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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the monthly Defence Extradition Lawyers' Forum newsletter. In this, our first edition we set out what we've been doing, and review two important decisions made over the summer in our case law update.

Our recent activities

Launch!

On 21 September DELF hosted a launch party at Baranis on Chancery Lane. As the social committee nervously waited for people to turn up we noticed the bar had their columns painted in DELF colours, surely a sign the event was to be a success.

As 6pm approached, the bottles of fizz were popped and lawyer after lawyer began to arrive, the party had really started and DELF was launched!

The DELF committee were joined by a breadth of lawyers from the profession, eminent QC's and trainees alike, mingling, discussing extradition (and hopefully more interesting topics) enjoying 'fine' wines and playing pétanque.

We were treated to an excellent toast by Edward Grange, standing in at the last minute as our leader had been detained at an airport in France. He welcomed everyone, introduced the forum, our successes so far and explained why Ben Keith's leaflets were so unusual.

As the event drew to a close, the party moved on elsewhere serenaded by the dulcet tones of unnamed counsel, it was clear it had been an enjoyable evening. We were left wondering... why has this not been done before and did Fadi ever leave the Piano bar?

We would like to thank all of our founding members and chambers for helping us fund such an excellent evening and to all our members for launching DELF in the emphatic manner which it deserved.

DELF is represented at the new Extradition Working Group examining whether a Northern Extradition Hub should be established

President of DELF, Edward Fitzgerald QC represented DELF at the Working Group meeting chaired by the Senior Presiding Judge, Lord Justice Fulford. The Extradition Working Group is examining whether HMCTS should establish a Northern Extradition Hub. The CPS is in favour of the move. Following the meeting all those represented were asked to submit formal written responses to the proposal by the 31 August 2016. The DELF committee have submitted written proposals opposing establishing a Northern Hub at this time.

Legal Aid Problems raised with District Judge Devas

DJ Devas met with the LAA to discuss concerns with regard to legal aid and prior authority. DELF was contacted and asked to provide examples of the problems with legal aid. A letter providing DJ Devas with examples and issues was sent on the 22 August 2016. Members are encouraged to inform us of any issues with legal aid so that we can ensure that the court and the LAA are aware.

Meeting with the Administrative Court Office

On the 14 July 2016 DELF Committee members met with the Administrative Court Office lawyers to establish a link with the Administrative Court lawyers and to discuss issues faced by defence practitioners in High Court proceedings. It is anticipated a further meeting will be held in the Autumn.

Explanatory Note on Directions in the Magistrates' Court

In January 2016 the Chief Magistrate issued an 'explanatory note on directions' for extradition proceedings in Westminster Magistrates' Court and in so doing invited consultation from practitioners. One of the first actions of the DELF Committee was to send a letter on behalf of the committee to the Chief Magistrate indicating an intention to provide a response to those directions. This led to a meeting between the judiciary and DELF. Matters discussed included the Court's work load, blue forms, bundles, prison visits, legal aid difficulties and rates of pay when certificates of counsel had not been granted. Following that meeting a letter was sent to the Chief Magistrates' Office with DELF's observations on the Explanatory Note on Directions.

Katy Smart

Case Law Update

Rusu v Romania (Westminster Magistrates' Court, 11 August 2016)

Since 2014 in order to successfully extradite a requested person from England and Wales requesting states facing prison overcrowding issues at home have become increasingly reliant

on assurances with respect to the conditions in which a requested person will be kept.

This is because some countries (for example Italy, Romania and Greece) have been found to have such problems within their prison estate that without assurances extradition would expose requested persons to a real risk of inhuman or degrading treatment contrary to Article 3 ECHR. Frequently these assurances are minimum space assurances, i.e. they guarantee that the person whose extradition is sought will not be kept in cells where they have less than 3m of individual space. Whilst those representing requested persons facing extradition on the basis of such assurances have not been shy to challenge the reliability of those assurances, in the case we summarise here *Timis County Court (Romania) v Daniel Nicolae Rusu,* (Westminster Magistrates' Court) the Court (District Judge Purdy), for what appears to be the first time under the EAW scheme, refused extradition on the basis that the requesting state could not or would not comply with the assurance it had given.

In *Blaj v Romania* [2015] EWHC 1710 (Admin) following the decisions in *Florea v Romania* (No 1) [2015] 1 WLR 1953 and *Florea* (No 2) [2014] EWHC 4367 (Admin) the Romanian Authorities gave a general minimum space assurance applicable, the assurance claimed, to all persons whose extradition was requested from England and Wales. This assurance promised that if a requested person was to be detained in an open prison they would have more than 2m² of individual space and that if they were detained in a closed prison they would have more than 3m² of individual space.

In *Rusu* the requested person challenged the general assurance given by the Romanian Authorities (see above) and argued that the authorities were persistently breaching the assurances that they had given to requesting states in order to secure extradition. Rusu relied on the written and live evidence of persons who had been extradited to Romania on the basis of assurances as to their treatment in prison and who were now contending that the Romanian Authorities had failed to comply with those assurances. The evidence that Rusu and his team had managed to obtain was persuasive describing *"deplorable"* conditions including very limited personal space and a failure on the part of the Romanian Authorities to comply with the assurances they had given. Rusu argued that as these assurances were not being complied with there were substantial grounds for believing that there was a real risk that, if extradited, he would be subject to inhuman and degrading treatment contrary to Article 3. The Romanian Authorities in further information conceded numerous breaches of the assurances citing "*exceptiona*l" criteria by way of explanation and expressly accepting that the "*observance*" of the minimum space for any surrendered prisoner was not possible during certain periods of a person's detention. District Judge Purdy concluded (inevitably) that given the failure of the requesting state to comply with the assurances that it had given in the past there were substantial grounds to believe that there was "*a real risk of a breach of the minimum space assurance that currently exists*," and extradition was refused.

The importance of effective means of monitoring assurances given by requesting states cannot be overstated; the *Othman* criteria make that plain. Historically the courts have been slow to give much weight to the question of monitoring assurances from other European countries in the context of extradition requests; perhaps this case will mark a change. An appeal against DJ Purdy's decision is understood to have been lodged on behalf of the Romanian Judicial Authority so look out for further developments in future editions of the newsletter.

Postscript: on 12 September the Romanian National Administration of Penitentiaries provided a new assurance repeating guarantees of minimum cell space and stating that a new

monitoring mechanism is being introduced. The reliability of this new assurance will be considered by the High Court this term.

Goluchowski v District Court in Elblag, Poland [2016] UKSC 36

It has long been the case that a warrant which was challenged for failing to comply with the requirements of section 2 of the Extradition Act 2003 (section 2 prescribes the content of an EAW e.g. particulars of conviction, sentence etc) could not be "eked out" by information extraneous to the European Arrest Warrant itself (*Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6). As such s.2 challenges have long been fertile ground for the defence. This year in what some may construe as yet another step in the gradual relaxing of the technical requirements of the EAW scheme (see *Zakrzewski v District Court in Torun, Poland* [2013] UKSC 2) the Supreme Court, applying recent European caselaw (see *Bob-Dogi Case C-241 15)*, considered that further information would have been permissible to validate an otherwise invalid EAW.

Goluchowski (G) and Sas (S) were the subject of EAWs seeking their extradition to Poland to serve sentences of imprisonment. G was wanted to serve two periods of imprisonment which had been initially suspended and were later activated. S was wanted to serve two sentences of imprisonment on two different EAWs. The first sentence fell to be served after an unsuccessful appeal and the second sentence fell to be served (or in fact completed as he had already served some of it) after S had been released on early conditional release and then had his sentence revoked for breaching the relevant conditions. Each EAW contained in box b simply the details of the sentence that had been imposed, this included the case reference number, the date of the decision, the length of the sentence and any time left to serve but did not include the details of any other warrants issued in respect of the sentence.

The issue for the Court was whether the information given in each of the warrants was sufficient for the purposes of s.2(6)(c). S.2(6)(c) requires "*particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence*" and it implements Article 8.1(c) of the Framework Decision which requires "*evidence of an enforceable judgment, and arrest warrant of any other enforceable judicial decision having the same effect…*"

The precise questions for the Court were:

1. Is an EAW defective for the purposes of s 2(6)(c) of the Extradition Act 2003 if it did not also give particulars of domestic warrants issued in the category 1 territory to enforce that judgment or order within the issuing state?
2. Does the term "any other warrant issued in the category 1 territory for the person's arrest in respect of the offence" in section 2 (6)(c) of the Extradition Act 2003 only require the European Arrest Warrant to include the conviction of the requested person, or does it, following *Poland v Wojciechowski* [2014] EWHC 412 (Admin) require particularisation of the decision that required the requested person to serve an immediate sentence of imprisonment and was the decision following which it could be said that the requested person was unlawfully at large?

The appellants argued that the EAWs had to contain particulars of at least the most recent domestic warrant issued to arrest a person wanted to serve a sentence of imprisonment and further, that an EAW must also contain particulars evidencing a judicial decision activating a suspended sentence (or in respect of S revoking a conditional release). They argued that the failure to include this information rendered the EAWs invalid for the purposes of s.2(6)(c).

Further information from the Polish Authorities set out the details of the previous warrants and judicial decisions and explained the bases on which and the processes by which the various judgments had become enforceable and the EAWs had therefore been issued.

The Court ultimately found the further information conclusive but considered first (without deciding) the question of what level of detail was necessary to satisfy the requirements of s.2(6)(c). Of particular relevance to their consideration of this issue were the significant differences that exist between conviction and accusation warrants. At **[25]** of his judgment Lord Mance explains that as the "*natural basis of a conviction warrant is an enforceable judgment*" or "*any other enforceable judicial decision having the same effect*" where such a judgment exists there is no reason why if a domestic warrant exists that it should be required to be evidenced in the EAW. To read s.2(6)(c) in such a way as to require an EAW to include details of every judicial decision by which the sentence had become enforceable would be too complex and would run contrary to principles of mutual confidence. It would also overlook the fact that it is always open to an executing state to request more information from a requesting state **[43]**.

The Court found that each of the EAWs in issue in the case gave details of judgments which, by themselves, required the Appellants to begin the immediate service of a sentence and that the further information made plain that the EAWs in question rested on a valid foundation in terms of enforceable court judgments and decisions. On this basis, the Court concluded that it was unnecessary to make a final decision on the level of detail needed to satisfy s.2(6)(c) as recent European case law made clear that an EAW could not be treated as invalid or ineffective merely because the full history of an enforceable judgment did not appear in the EAW itself and only became apparent from information subsequently received.

In what appears to be the final nail in the coffin for s.2 challenges Lord Mance stated, at **[45]** that even if a reference to the activating decisions should strictly have been made in the EAWs alongside the reference to the judgments as enforceable, this could not mean as a matter of European law that the EAWs should be treated as invalid or incapable of being executed.

What positive there is to be taken from this case (from a defence perspective) comes from the short judgment of Lord Neuberger, who agreed with Lord Mance but who, at **[52],** helpfully qualifies Lord Sumption's statement in *Zakrzewski* that *"as a general rule the court of the executing state is bound to take the statements and information in the warrant at face value*", explaining that it was never intended to be an absolute rule.

This case marks a real change in the approach to s.2 challenges, an area that was already limited following the decision in *Zakrzewski,* but arguably the judgment contains few surprises given the emphasis of the EAW scheme on mutual trust and the reduction of administrative obstacles to extradition. As with all these cases it will be interesting to see how this issue develops.

Katherine Tyler

Forthcoming events

Save the dates!

We will be meeting for Christmas drinks on **6 December 2016**. Please do come and join us for some extradition chat and some informal drinks. The venue will be confirmed to members shortly.

On **18 January 2017**, we will be holding an educational event on billing – we will be sending an email out to members shortly.

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