Neutral Citation Number: [2024] EWHC 3113 (Admin)

Case No: AC-2024-LON-000333

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4/12/24

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

IONUT – MIREL TODIRICA **Appellant**

- and -

PASCANI COURT OF LAW (ROMANIA) **Respondent**

- -

Martin Henley (instructed by **AM International Solicitors**) for the **Appellant**
Laura Herbert (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 14 November 2024

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Approved Judgment

This judgment was handed down remotely at 10am on 4 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Honourable Mr Justice Bourne :

Introduction

1. This is an appeal against an extradition order made by DJ Law on 29 January 2024. Permission was granted by Heather Williams J on 19 September 2024 for the appeal to proceed on a single ground.

2. The case arises from a conviction warrant concerning three driving offences committed on 8 October 2015 in Romania. When stopped by police the Appellant (1) was found to be driving an unregistered vehicle, which (2) had false registration plates, and (3) he had a suspended driving licence because he had been disqualified.

3. At a hearing on 8 October 2015 the Appellant was informed that he was under an obligation to inform the court in writing of any change of address within 5 days. He failed to comply with this obligation.

4. The Appellant did not attend his trial, informing the authorities by an email dated 6 February 2017 that he was working abroad. On 3 July 2017 he was sentenced to a fine of 3,260 lei.

5. On 25 July 2017 the court notified him that by 25 October 2017 he had to pay the fine and provide proof that he had paid. He was warned that if he avoided payment, he would be subject to imprisonment instead.

6. The Appellant did not pay the fine. On 20 May 2019 a term of imprisonment of 320 days was imposed as a result of the non-payment of the fine. The judgment was made final through lack of an appeal on 4 June 2019.

7. The ground of appeal is based on section 20 of the Extradition Act 2003 which provides:

> "20. **Case where person has been convicted**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

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

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

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

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

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

8. The Appellant contends that the questions at section 20(3) and (7) should both have been answered in the negative and therefore that he should have been discharged.

9. Although the Appellant was not represented in the extradition hearing, the DJ, having found that no other bars to extradition applied under section 11, proceeded to consider section 20. He found that the Appellant was not present or represented at his trial but that he was aware of the date and time of trial and deliberately absented himself. So the question at section 20(3) was decided in the affirmative, and the DJ proceeded under section 21 to find that extradition would be compatible with the Appellant's ECHR rights and therefore ordered extradition.

10. On this appeal the Appellant needs to overturn the DJ's decision on two issues. First, he must show that the relevant "trial" for the purpose of section 20(3) was not the hearing in 2017 at which he was convicted and fined, but the hearing in 2019 at which his fine was converted to a prison sentence. Second, he must overturn the DJ's finding that he effectively waived his right to attend the proceedings in 2019.

Legal framework

11. When section 20(3) is in issue, it is for the requesting state to prove to the criminal standard that the requested person unequivocally and intentionally waived his right to be present at his trial.

12. I am grateful to both sides' counsel for their references to a number of relevant cases in this area.

13. Since the extradition hearing, the Supreme Court has decided *Bertino v Italy* [2024] 1 WLR . There the requested person was suspected of committing an offence in Italy in 2015. He attended a police station in Italy on 23 July 2015 and signed a document which recorded that he was under investigation, that he was under an obligation to notify any change of his domicile to the authorities and that if he did not do so, the

service of any document would be "executed by delivery to the defence lawyer of choice or to a court-appointed defence lawyer". He left Italy for the UK in November 2015. He was sent a summons in June 2017 for a hearing in September 2017, at a time when the authorities knew that he was no longer at the address which he had provided in July 2015. The summons was served on a court-appointed lawyer because he could not be traced. At the extradition hearing, a DJ found that he had left Italy without giving a forwarding address so that he could not be served with court papers, and that in these circumstances he had deliberately absented himself from the trial. However, the Supreme Court disagreed, holding that on the facts of that case, he had not unequivocally and intentionally waived his right to be present at his trial, not least because when he left Italy there were no criminal proceedings in existence.

14. The Supreme Court in *Bertino* explained that the relevant sections of the 2003 Act reflect provisions of the EU Council Framework Decision of 13 June 2002 (2002/584/JHA) as amended by the Council Framework Decision of 26 February 2009 (2009/299/JHA) ("the amended FD")[1]. Section 20 reflects Article 4a of the amended FD, of which the opening words state:

> "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 …"

15. The Court in *Bertino* noted that the need to interpret section 20 to ensure conformity with Article 4a was confirmed by the Divisional Court in *Cretu v Local Court of Suceava, Romania* [2016] 1 WLR 3344, per Burnett LJ at [34]:

> "In my judgment, when read in the light of article 4a section 20 of the 2003 Act, by applying a *Pupino* conforming interpretation [Criminal Proceedings against *Pupino* [2006] QB 83], 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(1)(a)(i). That suggests an event with a 'scheduled date and place' and is not referring to a general prosecution process …".

16. The Court in *Bertino* also noted at [45] that both the amended FD and section 20 reflect the provisions of ECHR Article 6, as interpreted by the ECtHR, on the right to be present at trial, and said:

> "The phrase 'deliberately absented himself from his trial' should be understood as being synonymous with the concept in Strasbourg jurisprudence that an accused has unequivocally waived his right to be present at the trial. If the circumstances suggest a violation of article 6, the answer to the question in section 20(3) would be 'no' and the judge would be required to go on to consider the question in section 20(5) on retrial or appeal in accordance with section 20(8). By contrast, if the circumstances suggest that the

[1] Following the UK's exit from the EU, those provisions have been reproduced in Article 601(i) of the Trade and Co-operation Agreement ("TACA").

trial of the accused in his or her absence did not give rise to a violation of article 6 of the Convention, then the person is taken to have absented himself deliberately from the trial. The answer to the question in section 20(3) would be 'yes' with the consequence that the judge must proceed pursuant to section 20(4) to consider wider compatibility with the Convention under section 21."

17. At [54] the Court in *Bertino* further held that:

> "… the standard imposed by the Strasbourg Court is that for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another. A direct warning was expected from the judges in the exclusion cases. The Amended Framework Decision, reflecting an understanding of the obligations imposed by article 6, requires the summons to warn the accused that a failure to attend might result in a trial in absence."

18. A number of other cases have considered the meaning of the phrase "trial which resulted in the decision".

19. In *Criminal proceedings against Tupikas* (Case C-270/17PPU), [2017] 4 WLR 188 there had been a number of hearings leading to successive decisions at first-instance and appellate levels, at least one of which was given in the defendant's absence. The question was which was the "trial" for the purposes of article 4a(1). The CJEU answered the question in this way:

> "81. … the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned.
>
> 82. That interpretation is fully in line with the requirements of respect for the rights of the defence which article 4a of Framework Decision 2002/584 precisely seeks to uphold ...
>
> 83. It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned, since it directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served.
>
> 84. Accordingly, it is at that procedural stage that the person concerned must be able to fully exercise his rights of defence in order to assert his point of view in an effective manner and thereby to influence the final decision which could lead to the loss of his personal freedom. The outcome of that procedure is irrelevant in that context."

20. In *Criminal proceedings against Zdziaszek* (Case C-271/17PPU), [2017] 4 WLR 189, the defendant had not appeared at a hearing at which previous custodial sentences for 3 offences were commuted into a single cumulative sentence, and at which the question of guilt was no longer in issue. The CJEU referred to the decision which it had just handed down in *Tupikas* and reiterated at [82] that appeal proceedings are the "trial" for this purpose if they finally determine guilt and impose a penalty, even if the sentence is amended by a subsequent decision. It then decided the case before it, holding:

> "87. In that regard, it is apparent from the case law of the European Court of Human Rights that the guarantees laid down in article 6 of the Human Rights Convention apply not only to the finding of guilt, but also to the determination of the sentence: *Dementyev v Russia* CE:ECHR:2013:1128JUD 004309505, para 23. Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing because of the significant consequences which it may have on the quantum of the sentence to be imposed: *Kremzov v Austria* (1993) 17 EHRR 322 , para 67.
>
> 88. This is the case with respect to specific proceedings for the determination of an overall sentence where those proceedings are not a purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances: *Eckle v Germany* (1982) 5 EHRR 1 , para 77 and *Dementyev's case*, paras 25–26.
>
> 89. Furthermore, it is irrelevant in that regard whether the court concerned has jurisdiction to increase the sentence previously imposed: *Ekbatani v Sweden* (1988) 13 EHRR 504 , para 32 and *Hermi v Italy* (2006) 46 EHRR 46 , para 65.
>
> 90. It follows that proceedings giving rise to a judgment handing down a cumulative sentence, such as that at issue, leading to a new determination of the level of custodial sentences imposed previously, must be regarded as relevant for the application of article 4a(1) of Framework Decision 2002/584, where they entail a margin of discretion for the competent authority within the meaning of para 88 of the present judgment and give rise to a decision which finally determines the sentence.
>
> 91. Given that such proceedings determine the quantum of the sentence which the convicted person will ultimately serve, that person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard.
>
> 92. The fact that the new sentence is hypothetically more favourable to the person concerned is irrelevant since the level of the sentence is not determined in advance but depends on the assessment of the facts of the case by the competent authority and it is precisely the duration of the sentence to be served which is finally handed down which is of decisive importance for the person concerned.

93. In the light of the grounds set out above, it must be held that, in a case such as that at issue, where, following appeal proceedings in which the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on him, the level of which was however amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of article 4a(1) of Framework Decision 2002/584."

21. *Zdziaszek* was applied by the Divisional Court in *Foster Taylor v Prosecutor General's Office of Florence* [2019] EWHC 2938 (Admin). The case concerned a number of offences in Italy. In appeal proceedings, some of the convictions were set aside by application of limitation rules. The appeal failed in respect of the others and so, at the appeal hearing, the sentence for each appellant was "re-calculated" without reference back to the court below. Lane J (with whom Hamblen LJ, as he then was, agreed) said:

> "77. … notwithstanding what I have found to be the nature of the proceedings in the Court of Cassation concerning the guilt of the defendants, in the light of *Zdziaszek* it is necessary also to consider the sentencing aspect of the Court of Cassation's judgment. If that aspect involved the exercise of discretion, then Article 4a(1) will operate so as to make the cassation proceedings a 'trial resulting in the decision', along
> with those of the Assize Court of Appeal.
>
> 78. It is evident from paragraph 7 of the Court of Cassation's judgment that no such discretion was exercised in the case of the appellants. Rather, the Court merely 're-calculated' the appellants' sentences in the light of its conclusions regarding the time-barred sentences and the annulment of the conviction for abduction."

22. I then turn to the CJEU's decision in *Samet Ardic* (C-571/17 PPU) EU:C:2017 upon which both counsel relied before me. In *Ardic* the requested person served part of two custodial sentences following a trial at which he appeared in person. The court in Germany then suspended the remaining parts of the sentence. But by further decisions, it then revoked the suspensions and ordered the execution of the remainder of those sentences by reason of an infringement of the conditions of release. The requested person did not appear at the proceedings which resulted in the revocation decisions. It was found that the German court had "a margin of discretion when taking a revocation decision which allows it to take into account the situation or personality of the person concerned."

23. The CJEU held:

> "77 In the light of the foregoing, it must therefore be considered that, for the purposes of Article 4a(1) of Framework Decision 2002/584, the concept of 'decision' referred to therein does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that

regard (see, to that effect, … *Tupikas* … and … *Zdziaszek*, … paragraphs 85, 90 and 96).

78 As regards, in particular, decisions to revoke the suspension of the execution of previously imposed custodial sentences, such as those at issue in the main proceedings, it is apparent from the case file before the Court that, in the present case, those decisions did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned, which form the basis of the European arrest warrant which the German authorities are seeking to execute in the Netherlands.

79 Since the proceedings leading to those revocation decisions were not intended to review the merits of the cases, but only concerned the consequences which, from the point of view of the application of the penalties initially imposed and whose execution had, subsequently, been partially suspended subject to compliance with certain conditions, it was necessary to consider the fact that the convicted person had not complied with those conditions during the probationary period.

80 In that context, under the relevant national rules, the competent court only had to determine if such a circumstance justified requiring the convicted person to serve, in part or in full, the custodial sentences that had been initially imposed and the execution of which, subsequently, had been partially suspended. As the Advocate General pointed out in point 71 of his Opinion, while that court enjoyed a margin of discretion in that regard, that margin did not concern the level or the nature of the sentences imposed on the person concerned, but only whether the suspensions should be revoked or could be maintained, with additional conditions if necessary.

81 Accordingly, the only effect of suspension revocation decisions, such as those in the main proceedings, is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction.

82 In those circumstances, and in the light of what was stated in paragraph 77 of the present judgment, suspension revocation decisions, such as those at issue in the main proceedings, are not covered by Article 4a(1) of Framework Decision 2002/584, since those decisions leave unchanged the sentences imposed by the final conviction decisions with regard to both their nature and level."

24. I have also been referred to *Miroslav Murin v District Court in Prague (Czech Republic)* [2018] EWHC 1532 (Admin), [2019] 1 WLR 1400. The issue there – whether a European Arrest Warrant is capable, in principle, of covering a request by a judicial authority of a requesting state for return of a requested person to face proceedings to decide whether or not to activate a suspended sentence of imprisonment as a result of the commission of further offences – was a different one,

and I did not find the case of direct assistance though it contains an example of *Ardic* being applied by a UK domestic court.

The evidence of fact

25. The arrest warrant at box (b) identifies the enforceable decision:

> "Criminal sentence no. 138 of 20.5.19 pronounced by Pascani Court of Law in file no. 339/866/2019 and remained final by non-appealing on 04.06.2019. Based on this criminal sentence, it was issued the warrant for the execution of the imprisonment punishment no. 145/2021 issued on 04.06.2019. "

26. In relation to the length of the punishment, box (c) states:

> "The above-named person was sentenced to a punishment of 320 (three hundred and twenty) days of imprisonment for not executing in bad faith the punishment of the fine to which he was obliged by the criminal sentence no. 340/3.07.2017 of Pascani Court of Law, final by non-appealing for committing the offences of driving on public roads an unregistered vehicle, … driving on public roads a vehicle with a false registration number … and driving on public roads a vehicle by a person whose exercise of the right to drive has been suspended …".

27. Box (d) confirmed that the Appellant did not appear at "the trial consequently to which it was pronounced the decision", and that he "was personally summoned and, consequently, informed of the date and place established for the trial consequently to which it was pronounced the decision and he/she was informed that it can be pronounced a decision in case he/she didn't appear to the trial". The following particulars were given:

> " At the trial term of 18.03.2019, the court ascertained that from the minutes drawn up based on the bringing warrant, it appears that the defendant is away in Germany and that checks were made in the DEPABD database, from which it results that he appears to have the domicile at the address where he was summoned, ordering the summons of the defendant by posting at the door of the court and with a bringing warrant.
>
> At the trial term of 18.03.2019, the court ascertained that the summoning procedure is legally fulfilled by posting at the door of the court.
>
> During the trial, although legally summoned, the defendant did not present himself and did not mandate a lawyer to represent him in the trial."

28. The warrant at box (e) went on to recite the offences and the fine, followed by:

> "On 22.01.2019 there was registered on the roll the referral of the Criminal Enforcement Bureau from Pascani Court of Law, requesting the replacement of the fine imposed on [the Appellant] by the criminal sentence no. 340/03.07.2017, final by non-appealing, with the punishment of imprisonment."

29. The relevant Romanian law was then set out, including:

" According to art. 559 paragraph 1 Civil Procedure Code, the person sentenced to the punishment of the fine is obliged to submit the receipt for the full payment of the fine to the judge delegated with the execution, within 3 months from remaining final the decision.

Also, according to art. 22 paragraph 1 of Law no. 253/2013, the person sentenced to the punishment of the fine is obliged to pay the fine in full within 3 months from remaining final the decision and to communicate to the judge delegated with the execution of the proof of payment, within 15 days from its execution.

According to art. 63 paragraph 1 and 3 Criminal Code, if the sentenced person, in bad faith, does not serve the fine, in whole or in part, the number of unexecuted fine-days is replaced by a corresponding number of days of imprisonment."

30. During these proceedings further information was sought from the Romanian authorities. The UK authorities were not sure whether box (d) concerned only the 2019 proceedings and asked whether the Appellant was present at the trial in 2017 at which he was fined.

31. The reply explained that in respect of file no. 3198/866/2016, the Appellant had requested a postponement of a trial date of 14 November 2016 because he was abroad. A new date of 9 January 2017 was set. Another date of 6 February 2017 was set and the Appellant sent an email saying that he could not attend because he was abroad.

32. The UK authorities also asked whether the Appellant had been under any restriction to remain within the Romanian jurisdiction. The reply stated that he was under no such restriction, either "during the trial of case 3198/866/2016" or "during the trial of case 339/866/2019".

33. There were further questions about any warning of the fine being replaceable with imprisonment. The reply stated:

"On 25.07.2017 Pascani Court issued a notification to the defendant informing him that within 3 months from the date the decision remains final, that is by 25.10.2017 he has to pay the amount of 3260 lei to the Treasury of Pascani Municipality and present proof of full fine payment to Pascani Court, the criminal enforcement office.

He has been informed that evading in bad faith the payment of the fine, entails, according to art. 63 Criminal code, the substitution of the unpaid fine with imprisonment."

34. Finally the reply conformed that the Appellant had an obligation to notify the Romanian authorities of any change of address and did not comply with it, stating:

"On 08.10.2015 during his hearing in the criminal investigation file no. 4215/P/2015 (the case ended with his referral for trial in case 3198/866/2016, case in which sentence no.340/03.07.2017 was pronounced by the Pascani Court), according to the minutes found on page 43, he was informed of the obligation to communicate in writing, within 5 days, any change of address to which he is summoned, drawing his attention to the fact that, in case of failure to comply with

this obligation, the sanction provided for in Article 283 of the Criminal Procedure Code may be ordered against him."

35. The material part of the Appellant's witness statement said:

> "I knew about the case in Romania but I don't' remember the date. I found out about the fine received from driving without a valid licence, which was suspended in 04/08/2015 …
>
> I didn't know I received summons to attend court. My father received the letters from court but he has mental issues."

36. In his oral evidence he said that he found out about the proceedings in Romania on the internet from the UK. He denied filing any request for an adjournment or contacting the court by email. He did not receive any information about having to make payment. He was expecting to receive a fine which he would have paid. He thought correspondence would be forwarded but he received none. His father, who lives alone, has mental health issues and cannot communicate having suffered a blow to the head. When he did not receive any documents he thought the case was over. He did not find out that the fine had been converted to imprisonment until August 2023, shortly before his arrest.

The decision of the District Judge

37. The DJ found:

> "On 20 May 2019 the term of imprisonment of 320 days was imposed based on the RP's failure to pay the fine. The court had personally summoned the RP to attend the hearing by post to his address and informed him that the hearing could proceed in absence. The RP failed to attend the hearing or instruct a lawyer to represent him."
>
> (emphasis added)

38. The DJ rejected the Appellant's oral evidence as summarised above, and found "that he was being passed the details about his case, not least because it led him to correspond with the court after he had left Romania". He concluded:

> "26. The JA bears the burden of proof to establish compliance with section 20, to the criminal standard (s. 206 of the Extradition Act). The AW indicates that the Appellant was not convicted in his presence and was not represented. However, since my conclusion is that he notified the court he could not attend his trial because he was working abroad, I find he was aware of the date and time but deliberately absented himself from his trial under s.20(3). The same applies in relation to the subsequent hearing in 2019 when he failed to attend and the default term of imprisonment was imposed."

The parties' submissions

39. The Appellant was represented by Martin Henley of counsel. He submits that the DJ did not consider the correct "trial which resulted in the decision" as per article 4a(1)(a)(i), wrongly focusing on the hearing which led to the Appellant's conviction

in 2017 instead of the hearing at which he was given his prison sentence on 20 May 2019, the latter being the "decision" which gives rise to the extradition request.

40. There is, Mr Henley says, no evidence that the Appellant knew about the enforcement proceedings or the date of the hearing or that if he did not attend he might be tried in his absence. The evidence before the DJ was that the summons for the 2019 hearing was served merely by being "posted at the door of the court".

41. Mr Henley contends that on 20 May 2019 the Polish court had to consider whether there had been non-payment in "bad faith", leading to a form of criminal liability. That, he says, involved judgments of fact, as to the amount of any non-payment and as to bad faith, and therefore was a matter of discretion for the court. The "purpose or effect of [such a] decision is to modify either the nature or quantum of that sentence", as contemplated in *Ardic* at [77], depending on the circumstances.

42. This, he submits, was different from the activation of a suspended sentence, as in *Ardic*, where the term was fixed at the outset and the issue of an EAW ultimately would arise from the original imposition of the suspended sentence rather than its activation. In the present case, by contrast, the original imposition of the fine did not identify any fixed term of imprisonment, and therefore no EAW could arise from that purely financial penalty.

43. Mr Henley submits that the Respondent has not proved to the criminal standard that the 2019 hearing was purely formal or a matter of arithmetic as in *Foster Taylor*. Also, the evidence shows that the summons was merely "posted at the door of the court", and does not show that the Appellant had any knowledge of it. A finding by the DJ that the Appellant was lying when he denied receipt of notifications in 2017, based on documentary evidence of his communications with the court, does not justify the DJ finding that the same was true of the 2019 proceedings, there being no such documentary evidence on that occasion.

44. The Respondent was represented by Laura Herbert of counsel. She reminds me that the relevant provisions are concerned, above all, with safeguarding fair trial rights under ECHR Article 6 and that these apply to substantive proceedings and not to those concerned merely with the execution of orders previously made.

45. Ms Herbert submits that the 2019 hearing in this case falls in the latter, not the former category. The 2017 sentence of a fine was always one to which Article 63 of the Criminal Code applied, and therefore was always liable to be converted into imprisonment for the appropriate number of "fine-days" in the event of non-payment in bad faith. She therefore submits that this case is fairly close to *Foster Taylor*, where the re-sentencing exercise involved a "re-calculation". She also likens this case to *Ardic*. Although the 2019 decision was not an activation or revocation of a suspended sentence, it nevertheless resembled *Ardic* because it involved a court establishing that there had been non-compliance with a previous sentence and then imposing a consequence. In *Ardic* there was an element of fact-finding, and a "margin of discretion" about whether or not to revoke the suspension, but that was not enough because it did not "concern the level or the nature of the sentences imposed".

46. That sort of hearing, Ms Herbert submits, does not attract the protection of ECHR Article 6. What happened in 2019 related solely to the execution or application of a sentence previously imposed, not truly affecting either the finding of guilt or the nature or level of the sentence. It was a purely formal and arithmetic exercise, not entailing any margin of discretion in the determination of the level of the sentence.

47. In the alternative, Miss Herbert submits that even if the relevant "trial" was the 2019 hearing, the DJ nevertheless validly found as a fact that the Appellant had waived his right to be present. He made a finding at [24(c) and (d)] that the Appellant was receiving the notifications of the hearing through his father, and this must have applied also to notifications sent for the 2019 hearing.

48. Miss Herbert relies on the evidence in box (d) of the warrant, quoted at [28] above. That told the DJ that in March 2019, about 2 months before the 2019 hearing, the court had ascertained an address for the Appellant "where he was summoned". There is no evidence of the precise meaning of the phrases "posting at the door of the court" and "a bringing warrant", but Miss Herbert submitted that the DJ was justified in being sure that notifications were sent to the address on record for the Appellant in 2019, just as they were in 2017. He was also entitled to conclude that he was sure that the Appellant was receiving those notifications, for the same reasons as applied in respect of 2017.

Discussion

49. Although neither of these issues is entirely straightforward, I have concluded that there was no error by the DJ in respect of either of them.

50. The question of which hearing, 2017 or 2019, was the "trial" for the purpose of section 20(3) does not necessarily matter, because the DJ found that the Appellant was aware of both hearings and deliberately absented himself from both of them. Nevertheless, having considered the authorities which were not discussed before the DJ (because the Appellant was not represented and because *Bertino* had not yet been decided by the Supreme Court), I conclude that the 2019 hearing was not a "trial" in that sense.

51. I reach that conclusion because, on the available evidence of Romanian law, Article 63 of the Criminal Code provides that where a fine is not paid "in bad faith" then the number of "fine days" is converted into a term of imprisonment. I am satisfied, on that evidence, that that exercise is essentially mathematical in nature.

52. Whilst the words "in bad faith" suggest the possibility of some fact-finding, e.g. in a case where a defendant admits non-payment but advances some excuse for it, that does not change my conclusion, for two reasons.

53. First, having regard to paragraph 80 of *Ardic* (quoted at [23] above), the fact that the court there had to determine whether the circumstances required the suspension of a sentence to be revoked was not sufficient to bring Article 4a(1) of the Framework Decision into play, even where there was a "margin of discretion" in that regard. In the present case, by analogy, the Romanian court merely had to decide whether this

was indeed a case where non-payment triggered Article 63. And, whilst there may have been a theoretical possibility of relevant facts having to be found, there is no evidence of any "discretion" as that word would be understood in this jurisdiction. The evidence is that Article 63 states that the fine, if unpaid in bad faith, "is" replaced by a corresponding number of days in prison.

54. Although Mr Henley contends that the "nature" of the sentence was changed by the 2019 proceedings, unlike a case involving activation or revocation of a suspended prison sentence which was at all times a prison sentence, there is no evidence of any "margin of discretion" applying to that change. If a non-payment did not have some "good faith" explanation, the consequence would follow. Moreover, whilst this case is not identical to those involving suspended sentences, the evidence is that the sentence of a fine always carried with it the potential consequence of imprisonment under Article 63 for non-payment.

55. Second, on the facts of the present case, it was open to the DJ on the evidence summarised above to find, as he did, that the Appellant "was being passed the details" about the 2017 proceedings. For that reason Mr Henley conceded that if the 2017 hearing was the relevant "trial", he could not succeed under section 20(3). Those "details" included a notification on 25 July 2017 of the fine and of the fact that if he did not pay, in bad faith, it would be substituted with a prison sentence, which in my judgment satisfied the requirements of *Bertino* summarised at [17] above. There was also no defect in the DJ's finding that at an earlier date, the Appellant was told of the obligation to notify any change of address, and it was common ground that he did not make any such notification. Having made those findings, the DJ could not find that there was any significant issue of fact for the Romanian court to decide in 2019. The resulting exercise was essentially "mathematical".

56. But if I am wrong, and section 20(3) did apply to the May 2019 hearing, the Appellant cannot succeed unless he overturns the DJ's finding that a notification of that hearing was sent to him by post.

57. If that finding stands, then I would also uphold the DJ's finding that the Appellant, by knowingly not informing the authorities of his address and thereby evading their communications, effectively waived his right to be present at the hearing in May 2019, in particular because he was sent the communication in 2017 which warned him that non-payment of the fine in bad faith would result in imprisonment.

58. I have no reason to believe that the DJ was wrong to reject the Appellant's credibility on this subject, and therefore his evidence was and is of no real assistance on the issue.

59. It is fair to say that the evidence filed by the Respondent, at least as rendered in English translation, could be clearer. The question was raised before me of whether this Court should request further information from the Romanian authorities under the power contained in TACA article 613, though neither party urged me to do so. In the end it has not been necessary to take that step, though in future cases the UK courts could be assisted by more detail and/or more clarity in the translated summary of the proceedings in the requesting state.

60. Standing back and considering the evidence as a whole, I am sure that the Appellant was sent a notification of the 2019 proceedings at the address which the Romanian court had for him. That is the only inference which can reasonably drawn from the explanation in the arrest warrant that, in March 2019, it had been ascertained that "he appears to have the domicile at the address where he was summoned". That being so, there is no evidence of any reason why the Romanian court in 2019 would not have done what it did in 2017.

61. In those circumstances I cannot conclude that the DJ was wrong to find that the Appellant voluntarily absented himself from the 2019 hearing. He was entitled to reject the Appellant's evidence putting forward an explanation for not receiving communications sent to his address in Romania. The Appellant did not give any evidence, or any credible evidence, of any change of circumstances which could have persuaded the DJ that the situation in 2019 was any different from the situation in 2017. There was therefore no error in the DJ's decision arriving at the same findings with regard to both hearings.

Conclusion

62. The appeal is dismissed.