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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to Issue 9 of the Defence Extradition Lawyers Forum newsletter. In this edition Malcolm Hawkes considers the options open to the Government in negotiating extradition arrangements in its Brexit talks; Benjamin Seifert provides an overview and update on Romanian assurances; Thom Dieben reports on a recent Amsterdam Court ruling in relation to Lisbon prisons; Mary Westcott comments on the Divisional Court's stance on service of further information; and she also provides a summary of our October seminar, "CJEU and the Goldilocks Squeeze". 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. 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).

On 16 November 2017 DELF met with lawyers and court staff from the Administrative Court to discuss on-going operational matters and issues raised by DELF members. The following topics were discussed:

- Issues surrounding bail notices in the High Court. The court is currently preparing a note on bail which will be disseminated to members once it has been finalised by the judiciary;
- Di Benedetto and s.2 challenges. The High Court certified a point of law of general public importance:

  "is it ever permissible for a Part 1 warrant which fails to comply with the requirements of Section 2 of the EA 2003 to be corrected through the provision of information extraneous to the warrant?"

  It is hoped that a decision from the Supreme Court in respect of permission to appeal will be made in January 2018. In the interim, there will not be a blanket stay of cases seeking to raise this challenge and applications will need to be made on the merits of each case;
- Irwin LJ is the new lead extradition judge and has asked for parties to be reminded that they must comply with

court directions. If there is a delay or an issue, the onus is on the parties to raise this with the court and not for the court to chase the parties;

- Social services reports. There have been some issues when social services reports have been ordered by the High Court and questions have arisen as to whose responsibility it is to organise a court ordered report. DELF informed the meeting that, as the report is ordered by the Court, the defence, whilst assisting in whatever way it can, is limited in what can actually be achieved with social services. Further guidance is to be given to court associates as to how to deal with such issues, but in the meantime it would be prudent for the defence to provide the court with as many details as possible, such as, which local social services will be carrying out the report, name of a particular social worker if there is already involvement, and contact details;
- Applications to come off record and changes to the CrimPRs. New CrimPR 46.2, which came in to force on 2 October 2017, means that there is no longer a need for a formal application, which attracts a fee, to be made to apply to come off record. The application needs to be in writing and should contain the same information as before; namely whether the client is in custody or on bail, whether they require an interpreter and whether they have been informed of any court dates;
- Consent Orders. The CrimPR and Practice Direction does set out what information needs to be included in a consent order; however, the court is considering an informal template to assist parties. It was also highlighted that where there is a consent order allowing an appeal it should also dictate that the bail conditions are no longer in force; and
- Bulgarian prison conditions cases. There is a case management hearing on 27 November 2017 to select lead cases and deal with directions going forward. Any pre-permission applications are stayed pending this hearing.

The next meeting will be held in February/March 2018. If DELF members have any issues that they wish to raise, please let us know.

Legal Update
Extradition and Brexit: What comes next?[1]

On any view, the impact of Brexit upon the legal architecture of the UK's relationship with the EU will be profound. The close relationships the UK has developed with EU institutions and structures include helping to found and promote police cooperation, information exchange, pooled databases and mutual recognition of judicial authorities.

Foremost among the toolkit of measures to fight crime is the European Arrest Warrant, but the list of mechanisms and institutions is long: the real-time alert Schengen Information System (SIS II); the Prüm Convention, enabling the free exchange of fingerprint and DNA records, along with vehicle registration data; the Eurodac Regulation, a fingerprint database for tracking and identifying asylum seekers; EUROPOL: the EU's law enforcement agency; and EUROJUST: the EU body dealing with judicial cooperation in criminal matters. In addition, there are Joint Investigation Teams to tackle difficult and demanding cross border criminal investigations.

If Brexit is to be '*Hard*', leaving the EU without any deal, all of these mechanisms and arrangements must fall away. If it is to be '*Soft*', then some or all may be retained. But if so, the question remains, how will the UK retain the benefits from the relationship it currently enjoys and how will the UK be able to influence or shape these arrangements going forward?

The European Arrest Warrant

The increase in extradition cases has been exponential: in 1962 there were but 3 extradition requests, *worldwide*, to the UK, rising to 19 in 1973 and to 114 by 2003. Since the adoption of the EAW scheme, the UK has come to rely heavily upon it. Over 8,000 individuals were extradited from the UK between 2004 and 2015; the UK issued over 13,000 alerts using SIS II between 2015 and 2016.[2] It also works the other way: in 2016, there were 14,279 EAW requests made to the UK, with 2,102 arrests and 1,271 surrenders.[3]

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[1] A version of this article was published by Justice for its Human Rights Law Conference 2017, held on 13 October 2017: https://justice.org.uk/events/justice-human-rights-law-conference-2017/

[2] See, HM Government: *Security, law enforcement and criminal justice, A Future Partnership Paper*, at p. 5: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF

[3] See, Historical European Arrest Warrants statistics, 9 May 2016 at: *http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/historical-eaw-statistics/693-historical-european-arrest-warrants-statistics-calendar-and-financial-year-totals-2004-may-2016*

Although far from all extradition requests involve serious offending, in the year 2015-2016 there were a significant number of arrests for very serious offences: according to the National Crime Agency, there were 29 arrests in cases involving murder/manslaughter, 51 for grievous bodily harm, 25 for rape and 132 for robbery.[4]

Therefore, any reduction in the UK's ability to extradite requested persons creates a real risk that the UK will become a safe haven for criminals, including those convicted or accused of the most serious offences.

That the EAW scheme would lapse with a 'Hard' Brexit is clear. Recital 5 of the Framework Decision 2002 refers to the abolition of extradition between EU member states, being replaced by a system of surrender between judicial authorities; it is a system intended to be streamlined, simple and predicated upon mutual trust. A final decision on extradition is to be taken within 60 days of the suspect's arrest: *Article 17 Framework Decision 2002*. While this may often be more observed in the breach, EAWs are markedly quicker, and simpler, than their non-EAW counterparts.

Part 2 cases

All non-EU countries are treated as Part 2 countries, per the Extradition Act 2003. Whereas the EAW governs extradition arrangements between judicial authorities, Part 2 concerns extradition requests between governments and requires the UK Secretary of State to order extradition. The presumptions of mutual trust and respect in EAW cases do not apply to the same degree or at all.

According to the Crown Prosecution Service, Part 2 cases take three times as long as Part 1, taking on average 10 months to resolve, while they are four times more expensive.[5] Cases such as the alleged computer hacker, Gary McKinnon, wanted by the United States took 6 years to resolve[6]; it took 14 years to extradite an alleged associate of Osama Bin Laden, Khaled Al Fawaaz, to the United States.[7] Even taking the average of 10 months, there is little doubt that the Part 2 system would simply grind to a halt if all Part 1 cases were converted to Part 2. It would place an unmanageable administrative burden on the Home Office, which, as some have observed, struggles to deal with the demands of immigration and asylum law.

The immediate corollary would be a failure to detain and deal with suspects and convicts wanted in other jurisdictions, who would remain at large in the UK with a significant risk to public safety.

Flexibility

The Extradition Act 2003 goes further than bringing 2002 Framework Decision into domestic legislation. The UK has bolted on some amendments, such as s.21B, a '*Request for temporary transfer etc',* which permits either the requesting state or the requested person to seek to utilise less coercive measures than extradition, such as interview. Section 21A introduced the proportionality bar to accusation cases as a discrete consideration to human rights, perhaps intended to filter out those EAWs, often issued by Poland, for trivial offending.[8] Other additions include s.19B, the Forum Bar, and s.12A, which purports to address cases where the requesting state has made no decision to charge or try an accused person, and their absence is not the sole reason for not doing so.

These amendments and departures from the FD 2002 demonstrate that the existing UK legal framework for EU extradition can depart from the EU uniform standard yet still operate within it. It suggests that it may be possible for the EAW scheme to continue after Brexit. But there are still significant problems to be overcome.

Principal among these is the role of the Court of Justice of the European Union (CJEU), which has been described by the Prime Minister as a '*redline'* in the Brexit negotiations.[9] The CJEU provides interpretative and definitive judgment on the application of EU law, which includes the 2002 Framework Decision and extradition.

Whereas extradition could previously be barred on Article 3 grounds due to concerns over prisons, since the judgment of the CJEU in *Aranyosi and Calderaru* CJEU [2016] 3 W.L.R. 807 courts must adopt a different approach: if there is

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[4] Ibid.

[5] See, House of Lords Select Committee report, Brexit: future UK-EU security and police cooperation at [136]: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/7707.htm

[6] See, Gary McKinnon extradition to US blocked by Theresa May, BBC News, 16 October 2012: http://www.bbc.co.uk/news/uk-19957138

[7] See, *Meeting Khaled al-Fawwaz - Bin Laden's man in London*, Frank Gardner, BBC news, 9 October 2012: http://www.bbc.co.uk/news/world-us-canada-19887669

[8] Between 2005-2013, Poland issued 31,000 EAWs across Europe; by contrast, in the same period the UK issued 1,300: see, European Parliament Infographic, 23 June 2014 at: http://www.europarl.europa.eu/EPRS/140803REV1-European-Arrest-Warrant-FINAL.pdf.

[9] See, Toby Helm and Jamie Doward, *Ex-legal chief attacks Theresa May's 'foolish' claim on European court of justice,* The Guardian newspaper, 19 August 2017: https://www.theguardian.com/politics/2017/aug/19/brexit-european-court-of-justice-theresa-may-foolish-attack

evidence of very poor prison conditions, extradition is not to be halted, but rather an information exchange process between the judicial authorities must take place. Only following such an exchange, where the responses have been unsatisfactory, is one EU judicial authority to refuse to extradite on Article 3 grounds: see *Kirchanov & others v Bulgaria* [2017] 2048 (Admin) for a recent example.

In *Bob-Dogi* [2016] 1 W.L.R. 4583, the CJEU ruled that an EAW was invalid if it was not founded upon a domestic arrest warrant; it ruled that the Hungarian practice of self-certifying EAWs was not compatible with the EAW scheme.

These are but two examples of the role of the CJEU in regulating the EU-wide approach to extradition requests. The question is therefore whether the UK could continue to engage with EAWs post-Brexit and, if so, how would that be regulated?

What does the UK government want from Brexit?

In 2016, beyond '*Brexit means Brexit*' little was known of the government's aims. Now Brexit appears to mean leaving, but with a 2-year, possibly longer, transition period, while ECJ jurisdiction may still apply. Equally, the risk remains that the UK will crash out of the European Union on 29 March 2019 without any deal at all.

The government has acknowledged that, after leaving day, the current legal framework that underpins the UK's cooperation with the EU on security, law enforcement and criminal justice will no longer apply.[10]

While in her Florence speech, the Prime Minister said this:

"So we are proposing a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation: a treaty between the UK and the EU."[11]

Yet it remains very difficult to foresee how retaining the EAW scheme without being subject to ECJ jurisdiction could work.

Any new treaty will require a body to oversee and resolve disputes in extradition matters, as the CJEU currently does. A discrete body would have to act consistently with, and with deference to the case law and approach of the CJEU. In practice, there would be no real autonomy or appreciable difference between the work of the CJEU and this new body. The costs of setting up and maintaining such a court would likely have to be borne by the UK.

The evidence is that the negotiation and entry into force of any new security treaty will not be swift. The European Free Trade Association (EFTA) states of Iceland and Norway have spent many years trying to reach an agreement on extradition with the EU. The European Council agreed to negotiate with them in 2001. This resulted, in 2006, in the Council Decision on Extradition which largely mirrors the EAW scheme.

However, there are three important points to note:

Iceland and Norway have retained an exemption which allows them to refuse to extradite their own nationals: *Article 7.* This is significant, because it reflects the position of 17 current EU member states before they agreed to the EAW scheme; this may explain why the EAW scheme places such emphasis on mutual trust and respect between judicial authorities because of the change in attitude in those 17 states in permitting the extradition of their own nationals;

There is no court to resolve disputes in the Iceland/Norway – EU agreement; rather, any dispute is to be referred to EU and national government representatives who are to resolve any issues within 6 months (*Article 36*); the parties are to keep CJEU case law under constant review, and there is to be regular mutual transmission of national and CJEU decisions (*Article 37*); and

Although the agreement was approved by the EU on 27 November 2014, it is still not in force, 16 years after the fact.

Although the UK has been operating within the EAW scheme for the past 13 years, the fact the Iceland/Norway proposed agreement on extradition is near identical to it underlines how a rapid resolution of the UK's new

[10] See, HM Government: Future Partnership Paper: Security, law enforcement and criminal justice, 18 September 2017 at [15]: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645416/Security__law_enforcement_and_criminal_justice_-_a_future_partnership_paper.PDF

[11] See, PM's Florence speech: *A new era of cooperation and partnership between the UK and the EU* at https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu

arrangements can neither be assumed nor assured.

Reverting to the 1957 European Convention on Extradition?

All Council of Europe member states are or were state parties to the 1957 European Convention on Extradition. However, especially for monist states where international treaties and agreements have primary domestic effect, the adoption of the 2002 Framework Decision has superseded the 1957 Convention; many EU member states have since rescinded it. The UK could not expect such member states to alter their domestic law to accommodate the use of this instrument after Brexit. Or even if it could, the time it would take would likely be prohibitive. The 1957 Convention is accompanied by lengthy amendments – some 16 pages worth – as each country inserted its own provisos and caveats, not to mention the provision which permits states to refuse to extradite their own nationals. Moreover, any individual resisting extradition to the UK could point to the uncertainty of standards in the UK, including public statements by the Prime Minister about her general wish to withdraw from the European Convention on Human Rights.[12]

The other alternative would be for the UK to conclude 27 bilateral agreements on extradition with the remaining EU member states. These would be similar to the agreements which apply in Part 2 countries. There is no reason to suppose that these arrangements could not be made. However, given the volume of cases, the caseload would become unmanageable, leading to significant delay and huge increases in costs. Any reduction in the efficacy of extradition arrangements increases the risk to the public from convicted and alleged criminals who live in the UK and would make the UK an attractive destination for any EU suspects looking for a safe haven.

Therefore, we can conclude that:

The rejection of ECJ/CJEU jurisdiction undermines the prospects of any new treaty being viable and effective or quick to agree; being subject to CJEU jurisdiction during a transition phase merely postpones the problem;

The alternative model – the treaty – will necessarily mean much the same as now, since no extradition treaty could operate other than in concert with the CJEU case-law; there will be additional costs associated with such arrangements which the UK will be expected to bear; and

The timescale to implement such an arrangement is likely to be indeterminate, but measured in years, bringing with it a significant public security and safety risk in the interim.

Of course, the UK may rapidly be able to agree upon questions of security cooperation. The current international terrorism threat level in the UK is officially severe[13] – an attack is highly likely – and there is every interest in the EU to maintain security cooperation in the fight against terrorism. However, the security and law-enforcement architecture, partially set out above, is intricate and interwoven. The UK may be able to negotiate access to databases and perhaps enjoy an associate membership of those structures. The UK is after all not a member of the Schengen free travel zone, but is a member of Schengen II on information exchange. But each area will have to be negotiated and agreed; there is no evidence that these matters have even begun to be discussed with the EU. Moreover, there is the question of cost. These bodies and institutions are financed through EU member states' budgetary contributions. The UK will likely have to pay its share despite losing the opportunity it currently enjoys for British judges to sit in the ECJ and for British nationals to hold senior and influential positions in bodies such as Europol.[14]

Whether we end up with a Hard or Soft Brexit, there are serious and unanswered questions about the UK's future security arrangements with the EU. The one certainty, however, is that any alternative to the current arrangements is highly likely to be inferior, with increased risks to public safety.

Malcolm Hawkes, Doughty Street

International Legal Update

Romanian prison conditions cases

[12] On 18 May 2017, the Prime Minister committed to remaining in the ECHR for the duration of the next parliament, having previously expressly stated her wish to withdraw: see, e.g. *Conservative manifesto: Theresa May announces UK will remain part of European Convention of Human Rights*, Independent, 18 May 2017: http://www.independent.co.uk/news/uk/politics/conservative-manifesto-uk-echr-european-convention-human-rights-leave-eu-next-parliament-election-a7742436.html

[13] See, https://www.mi5.gov.uk/threat-levels

[14] A UK national, Robert Wainwright, is the current head of Europol: see, e.g. *Executive Director profile*: https://www.europol.europa.eu/executive-director-of-europol; Christopher Vajda QC, a British national of Monckton Chambers, has been a judge at the ECJ since 2012; the number of judges from each EU member state at the ECJ is to double in 2019.

In many years to come, when we may have left the European Union, people will undoubtedly discuss the plight of the many Romanians who came here to find a safe haven from the prisons which have been so heavily criticised by courts in Germany, Sweden and Strasbourg and, of course, the United Kingdom.

The history of Romanian prisons condition cases commenced with the case of *Florea v Romania [2014]* EWHC 2528 (Admin) ('Florea I') which dealt with serious concerns of overcrowding in the country's prison estate.

That case was quickly followed by a sequel: *Florea v Romania* [2014] EWHC 4367 (Admin) ("Florea II"). For that particular case the Romanian authorities had provided an assurance, with respect to that particular appellant, that he would be held in a minimum of 2 square metres of personal space.

However that was not the end of the saga of Romanian prisons. By the time of *Blaj v. Court of Alesd,* Romania [2015] EWHC 1710 (Admin) there was a requirement for a specific, general assurance for all individuals extradited to Romania. In that case a document, dated 26 February 2015, guaranteed that all individuals who were to serve their sentences in the semi-open or open regime (3 years or fewer) would be held in a minimum of 2 square metres. Those who were to serve their terms in the closed regime (more than 3 years) would be held in a minimum of 3 square metres. At the time of the hearing in *Blaj* it was accepted by all parties that this decision complied with Article 3 of the European Convention on Human Rights ("ECHR").

At the beginning of 2016, solicitors in the UK began to hear reports that individuals extradited to Romania had since returned and had complained about their conditions. To their credit the Romanians wrote to the CPS in London and accepted that they had experienced difficulties in complying with their own assurance. This led to some discharges by District Judges at Westminster Magistrates' Court, most notably by District Judge Purdy, in the case of Daniel Rusu.

The combined appeals of *Zagrean, Sunca and Chihaia v Romania* [2016] EWHC 2786 (Admin) were considered by a Divisional Court of Sharpe LJ and Cranston J. In spite of an admitted lie by Raluca Pruna, the then Romanian Minister of Justice, the Court found that the assurances could be trusted and all three individuals were subsequently extradited to Romania.

At the beginning of 2017, reports appeared from several individuals in prison in Romania, including all three named appellants in the *Zagrean* case, that they were being held contrary to the assurance. Their evidence was sent off to Romania and the detailed response was considered by Mitting J in a permission hearing in relation to two individuals, Ionel Remus Grecu, and Cosmin-Ionut Bagarea. He refused the appellants permission to argue that point, finding that there was no cogent evidence of any breaches. However, the Judge was also asked to consider a decision of the Grand Chamber of the European Court of Human Rights in *Muršić v Croatia*, Application No 7334/13, pronounced on 20th October 2016.

The Strasbourg Court held ((§138) that:
"The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met: (1) the reductions in the required minimum personal space of 3m² are short, occasional and minor (see para 130 above); (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see para 133 above); (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see para 134 above)."

Mitting J, in his ruling granting permission, noted: "It is, I anticipate, likely to be held to be a strange and even absurd conclusion that those extradited to serve sentences in the semi-open regime risk being subjected to Article 3 ill-treatment whereas those to serve in the closed regime will not."

On 24th May 2017 the Divisional Court (Irwin LJ and Collins J) considered the cases of *Grecu* and *Bagarea*. At paragraph 46 of their judgment, delivered on 22nd June 2017, Irwin LJ found that those who would serve their sentences in the semi-open regime would be not be held in Article 3-compliant accommodation in Romanian prisons.

Nevertheless, the Court then granted the Romanian authorities one further opportunity to rectify their position and produce an assurance that both men would be held in at least 3 square metres.

On 17th July 2017 further assurances were served which complied with the Divisional Court's request and it was therefore not possible to make further submissions. The final order disposing of the case was sealed on 24th August 2017.

However, anecdotally it appeared that the extradition community was poised for a further hearing to consider the compliance of this new assurance. Indeed there were utterances in Court that the Chief Magistrate was awaiting a further decision from the High Court. There was none because none had been requested.

Mr Bagarea was extradited to Romania soon after the order and Mr Grecu had one last attempt to resist extradition. On 17th October 2017, Ouseley J refused him permission to appeal on Article 8 grounds and he has now returned to serve his sentence in Article 3-compliant conditions.

Post-*Grecu*

Given that there were personalised assurances for both Mr Grecu and Mr Bagarea it is now necessary for there to be a named assurance for each individual. There have been several cases where the Romanian judicial authorities have issued a document purporting to be an assurance, but which, again, guarantees a minimum personal space of 2 square metres. In those circumstances the CPS has made concessions; even when they concern individuals who are due to serve their terms in the closed regime. Some serious criminals have been released from prison. It also appears that the authorities have been unable to provide compliant assurances for female prisoners.

A word of warning

Nonetheless, those of us who may believe that *Grecu* was the last word on prison conditions cases should heed the words from a case decided this summer by the new Lord Chief Justice. Lord Burnett of Maldon, in his previous role as the judge of the Court of Appeal with responsibility for extradition cases, sitting with Sir Wyn Williams considered a Part 2 case - *Serra & Galino v Paraguay* [2017] EWHC 2300 (Admin). The Court referred to *Muršić* but stated (17) that it had not seen any decision of the Strasbourg Court or the Luxembourg Court which dealt with the question of space in the context of extradition:

"It might be thought anomalous, to say the least, that a fugitive from justice in an ECHR state apprehended in his own country would be returned to prison (with his remedy for sub-standard accommodation being a complaint in the courts and then Strasbourg) but the same person who manages to cross the border into another ECHR state would be immune from return, absent assurances."

So it appears that the sands may well be shifting and our courts have yet to say the last word on prison conditions and extradition.

Benjamin Seifert
Drystone Chambers

An update from Holland

Amsterdam Court rules extradition to Portugal may be resumed

The Amsterdam District Court ruled on 31st October (ECLI:NL:RBAMS:2017:7968) that the Portuguese authorities have given sufficient assurances to exclude a real risk of ill-treatment in Lisbon prisons. The text of the assurance accepted by the Amsterdam Court reads as follows:

> "As Director General for Reinsertion and Prison Services of the Portuguese Ministry of Justice, following the additional request by the Amsterdam Court regarding pending European Arrest Warrants, I hereby guarantee and clarify:
>
> The declarations of commitment, dated 31st July 2017 and 27th January 2017, shall henceforth be deemed applicable not solely to the particular cases referenced therein, but also to all existing cases where the enforcement of a European Arrest Warrant is to result in the surrender of a person from the custody of the authorities of the Kingdom of the Netherlands to that of the Directorate General for Reinsertion and Prison Services, as well as to any such cases that may arise in the future;
> The aforementioned declarations of commitment shall be construed as to imply that no inmate whose custody has been surrendered by the authorities of the Kingdom of the Netherlands to that of the Directorate General for Reinsertions and Prison services pursuant to a European Arrest Warrant shall be detained in:

a. Any cell, ward, room or area of the Prison Establishment of Lisbon that has been considered inadequate by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment or the Ombudsman, including the underground areas of wings B, C, D and E;

b. Prison rooms lacking artificial light; and

c. Multiple inmates' cells with no partition of the toilet.

3. All subsequent commitments, which have been issued upon the request of the Amsterdam Court, shall be construed as accruing to the earlier ones; hence the declaration of commitment dated 27th January, remains fully in force with an extended scope as per paragraph 1, particularly in relation to the guarantee that no surrendered inmate shall be held in custody at the Prison Establishment of Lisbon for any longer than 21 days.

4. The commitments herein shall be recorded in the inmates' personal penitentiary files."

In light of the surprising "clarity" of the assurance, it appears to have been drafted with (a lot of) help from the Dutch Prosecution Service. In fact, when pronouncing the judgment, the presiding judge remarked that he had little doubt that it had been dictated to the Portuguese authorities by the Dutch prosecutors. Be that as it may, the Amsterdam Court had little choice but to accept and declare the surrender admissible. It is to be expected that this assurance will henceforth be given in all Portuguese EAW cases meaning that extraditions to Portugal will (slowly) resume in the coming weeks.

The decision by the Amsterdam Court is accessible via: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2017:7968

Thom Dieben
JahaeRaymakers

Divisional Court reiterates that it is not acceptable to serve further information without the questions asked: "No RFFI – No Reply"

IJA further information frequently crushes carefully constructed arguments, but, on occasion it can only be comprehensively understood by reference to the questions asked. Sometimes, knowing explicit questions asked which might have gone unanswered, or indeed a vital question that was not asked, will be critical to interpreting an ambiguous phrase or bland assertion.

This was a point highlighted by Lord Thomas CJ at paragraph 23 of *Puceviciene and Another v Lithuanian JA and Another* [2016] 1 WLR 4937, but it does not appear to have had much impact.

At paragraph 36 of *Kirsanov v Estonia* [2017] EWHC 2593 (Admin), Irwin LJ (with whom Dingemans J agreed) reiterated the point during a case conducted by David Williams (5 St Andrew's Hill):

> "We re-emphasize that it is not acceptable to furnish answers as further information, without the corresponding questions which have been asked. The questions must be supplied at the time the further information is served on the other party and filed. This is easily achieved, as Lord Thomas made clear."

The upshot is that practitioners should have no hesitation in requesting, as a matter of course, that the CPS provide the questions asked when providing further information.

Mary Westcott, Doughty Street Chambers

DELF Educational Event: "The CJEU and the Goldilocks Squeeze"

On 26th October 2017, members were treated to the rare opportunity of hearing a Judge of the CJEU, Judge Lars Bay Larsen, discuss the political and legal context surrounding the well-publicised decision in the Joined Cases C-404/15

and C-659/15/PPU *Criminal Proceedings Aranyosi and Caldarau* [2016] Q.B. 921.

Judge Lars Bay Larsen confessed to borrowing the "goldilocks squeeze" concept from other disciplines, but explained that in this context it referred to the sometimes uneasy balance between our old friends – the need for mutual trust and confidence upon which the EAW Framework is based – against the need for proper scrutiny in order to respect absolute rights.

Pragmatism was plainly important in order to strike the right balance. That said, Judge Larsen explained his view that *Aranyosi and Caldarau* represented a two-stage process. Firstly, a Judge in an executing Judicial Authority has to decide "when to take out his human rights tool-box". Some complaints will be obviously spurious ("it is cold and dark in Finland and they speak a strange language").

Secondly, assuming further scrutiny is required, in order for the porridge to be "just right", the issuing Judicial Authority may need to provide further information. The executing Judge might have to ask for this more than once, but it will not normally be his or her place to question seriously the bare facts presented. For example, where prison statistics and square metres of living space are provided which are not obviously inconsistent.

The event was a helpful reminder about alternative perspectives on much of our "bread and butter" EAW work, i.e. viewing it from a political, Danish and judicial angle. The history behind the EAW Framework Decision, accelerated in a post-9/11 climate, is well known but easily forgotten. It is some comfort to recall that even the most senior judges berate the hasty drafting underlying our current legislation.

We were also provided with some insight into the early days of judicial liaison, prior to the European Judicial Network and Eurojust being so well resourced.

As well as our gratitude to Judge Larsen for his time, our sincere thanks also go to Kingsley Napley for hosting, Valsamis Mitsilegas of Queen Mary for chairing, and, of course, Myles Grandison for organising.

Mary Westcott, Doughty Street Chambers

Forthcoming events

The DELF Christmas Party will take place on Monday 4 December 2017 from 6.30pm at the Clerkenwell & Social, 2-5 St John's Square, London EC1M 4DE. Please RSVP to ahanratty@bivonas.com to book your place.

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.

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