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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to Issue 10 of the Defence Extradition Lawyers Forum newsletter. In this edition Daniel Sternberg comments on the CJEU decision in *Piotrowski*; Thom Dieben reports the CJEU judgment in *Ardic*, mandatory suspension after 90 days and the latest on Lisbon prisons; Anna Oehmichen provides an update from Germany in relation to an extradition request from Romania; Saoirse Townshend provides an update on French prison conditions; and Amanda Bostock writes about *Sobczyk v Poland* and Article 8 delays. 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).

Legal Update

Case comment: Piotrowski

In its judgment of 23 January 2018 (Case C‑367/16) the Grand Chamber of the Court of Justice of the EU considered three questions. First, whether a minor defendant could be extradited on an EAW. Second, whether the executing member state could carry out an assessment to establish whether the same conditions of criminal responsibility are required in both the executing and issuing state. Third, if such an assessment is required, is there any distinction between surrender to serve a sentence or for prosecution? The Court answered these questions in a relatively common-sense way.

The Facts: Mr Piotrowski is a Polish national who is now 24 years old. His surrender was requested by the Regional Court in Bialystock, Poland, to serve two sentences. The first was a sentence of six months' imprisonment for theft of a bicycle. The second was a sentence of two years and six months for giving false information in relation to a serious

attack. Although he was over 18 when he was convicted and made subject to the EAW, it appears that he was under 18 when both offences were committed. He was arrested in Belgium in June 2016. Following proceedings in the Belgian Courts his surrender was ordered for the offence of making threats. However, in relation to the offence of bicycle theft the Belgian Court of Cassation reached differing conclusions as to whether the surrender of a minor on an EAW called for an assessment of conditions to be met in the executing member state.

The questions: the Belgian Courts presented three questions to the CJEU for a preliminary ruling (summarised below):

1. Should surrender on an EAW only be granted for persons who are not minors under the law of the executing member state or can minors be extradited if they are over the age of criminal responsibility in the executing state?
2. If minors can be surrendered, is being above the age of criminal responsibility sufficient or should the executing member state carry out an assessment on a case by case basis having regard to the requested person's age at the time of the acts, the nature of the offence and their offending history?
3. If there is to be an assessment of conditions on a case by case basis is there any difference between accusation and conviction cases?

The Court's answers: the CJEU answered the first question by finding that the Framework Decision on the EAW is to be interpreted as meaning that the executing member state must refuse to surrender only minors who are under the age of criminal responsibility under the law of that state and who have not reached the age of criminal responsibility for the acts on which the warrant issued against them is based. Answering the second question, the Court held that the executing member state must simply verify whether the person concerned has reached the age of criminal responsibility for the acts on which the EAW is based, without considering additional conditions such as the individual's circumstances and the conditions under which they would be prosecuted and convicted under the law of the executing member state. These answers meant it was not necessary to answer the third question.

Comment & conclusion: the CJEU's judgment provides a relatively common-sense answer to the questions posed. Extradition of minors is relatively rare but not unheard of. The author of this comment has personal experience of both defending and prosecuting minors subject to EAWs for offences of varying seriousness. The bar of age in section 15 of the UK's Extradition Act 2003 is never relied on, presumably because no EAWs have been executed against children under the age of 10 in England and Wales or 8 in Scotland.

Perhaps the most interesting part of the Court's analysis for extradition defence practitioners is not the main issue, but what the Court said at paragraph 61 regarding requests for supplemental information under article 15 of the Framework: '*However, it should be noted that recourse may be had to that option only as a last resort in exceptional cases in which the executing judicial authority considers that it does not have the official evidence necessary to adopt a decision on surrender as a matter of urgency.*' This may be useful to discourage unnecessary resort to article 15 requests where the case is not exceptional.

To find out more see below for our DELF Education event in April: "CJEU EAW case law: how to use it until Brexit", presented by Mark Summers QC of Matrix Chambers.

Daniel Sternberg
Foundry Chambers

An update from Holland
Post Zdziaszek and Tupikas case law

Last year, the CJEU ruled in Zdziaszek (Case C-271/17 PPU) and Tupikas (C-270/17 PPU) that art. 4bis of the EAW Framework decision also applies to appeal proceedings and so-called "merger of sentences" proceedings (often applied in Poland). In the case of the latter, however, the court ordering the merger should have some form of discretion. If the calculation of the merged sentence is a mere arithmetical exercise, art. 4bis does not apply.

On 26 October last, the Amsterdam District Court ruled that the Italian *provvedimento di cumolo* does not leave any room for judicial discretion and was therefore not covered by art. 4bis. The relevant decision can be accessed here: *http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2017:7856*

Finally, there has been quite some discussion in the Netherlands concerning whether the Zdziaszek and Tupikas rulings also apply to revocation proceedings. On 28 September last, the Amsterdam District Court referred a preliminary question to the CJEU on the issue (*http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2017:7037*). The resulting *Ardic* case (C-571/17 PPU) is dealt with under the PPU. I (TD) happen to have had the good fortune of arguing the case in Luxemburg which was quite the experience. Unfortunately, only the Irish Government (undoubtedly inspired by the decision of the Irish Supreme Court in *Lupinski*) supported my argument that art. 4bis should also apply to revocation proceedings. Interestingly, the European Commission argued that in absentia problems in revocation proceedings should not be dealt with under art. 4bis, but under the *Aranyosi/Caldararu* case law. Advocate-General Bobek delivered his advisory opinion on 20 December (ECLI:EU:C:2017:1013). He argued that art. 4bis does not apply to revocation proceedings. Two(!) days later, the CJEU pronounced its judgment in which it concurred with AG Bobek (ECLI:EU:C:2017:1026). Please see the English translated version of the judgment here: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd6f619ecb15904fc8b48ee5d21d07b6f4.e34KaxiLc3qMb40Rch0SaxyNaNb0?text=&docid=198161&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=157964

ECtHR communicates applications against the Netherlands about refusal to apply mandatory suspension of surrender detention after 90 days.

On 5 October last, the European Court of Human Rights (ECtHR) decided to communicate to the Dutch Government three applications filed against the Netherlands.

The applicants complained about a violation by the Netherlands of art. 5 ECHR (right to liberty and security), more particularly, the obligation laid down in this article that all detention must be in accordance with national law.

All three applicants were detained on the basis of a European Arrest Warrant (EAW). Dutch law (art. 22, par. 4 of the Surrender Act) provides that if the Amsterdam District Court does not rule on the EAW within 90 days, the wanted person must be conditionally released from detention.

In the cases of the applicants, the Amsterdam District Court had been unable to rule on the EAWs within 90 days. The reason for this was that it had to postpone its decisions multiple times because of problematic detention conditions in Romania, and a preliminary reference on this issue made to the Court of Justice of the European Union.

As a result of the lapsing of the 90 day time limit, the applicants requested that the Amsterdam District Court conditionally release them. The District Court denied these requests, arguing that because of the special circumstances of the case, the 90 day time limit had been suspended (see ECLI:NL:RBAMS:2016:1995; ECLI:NL:RBAMS:2016:2630 and ECLI:NL:RBAMS:2016:9691). The applicants filed an appeal against this decision. The Amsterdam Court of Appeal, however, confirmed the decisions of the District Court, albeit on the basis of a different line of argument (see ECLI:NL:GHAMS:2016:1838; ECLI:NL:GHAMS:2016:4900; and ECLI:NL:GHAMS:2017:220). Interestingly, the subject matter of the case resulted in a serious disagreement between the Amsterdam District Court and the Amsterdam Court of Appeal. The disagreement was so fundamental that the District Court felt compelled to stick to its own line of reasoning, even though this reasoning has been overturned time and again by the court of appeal.

The applicants believe that it is not necessary to establish which court (District Court or Court of Appeal) is correct. After all, the Amsterdam Court of Appeal decided on their applications for release in final instance and that Court's line of argument does not, in any event, stand up to legal scrutiny. In the applicants' view, the line of reasoning of the Amsterdam Court of Appeal is in clear contravention of the plain text of the law as a result of which their continued detention was also unlawful. They therefore decided to submit an application to the ECtHR.

By communicating the applications, the Dutch Government is given an opportunity to respond to the arguments of the applicants. Only a very small number of applications reach this stage of the complaint procedure at the ECtHR. The

ECtHR will decide on the merits of the applications after having heard (further) argument of the various parties involved.

The applicants in all three cases happen to be represented by me (TD). The communication decisions of the ECtHR can be downloaded via: *https://hudoc.echr.coe.int/eng?i=001-178254; http://hudoc.echr.coe.int/eng?i=001-178255* and *http://hudoc.echr.coe.int/eng?i=001-178256*

Update on Lisbon prisons

The Amsterdam District Court ruled on 31st October last (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

German Federal Constitutional Court: Extradition to Romania ordered by Hamburg Court violates

German Constitution

By Order of 19 December 2017 – 2 BvR 424/17 – the German Federal Constitutional Court ruled on a constitutional complaint raised by a person who had been arrested in Germany bases on an EAW from Romania. The requested person argued that the extradition to Romania was inadmissible, as the detention conditions in Romania amounted to a violation of Art.3 of the ECHR.

Facts of the Case: Based on a national arrest warrant issued by a Romanian court on three cases of suspicion of document fraud and other fraud related offences, a European arrest warrant was issued against the complainant. The complainant served a prison sentence in Hamburg for criminal offences committed in Germany, after which he was kept in extradition detention.

In the course of the extradition proceedings, the German Federal Ministry of Justice informed the justice administration of the German federal states *(Länder)* by letter dated 1 December 2016 that there had been discussions in Romania regarding the insufficient detention conditions, and that the detention centre at Jilava had been visited. They found that the Romanian prisons were highly over-populated and short of approximately 9,500 spaces for detainees. During the visit to Jilava, one German citizen confirmed that he had the impression that the prison was over-populated and stated that he shared his cell with eight other inmates and the only personal space available to him was his bed. Moreover, they outlined several legal reforms required by the Romanian authorities, including the installation of an ombudsman and a "judge for the supervision of the deprivation of liberty".

When asked about the personal space available to requested persons in Romania, the Romanian authorities, as always, guaranteed a minimum personal space of 3 square metres, including furniture in the case of a closed regime, and 2 square metres in open or semi-open regimes.

The Higher Regional Court of Hamburg, one of the few German Courts that had, until recently, maintained that extradition to Romania could not be categorically denied as this would jeopardise the judicial cooperation in criminal matters, allowed the extradition. It relied on *Aranyosi* and *Calderaru* (C-404/15 and C-659/15 PPU), which clarified that the principle of mutual trust generally obliged Member States to execute an EAW. Only under exceptional circumstances could this principle be limited, eg, in the case of a violation against Art.4 of the Fundamental Rights Charter. Based on the submissions from the German Ministry of Justice and the Romanian authorities, the Hamburg Court considered that the functioning of the criminal justice system within the EU had to be considered. If Germany rejected the extradition, crimes committed in Romania would remain unpunished, and this would eventually lead to Germany becoming a safe haven for Romanians. Despite the various findings by the European Court of Human Rights of Romania's violations of Art.3 ECHR for poor prison conditions, the prison situation in Romania had to be viewed "as a whole", and the individual space only had indicative value. Detention conditions in Romania have improved significantly since 2014, even though prison overcrowding remained at alarmingly high levels and the minimum of personal space assured by the Romanian authorities – at least the individual space granted under a semi-open or open regime – still fell short of the standards established by the ECtHR in relation to living space available to prisoners. According to the Higher Regional Court, it should also be considered that the insufficient space available within the prison cell was considerably mitigated by the rather generous allocation of out of cell time. The Higher Regional Court added that Romanian prison facilities had by now established the necessary infrastructure to allow prisoners free movement; that opportunities for prison leave; admission of visitors; washing or private laundry and purchase of personal items have been strengthened; and, moreover, that better facilities are provided for heating, sanitation and hygiene.

The defence argued that the requirements of Art.3 ECHR were not met at all in the case of prison conditions. When establishing the individual prison space granted, the space taken up by furniture could not be included. It lodged a constitutional complaint against the decision, based on the violation of Art.1 of the German Constitution (human dignity), in light of the poor prison conditions. (Art.1 also implies the prohibition of torture and inhumane or degrading treatment in German law.)

The Constitutional Court allowed the complaint. Interestingly, it did not discuss the violation of Art.1 of the German Constitution, but instead found that the Hamburg Court had erred in interpreting Art.4 FRC, without seeing the need to request a preliminary ruling by the CJEU. According to the Constitutional Court, the challenged decisions violated the complainant's right to his lawful judge (Art.101(1) second sentence German Constitution), a right equivalent to fundamental rights. Where doubts concerning the interpretation and application of EU law arise in proceedings before

the regular courts for the review of extradition requests received by way of mutual legal assistance as determined by EU law, the right to one's lawful judge requires that the relevant questions be referred to the ECJ for a preliminary ruling. Failure to comply with the duty of referral incumbent upon regular courts under EU law does not always violate the guarantee of Art.101(1) second sentence of the Basic Law *(grundgesetz* – GG). The right to one's lawful judge is violated, however, if an issue is not yet fully resolved in the case law of the Court of Justice and a regular court exceeds, in an untenable manner, the margin of assessment which it is necessarily afforded when interpreting and applying EU law. To date, the ECJ has not definitively determined which specific minimum standards derive from Art.4 of the CFR in relation to conditions of detention, nor has it clarified the standards of review applicable to detention conditions under EU law. A regular court certainly exceeds its margin of assessment if it draws on case law of the ECJ as required under Art.52(3) CFR, but does so only selectively while adding other considerations and thereby develops EU law on its own authority. For these reasons, the Federal Constitutional Court had granted the relief sought in constitutional complaint proceedings directed against the orders of the Higher Regional Court of Hamburg and remanded the case to the Court.

Comment: This decision is extremely interesting. It responds to a current problem regarding extradition to Member States of the EU with poor prison conditions: some countries grant extradition based on the principle of mutual trust, while others deny it, based on a violation of Art.3 ECHR or Art.4 FRC. Even within Germany, there is no unified case law in this matter. Therefore, with the constitutional complaint the Federal Constitutional Court had the chance to unify German case law by establishing what conditions need to be fulfilled in order to comply with Art.3 ECHR/Art.4 FRC. However, in light of these provisions being European ones, and the EAW being a European instrument, the Constitutional Court went even further and suggested this case be put before the CJEU. In the event that the Higher Regional Court of Hamburg brings this question before the CJEU, we have reason to hope that the CJEU will give a definite ruling on the matter, establishing clearer minimum standards even those set down in *Mursic v Croatia*, and, thereby hopefully contribute to a more unified European approach on extradition matters.

But the ruling is also interesting from a different aspect in that it not only encourages, but even obliges, German national judges to profoundly research the CJEU's case law when it comes to the interpretation of European criminal law and, if there is doubt about the interpretation, request a preliminary ruling under Art.267 TFEU. This may not only be relevant in EAW cases, but in any case relating to the interpretation and implementation of European Directives, eg, with regards to what are considered "essential documents" that need to be translated within the meaning of Art.3(3) of Directive 2010/64. It, therefore, has the potential to strongly contribute to the on-going unification and streamlining of European criminal law.

The full decision is published at the Court's website:
https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/12/rs20171219_2bvr042417.html
A press release is also available here:
https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-003.html

Anna Oehmichen
Knierim & Krug Rechtsanwälte

French prison conditions update

On 22 January 2018, Mr Justice Dove granted permission to appeal in the joined the cases of Shumba (CO/3071/2017), Bechian (CO/2743/2017) and Henta (CO/44461/2017). The case will be the first to consider French prison conditions since the Committee for the Prevention of Torture report was published (7 April 2017). The CPT found that conditions in two prisons - Fresnes and Nimes - breached Article 3 ECHR. Villepinte prison was also visited and conditions were heavily criticised. The report details overcrowding (at 150% or more) with individual cell space of sometimes less than 3m²; ill-treatment from prison officers (particularly in Fresnes); low temperatures and humidity; and few activities outside of cell. Assurances have been required in two Dutch cases but none has been provided in any extradition cases thus far in this jurisdiction.

Saoirse Townshend and Emilie Pottle are instructed in the appeal.

Saoirse Townshend

Article 8 delays

The case of *Sobczyk v Poland* [2017] EHWC 3353 (Admin) was heard before the Divisional Court on 20th December 2017. Permission was granted by Sir Ross Cranston on the following basis:

'The Divisional Court needs to decide whether any significant weight should be attached to delay by the authorities in seeking extradition when the Requested Person is a fugitive. Particularly, on the apparent conflict between the four cases of *Oreszczynksi v Poland* [2014] EWHC 4346 (Admin); *Marchewka v Poland* [2016] EWHC 998 (Admin), *Miller v Poland* [2016] EWHC 2568 (Admin) and *Juchniewicz v Poland* [2013] EWHC 1529 (Admin); and the decision in CO/137/2017 *Sibilski v Regional Court and the Circuit Court in Warsaw (Poland)* [2016] EWHC 998 (Admin).'

All extradition practitioners will be familiar with these authorities and that, when raising the point, the success or failure of your case relies heavily on which Judge it is allocated to at the High Court. Permission was granted with the intention of making the position clearer. Unfortunately, however, the Divisional Court declined to do so on the specific facts of this case. Particularly, additional information provided on appeal (including documents supporting the Appellant's account that he lived openly in the UK, which the District Judge had doubted) was not admitted. That decision allowed the Court to sidestep the question posed upon the granting of permission.

The conflict of authorities therefore remains open to argument and must now wait for another opportunity to be aired before the Divisional Court.

Amanda Bostock
Furnival Chambers

Forthcoming events

The first DELF educational event will take place on 21st March 2018: Ed Fitzgerald QC in conversation with Sir Andrew Collins. The event will take place at Kingsley Napley – Knights Quarter, 14 St John's Lane, London EC1M 4AJ. Registration from 6 pm and the event will begin at 6.30 pm.

There are limited spaces available. To register, please email: membership@delf.org.uk

The next DELF educational event "CJEU EAW case law: how to use it until Brexit" will be presented by Mark Summers QC of Matrix Chambers on 23rd April 2018, at Matrix Chambers. Invitations will be sent out shortly.

These events are free for all members who have paid their annual membership fee for 2018.

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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