**ISSUE 3: 13th February 2017**

DELF

DEFENCE EXTRADITION LAWYERS FORUM

# NEWS

Welcome to the monthly Defence Extradition Lawyers' Forum newsletter. In this, our third edition we set out what we've been up to and in an effort to provide an international comparative slant to the newsletter, review the decisions of the Dutch courts in respect of the cases Aranyosi and Caldararu and the recent report of the French General Controller of the places of deprivation of liberty.

## Our recent activities

### *Liaising with the Administrative Court Office*

On 13 December 2016 members of the DELF committee met with the Administrative court lawyers and administrative staff to discuss working practices. We discussed a number of issues:

- In spite of representations by DELF about the 2.30 deadline for submissions of detailed grounds/renewals. The deadline still applies to email submission. Extensions of time can be sought. The deadline for a hard copy submission is 4.30pm.

- The issue of standard directions for the submission of bundles and skeletons was discussed. DELF submitted that the present 4 week deadline for bundles and 3 weeks for skeletons was too long given the listing times. The Admin Court are going to discuss the matter with the judiciary and hope to make a more realistic set of deadlines as standard

- The Listing Officer confirmed that their timetable is to list renewals within 1 month and full hearings within 2.

- The Court supplied DELF with details of how solicitors can apply for a fees account to prevent the need to attend court or post a cheque. This will enable electronic payment. We will circulate this information by e-mail.

- The Admin Court are looking at a method of accepting Appeal Notices by email. Presently this is not possible; the DELF committee will discuss this at our next meeting in the Spring and update the membership of developments.

- The Admin Court asked when representatives are filling in appeal notices they give details of secure e-mail addresses are as the Admin court cannot send out acknowledgments to non-secure email addresses.

- The Admin Court asked that the DELF committee alert members to the importance of coming off the record in good time and letting the Court know when you are not acting using the relevant form.

If you have concerns or matters that you would like raising at the next meeting please let us know by email.

### *The Criminal Procedure Rules Committee*

DELF hopes to enter into a continuing engagement with the Criminal Procedure Rules Committee. If you have any matters relating to the Rules which you would like to raise, please do get in contact with us by email your suggestions to ben.lloyd@6kbw.com. The next meeting will take place on 17 March 2017; please provide us with any suggestions by 6 March 2017.

### *Call for English Translations of Publicly Available Material*

Most of us have had the frustrating experience of discovering a relevant European Court of Human Rights decision, recent CPT report or some other open-source material, only to find that there is no English version available. We have even found that that some of our members have then been obtaining their own English translations of the same documents. With a view to saving time, effort and money, DELF would like to compile a database of publicly available material that has already been translated into English. If you would like to contribute to this with documents that you have had translated then please do not hesitate to contact us at enquiries@delf.org.uk .

### *High Court Listings*

Ms Jyoti Gill, the ACO Lead Lawyer for extradition matters will be writing to the Listing Office reminding them that it is not appropriate for substantive appeals to be heard by the same single Judge that refused permission to appeal on the papers. To our knowledge this has happened twice in 2017, prompting Counsel to raise the point which either led to the case being removed from the daily cause list or the Judge recusing himself.

Members might like to note that we have been informed by the High Court listing officer that there is an informal policy whereby no extradition cases are listed on Mondays.

## Case Law Update

### *The implementation of Aranyosi & Căldăraru (ECLI:EU:C:2016:198) in the Netherlands*

The first time the Amsterdam District Court[1] had to rule on the implications of the *Aranyosi & Căldăraru* judgment *d.d.* 5 April 2016 (ECLI:EU:C:2016:198) was only three days after the CJEU had delivered its judgment.

On that occasion, the Amsterdam court ruled that *Aranyosi* implies a two-stage test (ECLI:NL:RBAMS:2016:2630). The first step of this test is whether, in general, the prison conditions in a certain Member State as a whole (or a specific prison within that Member State) lead to a real risk of inhuman or degrading treatment. If, and only if, such a general risk has been established will the Amsterdam court proceed to the second step which requires an assessment of the existence of such a real risk in the specific situation of the wanted person.

The burden of proof in relation to the first step is, in practice, on the wanted person although in some (clear cut) cases the court may act *proprio motu* based on information it already has at its disposal. If the wanted person succeeds in establishing a general risk of ill-treatment, the Amsterdam court will request additional information / guarantees from the authorities of the issuing State.

[1] The Amsterdam District Court has exclusive jurisdiction in all Dutch EAW cases. Its decisions are not subject to any ordinary appeal.

For both situations (whether it is the entire prison estate within the individual member state or only a specific prison within the member state) the Amsterdam court will rely heavily on judgments of the European Court of Human Rights (ECtHR) and reports of the Committee for the Prevention of Torture, sometimes supplemented by information from NGOs[2].

If prison conditions are problematic in a Member State as a whole[3] the wanted person does not, of course, have to establish in which prison he will be detained after surrender. If the situation is only unacceptable in a specific prison, the Amsterdam court appears to use as a test that it should not be unlikely that the wanted person will be detained in this prison.[4]

So far, the Amsterdam court has ruled on the (non-)existence of a general risk of ill- treatment (thus requiring additional information / guarantees) in relation to the following Member States and/or specific prisons, as set out in the table overleaf. [Please note that the case references set out in the table reflect the way in which cases are named in the Netherlands, the decisions themselves are fairly easy to find if you enter the reference into an internet search engine – *Ed*].

Absent (satisfactory) information / guarantees[5] that the general risk of ill-treatment will not materialize in the case of the wanted person, the Amsterdam court will decline to rule that the surrender is permissible. Interestingly, however, it will not *refuse* the surrender of the wanted person even though it has the authority to do so pursuant to art. 11 of the Dutch Surrender law.[6] Instead, the Amsterdam court will postpone its decision on the permissibility of the surrender *sine die* until it has received information that there no longer is a real risk of inhuman or degrading treatment.

This choice is particularly problematic for wanted persons detained on the basis of the EAW. After all, since a definitive decision on the permissibility of the surrender is postponed, the detention order will in most cases not be lifted, at least not during the initial months of the postponement.[7]

The first decision in which the Amsterdam court has decided to postpone its assessment of the validity of the EAW is now almost 9 months old.

Not surprisingly, such a postponement could not last indefinitely and on 26 January last, the Amsterdam court delivered a long awaited decision clarifying how it will proceed in cases like this (ECLI:NL:RBAMS:2017:414):

> "*The reasonable time period during which the real risk has to be discounted is not intended to provide the issuing State with an opportunity to expand its detention capacity in the future and improve the general detention conditions, but to provide the issuing State with an opportunity to submit additional information as to how, given the current detention capacity and current general prison conditions, a real risk for the wanted person can be discounted. The court will therefore not follow the Prosecutor in her proposal, submitted in the alternative, to request the Romanian authorities as to when the general prison conditions will improve. It should be noted in this regard that, also without an expansion of the detention capacity and improvement of the general prison conditions, it is possible to provide*

[2] Such as, for example, the Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR-CH).
[3] So far the Amsterdam Court has only established such a risk in relation to Romania, see the table overleaf.
[4] See, for example, ECLI:NL:RBAMS:2016:6316 (Not unlikely that the wanted person will be placed in Lisbon prison because he hails from that city and the judgment in question was given by the Lisbon Court of Appeal).
[5] For example, a request to indicate in which specific prison the wanted person will be placed and the space available per prisoner there and/or a guarantee that the prisoner will not be placed in a specific prison (*Cf.*, for example, ECLI:NL:RBAMS:2016:6316; and ECLI:NL:RBAMS:2016:9099). In relation to the Lisbon prison, the Portuguese authorities have, so far, been unwilling to provide a guarantee that the wanted person will not be detained there.
[6] As far as I am aware, German courts also refuse the surrender rather than postpone their decision on the EAW.
[7] That being said, the Amsterdam court has ruled in at least one case that now that there were no indications that Romanian prison conditions were going to improve in the short term (and thus that the EAW proceedings would continue to be conducted with sufficient diligence) the wanted person had to be conditionally released (case 13/751069-16). It should be noted, however, that in this decision the Amsterdam court also explicitly took into account the time already spent in surrender detention by the wanted person *vs.* the duration of the prison sentence imposed by the Romanian court.

**A table showing the decisions of the Dutch Courts, prepared by Thom Dieben.**

| Country | General country wide risk? | Case reference | General risk in relation to a specific prison? | | Case reference |
|---|---|---|---|---|---|
| Belgium | No | ECLI:NL:RBAMS:2016:3943[1] | | | |
| Croatia | No | ECLI:NL:RBAMS:2016:4596 | | | |
| France | No | ECLI:NL:RBAMS:2016:3123[2] | | | |
| Hungary | -[3] | - | Budapest Penitentiary Institute | No | ECLI:NL:RBAMS:2016:4966 |
| | | | Szombathely prison | No | ECLI:NL:RBAMS:2016:4966; ECLI:NL:RBAMS:2016:5712; ECLI:NL:RBAMS:2016:7720; |
| | | | Tiszalök prison | No | ECLI:NL:RBAMS:2016:4966; ECLI:NL:RBAMS:2016:5712; ECLI:NL:RBAMS:2016:7720; |
| Italy | No | ECLI:NL:RBAMS:2016:4597 | | | |
| Latvia | No | ECLI:NL:RBAMS:2016:4857; ECLI:NL:RBAMS:2016:6014 | | | |
| Poland | No | ECLI:NL:RBAMS:2016:3081; ECLI:NL:RBAMS:2016:8325 | | | |
| Portugal | - | - | Lisbon Prison | Yes | ECLI:NL:RBAMS:2016:6316; ECLI:NL:RBAMS:2016:9099 |
| Romania | Yes | ECLI:NL:RBAMS:2016:2630 | Arad prison | No | ECLI:NL:RBAMS:2016:2629 |
| | | | Brăila prison | Yes | ECLI:NL:RBAMS:2016:2630 |
| | | | Bucharest – Jilava Hospital Prison | Yes | ECLI:NL:RBAMS:2016:7499 |
| | | | Craiova prison | Yes | ECLI:NL:RBAMS:2016:4598 |
| | | | Galati prison | Yes | ECLI:NL:RBAMS:2016:2630 |
| | | | Gherla prison | Yes | ECLI:NL:RBAMS:2016:4591; ECLI:NL:RBAMS:2016:4599 |

[1] This case concerned the situation in Belgian prisons during the prison guards strike

[2] This case specifically concerned the treatment of suspects of terrorism offences in French prisons.

[3] Oddly enough, as far as I was able to ascertain, the Amsterdam District Court has never ruled on the prison conditions in Hungary in general. Presumably, because in all published cases it was already clear where the wanted person would be detained before the court was requested to rule on the validity of the EAW. The court could therefore focus on the prison conditions in that specific prison rather than in the country as a whole.

*additional information about the current detention conditions that will exclude a real risk for the wanted person.*

*The* Aranyosi and Căldăraru *judgement does not prescribe the opinion that the reasonable time period is equal to the time period for a decision on the EAW. On the contrary, it follows from the reference to ar. 17, par. 7 of Framework Decision 2002/584/JHA in par. 99 of the judgement that a postponement of the surrender qualifies as an "exceptional circumstance" referred to in that provision. It is therefore not logical, to, in case of such an* exceptional *circumstance, prescribe the term limit that applies to* regular *circumstances. The court will therefore reject the argument submitted by the Defence that the reasonable time period is a maximum of 90 days.*

*For the rest, the question as to which time period should be considered reasonable cannot be answered in general. The answer to this question depends on the specific circumstances of the case.*
*In the present case, the Court postponed its decision regarding the surrender on 28 April 2016. The Court is of the view that in this specific case the reasonable time period has been exceeded.*"

Interestingly, the Amsterdam court did not agree with the argumentation of both the Defence and the Prosecutor that – should it rule that the reasonable time period had been exceeded – the surrender ought to be refused:

"*In cases where the real risk for the wanted person cannot be discounted within a reasonable time period, the executing judicial authority must decide 'whether the surrender procedure should be brought to an end' (*Aranyosi and Căldăraru*, par. 104). It is therefore not compulsory that the surrender proceedings are brought to an end in case of an exceeding of the reasonable time period. In the present case, however, the Court sees no reason to refrain from ending the surrender proceedings.*
*Since Dutch surrender law does not provide for a possibility to end the surrender proceedings as such, the question arises as to which decision exactly a bringing to an end of the surrender proceedings should lead.*

*Contrary to what has been argued by the Defence, the Court is of the view that the* Aranyosi and Căldăraru *judgement excludes the possibility that the surrender is refused in cases where the reasonable time period has been exceeded. Par. 80 of the judgement reiterates that the grounds for refusal and guarantees have been exhaustively listed in articles 3-5 of Framework Decision 2002/584/JHA. There are no indications that the judgement makes an exception in this regard in case of an exceeding of the reasonable time period. On the contrary, it follows from the use of the words 'bringing to an end of the surrender proceedings' – and not 'refusal of the execution of the EAW' that such an exception was not provided for.*

*As the Court has previously held, article 11 of the Dutch Surrender Act can only be applied 'when the court has ruled on the preliminary question of the admissibility of the Prosecutor's motion to rule on the validity of the EAW' (ECLI:NL:RBAMS:2016:2630). Since a refusal of the surrender on the basis of article 11 of the Dutch Surrender Act would be contrary to EU law, the Court will bring the surrender proceedings to an end by declaring the Prosecutor's motion to rule on the validity of the EAW inadmissible.*"

For the wanted person in question, the outcome of this rather academic discussion of refusal *vs.* inadmissibility was to a large extent irrelevant. In both scenarios the surrender proceedings would come to an end and the detention order would be lifted. The only downside of the Amsterdam court's choice for inadmissibility of the Prosecutor's motion rather than an outright refusal of the surrender is that he will not be able to claim compensation for damages resulting from the surrender detention as well as his legal fees (if any). After all, art. 67 of the Dutch Surrender Act only provides for a possibility to claim compensation in cases where the surrender has been refused by the Amsterdam court. It is consistent case law of the Amsterdam Court of Appeal that there is no room to expand the application of this article to cases where the Prosecution's motion to rule on the validity of the EAW has been declared inadmissible (see, for example ECLI:NL:GHAMS:2012: BY4702).

*Thom Dieben. Jahae Ravmakers*

## *Rats, overcrowding, dilapidation: the conditions in the French Fresnes prison breach Article 3 of the ECHR*

On 14th December 2016, the French General Controller of the places of deprivation of liberty (the "Controller") published her report on conditions in the male section of the Fresnes prison in the Official Journal of the French Republic (the "Report," which is available in French here: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033586582&categorieLien=id ).

The Controller is an administrative authority created by law No. 2007- 1545 of 30th October 2007. It is independent, in that it does not receive any instructions from any other authority. The Controller (or his/her representatives) is allowed to visit at any time places where individuals are deprived of their liberty, including mental institutions, police stations, waiting zones in airports, vehicles used for the transfer of prisoners etc.. The Controller's core mission is to ensure that the conditions in places where individuals are deprived of their liberty are compatible with their fundamental rights.

The Report was published following a visit of the male section of the Fresnes prison by 12 representatives of the Controller from 3rd to 14th October 2016. The Fresnes prison is one of the three main prisons in the Paris region and one of the biggest prisons in France.

The Report concludes that owing to a number of serious failures, the conditions of individuals deprived of liberty in the male section of the Fresnes prison amount to inhuman or degrading treatment within the meaning of Article 3 of the European Convention on Human Rights ("ECHR").

### *Summary of the Report*

The Report is divided up in two core sections, section 1 which is entitled "*the overcrowding of the prison, together with an insufficient number of staff does not permit the respect of prisoners' fundamental rights*" and section 2 which is entitled "*the weakness of the prison's management allows the development of practices which violate the prisoners' fundamental rights*".

Section 1 discusses overcrowding, inadequate buildings, hygiene and the number of staff, training and supervision.

*In respect of overcrowding*, the Report notes that the number of prisoners in Fresnes prison has increased by 52% between 2006 and 2016. It explains that prisoners are housed in three different buildings, depending on their situations.[8] All these buildings are overcrowded. Their occupancy rates amount to 159%, over 199% and 201%, respectively.

The Report also states that only 13% of the Fresnes prisoners benefit from an individual cell, 31% of the prisoners share a cell with one other prisoner and **56% of the prisoners share a cell with two other prisoners**. In respect of the latter category of prisoners, three prisoners live in 10 sq. m. cells. Once the space for the beds, the toilets and the table is deducted, **they live in a space of around 6 sq. m. for three individuals**. The Controller concludes that this is below the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The Report further describes the state of the prison's visiting rooms and yards. The visiting rooms measure 1.3 or 1.5 sq m. which means that two people cannot sit opposite each other without crossing their legs. The walls are covered in saltpetre and dirt. Despite these conditions, prisoners are often put in these rooms with three visitors, including children.

[8] The first building houses arriving prisoners, prisoners in solitary confinement and individuals whose offence is linked to the radical practice of Islam as well as those individuals whose case is in the media. The second building houses individuals who are serving sentences as well as individuals remanded in custody pending their trial. The third building houses a large proportion of foreigners and individuals who are working or participating in learning.

As for the prison yards, they are described as small, not equipped with benches, shelter or toilets. The lack of toilets leads prisoners to urinate in plastic bottles which they throw over the walls.

*In respect of hygiene*, the Report insists on the fact that rats are everywhere in the prison. They are not afraid of humans and their smell is pervasive: "***the smell of their fur, their excrement and their dead bodies adds up to the piles of rubbish at the bottom of the buildings***." This constitutes a risk for prisoners' health. In 2016, two serious cases of leptospirosis were reported. The Report also describes the infestation of bed bugs and the fact that many prisoners are covered with bites.

The Controller concludes *inter alia* that the conditions observed in the male section of the Fresnes prison is comparable to the situations that the European Court of Human Rights considered to be a breach of Article 3 ECHR in *Canali v France* (App. No. 40119/09), 25th April 2013 (available in French here: http://hudoc.echr.coe.int/eng#{"itemid":["001-118735"]} ).

*Regarding the prison staff*, the Report describes the insufficiency of the number of prison staff, their training and management. It recalls that since 2012, the number of prisoners has increased by 20%, whilst the number of staff has remained almost unchanged. In addition, the direction of the prison estimates that **around 70% of the prison's staff consists of interns**. This means that, in addition to its lack of experience, the staff are materially unable to ensure that prisoners benefit from planned activities or care because they do not have enough time to arrange for the movements that would be necessary for the prisoners to be able to access those activities or care (e.g. they do not have enough time to open and close the doors and bring the prisoners to the relevant place within the prison).

Section 2 focusses on the use of force by staff, the violence in the prison as well as the fact that some of the Controller's prior recommendations have not been implemented.

*In respect of the use of force*, the Report notes that the use of force is trivialised and immediate whilst the necessity of its use is not always clear. It refers to the fact that staff violence has been reported in 10% of the 190 confidential interviews with prisoners conducted by the Controller's representatives.

*As for violence between prisoners*, it is said to be frequent, in particular, in showers, waiting rooms and prison yards where surveillance is either minimal or inexistent.

*The recommendations previously made by the Controller and not implemented* include putting an end to the automatic body search before prisoners are allowed into visiting rooms, discontinuing the systematic use of overcrowded waiting rooms with no facilities, ceasing the publication of the list of people benefiting from opioid substitution treatments.

### *Photos*

The Controller has published photos to accompany her report which can be access through her website:

http://www.cglpl.fr/2016/recommandations-en-urgence-relatives-a-la-maison-darret-des-hommes-du-centre-penitentiaire-de-fresnes-val-de-marne/

### *Response of the Minister of Justice*

In its appendix, the Report contains a letter from the Minster of Justice which purports to respond to the Report. In essence:

- the response insists on improvements to the furniture in the cells and the visiting rooms as well as new cleaning equipment.
- The Ministry has engaged the services of a new rodent control provider and engaged in works to limit rodent proliferation. The budget invested in the works amounts to 151,000 € for one part of the works and 776. 100 € for the other part of the works.

It has also asked the company currently providing meals that they be of better quality to reduce the amount of food thrown of the windows. A tender has also been set up to find a new service provider for insects' disinfestation. Mattresses will be checked.

- The Minister states that 91.61% of the staff necessary to run the prison is currently onsite. This number will reach 95.6% by March 2017. However, the Minister's calculation is based on an occupancy rate of 100%, as opposed to 202% (which the Ministry says is the current occupancy rate).
- Violent incidents against staff and between prisoners are diminishing.
- The Minister agrees that the list of people benefiting from opioid substitution treatments should no longer be public. He agrees the prison has to apply the law in relation to body search.
- He has given instructions regarding the use of waiting rooms. He affirms that if rules of ethics are not respected by prison staff, he will not hesitate to take disciplinary measures.

### *Consequences on extradition requests from France*

This Report is unlikely to bar all extraditions to France. It only relates to one prison where conditions are exceptionally bad.

However, the Report makes it clear that the conditions in the male section of Fresnes prison breach Article 3 ECHR. It seems that the Minister's response is insufficient to address the concerns raised by the Report, not least because it does not dispute the level of overcrowding in the prison. As a result, it is likely that France will have to issue assurances for extradition from England to be ordered.

In this context, the Report's suggestion that any undertaking made by the Minister should be treated with care is noteworthy. The Controller refers to a letter from the director of Fresnes dated May 2016 which states that the conditions in Fresnes prison are improving. This letter was produced by the Ministry in the context of Court proceedings brought against the French State by the International Observatory of Prisons in early October 2016 in relation to the conditions in the Fresnes prison. The Controller notes: "*the improvement alleged in May by the director of the prison is by no means in keeping with the reality observed four months later. The Controller can thus only be surprised that the administration used this letter before a judge at a date where the unrealistic character of it had become obvious*."

*Emilie Gonin, Doughty Street*

## Forthcoming events

### Save the date!

To tie in with the expected triggering of Article 50 we are planning to present the first of what we hope will be a series of "Brextradition" seminars at the end of March. Further details to follow, so please watch this space (and your e-mails).

## Membership

Membership runs from January to December annually. If you wish to join DELF for the first time from 01 January 2017, please e-mail your name, professional title, firm / chambers / employer, e-mail address and the category of membership that you wish to join DELF under, with "DELF Membership" in the subject heading to the e-mail address membership@delf.org.uk and follow the payment instructions set out below.

If you are simply renewing your existing 2016 membership from 01 January 2017, please follow the payment instructions set out below.

Fees for 2017 will be as follows:

**£50** - Full Membership - Open (subject to approval by the Committee) to any Solicitor, Barrister or member of the Institute of Legal Executives practising in the field of extradition and legal academic staff, whose practice includes representing requested persons in extradition cases. Full membership is also open to lawyers practising outside of England and Wales whose practice includes representing requested persons in extradition cases

**£25** - Associate Membership - Trainee Solicitors, Pupil Barristers and Paralegals

**£15** - Correspondent Membership - Open to court staff and other lawyers practising in the field of extradition

Membership fees are due by 31 December 2016, but if paid by 22 December 2016, a 10% discount will apply. Fees can be paid in a group payment by a firm or Chambers administrator, or can be paid individually. If you are paying for more than one member in the same transfer, please email the details of who you have paid for and at what levels of membership they are joining at to membership@delf.org.uk after you have transferred the membership fees.

If you are simply paying for your own membership fee, please use your name as a reference on the bank transfer. There is no need to email to confirm if the name is used as the reference on the bank transfer.

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- Defence Extradition Lawyers Forum
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