ISSUE 7: 9 August 2017

DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the August edition of the Defence Extradition Lawyers Forum newsletter. In this edition James Stansfeld looks at the validity of EAWs which fail to comply with s.2(2) of the Extradition Act in light of *Alexander & Di Benedetto v France & Italy;* Anna Demenko reports on changes to the judiciary in Poland; and Thom Dieben provides an update on Dutch decisions in relation to Belgian prison conditions and Moldova.

Our Recent Activities

Representations to the LAA

On 19 July, DELF submitted its response to the LAA's request for further information on which items should not be reduced or removed when considering requests for CRM4 prior authority and CRM7 appeals. DELF made the following representations:

Reductions

In general, experts are best placed to assess how many hours are required for providing a report once the material has been reviewed. With regards to psychologists' hours, DELF noted that psychologists are routinely required in Article 8 cases. Given that most psychologists with the necessary experience of extradition live in London, as that is where extradition proceedings take place, the LAA should consider that it is frequently very difficult to find suitable local psychologists and not expect solicitors to instruct experts without the relevant expertise simply to save money.

There appeared to be an overall reduction on uplifts to the extent that it appeared to be a policy decision. The LAA appeared to be basing these decisions solely on 'undue burden', which is only an element of the overall test. Arbitrary reductions lead to appeals which are then mostly granted.

Delays in decisions on prior authority and reductions in the time it takes to makes these applications were also raised.

Removed items

Travel costs, particularly in relation to travel times for interpreters and costs for experts in visiting Requested Persons, were raised.

The issues surrounding interim payments are causing difficulties for practitioners when instructing experts. Cases frequently continue for over a year and experts have no certainty over when they are going to be paid. Coupled with low remuneration rates, it is increasingly difficult to find experts who will accept instructions in extradition cases.

CRM4/7/CRM7 appeal

The LAA should take into account the amount of time it takes for practitioners to prepare bills and/or appeals, as the amount of detail required to argue for uplift is becoming increasingly unreasonable. It is often noted that certificate for counsel means that work done by the solicitor is eligible for uplift. The work done by each is very different and does not mean the case is any less complex.

There is general frustration with the CRM4 application system. Frequently, these applications are front-loaded with the necessary attachments and documentation, only to find that the application is returned with those same documents being requested. The granting of CRM4 applications with the LAA cutting down the hours requested is futile, as it closes the application, which then has to be re-started or appealed. Often, these decisions appear arbitrary, which makes appealing them difficult, as we do not understand the basis for refusal.

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

Administrative Court meeting

DELF met with the Administrative Court on 1 August at which the following was raised/discussed:

- Court wi-fi is currently being upgraded and is due to be up and running in 2019;
- There are approximately 20 Romanian cases awaiting final determination. Where there is an application to re-open an appeal, practitioners should ensure that s.36 applications to extend time for removal are made by the CPS notwithstanding informal agreements not to remove until after determination of appeals;
- A few Romanian cases appear to have been listed for hearing; however, no more will be listed until a decision in *Grecu* has been made;
- There is an Admin Court Users Group which meets three times a year. This is mainly focussed on immigration and judicial review issues, however DELF has been invited to the next meeting which is scheduled for 20 November 2017 at 5pm;
- If a client wishes to change solicitors, then an application should be made to transfer legal aid, rather than applying to come off record. Applications to transfer legal aid cannot be dealt with by the court lawyers; they have to be dealt with by the Master; and
- There is currently a notice being sent to Requested Persons informing them that they must surrender to the Royal Courts of Justice. A guide on the correct forum for bail related applications is being drafted and will be circulated.

The next meeting with the Administrative Court will take place on 16 November 2017 at 12pm.

DELF also continues to make representations on behalf of its members to the Criminal Procedure Rules Committee. 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).

Advocates Room at Westminster Magistrates' Court

DELF wrote to the court last month opposing the closure of the Advocates Room and did not receive a response. It is a matter we are pursuing and would welcome views of the new facilities.

Legal Update

The Uncertainty of Validity

The Divisional Court decision in *Alexander & Di Benedetto v France & Italy* [2017] EWHC 1392 examined the question of whether EAWs that fail to comply with s.2(2) of the Extradition Act 2003 ("the Act") can be supplemented by further information, in light of the Supreme Court decision in *Goluchowski & Sas v Poland* [2016] 1 WLR 2665. The Court reached two important conclusions. Firstly, there has been a 'sea change' and Lord Hope's interpretation of s.2(2), set out in *Brussels v Cando Armas* [2006] 2 AC 1, §28 and *Dabas v Spain* [2007] 2 AC 31, §50, has not survived, §73. Secondly, an EAW can be supplemented by further information unless there is a lacuna or wholesale failure to provide the necessary particulars, §74.

A closer examination of these two conclusions demonstrates that the decision in *Alexander* could be susceptible to challenge, and, instead of clarifying the decision in *Goluchowski*, it has provided a third alternative approach to correcting EAWs. This is an area of law that is far from settled.

Prior to considering the decision, it is instructive to recall that s.2(2) of the Act defines a Part 1 warrant as being an arrest warrant which contains the information specified in s.2. Thus, if a warrant does not comply with s.2(2), as a matter of statue, the document is not a Part 1 warrant. The consequence, when the rest of Part 1 of the Act is examined, is that there is no power of arrest and no jurisdiction to commence proceedings under s.8 of the Act. The wording of the Act is predicated upon there being a Part 1 warrant. That was Lord Hope's interpretation of s.2(2) in *Cando Armas* and *Dabas* and it is unsurprising that it was consistently affirmed and followed, for it is the natural reading of the Act.

In the unanimous Supreme Court decision in *Zakrzewski v Poland* [2013] 1 WLR 324, the Court affirmed the principle in *Dabas* and held that errors or changes could be corrected through further information but, importantly, validity is not a transient state, an EAW is either valid *ab initio*, or it is not.

The issue in *Alexander* was how far had the Supreme Court gone in *Goluchowski,* in applying the approach of the CJEU in *Bob-Dogi* [2016] 1 WLR 4583 (Case C-241/5), in which the CJEU used further information to determine whether there was a domestic warrant underlying the EAW. Lord Mance in *Goluchowski* 'qualified' Lord Hope's dicta in *Dabas* and arguably permitted the use of further information to correct formal, but not substantive defects. Unfortunately, the judgment contains no definition of 'formal' and 'substantive'. There is also no examination of Lord Hope's dicta and the wording of s.2(2) of the Act. Nor is there any examination of the arguable incompatibility of the decision with the approach in *Zakrzewski,* that validity is not a transient state, despite Lord Neuberger PSC and Lord Wilson JSC presiding in both cases.

The Divisional Court in *Alexander* therefore had a difficult task in interpreting the breadth of the approach in *Goluchowski*. The Court's conclusion that, as a consequence of the duty of conforming interpretation set out in *Criminal Proceedings against Pupino* [2006] QB 83 and the decisions in *Bob-Dogi* and *Goluchowski,* Lord Hope's interpretation has not survived, is one of the most significant parts of the judgment and, it is suggested, one of the

elements that is susceptible to challenge.

Lord Hope's dicta was based on the natural reading of s.2(2) and Part 1 of the Act. Thus, if that interpretation is no longer good law, one would expect to see either (a) an examination of the Act to demonstrate that Lord Hope's interpretation of s.2 as a jurisdictional provision was wrong, or, (b) if the duty of conforming interpretation requires a different approach, a detailed analysis of the wording and structure of the Act identifying why Lord Hope's interpretation is not the only possible interpretation and identifying the alternative interpretation that permits s.2 to be complied with at a later stage of proceedings. Any such examination is absent in *Alexander* and thus the Court has overruled an established statutory interpretation without justifying it with reference to the wording of the statute. This could be a means of challenging the decision.

It is clear from the decision in *Alexander* that the Court concluded that Lord Hope's approach no longer applied because of the decision in *Goluchowski,* which followed *Bob-Dogi* and applied the interpretative obligations set out in *Pupino*. The *Pupino* principle is, however, limited, in that national law cannot be interpreted *contra legem*. It is arguable that the CJEU's approach, that further information can supplement an otherwise invalid warrant, is in direct contradiction to the wording and structure of Part 1 of the Act and the jurisdictional nature of s.2 of the Act.

It is also arguable that contrary to the view of the Court in *Alexander,* the Supreme Court in *Goluchowski* did not go so far as to overrule the approach of Lord Hope. The Court explicitly *qualified* Lord Hope's dicta to the extent that the Court permitted the regularisation of formal but not substantive defects, §§45-47. Perhaps that was as far as the Court felt it could go, before the interpretation was *contra legem.* The fact that it is difficult to draw a distinction between formal and substantive defects does not lead to the conclusion that the Supreme Court overruled Lord Hope, without providing an alternative statutory interpretation.

In *Alexander* the Divisional Court understandably concluded that they could not see an easy distinction, in practice, between "formal" and "substantive" requirements and thus created a new test and held that an EAW can be supplemented by further information unless there is a lacuna or wholesale failure to provide the necessary particulars. It is clear that in doing so the Court went further than the decision in *Goluchowski*.

This leads to the second possible ground of challenge, namely that supplementing an EAW so that it complies with s.2(2) of the Act is directly contrary to the Supreme Court's unanimous decision in *Zakrzewski,* that validity is not a transient state. If the decision in *Alexander* is correct then validity, if indeed that term has survived, is transient. An EAW that is invalid upon arrest can be later made valid by the provision of the relevant information. The decision in *Alexander* does not address this particular conflict with Supreme Court authority.

As a consequence of these decisions, the law on s.2 is unclear. Supreme Court authority states that validity is not a transient state and validity depends on whether the required particulars are found within the EAW, although formal defects can be regularised by the use of Article 15 of the Framework Decision. Divisional Court authority is that validity is, indeed, transient and that the question is not whether the defect is formal or substantive, but whether there has been a lacuna or a wholesale failure to provide the necessary particulars.

Whilst Mr Alexander did not pursue his appeal further, the Divisional Court has certified a point of law in Mr Di Benedetto's case, namely:

> "*Is it ever permissible for a Part 1 warrant which fails to comply with the requirements of s.2 of the 2003 Act to be corrected through the provision of information extraneous to the warrant?*"

Permission to appeal was refused. With clearly conflicting decisions and approaches and an absence of a full examination of the structure and wording of the Act, it is hoped that the Supreme Court grants permission and resolves the difficult question of whether there is such thing as validity of EAWs and, if there is, whether validity is transient.

James Stansfeld
Furnival Chambers

International Legal Update

Anna Demenko, a colleague in Poland, updates us on recent changes to the law in relation to executive powers in Poland; Thom Dieben provides an update on Belgian prison conditions in the Dutch courts.

Polish laws on the judicial system

In July, the Polish Parliament passed three bills seeking to restructure the judiciary: one in relation to the Supreme Court; one on the National Council of the Judiciary (which is a body responsible for nominating judges and making other personnel decisions); and one on the reform of the structure of common courts. President Andrzej Duda vetoed the two first bills, and these will not be proceeded with (at least for the moment), but signed the third act, making it binding law.

This act introduces measures which subject common courts to the control of the Minister of Justice, among others, giving him the power, at his sole discretion, to appoint the chief justices of common courts and sanction them with salary reduction on the basis of a very subjective set of criteria. As the chief justices perform a crucial role in the administration of their courts (they are responsible for organizing the work and, for example, appointing the department's presidents and special coordinators for transnational cooperation and human rights), their dependency on the executive power is unconstitutional and marks the end of the judiciary's independence.

Considering some of the provisions of these bills, it is also a reasonable belief that the purpose of this "reform" was not to increase the efficiency and transparency of the judicial system, but rather to tackle some personal and purely political issues. This development may also have a direct influence on the effective right of access to a lawyer. In Polish criminal procedure, in principle, it is the chief justice of the court who appoints *ex officio* defence counsel if needed (e.g. if a suspect is unable to bear the costs of defence). Obviously, in a worst case scenario this can lead to a more or less open political abuse of authority, for example, with lawyers being appointed to deal with (transnational) issues they are not competent to manage. This threat has become a reality, as there have recently been cases of lawyers being actually hindered from helping their clients to apply for refugee status on the Polish-Belarusian border.

Anna Demenko

Prison conditions in Belgium

On 20 July 2017, the Amsterdam District Court decided to postpone a surrender to Belgium due to the prison conditions there. The relevant part of the interlocutory decision reads as follows:

"7. Prison conditions: reopening of the proceedings

Counsel for the wanted person has expressed his concerns in this case about prison conditions in Belgium by submitting an article on Telegraaf.nl of 5 July 2017 entitled "Belgian prisoners sleep on the ground". In response to the aforementioned article submitted by counsel for the wanted person, the prosecutor submitted that it is based on media publications in relation to the 2016 annual report of the Directorate-General Penitentiary Institutions. This annual report does not contain any relevant information over 2017 and is therefore irrelevant.

The District Court considers as follows.

After the hearing, the District court has taken cognisance of:

-Public statement Belgium of the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment d.d. 13 July 2017

The District Court is of the view that, in light of art.4 of the Charter of Fundamental Rights of the European Union and the Aranyosi and Caldararu judgment of the European Court of Justice of 5 April 2016 (C-404/15 en C-659/15 PPU), this recent information concerning prison conditions in Belgium requires further deliberation. It will be discussed with the parties at an upcoming hearing.

Given the above, the District Court will reopen its examination of the case."

The Dutch Minister of Justice did not appeal the decision of the District Court, which has, therefore, become final.

The full judgment of the District Court can be viewed here:
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2017:5143

Extradition to Moldova

On 9 June last the District Court of The Hague refused an extradition to Moldova (decision published on 17 July). The District Court ruled that, in general, prison conditions in Moldova are very bad. It particularly referred in this regard to a 2016 CPT report and 'Country Reports on Human Rights Practices' for 2014 and 2016 by the US Department of State. According to the District Courts, it followed from these reports that the situation is particularly dire in prisons 13 (Chisinau) and 6 (Soroca) as well as at most police stations. Although the Moldovan authorities had provided assurances that the wanted person would not be detained in one of these prisons, the District Court ruled that this did not mean that there was no real risk of ill-treatment. After all, it followed from the reports by the US Department of State that throughout the country prison conditions fell below the minimum standards. According to the District Court this was also confirmed by the *Malai v. Moldova* judgement of the ECtHR (ECLI:CE:ECHR:2008:1113JUD000710106, which case concerned Orhei prison). As to the remainder of the assurances provided by the Moldovan assurances, the District Court held that they were too vague and too general to be considered sufficient. The Dutch Minister of Justice did not appeal the decision of the District Court which has therefore become final.

The full judgment of the District Court can be downloaded
via: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2017:7900

Thom Dieben, RahaeRaymakers

Public statement issued by the CPT on Belgium

The CPT statement is available here:
http://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-issues-public-statement-on-belgium

The issuing of a public statement by the CPT is very rare. There have been only eight public statements made in the history of the CPT (http://www.coe.int/en/web/cpt/public-statements).

England & Wales

Government of Rwanda v Nteziryayo & Ors [2017] EWHC 1912 (Admin)

Judgment was handed down on 28 July 2017 in the case of the alleged Rwandan genocidaires whose extradition was refused in 2009 on Article 6 grounds.

The Rwandans renewed their request for extradition on the grounds that there had been an improvement in the criminal justice system in Rwanda and, as such, they could now receive a fair trial. SDJ Arbuthnot, and then the High Court, disagreed. Extradition was rejected outright for two of the Requested Persons, with a final opportunity given to Rwanda to provide fair trial assurances in respect of the other three.

Please see the judgment here: https://www.judiciary.gov.uk/wp-content/uploads/2017/07/rwanda-v-nteziryayo-and-others-judgment-20170728.pdf and a summary of the judgment here: https://www.judiciary.gov.uk/wp-content/uploads/2017/07/rwanda-v-nteziryayo-and-others-press-summary.pdf

RT v Poland [2017] EWHC 1978 (Admin)

Practitioners should be aware of this decision on Article 8 handed down on 1 August 2017. A digest can be found here: http://cases.iclr.co.uk/Subscr/search.aspx?docID=WLRD2017-539"

Forthcoming events

Please save the date for our next educational event on **26 October 2017**, when we will hear from ECJ Judge Lars Bay Larsen and others.

Announcements

Congratulations to Katherine Tyler, whose idea the DELF newsletter was (and who edited the first six issues), and Stuart Biggs on the birth of their daughter Åsa.

Congratulations also to DELF members Saoirse Townshend and Adam Payter on their recent engagement.

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.

Please make your payments by bank transfer to:

Defence Extradition Lawyers Forum
Natwest
Sort Code: 60 40 04
Account Number: 32 49 95 82
IBAN details: GB97NWBK60400432499582
BIC: NWBKGB2L

For any queries, please contact enquiries@delf.org.uk

Contacts

Contact us at enquiries@delf.org.uk

To join, email membership@delf.org.uk

Website: www.delf.org.uk

Follow us on twitter: @DELF_Lawyers

Editor: If you would like to contribute, please contact our editors, Irene McMillan at imcmillan@kingsleynapley.co.uk or Rebecca Hadgett at Rebecca.hadgett@3rblaw.com