was right to foreshadow this in *Bicioc.*

> ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a paragraph 1.(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate article 6 ECHR;
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> iii) An accused who has instructed ("mandated") a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it;
>
> iv) The question whether an accused is entitled to retrial or a review amounting to a retrial for the purposes of section 20 (5) is to be determined by reference to article 4a paragraph 1(d).
>
> v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW."

13. It is [34(ii)] that matters here. A person is "deliberately absent" from his trial for the purpose of s20(3) if he has been summoned as envisaged by article 4a(1).(a)(i), but is not actually made aware of the scheduled date and place of trial, but the manner in which he has been summoned does not violate article 6 ECHR. It is silent about the (a)(ii), and information about proceedings in the absence of the defendant.

14. The decision of the CJEU in *Openbaar Ministrie v Dworzecki* 24 May 2016 (2016) C-108/16 PPU shows in [43-47 and 49] that it is knowledge of the date and place of trial which must actually be communicated to the defendant, one way or another, for the optional basis for the refusal of extradition to be removed, and hence extradition compelled. The importance of [50] is that because (1)(a)(i) is an exception to an optional ground for the refusal of extradition, and not a condition to be satisfied before extradition can take place, "the executing judicial authority may in any event, even after having found that [(1)(a)(i),(b),(c),(d)] did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence." Extradition can still be ordered where the conditions in those paragraphs are not met, provided that the surrender does not breach his fair trial rights. It continued in [51]:

> "In the context of such an assessment of the optional ground for non-recognition, [i.e. that the executing judicial authority may also refuse extradition if the person did not appear in person at trial, but not where (a)-(d) are satisfied], the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of

> diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him."

15. This last paragraph is therefore an illustration of the scope of the discretion to extradite a person not present at his trial, and not an illustration of a further bar to the optional refusal of extradition nor is it an interpretation of article 4(1)(a)(i).

16. *Romania v Zagrean* [2016] EWGC 2786 (Admin), Cranston J with whom Sharp LJ agreed, dealt at [77, 78, 80 and 81] with the position where a defendant had deliberately prevented the court communicating with him so as to give him notice of the time and place of trial. Did such deliberate evasion of the receipt of information about the date and place of trial, or the consequences of absence, cause the trial to breach article 6 ECHR and was the defendant deliberately absent from his trial? It was therefore an examination of the circumstances in which [34(ii)] of *Cretu* might apply:

> "77. Our reading of the decision of the Luxembourg court in *Dworzecki* is that it does not alter the principles enunciated in *Cretu v Local Court of Seceave, Romania* [2016] 1 WLR 3344. The overall objective of Article 4(a)(1) of the Framework Decision is to ensure the right to a fair trial by a person summoned to appear before a criminal court by requiring that he has been informed in such a way as to allow him to organise his defence effectively. The list in Article 4(a) (1)(i) is designed to that end so that if one or more of the conditions set out there are satisfied, executing judicial authority under an EAW must extradite the requested person, even if he did not appear in person at the trial resulting that decision.
>
> 78. However, Article 4a(1) (i) does not constitute an exhaustive list of how the end is to be achieved, since the conditions set out in that provision are satisfied if the person concerned was actually given official information of the date and place fixed for his trial by other means. The key question is whether surrender would lead to a breach of the extraditee's fair trial rights….
>
> 80. Notwithstanding the specific result in *Dworzecki*, it is clear to us that even if none of the exceptions in the list in Article 4a(1)(i) apply, an executing judicial authority may take into account other circumstances that enable it to be assured that the surrender of the person concerned will not mean a breach of his fair trial rights. The exceptions in Article 4(a)(1)(a) are exceptions to an optional ground for non-surrender.
>
> 81. Moreover, the CJEU was also clear that the executing judicial authority can have regard to the conduct of the person concerned, what the court described in paragraph [51] as a manifest lack of diligence on his part, notably where it transpires that he sought to avoid service of the information the court sent. Thus the approach in *Cretu* in interpreting section

> 20 remains good: a requested person will be taken to have deliberately absented himself from his trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial. Finally, we are clear that the emphasis in *Cretu* on the wording of the EAW, and the significance of the statements made within it as to the facts of the requested person's absence, accord with the decision in *Dworzecki*, in particular in paragraph [34].""

17. The propositions developed by Hickinbottom J in *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 (Admin) are not of the usual assistance because, with respect, they restate Divisional Court propositions in different language and in doing so, (vi) or (f), is unintentionally at odds with *Zagrean* at [81] and therefore with *Cretu* at [34 (ii)], as Julian Knowles J in *Tyrakowski v Regional Court in Posnan* [2017] EWHC 2675 (Admin) gently pointed out. I am not sure of the derivation or accuracy either of (vii) or (g). So, I shall refer only to the Divisional Court decisions.

18. The particular point upon which Mr Swain, who appeared for Mr Dziel, focused was that, not merely had Mr Dziel not been told in person or actually informed of the date and place of the trial in 2016, or 2014 for that matter, he had not been actually told that he could be proceeded with in his absence. He was actually told in fact in 2013, as the EAW states, that if he did not appear, he could be "detained and forcibly brought" to trial. That carried with it the clear implication that he could not be tried in his absence, and that is what he would have been told, if told anything. The Further Information of 7 February 2019 confirms that if he had received the correspondence about the 2014 trial, he would have been told that the trial would not proceed in his absence. He never actually found out that, after July 2015, he could be proceeded with in his absence. The Further Information of 8 February 2019 does show that the letters about the 2016 trial and sent to the address he had given, did contain that information. So the issue was whether he had been deliberately absent in those circumstances for the purpose of s20(3).

19. In [80-81] of *Zagrean*, the Court is concerned to point out that the purpose of the various provisions is to ensure that no one is surrendered where that would mean a breach of their fair trial rights. In [81], a person is to be treated as "deliberately absent" from his trial, "where the fault was his own conduct in leading him to be unaware of the date and time of his trial." This is in line with [34(ii)] of *Cretu*, which also adds that the defendant has to be summoned in a manner which does not breach his fair trial rights in article 6 ECHR. The question is therefore how that is to be determined where it was the defendant's fault that he did not receive notice of the date and place of trial, that notice would have told him that he could be proceeded with in his absence, but that he had been actually told or clearly given to understand, correctly at the time before the law was changed, that he could not be proceeded with in his absence.

20. Mr Swain referred me to [75] in *Zagrean* and adopted the submissions of Mr Fitzgerald QC in that case, submissions not clearly accepted but not necessarily wrong either, that there had to be an "unequivocal and intentional waiver of the right to attend one's trial before a court is entitled to proceed in absentia." He relied on *Colozza v Italy* (1985) 7 EHRR 516. Further, waiver required knowledge of a forthcoming trial and voluntary absence. Waiver required that the defendant could

"reasonably have foreseen what the consequences of his conduct would be." He relied on, but did not produce, *R v Jones* [2003] 1 AC 1. I have nonetheless read it.

21. In that case, Jones was on bail pending trial for robbery, but did not appear on the date fixed for the trial. A new trial date was then fixed. It appears that Jones did not know of this new date. At any event he did not appear. Submissions were heard as to whether the trial could and should proceed in Jones' absence. The judge decided that it could and should. It started on the following day. His lawyers withdrew. Jones was convicted. After his eventual arrest, he appealed against his conviction and sentence. The first question was whether English law permitted a trial to be held in his absence. There appeared to be some uncertainty about this. Lord Bingham held that English law and the ECHR recognised the right of the accused to attend his trial but not an obligation to do so, such that his absence did not prevent the trial proceeding, if his absence was his own choice. He approved the formulation of the Court of Appeal that, on the facts, Jones "had clearly and expressly by his conduct, waived his right to be present and to be legally represented." He summed up the ECHR article 6 jurisprudence as being that the Strasbourg Court had never found a breach of the ECHR where a defendant, fully informed of a forthcoming trial, had voluntarily chosen not to attend. While there was no direct evidence to show that Jones knew what the consequences of his absconding would be, there was nothing to suggest he believed that the trial would not go ahead in his absence. At [15], Lord Bingham said that Jones' decision to abscond "in flagrant breach of his bail conditions could reasonably be thought to show such complete indifference to what might happen in his absence to support the finding of waiver." But reservations were expressed by others of their Lordships about waiver, so he added that nonetheless he agreed that Jones had had a fair trial.

22. Lord Nolan agreed with both aspects of what Lord Bingham had to say and with the formulation adopted by the Court of Appeal. The critical question was whether the defendant "had, clearly expressed by his conduct, waived his right to be present and to be legally represented." Jones had had all the advantage of legal advice and representation at all stages before the start of the trial. But, seeing the "near impossibility" of a judge's task in being satisfied that a defendant had been absent with full knowledge of his rights, preferred to base his decision on the fairness of the trial which Jones had received. Lord Hutton concluded that the facts warranted the finding that Jones' deliberate absence waived his right to appear and to defend himself, but even if not, there was in fact no violation of the article 6 fair trial rights where the defendant chose not to exercise his right to be present.

23. Lord Rodger concluded that the facts did not warrant a finding that Jones had waived his right to be present, since he would not have known that which the trial judge himself had to research and ponder, namely whether a trial could take place in his absence; even more difficult was proof that he had waived the right to be represented. However, there had been no breach of article 6 ECHR, looking at the proceedings as a whole, including the proceedings in the Court of Appeal, where Jones had been present and represented. The judge had exercised his discretion properly bearing in mind the effect of further delay on the interests of justice, including the many traumatised witnesses to the robbery, whose ability or willingness to give evidence could fade over the time until Jones was apprehended. Lord Rodger considered the process of the trial, the strength of the prosecution case, and how what Jones could

have said by way of defence was dealt with, the fairness with which judge and prosecuting counsel conducted the proceedings and of the summing up.

24. Lord Hoffmann agreed with Lord Bingham and Lord Rodger, but preferred not to find that there was waiver where it had not been shown that Jones knew that the trial could proceed in his absence. His preferred formulation was that Jones "deliberately chose not to exercise [his] right to be present or to give adequate instructions to enable lawyers to represent [him]." He did not see Strasbourg jurisprudence as making waiver the only basis upon which a trial could proceeding the absence of the defendant. The question was whether the trial had been fair, as it had been.

25. Jones' application to the ECtHR was rejected as inadmissible; 03900/02 [2003] ECHR 713. It found that it had not been established that Jones had unequivocally waived his right to be present and defend himself; for that purpose, it would have had to be reasonably foreseeable what the consequences of his non-attendance would be. But at that time, a layman could not have been expected to appreciate that his deliberate absence could lead to trial and conviction in his absence and in the absence of legal representation.

The submissions

26. Mr Swain submitted that "deliberately absent" in s20(3) had to be interpreted in such a way that a person was not "deliberately absent" from his trial unless Strasbourg article 6 jurisprudence would regard it as fair for the trial to have taken place in his absence. The deliberate nature of a person's absence had to be such as to amount to an unequivocal waiver of his right to appear at the trial. Mr Dziel had never been summoned as envisaged by article 4A of the Framework Decision; he had never been informed that he might be tried in his absence, indeed the information he did receive was to the contrary. He could not be said to have waived his right to attend his trial if he did not actually know that he could be tried in his absence, or if that were not a reasonably foreseeable consequence of his not attending.

27. Ms Brown for the RJA submitted that, although Mr Dziel was not actually aware of the hearing in January 2016, the District Judge had rightly found that he had deliberately absented himself from his trial because it was his own conduct which led him to be unaware of the date and time of the trial, and indeed of the fact that he could be now tried in his absence. He had also shown what was referred to in *Zagrean* as a manifest lack of diligence, through not informing the Polish authorities of his whereabouts, or making enquiries about the proceedings for the assaults, and by seeking to evade service of information from the court. It was his own fault that he did not attend the first trial date listed in 2014, or the second trial date in January 2016, and was unaware that on that occasion he could be tried in his absence. Mr Dziel had not said that he would have returned to be tried if he had known either the date or place of trial or that by 2016 he could be tried in his absence; nor had he indicated what he might have said by way of defence, if anything. There had been no breach of his article 6 rights. She also suggested that I should approach matters on the basis that, if there had been a breach of his article 6 rights, I should assume that the Polish courts will be able to take steps to put that right, whether by appeal, retrial or otherwise.

Conclusion

28. The upshot of the authorities is quite clear. The relationship between the proper interpretation or application of "deliberate absence" and the fair trial rights in article 6 ECHR is referred to in [34(ii)] of *Cretu* and [80-81] of *Zagrean.* S20 is intended to ensure that a person whose extradition is sought to serve a sentence after a conviction in his absence has the right to a retrial unless he has already been present at his trial or was properly notified of it and deliberately absented himself. Its purpose is to ensure that no one is surrendered where that would mean a breach of their fair trial rights. A person will be taken to have deliberately absented himself from his own trial where the fault was his own conduct in leading him to be unaware of its date and place, through deliberately putting it beyond the power of the prosecutor or court to inform him. This includes breaching his duty to notify them of his changes of address, deliberately ignoring the court process. In such circumstances, there is no need for the further questions in s20(4) and onwards of the Extradition Act to be considered. Extradition follows.

29. The decision in *Zagrean* confirms that the amendment to the Framework Decision in article 4a (i)(a) is an optional basis upon which the courts of the executing state may decide to refuse an extradition request. It is not an obligatory basis for refusal. However, the option to refuse extradition is removed if the condition in (a)(i) and (ii) are satisfied. The other conditions which have a similar effect are immaterial here. The conditions in article 4.1 (a)(i) are not met here. They envisage the defendant having actual knowledge of the date and place of trial. Mr Dziel did not have that knowledge. But all that that means is that there is no bar to the executing judicial authority refusing to extradite the requested person; the executing authority may still decide to extradite him if that would be compatible with article 6 ECHR, and in conformity with domestic law.

30. The concept of a "manifest lack of diligence" covers the concept of "deliberate absence"; see [81] of *Zagrean*. It may go wider with its connotations of negligence and inefficiency; but that cannot broaden the meaning of "deliberate absence" in the Extradition Act. "A manifest lack of diligence" only illustrates one set of circumstances in which EU law permits but does not require the executing authority to order or to refuse to order the extradition of a person who was not present at his trial. S20 is not in conflict with it; s20 may lawfully restrict the Framework's discretion to order extradition; it cannot and does not permit a refusal of extradition, where the article 4a bars to the refusal of extradition bite. In any event, this notion of a "manifest lack of diligence" drawn from [51] of *Dworzecki*, may need to be read with [52] in which the CJEU discusses the availability in Poland of re-trial rights in the sort of circumstances which arose in that case.

31. There is nothing in ECtHR jurisprudence to suggest that, where a defendant deliberately breaches his obligations to inform the authorities of his changes of address so as to prevent the authorities informing him of the date and place of trial, as here, a subsequent trial in his absence is in breach of article 6. That may be seen as a waiver of the right to attend his trial or as a deliberate decision not to exercise the right to attend his trial.

32. In the light of the *Jones* decisions, Strasbourg jurisprudence does not require waiver with full knowledge of the rights foregone, namely that the trial could proceed in his absence, for a trial in the absence of the defendant to comply with article 6. Strasbourg only required that that outcome could be "reasonably foreseen", which it

elaborated no further, for a waiver to arise. What prevented a trial in the deliberate absence of Jones being "reasonably foreseen" by him was that the state of the law in England and Wales on that point was not certain, as Lord Rodger had explained. If Jones did not waive his right to attend through his deliberate absconding, it was because it was not known by anyone that a trial could be held in his absence, rather than that his knowledge of procedural law was inadequate. It may be that the notion of what could be "reasonably foreseen" was introduced to deal with the absence of an individual's actual knowledge of readily ascertainable procedural law. What could reasonably be foreseen is that which is reasonably foreseeable.

33. *Jones* in Strasbourg is only an admissibility decision, and there are obvious limits to its usefulness on that ground alone. It does not deal with Lord Hoffmann's formulation that Jones deliberately chose not to attend, or to give adequate instructions to his lawyers, which is consistent with what Lords Hutton and Nolan said, even if the former did and the latter did not couch that as waiver. Nor did it deal with the formulation of Lord Bingham's, with which Lords Nolan and Hutton also agreed, that Jones' conduct "could reasonably have been thought to show such complete indifference to what might happen in his absence as to support the finding of waiver." This to my mind encompasses the notion that a person does not need to know which right he is waiving, if he shows that he does not care what it may be. "Waiver" may be used in ECtHR jurisprudence without the precision which the House of Lords gave to it.

34. The *Jones* decision in the House of Lords makes clear that deliberate absconding, in breach of bail obligations, can amount to a waiver of the right to attend, or as the deliberate exercise of a choice not to attend. It may also be found in a complete indifference to the procedures which may be followed in his absence, including trial itself. In none of those circumstances would trial breach article 6.

35. In my view, and in the light of *Cretu* and *Zagrean*, the same approach applies to a failure to attend where the inability to do so is the result of a deliberate decision to breach an obligation to provide the authorities with information about changes of address, so as to prevent them actually notifying a defendant of the date and place of trial. That is how the District Judge has found Mr Dziel conducted himself and why.

36. The 2014 trial date is something of a distraction. The s20 question is whether he was deliberately absent from his trial in January 2016. I consider the position first on the assumption that Mr Dziel was not informed in 2013 that he could not be tried in his absence, and did not actually know in 2013 or 2016 what the law was. I then consider what difference it makes that he was actually told in 2013 that he could not be tried in his absence and I shall assume that was what he actually believed in 2016 still to be.

37. On any view, Mr Dziel knew that he was to be tried. He decided not to provide his changes of address, leaving only the one where letters would be ignored by him; he did this in breach of his obligations, deliberately to prevent the authorities notifying him of the date and place of trial. He deliberately put it beyond the ability of the court or prosecutor to provide him with further or changed information as to the consequences of his absence. He took no steps to find out about the progress of the criminal proceedings, whether from a lawyer or from a Court. His behaviour over notification of his address would be just as much responsible for his not knowing the consequences of absence as it would be for his not knowing the date and place of trial.

38. Applying *Jones* in the House of Lords, that behaviour demonstrates complete indifference to how proceedings might unfold, and an acceptance of the consequences. Whether waiver is the right concept or not, it also shows the deliberate exercise of a choice not to attend. There would be no breach of article 6 in a trial in Mr Dziel's absence in those circumstances; he would have been deliberately absent.

39. If what a layman could have reasonably foreseen is relevant, in the light of the ECtHR admissibility decision in *Jones*, what Mr Dziel might "reasonably" have foreseen the position to be, has to be judged in the light of his obligations. What could reasonably be foreseen, or is reasonably foreseeable, here must include what could reasonably be foreseen if the individual complied with his obligations, rather than turning a Nelsonian blind eye to them. If he breaches those obligations, he must be taken to accept the consequences which he has decided not to find out about, and can be treated as making his choice regardless of the possible consequences. What Mr Dziel would have found out, had he complied with his obligations, is that his trial could proceed in his absence. By contrast, Jones would not have done so. If he had rung his lawyers even the day before his trial began, and asked them whether it could proceed in his absence, he would have been told that the jurisdiction would be uncertain, until resolved that day by the judge and by the Court of Appeal or House of Lords later on appeal.

40. ECtHR jurisprudence cannot be read as intending to put the many interests involved in a criminal trial, under the broad umbrella of the interests of justice, but notably victims and witnesses, entirely in the hands of a defendant who does not wish the trial to take place, and believes that by losing contact by whatever means, and in breach of whatever obligations, he can thwart it indefinitely, or who relies on maintaining his ignorance to achieve the same result.

41. Moreover, court obligations apart, what Mr Dziel could reasonably have foreseen includes what he would have discovered had he taken reasonable steps to find out. These are the steps which it would be reasonable for someone to take who knew that his trial process had not begun but was intended, and who also knew that he had prevented the Polish prosecutor or court contacting with him. Those steps include inquiring from a lawyer or court, after mid-2015, what the procedural position was in Polish law, he would have been told that he could be tried in his absence. Had he even collected any correspondence, he would have seen what the position was, as it was so stated on communications about Polish procedure for the January 2016 trial. Had he kept himself abreast of the process he knew had not ended, he would have been told the position, well before the trial took place. His absence from his trial would have been deliberate.

42. I now turn to consider whether that position is any different because in 2013, before he broke off contact with the Polish authorities and decided to make it impossible for them to communicate with him in any normal fashion, he had been told that he could not be proceeded with in his absence, because that is what Polish law then was. I do not consider that that makes any difference. He cannot treat his choice to end contact in breach of his obligations as freezing all that he needed to know about the trial process. He was obliged to maintain contact. He had then deliberately, and in breach of his obligations, put it beyond the power of the Polish authorities to communicate with him about anything pertaining to his trial. This absence of communication with the Polish authorities in any way and at any stage was entirely his deliberate choice in

order to avoid proceedings and their adverse consequences. He still knew that the process had not come to an end. He was given no promise that the law could not change, however long he was out of touch. It remained his deliberate choice not to attend trial; he showed that complete indifference to the trial process which means his actions can be treated as a waiver of his right to attend.

43. All the steps that it would have been reasonable for him to take, necessary for establishing what he could reasonably have foreseen, remain the same. Had he provided them with his address, as he was required to do, he would have found out that he could be tried in his absence, and he could have attended his trial. He took no steps to find out what the position with his case was, or what the law was, through communication with the court, a lawyer, or by getting his mail forwarded. Had he asked any Polish lawyer from mid-2015 onwards, which would have involved minor diligence on the part of someone otherwise deliberately evading contact with the authorities, he would have been told the position, and would have been able to adjust his conduct. He never collected his letters, though he must have known that there would be some. At all times Polish law was certain, albeit that it changed, and for both trial dates, the letters sent to the address he had given, stated what could and could not be done in his absence.

44. Mr Dziel's case is, that, notwithstanding his breach of his obligations to provide a contact address, the obligation to furnish him with information, which he now says he ought to have had, lay exclusively with bodies he deliberately prevented contacting him. He was as deliberately absent from his trial in 2016 as he was in 2014, or as he would have been had he received the notice in 2014, and decided not to attend.

45. I also accept the significance of Ms Brown's point that at no stage has Mr Dziel stated that he would have attended had he known that the trial could proceed in his absence, what he would have said had he done so. There is no evidence of any unfairness in practice in the trial proceeding in his absence. There has been no reference to anything that happened at the trial.

46. I am satisfied that Mr Dziel was deliberately absent from his trial, that he waived his right to attend, or chose not to attend whenever it might be and whatever the consequences might be, and that there is no breach of article 6 in his extradition. He is entirely to blame for the position he is in and there was nothing unfair about his being tried in his absence.

47. Accordingly, this appeal is dismissed.