ISSUE 8: 4th October 2017

DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to Issue 8 of the Defence Extradition Lawyers Forum newsletter. In this edition, Mary Westcott considers Belgian prison conditions following *Purcell & Pengel*, and provides an update on Section 2, which we reported on in issue 7. Rachel Scott and Thom Dieben provide an update on Russian and Dutch assurances, and Thom also provides a summary on Portuguese prison conditions. 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

Correspondence with Westminster Magistrates' Court over the relocation of the Advocates' Room is on-going. If anyone would like to add anything further to this discussion, please let us know at enquiries@delf.org.uk.

We continue to engage with the LAA over various issues. If anyone has anything specific they would like us to raise, please do get in touch.

The next Administrative Court meeting is due to take place on **16 November 2017**. Please let us have notification of any points you would like to us to raise by 9 November 2017.

DELF 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).

Legal Update

What is left to argue about Belgian prison conditions following Purcell & Pengel v Belgium [2017] EWHC

1328 (Admin) 1981 (Admin)?

In terms of prisons, Belgium suffers from the opposite of their Dutch neighbours' under-populated prisons. Overcrowding and, generally, poor conditions have led to repeated industrial action by prison staff, prompting unusual explicit CPT criticism of "inhuman and degrading" conditions during strikes (most recent CPT report published 18 November 2016, paragraph 21).

The Strasbourg decision of *Vasilescu v Belgium* (App No. 64682/12) has been described as a *de facto* Pilot Judgment and subsequent decisions suggest at least some of the systemic problems identified in *Vasilescu* persist (such as *Sylla and Nollomont v Belgium* Application No 37768/13 & 3647/14).

Nevertheless, the joined appeals of *Purcell & Pengel v Belgium* [2017] EWHC 1981 (Admin) were dismissed on 30 July 2017. The course of the appeals was unusual, including hearings before three separately constituted Divisional Courts and two full appeal hearings on 25 May and 6 July. It will assist those considering whether to raise Belgian prison conditions in current cases to know more about the way in which the case was decided.

Purcell & Pengel might not be as definitive a decision as it first appears, because of a pending application to certify a point of law of general public importance, but also for those destined for detention in French speaking prisons (as opposed to Flemish) and if the burgeoning international consensus about unacceptable conditions continues to build (for example, a Dutch refusal to extradite was not considered by the Court in *Purcell & Pengel*).

It was with some surprise that the parties in *Purcell & Pengel* learnt they had been joined by Order of Ouseley J on 14 March 2017, in the manner the Court occasionally does when it comes to "headline" cases.

Permission to appeal was later granted at a hearing by Flaux LJ and Mitting J on 7 April 2017, when a clear steer was given to focus on the "prison strike" point. At that stage the Court declined to specify questions to be asked of the issuing Judicial Authority, but made it plain that further information would be required on the point.

25 May Hearing

Lloyd Jones LJ and Ouseley J presided over the first listing of the full appeal on 25 May 2017 (the decision is published as [2017] EWHC 138 (Admin)). The appeal was adjourned following submissions from the Appellants (Edward Fitzgerald QC), largely due to a concession by the Respondent (John Hardy QC) that further information would be appropriate (paragraphs 61 - 65).

The Divisional Court was again addressed regarding the CJEU guidance in *Aranyosi and Caldararu* (C-404/15 and C-651/15 PPU, 5 April 2016) and, following submissions, determined several questions that should be asked of the Judicial Authority (paragraph 66 - 68). Interestingly, the Divisional Court used the language of there being a "threshold" in connection with the "*Aranyosi* process" (paragraph 61). At this stage the Belgian authorities had failed to provide any reply to a request for further information made by the CPS on 3 May 2017.

6 July Hearing

The appeal hearing resumed on 6 July 2017 before Hamblen LJ and Ouseley J. The Responding Belgian authorities provided further information on the afternoon prior to the hearing (quoted at paragraph 4 of the Judgment of 31 July 2017 [2017] EWHC 1981 (Admin)). It asserts that "strikes have exclusively occurred in French speaking prisons" and that "negotiations … have led to a sustainable solution" to strikes. The reply and a subsequent letter also stated that the Appellants would be detained in Beveren prison (a new Flemish prison).

The Respondent (James Hines QC) no longer made any concession about requiring further information. It was clear that the Court did not accept that there was much significance in the fact of the previous Court's questions asked.

The Appellants were permitted extra time to obtain evidence in response to the further information after the hearing.

CPT Public Statement & Extra Evidence

By chance, there were two significant developments during the few weeks before the Judgment was handed down.

Members will have read with interest the August newsletter updates from our Dutch colleague Thom Dieben (of JahaeRaymakers) about the Amsterdam District Court's decision to postpone surrender under an EAW to Belgium due to prison conditions there (see Thom's further update below). The Dutch decision was made on 20 July, taking into account the CPT's unusual decision to issue a public statement on Belgium on 12 July, just over a week previously. The Dutch decision was not before the Court in *Purcell & Pengel*, but the public statement was.

The public statement addresses the continuing failure of the Belgian authorities to establish "a minimum level of service to guarantee the rights of inmates during periods of industrial action by prison staff". In other words, strikes breach rights, so legislation must provide for effective cover when they happen. One might say the public statement seriously calls into question the Belgian assertion in *Purcell & Pengel* that "a sustainable solution" to strikes had been achieved.

For some context, a public statement can only be made under Article 10 (2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, if a State Party "*fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two thirds of its members to make a public statement on the matter.*"

Since 1992, the CPT has issued just eight public statements, three of which concerned Russia and two Turkey.[1] It is a rare and exceptional step which reflects deep and enduring concerns about state practices. The CPT called for this type of guaranteed minimum service to ensure the basic rights of detainees in Belgium in its reports of 2005, 2009, 2012 and 2013. The reports disclose that the public statement procedure was initiated in 2014, so it took some three years to complete. Nevertheless, the Respondent's submissions in *Purcell & Pengel* made no reference to it.

31 July Judgment

The final decision in *Purcell & Pengel* notes the public statement (paragraph 7) and rejects the Appellants' submission that further information will only be sought pursuant to *Aranyosi* once a certain threshold has been passed, and concluded that the previous Divisional Court had made no evidential finding about the risk of breach (paragraph 17 – 19).

The Divisional Court interpreted the assertion in the Respondent's evidence that "there have been no new strikes" since the dramatic action of summer 2016 as accurate, as although there had been subsequent strikes of a few days' duration "such strikes do not necessarily affect prison conditions" (paragraph 27). The Court found that "what matters is not the risk of strikes itself, but rather the risk of strikes which result in inhuman conditions" (paragraph 38).

The Court was satisfied that the Appellants would be held in Beveren prison only, which did not suffer from many of the well-publicised problems of overcrowding and dilapidation within French-speaking prisons, or at Flemish-speaking Antwerp and Merksplas prisons (paragraphs 31 – 33).The most recent material from the Committee of Ministers of September 2016 questioning the presence of an effective remedy to Article 3 breaches was dismissed because many detainees had successfully lodged preventative applications (paragraph 39).

Loose Ends

A case concerning French-speaking prisons therefore, and including in evidence the Dutch refusal to extradite, should be easily distinguished.

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[1] Public statements were issued in 1992 and 1996 (Turkey), 2001, 2003 and 2007 (Russia), 2011 (Greece), 2015 (Bulgaria) and 2017 (Belgium).

Members should also note that on 11 August, an application to certify a point of law of general public importance was made in the case of *Pengel* which remains undetermined at the time of writing. The proposed points concern the way in which the *Aranyosi* and *Krolik* approaches should be applied; whether there is in fact a threshold a requested person needs to cross prior to *Aranyosi* further information being sought; and the way in which further information should be treated in light of the well-established *Fenyvesi* guidance regarding fresh appeal evidence.

Given the developments to date, it seems likely that in due course further significant material could emerge from Strasbourg, the Committee of Ministers, or indeed the CPT. For example, the CPT visited Belgium for the seventh periodic inspection between 27 March and 6 April 2017, as always practitioners will simply have to wait for the resulting report which could take months, even years. The prisons visited were primarily French speaking. The delegation also inspected Court holding cells and facilities for psychiatric patients (there is a separate Pilot Judgment against Belgium regarding systemic problems arising from detention of offenders with mental disorders, *W.D. v Belgium* (Application No. 73548/13, 6 September 2016).

Mary Westcott, Doughty Street

Section 2: A Transient State

Further to "The Uncertainty of Validity" piece by James Stansfeld (Furnival) analysing the decision of *Alexander & Di Benedetto v France & Italy* [2017] EWHC 1392, Members may be interested to learn about the way in which that decision is being applied in recent decisions, particularly given the question certified by Irwin LJ still pending a permission decision by the Supreme Court.

The following cases suggest all is not lost when it comes to s.2 arguments, at least at the appeal stage.

At a full appeal in *Csente v Hungary* [2017] EWHC 2238 (Admin), Sir Ross Cranston rejected a consent order submitted by the parties staying the case behind the final determination of *Alexander & Di Benedetto.*

Following a hearing on 17 August in *Csente,* the EAW ("EAW 4") was deemed invalid and incapable of being "eked out" by somewhat confusing further information (paragraphs 21 – 24). On the particular facts of that case, errors within the EAW were arguably found to be a "wholesale failure" rather than constituting a reparable lacunae. There is hope then, that paragraph of 75 of *Alexander & Di Benedetto* will not be the end of all successful s.2 arguments.

A slightly different approach was adopted by Ouseley J on 8 September at a renewal hearing (*Lewicki v Poland*). In that case it was common ground that further information rectified an otherwise s.2 defective EAW. In granting permission to appeal, Ouseley J agreed that the District Judge was arguably wrong in relying on the IJA's further information to eke out the EAW. Interestingly, the full appeal hearing is now stayed behind the final Supreme Court decision on *Alexander & Di Benedetto.* This could be relatively quick if permission is refused, or many months if the case proceeds to a full Supreme Court appeal. It is understood the "headline" German s.2 cases may also be stayed in a similar manner.

Assuming the Supreme Court upholds *Alexander & Di Benedetto,* scope for s.2 arguments on particular facts remains. Given the frequent delays in providing an English version of an EAW, there will inevitably be arguments about provision of correct further information within "a reasonable time" (echoing *Aranyosi & Caldararu* Cases C-404/15 and C-659/15 PPU).

Mary Westcott, Doughty Street

International Updates

Russian Prison Assurances

The *Ananyev* pilot judgment handed down by the ECtHR in 2012 remains in force, meaning that there is a rebuttable presumption of an Article 3 violation in respect of all pre-trial detention in Russia. As to places of detention for serving prisoners, Russian law sets the minimum personal space allocated to each prisoner at 2m², compared to the ECtHR standard of 3m². This too gives rise to a strong presumption of an Article 3 violation, rebuttable only if the

exposure to less than 3m² of personal space is shown to be "short, occasional and minor" (*Mursic v Croatia* (2016) App 7334/13, applied by the High Court in *Grecu v Cornetu Court, Romania* [2017] EWHC 1427 (Admin)). Assurances seeking to address both presumptions have been provided by Russia in recent cases. In *Dzgoev v Government of the Russian Federation* [2017] EWHC 375 (Admin) the specific assurances given were held to be reliable and sufficient to render extradition compatible with the ECHR. Subsequently, in a decision at first instance (*Russian Federation v Shuppe*), DJ Grant held (whilst discharging the RP on Article 6 grounds) that he considered himself bound by *Dzgoev* to accept Russia's assurances, albeit in a case concerning different prisons and different evidence as to conditions. That approach remains to be tested in other on-going cases.

Rachel Scott, 3 Raymond Buildings

Portuguese Prison Conditions

On 14 September last, the Amsterdam District Court ruled that the assurances given by the Portuguese authorities regarding prison conditions in Lisbon prison were too vague. The authorities had given the following assurance:

> "*As Director General of the Directorate General for Reinsertion and Prison Services of the Portuguese Ministry of Justice and within the case ID 34563 MDE, with reference to the European Arrest Warrants, and following the additional request by the Amsterdam Court transmitted to this Directorate General after the Declaration of Commitment dated 27th January, 2017, I hereby guarantee that the following individuals:*
>
> *(…)*
>
> *iv. [name wanted person] , (…);*
>
> if surrendered from the Netherlands pursuant to the respective European arrest warrants, in no case will be detained in any of the wards of the Prison Establishment of Lisbon that have been considered inadequate by the European Committee for the Prevention of Torture and inhuman or Degrading Treatment or Punishment, or by the Ombudsman.
>
> *Furthermore, I guarantee that the assurance herein shall be recorded in the inmates' personal penitentiary files."*

The Amsterdam Court ruled that it follows from the report of the Portuguese Ombudsman that several of the shortcomings identified by the CPT in 2013 were still present when he visited the prison in 2016. This was particularly so in relation to the general conditions of the so-called "basement areas" of the B, C, D, and E wing. But there were also shortcomings that were not limited to a concrete section of the prison, namely: the lack of artificial light in the cells and the lack of a separation of the toilet in the multi-person cells. Since the latter shortcomings are not limited to a specific section, the meaning of the current assurance was - according to the Amsterdam Court - not clear enough. For this reason it once again postponed its decision on the EAW in the case and ordered the prosecution to ask the following questions to the Portuguese authorities:

1. Can you confirm that the assurance given in your statement of 31 July 2017 insofar as it concerns the findings of the CPT and the Ombudsman, means that the wanted person will not be detained:
- in the "basement areas" of the B, C, D and E wing;
- in cells which lack artificial light;
- in multi-person cells in which there is no separation of the toilet?
2. Can you confirm that the assurance given on 27 January 2017 that the wanted person will not be detained in Lisbon Prison for more than 21 days is still valid?

Thom Dieben, JahaeRaymakers

A short update from Holland

In absentia assurances:

On 4 September last, the Amsterdam District Court has decided to refer another question to the CJEU. Stated succinctly, the question concerns the last issue left open by the recent *Zdziaszek* (Case C-271/17 PPU) and *Tupikas* (C-270/17 PPU) rulings of the CJEU. Namely, if art. 4*bis* of the Framework Decision also applies to procedures where the suspension of a sentence is revoked. This is basically question 1(b)(ii-iii) of the *Lipinski* case (Case C-376/17) which was referred by the Irish Supreme Court. The big difference, however, is that the wanted person in the Dutch case is held in detention, so I expect the Amsterdam District Court to request the CJEU to apply the PPU procedure. This means that we will have an answer in the very short term.

See: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:6672 (n.b. the exact question is yet to be formulated by the court).

French prison conditions:

The Amsterdam Court has ruled on 17 August last that the French authorities had given sufficient assurances to hold that prison conditions in Villepinte and Fresnes will not fall below the minimum acceptable level. However, it considered the assurances given in relation to Nîmes prison were too vague because it was unclear whether the space guaranteed by the French authorities was also available at night time. Furthermore, it was unclear in which prison the wanted person would be detained after surrender. The Court held that it was not for the Dutch authorities to speculate if it was (un)likely that the wanted person would end up in Nîmes prison or not. For this reason it postponed its decision on the EAW in order to give the prosecution more time to ask the French authorities for more information in this regard.

See: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:6648

Belgian prison conditions:

The Amsterdam Court has published the decision in which it held that surrenders to Belgian may be resumed.

See: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:6114

Thom Diebens, JahaeRaymakers

Important Electronic Service Changes – 16:30 is the new 14:30 for electronic service from 2 October

Good news is secreted within the Criminal Procedure (Amendment No. 3) Rules 2017 (SI No 755 (L. 11)), coming into force on 2 October.

Part 4 of the Criminal Procedure Rules 2015 (Service of Documents) and Rule 4.11(2)(d) (Date of service) will be amended, so that where it reads after "2.30pm that day", in each place it occurs, it will read "(4.30pm that day, in an extradition appeal case in the High Court)".

In other words Rule 4.11 is amended to allow electronic service of documents in extradition appeals to have effect on the same business day if they are sent at a later time than in other criminal proceedings, i.e. by 4.30pm instead of by 2.30pm (according to the Explanatory Note to the SI).

The SI is available here:
http://www.legislation.gov.uk/uksi/2017/755/made?view=plain

Mary Westcott, Doughty Street

Report on the International Extradition and the European Arrest Warrant Conference in Oxford, 4 and 5 September 2017

Academic and practising lawyers from around the world congregated at Worcester College, University of Oxford, in the first week of September for the second conference on International Extradition and the European Arrest Warrant. Experts from as far afield as Canada, the United States, Australia and Singapore met with European colleagues to discuss current developments in extradition law, both in the UK and abroad. High on the agenda was an examination of the comparative practice of extradition in several jurisdictions, the current state of the European Arrest Warrant (EAW) mechanism and the consequences of Brexit for extradition rules in the UK.

Over the course of two days, the seminar sessions covered the theory and practice of a number of domestic extradition laws. Highlights included an analysis of recent jurisprudence in the German Federal Constitutional Court by German extradition expert Dr Thomas Wahl from the Max Planck Institute, a comparison between the approach of the European Court of Justice and the UK Supreme Court in the reading of EAW provisions by Mark Summers QC of Matrix Chambers, a discussion of the issues surrounding bail and detention in EAW proceedings by Rebecca Niblock, Partner at Kingsley Napley, and an examination of the current issues facing extradition practitioners in Canada (Gary Botting), Switzerland (Gregoire Mangeat and Alice Parmentier) and Australia (Ned Aughterson).

Other participants included USA academic lawyer Darryl Brown, UK Barrister Beatrice Collier, Alessandro Lazzaroni, a lawyer from Italy, Ravneet Kaur, a lawyer from Singapore and Kai Ambos, an academic lawyer from Germany.

The third International Extradition Conference will be held in Northern Italy at the end of June 2018. All those interested should email the team of organisers at stefano.maffei@gmail.com

Stefano Maffei,
Co-Director
European Center for Continuing Legal Education

Request for assistance from Fair Trials

Fair Trials ("FT") is running a European Arrest Warrant project "Beyond Surrender" that looks at what happens to persons after they have been surrendered to Lithuania, Poland, Romania and Spain. They would like to identify and illustrate good and bad practices in post-surrender treatment to support their advocacy efforts to reform the EAW and seek assistance from DELF members in identifying relevant cases.

FT and its NGO partners seek to gather details of those who are to be surrendered to Lithuania, Poland, Romania and Spain. They will then approach the lawyers in both the executing and issuing states to get client consents to review the case files in the requesting state, attend court hearings (if any), discuss the cases with the lawyers, the clients themselves and their families (or some combination of consents). Then, again if consent is given, they aim to record three short films around the most interesting cases.

The research will be conducted with a view to understanding the effect that the use of EAWs (particularly those issued disproportionately or too early) have on the lives of those against whom they are issued and, in light of the CJEU's decision in Aranyosi and Caldararu, whether their fundamental rights (e.g. rights to liberty, fair trial, freedom from ill-treatment, family life) are protected post-surrender.

If you are able to assist you will be required to obtain your clients' consent before they are extradited by asking them to sign the consent form. The forms are in the process of being translated into Lithuanian, Romanian, Polish and Spanish.

Whilst FT is looking specifically for cases where persons are to be surrendered to Lithuania, Poland, Romania and Spain, they would also be very interested to hear of EAW cases of concern more broadly. If you have any cases that you think might be relevant please get in contact with Jon Ewing at Fair Trials (email: jon.ewing@fairtrials.net; tel. +32-2424-1136).

Forthcoming events

Our next educational event will take place on **26 October 2017** at the offices of Kingsley Napley, where we will be delighted to welcome Judge Lars Bay Larsen of the CJEU to discuss the impact of *Aranyosi and Caldararu on challenges before national courts and on the Protection of Fundamental Rights*. Places for this event are limited, so please RSVP eg@corkerbinning.com as soon as possible to secure your attendance.

We'll also be holding a Russian educational event on **15 November 2017** - details to be confirmed.

Announcements

Congratulations to Julian Knowles on his recent appointment as a High Court judge.

We thank Myles Grandison, who is retiring from his post as DELF's educational officer, for his fantastic contribution over the past year in organising our educational events. We welcome Ben Keith, who has kindly agreed to take over the post. If you have any ideas for future education events, please contact Ben.

The Committee would like to extend its gratitude to outgoing Chair and co-founding member of DELF, Rebecca Niblock. Rebecca's verve contributed to the inaugural year for the organisation being a resounding success in which DELF was involved in opening a dialogue with the Chief Magistrates' Office on behalf of defence practitioners, responding to the Criminal Procedure Rules Committee, making representations to the Legal Aid Agency and obtaining a regular meeting event with the Administrative Court Office – all for the benefit of you, our members.

Rebecca's year in office culminated in the well-attended and much talked about Annual dinner. Rebecca continues to sit on the DELF Committee.

The Committee welcomes Edward Grange as the new Chair of DELF.

Membership

Membership runs from January to December annually. If you wish to join DELF for the first time from 01 January 2018, 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 2017 membership from 01 January 2018, please follow the payment instructions set out below.

Fees for 2018 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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