HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 51

on appeal from: [2007]EWHC 1624 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Caldarelli (Appellant) *v* Court of Naples (Respondents) (Criminal Appeal from Her Majesty's High Court of Justice)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Mance

Counsel

Appellant:
John Hardy QC
Mark Summers

(Instructed by Studio Legale Internazionale Lombardo)

Respondents:
David Perry QC
Melanie Cumberland

(Instructed by Crown Prosecution Service)

Hearing date:
3 JUNE 2008

ON
WEDNESDAY 30 JULY 2008

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Caldarelli (Appellant) *v* Court of Naples (Respondents) (Criminal Appeal from Her Majesty's High Court of Justice)

[2008] UKHL 51

LORD BINGHAM OF CORNHILL

My Lords,

1. Mr Caldarelli challenges a decision of the Queen's Bench Divisional Court (Laws LJ and Tomlinson J: [2007] EWHC 1624 (Admin), [2008] 1 WLR 31) upholding an order that he be surrendered pursuant to a European arrest warrant issued on 6 October 2006 by the Court of Naples. He complains that the warrant is bad because it seeks his surrender as an accused person and not (as he claims to be) a convicted person. The Divisional Court has neatly expressed the point to be decided in its certified question:

> "Where a fugitive has been convicted and sentenced in his absence in the requesting state, but the conviction and sentence are neither final nor enforceable, may his case be treated as an accusation case even though he does not enjoy an unqualified right to a retrial on the merits?"

2. The appellant is said to have been party to the unlawful smuggling of drugs into a Naples prison in which he was incarcerated at the time. On 6 October 2006 Judge Saraceno, judge for preliminary investigations of the Court of Naples, issued a European arrest warrant ("EAW") relating to that offence. It is agreed by the parties that this was an accusation warrant within the meaning of section 2(2), (3) and (4) of the Extradition Act 2003. The warrant requested that the

appellant "be arrested and surrendered for the purposes of executing the Pre-Trial custody order issued against him and in order to be judged in the subsequent instances of the ongoing proceedings". This warrant was duly received and certified by the Serious Organised Crime Agency under section 2(7) and (8) of the 2003 Act and on 10 October 2006 he was arrested. Following an extradition hearing the Senior District Judge ordered the appellant's extradition under the EAW, an order which (on different grounds) the Divisional Court upheld.

3. In the courts below there was evidence of the facts and of Italian law and practice. The effect of this evidence is agreed:

(1) On 24 January 2003 Judge Saraceno sitting as an examining judge in Naples issued an "Order of Application and Partial Rejection of Personal and Real Coercive Measures" against the appellant and others.

(2) On 7 June 2005 the appellant was tried and convicted of the drug offence mentioned above before the Court of Naples, 1st Criminal Section. The appellant deliberately absented himself from the trial but was represented by lawyers appointed by him personally. The evidence was heard and tested on his behalf. He was sentenced to 11 years' imprisonment and other penalties.

(3) The appellant appealed against that conviction and sentence to the Court of Appeal of Naples. That appeal remains outstanding. The first instance judgment and sentence are not under Italian law either final or enforceable until the criminal appeal process is concluded.

(4) Under Italian law a defendant is not regarded as "convicted" until his conviction becomes final. If he is extradited, his custody in Italy will be categorised as pre-trial custody until all appeals have been exhausted.

(5) The appellant is not now entitled, as of right, to a retrial or to a review amounting to a retrial. Such a right would exist if fresh evidence were to come to light, but it has not been suggested that such evidence

> exists here. Failing that, the Italian court possesses a judicial discretion as to whether or not to grant the appellant a rehearing of the evidence.

The earlier history of extradition

4. The House was referred to two early extradition statutes, 6 & 7 Vic cap 75 and 6 & 7 Vic cap 76, both enacted in 1843. The former gave effect to a bilateral treaty with France providing for the delivery up to justice of persons "being accused" of certain grave crimes, the latter to a bilateral treaty with the United States providing for the delivery up to justice of persons "being charged" with a number of serious crimes. Thus neither Act provided for the extradition of those tried and finally convicted. This was a crucial consideration in *In re Coppin* (1866) LR 2 Ch App 47, where the French government sought the surrender of a man who had been tried and convicted of forgery and fraud in France in his absence. It was argued on his behalf that he could not be surrendered under the Act since he had been convicted and so was not "accused". The evidence showed that judgment had been given against him *par contumace*, the effect of which was, under French procedure, that on his return to France the judgment against him would be annulled and he would be put on trial for the offence. Lord Chelmsford LC held that he could only be described as an accused person and so fell within the statute.

5. The Extradition Act 1870 extended the reach of earlier statutes by providing, in section 10, for two classes of fugitive criminals: those "accused of an extradition crime" and those "alleged to have been convicted of an extradition crime". But the definition section, section 26, gave statutory effect to the *In re Coppin* decision by providing that "conviction" and "convicted" should not include or refer to a conviction which under foreign law is a conviction for contumacy and the term "accused person" should include a person so convicted for contumacy. In cases governed by the 1870 Act, whether directly or through the application of Schedule 1 to the Extradition Act 1989, the distinction between accusation and conviction cases has proved troublesome. In *R v Governor of Brixton Prison, Ex p Caborn-Waterfield* [1960] 2 QB 498 the Divisional Court felt compelled to hold that the applicant had been wrongly treated as an accused person when he should, having regard to the final nature of the French judgment ultimately passed upon him, have been treated as a convicted person. In *R (Guisto) v Governor of Brixton Prison* [2003] UKHL19, [2004] 1 AC 101 it was held that the applicant could not be extradited as a convicted person on a warrant

describing him as an accused person. In other cases it was held that the applicant had properly been treated as a convicted rather than an accused person because he did not fall within the contumacy exception: see, for example, *Athanassiadis v Government of Greece* (Note) [1971] AC 282; *R v Governor of Pentonville Prison, Ex p Zezza* [1983] 1 AC 46; *In re Avishalom Sarig* [1993] COD 472, transcript CO/2643/92.

6. The Fugitive Offenders Act 1881, applicable in Her Majesty's dominions, did not reproduce the contumacy exception in section 26 of the 1870 Act, no doubt because such convictions did not occur in those dominions. Parts I to III of the 1881 Act were very largely directed to persons accused of having committed a relevant offence, but section 34 (in Part IV) extended the scope of the Act, where appropriate, to a person convicted by a court in any part of Her Majesty's dominions who was "unlawfully at large before the expiration of his sentence". This last expression was not defined but was clearly used to describe someone who was effectively at liberty but not lawfully so. The Fugitive Offenders Act 1967 repealed and replaced the 1881 Act: it maintained (in section 1) the distinction between a person accused of a relevant offence and a person alleged to be unlawfully at large after conviction of such an offence.

7. The Extradition Act 1989 repealed and replaced the 1967 and (subject to its preservation, in relation to some statutes, in Schedule 1) the 1870 Act. It provided, in section 1, for the arrest and return to a foreign state of a person who was accused in that state of the commission of an extradition crime or was alleged to be unlawfully at large after conviction of an extradition crime by a court in that state. Convictions in absentia, which had concerned a departmental working party (see the Green Paper on *Extradition*, February 1985, Cmnd 9421, Annex B, p 21, para 9), were specifically addressed in section 6(2):

> "A person who is alleged to be unlawfully at large after conviction of an extradition crime shall not be returned to a foreign state, or committed or kept in custody for the purposes of return to a foreign state, if it appears to an appropriate authority -
>
> (a) that the conviction was obtained in his absence; and
>
> (b) that it would not be in the interests of justice to return him on the ground of that conviction."

Of the many decisions given on the 1989 Act, it is only necessary to mention *In re Ismail* [1999] 1 AC 320, 326-327, where Lord Steyn strongly advocated a purposive and internationalist approach to interpretation of the term "accused".

8. It is unnecessary for present purposes to review the European Convention on Extradition 1957 to which the United Kingdom gave belated effect in 1990. It is, however, worthy of note that by the European Convention on Extradition Order 2001 (SI 2001/962), the UK accepted Article 1 which provides:

> "The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order."

The Council Framework Decision of 13 June 2002

9. The Council Framework Decision of 13 June 2002 was a new departure. It sought to achieve much greater co-operation between member states of the European Union, seeking (recital (1)) to abolish formal extradition procedures among member states in respect of persons "fleeing from justice after having been finally sentenced" and the speeding up of extradition procedures in respect of persons "suspected of having committed an offence". The objective (recital (5)) was to abolish extradition between member states and replace it by a system of surrender between judicial authorities. A new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences would make it possible to remove the complexity and potential for delay inherent in existing procedures. There should be a new system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions. Procedures were to be largely judicialised (recitals (8) and (9)) and human rights would be protected (recitals (12) and (13)).

10. The articles of the Framework Decision have been fully discussed in earlier cases, and that discussion need not be repeated. It is enough to note:

(1) the definition of an EAW in article 1(1) of the Decision as

"a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order";

(2) the obligation of member states under article 1(2) to execute any EAW "on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision";

(3) the discretion accorded to member states in article 5(1) to require certain assurances where an EAW has been issued for the purpose of executing a sentence or a detention order imposed by a decision rendered *in absentia* and without proper notice to the defendant;

(4) the obligation on the requesting state under article 8(1) to set out certain information in the EAW, including (c) "evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect" and (f) "the penalty imposed, if there is a final judgment";

(5) the emphasis (in articles 17 and 23, for example) on compliance with very demanding time limits;

(6) the obligation on member states (under article 34(1)) to give effect to the Framework Decision by the end of 2003; and

(7) the request, in the prescribed form of EAW, that "the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order".

The Extradition Act 2003

11. Part 1 of the 2003 Act was enacted to give effect to the UK's obligation under article 34(1) of the Framework Decision. It applies as

between member states of the EU, described as "category 1 territories", and thus between Italy and the UK.

12. The obligation on the requested state, here the UK, arises on receipt of a Part 1 warrant in respect of a person: that is, of an EAW properly so described. The EAW, as defined in section 2, may fall into one or other of two categories, depending on the statement and information which it contains. It may (section 2(2)(a), (3) and (4)) be a warrant issued with a view to a person's arrest and extradition to a category 1 territory for the purpose of his being prosecuted for an offence. Or it may (under section 2(2)(b), (5) as originally enacted and (6)) be issued where "(5)(a) the person … is alleged to be unlawfully at large after conviction of an offence specified in the warrant by a court in the category 1 territory, and (b) the [EAW] is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence".

13. Part 1 of the Act provides for an extradition hearing (section 9) at which the judge must decide (section 10) whether the EAW specifies an extradition offence. If not, the person must be discharged. If so, the judge must decide (section 11) whether the person's extradition is precluded by any of the bars listed in (a) to (h) of subsection (1). If so, the person must be discharged. If the judge decides that extradition is not precluded by any of those bars, he is required to proceed under either section 20 or section 21 of the Act. He must proceed under section 20 (section 11(4)) if "the person is alleged to be unlawfully at large after conviction of the extradition offence". He must proceed under section 21 (section 11(5)) if "the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it".

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

15. Section 21 requires the judge to consider whether the person's extradition would be compatible with his Convention rights under the Human Rights Act 1998. The section is engaged if the person is accused of the commission of an extradition offence but is not alleged to be unlawfully at large after conviction of it, if the person was convicted in his presence, if the person had deliberately absented himself from his trial or if the person, not having absented himself deliberately from his trial, would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

16. There are a number of other uses of the expression "unlawfully at large after conviction" in Part 1 (and other Parts) of the Act: for instance, sections 37(5), 44(7)(d), 48(5)(d), 52(4) and 64(1)(b), and in section 63(2)(a) there is a reference to "unlawfully at large from a prison".

17. In *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1 the House had occasion to consider the content of an EAW issued in Brussels for the return of a person convicted and sentenced in his absence. In that context my noble and learned friend Lord Hope of Craighead, in paras 41-48 of his opinion, pointed out that the statement required under section 2(5) of the 2003 Act (that a person is alleged to be unlawfully at large after conviction) did not correspond with any provision in the Framework Decision. This, he suggested, was likely to be a source of continuing difficulty. Parliament promptly responded to this intimation by amending section 2(5) of the Act in Schedule 13 to the Police and Justice Act 2006. For "is alleged to be unlawfully at large after conviction" in section 2(5)(a) was substituted "has been convicted". Thus the Act no longer required an EAW in a conviction case to contain a statement not called for by the Framework Decision. The other statutory references to "unlawfully at large after conviction", not bearing on the content of the EAW, were not deleted because there was no need to delete them. The opportunity was taken, in a new section 68A, to define the meaning of "alleged to be unlawfully at large after conviction of an offence": the condition is met (save for the purposes of sections 14 and 63, not relevant here) if

> "(a) he is alleged to have been convicted of it, and
>
> (b) his extradition is sought for the purpose of his being sentenced for the offence or of his serving a sentence of imprisonment or another form of detention imposed in respect of the offence".

The issue

18. Despite the length of this prologue, the issue between the parties is a very short one. Mr Hardy QC for the appellant points to the fact that the appellant has been tried and convicted and sentenced to 11 years' imprisonment. The trial took place in his absence because he deliberately absented himself, but that does not affect the fact that he has been tried, convicted and sentenced. He has no right, like the applicant in *In re Coppin* following the judgment against him *par contumace*, to be treated on return as if he had never been tried or convicted at all. There is a clear dichotomy in the Act, as in the Framework Decision, between those who are accused and those who have been convicted, and the appellant falls clearly in the latter category, not the former. Had the EAW sought his extradition as a convicted person, there would have been no answer. But the requesting state having chosen, wrongly, to treat him as accused when he should have been treated as convicted (the error which defeated the application in *Caborn-Waterfield*) he cannot be committed as a convicted person, as was held in *Guisto*. Therefore (submits Mr Hardy) the appellant must be discharged.

19. Mr Perry QC, for the Court of Naples, resists this argument on two main grounds. First, it seeks, quite inappropriately in the international context of an EAW, to treat Italian criminal procedure as if it were English, failing to recognise that in Italy a criminal trial is not (as here) an event but a continuing process. Secondly, he points to the dichotomy in section 11 of the Act between (subsection (4)) those alleged to be unlawfully at large after conviction of the extradition offence and those (subsection (5)) accused of the commission of the extradition offence but not alleged to be unlawfully at large after conviction. Reading these provisions with the benefit of the definition in section 68A, it is plain (Mr Perry submits) that the appellant falls within subsection (5), not subsection (4), and therefore the EAW is valid and should be given effect.

20. The Senior District Judge upheld the EAW on the ground that the appellant would, if extradited, be entitled in the appeal proceedings to a full re-hearing on the facts and the law. But this is not the effect of the agreed evidence, and the EAW cannot be upheld on that ground, as Laws LJ in the Divisional Court correctly held ([2008] 1 WLR 31, para 22). Relying in particular on *Migliorelli v Government of Italy* (*No 1*) (28 July 2000, unreported) and *La Torre v Her Majesty's Advocate* 2006 SCCR 503, Laws LJ (with whom Tomlinson J agreed) concluded that the EAW was rightly characterised as an accusation warrant (para 44).

21. I am satisfied that the Divisional Court was right to reach the conclusion it did. A number of considerations weigh with me in reaching that conclusion.

22. While a national court may not interpret a national law contra legem, it must "do so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues and thus comply with article 34(2)(b) EU" (*Criminal proceedings against Pupino* (Case C-105/03) [2006] QB 83, paras 43, 47: see *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31, paras 5, 39-40, 75-77). As I suggested in *Cando Armas*, above, para 8, the interpretation of the 2003 Act must be approached on "the twin assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of cooperation by the United Kingdom than the Decision required, it did not intend to provide for less".

23. Providing as they do for international cooperation between states with differing procedural regimes, the Framework Decision and the 2003 Act cannot be interpreted on the assumption that procedures which obtain in this country obtain elsewhere. The evidence may show that they do not. Such was the case in *In re Coppin*, where the Lord Chancellor considered a form of judgment unknown in this country, and in *Caborn-Waterfield*, where the court examined and contrasted the legal effect, in France, of on the one hand a *jugement par défaut* and an *arrêt de contumace* and on the other a *jugement itératif défaut*: the latter was final, the former were not. The need for a broad internationalist approach signalled by Lord Steyn in *Re Ismail* is reinforced by the need to pay close attention to whatever evidence there is of the legal procedure in the requesting state.

24. Under article 1 of the Framework Decision the EAW is a judicial decision issued by the requesting state which this country (subject to the provisions of the Decision) must execute on the basis of the principle of mutual recognition. It might in some circumstances be necessary to question statements made in the EAW by the foreign judge who issues it, even where the judge is duly authorised to issue such warrants in his category 1 territory, but ordinarily statements made by the foreign judge in the EAW, being a judicial decision, will be taken as accurately describing the procedures under the system of law he or she is appointed to administer. Here, as is common ground, the foreign judge has treated the appellant as an accused and not a convicted person. This seems

strange to an English lawyer, familiar with a procedure by which a defendant sentenced to imprisonment at the end of a jury trial goes down the steps from the dock to the cells. But such is not the practice in Italy where the trial is indeed a continuing process, not yet finally completed in this case, and not an event. On the evidence the appellant falls within section 11(5) of the Act as a person accused of the commission of an extradition offence but not alleged to be unlawfully at large after conviction of it, not within section 11(4) as a person alleged to be unlawfully at large after conviction of it. In terms of recital (1) of the Framework Decision he has not been "finally sentenced" and (article 8(f)) no "final judgment" has been given as to the penalty imposed.

25. In *Migliorelli v Government of Italy* (28 July 2000, unreported) the Government sought the return of a fugitive who had been tried and convicted in his absence. The issue, arising under the 1989 Act, was whether the warrant should have been issued against the fugitive as a convicted person and not, as it had, as an accused person. Morison J, with whom Judge LJ agreed, held that the warrant had been correctly issued since the trial process had not yet come to an end. As Judge LJ put it, the process in Italy was incomplete not only in relation to sentence but also conviction. This was on the evidence a correct decision.

26. In *La Torre v Her Majesty's Advocate* 2006 SCCR 503 the Appeal Court of the High Court of Justiciary had a number of issues to decide on an application for extradition of the appellant to Italy. As in the present case the appellant had been tried and convicted at a trial which he had not attended but at which he had been represented. One of the issues was whether the extradition of the appellant should have been sought as a convicted rather than (as was the case) an accused person. The question arose under section 70(4)(a) in Part 2 of the 2003 Act, applicable at the time, but the language of that subsection closely follows that of section 2(3)(a), which has not been amended. The appellant contended that he should have been treated as a convicted person. For the Lord Advocate it was submitted (para 126) that the appellant was not unlawfully at large after conviction because his sentence was not yet enforceable; that he must therefore be an accused person in terms of section 70(4)(a); that there was no category other than those two; that the categorisation had to be made as at the date of the request, even if the appellant's status later changed; and that the appellant was not, at the date of the request, said to be unlawfully at large after conviction. The Appeal Court rejected the appellant's

argument as misconceived (para 127). The Lord Advocate's submission was, as I respectfully think, sound.

27. The extradition of this appellant was properly sought as an accused person. I would accordingly dismiss the appeal and invite the parties to make written submissions on costs within 14 days.

LORD HOPE OF CRAIGHEAD

My Lords,

28. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons he gives I would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

29. I too would dismiss this appeal, for the reasons given by my noble and learned friends Lord Bingham of Cornhill and Lord Carswell, with which I agree. The crucial distinction drawn in article 1.1 of the Council Framework Decision (2002/584/JHA) is between an arrest warrant issued with a view to the arrest and surrender of the requested person "for the purposes of conducting a criminal prosecution" and an arrest warrant issued with a view to the arrest and surrender of the requested person "for the purposes of . . . executing a custodial sentence or detention order". A lower minimum sentence is required, under article 2.1, to bring the matter within the scope of the scheme if a sentence has been passed or a detention order has been made. It is clear from the particulars required under article 8.1 that this refers to a "final judgment".

30. In this case, the appellant is not being sought for the purpose of executing a custodial sentence or order, because no enforceable order has yet been made. He is being sought for the purpose of a conducting a

criminal prosecution. The statements in the warrant fall squarely within section 2(3)(b) of the 2003 Act and not within section 2(5)(b): he is being sought "for the purpose of being prosecuted for the offence", and not "for the purpose of . . . serving a sentence of imprisonment . . . imposed in respect of" it. It is therefore a valid Part 1 warrant. The process can continue in accordance with the procedures laid down in Part 1 of the Act. When he came before the district judge at the extradition hearing, he was not a person "alleged to be unlawfully at large after conviction of the extradition offence" for the purpose of section 11(4), because although convicted his extradition is not sought "for the purpose of … his serving a sentence of imprisonment … imposed in respect of the offence", which is now part of the definition of "unlawfully at large after conviction" by virtue of section 68A(1)(b). He was therefore covered by section 11(5), as a person "not alleged to be unlawfully at large after conviction". The judge was therefore required to proceed under section 21 and decide whether his extradition would be compatible with his Convention rights and not under section 20 which only applies to persons who are alleged to be "unlawfully at large after conviction" within the meaning of the Act.

31. It may be thought unfortunate that distinctions were drawn and expressions used in Part 1 of the 2003 Act which owed more to the historical development of the law of extradition and fugitive offenders than to the wording of the Framework Decision. But we must assume that Parliament intended the Act to work so as to implement rather than to frustrate the intentions of the Framework Decision. In this case it is not difficult to conclude that the extradition of this appellant was properly sought as an accused person.

LORD CARSWELL

My Lords,

32. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. I am in full agreement with his reasons and conclusions and wish to add only a few observations of my own.

33. The district judge is required by section 11 of the Extradition Act 2003 to address a sequence of matters. Subsection (1) sets out a number

of bars to the person's extradition and subsection (3) requires the judge to discharge him if any of them applies. Subsections (4) and (5) provide:

> "(4) If the judge decides those questions in the negative and the person is alleged to be unlawfully at large after conviction of the extradition offence, the judge must proceed under section 20.
>
> (5) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 21."

This sequence appears to be intended to cover all cases, with the effect that, if none of the bars in subsection (1) applies, subsections (4) and (5) are alternatives, which are comprehensive in scope. Depending on which applies to the case, the judge is to proceed under either section 20 or section 21.

34. Section 11(4) refers to the person whose extradition is sought being "unlawfully at large after conviction of the extradition offence". It is common cause or "ground" that the appellant was not unlawfully at large, since under Italian law his conviction was suspended pending appeal and having lodged an appeal he was not required to commence the prison sentence until its disposal. In a case to which subsection (4) applies, the judge is to proceed under section 20 under which the judge must address a series of questions relating to cases where the person whose extradition is being sought has been convicted. In the event that the judge decides that the person was convicted in his presence, or that he deliberately absented himself from the trial, or that he would, if he did not deliberately absent himself, be entitled to a retrial or (on appeal) to a review amounting to a retrial, the judge must proceed under section 21, which requires consideration of the question whether the person's extradition would be compatible with his Convention rights. Section 11(5) applies if "the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it". If that subsection applies, the judge is to proceed under section 21. The appellant's case is that he is not properly to be regarded as a person accused of the offences charged, since he has been convicted by the Naples court, subject to the appeal.

35. The appellant claims that he is a person convicted, though not unlawfully at large. He calls in aid section 68A, which was added by Schedule 13 to the Police and Justice Act 2006. Section 68A defines the meaning of "alleged to be unlawfully at large after conviction of an offence". A person comes within that definition if

> "(a) he is alleged to have been convicted of it, and
>
> (b) his extradition is sought for the purpose of his being sentenced for the offence or of his serving a sentence of imprisonment or another form of detention imposed in respect of the offence."

The argument presented on behalf of the appellant was that this applies to the present case, with the result that he is deemed to be a person unlawfully at large and so is covered by the terms of section 11(4). In consequence the warrant should have been framed as a conviction warrant, not an accusation warrant, and is accordingly bad.

36. I am unable to accept this suggestion. The appellant is plainly not a person sought for the purpose of his being sentenced for the offence, as the sentence has already been imposed. It might be argued that he is being sought for the purpose of serving the sentence of imprisonment. The difficulty with that argument, which the appellant cannot in my opinion surmount, is that the sentence is not yet in effect and may not take effect if his appeal is successful. I accordingly do not consider that the appellant comes within the definition in section 68A.

37. If the appellant's case is to come within section 11, it must therefore be under the heading of subsection (5), as a person "accused of the commission of the extradition offence". It is obvious that under the system of criminal justice applying in England and Wales (or Northern Ireland) it would be difficult to class him as a person accused of the offence, when the process has reached the present stage. Nevertheless, for the reasons set out in paragraphs 18 *et seq* of the opinion of Lord Bingham, which it would be superfluous to repeat, I am satisfied that he can properly be regarded as still being an accused person in the Italian system of justice. The warrant was rightly characterised as an accusation warrant. The district judge was correct to order as he did and the Divisional Court was right to uphold his decision.

38. I would dismiss the appeal.

LORD MANCE

My Lords,

39. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Carswell.

40. I must confess to having found the answer to the present issue not easy. But it is an issue on which certainty under United Kingdom domestic law is probably more important than anything else, and this is now offered by the speeches of my noble and learned friends, following on a previous line of authority established by lower courts in *Migliorelli v. Government of Italy* (28 July 2000) and *La Torre v. Her Majesty's Advocate* 2006 SCCR 503.

41. The difficulties which I have felt derive from the fact that both the Framework Decision of 13 June 2002 (2002/584/JHA) and the Extradition Act 2003, as amended by the Police and Justice Act 2006, identify two categories (in shorthand: accusation and conviction warrants) which, although they must be intended and construed so as to abut, are on their face described in terms which fail to cover intermediate cases such as the present, where the appellant would neither receive a full retrial or equivalent if returned to Italy nor necessarily go to prison there, because his appeal will allow him only a partial opportunity for review of the first instance conviction and sentence to 11 years imprisonment which took place during his (in this case deliberate) absence.

42. The Italian court prepared the present arrest warrant (apparently with assistance from the local British liaison magistrate) as an accusation warrant on the basis that the case was one where the appellant was, within s.11(5) of the 2003 Act, "accused of the commission of the extradition offence but …. not alleged to be unlawfully at large after conviction of it". In so far as the dichotomy between accusation and conviction warrants is drawn by and potentially significant under the Framework Decision (as is the case for some

purposes: see e.g. articles 5 and 18), the line may fall to be drawn autonomously, as a matter of European law. Framework decisions do not have direct effect, but, as my noble and learned friend Lord Bingham notes in paragraph 22, domestic law intended to give effect to them should so far as possible be construed consistently with their terms. In the last analysis, if a consistent interpretation of domestic legislation is not possible, domestic courts must of course give effect not to the Framework Decision, but to the domestic legislation. And, if and so far as the relevant dichotomy is a matter for domestic law contained in the 2003 Act, its meaning and application are matters for English law, once the facts regarding the relevant foreign jurisdiction are identified. Whether the dichotomy is drawn by reference to European or English law, the view of a court of a foreign requesting state as to the correct categorisation cannot on any view determine the matter.

43. In the present case, a possible clue to the United Kingdom statutory distinction between accusation and conviction warrants may be obtained by considering article 5(1) of the Framework Decision, which relates in the scheme of the 2003 Act to ss.20(5) to (8) and 85(5) to (8), dealing with the subject of trials in absentia. Under article 5, a discretion on this subject is given to the domestic law of the executing state, which only applies in respect of an European arrest warrant "issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia*". However, recital (12) of the Framework Decision indicates that that Decision is also intended to be consistent with fundamental rights principles and with domestic constitutional rules relating to due process, which is probably sufficient to enable member states, if they choose, to introduce guarantees along the lines of ss.20(5) to (8) and 85(5) to (8) of the 2003 Act, even though these may apply to what would under European law be regarded as accusation warrants as well as to conviction warrants. Even if the Framework Decision itself is intended to encapsulate an inflexible distinction between accusation and conviction warrants, which I doubt bearing in mind the nature of such decisions, the primary focus must, it seems to me, be on the United Kingdom's domestic statute in this situation. I would add that neither party before us suggested that the issue before us required a reference to the European Court of Justice.

44. In deciding whether the present warrant constituted a conviction warrant within the definition in s. 68A(1)(b) of the 2003 Act, I for my part would see no great difficulty in describing the appellant's extradition as being sought in the present case "for the purpose of his ….. serving a sentence of imprisonment". Unless his appeal succeeds, service of his sentence is what will happen, and the Italian authorities

seeking extradition clearly propose to resist his appeal and ensure that it does happen. They do not need to secure the appellant's return in order for his appeal to be resolved. He does not under Italian law have to attend his appeal, which can and would proceed without him. Looking at the alternative analysis, to say that the appellant is, under s.11(5), "accused of the commission of the extradition offence" in respect of which he has already been convicted and sentenced, although the conviction and sentence are not final and he is not liable to go to prison unless and until after his appeal is unsuccessful, also involves awkwardness, if not artificiality, of language.

45. A more substantive consideration is that, in a case requiring a conviction warrant under s.11(4), s. 20 prescribes a sequence of guarantees entitling a person convicted in absentia without having deliberately absented himself to an automatic discharge in the event that he would not be entitled in the requesting state to a retrial or (on appeal) a review amounting to a retrial: s.20(5) and (7). And this is in addition to his further entitlement in any event to have the executing court consider whether his extradition would be compatible with the Convention rights: ss.20(2), (4) and (6) and 21. If an "accusation" warrant under s.11(5) is all that is required in the present case, there are no safeguards equivalent to s.20(5) and (7), although the appellant will have been convicted in absentia and have no right to a retrial or equivalent. He will of course have the (not inconsiderable) benefit of his basic entitlement to have the executing court consider whether his extradition is compatible with the Convention rights: ss.11(5) and 21. One might have expected the United Kingdom legislator, who decided to introduce such a safeguard as s.20(5) and (7), to intend *all* trials in absentia to entitle the person affected to a retrial or equivalent. If a right in the requesting state to a limited review is not sufficient in the case of a final conviction, but calls rather for immediate discharge by the executing state, why should a right to a limited review which prevents the conviction being regarded as "final" or "executable" in the requesting state not have the same effect?

46. It is also relevant to look at the impact of the present issue in relation to an extradition request by a category 2 territory to which Part 2 of the 2003 Act applies. The equivalent protection which one might have expected in respect of trials in absentia is again lacking in this context: compare ss.84 and 85. However, there is the further point that, if a warrant is an accusation warrant under Part 2, then the requesting state has (save in the case of territories designated under s.84(7)) to go through the additional hoop of making out a sufficient case requiring an answer: see ss.79(4) and 84(1); and this, on the present respondents'

case, even though the “accused” has already been the subject of a first instance conviction and sentence, subject to appeal.

47. Notwithstanding these problems and the doubts which they cause me, I am content to agree with the answer proposed by my noble and learned friend, Lord Bingham, which will provide certainty without depriving an appellant who has been tried in absentia of the fundamental safeguard of the Human Rights Convention. I would therefore hold that extradition was properly sought of the appellant as an accused person under 2(3) of the 2003 Act and dismiss this appeal.