**ISSUE 4: 21 March 2017**

DELF

DEFENCE EXTRADITION LAWYERS FORUM

# NEWS

Welcome to the monthly Defence Extradition Lawyers Forum newsletter, in this edition Anthony Hanratty considers the obligations on a District Judge where the requested person appears unrepresented and Dr. Anna Oechmichen considers Lithuanian prison conditions following the decision of a German Court. We update you on forthcoming events and our activities over the past month and explain how you could get involved and, after the sad loss of Clive Nicholls QC last month, John Hardy QC's eloquent tribute appears below.

## Our Recent Activities

### *DELF activities*

We continue to engage with LAA over various issues. If anyone has any burning issues, please do get in touch with us at enquiries@delf.org.uk

We are also making submissions to the Criminal Procedure Rules Committee - we welcome input from members.

We are holding a meeting with the Administrative Court on 6th April to talk about issues regarding appeals. If you have any comments that you would like us to pass on please provide these to us by close of play on 4th April.

## Case Law Update

### *Higher Regional Court of Saarbrücken: Extradition to Lithuania denied based on poor prison conditions, in particular, feared inter-prisoner violence*

On 5 October 2016, the Higher Regional Court of Saarbrücken declared an extradition of a Lithuanian citizen to Lithuania as inadmissible, based on human rights concerns (case number: Ausl 9/2016 (47/16)).

The requested person had objected his extradition for two reasons: (1) poor prison conditions, and (2) risk for his life since he owed one inmate in a Lithuanian detention facility 10.000€.

The Court took notice of the latest CPT report of 4.6.2014 concerning Lithuania, which outlined various shortfalls of Lithuanian prisons. Some inmates were held in cells where they had less than 2 square meters of personal space, many had less than 4 square meters. Further, cases of inter-prisoner and staff violence had been reported in some specific detention facilities. The Court therefore requested the Lithuanian authorities to ensure that the requested person would be detained in a detention facility that met the CPT and ECHR minimum standards and allowed representatives of the German consulate and embassy to visit and control that these standards were met. The response from Lithuania was, in a nutshell, that these guarantees were contained in the Lithuanian constitution and Code of Criminal Procedure, and that the standard living space of a detainee amounted to 3,6 square meters, which, in view of the Lithuanian authorities, was compatible with European standards. After the German prosecutor informed the Lithuanian authorities that this information did not suffice to meet the Court's concerns, Lithuania went on saying that important changes in the policy of enforcement of sentences had taken place in Lithuania, that the number of detainees had been considerably reduced since 2012, when the CPT had visited, and that the recommendations of the CPT had been implemented through legal reforms in the meantime.

The Saarbrücken Court ruled that extradition was inadmissible, since there were clear and specific indications that the requested person was going to be detained in a prison facility that did not meet European standards. The CPT had reported in some detention facilities **serious cases of ill-treatment by staff and inter-prisoner violence** which prison staff was unable to prevent, especially at night and on weekends. These findings, in particular the ones relating to inter-prisoner violence, were in line with the arguments raised by the requested person. In the absence of a diplomatic assurance mitigating this risk, extradition was denied. The merely general, abstract information provided by the Lithuanian authorities was not sufficient. Even the promise of 3.6 square meters rather confirmed the Court's concerns of degrading and inhumane treatment, because **a personal space of less than 4 square meters, as such, does not comply with the minimum standards of Art. 3, ECHR.**

The decision must be strongly welcomed, because it clarifies that

- less than 4 square meters of personal space does not meet European standards,
- (alleged) inter-prisoner violence can also be a ground for refusal of an extradition request, if such argument is confirmed by objective sources such as a CPT report
- merely general, abstract information on the legal guarantees or legal reforms provided by the requesting State are not sufficient to mitigate refusal grounds that relate to Art. 3, ECHR.

[The judgment is published in German at BeckRS 2016, 111700, you can find my German summary at FD-StrafR 2017, 385514.]

*Dr. Anna Oechmichen, Rechtsanwältin / Partner at Knierim & Krug Rechtsanwälte*

NB. This article has also been published by Fair Trials International.

***Following the decision in Weszka v Regional Court in Poznan, Poland [2017] EWHC 168 (Admin) Anthony Hanratty considers how a District Judge should deal with an unrepresented person.***

Most extradition defence lawyers will, at some point, be instructed to represent a client on appeal who has been unrepresented in the Magistrates' Court. This is usually due to the client falling foul of the Legal Aid Agency's extremely low income threshold;the client earns too much for legal aid but cannot afford private representation. They are then left to navigate complex extradition proceedings, an area which can challenge the most experienced of

extradition lawyers, without legal representation.

This can cause problems for defence lawyers on appeal when attempting to adduce evidence that wasn't before the District Judge or when trying to raise arguments that were not raised in the court below. Following *Hungary v Fenyvesi [2009] EWHC 231 (Admin)*, evidence which was "not available at the extradition hearing" as set out in s27(4) of the Extradition Act 2003 means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. Furthermore, §35 of *Fenyvesi* states:

> '*Even for defendants, the court will not readily admit fresh evidence which they should have adduced before the district judge and which is tendered to try to repair holes which should have been plugged before the district judge, simply because it has a Human Rights label attached to it.'*

Difficulties arise where requested persons are unrepresented before the lower court and, quite often, will have no idea what evidence is required during the extradition hearing or how bars to extradition apply. To what extent should the District Judge assist the requested person in having a fair and proper assessment of their arguments? This issue was considered by Mr Justice Blake in *Weszka v Regional Court in Poznan, Poland [2017] EWHC 168 (Admin)* which was handed down on 10th February 2017.

Mr Weszka's extradition was sought by the Polish Judicial Authority to serve a sentence of 16 months imprisonment for offences of fraud obtaining credit. He was unrepresented at his extradition hearing before District Judge Grant; his application for an adjournment to obtain legal representation having been refused. Although Mr Wezka gave live evidence at his hearing, he had not prepared a witness statement or bundle of evidence and '*may have confined himself to answering direct questions rather than giving an overview of his circumstances' (*§5 of the judgment). The District Judge ordered Mr Weszka's extradition to Poland and Mr. Wezka appealed, with the leave of the High Court.

On appeal, Mr Weszka sought to place fresh evidence before the court; namely a new translation of part of the EAW; a detailed psychiatric report; a witness statement; supplementary updates from himself and his present partner as to his domestic circumstances and e-mail communications with the Polish court. At the outset of the appeal the first two pieces of further evidence were admitted however Blake J withheld a decision on the rest of the evidence pending conclusions on some of the arguments advanced.

Blake J was invited by Counsel for Mr Weszka to give guidance as to the function of the District Judge in a case where the requested person in an extradition hearing is unrepresented.

In determining whether to accept the new evidence it was necessary for Blake J to consider the hearing before the District Judge. During live evidence Mr Weszka stated that there were no conditions attached to his suspended sentence and he did not have to report to probation or the police. As there were no conditions he wasn't in breach. Furthermore, the time he spent in prison up to the hearing was used instead of paying the court costs. At this point the District Judge interjected and indicated that he had never heard of a suspended sentence that has no conditions. Mr Weszka repeated that there were no conditions because he went to prison voluntarily. The District Judge is then recorded as challenging Mr Weszka's account. In his written decision the District Judge concluded:

> '*Although the warrant is silent about the reason for the activation of the suspended sentence the activation took place in 2013 which suggests that the requested person failed to comply with his probation requirement. I found Mr Weszka to be an unreliable and unsatisfactory witness on this issue of his sentence and Polish judicial procedure. It sounded very unlikely that he was sentenced to imprisonment subject to a condition that he did not return to Poland. I did not believe him when he said that the term of his suspended imprisonment was not subject to a probation requirement and that his Polish lawyer was unable to find out why his suspended sentence was activated.'*

In his appeal Mr Weszka adduced a fresh translation of part of the EAW which, contrary to the translated version before the lower court, revealed that there was no reference to probation but that the imprisonment was 'suspended conditionally for 5 years'. Further evidence from the judicial authority, served after the District Judge's decision, confirmed that Mr Weszka's sentence was activated due to the non-payment of compensation rather than breach of a probation requirement. Blake J held that, in the circumstances, he was satisfied that there were material errors of fact in the District Judge's conclusion as to the breach of conditions of the suspended sentence. The decision of the District Judge was set aside and a fresh determination made.

Blake J then went on to find that the District Judge's handling of a litigant in person did not conform with best practice as currently recommended to judges in the Equal Treatment Bench Book November 2013 edition. He highlighted the following paragraphs as relevant:

> *'19. The aim is to ensure that litigants in person understand what is going on and what is expected of them at all stages of the proceedings – before, during and after any attendances at a hearing.*
>
> *20. This means ensuring that:*
>
> *i) The process is (or has been) explained to them in a manner that they can understand;*
> *ii) They have access to appropriate information (e.g. the rules, practice directions and guidelines – whether from publications or websites)*
> *iii) They are informed about what is expected of them in ample time for them to comply;*
> *iv) Wherever possible they are given sufficient time according to their own needs.*
>
> *40. Judges are often told; 'All you have to do is ring Mr X and he will confirm what I am saying'. When it is explained that this is not possible, litigants in person may become aggrieved and fail to understand that it is for them to prove their case.*
>
> *i) They should be informed at an early stage that they must prove what they say by witness evidence so may need to approach witnesses in advance and ask them to come to court.*
> *ii) The need for expert evidence should also be explained and the fact that no party can call an expert witness unless permission has been given to the court, generally in advance.*
>
> *41. When there is an application to adjourn, bear in mind that litigants in person may genuinely not have realised just how important the attendance of such witnesses is. If the application is refused a clear explanation should be given.*
>
> *44. The judge is a facilitator of justice and may need to assist the litigants in person in ways that are not appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:*
>
> *a) Attempting to elicit the extent of the understanding of the party at the outset and giving explanations in everyday language;*
> *b) Making clear in advance the difference between justice and a just trial on the evidence (i.e. that the case will be decided on the basis of the evidence presented and the truthfulness and accuracy of the witnesses called).*
>
> *<u>The judge's role</u>*
>
> *48. It can be hard to strike a balance in assisting the litigant in person in an adversarial system. A litigant in*

*person may easily get the impression that the judge does not pay sufficient attention to them or the case, especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties.*

*a) Explain the judge's role during the hearing.*
*b) If you are doing something which might be perceived to be unfair or controversial in the mind of the litigant in person, explain precisely what you are doing and why.*
*c) Adopt to the extent necessary an inquisitorial role to enable the litigant in person fully to present their case but not in such a way as to appear to give the litigant in person an undue advantage).*

After finding that the District Judge's approach did not conform with best practice, Blake J went on to be critical of the way in which the District Judge handled Mr Weszka during live evidence. At §24 he noted that:

*'…the judge entered the forensic arena, expressed his own view on the appellant's account while it was being given so and did so on the basis of assumptions of Polish practice based on previous experience rather than the evidence adduced by the requesting state which assumptions have proved not to be accurate in material respects. For this reason also I consider that the decision making is flawed'.*

This judgment highlights the need for defence practitioners, who are instructed to represent previously unrepresented persons on appeal, to make enquiries as to the circumstances surrounding the evidence given by the requested person in the lower court to ensure that they were given a fair opportunity to put forward any arguments in resisting extradition.

Whilst this judgment provides useful guidance as to how District Judge's should deal with litigants in person, it is apparent that more can be done to protect the position of unrepresented persons. Most extradition duty solicitors will have represented clients at a first appearance who are told that it is their responsibility to obtain legal representation and that if they do not obtain representation prior to the extradition hearing then they should submit a statement to the court setting out their personal circumstances and why they do not want to be extradited. Is this sufficient?

Extradition is a complex and difficult area of law. It is almost inevitable that a requested person appearing for the first time at Westminster Magistrates' Court will not even know what extradition is, let alone what bars are available to them. It therefore follows that, if unrepresented, they will have no idea as to what evidence is required of them to substantiate any arguments that they may have. Perhaps a way forward would be for further guidance to be given to extradition judges as to what information should be provided to requested persons at first instance.
In circumstances where the judicial authority is represented by specialist extradition prosecutors, or counsel, then defence lawyers need to be active in ensuring that previously unrepresented clients are afforded the opportunity to obtain evidence and have a fair assessment of their case. Notwithstanding the fact that this could assist in applying to adduce fresh evidence under *Fenyvesi*, it could also help to ensure that the ever depleting arguments available on appeal are not depleted even further.

***Anthony Hanratty, Head of Extradition at Kaim Todner***

***Thanks to Emilie Pottle, the 36 Group and Kevin Kendridge, Kaim Todner for providing us with this update on the adequacy or otherwise of specialty protection in Polish Cases where an aggregate sentence has been imposed***

Permission has been granted by Garnham J to the Appellant in Kortas v Poland CO 4194/2016 to argue that Poland will not disaggregate a merged penalty where extradition has been ordered for some, but not all, of the underlying offences.

The Appellant has served factual and expert evidence showing that persons who had been extradited previously had not had their merged sentences disaggregated. Garnham J held that, "There is a properly arguable ground here, namely that the Polish authorities will not disaggregate the sentence so as to ensure that the applicant does not serve the sentence for the offence for which he was discharged by the DJ".

The case will be heard on 16 May by a Divisional Court.

The outcome of the appeal could impact a significant number of Polish extradition requests: specifically any request where a merged penalty has been imposed and the requested person has been discharged, or claims that he ought to be discharged, for one of the underlying offences.

***Thanks also to Thom Dieben, Jahae Raymakers, for providing this update on the Amsterdam District Court's recent decision on Bulgarian Prison conditions***

Last week, on 16th March 2017 the Amsterdam District Court published a decision it pronounced on 24 January of this year. In the decision the Amsterdam Court - referring to an unpublished decision of August 2016 - held that the prison conditions in Bulgaria as a whole lead to a real risk of inhuman or degrading treatment. The prosecutor was therefore instructed to request additional guarantees from the Bulgarian authorities. These guarantees were sufficient and the Amsterdam Court allowed the surrender. Despite this, the Court's assessment regarding the prison conditions in Bulgaria is interesting. It is understood that the Court will want to see additional guarantees in every Bulgarian EAW case.

The details of the decision are:

Date: 24-01-2017
Date of publication: 16-03-2017
Case no: 13/751847-16
ECLI-number: ECLI:NL:RBAMS:2017:588
Link: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:588

## Clive Nicholls QC - An Appreciation

Clive Nicholls QC died aged 84 on Thursday 9 February. He had fallen at his home and broken his hip some three weeks earlier. Surgery to repair the hip initially seemed to have been successful, but complications set in, and he gradually slipped away. He died surrounded by his family, to whom he was devoted. Until his fall, he had been his usual dynamic and indefatigable self.

Clive and his identical twin brother Colin were called to the Bar in 1957. They both graduated from Trinity College, Dublin and both became leading lights in their respective fields after joining Chambers situated, formerly, at Queen Elizabeth Building in Middle Temple, and, latterly, at 3 Raymond Buildings in Gray's Inn. Clive became head of Chambers in 1994, and served in this position until 2010. Both Colin and Clive took silk (in 1980 and 1981 respectively), both sat as Recorders of the Crown Court between 1984 and 1999, and both became Benchers of Gray's Inn (in 1989 and 1990 respectively.) Both continued to be active in advisory and academic work after their 80th birthday, and each remained (and, in Colin's case, remains) a welcome and valued member of Chambers.

Clive's was a stellar, glittering career. He had a wide range of work, and was able to apply his mind to legal issues in a number of disciplines. In particular, he specialised in extradition, and the roll-call of cases in which he appeared speaks for itself. The pinnacle of his career was the case of Chile's former head of state, Senator Augusto Pinochet,

which involved no fewer than three appeals to the House of Lords. He appeared in courts all over the world, and was internationally acknowledged as a leader in his field. He was the lead author of "The Law of Extradition and Mutual Assistance" (Oxford University Press), now in its third edition.

While he achieved real distinction in his career, Clive will be remembered for more than just the cases in which he appeared. For one who had achieved so much, he remained an engagingly modest man, never "pulling rank" or taking on "airs and graces". He was a genuine father-figure and mentor in Chambers, ever humorous, radiating dynamism and a formidable energy, but always making himself available to help members of Chambers who were not as successful as he. He particularly enjoyed leading new and relatively junior members of Chambers, and they invariably found the experience of working with him invaluable. He embodied and exemplified all the virtues of the Bar as a profession: his integrity and example were nonpareil, his courtesy to fellow barristers even in the most hard fought of cases never wavered, while his cheerful temperament and the pleasure he took in his work were qualities few of us could hope to match.

Above all, he was a loving and devoted husband and father to six children. The expression "both a pleasure and a privilege" has become something of a modern-day cliché, but, in Clive's case, it truly was both a pleasure and a privilege to have known him.

*John Hardy QC*
*3 Raymond Buildings*
*February 2017*

## Forthcoming events

A reminder about our next DELF talk on **21 March 2017**: **Immigration and extradition: what's the difference and why does it matter?** With speakers Gabriella Bettiga, Helen Malcolm QC, Mark Summers QC and Hugh Southey QC. The event is free for members and £20 for non-members. To sign up, please email events@kingsleynapley.co.uk

Our inaugural annual dinner will take place on **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.

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

## Other News

District Judge Tan Ikram has been appointed the new Deputy Senior District Judge at Westminster Magistrates' Court.

## 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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