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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the monthly Defence Extradition Lawyers Forum newsletter, in this edition Daniel Sternberg considers the role that the Court of Justice of the European Union will play in UK extradition arrangements post-Brexit; Benito Capellupo and Giovanna Fiorentino consider the amendments to article 175 of the Italian Code of Criminal Procedure and how it affects the question of trial in absence and a fugitive's rights on return to Italy and Myles Grandison provides a summary of our March seminar, "Immigration and extradition: what's the difference and why does it matter?" We update you on forthcoming events and our activities over the past month and explain how you could get involved.

Our Recent Activities

DELF activities

We continue to engage with LAA over various issues. If anyone has anything specific they would like us to raise, please do get in touch with us at enquiries@delf.org.uk

DELF continues to make representations on behalf of its members to the Criminal Procedure Rules Committee. In March, DELF raised the issue of the electronic service of documents in extradition appeal proceedings (with thanks to James Stansfeld) and in April we filed extensive representations upon the overlap of extradition and family proceedings (with thanks to Mary Westcott and Amelia Nice). If members have any issues they would like DELF to raise with the Criminal Procedure Rules Committee, then please email Ben Lloyd (ben.lloyd@6kbw.com).

Legal Update

Frozen in Time? The Court of Justice of the EU after Brexit

The shape of the UK's extradition relations with the EU after Brexit are unknown. While continuity is expected in the

UK's relations with extradition partners outside of the EU and the European Arrest Warrant (subject to any manifesto commitments in this general election to withdraw the UK from the European Convention on Human Rights), what of the vast bulk of extradition cases currently before the English courts involving EAWs? Reducing co-operation on security and criminal justice is not in the interest of either the UK nor the remaining EU27 states. However, the regulation of any future agreement to keep the UK-EU's extradition relations running smoothly is critical and raises difficult questions.

The (current) Home Secretary has described remaining in the EAW as a priority for the Government in Brexit negotiations. Similarly, the European Commission's recent 'non-paper' on key elements for Brexit negotiations prioritises both ongoing judicial co-operation between Member States and the UK under EU law and ongoing administrative and law enforcement co-operation.

This raises the prospect that the UK could find itself subject to the judgments of the Court of Justice of the EU ('CJEU') in order to retain membership of the EAW, but with no influence over either legislation, in the form of Framework decisions and directives, or case law, being unable to appear before the CJEU to put forward Britain's interests there.

Most difficult of all is this question: 'What role will the Court of Justice of the EU have in regulating the UK's future extradition relations with the EU?'

The prospect of the UK being in the European Arrest Warrant but without influence over how it is governed, amended and interpreted does not sit well with the UK Government's stated desire to break the link with the CJEU. There are no obvious models to adapt. Professor Steve Peers of the University of Essex has noted (on Twitter) that Norway has adopted some EU criminal justice JHA measures which are not subject to the CJEU. Norway is not in the EAW.

In the short term, if the UK can continue as a member of the EAW either permanently or under a transitional deal, there will be no change. The UK Government has accepted that the case law of the CJEU will continue to apply at the date of the UK's exit from the EU. What happens after that? Will English courts have to apply the case law of the CJEU as it stands at the date of exit, ignoring any future developments? Or will they be willing to take account of subsequent CJEU decisions, even if we are no longer EU members and not subject to the CJEU's jurisdiction for the purposes of operating the EAW? Practically, the existing case law of the CJEU, including the recent decisions in *Bob-Dogi* and *Arranyosi* will have the status of decisions of the Supreme Court. Superficially, how would this work in practice? Critically, if the CJEU changes its mind on a technical or substantive matter of EU law and reverses its earlier decisions the UK could be stuck with law that our EAW partners regard as out of date or incorrect. What becomes of mutual trust and confidence between Judicial Authorities where our partners cannot rely on us to interpret EU law in a uniform way?

Paragraph 33 of the European Commission's recent 'non-paper' suggests that the exit agreement and any agreement for future dispute settlement must contain 'a provision according to which future case-law of the Court of Justice of the European Union intervening after the withdrawal date must be taken into account in interpreting such concepts and provisions should be included.' What does this mean? An obvious interpretation is that any future extradition agreement between the UK and the EU would be subject to interpretation by the CJEU. Once again it is difficult to see how the EU 27 could agree that they will be subject to the case law of the Brussels court but the UK will be free to ignore the decisions of that court in interpreting the same agreement. In an area of law with as much at stake as extradition, the practical operation of such an agreement is critical. There will have to be compromises if both sides are to make it work.

The Chairman of the Bar, Andrew Langdon QC says it is 'difficult to see how the Supreme Court could be prevented from absorbing the future jurisprudence of the CJEU' in the New Law Journal. That seems sensible enough but if English Courts after Brexit are to apply earlier decisions as if they emanate from the UK Supreme Court and can take

account of future decisions, then it is hollow to suggest the UK's link with the CJEU has been broken.

In a recent blog the ICLR's Paul McGrath asks 'is reporting EU case law now a waste of time' and opines that the precedence of EU law after Brexit 'will disappoint the Brexiteers who yearn to see a great bonfire of regulations and EU-derived red tape. They will need to be patient.' This raises the prospect of EU law after Brexit having a limited half-life: once the UK (or what is left of England and Wales) enacts new domestic law then EU law will cease to apply. However, the Government's White Paper on Brexit states that new domestic law will take priority over pre-existing EU law, but EU law that is in force at the time of exit will still take precedence over purely domestic law.

All of this leads to a real prospect that 'taking back control' will leave the UK with less control over its extradition relations with the EU 27 than it has now. We may find ourselves subject to the current and future case law of the CJEU with no influence over it at all. The alternative is to accept the snapshot of EU law at the date we leave, risking the UK's extradition law being trapped in stasis, frozen in time.

Daniel Sternberg, 9 -12 Bell Yard

International Legal Update

Avv. Benito Capellupo and Giovanna Fiorentino update us on Article 175 of the Italian Code of Criminal Procedure and new time limits to challenge the outcome of a trial in absentia

Definition of "fugitive" (*contumace*) and trial in absentia

The definition and the discipline of the status of "fugitive" in Italian law has undergone, over the course of the years, an evolution that has radically changed its meaning. Trial in absence is, at times, the legal position of the Defendant who - even if properly summonsed for trial – or preliminary hearing – fails to appear in Court, in the absence of a legitimate impediment, before the judge.

The definition of "fugitive", governed by art. 420 *bis*, *ter* and *quater* of the Code of Criminal Procedure (C.P.P) has been subject over the years to several amendments, the last of which was effected by law n. 67 of 28 April 2014. Originally and prior to the above mentioned law n. 67, the conditions required to declare a Defendant "fugitive" were the following three: 1) correctly issued summon; 2) failure of the Defendant to appear; 3) lack of evidence that such failure to appear was the result of a legitimate impediment.

With the new law (n.67/2014) the provisions governing the status of a fugitive and the related applicable law - most notably the one imposing a requirement to notify the fugitive Defendant with a transcript of the judgment (ex article 548 ss III C.P.P) and which in turn established the time limit for the appeal – has been repealed and replaced by a specific set of provisions catering for the trial of the fugitive Defendant which it is claimed will speed up criminal proceedings whilst ensuring the Defendant has – at least formally - knowledge of it.

In particular, the "new" art. 420 *bis* C.P.P permits the trial *in absentia* of the fugitive Defendant when it is established that either the Defendant knew of the existing criminal proceedings against him; or that he has knowingly refused to accept notification of the trial or of some of its procedural acts.

Supreme Court SS. UU., Judgment no. 52274, Hearing 29 September 2016

A further significant contribution to the interpretation of "fugitive" and "trial in absentia" was given by the ruling of the *Supreme Court SS. UU., Judgment no. 52274, Hearing 29 September 2016.*

The Defendant, having been sentenced *in absentia* in the first instance to a term of imprisonment of 2 years, 2 months

and a fine of € 600,00 for various offences, applied to the enforcement court (*Tribunale dell'Esecuzione)* for a declaration of nullity of the previous proceedings against him and, in alternative, to be allowed a new time limit (per art. 175, par. 2 C.P.P) within which to appeal the judgment issued *in absentia*.

The Judge acceded to the defence request under art. 175, par. 2 C.P.P. for new appeal terms. The Defendant as a consequence, filed a request to avail himself of one of the special proceedings available to a Defendant in the first instance, namely abbreviated trial (*rito abbreviato)*. The request was rejected on account of its unavailability at that late stage of the criminal trial and the Defence appealed to the Supreme Court arguing, *inter alia*, that the Appeal Judge had failed to take into account the Defendant's lack of knowledge of the date of the initial trial and therefore his inability to lodge any sooner a request for abbreviated trial (*rito abbreviato)*.

The Second Division of the Supreme Court, called to adjudicate on this appeal, recognizing the existence of a conflict of jurisprudence on this point of law, referred the matter to the United Divisions. The question posed was "Whether the new terms to appeal a judgment given *in absentia ex* article 175, s. 2 C.P.P. permits a Judge on appeal to acced to a defence request to choose one of the special proceedings".

The United Divisions, having briefly illustrated the historical origin of the new terms for appeal provisions, concluded that in the specific case, the applicable legal provisions are, according to art. 15 *bis* of law n. 67/2014 those in existence before the entry into force of the said law, according to the principle *tempus regit actum*. The Supreme Court however went on to state that the current provisions contained in art. 175 c.p.p. should be read and interpreted in accordance with the rulings of the European Court of Human Rights (EctHR) which "encouraged" the Italian Parliament to take the necessary steps to guarantee to a Defendant, absent through no fault of his own, the exercise of the right of defence.

<u>The impact of law n.67/2014 on a defendant's right to appeal</u>

Prior to the amendments introduced by law n. 67/2014, the C.P.P only gave the Defendant tried *in absentia* limited defence rights on appeal, such as the re-calling of the evidence. Indeed, as a result of the amendments introduced by law n. 67/2014, and in line with the rulings of the ECtHR, art. 604 C.P.P. titled "Nullity" was modified and subsection 5 bis introduced in order to fully address the rights of the defence for the Defendant tried *in absentia*. In an instance of a failure to comply with arts. 420 *ter* (inability to attend of the defendant or defence lawyer) and 420 *quater* (suspension of the trial as a result of the absence of the defendant) C.P.P., the Appeal Judge shall declare the *in absentia* first instance judgment a nullity and remit the proceedings to the court of first instance. Likewise proceedings revert back to the judge of first instance if the Defendant is able to prove that his absence from the trial was due to lack of knowledge, through no fault of his. In this instance the Defendant will also be allowed to make an application to be admitted to one of the special proceedings disciplined by art.438 and 444 C.P.P (e.g. abbreviated proceedings or application of penalty upon request).

In order to ensure art. 175 C.P.P. is compatible with art. 6 of the ECHR and the principles of due process, it must be interpreted in a manner that allows a Defendant to exercise those rights he had previously been unable to exercise due to involuntary and blameless absence – provided the exercise of those rights can be exercised at the stage the proceedings have reached.

<u>Extradition</u>

In light of article 111 of the Italian Constitution and art. 175 par, 2 C.p.p. (as amended in accordance with the principles laid down in Article 3 of the Second Additional Protocol of the European Convention on Extradition art. 1, par.1 let.b, Law Decree 21.2.2005 n.15 converted in Law n. 60/2005) extradition based on a judgment *in absentia* is possible only when the Requesting State will provide legal remedies to the Defendant to appeal the final judgment.

The Defendant convicted in his absence whilst abroad and later extradited to Italy to serve a sentence, has the right to submit the request for relief within 30 days from delivery to the Requesting State as opposed to the time he became

aware of the conviction. The principle was established by the 4th Division of the Court of Cassation, with judgment n. 24860 of 12 June 2015 which quashed a decision refusing the application of art. 175 C.P.P. by the Court of Appeal of Rome.

In this case, the Tribunal of Rome convicted, in first instance *in absentia*. The Requested Person applied, *ex* art.175 ss.2 C.P.P. for new terms for appeal. The Court of Appeal rejected the request deeming the terms had expired as the Requested Person had been aware of the conviction prior to being formally served with the decision.

The reasoning of the Court of Appeal was not upheld by the Supreme Court which established that the 30 days terms envisaged by art 175 ss. 2, C.P.P starts from the day the decision is formally served on the Requested Person regardless of any factual prior knowledge of the proceedings or appointment of a lawyer of his choice. The Supreme Court noted that this is an additional necessary guarantee to allow the Requested Person detained abroad the full exercise of the rights of defence.

A brief overview of the provisions and its interpretation outline a panorama which at times clashes with a system condemned internationally as not fit for purpose and insufficient. The new law tends, whilst leaving unaltered the provisions on serving of summons and election of domicile, to certainly reinforce the importance for the Defendant to have effective knowledge of the proceedings.

Avv Benito Capellupo, Studio Legale Capellupo
Giovanna Fiorentino, Lansbury Worthington Solicitors

Immigration and extradition: what's the difference and why does it matter?

DELF's second lecture of the year, 'Immigration and extradition: what's the difference and why does it matter?' was hosted by Matrix Chambers on 21st March. We were privileged to have Hugh Southey QC, Gabriella Bettiga, Mark Summers QC and Helen Malcolm QC to present lectures on issues which straddled both immigration and extradition law.

Hugh Southey QC commenced proceedings by setting out the differences between extradition and deportation. Mr Southey then proceeded to focus on freedom of movement within the European Union and how that could be curtailed by the UK based on the conduct of an individual. He then set out the manner in which the legal tests differed depending on the period of time that the EU citizen had resided in the UK. As with extradition, the effect of Brexit on our deportation provisions is unknown.

Gabriella Bettiga provided an overview of deportation law before moving on to prisoner transfers within the EU. The first part of the lecture focussed on the various powers available to the State to deport individuals, either as a result of previous criminal convictions, national security concerns or because their remaining in the UK was not conducive to the public good. Practitioners were given examples of the main challenges raised in attempts to resist deportation. Ms Bettiga then proceeded to deal with the transfer of those serving sentences of imprisonment to other Member States. Whilst many extradition practitioners have had experience of applying for a sentence to be served in the UK following their client's arrest on the EAW, Ms Bettiga provided a useful insight into how arguments from the field of extradition law are now being used to oppose prisoner transfer from the UK. Prison conditions in Romania was one such example.

Mark Summers QC spoke on the topic of extradition and expulsion. Mr Summers explained what is often a tactical decision as to whether to seek extradition or wait for the host state to deport the individual. Mr Summers, with the assistance of case law, explained what was permitted and what could be construed as an abuse of process. Mr Summers then proceeded to deal with the case of *Turkey v Ozbek* [2014] EWHC 3649 (Admin) and some of the

criticisms that have been levelled at the judgment, given that the obtaining of British nationality removes any of the protection one would have received following the grant of asylum from the Requesting State.

Helen Malcolm QC dealt with the situation where there are concurrent asylum and extradition proceedings. This will involve lawyers needing to advise clients as to the best forum in which to raise their arguments. Whilst the extradition courts appear to be more receptive to challenges to prison conditions, the immigration tribunals are better adapted to considering witnesses who wish to remain anonymous. What became clear from Ms Malcom's presentation is that there is no "one size fits all" approach.

DELF is indebted to the speakers, all of whom presented their topics with eloquence and passion. We are also incredibly grateful to Matrix Chambers who kindly provided their venue for this lecture.

Myles Grandison, Temple Garden Chambers

Forthcoming events

Our inaugural annual dinner will take place today, **5 May 2017** at the magical 600 year–old Crypt at St Etheldreda's in Clerkenwell. This atmospheric venue promises to set the scene for a wonderful coming-together of all those who have helped to make DELF's first year. With a drinks reception and formal dinner, followed by music and mingling, the event promises to combine fantastic networking opportunities with a sparkling social occasion. With all that to take in perhaps it is no surprise that the event has now sold out! Thank you to everyone who has bought tickets and if you aren't able to make it this evening we look forward to seeing you at another event soon.

We'll also be holding an educational event on **7 June 2017** - details to be confirmed.

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

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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Contacts

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