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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to Issue 13 of the Defence Extradition Lawyers Forum newsletter. In this edition Peter Caldwell reports on the *Celmer* case; Saoirse Townshend and Emilie Pottle provide an update on *Shumba et al*; Walter De Agostino provides a case note on the difficulties of challenging EAWs in Italy; Thom Dieben has an update from Hungary on inhuman and degrading treatment; and we include a report from Fair Trials on how the EAW system is failing individuals in a number of ways from a human perspective. We also update you on forthcoming events and explain how you could get involved.

A message from the Chair

The line-up for the 2018 DELF Annual Conference has been announced, with Jago Russell – CEO of Fair Trials – opening the day with a key note address. The Conference will be held at the Grange Hotel, a stone's throw from the historic St Paul's Cathedral. Tickets are on sale now.

The John Jones QC essay competition closes on 23 July 2018. There is still time for members who qualify for submission to get their entries to essay@delf.org.uk. The winner will receive £500 and two tickets to the DELF annual conference.

Finally, the DELF Committee would like to thank Irene McMillan, our Editor-in Chief, who will be standing down from her duties in August when she takes a well-earned sabbatical. A lot of time and effort goes into sourcing material for the Newsletter and Irene has done a sterling job. We wish her a restful and productive sabbatical.

I hope you enjoy Issue 13.

Edward Grange
Corker Binning

DELF activities

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

If you have any matters to raise in relation to the LAA please contact Anthony Hanratty (AHanratty@bivonas.com).

Legal Update

Minister for Justice and Equality v LM case C-216/18 PPU

On 28 June 2018, Advocate General Tanchev ("the AG") delivered his opinion to the CJEU on how the Court should answer the reference made by the Irish High Court in the case of *Celmer*.

Background

The Irish High Court considered that the legislative reforms undertaken by Poland affecting, in particular, the appointment and tenure of judges, breached the common value of the rule of law, referred to in Article 2 TEU. It drew the conclusion that there was a real risk that the requested person would not receive a fair trial in Poland, because the independence of the judiciary is no longer guaranteed there and compliance with the Polish Constitution is no longer ensured.

The Irish High Court looked at whether it should apply the approach that had been taken in *Aranyosi and Caldararu*[1] to the risk of inhuman or degrading treatment as prospective breaches of Article 4 of the Charter and Article 3 of the Convention.

Having found that there was evidence of general and systemic deficiencies in the Polish justice system it asked whether the two-stage process applied in *Aranyosi* was appropriate. It questioned whether it was realistic to require the individual concerned to establish that those deficiencies have an effect on the proceedings to which he is subject and whether it would be realistic to require guarantees as to the identity of the prosecutor or judges who might hear the case.

Summary

In summary, the AG recommended the *Aranyosi* approach but emphasised that it was for the requested person to establish a real risk of a flagrant denial of justice in his case; that the test of flagrancy was a high threshold but could arise from deficiencies in judicial independence [90]. Where the Court found systemic deficiencies and the existence of a real risk to the subject of an EAW it should seek further information per Article 15(2).

Jurisdictional issues

On a preliminary issue, the AG had no difficulty disposing of the Polish Government's objection to the admissibility of the reference, noting that all questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance and that the reference was not a hypothetical question but necessary to the resolution of a dispute.

As to jurisdiction, the AG stated that the broader remit of the European Council to assess under Art 7(1) whether there is a clear risk of a breach of Article 2 TEU (including the rule of law) did not preclude an executing state from carrying out a risk assessment of its own. A risk of a breach of the right to a fair trial may exist in the issuing Member State even if the state is not in breach of the rule of law. Likewise, a determination by the Council that there is a clear risk of a serious breach of the values referred to in Article 2 TEU does not have the same consequences as the executing judicial authority finding that there is a real risk of breach of a fundamental right. [40-41]

Obligations under the Framework Directive

The AG recalled that under the principle of mutual recognition Member States are *required,* subject to Articles 3 and 4 of the Framework Decision, to execute any EAW. In *Aranyosi* the Court had stated that, "in exceptional circumstances", limitations may be imposed on the principles of mutual recognition and mutual trust. Article 1(3) of the Framework Decision, itself provides that the Decision "shall not have the effect of modifying the obligation to respect fundamental rights" as enshrined in particular by the Charter.

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[1] The judgment of CJEU given on 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 98

Here, the "Right to an effective remedy and to a fair trial" provided by Article 47 of the Charter refers to the entitlement to a hearing by "an independent and impartial tribunal previously established by law". The AG therefore examined whether there was any difference of approach to the prohibition of inhuman or degrading treatment, laid down in Article 4 of the Charter, which is absolute, and the right to a fair trial set out in Article 47, which may be subject to limitations.

His view was that there was not: the Framework Decision does not indicate that Member States are bound to observe only fundamental rights which do not admit of any limitation; secondly, if there is a real risk that the courts of the issuing state do not provide a fair trial then automatic mutual recognition does not apply; thirdly, the Convention precludes Contracting States from extraditing persons who would be at real risk of a flagrant denial of justice in breach of Article 6.

The AG took the view that a judicial authority is required to postpone the execution of an EAW only where it finds, not only that there is a real risk of flagrant denial of justice on account of deficiencies affecting the system of justice of the issuing Member State, but also that the individual concerned will be exposed to that risk. Exceptions can only apply in a specific case.

Flagrancy
It is significant that it was to the case law dealing with Article 6, rather than to the decisions of the CJEU, to which the AG turned in setting the bar for an unfair trial, focussing on the threshold of flagrancy. Referring to *Othman,* he took a breach to constitute no less than that "which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right".

The AG went on to observe that the ECtHR has concluded on only four occasions that an extradition or expulsion would breach Article 6 of the ECHR. Such a comment risks understating the willingness of national courts to make a finding of flagrancy. Evidently the AG was at pains to foster the view that such a finding would be truly exceptional. That said, the AG does ultimately acknowledge, ("it cannot be ruled out") [90], that lack of independence of the courts of the issuing Member State may, *in principle*, constitute a flagrant denial of justice, though he is at great pains to stress that this has only rarely been the basis of a finding of an Article 6 breach in an expulsion case.

Application of Aranyosi approach
The AG observed that, even assuming that there is, in Poland, a real risk of flagrant denial of justice on account of the recent reforms of the system of justice, this cannot be taken to mean that *no* Polish court is capable of hearing *any case whatever* in compliance with the second paragraph of Article 47 of the Charter. To that it might be added that it should not be necessary for a requested person to show on the threshold assessment that there is a real risk of flagrant denial of justice in *any case whatever*.

The AG went on to give a number of examples where risk to the individual would not be established. The tendency of his analysis [113-117] is that this claim is more likely to be well founded in a political case, for which recital 12 of the Framework Decision provides a remedy in any event. His (rather unsympathetic) view of Mr Celmer's case is that it does not explain in what way the alleged deficiencies in the Polish system of justice would prevent his case from being heard by an independent and impartial tribunal.

As to the second limb, assuming the evidence has been provided of general deficiencies in the issuing state, the AG firmly endorses requests being made under the Article 15 procedure. This might include, in the case of Poland, information about recent legislative reforms. However, as an aside, the AG noted that, unlike specific assurances that might be offered concerning conditions of detention in an Article 4/Article 3 case, where there has been a finding of a real risk of a flagrant breach of a fair trial, further information is "unquestionably less likely to dispel the doubts of the executing judicial authority" [127].

Commentary
One has the sense that the AG's opinion was never in doubt concerning the availability of the remedy/process. Though rigorous in identifying the legal basis for postponement or discharge of an EAW on Article 47, his opinion, if adopted, offers little hope for the ordinary requested person facing extradition to Poland or anywhere else where the rule of law has been under attack. He gives a very firm steer towards maintaining a flagrancy bar, and at a very high level. The implication perhaps is that if things ever got so bad that there could be no prospect of a fair trial in an

ordinary case the European Council would have the power to remove a member state from participation in the EAW scheme. A decision for politicians rather than the Courts.

Peter Caldwell
Doughty Street

French prison conditions: Non merci…pour l'instant

Last Thursday, 12 July 2018, a Divisional Court (Singh LJ and Carr J), gave judgment in the long-awaited case of *Shumba, Bechian and Henta v France* [2018] EWHC 1762 (Admin). The Court considered that there may be a "*real risk*" of inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights ("ECHR") if the Appellants were extradited to France due to overcrowding in four Parisian prisons. Following the procedure set out in *Aranyosi and Căldăraru* [2016] 3 WLR 807, the Court called on the French authorities to provide further information in order to try and allay those fears.

Shumba et al is the first case in which conditions in the specific French prisons which were criticised by the recent Committee for the Prevention of Torture ("CPT") report dated 7 April 2017 (Fresnes and Villepinte), have been considered. Only two weeks before the Court handed down judgment in *Shumba et al*, another Divisional Court (Irwin LJ and Knowles J) in *Grant v Public Prosecutor of Argentan, France* [2018] EWHC 1630 (Admin), found that Article 3 ECHR was not breached in respect of two other prisons (Le Mans and Caen). The Appellants had relied upon the CPT report and a recent report of the Inspector General of Places of Deprivation of Liberty (CGLPL) (designated body through OPCAT). Singh LJ and *Shumba et al* expressly distinguished these two cases (see paras. 90-91).

The Appellants relied on expert evidence which suggested that if extradited, the Appellants would serve their sentences in one of four prisons, namely Villepinte, Fresnes, Nanterre or Fleury-Mérogis, all within the Paris region. The first two of those prisons (and Nimes, in the South of France which was not relevant to this appeal), had been the subject of heavy criticism by the CPT due to overcrowding. Indeed, the CPT expressly considered that imprisonment in Fresnes in particular due to poor conditions of detention, combined with overcrowding and lack of activities "*could be considered as inhuman and degrading treatment*" (CPT report, p.5). The Appellants relied not only on overcrowding, particularly as prisoner levels were proven to have *increased* since the CPT published its report, but also other conditions such as the length of time spent in cells (22 out of 24 hours per day), serious and prolonged infestations of rats and bedbugs and inter-prisoner violence. The Appellants primarily relied upon the CPT report, but also recent reports of the Inspector General (CGLPL) from February 2018 (which was based on visits of 70 prisons over the last three years), Ministry of Justice overcrowding statistics and the International Observatory of Prisons (French Section), an NGO, particularly regarding Fresnes in September 2017.

The Court held at para. 87 that "*In relation to those four prisons, we are satisfied on the evidence that there may be substantial grounds for believing that the Appellants face a real risk of inhuman or degrading treatment if they are extradited*". Furthermore, the Court concluded that the first stage of C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] 3 WLR 807 had been met and that "*there is sufficient evidence before the Court to require the Court to make a request of the French authorities setting out certain questions on which we need specific information before this Court could permit extradition of these Appellants to France"* (para. 89). Those questions are set out at the final paragraph of the judgment, at para. 138 (and are repeated for each Appellant):

1. *"In which part of which institution or institutions will Emanuel Shumba be detained if he is returned to France?*
2. *Will Emanuel Shumba be accommodated in a cell which provides him with at least 3m² of personal space (excluding any in-cell sanitary facility) at all times throughout his detention? If the answer is Yes, will he have between 3m² and 4m²?*
3. *Will the overall surface of the cell allow Emanuel Shumba to move freely between the furniture items in the cell at all times throughout his detention?*
4. *What will the other detention conditions be for Emanuel Shumba throughout his detention, including whether he will be accommodated in a cell where he or someone he is sharing with is sleeping on a mattress on the floor, what sanitary facilities there will be and whether the toilet will be fully partitioned from the rest of the cell, how many hours a day he will be allowed out of his cell, what meals he will receive and whether there remains a serious problem with rats and bedbugs at the prison?"*

The Respondent Judicial Authority now has until 7 September 2018 to respond. It is expected that further time will be given for submissions and that the Court may reconvene for another appeal hearing.

Although in *Grant v France,* further information on prison conditions had been admitted into evidence at first instance, this is the first time France has been asked *by a court* to provide further information or "*assurances*" of this type, having found that there may be "real risk" of a prospective Article 3 ECHR breach.

Mr Shumba is represented by Alison Macdonald QC and Saoirse Townshend and is instructed by BSB Solicitors. Mr Bechian and Mr Henta are represented by Alison Macdonald QC and Emilie Pottle and are instructed by McMillan Williams Solicitors and National Legal Service respectively.

Saoirse Townshend and Emilie Pottle
36 Bedford Row

Casenote: Challenging an executing EAW in Italy – Italian Supreme Court of May 2018 n.23156/18

Mr R, a Romanian citizen, was arrested in Rome on 24 March 2016 on the basis of a European Arrest Warrant issued by Romania for the purpose of executing a custodial sentence of eight years: six years and six months for fraud and one year and six months for forgery of private written agreements.

When Mr R's case was heard by the President of the Court of Appeal in Rome (within five days of his arrest) he did not consent to his surrender to Romania.

On 17 May 2016, the Court of Appeal in Rome decided to surrender Mr R to the Romanian Judicial Authority on the basis that he was not officially resident in Italy, regardless of the fact that he ran the risk of being exposed to inhuman and degrading treatment as a result of the conditions for his detention in the issuing Member State.

The evidence of the systemic deficiencies affecting almost all penitentiaries in Romania was provided to the Court through a pleading, having regards also to several ECtHR judgments and the, then very recent, CJEU judgment in the case *Aranyosi* and *Caldararu*.

It is important to point out that Mr R's surrender was granted only in relation to the fraud as, in Italy, the forgery of private written agreements has not been considered a crime since 2016, thus the remaining sentence to be served is six years and six months.

An appeal against Mr R's surrender was submitted to the Supreme Court on the basis that the Court of Appeal failed to request any information regarding detention conditions in the issuing Member State. On 14 June 2016, the Supreme Court quashed the judgment and referred the case back to a different section of the Court of Appeal in Rome (to ensure that the matter did not come before the same judge) in order that more specific and precise information on detention conditions in Romania could be requested and considered.

On 6 July 2016, the referral hearing before the Court of Appeal in Rome was postponed to 21 September 2016, as the request for information had not been received from the Issuing Judicial Authority.

On 11 July 2016, Mr R was released upon expiry of the time limits for detention in EAW proceedings in Italy (60 days for first instance proceedings, starting from the arrest of the requested person. This term can be extended for a further 30 days in cases where a supplementary information request is made; 15 days for proceedings before the Supreme Court; and 20 days for referral proceedings, both terms starting from the date the case files are received by the Court).

The hearing was further postponed to 16 January 2017, as the requested information had still not been received. In the meantime, the Romanian Judicial Authority served a general report dealing with the different regimes of enforcement of the sentence in Romanian prisons.

The defence argued that the issuing Judicial Authority failed to send the further assurances required to show that the detention conditions in which Mr R would be held complied with Art 4 of the Charter of Fundamental Rights of the

European Union, as the CJEU stated in *the Aranyosi and Caldararu* judgment. For these reasons, the Court of Appeal in Rome postponed the hearing to 20 April 2017, once again requesting that Romania send specific information identifying the assigned penitentiary and conditions of detention.

Prior to 20 April 2017, a note was provided by the Romanian National Penitentiary Department with the intention of providing the required assurances, which included evidence of violations of the principles stated by the CPT and also the ECtHR Grand Chamber Judgment *Mursic v Croatia* (20 October 2016). In fact, Mr R was to be detained in a closed regime, which provided the opportunity to spend a maximum of three hours out of his cell per day - below the minimum standard of eight hours established by the Jurisprudence of ECtHR. The defendant would have been assigned to Margineni Penitentiary, in which he would have been detained within a variety of multi-occupation cells with less than 3m² per detainee. The defence provided copies of two ECtHR judgments highlighting violations of Art 3 ECHR founded within the same Margineni Penitentiary (*Rebergea v Romania* 15 March 2016, Third Section; and *Iacov Stanciu v Romania* 24 June 2012, Third Section).

Despite the evidence provided, the Court of Appeal in Rome decided to surrender Mr R to Romania on the basis that the Requesting State had provided sufficient assurances regarding the minimum guaranteed space, still leaving aside the issue of freedom of movement outside the cells (as established in the *Mursic* judgment).

An appeal was submitted to the Supreme Court, but a judgment issued on 6 June 2017 declared that the complaints were inadmissible because there was no evidence of the risk of violation of Art 3 ECHR, despite the recent ECtHR pilot judgment *Rezmives and Others v Romania* (25 April 2017) that demonstrated that there were systemic deficiencies in almost all Romanian prisons.

As the decision became final, an order to arrest was issued by the Court of Appeal in Rome on 23 June 2017, but it was discovered that Mr R had absconded. He was subsequently apprehended and held in custody on 19 March 2018 pending his return to Romania in no later than 10 days (in accordance with Art 23 § 5 of Framework Decision and the CJEU Grand Chamber Judgment of 15 July 2015, *case C-237/15 PPU Ministry of justice and Equality v Lanigan*).

The day after Mr R's arrest, Italian Interpol received news that Romanian Interpol had scheduled Mr R's return trip on 11 April 2018, as a result of unspecified organizational reasons, proposing to postpone the term of surrender until that date. As the Court had not yet decided to extend the 10 day period in which Mr R was to be returned, the defence demanded the immediate release of Mr R on the basis that the purchase of a flight ticket could not be considered as "*circumstances beyond the control of any of the Member States*" (Art 23 § 2 of Framework Decision) to allow the deferral of the surrender.

On 29 March 2018 this request was rejected by the Court of Appeal in Rome and the term of surrender was extended until 11 April 2018, as the Court decided that organizational reasons could be considered as circumstances beyond the control of the issuing Member State.

On 30 March 2018, Mr R's defence team again applied for the immediate release of Mr R on the grounds that his continued detention was illegal under Art 5 of the ECHR, as the extension of the surrender period had been granted after the original term had already expired.

On this basis, on 3April 2018 the Court of Appeal released Mr R from detention.

At of date of publication, the European Arrest Warrant issued against Mr R has still not been executed.

Rome, 2 July 2018

Avv. Walter De Agostino
Rome Bar - Italy

Hungarian prisons acknowledged to represent a systemic Article 3 violation: *Fuzesi and Balazs v Hungary*

The link below contains a press release from the CJEU, released on 4 July 2018, which may be of interest to DELF members. Advocate General Campos Sánchez-Bordona proposes that the CJEU should rule that the existence of judicial remedies against possible inhuman or degrading treatment in the state issuing an EAW is a relevant factor

allowing such a risk to be discounted and that, consequently, there are, in principle, no exceptional circumstances capable of justifying the non-execution of that arrest warrant.

If I understand his opinion correctly, this may very well be the beginning of the end of *Aranyosi* case law.

https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-07/cp180102en.pdf

Thom Dieben
Jahae Raymakers

Fair Trials: Beyond Surrender – Putting human rights at the heart of the European Arrest Warrant

The link below contains a recent report published by Fair Trials. Following the decision in *Aranyosi and Calderaru*, Fair Trials, together with partners in four countries: APADOR-CH (Romania); Helsinki Foundation for Human Rights (Poland); Human Rights Monitoring Institute (Lithuania); and Rights International Spain, launched a research project to look at what happens to individuals once they have been extradited. The research considered the EAW system very much from the point of view of the human effects on the lives of those subject to an EAW and their families.

The report had three main findings:

- The EAW is overused and it is having a destructive effect on the lives of ordinary individuals;
- It is used without regard for the most basic of human rights; and
- Insufficient information is disclosed on post-surrender treatment.

Originally set up to deal with serious and complex cross-border crime, the EAW continues to be frequently used to deal with petty criminal offences and either to circumvent, or used alongside, the European Evidence Warrant and the European Investigation Order (EIO) by requesting the surrender of individuals only for the purpose of interview.

Whilst the Procedural Rights Roadmap has done a great deal to improve the situation with regards to an individual's right to a fair trial, it has not been able to resolve many of the issues relating to the EAW, such as its over-use or the continuing problems with prison conditions.

The European Supervision Order was set up to enable the monitoring of individuals on release pending trial, but these are rarely used. As a result, families are separated for long periods of time and individuals risk the loss of employment or closing their businesses because they are being detained for unnecessarily lengthy periods of time.

The report identifies a number of gaps which, if dealt with, could help to resolve many of the problems currently experienced, such as: allowing executing countries to assess proportionality; stating whether an EIO has been used first; allowing direct challenges to the issuing of an EAW; allowing executing countries to look behind assurances on prison conditions; and establishing rules on remedies where there has been a violation of rights and when an EAW should not be executed.

The report recommends amending the EAW law; completing the Procedural Rights Roadmap in relation to pre-trial detention and vulnerable suspects; and strengthening the implementation of EU criminal law.

http://fairtrials.org/publication/beyond-surrender

Irene McMillan
Kingsley Napley

Forthcoming events

Tickets are now on sale for the DELF Annual Conference which will be held at the Grange Hotel, St Paul's on 14 September 2018. There will be an evening reception afterwards. Registration forms are available here: http://delf.org.uk/delf-annual-conference-2018/. Once completed, please send by email to membership@delf.org.uk.

As mentioned by Ed Fitzgerald QC at the DELF Annual Dinner, we are now launching the DELF John RWD Jones QC Essay Competition 2018. The competition is open to those either currently - or about to - study law, trainee solicitors, pupil barristers and legal practitioners up to 3 years' PQE or call. Please see the link below for further information.

http://delf.org.uk/the-delf-john-rwd-jones-qc-essay-competition-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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