



DELF  
DEFENCE EXTRADITION LAWYERS FORUM

## NEWS

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Welcome to Issue 12 of the Defence Extradition Lawyers Forum newsletter. In this edition Rachel Scott reports on the expert roundtable meeting she attended at the European Parliament on pre-trial detention; Mary Westcott provides an update on *Jane v Prosecutor General's Office, Lithuania* [2018] EWCH 1122 (Admin); we update you on our recent meeting with the LAA; Mary Westcott provides a briefing on the latest DELF education event, which took place on 23 April 2018 - CJEU EAW Case law: how to use it until Brexit; and Peter Caldwell reports on the second DELF annual dinner. We update you on forthcoming events and our activities over the past month and explain how you could get involved.

### A message from the Chair

Welcome to the 12<sup>th</sup> edition of the DELF Newsletter. DELF has come a long way in its short existence. Two years ago Rebecca and I had the idea of establishing an organisation for the defence community of extradition lawyers. A forum where our voices could be heard. Since its inception, DELF has engaged with the LAA, made submissions to the Criminal Procedure Rules Committee, attended regular meetings at the Administrative Court Office and secured a quarterly meeting with the Chief Magistrate's Office. We have also set up a Brexit sub-committee. All, we hope, to the benefit of our members. I am not sure either of us possibly imagined that within two years we would have over 230 members, including international members from Italy, France, Portugal, Germany and the Netherlands.

Looking forward, I am delighted that the first DELF annual conference will take place on Friday 14 September 2018 followed by an evening reception. Panels are already in place and tickets will go on sale in late June.

At the Annual Dinner on 11 May, I announced that DELF will be launching an Essay competition in memory of the late John Jones QC whom many of you knew and loved and who contributed so much to extradition law. The John Jones QC essay competition will be open to law students, pupils and trainees as well as qualified barristers and solicitors up to three years of call. A panel consisting of Mr Justice Nicol, Ed Fitzgerald QC and myself will judge the entries and the winner will be announced at the Annual Conference receiving a £500 prize. Further details will be released next month.

I would like to thank my committee for all their hard work. A lot goes on behind the scenes to make DELF the success it is and I would like to thank each and every one of them for their commitment and verve.

I would also like to thank you, our members, for your continued support. I hope you enjoy the 12<sup>th</sup> edition of our

## Our Recent Activities

### *Engagement with the LAA*

On 27 March 2018 DELF met with the LAA at Westminster Magistrates' Court. Below is a summary of the discussion points:

#### Applications for legal aid

- Requiring evidence/information from clients in custody:
  - The LAA does not require evidence of income for a client in court custody (wage slips, rent payments, etc), but if the client is suggesting that their income has stopped as a result of being in custody then evidence will be required to validate this (unless they've been in custody for a long time). If evidence is not available then a note of this should be made on the application including details of what has been done to try and obtain the evidence required;
  - It appears that LAA caseworkers have been asking for evidence. This may be a case of using the standard wordings or it may be that there was something in the application triggering the request. The LAA has agreed to look at some examples where this has happened and will also look at any issues with the standard wording;
  - Changes to the eForm (when implemented) should help with this.
- Signing the form for a client with mental health problems:
  - This is prohibited in the guidance currently;
  - The LAA is exploring whether there is any way round this.
- Completing the form for contractors, e.g., UBER drivers, etc:
  - Tick the self-employed box and explain the nature of the work and that the client will not have accounts.

#### Prior Authority applications

- Experts and foreign exchange rates:
  - The LAA grants prior authority rates in sterling and there was concern that where an expert's invoice differs as a result of exchange rates, the LAA would not pay the amount agreed;
  - The LAA confirmed that it should pay as long as the expert has kept to the quote in the original currency (within the usual caveats of it being reasonable) even if the sterling price is higher. This message will be sent out to caseworkers to make sure they are aware of this.
- Interim payments:
  - The LAA will explore further whether it can make interim payments work operationally.
- Interpreters/translation costs:
  - Some interpreters or translators are difficult to secure because there are few which deal with particular languages;
  - DELF will provide a list of those languages and this will be shared with caseworkers;
  - LAA will provide a checklist for what information is required when considering a prior authority request to prevent applications being returned.
- Foreign travel:
  - LAA to explore arrangements.

#### Claims

- Enhancements:
  - It was agreed that there should be a strong presumption that enhancement should be available in cases where a Certificate of Counsel has been granted. This will be confirmed with caseworkers;

- The LAA does not allow enhancements on all work within a case, and it would be helpful for firms to specify which parts of the case require more specialist expertise when claims are submitted.
- Research:
  - It was discussed whether research would be allowable, given the more frequently changing nature of extradition (as compared to crime cases). To be further explored by the LAA. In the meantime, if firms are claiming for research they will be required to record in detail their reasons for doing so.
- Joint experts with CPS:
  - LAA to explore how these may be claimed.

#### Contacting the LAA

- In the first instance firms should use the normal contact telephone numbers and email addresses; and
- If anyone has anything specific they would like us to raise, please do get in touch with us at [enquiries@delf.org.uk](mailto: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](mailto:ben.lloyd@6kbw.com)).

#### Legal Update

##### *A report the Pre-trial detention roundtable at the European Parliament*

On 25 April 2018, I represented DELf and its members at the Expert Roundtable on Pre-Trial Detention, held at the European Parliament in Brussels. It was an event organised by Ralph Bunche of Fair Trials, in conjunction with LEAP (the Legal Experts Advisory Panel); and hosted by MEPs Judith Sargentini (Green Party, Netherlands) and Birgit Sippel (Socialists and Democrats, Germany).

Bringing together representatives of a large number of EU-wide organisations with an interest in this area, the meeting was a forum for the sharing of research and experiences across a broad variety of disciplines: lawyers, academics, probation officers, NGOs and prison officers.

The purpose of the event was to use that pooled knowledge and experience to identify the key failings in how pre-trial detention is being applied across Europe, and to discuss where and how improvements could be achieved.

After a joint welcome by our host MEPs, who emphasised that their role was primarily to listen and understand, the event began in earnest with a presentation from the Added Value Unit of the European Parliamentary Research Service. This revealed the results of a recent study which had boldly attempted the impossible by trying to quantify the human costs of pre-trial detention. Damaged earning potential, loss of access to family support networks, and the costs of anti-radicalisation programmes were all cited. The study also referred to evidence linking overcrowding with an increased risk of suicide, emphasising that no figure can ever be attributed to the value of life itself. It was a thought-provoking and sensitively-presented contribution to the debate.

The CPT told us, in news which will no doubt be welcomed by all DELf members, that work is afoot to move towards a system of compulsory publication of its inspection reports without the need for the country in question to consent. The bad news is that the proposal only applies to EU member states. The frustration of being left to speculate what may lie within the pages of certain other states' embargoed CPT reports will endure a while longer, it would appear.

Walter Hammerschick, the Director of the Institute for the Sociology of Law and Criminology (part of the University of Vienna) presented the results of an illuminating comparative study of the use of pre-trial detention within the EU. Conducted in seven member states over a three-year period, it revealed that, in large part, states have appropriate legislative and procedural structures in place, but that serious and widespread problems remain thanks to unfairness within the decision-making processes. The study observed that judges and prosecutors would all too often ignore the principle of prison as the *ultima ratio*, or last resort. Prosecutorial objections to bail would be taken as a matter of principle, with the legal grounds for justification an afterthought. It was common for neither judges nor prosecutors to have heard of the European Supervision Order (ESO). Fundamentally, the study concluded, what was called for was

not a change in existing laws but rather a change in legal culture, together with a harmonisation of standards across member states.

Frustrations with the ineffective ESO - the product of a Framework Decision which was to be fully implemented by December 2012 - were a recurring theme as the microphone passed to the representatives of the various legal practitioner organisations (in addition to DELF, the ECBA and the Council of Bars and Law Societies of Europe were participants). All agreed that the problem lay not with the instrument itself, since it is perfectly up to the task (namely enabling one member state's bail decisions to be recognised and enforced in another member state where the suspect or defendant has ties). The issue - and this was the experience of all practitioners present - is in its woeful underuse. I recounted an example from a recent extradition case before the English courts which, on its facts, would have been the perfect ESO candidate, but for the refusal to even contemplate such an idea on the part of the judicial authority seeking extradition.

As DELF members will be all too well aware, individuals facing extradition - as opposed to domestic criminal proceedings - are particularly susceptible to lengthy periods of pre-trial detention. The early stage at which some states issue their extradition requests (sometimes the result of procedural rules requiring the presence of the accused during initial investigative steps) means that months and even years can pass before a person is finally tried post-extradition. If he or she has no local ties, that time will be spent in custody (and it is almost certain that a requested person *will* lack ties in one or other of the two countries involved in the extradition process; not infrequently they lack ties in both).

From a sharing of perspectives on the problems, the roundtable moved on to consideration of how to effect positive change.

Was further legislation needed at the EU level to encourage the principle of bail as a last resort? On balance, the prevailing view was no; better to advocate for education and training to promote the effective use of the instruments which are already at our disposal. It was suggested that one way of bringing the ESO into common use might be to push for an amendment of the European Arrest Warrant template so as to include a section forcing the issuing authority to at least consider its potential applicability in every EU extradition case.

How to arrive at a genuine position of common standards of detention across the EU? This question triggered an animated debate on whether the imposition of hard law inevitably risks lowering standards to the lowest common denominator. The pragmatists and the idealists did battle in good-natured style but no consensus was reached.

By contrast, the request of Fair Trials that we establish a smaller working group from within our number, to harness and build upon the afternoon's discussions and momentum, was met with enthusiastic agreement. And on that positive note, I stepped out into the continental sunshine, to take in the photographic exhibition paying tribute to the inspirational Simone Veil, and to breathe a deep sigh of relief that not one person had mentioned Brexit.

Rachel Scott  
3 Raymond Buildings

### Divisional Court re-instates requirement for prisons assurances in Lithuanian accusation cases: *Jane v Prosecutor General's Office, Lithuania* [2018] EWCH 1122 (Admin)

It may be of interest to note that the "headline" Lithuanian prisons case heard by the Divisional Court on 25 April 2018 led to a judgment handed down on 15 May 2018.

Noting the extensive on-going international criticism of two of Lithuania's three remand prisons (Lukiskes and Siauliai), the Court found that, despite reductions in overcrowding, there was no international consensus that conditions had been made Article 3 compliant pursuant to the test in *Elashmawy* (paras 90-91). Judges at WMC had accordingly been wrong in law and in fact to allow, since mid-2016, accusation extraditions to Lithuania to proceed without assurances (at least in cases where it was not otherwise clear that the defendant would be remanded in Kaunas remand prison).

Lithuania was granted 42 days to provide an adequate assurance in order to address the risk. The judgment anticipates potential future argument about the adequacy of any assurance offered.

The judgment affects all Lithuanian accusation cases where geography suggests the person will be held in any remand prison other than Kaunas. The pre-2016 position is restored and assurances are required.

The Divisional Court was composed of Hickinbottom LJ and Dingemans J.

The Appellant was represented by Mark Summers QC and Mary Westcott, instructed by Renata Pinter of Dalton Holmes Gray.

Mark Summers QC, Matrix  
Mary Westcott, Doughty Street

### DELf Educational Event - "CJEU EAW case law: how to use it until Brexit", 23 April 2018

There was a real risk this acronym-rich topic might prove a little dry for even the most seasoned practitioners. The itemised list of 35 hyper-linked authorities was somewhat intimidating. But we would like to express our genuine gratitude to Mark Summers QC for making the almost unintelligible not only palatable, but even interesting.

Anyone attending could not fail to have been drawn in by the probably time-limited "trump card" power of CJEU decisions in our jurisdiction. Before our own looming watershed moment of Brexit, there appears to have been a marked shift in CJEU decisions from 2016 onwards. Starting with *Aranosi*, it is now an accepted norm that there are limitations to mutual trust, particularly where fundamental rights apply.

Practitioners looking to spot new points of law would do well to consider inconsistencies between "our" cases and CJEU decisions. For example, compare and contrast the different analysis of when a Ministry of Justice is truly capable of being "judicial" by the Supreme Court (*Lithuania v Bucnys* [2014] AC 480) as opposed to the CJEU in *Kovalkovas* (10 November 2016) C-477/16 PPU.

If using CJEU case law is akin to playing the cello on the deck of the Titanic, then we all left thoroughly encouraged to play on and make use of it whilst we can. The challenge has been set for the first referred point by the UK, or at least to use these decisions whilst they apply here with full force.

Mary Westcott  
Doughty Street

### Recent events – The DELf Annual Dinner

On 11<sup>th</sup> May the beau monde of extradition defence lawyers met for DELf's annual dinner in the beautiful crypt of St Ethelreda's Church.

Edward Grange as chairman of DELf thanked all members and committee members for their contributions to the educational and social events held over the course of a busy year. He also introduced the John Jones QC Essay Competition to be awarded at our annual conference (see below). Special thanks were reserved for Anthony Hanratty who had arranged the dinner.

DELf was delighted to welcome the Chief Magistrate Emma Arbuthnot, and also our President, Edward Fitzgerald QC. Ed gave a rousing speech highlighting the impact of extradition practitioners on the development of the law and remembering in particular Clive Nicholls QC who passed away last year. Few who were present could forget the pride he took in what it takes to be British in a park on a cold winter's day – an insight that will inform DELf's submissions to the Brexit Select Committee..

We were pleased that this year's dinner was attended by a number of overseas lawyers and junior practitioners who will no doubt be our leading lawyers in years to come. Those with enough stamina were led harmlessly astray by Hannah Hinton for karaoke into the wee hours.

Islands in the stream – that is what we are.

Same time, same place next year.

Peter Caldwell, Doughty Street

### Forthcoming events

Please save the date in your diaries for 14 September 2018 for the DELF Annual Conference which will be held at the Grange Hotel, St Paul's. There will be an evening reception afterwards. Tickets will go on sale in June and details will be sent out shortly.

### 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 "DELFL Membership" in the subject heading to the e-mail address [membership@delf.org.uk](mailto: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](mailto:membership@delf.org.uk) after you have transferred the membership fees.

If you are simply paying for your own membership fee, please use your name as a reference on the bank transfer. There is no need to email to confirm if the name is used as the reference on the bank transfer.

Please make your payments by bank transfer to:

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