JUDICIARY OF
ENGLAND AND WALES

IN THE WESTMINSTER MAGISTRATES' COURT

BETWEEN

THE COUNTY STATE ATTORNEY OFFICE

REPUBLIC OF CROATIA

Judicial Authority ("JA")

v.

IVICA TODORIC

Requested Person ("RP")

JUDGMENT

Introduction

1. The County State Attorney Office in Zagreb, Croatia (the "JA" or "the prosecutor") has issued a European Arrest warrant ("EAW") dated 23rd October 2017 for the extradition of Mr Ivica Todoric. The warrant is based on a detention order dated 18th October 2017 issued by the Croatian court. The EAW was issued on 23rd October 2017, it was certified by the NCA the day after and Mr Todoric was arrested on 7th November 2017. Mr Todoric was granted conditional bail by the court and the full hearing took place on 10th April 2018. Judgment was given on 23rd April 2018.

2. Ms Rosemary Davidson represented the RP at the full hearing and Ms Clare Montgomery QC leading Mr Aaron Watkins appeared for the JA. This was the first request under the EAW scheme from Croatia. This case is of interest to the Croatian press as Mr Todoric is accused of various types of fraud allegedly committed against a very large company, Agrokor, which he founded in 1976. The company is said to employ over 60,000 people and is of significance to the economy of the country. The offences are set out in detail in box (e) of the EAW and span 2006 to April 2017.

Issues

3. Ms Davidson raised two issues only. The first, that there is an absence of a prosecution decision in the case and applying section 12A of the Extradition Act 2003 ("EA"), extradition should be barred. The second, that the prosecution is for an improper purpose and is an abuse of the process of the court and that extradition should be barred.

Evidence

4. I was provided with a joint bundle containing the evidence from both parties. The evidence included the EAW and associated documents as well as the expert evidence relied upon by the RP.

Evidence - JA

5. From the JA, I have received the Form A dated 23rd October 2017, in the last line it says that the court has ordered investigative detention (tab C2 page 24). The Form A was accompanied by a Form M under the NSIS II System (tab C2 page 28). Page 30 of Form M stresses that the EAW was issued on the basis of the Zagreb Court ruling on 18th December 2017 (this probably should read 18th October 2017) ordering investigative detention against the RP.

6. The Form M sets out the law, that investigative detention may be ordered if there exists probable cause that a person committed an offence. In the RP's case it was ordered because there was probable cause he committed seven offences and there were circumstances suggesting that he "shall impede the proceedings by influencing witnesses". The document explains that such an order is made only if the measure is reasonable and necessary. The interference with witnesses objection to bail is justified at page 31 in the last paragraph where it is said that the RP had used electronic communication to influence witnesses and the judiciary.

7. A letter dated 7th November 2017 encloses the English translation of the EAW (tab C3 page 33 onwards). The EAW has the usual request for the arrest of a person for the "purposes of conducting a criminal prosecution or executing a custodial sentence…". The court's ruling on detention is set out at box (b). The maximum sentences are to be found in box (c). The alleged offences are set out in detail in box (e) at pages 37 to 52. They include all that is necessary to satisfy the relevant provisions of the Act (section 10 and section 64(3) of the EA 2003). The date and place of the alleged offences are shown and the detail allows the RP to consider whether there are any bars to extradition. It is signed by the County State Attorney, the prosecutor Ms Sani Ljubicic.

8. The first further information is found at tab C7 page 273 to page 324. Dated 6th March 2018, it is written by the County State Attorney Ms Ljubicic in response to the report given by Ms Slokovic, Mr Todoric's lawyer.

9. The County State Attorney deals with a number of points raised by the defence. She explains that the decision on initiating formal criminal proceedings is preceded by the enquiries phase ("pre-criminal proceedings") (page 277). The formal Decision to Conduct Investigation was made on 17th October 2017 by the County State Attorney's Office as the competent prosecutor. The RP and the 14 co-defendants appealed as was their right; they contended that the decision to investigate was based on "an erroneous or incomplete determination of the factual situation" (Slokovic page 58). That appeal was rejected by the court however and on 20th November 2017 when the decision became final, the criminal process formally began.

10. The State Attorney explains that it is only possible to file an indictment without formal investigation when the prospective defendant has admitted the offences and it is not necessary to collect witness evidence or to obtain accounting and financial expert examination which must be obtained by law after the Decision to Conduct Investigation becomes final.

11. The evidence uncovered during the investigation of the case is set out in the 6th March 2018 document from page 278. At page 279 onwards the prosecutor sets out the enquiries which were made before the Decision to Conduct Investigation on 17th October 2017. It was a coordinated enquiry in which documentation was obtained and witnesses spoken to. On 26th May 2017, an audit expert witness Ms Matovina was employed and she produced two analytical Reports which are relied upon by the prosecutor (page 280). The combination of the statements from witnesses, the auditor′s two reports and the analysis of the business documentation uplifted gave the prosecutor "valid and strong reasons to conclude that there is reasonable suspicion that the reported persons, including the defendant Ivica Todoric, committed the criminal offences on the basis of which the Decision to Conduct Investigation was rendered" (paragraph two on page 280).

12. Even before the Decision to Conduct Investigation was made on 17th October 2017, 12 prospective defendants had been interrogated. They blamed the RP as the person responsible for the financial reports of the company. He was said to have incorrectly applied the international accounting standard, IAS 27, which led to the misrepresentation of the company's finances.

13. By 6th March 2018, the prosecutor said that 43 witnesses had been interrogated although evidence was still being gathered. An order for an accounting expert examination was still to be made. The prosecutor points out in paragraph 1 of page 282, that the results of the "significant evidentiary actions conducted so far entirely confirm and in the procedural sense strengthen the reasonable suspicion as presented in the Decision to Conduct Investigation". The prosecutor goes on to say at paragraph 2 of page 282 that as at 6th March 2018, there is strong evidence to say that the RP committed the offences "of which he is charged. Based on that evidence it is confirmed that the intention of the County State Attorney's Office is to take Ivica Todoric and others to trial for those offences".

14. The further information goes on to reply to the evidence of Dr Kranebitter and Dr Bartlett. The prosecutor rejects the insinuation that she is motivated by something other than the evidence. She says *Lex Agrokor* which came into force on 7th April 2017 has had no impact on her actions.

15. From page 287 onwards the prosecutor goes through the evidence on which she relies to support the allegations she makes. There is a great amount of detail including what the co-defendants are said to have told the prosecutor (it would appear that two at least blame the RP). From the evidence the prosecutor says there is reasonable suspicion that this supposedly very successful company has not been operating profitably since 2006, yet has been paying dividends to the RP quite apart from making personal payments for his and his family's holidays, paying for example, for the RP's big game hunting in Africa and the resulting taxidermy (page 323).

16. The second further information is dated 5th April 2018. It is from the State Attorney's Office and is a two-page letter addressed to the Extradition Unit in London. The prosecutor explains how the enquiries started after complaints were received and they had to decide whether the allegations against the RP and the others were well grounded. A politician, Mr Petrov, on 30th March 2017, made a complaint against a number of the accused including the RP. There were several anonymous complaints between 4th April 2017 and 30th October 2017. Then a bank lender, Sberbank of Russia, made a criminal complaint against the RP and Agrokor including for forgery of a business document. The six months of enquiries undertaken before 17th October 2017 was to see whether the allegations were credible. A number of different agencies were conducting the enquires which led to the Decision to Conduct Investigation.

<u>Evidence - RP</u>

17. I heard from two witnesses for the defence. I also had a written report from an accounting expert, Dr Kranebitter, and some press reports which had been translated into English.

Ms Slokovic – section 12A

18. Jadranka Slokovic was the RP's Croatian lawyer although she had been a public prosecutor for six years. She was a criminal specialist but said that the case alleged against the RP and his co-defendants was a "really rare complex case". She had not seen one like this before. She produced a translated copy of the relevant parts of the Criminal Procedure Act concerning the investigations and prosecution stages of Croatian criminal proceedings.

19. In her first report she said the investigation phase in the Agrokor case had started in October 2017. The test for the start of the investigation phase was whether there were reasonable grounds to suspect that the RP had committed a crime. When there is a decision to institute an investigation, the prosecutor may put a motion for pre-trial detention of the person being investigated to the judge.

20. In the RP's case the formal investigation started on 17th October 2017 and a motion for pre-trial detention was granted for the RP but refused for the co-defendants.

21. The investigation that had started in April 2017 was the pre-investigation phase in which formal evidence cannot be gathered. That evidence had no formal standing in the criminal process that followed. I noted the witness did not mention the pre-investigation enquiries in her statement.

22. The RP appealed the decision to investigate on the basis that it was the result "of an erroneous or incomplete determination of the factual situation" (tab C4, page 58, paragraph 9). The court refused the appeal and that of the co-defendants. On 20th November 2017 the investigation decision became final and the criminal process formally commenced.

23. The investigation phase continues until the indictment is lodged. The RP has to be interviewed before the completion of the investigation. The test for the lodging of an indictment is whether there is sufficient evidence to found a reasonable suspicion that the RP committed the crime. There is a route of appeal against the lodging of the indictment. Ms Slokovic's evidence was that an investigation of this sort could take up to 18 months before the indictment is lodged. The trial would not then start for another two years. The RP would be in custody for at least some of that time, possibly all of it.

24. Ms Slokovic was asked about when the decision to charge is taken in the Croatian criminal process. The Court in *Puceviciene v Lithuania* [2016] EWHC 1862 (Admin) had defined the decision to charge as: "the decision which is made when there is sufficient evidence under the relevant procedural system to make an allegation that the Defendant has committed the crime alleged" (tab C4 p60 paragraph 23). Ms Slokovic said she could not find in the Croatian criminal process any parallels to the decision to charge in this jurisdiction prior to the lodging of the indictment.

25. Ms Slokovic was asked about the decision to try the RP. The decision to try was described in *Puceviciene* as "a decision where the relevant decision maker (who may be a police authority, prosecutor or judge under the relevant procedural system) has decided to go ahead with the process of taking to trial the Defendant against whom the allegation is made" (tab C4 page 61 paragraph 27). She said that once an indictment is proffered that is both a decision to charge and a decision to try. It is a formal decision and the indictment must be submitted to the indictment panel of the court (page 61 paragraph 29). In this case there had not yet been a decision to charge or to try. The decision to open an investigation meant that the prosecutor had decided that there were reasonable grounds to suspect that the RP had committed an offence.

26. Her evidence was that the case was at a very early stage. As at the date of her report, the 31st January 2018, the Prosecution had only questioned 15 out of the 65-70 potential witnesses. She accepted in cross examination, however, that by 10th April 2018 53 witnesses had had their evidence taken formally. She has access to the file and can be present when witnesses are interviewed. She agreed the vast majority of witnesses had now been seen but said the report from an expert forensic accountant had not yet been ordered. She said the preparation of such a report would take a minimum of six months as the expert accountant would have to cover a company's financials from 2006 to 2016. In cross examination she accepted that a specialist accounting expert was employed as from 26th May 2017 before the investigation phase had been formally started. She accepted too that all the business records had been obtained in searches.

27. Ms Slokovic said she found it "incredible" (page 62 paragraph 34) that it could be suggested that the prosecution had made a decision to try in a case of such complexity at what she called this very early stage. She said that for the prosecutor to say she was going to lodge an indictment in due course was premature and in her view showed prejudice. She did not accept that the details provided by the prosecutor showed that much of the investigation was complete and that inferences of dishonesty could be drawn.

28. She said that the absence of the RP did not prevent the prosecutor from making a decision to charge or try.

Dr Bartlett – abuse of process

29. Dr Bartlett had written two reports, at tabs 5 and 9 of the bundle. He was called to deal with the second submission that the prosecution was politically motivated and that there was a close connection between the company and senior Croatian politicians (see Ms Davidson's skeleton at page 22 paragraph 63). Dr Bartlett's view was that the over-expansion of the company should have been prevented by the Croatian government. When the company started failing it was the government's fault. He believed that a restructure should have been attempted by the government, instead of which a law was enacted, known as *lex Agrokor*, which led to the takeover of the company and the removal of the RP from the board.

30. Dr Bartlett's evidence was that the prosecution of Mr Todoric was to distract attention from the government's own misdeeds and in particular the actions of a senior politician who was a senior financial controller in Agrokor before the near collapse of the company. Dr Bartlett relied on the fact that a different politician had made one of the first complaints about the behaviour of the RP. He also relied on the fact that a Parliamentary Committee of Inquiry which had started to enquire into the collapse of Agrokor had been asked to suspend its work on the grounds that a criminal investigation had been opened.

31. In an annex to this report at page 216 he makes some remarks about the judicial independence in Croatia. I gave very little weight to these comments. Article 6 is not being raised by Ms Davidson and the remarks made by her witness do not begin to reach the sort of threshold required to make a finding that the RP, if extradited, would not have a fair trial.

32. In cross examination, it became clear that Dr Bartlett was not aware of the detailed allegations being made against the RP. The witness said he had no reason to doubt either the bona fides of the prosecutor or the expert witness who had already prepared two financial reports and had told the prosecutor that there had been massive financial irregularities.

33. The height of his evidence appeared to be that as the RP had not carried out any "dodgy dealings" before and had set up the company, he thought it unlikely that he would have changed his behaviour and turned into a different type of entrepreneur. He said he did not doubt the legal accuracy of the prosecutor's allegations but said he questioned why the RP alone should be blamed. Of course, the RP is not the only one being blamed for the collapse of Agrokor, there are 14 potential co-defendants.

34. A third witness, Dr Kranebitter, whose statement had been provided to the court was not called. Ms Montgomery and Mr Watkins wanted to challenge the accounting expert's evidence. In the event Ms Davidson relied on him to show that it was possible for an alternative explanation to be given for the various company practices used by the RP.

Submissions

35. Ms Davidson's stronger submission was that there had been no decision yet to charge or try the RP. She said the EAW used pro forma wording which was not determinative of the question. The order for investigative detention did not help either way nor did the detail of the offences set out at box (e) of the EAW. Ms Davidson relied on the evidence of Ms Slokovic that the proceedings were at a preliminary stage and that the decision to charge and to try would be made when the decision was taken to lodge an indictment. If extradited now the RP would be waiting for at least two years before the trial would start and that he may well be in custody for that time. She relied on Parliamentary material and the Explanatory Notes to section 12A to show what Parliament's intention had been when the section was introduced.

36. Her second submission was that the conduct particularised by Dr Bartlett was capable of amounting to an abuse of process because there was evidence that the prosecution had been launched to deflect responsibility away from senior politicians who fear political repercussions, or even criminal charges, as a result of their role in Agrokor.

37. Ms Montgomery argues that the intention to try has clearly been made and that I should not look beyond the EAW. If I do, then I should consider what is clearly stated in the 6th March 2018 further information. She goes on to contend that there is no abuse of process argument in this case.

Findings

Section 12A

The warrant

38. The EAW is issued under cover of a letter from the General State Attorney Office to the National Crime Agency (tab 3 page 33). In the second paragraph the letter refers to the County State Attorney's Office in Zagreb as a prosecutor's office "which conducts investigation against Ivica Todoric". Ms Davidson relies on this as showing there is an on-going investigation. I agree that is what the letter says but I find that does not help when considering whether a decision to try has been taken. The prosecutor's office investigates offences and then prosecutes. That comment does not indicate whether a decision to charge or to try has been taken.

39. Ms Davidson relies on the fact that the EAW was issued a few days after the Decision to Conduct Investigation. That is correct but the enquiries had started in April 2017, it was the formal investigation which started with the Decision.

40. Ms Montgomery relies on the header which is found on all EAWs on page 35. The warrant is said to have been issued by a competent JA (not in dispute) who requests that the RP is arrested and surrendered "for the purposes of conducting a criminal prosecution or executing a custodial sentence…" I find the statement does not indicate either way whether a decision to charge or try has been taken. It is the sort of template used at the top of many EAWs.

41. The warrant is based on the Ruling on detention issued by the County Court in Zagreb dated 18th October 2017. This suggests that a court has oversight of the bail position of the RP which in turns suggests that the EAW is issued for a criminal prosecution. I do not find that determinative of the argument.

42. Ms Montgomery relies on the great amount of detail set down at box (e) of the EAW in relation to the various offences alleged. The JA provides 15 pages of closely typed descriptions of the alleged offences. They are broken down year by year and involve allegations of false accounting involving mostly the members of the management board of the company as well as a number of benefits allegedly improperly obtained by the RP. Perhaps the clearest allegation is that set out at paragraph 4 page 51, the allegation that the RP instructed Agrokor to settle his and his family's personal expenses in the sum of at least 1.5 million euros, £1m, and US$ 221,180.00. The other amounts obtained by the RP through false accounting amount to many million euros.

43. It is clear that detailed allegations have been made and that a thorough investigation has been carried out. If this court was focussed just on the EAW and having to decide whether there were reasonable grounds to believe that a decision to charge or to try has not been made, the detailed allegations set out in box (e) would lead this court to find no reasonable ground that a decision to try had not been made.

44. What has led me to question whether the decision to try had in fact been taken was the subsequent statement of the prosecutor in the further information of 6th March 2018. Taking that into account, that leads me to the conclusion that there are reasonable grounds to believe that a decision to try had not been made as at the date of the Decision to Conduct Investigation on 17th October 2017.

The investigation

45. The chronology of the investigation is not in dispute. At the end of March 2017 and in the following months complaints were received about the RP and Agrokor. The first complainant was a politician, this was followed by some anonymous complaints and then a complaint from a lender to the company, a Russian bank. An enquiry was started, conducted not just by the prosecutor but also by the Independent Sector for Financial Investigations of the Ministry of Finance and the Police National Office for the Suppression of Corruption and Organised Crime. Witnesses were interviewed, documentation was recovered from Agrokor and the potential co-defendants were interrogated; importantly an accounting expert was instructed on 26th May 2017 and produced two reports, all this had happened before the formal investigation started.

46. On 17th October 2017 the Decision to Conduct Investigation was made. The test applied to the Decision made on 17th October was whether there are reasonable grounds to suspect that the defendant had committed a criminal offence. A ruling on detention was made on 18th October 2017. The RP was to be remanded in custody on the basis that if on bail he would interfere with witnesses. This he was said to have done whilst the enquiry was on-going, there was information that he had been in electronic communication with some witnesses. The court decided to bail the co-defendants.

47. The RP appealed unsuccessfully against the October decision and on the 20th November 2017, the Decision to Conduct Investigation became final.

48. I find and it is not in dispute that the next formal procedural step is for the indictment to be lodged. There is no timescale given for this and the evidence of the lawyer was that it would take up to 18 months from the start of the investigation. In fairness to Ms Slokovic she had not been involved in such a complex case before so it was her best guess.

49. It was accepted by Ms Slokovic (she has access to the file) and I find that as of 10th April 2018, 53 witnesses of the 65-70 expected have made statements. The prospective co-defendants have been interviewed. The prosecutor has instructed an expert accountant who by 17th October 2017 had provided two reports. Judging by the detailed allegations set out in the March 2018 further information a large amount of evidence has been obtained by the prosecutor.

50. I find that the investigation is progressing at speed but I accept that one or two further expert accountants have not yet been instructed. I do not accept however that they will necessarily take a year to carry out their investigations. If the expert accountant already instructed can do her job in just under five months, I would not expect the new accountants to take much longer. I noted that the accountant who has already reported

had examined Agrokor's journal of entries for between 2008 and 30th April 2017, she had analysed too the gross balance sheets of the company from 2002 to 30th April 2017, the separate financial reports from 2002 to 2015 and the consolidated financial reports for the years 2002 to 2015. She has clearly carried out a thorough piece of work and this will help newly instructed experts. It is not right to say that she had only carried out an examination of two years of the company's financials.

51. I find that there is no separate decision to charge in the Croatian criminal justice system. The focus of this court has to be on the decision to try and whether that decision has been taken.

52. On the evidence I have heard, the prosecutor would have to take the decision to try at some point on the continuum between the Decision to Conduct Investigation and the lodging of the indictment. There are a number of points at which such a decision could be made.

53. The first point, could be when the Decision to Conduct Investigation is made, in this case on 17th October 2017. That is an attractive proposition particularly as it would lead to certainty. The problem with that finding is that by the time of the further information of 6th March 2018 the prosecutor has much more evidence to rely on. By then 43 witnesses had made statements and as a result of the evidence obtained by that date, the prosecutor said the "evidentiary actions" "entirely confirm and in the procedural sense strengthen the reasonable suspicion" (page 282 paragraph 1) which was the formal position when the Decision to Conduct Investigation was made. By 6th March 2018, she says, the case had become stronger.

54. The prosecutor says at page 282 paragraph 2 of the further information of 6th March 2018, that "At this stage there is strong evidence" that the RP has committed the offences "of which he is charged". Importantly is the next sentence "Based on that evidence it is confirmed that the intention of the County State Attorney's Office is to take Ivica Todoric and others to trial for those offences. The formal steps necessary will be taken at the appropriate point in due course according to Croatian criminal procedure law". That is the second point, at which the decision to try could have been made.

55. The last statement quoted above from the 6th March further information is clear and unequivocal and based on the evidence that the prosecutor has gathered now for nearly a year (consisting of six months of informal investigation and then six months after the Decision to Conduct Investigation is taken). I do not find it surprising that as a case develops the prosecutor leading the investigation can come to a decision about the future direction of the case. From the further information there are clear

implications of the RP's dishonesty from the actions described. If the 6th March detailed description of the evidence is correct, and it was never suggested by Ms Slokovic it was not, it is hard to see how this case could not end in a trial. Whether or not I am right in my judgment on the strength of the evidence, the decision to try has been made. I accept that Dr Kranebitter gives a different view of the accounting methods used etc but that is a question for the trial.

56. This is a complex case, involving 14 or 15 prospective defendants, I do not find it improper that the prosecutor can make the decision to try whilst continuing to gather evidence. The prosecutor has to take the decision to try at some point before the lodging of the indictment. I accept that a prosecutor in Croatia would not normally publicly express the intention to try as there is no need to. The expressing of the intention to try is by the lodging of the indictment. The intention to try which is expressed by the lodging of the indictment will have been taken at some point before that is done.

57. I do not find there is any evidence which undermines the clear statement made by the prosecutor and I find that as at that date the prosecutor has an intention to try the RP although the formal steps are yet to be taken.

58. I note that by 10th April 53 witnesses had given formal evidence to the prosecutor. I suspect by the time I give this judgment on 23rd April, more witness statements will have been obtained. The full number (presumably based on the number seen in the enquiries phase) is between 65 and 70. I find this investigation is been conducted with expedition.

Abuse of process

59. I did not find Dr Bartlett's evidence persuasive. His argument that the Croatian government should have stepped in to prevent the over-expansion of Agrokor was weak. Agrokor is an independent company started by the RP and it was the RP who made the decisions. The fact that the now finance minister was employed as a senior financial controller between 2012 and 2016 is not significant. It appears that the majority of the prospective defendants were at a higher level and on the Management Board of the company. A decision of the government not to rescue and restructure the company but to take it over (*Lex Agrokor*) was criticised by Dr Bartlett as it expelled the owner (the RP). It seems to me that this was one option open to the government and I do not have sufficient evidence to know whether it was the right one. What I do understand from the evidence was that Agrokor was of great significance to the economy which would explain why the government was so involved in the repercussions of the near failure of the company.

60. Ms Davidson also criticised the fact that the original complaint against the RP and the others was made by a separate leading Croatian MP. There is no evidence at all that that MP was involved in the company. For all one knows he or she may have received a complaint from a constituent. I did not accept Ms Davidson's contention that there were politicians who feared political repercussions or even criminal charges for their role in Agrokor.

61. Finally, I did not accept Dr Bartlett's evidence that the reason the Parliamentary Committee of Inquiry's work looking at the reasons for the failure of the company was suspended was because the government wanted to avoid in-depth scrutiny of the role of the government and its ministers in the company. I saw no reason not to accept the explanation given that a criminal investigation had started so the inquiry would be suspended. It seemed to me that a criminal prosecution would be just as likely to reveal any such role. A resignation for unrelated corruption allegations by a Commissioner looking at Agrokor was not proof one way or another.

62. It was clear to me that Dr Bartlett had started from the premise that he did not think that Mr Todoric was the sort of person who would defraud the company he set up. From that premise he had weaved a conspiracy theory which on examination did not begin to stand up.

Law

63. The law is agreed between the parties.

64. Section 12 A provides:

(1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)—

(a) it appears to the appropriate judge that there are reasonable grounds for believing that—

(i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and

(ii) the person's absence from the category 1 territory is not the sole reason for that failure,

and

(b) those representing the category 1 territory do not prove that—

(i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or

(ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.

(2) In this section "to charge" and "to try", in relation to a person and an extradition offence, mean—

(a) to charge the person with the offence in the category 1 territory, and
(b) to try the person for the offence in the category 1 territory.

65. The approach to section 12A is set out in a number of authorities amongst which are the leading cases of *Kandola v Germany* [2015] EWHC 619 (Admin) and *Puceviciene v Lithuania* [2016] EWHC 1862 (Admin). These set out a two-stage approach to the question.

66. In the first stage, the default position is that the necessary decisions have been made. The focus of the court should be on the EAW alone. The test to be applied is whether there are reasonable grounds for believing that a decision to charge or try has not been made. Extrinsic evidence is not appropriate unless the defence has shown by looking at the EAW that there are reasonable grounds for doubting that the decision to charge or to try has been taken. If the burden in this first stage has been discharged by the RP, then the second stage is that the JA must establish beyond reasonable doubt that (a) either the decision or decisions have been taken or (b) that the only reason they have not is the absence of the RS from the state.

67. The authorities make clear that expert evidence from lawyers should rarely be allowed. They also say that a statement by a judicial authority that it had made the necessary decision should be accepted. The court is encouraged to take a cosmopolitan approach with a focus on a decision to try which will incorporate a decision to charge.

68. Importantly, bearing in mind the state of the investigation in this case, *Puceviciene* allows a decision to try to have been made even though it has not been formalised. "We see no reason why any formality is required in relation to the making of a decision, as a prosecutor is entitled to make a decision to try a defendant before implementing any formal steps necessary, unless the procedural law of the requesting state prevents informality" (*Puceviciene* paragraph 54) and in *James Fox v Public Prosecutor's Office of Frankfurt am Main, Germany* [2017] EWHC 3396 (Admin) "A decision to try may be made even though it has not been formalised, even if it is conditional and even though investigations may be continuing" (*Fox* paragraph 48(14)).

69. *Puceviciene* makes it clear that the case need not be "trial ready" (paragraph 50 ii)). The then Lord Chief gives as an example to position in England and Wales where a decision to try is made with the fixing of a trial date at a very early stage in the proceedings "whilst the investigation is still underway and it is known that the trial might be at some considerable time away". The important point is made at paragraph

50 iii) “the term used in the section is “a decision to charge” not “charged”. This plainly implies that the focus should be on the word “decision” not any formal step”.

Decision

Formalities

70. I find the offences outlined are extradition offences within the meaning of sections 10 and 64(3) of the EA 2003.

71. There are no bars being raised under section 11 of the EA and I find there are none.

72. Section 12A is dealt with below.

73. There are no section 21 EA reasons why the RP should not be extradited and I find that extradition would be compatible with the RP’s Convention rights.

74. I deal with abuse of process below.

Decision – Section 12A

75. I turn to consider the first step laid out under section 12A. The court must focus on the EAW. It is relevant that it was issued only six days after the Decision to Conduct Investigation was made and five days after the ruling on detention was made by the court. The 17th October 2017 was when the formal investigation started.

76. As is clear from the findings at paragraph 38 onwards above, whilst on the face of the EAW there are no reasonable grounds to believe a decision to try has not been made and that is the default position, on the basis of the 6th March 2018 further information there is evidence from the prosecutor herself which leads me to question the position as at 17th October 2017. I am taking extrinsic evidence into account but it is evidence from the prosecutor who filled in the original request. I have therefore gone on to consider the second stage of the test in section 12A because I find reasonable grounds to find that a decision to try has not been made.

77. The second stage is that the JA must establish beyond reasonable doubt that the decision to try has been taken.

78. Applying the authorities to the findings above, I take a cosmopolitan approach, in Croatian criminal procedure there is no exact parallel to the decision to try in this jurisdiction. It seems to me I must respect the prosecutor's decision under the principle of trust and mutual confidence. I bear in mind too that Dr Bartlett confirmed he saw no reason to question the *bona fides* of the prosecutor.

79. I accept however too the evidence of Ms Slokovic that it is unusual for an intention to try to be expressed by the prosecutor publicly before the indictment is lodged when the formal decision is taken but I do not accept by doing that she has shown prejudice. The procedural law in Croatia is silent about whether a prosecutor should express an intention to try before the lodging of the indictment. It would never need to happen in Croatia but an extradition request to a common law jurisdiction with few procedural parallels has no doubt led the prosecutor to express publicly something she has no doubt been thinking as she reviews the evidence.

80. The decision to try as set out at page 282 of the further information is taken by a prosecutor who has been investigating, either informally or formally, a complex fraud for 12 months, who has collated a large amount of evidence, including expert reports and interviews with prospective co-defendants and who is nearing the end of the investigation with one or two accountants reports still to be obtained. The prosecutor knows her case and is able to say, albeit very unusually, that as of 6th March 2018 she has an intention to try the RP.

81. The decision as expressed in the 6th March document is not a formal one but the conclusion the prosecutor has drawn from the evidence she has gathered. The implication is the case has strengthened with the evidence she has obtained since the 17th October 2017 Decision to Conduct Investigation was made, she says in paragraph 2, "At this stage there is strong evidence to make the allegations that Ivica Todoric committed the offences of which he is charged". I accept she has further evidence to obtain including evidence from the expert accountants and that therefore the investigation is on-going and is not trial ready however looking at the evidence as summarised in the further information, on one view of it, the behaviour complained of is dishonest. A trial will of course determine whether in fact it is.

82. Ms Davidson says that the fact that the RP may return to Croatia and have to wait two years for a trial should lead this court not to order his extradition. The problem with the case against the RP is that he is wanted for prosecution in relation to a complex fraud spanning 11 years where there are 14 prospective co-defendants, and 53 witnesses out of a possible 65 to 70 have made statements already. The evidence will depend to some extent too on expert evidence. One expert has been instructed and another or others will be soon. Ms Slokovic said the RP might or might not get bail, if he is extradited and remains in custody, this will be for possibly two years.

83. Ms Davidson relied on the case of Mr Symeou (*Symeou v Greece* [2009] EWHC 897 (Admin) which led to the introduction of section 12A. Mr Symeou was a British national wanted for a one punch manslaughter with essentially three witnesses and a defence of alibi. That sort of case is a far cry from the fraud alleged in this case. A possible six month wait from April 2018 to the lodging of the indictment and then potentially a two year wait from the lodging of the indictment to trial is not an unreasonable time to wait in a case of this complexity. A trial of this sort in our jurisdiction would no doubt involve investigation, a sending and a continuation of preparation before a trial one year or more later. Section 12A is not designed to assess the time between extradition and trial, it is there at the second stage for a court to decide whether it can be sure the decision to try has been made whether formally or, as in this case, informally. I have no doubt that in this case the prosecutor made the decision to try the RP before the document of 6th March 2018.

Decision - Abuse of process

84. Ms Davidson relies on Dr Bartlett. I found there was no evidence of a political motivation for the prosecution. There was no close involvement in Agrokor of politicians. One politician was a senior financial controller and another made a complaint about the RP and the company. I accept that the Agrokor affair has a political dimension as it represents 15% of the GDP of Croatia but the prosecution is based on the evidence uncovered is not being pursued because of political pressure. There was no evidence that the allegations were being made to deflect attention from the politicians. The Parliamentary Inquiry was halted for the good reason that a criminal investigation had started.

85. I have not set out the well-known principles but they have been recently re-stated in the case of *Malarz v Poland* [2018] EWHC 28 (Admin). I have to be satisfied that there is cogent evidence that the JA has acted in a way that subverts the integrity of the domestic process (paragraph 54). There is no evidence of any weight which would allow this court to find an abuse.

Order

86. In the light of the decisions above and no other issues being raised, I order the extradition of Mr Ivica Todoric to Croatia. He now has seven days in which to apply for leave to appeal.

Senior District Judge (Chief Magistrate) Emma Arbuthnot

23rd April 2018