Judgments

Doci v Court of Brescia, Italy; Motiu v Criminal Court Nowy of Santa Maria Capua Vetere, Italy

[2016] EWHC 2100 (Admin)

Queen's Bench Division, Administrative Court (London)

Beatson LJ and Ouseley J

12 August 2016

Judgment

James Lewis QC and Rebecca Hill (instructed by **Lewis Nedas Law**) for **the Appellant Doci**

James Lewis QC and Graeme Hall (instructed by **SMW Solicitors**) for **the Appellant Motiu**

Julian Knowles QC and Hannah Hinton (instructed by **CPS Extradition Unit)** for **the Italian Judicial Authorities**

Hearing date: 5 July 2016

Further submissions: 5 August 2016

- -

Approved Judgment

Lord Justice Beatson :

I. Introduction

1. This is the judgment of the court, to which both its members have contributed, but which has been drafted principally by Ouseley J.

2. There are before the court two appeals against decisions of District Judges sitting in the Westminster Magistrates' Court on 16 March and 4 April 2016 ordering the appellants' extradition to Italy pursuant to accusation European Arrest Warrants ("EAWs"). The appellant in the first case is Altin Doci, now aged 35, formerly a citizen of Albania but now a British citizen. The appellant in the second case is Alexandru Sergiu Motiu, now aged 27 and a citizen of Romania.

3. The principal issue before this court concerns section 12A of the Extradition Act 2003 ("the 2003 Act"), as amended by the Anti-Social Behaviour, Crime and Policing Act 2014. Section 12A provides that a person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (a) it appears that there are reasonable grounds for believing that the competent authorities in the territory have not made a decision to charge or to try that person and the person's absence from that territory is not the sole reason for that failure, and (b) those representing the territory do not then prove that the authorities in the territory have made a decision to charge and a decision to try or, where one of those decisions has not been made, the person's absence from the territory is the sole reason for the failure to make such a decision.

4. In the case of Mr Doci, the issue is whether a decision has been made to charge and try him by the competent Italian authority and, if not, whether the sole reason for that is his absence from Italy. In his case, there is also an issue as to the applicability of the "rule against double jeopardy" bar to extradition in section 12 of the 2003 Act, and a related abuse of process argument. In the case of Mr Motiu, the issue is whether there are reasonable grounds for believing that the competent authorities in Italy have not made a decision to charge or try him.

5. It was known at the hearing of these appeals that the construction and application of section 12A of the 2003 Act had been considered by the Divisional Court in *Puceviciene v Lithuanian JA, Conrath v German JA and Savov v Czech JA*. We stated that we would invite the parties to provide submissions on its implications for these appeals. Judgment was handed down in that case on 22 July 2016: see [2016] EWHC 1862 (Admin). We summarise the main points of general relevance and the further submissions at [26] -[28] below, and deal with the implications of that decision for these appeals in our conclusions in sections III and IV.

II. Mr Doci

(i) *The EAW and the further information:*

6. Mr Doci is the subject of an EAW dated 22 September 2015 issued by Carlo Bianchetti, the Giudice per le Indagini Preliminari or Judge for Preliminary Investigations (hereafter "the GIP") attached to the Court of Brescia. The EAW was certified by the NCA on 25 September 2015. It replaced an earlier EAW issued on 14 - 15 April 2015 which was discharged under section 41 of the 2003 Act on 24 September 2015. The EAW seeks Mr Doci's extradition on the basis of an order dated 14 August 2014 for precautionary measures by way of custody, or "implementing precautionary measures in prison" in the language of the EAW, issued under Article 274 of the Italian Code of Civil Procedure by a JPI attached to the Court of Brescia.

7. Mr Doci's return is sought in relation to two alternative counts charging him with unlawful drug dealing. Count 1 is stated in box E to be an offence of participation in a criminal association aimed at perpetrating an indefinite series of offences of illicit possession of drugs between August 2011 and February 2012. Count 13 is said to be an offence of illicit possession of large quantities of cocaine, committed on 5 and 6 December 2011. Box (e), relating to both counts, also states that there is "serious circumstantial evidence" against Mr Doci that he participated in importing a quantity of drugs from Spain to Italy and that, from August 2011 until 6 December 2011 at least, he participated in a criminal association aimed at transnational drug

trafficking, his role being to collect money from customers to pay the cocaine supplier. It is stated that on his arrest he was found in possession of a "war sub-machine gun" and EUR 219,545. It is stated that the fact that the money was used to pay for the drugs appeared from the content of intercepted telephone conversations.

8. In Mr Doci's case, further information was served on four occasions, respectively dated 16 July, 22 September and 27 November 2015, and 8 February 2016. The further information dated 27 November 2015 is a document from the Director General of the Italian Ministry of Justice providing information on Italian legislation covering precautionary measures and immediate trial. The District Judge referred to this as a "generic document". We start with that, before moving to the more particular.

9. The November 2015 document from the Director General of the Ministry of Justice describes two different ways in which criminal cases can proceed in the Italian system. At the hearing before the District Judge, these were described as the "ordinary procedure" and the "immediate procedure". In the case of the former, a person under investigation is served with a notice at the end of the investigations stating that the preliminary investigation phase has been concluded; the prosecutor files a committal to trial; the person is then entitled to present his case at a preliminary hearing before a preliminary hearing judge, the Guidice per l'Udienza Preliminare, hereafter the "GIP". The preliminary hearing results either in a committal for trial, which only requires the investigatory material to show that the accusation is "sustainable" at trial, or a in judgment of *nolli prosequi*.

10. Where however a measure such as a custodial precautionary measure has been issued, as in Mr Doci's case, as a rule the "immediate procedure" applies, although there can be exceptions. A person in this position is to be tried more quickly because he is in custody before he has been tried. Although the purpose of the detention is to prevent the person absconding, interfering with witnesses or committing other offences, such an order can only be issued where there are "serious elements of guilt". The generic document stated that, over time, "serious elements of guilt" had come to mean that an in-depth analysis of the evidence showed that a person is "likely to be found guilty," or "highly likely" to be found guilty. The remand in custody, by the order for precautionary measures, includes an accusation, a summary description of the acts and the offence they constitute, all of which satisfies the requirements of a formal charge, and the charge includes the description of the offence given in the precautionary measure. The judge, the GIP, must also check before issuing the precautionary custodial measure that there are no defences. Under the immediate procedure, the criminal case proceeds to trial without service of a notice that the investigation has concluded and without a preliminary hearing.

11. The reason for the difference is that, where a person is subject to a custodial precautionary measure, there is no point in a GIP considering whether the accusation is merely "sustainable" at trial. This is because the measure would not be applied in the first place unless the GIP had been satisfied at that stage that the defendant was "highly likely" to be convicted. The fact that the evidence has been assessed as weightier and more significant also means that the trial can begin and conclude more quickly. The immediate procedure can only be applied to a person subject to a preventive order of remand into custody when the person is actually in custody in Italy, and he must be interviewed, though not at a preliminary hearing. Accordingly, the procedure cannot be used in the absence of the person. Within 180 days of arrest after extradition, the prosecutor must ask the judge who made the order for precautionary custody to examine the charges and evidence and to commit the person to trial without a preliminary hearing.

12. The July and September 2015 pieces of further information were both served in relation to the earlier EAW to which we have referred. The document, from the Public Prosecutor, states that "The Judicial Authority having jurisdiction made a request to the GIP for the application of personal preventive measures to" Mr Doci. The Judicial Authority which makes that request is the public prosecutor; this was not at issue. Later, it states: "At present the case is in the preliminary investigation phase and soon will be closed either with a request for committal to trial or with a request for immediate trial". A person under investigation becomes a defendant when a request for trial is submitted; but "the elements which will lead to such a request already exist. Moreover, in the case in question, the evidence against Mr. DOCI is corroborated by the order for pre-trial precautionary custody in prison, which was issued on the basis of serious evidence of guilt". The request for committal to trial or for immediate trial would soon be submitted to the GIP. Mr Doci "could not be informed of the charges and of the prosecution against him" because he could not be found.

13. The document from the GIP stated that Mr Doci had not been committed for trial. He remained in the preliminary investigations phase as there is "strict limitations for trials in absentia and because there is no point in committing a person to trial unless he is (or is able to be) present in court". There was also a strict timetable to be followed to trial once the defendant had been arrested.

14. There were two letters containing further information both dated 8 February 2016. One was from the public prosecutor stating that he "planned to commit" Mr Doci for trial under the immediate procedure, "for the crimes stated against him as soon as he will be extradited to Italy."

15. The second letter was from the GIP. The GIP stated that notice of the conclusion of the preliminary investigation was not needed in Mr Doci's case before formal committal for trial. When he was under arrest, the public prosecutor could request the GIP to issue a direct committal for trial without preliminary hearing. The Defendant would have been notified of the charges, enabled to know the content of the file and to present his pre-trial defence so no notice of the conclusion of the investigation was required. The public prosecutor was "evidently going to request him to direct committal for trial without preliminary hearing" for two reasons. That was why the public prosecutor had asked him, as the GIP, to issue an EAW; and the public prosecutor himself in further information also dated 8 February had confirmed that "firm and formal intention", saying that he planned to commit Mr Doci for trial under the immediate trial procedure "for the crimes stated against him as soon as he will be extradited to Italy."

16. The GIP then pointed out that Mr Doci could not be tried in his absence unless he had already been notified of committal, which was not yet the case, and he had already "renounced to be present in Court". The absence of a notice that the preliminary investigation phase had concluded and of a request for committal did not mean that the GIP was:

"not going to make a decision to charge him or to seek his committal for trial; the choice whether to charge and to request for committal for trial or not is up to the Public Prosecutor, who...is going to request the issue of a *decreto di giudizio immediato* [which he translated as] (direct committal for trial without preliminary hearing), as soon as Mr. Doci will be brought to Italy his presence is necessary, since he must have explanation of the charges from the judge, and the opportunity to present his defence to the judge himself) and I will immediately issue a decreto di giudizio immediato (and the trial will be scheduled by July 2016)".

Mr Doci's presence in Italy was necessary unless he had formally renounced his right to be present and allowed the court to try him in his absence.

(ii) The decision below:

17. As well as the EAW and the further information the Westminster Magistrates' Court also had expert evidence on behalf of Mr Doci in the form of a report dated 7 January 2016 of Professor Saccucci of Saccucci, Faros & Partners, a firm of lawyers based in Rome. He is an Associate Professor of International Law at the Seconda Università di Napoli, Professor of International Law at the LUMSA of Rome, Professor of Human Rights at the Faculty of Law of the Università Catholica of Milan and holds other appointments. There are no major differences between his description of the Italian criminal justice system and the Italian authorities', beyond that he considers that the Judicial Authority is wrong to treat the order for precautionary custody as a charge or as based on evidence as stringent as that required to charge a suspect. He focuses on the ordinary procedure. Much of what he says about the procedures is directed to what constitutes a formal charge or the stage at which a person is formally charged, and who makes a formal decision that a person is to be charged or tried and when.

18. Before the District Judge, it was submitted on behalf of Mr Doci that his extradition was barred on four grounds, two of which were pursued before us. First, it was barred under section 12A of the 2003 Act as amended because of the absence of prosecution decisions. Second, it would be contrary to the rule against double jeopardy in section 12 of the 2003 Act, and related to that, it would be an abuse of process. We will deal with the second ground after dealing with section 12A in relation to both Appellants.

19. As to the section 12A point, it was agreed before the District Judge that if Mr Doci's case were to proceed under the ordinary procedure there had been neither a decision to charge nor a decision to try because no notice of the conclusion of the investigation had been served, nor had a request been made for the committal to trial. But this was not a case involving the ordinary procedure. The immediate procedure, one of a number of special procedures, was being followed, because Mr Doci would be subject to precautionary custodial measures upon his extradition to Italy. The District Judge noted that the information from the Judicial Authority had moved from being a statement that a request for committal for trial or for immediate trial will soon be submitted to the statement that the prosecutor is now intending to follow the "immediate" procedure and that the GIP "will immediately issue a *decreto di giudizio immediato*" in response to the request. It was clear that the immediate procedure could not be carried to conclusion unless and until Mr Doci was in custody in Italy. The generic document from the Director General of the Ministry of Justice confirmed that, in the case of a person against whom a precautionary measure had been ordered, "the proceedings to be carried out shall be, as a rule, an immediate trial where no notice on the conclusion of the investigation shall be served, nor shall a preliminary hearing be carried out"; and that the absence of the person from Italian territory is a bar to this proceeding so it is necessary for the precautionary measure to be enforced after extradition, and the person involved to be interviewed, for the immediate trial to proceed.

20. The District Judge stated that the wording of section 12A does not include a definition of the term "decision", but that it must include "something less than a court ruling or order and could include a clearly expressed intention by the competent authority". The question must be interpreted in "a cosmopolitan way". The District Judge stated that the decision to proceed by the immediate procedure meant that there were no formal charges, but Mr Doci was the subject of an order for precautionary detention including an official notification of the allegations and

the legal foundation of the charge. This, she said, amounted to the decision to charge. She was satisfied that the judge with conduct of these proceedings in the Court of Brescia had made a decision that the case would continue under the immediate procedure, and that the document dated 8 February showed an unequivocal decision to do so. The Italian judge, the GIP, stated "I will immediately issue a *decreto di guidizio immediatio*". That, the District Judge stated, would start the trial procedure immediately, and that amounted the decision to try Mr Doci. She was satisfied that that was a decision to try Mr Doci. She continued: "The formal order cannot be made until Mr Doci is in custody in Italy. I am satisfied that his absence from [Italy] is consequently the sole reason why that formal step has not yet been taken."

(iii) The grounds of appeal and the submissions:

21. The grounds of appeal in the case of Mr Doci are that the District Judge erred in finding: (i) that there was a decision to charge or try Mr Doci for the purposes of section 12A; (ii) that the proceedings were not an abuse of process because of lack of clarity about the charges Mr Doci faces; and (iii) that extradition was not barred by reason of double jeopardy. As we have said, we will deal with the latter two related points after dealing with section 12A.

22. Mr Lewis QC, on behalf of Mr Doci, submitted that section 12A provided a safeguard additional to that found in the Framework Decision. He argued that it went beyond merely requiring someone to be wanted for the purpose of being prosecuted, a necessary averment for a valid EAW. Only the public prosecutor could take the decision to charge a suspect. The District Judge was wrong to conclude that, because the GIP issued an order for precautionary detention, the public prosecutor had taken a decision to charge Mr Doci. It was no more than a measure taken by the GIP during the investigation stage on the application of the public prosecutor to prevent a suspect from absconding. It could not be a charge because the investigation was not complete at that stage. An intention to charge was not enough; a formal legal step was required. "Charge" meant charge according to the law of the requesting state. A person was only charged under Italian law when the prosecutor submitted the request for committal for trial or for immediate trial.

23. Mr Lewis further contended that, in granting the prosecutor's request for committal for trial in the immediate procedure, the GIP would take the formal decision to try the accused, as with the old-style committal of English law, but that neither request or grant had occurred. Accordingly, the District Judge was wrong to find that there was a decision to try Mr Doci on the basis of an intention on the part of the public prosecutor to elect for immediate proceedings rather than the ordinary procedure. Such an intention did not amount to a decision to try. Mr Lewis submitted that if an intention to make a decision to try was sufficient, there would be no need for section 12A(1)(b)(ii) to provide that extradition was not barred where the sole reason why the decision to try had not been taken was the person's absence from the requesting state. This was also a provision in the UK legislation which was not in the otherwise not dissimilar Irish legislation. That meant that decisions on the Irish legislation could not be applied to section 12A. The decision to try could not be taken by the public prosecutor but had to be taken by the GIP. Such a decision could not be made until the request was made to the GIP, which could not happen until Mr Doci was in Italy and had been interviewed. The District Judge's finding that there was no formal decision to try because Mr Doci was not in Italy was confused, because there either had been or had not been a decision to try.

24. Mr Lewis also submitted that, in any event, if there were no decision to try it was not solely because Mr Doci was absent from Italy. Mr Doci could be interviewed in the United Kingdom under mutual legal assistance ("MLA"), but that had not happened. Moreover, Mr Doci

is not, at present, subject to the immediate procedure so that his absence from Italy is not the sole reason for not deciding to charge or try him. A decision to try him could be made under the ordinary procedure. The form of procedure to be used was for the prosecutor, not the Judge, and the District Judge was wrong to have thought otherwise.

25. Mr Knowles QC, for the Respondent Judicial Authorities, submitted that, applying the required "cosmopolitan" approach, the decision to charge was taken on or shortly before the pre-trial detention order was made on 14 August 2014. Evidence showing "serious elements of guilt" had to be provided before a pre-trial detention order could be made. At that point, the person had been or could be given notice of the offences of which he was accused and the evidence showing that he was likely to be found guilty. That sufficed to constitute a charge. The decision to try was made either by 16 July 2015, or by 8 February 2016, the dates of the further information set out above. The "cosmopolitan" approach meant that the terms "decision to charge" and "decision to try" could not be given a meaning which simply related to Italian or indeed to English criminal procedure. The statutory language focussed on the decisions to charge and to try, and not on the act of charging or trial. A decision to charge was a decision that someone should be notified of the offence alleged against him, with the reasons why he is believed to be guilty, following an assessment of the strength of the case, and that the person will face prosecution. An arrest warrant can suffice for the decision to charge. A decision to try could be based on the formation of a settled intention to put someone on trial. A decision to seek an immediate trial is a decision to try, and must carry with it either a decision to charge if one had not been made earlier. Neither decision needs to be irrevocable or final; they can be contingent. They need not be based on any formal procedural stage in a state's criminal code. Much of Professor Saccucci's evidence missed the point. The evidence from the Italian authorities shows that the mischief at which section 12A was supposedly aimed, preventing a long period in custody before trial, would be avoided. If there were found to be no decisions to charge or to try, that could only be because of Mr Doci's absence from Italy.

(iv) Puceviciene's case:

26. We referred to the decision of the Divisional Court in *Puceviciene v Lithuanian JA, Conrath v German JA and Savov v Czech JA* [2016] EWHC 1862 (Admin). The main features of the decision which are of general relevance are:

1: The general summary at [11-16] of the approach in in the three linked cases known as "*Kandola"; Kandola v Generalstaatwaltschaft, Frankfurt, Germany, Droma v State Prosecutor Nurnberg-Furth, Bavaria, Germany, and Ijaz v Court of Milan* [2015] EWHC 619 (Admin), [2015] 1 WLR 5097. In this judgment we shall identify them either generically as "the *Kandola* cases" or by the name of the relevant appellant.

2: The problems in achieving a cosmopolitan approach to section 12A. See [19], and [51-56] where the Court considered the right approach to a decision to charge and a decision to try.

3: The role of expert evidence and the requesting Judicial Authority's statements: see [57-62]. The court stated that the provision of expert evidence from lawyers should be very rare indeed.

4: The general irrelevance of Mutual Legal Assistance ("MLA") to the operation of section 12A: see [68-81]. *Puceviciene* stated that *Kandola* was clearly wrong in its consideration of MLA. In particular (see [69-70]) the *Kandola* approach is inconsistent with the wording of section 12A,

and the fact that the 2003 Act does not require the judge at the extradition hearing to go behind the statement by the requesting State that the reason for not taking a decision to charge or to try was that the requested person was absent from its territory.

27. Mr Lewis submitted that there are a number of fundamental differences between the appeals before us and those considered by this court in *Puceviciene*. The first is that, in that case, it was conceded that section 12A of the 2003 Act is consistent with the Framework Decision but in the present appeals it is submitted that section 12A directly contradicts the general principles contained in Article 1 of the Framework Decision. Article 1(2) provides "Member States shall execute any European Arrest Warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision". Section 12A, however, introduces restrictions on return in addition to those in the Framework Decision which (see *Office of the King's Prosecution, Brussels v Cando Armas [2005] UKHL 67,* [2006] 2 AC 1 at [24] *per* Lord Hope) were regarded by Parliament as a necessary protection against an unlawful infringement of the right to liberty. Secondly, Mr Lewis submitted that the position concerning Italian law and procedure is different from the position under the German, Czech and Lithuanian legal systems considered in that case. He argued that Italian law provides that the Italian GUP/GIP are the only "competent authority" who can make the decision to try, and that is a formal decision. The prosecutor cannot take that decision. The third limb of Mr Lewis's submissions is that *Puceviciene* was argued in a different way and the submission made in that case on behalf of the requested persons represented by Mr Perry QC "(1) that the authorities had taken a step which could fairly be described as the commencement of the prosecution and (2) that it was likely that a trial would take place within a reasonable time" was not one made or accepted by the appellants in these appeals. Finally, it is submitted that the decision in the *Kandola* cases is correct and should be preferred to that in *Puceviciene*. We deal with these submissions in the remainder of this judgment. In the light of the conclusions we reached on Mr Lewis's submissions on the effect of *Puceviciene*, we informed the respondent that we did not require submissions in response.

III Conclusions on section 12A of the 2003 Act in Mr Doci's appeal:

28. Before dealing with the main arguments raised by the Appellants, we comment briefly on Mr Lewis' written submission that section 12A is inconsistent with the Framework Decision and should be so construed. We see no reason to reject as incorrect the assumption made in *Puceviciene* [4(ii)] that section 12A is not inconsistent with the Framework Decision. As in the three appeals in *Puceviciene*, properly interpreted, it can be given effect without creating any such inconsistency, and we have reached the same conclusion here. The fact that in certain cases it may act as an additional bar, rather than clarifying the scope of the requirements of an EAW, does not mean that it must be given an interpretation which in all accusation cases means that an EAW cannot suffice of itself.

29. Like the Appellants in *Puceviciene*, Mr Lewis sought to derive comfort from what was said in Parliament about the purpose of section12A, to the effect that it was designed to prevent extradited persons languishing in prison for a long time awaiting trial. But the language chosen does not address that issue directly at all. A decision to charge and try may come early in an investigation, as can happen in England and Wales, leaving a long period before trial while investigations are carried out. The impact of the language of section 12A on its purported aim is indirect. Quotations from Parliamentary debates, if admissible to identify the mischief, do not help with interpretation here. The facts in *Symeou v Public Prosecutor's Office, Patras, Greece* [2009] EWHC 897 (Admin), [2009] 1 WLR 2384, do not support an inference that if section 12A had then been in force, Mr Symeou's extradition would have been barred.

30. We now turn to the principal oral submissions. The starting point in relation to decisions to charge or try is that they require no formal decision. The decisions may be revocable or contingent on some further procedural step being undertaken, commonly an interview with the accused.

The decision to charge

31. *Puceviciene* at [55] describes a decision to charge as being the decision made when there is sufficient evidence under the relevant procedural system to make an allegation that D has committed the crime alleged. The absence of a formal charge even where such a stage clearly exists in the procedures of the requesting state, does not mean that a decision to charge has not been taken within the meaning of section 12A. Nor is it necessary to identify the foreign stage which most closely approximates to the charging process in the procedures of England and Wales. Section 12A is not to be construed as a means of throwing technical spanners into the extradition works. It does not require the concept of decision to charge, or to try for that matter, to be construed as if applying domestic procedural concepts to foreign procedures. What matters is that a decision to charge has been taken within the meaning of section 12A, a broad expression applying equally in a practical and purposive way to the various criminal procedures of category 1 territories, the cosmopolitan approach.

The decision to try

32. The same general points on formality and contingency apply to the decision to try. Again, the broad practical and purposive interpretation, applying the words to the various systems of category 1 territories, the "cosmopolitan approach", applies. The decision to try is made when the relevant decision-maker "has decided to go ahead with the process of taking to trial the defendant against whom the allegation is made", i.e. on the allegations made against him: *Puceviciene* at [56]. The court stated (at [56]) that "a decision is a decision even if informal". *Puceviciene* at [55] explains that the statement in the EAW that surrender is sought for the purpose of conducting a criminal prosecution usually shows that there has been a decision to charge, and (at [56]) that may also be the same as the decision to try. Indeed, in the absence of other material, the standard statements in the EAW should suffice for both. After all, the decision to charge shows, in the absence of anything else, that there is a decision to try.

33. There may be systems where the decisions are different, notably where the decision to charge and the decision to try are made by different bodies. Italy provides an example, and this judgment reflects the need for the decision, informal or contingent, to be taken by the person who has the institutional competence to take it. Here, it is the public prosecutor who takes the decision to charge, and the GIP under the immediate trial procedure, who takes the decision to try. But that does not require the formal stages under Italian criminal procedure to have been reached where the formal and final decision are taken. That is not the correct construction of section 12A. It does not look to the nearest equivalent in the requesting state to the English position, nor to the formal position under the requesting state's law.

34. We note that it was agreed in oral submissions and in the Skeleton Argument from Mr Lewis, [51], and is entirely borne out by Professor Sacccucci's report, that it is the GIP in the immediate procedure who takes the decision to try. The post-hearing written submissions appear to suggest that it is the GUP, see paragraphs 11 and 35, but that is just wrong for a case proceeding in the immediate procedure, as both these are.

35. *Puceviciene* does not support the proposition that an intention to decide to charge or to try is the same as a decision to charge or to try. That intention to decide simply shows that the relevant decision has not in fact been made. Nor is it helpful to talk of a firm and settled intention. We can see how that language arose when the question was whether a formal decision was required, or if a decision could only be made once a particular procedural step had been taken. But that is not the right approach. The statutory language requires a decision. If forming the firm and settled intention is a decision, as it may well be, then it should be so described and analysed. If it is not, it cannot become one however firm and settled the intention may be.

36. Here, however, the District Judge was right to conclude that the relevant decisions had been taken, even though she was wrong to treat a clearly expressed intention as sufficient, if that is what she meant. She was not quite right to treat the order for precautionary measures as the decision to charge, because it is the public prosecutor who has to make the decision to charge. But the public prosecutor had to make the application to the GIP for the preliminary measures, and that application is the point at which the decision to charge was made by the public prosecutor, if it was for him to make the decision and only him. As we have stated (see [30] above), no formal charge is required for the decision to charge to be made. The application for preliminary measures must be based on sufficient evidence to show a high likelihood of conviction on the allegations set out against the person to whom the measures are directed. The evidence on which that is based is set out in it, and the offences are specified. Those are the ingredients of a decision to charge. As the District Judge correctly said, the order for precautionary detention included an official notification of the allegations, a description of the evidence supporting them, and the legal foundation of the charge.

37. The District Judge was therefore right to state that there had also been a decision to try on a different basis. The GIP made it clear that Mr Doci's case is proceeding under the immediate procedure. In the further information dated 8 February, the GIP stated that the public prosecutor had asked him for the EAW because the prosecutor was going to request what the Italian authorities translated as "direct committal for trial without preliminary hearing". The further information from the public prosecutor states that he "has planned to commit" Mr Doci for trial under the immediate procedure "for the crimes stated against him as soon as he will be extradited to Italy". The further information from the GIP states that the public prosecutor was going to make that request, and as soon as Mr Doci was extradited, had had the charge explained and he had had the opportunity to present his defence to the GIP, he would immediately issue the decree for trial under the immediate procedure. The GIP describes that as the prosecutor's "firm and formal" intention. But we are satisfied that it amounts to the GIP's decision to follow that course, even if it is not one which can formally be taken at this stage.

38. The GIP had thus already decided that he would issue the decree or committal for immediate trial upon receipt of the prosecutor's request. That request would come, as he knew. That is indubitably the decision for the purpose of section 12A. The whole narrative in the generic document shows that the decision to follow the immediate procedure as a result of an order for precautionary measures satisfies what section 12A means by the taking of a decision to charge and a decision to try. It is clear that a decision to seek a trial has been taken by the prosecutor and that the GIP will grant that request, and indeed would actually do so with a view to a trial taking place quickly. It would be an absurd application of section 12A, devoid of any practical purpose or "cosmopolitan" approach if the state of affairs set out in the generic document and in the further information, was found to fall short of what the section requires. We do not need to consider whether, in the light of *Puceviciene*, the concession made before the District Judge that the absence of a notice that the investigation had been concluded in the ordinary procedure would be fatal to the existence of a decision to charge or to try.

39. It is not necessary here to consider further the Irish cases dealt with in *Puceviciene* [43] - [48]. They do not assist the Appellants.

40. Much of what Professor Saccucci said dwelt on formal decision and actual charge. This is understandable since that is where his expertise lay; but it does not address the issue. When his evidence became submissions as to what the District Judge's and our decision should be on the meaning and application of section 12A to the facts and procedures, it went beyond the proper remit of expert evidence. The role of such evidence is, in any event, rather limited in the light of *Puceviciene*. In that case, the court stated (at [62]) that it envisaged "that the provision of expert evidence from lawyers should be very rare indeed" because "it is no part of the function of the extradition court to embark on an investigation of the legal niceties in the jurisdiction of the requesting judicial authority".

41. The District Judge also said that she was satisfied that Mr Doci's absence from Italy was the sole reason why the formal order to try him had not been made. If it had been right for the focus to be on taking a formal decision, which rightly it was not, this conclusion on the sole reason why that decision had not been taken would also have been correct. There is no confusion about her reasoning as between what is required for a section 12A decision and a formal decision. We reject Mr Lewis' submissions that there were reasons why the formal decision had not been taken other than Mr Doci's absence from Italy. Plainly, the fact that no steps were taken to use MLA to interview Mr Doci in England is not relevant after the decision in *Puceviciene*. But that decision also makes clear that the domestic courts' consideration of why there has been no decision to charge or to try does not require that all possible alternatives to extradition be used or rejected for reasons which are judged sound by English courts. Section 12A does not require an investigation of the merits or reasons for the requesting states' prosecutorial procedural decisions. Part of the reasoning why MLA is not generally relevant to the operation of section 12A is its inconsistency with the language of the section. That reasoning, see *Puceviciene* [58], [69] - [71], [73], [209] - [211], and [213] is equally applicable to the question of whether the prospect that a case could proceed in the ordinary procedure meant that there was some other reason why there had been no decision to charge or try, other than Mr Doci's absence from Italy.

42. We have nothing to add to the reasoning on MLA in *Puceviciene,* though Mr Lewis's later written submissions served to emphasise the very real problems which his approach would create in the examination by domestic courts of the prosecutorial and judicial decision of another state. Indeed, the logic of his contention that the prosecutor could have opted for the ordinary as opposed to the immediate trial, and so could have proceeded in Mr Doci's absence in effect puts the requested person in charge of the requesting state's prosecutorial decisions. It is in effect an argument that all processes which could be followed in a person's absence must be followed. Section 12A should not be interpreted in that way. Whatever else Parliament intended, by using the phrase "sole reason" it did not intend to throw so large a spanner into the extradition works.

IV Mr Motiu:

43. Mr Motiu is the subject of an EAW dated 1 January 2014 issued by Nicola Pauni, a magistrate of the Criminal Court of Santa Maria Capua Vetere, Italy, and certified by the National Crime Agency ("NCA") on 4 September 2015. The decision on which the EAW is based is an order "for precautionary custody under house arrest" issued by the GIP of that same court on 28 May 2013. The warrant is an accusation warrant relating to 38 offences of possession with intent to supply heroin on various dates between 13 February and 26 March

2012 in Salerno and Castelvolturno in Italy. The offences are described in box (e) and box (c) states they carry a maximum sentence of 20 years imprisonment. Box (e) of the EAW also states that "the investigations showed that the requested person got supplies of narcotic with the purpose of selling it". It is stated that the evidence of the offences is SMS messages and telephone calls that were intercepted by the Italian authorities. Box (e) then sets out the 38 offences, by date, place, in some instances quantity or price, and the evidential basis for the offences, in intercepted phone calls or text messages. Supplementary Information described Mr Motiu as "accused" of stocking drugs with intent to supply, and referring to the nature of the evidence against him.

44. Mr Motiu adduced no evidence before the District Judge to suggest the decisions required by section 12A had not been taken. It was simply submitted on his behalf that the fact that the EAW was issued by the GIP, and was based on an order for protective custody issued by the GIP, showed that there had been no decisions to charge or to try, or at least that there were reasonable grounds for such a belief. The source for that submission was what was said to be the position in *Ijaz,* one of the three cases in the then leading case on section 12A, *Kandola,* above.

45. Following a hearing, on 16 March 2016 District Judge Tempia ordered Mr Motiu's extradition under section 21A(5)(b) of the 2003 Act, as amended. She said that she had been referred to a number of decisions by Westminster Magistrates' Court on section 12A but rightly pointed out that they were not binding on her. She referred to the EAW in *Ijaz*, and distinguished it on the grounds that Ijaz had been referred to as one of the "persons under investigation" and as someone "being investigated in the criminal proceedings". She contrasted that with the language of box (e) in Mr Motiu's case, set out above. Her assessment was that that language clearly showed that the investigation had been completed, and the evidence of his involvement had been obtained through intercepts. The EAW had the usual generic heading that it was issued, so far as material, "for the purpose of conducting a criminal prosecution." There had been an investigation and evidence obtained to prove what Mr Motiu was accused of. The wording was clear, and she could find no reasonable grounds to believe that the Judicial Authority had not made the decision to charge and to try. In this case, the District Judge had no evidence about Italian criminal procedure.

46. Mr Lewis submitted that the District Judge should have been persuaded by the concession and decision in *Ijaz* and by a decision of the Senior District Judge in another case, that there were at least reasonable grounds for believing that neither the decision to charge nor the decision to try had been made, and that Italian authorities could make the decisions to charge and try in the absence of the requested persons. Contrary to what the District Judge inferred from the language of box (e), and in particular "investigations showed", the investigations in Mr Motiu's case were not complete. Even if they were complete, that did not mean that the decisions to charge and to try had been taken. The order for temporary custody showed that. The same points as made in relation to Mr Doci applied here.

47. Mr Knowles submitted that it was clear from *Kandola* [30-32] that the starting point for the consideration of section 12A was the language of the EAW. Its standard template language, without further evidence, did not provide reasonable grounds for believing that the relevant decisions had not been taken. There was nothing in the EAW to warrant any contrary conclusions, to "open the door" to reasonable grounds for the necessary beliefs. There was no further evidence here. It was not sufficient to refer to the different language of other EAWs in other cases. The concession and approach of Mr Hardy QC, for the Judicial Authority in *Ijaz*, to Italian accusation EAWs was wrong, and inapplicable to this case.

48. In our judgment, District Judge Tempia was right. The starting point is that the standard language of the EAW, that the requested person is wanted for the purpose of conducting a criminal prosecution, suffices, unless other parts of the EAW itself create reasonable grounds for believing that one or both of the relevant decisions have not been taken. Otherwise, further material is required. All there was here were the Senior District Judge's decision in a different case, and the facts of *Ijaz* and the approach taken in that case.

49. The District Judge was entitled to approach the decision of the Senior District Judge in another case in the way she did. It is for the district judges to decide whether such arguments as were addressed to her on it are helpful but, in view of the numbers of decisions, and the extent to which they turn on their own facts, evidence, and EAW, it is likely that such arguments will merely distract from or fruitlessly lengthen the task in hand. That task is to reach a decision on the facts of the instant case, and not to weave a path around and through other decisions and dicta, in an exercise of comparing, contrasting and distinguishing cases which do not bind them, and may be right or wrong.

50. Much the same can be said of the reliance on the facts of *Ijaz,* which has become something of a standby to requested persons in Italian cases. See also the emphatic reiteration in *Puceviciene* at [30] that cases should not be cited for comparisons on the facts. The District Judge was right to treat it as turning on its own facts, and to distinguish it from the facts here and, on that basis, to reach the conclusion she did. Shorn of whatever could be extracted from *Ijaz*, there really was only one answer which could be given to whether there were reasonable grounds for believing that one or other or both of the relevant decisions had not been taken.

51. The decision in *Ijaz* turned on the wording of the EAW in that case. The stated purpose of that EAW was to give effect to the precautionary custodial measure issued by the GIP, and Mr Ijaz was one of the "persons under investigation". This language was repeated in the further information. This language is different from that in the EAW here. The evidence too is different. The EAW here leaves no room for doubt. The decisions have been taken. Even if the investigation had not been completed, the evidence it had already yielded enabled the decisions to be taken.

52. In *Ijaz*, it was conceded by Mr Hardy QC that no decision to charge or to try had been made, since no such decision could be made in respect of a person at the investigation stage. The Court had little choice but to accept that concession on the facts of that case. Mr Hardy informed the Court, at [53], presumably on instructions, that section 12A would "torpedo" all Italian accusation EAWs in the UK. We are not sure that the Court accepted that assertion but it appears to be premised on a supposed requirement for formal decisions at a formal stage in Italian procedure, or a mistaken belief that a decision to charge or try for section 12A purposes could not be taken before an investigation was actually or formally concluded. While it is easy to understand why that what Mr Hardy said would be prayed in aid by any requested person on an accusation EAW from Italy, it was too pessimistic then and was, with respect, an unjustified generalisation. In the light of *Puceviciene*, it is now plainly wrong on an analysis of language, evidence and the law.

53. The evidence of Italian procedure which the District Judge had in Mr Doci's case was not available in the case of Mr Motiu. Had it been, the decision would have been yet more clearly adverse to him. The order for precautionary measures evidenced or was based on the decision to charge. The case would proceed, as a result of that order, in the immediate procedure. There was no basis at all for supposing that the prosecutor, having applied for the order, would not request the decree, and have it granted in the light of the evidence presented to the GIP

and accepted by him for the purpose of the precautionary measures order. Indeed, in view of what is required for such an order to be granted by the GIP on the prosecutor's application, both prosecutor and judge have appraised the evidence as sufficient for conviction to be likely or highly likely. In these circumstances, the order for precautionary measures is also a contingent but not formal decision by the GIP that Mr Motiu should be tried, a decision contingent on his presence in Italy, interview, and a prosecutor's request if necessary, but a decision made by the person who is empowered to make the decision to try.

V. The further grounds of appeal in relation to Mr Doci:

54. We turn to the arguments on behalf of Mr Doci based on double jeopardy and abuse of process. These relate to the fact that, when Mr Doci was arrested, he was found in possession of a sub-machine gun and that, by Article 74(4) of Law No.162 of 26 June 1990, where those in an association for the purposes of unlawful drug trafficking are armed, the sentence cannot be less than 24 years of imprisonment. It was submitted that the availability of weapons is a statutory aggravating feature which elevates both the maximum and the minimum sentence. Because Mr Doci had already been prosecuted, convicted and sentenced in Italy for possession of a firearm following this arrest but not, at that time, tried for offences concerned with participation in the possession of or trafficking of controlled drugs, it was submitted that the EAW's terms showed that he risked double jeopardy in relation to the possession of the firearm. It was contended that the extradition was therefore abusive. The two documents dated 8 February 2016 also contained further information about this defence. The letter from the public prosecutor stated that "The accusation will not include the aggravating circumstance of illegal weapon possession". The letter from the GIP states that "the alleged 'double jeopardy' is no more existing as the public prosecutor in the attached declaration formally renounces to charge Mr Doci Altin with the aggravating factor of availability of weapons."

55. The submissions based on double jeopardy in the court below were wider than just those based on the availability of weapons. They also concerned the fact that the provenance of the money found on Mr Doci had been the subject of litigation before the Italian courts. In her decision on 4 April 2016, District Judge Rose rejected all these submissions. In relation to the weapons, she rejected the submission that because the EAW had identified the relevant part of Article 74 of the Criminal Code as the provision relating to illicit drug trafficking aggravated by the availability of weapons, the fact that the accusation would not now include that aggravating circumstance was a change so material that the EAW no longer reflected the true position. This was not a case within the exceptional jurisdiction envisaged by Lord Sumption in *Zakrzewski v Regional Court, Lodz, Poland* [2013] UKSC 2, [2013] 1 WLR 324, at [13], where extradition should be refused. There was no suggestion in the correspondence that Mr Doci would not be prosecuted for the offence described as a count 1, only that he would not be charged with the aggravated form of the offence. He still faced prosecution for two offences, but one was not subject to the aggravating factor in Article 74(4). The District Judge did not consider that the change in the possible maximum sentence as a result of the further information was so material to the operation of the statutory scheme that it would be an abuse to extradite Mr Doci. It was sent in response to legitimate concerns and was intended to provide assurance that there was no possibility of double jeopardy. The fact that it was the prosecutor who took or confirmed this decision did not detract from its force.

56. Before us, Mr Lewis submitted that, in the Italian Penal Code, the availability of weapons was a statutorily aggravating feature which raised both the minimum and maximum sentences for related drug trafficking. If Mr Doci no longer faced the sentence of 12-14 years, as the Judicial Authority assured the District Judge, the sentence as set out in the EAW was no longer accurate. It was therefore now unclear whether return was sought for both offences in the EAW

or just for the second one, count 13. He argued that the EAW was so uncertain as to be invalid, or there was a risk of a breach of specialty, and that the Court should not rely on the statement of the public prosecutor, who is not for these purposes, a judicial authority. The GIP would not be in a position to hold the prosecutor to his statement, since, on Professor Saccucci's evidence it was clear that the Judge was bound to accede to a prosecutor's request that a person be committed for trial.

57. Mr Knowles submitted that the EAW was clear as to what charges Mr Doci faced. There was no abuse. Count 1 was directed at the organisers of a drug trafficking gang, and count 13 was directed at a "mere participant". Possession of a gun was not an ingredient of either offence. But it was a statutory aggravating feature which applied to both, so as to increase the sentencing range. But as that feature was not being relied on, the sentencing range was the lower one in each instance. Mr Doci's return is sought for both offences; the minimum sentences are 20 and 10 years for count 1 and count 13 respectively. The offences were created by Articles 74(1) and 74 (2) of the relevant Italian law. The public prosecutor's decision not to rely on the aggravating feature could not possibly be regarded as an abuse of process.

58. It was not double jeopardy either. There was no basis for the implied suggestion that the prosecutor would go back on his word and assert the relevance of the aggravating feature.

59. We accept the statement of the prosecutor. It would be accepted by the trial judge. The GIP saw the prosecutor's letter but expressed no doubt about the statement. There is no suggestion of bad faith on the part of either. Each would know of the basis upon which the Court below ordered extradition and on which this Court dismissed the appeal on that point. It is inconceivable that the prosecutor would go back on his word or that the judge would permit him, let alone encourage him to do so, or would treat himself as other than bound to deal with Mr Doci on the basis upon which extradition was ordered. There is no uncertainty, invalidity, or risk of a breach of speciality. Mr Knowles' approach is correct.

VI. Conclusions

60. For the reasons we have given, these appeals are dismissed.