



## Press Summary

6 March 2024

### **Bertino (Appellant) v Public Prosecutor’s Office, Italy (Respondent)**

**[2024] UKSC 9**

*On appeal from [2022] EWHC 665 (Admin)*

**Justices:** Lord Hodge (Deputy President), Lord Sales, Lord Burrows, Lord Stephens, Lord Burnett

#### **Background to the Appeal**

The appellant’s extradition was sought pursuant to a European Arrest Warrant (“EAW”) issued on 6 February 2020 by the public prosecutor’s office of the Court of Pordenone (“the requesting judicial authority”) seeking to enforce a sentence of one year’s imprisonment imposed for a conviction of sexual activity with an underage person. The appellant had not been arrested or questioned formally after the offence, which was alleged to have taken place on 18 June 2015 at a holiday camp where the appellant was working. However on 23 July 2015 the appellant attended a police station in Sicily where he signed a document which recorded that he was under investigation and in which he elected Italy as his domicile. The document warned that if the appellant did not notify any change of domicile the service of any document would be executed by delivery to a defence lawyer either of the appellant’s choosing or of the court’s appointment. The appellant left Italy in November 2015 and came to the United Kingdom. The requesting judicial authority was subsequently unsuccessful in serving a writ of summons dated 12 June 2017 on the appellant, and the trial took place in his absence.

The question of whether to extradite the appellant pursuant to the EAW was determined by a district judge by reference to the questions set out in section 20 of the Extradition Act 2003 (the “Act”) read in conformity with the 2002 Council Framework Decision 2002/584/JHA of 13 June 2002, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (the “Amended Framework Decision”). The only issue for determination before the district judge arose under section 20(3) of the Act, namely whether the requested person “deliberately absented himself from his trial”. The district judge concluded that the appellant left the country so that he could not be served with court papers or future dates for his trial and that he demonstrated a ‘manifest lack of diligence’ in moving address without notifying the

requesting judicial authority which was sufficient to establish deliberate absence under section 20(3) of the Act. The High Court dismissed the appellant's appeal but certified the following point of law of general public importance: "For a requested person to have deliberately absented himself from trial for the purpose of section 20(3) of the Act, must the requesting judicial authority prove that he has actual knowledge that he could be convicted and sentenced in absentia?" The Supreme Court granted the appellant permission to appeal on this point.

## **Judgment**

The Supreme Court unanimously allows the appeal. It holds that for a judge at an extradition hearing to be satisfied that a requested person was "deliberately absent from trial" within the meaning of section 20(3) of the Act, the requesting judicial authority must demonstrate to the criminal standard of proof that the requested person had unequivocally waived their right to be present at trial. Ordinarily that will require the requested person to have actual knowledge that they could be convicted and tried in their absence although there may be cases where the requested person's behaviour is of a nature that establishes unequivocal waiver without establishing such knowledge. Lord Stephens and Lord Burnett give the lead judgment, with which Lord Hodge, Lord Sales and Lord Burrows agree.

## **Reasons for the Judgment**

The requesting judicial authority indicated in the EAW that the appellant had not been present at trial. However it did not rely on any of the criteria in the subsequent boxes which reflect the exceptions set out in article 4a(1) of the Amended Framework Decision to the discretion afforded to member states to refuse extradition where the requested person was not present at trial. If any of those criteria was established the appellant's extradition would be required pursuant to the Amended Framework Decision [8], [44]. Those criteria are that the appellant was aware of the trial and the consequence of non-attendance or that he had given a mandate to a legal advisor who defended him at trial or that he was subsequently served with the decision to convict and informed of his right to a retrial or to an appeal amounting to a retrial and either expressly stated that he does not contest the decision or did not request a retrial [8].

The Amended Framework Decision recognises that the question of whether to extradite is a matter for domestic law when none of the criteria in article 4a(1) of the Framework Decision is satisfied. In this instance the applicable domestic law is found in section 20 of the Act [45]. The phrase "deliberately absented himself from his trial" in section 20(3) of the Act should be understood as having the same meaning as the concept in the case law of the European Court of Human Rights (the "Strasbourg Court") in relation to the right to a fair trial guaranteed by article 6 of the European Convention of Human Rights, namely that an accused has unequivocally waived their right to be present at trial. The Strasbourg Court has emphasised the "capital" importance of the right of defendants to be present at their trials and also that a fair hearing requires that defendants are notified of the proceedings against them. Moreover, the Strasbourg Court has emphasised that the notification of the formal

“accusation” to the defendant plays a crucial role because it is then that the defendant is put on notice of the factual and legal basis of the charges [47].

It is for the requesting judicial authority to prove to the criminal standard that the appellant had unequivocally waived his right to be present at his trial: see section 206 of the Act [48]. In this case, the appellant was under investigation. He had never been questioned or arrested or charged in connection with the alleged offending. The appellant was never officially informed that he was being prosecuted nor was he notified of the time and place of his trial [50]. The Supreme Court holds that the appellant’s conduct in leaving Italy was far removed from the sort of conduct envisaged by the Strasbourg Court which might justify a conclusion that the requested person had unequivocally waived their right to be present at trial [51].

The Strasbourg Court has been careful not to present the issue in the stark terms in which it was presented in the certified question before the Supreme Court in this case, although ordinarily it would be expected that the requesting judicial authority must prove that the requested person had actual knowledge that he could be convicted and sentenced in absentia [58]. The Strasbourg Court has been careful to leave open the precise boundaries of behaviour that would support a conclusion that the right to be present at trial had been unequivocally waived. The cases cited in the judgment in this appeal provide many examples where the Strasbourg Court has decided that a particular indicator does not itself support that conclusion. But the Supreme Court holds that behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence [58].

As indicated, the requesting judicial authority failed to establish to the criminal standard of proof that the appellant had unequivocally waived his right to be present at trial. The Supreme Court therefore allows the appeal, quashes the extradition order and orders the appellant’s discharge [59].

*References in square brackets are to paragraphs in the judgment.*

**NOTE:**

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)**