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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the Defence Extradition Lawyers Forum newsletter, edition 14. We are back after a short summer break and the DELF Annual Conference on 14 September 2018 where we were able to meet up with so many members of DELF. This edition includes the Sarah Phillips' excellent prize winning essay from the John RWD Jones QC Essay Competition, a write up of all four panels at the Annual Conference (with thanks to Sophie Wood, Reka Hollos, Rebecca Hadgett and Hannah Hinton) and a legal update from Anthony Hanratty who, continuing the themes of one of the conference's panels, examines the implications two successful decision on forum *Love v USA* and *Scott v USA*.

A message from the Chair

It is a privilege and an honour to have been appointed Chairman. As our first conference showed (for more, see below) DELF is a thriving organisation and one that serves a real purpose in the world of extradition, not just here in the UK but internationally too. I want to pay tribute to our outgoing Chair, Ed Grange, who has been a superb leader this past year. I also want to add my personal thanks to those who spoke at the Conference. It really was an inspirational day. Huge thanks to Ben Keith for the hard work he put it as well as to the rest of the DELF Committee for all of their efforts.

This next year could potentially be the most significant for those who work in this important area. As our panel discussion illustrated, Brexit will have a profound impact (although still no one quite knows how and to what extent!). We would encourage members to get in touch with their views and ideas on this crucial area. Indeed, please do continue to raise with us any issue that you think DELF can assist with. We will continue to raise issues with the Administrative Court staff, with the Senior District Judge, and with any policy and rule makers who affect our work. DELF exists to serve our members and that is what we will continue to do. Thank you for all of your support.

Ben Lloyd
6KBW

Our Recent Activities

DELF continues to make representations on behalf of its members to the Criminal Procedure Rules Committee, the LAA, the Administrative Court staff and the Senior District Judge's office.

If members have any issues they would like DELF to raise then please email enquiries@delf.org.uk

Legal Update

Forum Bar – finally in force?

The 'forum bar' was introduced in to the Extradition Act 2003 by the Crime and Courts Act 2013 and came in to force in October 2013. It was enacted following Theresa May's decision to block the extradition of Gary McKinnon to the US and to redress the perceived imbalance in the UK/US extradition arrangements.

The aim of the forum bar (s.19B and 83A in the 2003 Act) was to prevent extradition in circumstances where the alleged offences could be prosecuted in the UK and where it would not be in the interests of justice to extradite. The Act stipulates that it will not be in the interests of justice to extradite where the judge has decided (a) that a substantial measure of an individual's activity was performed in the UK and (b) that, having regard to specified matters relating to the interests of justice (and only those matters), extradition should not take place.

The Act sets out, at s.19B and s.83A the specified matters relating to the interests of justice for the purposes of s.19B(2)(b) and s.83A(2)(b), they are:

a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
b) the interests of any victims of the extradition offence;
c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
e) any delay that might result from proceeding in one jurisdiction rather than another;
f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—
    i. the jurisdictions in which witnesses, co—defendants and other suspects are located, and
    ii. the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;
g) D's connections with the United Kingdom.

Following the introduction of the forum bar all attempts to use it as a bar to extradition failed, leading many practitioners to believe that it was a bar in name only.

That changed with the High Court decision in *Love v USA* in February 2018. In circumstances almost mirroring those found in the McKinnon case, Laurie Love was accused of hacking in to various US Government agencies (including the US Army, US Federal Reserve, NASA and Missile Defence Agency). Also, like McKinnon, Love suffers from Asperger's. In allowing Mr Love's appeal the court concluded that the judge at first instance had erred in her analysis of (i) the interest of the victims, specifically in so far as it was overwhelmingly in their interests to have a

trial and that this made significantly less likely by Mr. Love's extradition and (ii) the significance of the absence of a prosecutor's belief that the UK was the most appropriate jurisdiction in which to have a trial. The Court concluded that although by themselves these errors would not have persuaded the court that the judge was wrong but there were two factors which outweighed the arguments in favour of extradition. These were her conclusion as to the practicalities of holding a trial for the alleged offences in the UK and the particular strength of Mr. Love's connection to his family and home circumstances exemplified by the care and treatment he received at home for his various medical conditions specifically the stability provided by his parents. This was something which could not be provided in the US.

Following this judgement there remained scepticism as to whether or not forum would, in fact, become an available bar or, whether, given the very particular set of circumstances in Mr Love's case, this would be a one off victory. Although *Love* was no doubt a significant break-through, perhaps a decision of greater importance was that of *Scott v USA*. This was a case which bore absolutely no similarities to that of *Love* and yet it succeeded on a forum argument.

Scott's extradition was sought by the US in relation to an allegation that, whilst employed by HSBC in London, participated in a scheme to defraud an oil and gas exploration company, Cairn Energy Plc, in connection with a currency market transaction. Cairn had invited HSBC and other banks to bid for the right to execute a foreign exchange transaction by which it planned to convert approximately US $3.5 billion in to sterling. Before providing HSBC with information about this proposed transaction, Cairn required it to enter into a confidentiality agreement by which HSBC agreed to use the information solely for the purposes for which it was provided. Scott was given access to this information. HSBC were successful in winning the bid to execute the transaction. The allegation against Scott is that, despite the obligation of confidence undertaken by HSBC, he and Mark Johnson devised a scheme to benefit HSBC and ultimately themselves at Cairn's expense by *"(a) using their insider knowledge of the details of the [transaction] to front-run that transaction, and (b) ramping the price of Sterling/Dollar to the benefit of HSBC, and to the detriment of [Cairn]."*

In the case of *Scott*, the court held that, although market manipulation was damaging to the integrity of the United States financial markets that was unquantifiable. The only quantifiable harm was caused to Cairn, a UK company. This was treated as a factor weighing heavily against extradition. While *Love* seemed to set a high threshold that needed to be passed before attaching significant weight to the requested person's connection to the UK, on the face of the judgment, there was nothing particularly significant in Scott's connection to the UK other than it was a strong one. Nonetheless, the court viewed his connection to the UK as an important factor weighing against extradition.

One of the most interesting features in this case was there was no real prospect of prosecution in the UK. The SFO had issued a public statement that its investigation into the fraudulent manipulation of the Forex market had closed as there was insufficient evidence for a realistic prospect of conviction. It further confirmed to Scott, by letter that he had not been a suspect in the investigation and would not be the subject of any future SFO investigation. The court held that the district judge was wrong to view this letter as relevant to the prosecutor's belief as it was not commenting on the most appropriate jurisdiction. Rather, it should be viewed as a statement of fact. The court went on to discuss that where "*the practical reality appears to be that no investigation or prosecution is likely in this jurisdiction*", the availability of evidence and convenience of witnesses is an arbitrary consideration.

While it may be too early to view *Love* and *Scott* as an indication that the forum bar will be more readily applied by the courts, it has to be seen as encouraging that it finally seems to have some teeth. Furthermore, these judgments, together with the decision of District Judge Qureshi in *USA v Stickland* (where it was held the requested person's extradition would unjust and oppressive due to his physical and mental health and would amount to a breach of Article 3 and Article 8 ECHR), give some hope to practitioners that perhaps the balance of the UK/US extradition arrangement is shifting to a more neutral position.

Anthony Hanratty
Bivonas

The DELF John RWD Jones QC Essay Competition

Sarah Phillips' winning essay, "What has extradition law done for the law?" appears below. Thank you to Sarah and to everyone who entered.

What has extradition law done for the law?

This essay considers what extradition law has done for the law with a focus on Article 3 of the European Convention on Human Rights ("Article 3"). The application of Article 3 has evolved from being an issue outside the remit of extradition law, to one very much relevant to extradition practice today. The evolution of extradition law after the ground breaking case of *Soering*, as will be explored, forced signatory states to the ECHR to be held accountable not just for breaches of the convention within their own borders, but also for foreseeable breaches in requesting states, even where that breach is outside of the control of the member state. This essay will show that this responsibility has extended to deportation cases as well as extradition.

Extradition Courts across Europe today regularly resound with the argument that a requested person cannot be extradited to the requesting state, because to do so would amount to or at least would raise a real risk of a breach of their Article 3 Convention Rights. Article 3 dictates that:

> "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"[1]

The Divisional Court of England and Wales, this year alone, has adjudicated on the position of Portugese[2], Hungarian[3] and French[4] prison conditions, finding that the conditions in prisons in Lisbon and Paris are such as to provide a real risk that if extradited, the requested person(s) would face a real risk of inhuman and degrading treatment contrary to Article 3. In these circumstances, the individual cannot be extradited (without safeguards being in place) or else the country expelling that individual is held equally culpable for the Article 3 breach according to the case of *Soering v United Kingdom* (1989) 11 E.H.R.R. 439. This is trite law in extradition proceedings today, but before *Soering* was not so, and this essay seeks to demonstrate that the decision in *Soering* is an example of where extradition law has fundamentally changed the landscape of the wider law. Prior to this decision it was not envisioned that a signatory state could be held responsible for the breaches of other states and therefore the question of whether ill-treatment may occur to the requested person after extradition was not a concern of the extradition courts. The consequences of a member state being forced to refuse extradition based on the potential ill treatment that a requesting state may inflict are plainly serious. Signatories to the Convention are unable to expel convicted or accused criminals to meet justice, no matter how serious their crimes, by virtue of their absolute rights under Article 3. The individual has committed no crime in the host state and therefore the individual remains at liberty in the host state.

Jens Soering's extradition was requested by the United States of America to be tried for murder. After unsuccessfully contesting his extradition in the United Kingdom, he petitioned to the European Court of Human Rights and argued, amongst other complaints, that his extradition would amount to a breach of his Article 3 convention rights as he would surely be held in intolerable death row conditions.[5] The United Kingdom, in responding to the complaint, primarily submitted that Article 3 does not bestow a responsibility on a contracting state for acts that fall outside of their jurisdiction. It was argued that this interpretation exceeded the clear remit of Article 3 and would encroach on international extradition treaties, thus interfering with the international judicial process.[6] In the alternative, the United Kingdom argued that if Article 3 did compel member states to refuse extradition for fear of inhuman or degrading

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[1] Article 3 of the European Convention on Human Rights
[2] Mohammed v Portugal [2018] EWHC 225 (Admin)
[3] Fuzesi and Balasz v Hungary, Unreported ; DC; 16 July 2018
[4] Shumba v France [2018] EWHC 1762 (Admin)
[5] see *Soering v United Kingdom (1989) 11 E.H.R.R. 439*
[6] Para 83, *Soering*

treatment in the requesting state, it ought to only apply where the Article 3 breach was "*certain, imminent and serious*."[7] It is noteworthy that even this alternative test would have been a considerable departure from the status quo at the time. The European Court, however, disagreed with the submissions of the United Kingdom, going further than even the alternative "*certain, imminent and serious"* test that had been suggested. They instead found that where there are "*substantial grounds*" for believing that the requested person would face "*a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country*", the convention state's own Article 3 responsibilities are engaged and extradition will not be compatible with their treaty obligations.[8] This invoked a far more onerous responsibility on the United Kingdom and indeed all EU member states to both conduct an assessment of the treatment a requesting person would face once surrendered, and where there is a real risk of ill treatment the member state is forced to refuse extradition, lest they conduct a breach of Article 3 themselves.

This decision was taken nearly 30 years ago and it is perhaps difficult to imagine for most practitioners just how radically this would have changed the practice of not just extradition law at the time but all expulsion cases. Academics at the time observed that the ECHR may have opened a 'pandora's box' by allowing human rights to enter the extradition arena.[9] Indeed the rationale of this decision extended beyond Europe when the UN Committee on Human Rights acknowledged it in several decisions, which explicitly refer to *Soering* and the principles that it raises in other International Extradition decisions.[10]

It would be many years later that the German government sought direction from the Court of Justice of the European Union ("CJEU") as to whether the conditions of detention in the requesting state were within the ambit of Article 3. If so, they would very much be within the concerns of extraditing states by virtue of the responsibility placed on them by *Soering*. In *Aranyosi and Caldararu*[11], the CJEU held that conditions of detention that do not afford human dignity do engage Article 3 of the Convention and guides member states on the correct procedure to adopt where such a risk is identified. This is the procedure that has been successfully engaged in the three instances referred to at the beginning of this essay, which illustrates how critical this challenge is in modern Extradition practice. *Aranyosi* encourages the use of assurances from requesting states to alleviate the responsibility of the extraditing state and to protect the requested person from Article 3 mistreatment. This ought to allow extradition to still effectively operate in the face of problematic prison regimes. However it is noteworthy that an assurance in itself will not admonish the state's responsibility in the face of evidence that such assurances are not complied with. This was the case in recent Romanian extradition litigation, where evidence came to light that despite assurances from the Romanian state to ensure minimum standards of detention, in practice those extraditees were often still exposed to the inhuman and degrading treatment that the assurance was expected to protect them from[12]. Returning to the dicta in *Soering,* the Convention state contemplating the extradition of a requested person will be responsible for foreseeable breaches of Article 3, even though it falls outside their control. Therefore if the requesting state is shown to be failing to uphold its assurances, this causes real problems for the host state since Article 3 breaches are now foreseeable even when an assurance has been issued. The concern regarding Romanian assurances has been resolved in the United Kingdom by the acceptance of further, individual specific, assurances[13]. One wonders how long one has to wait before there is further evidence of breaches of those assurances and how the English courts will respond to such a breach given their responsibilities and liabilities that are bestowed upon them by *Soering.*

Article 3 breaches, specifically the Article 3 breaches of another state, are not a concern solely for extradition Courts but for all expulsion cases, thus engaging the Immigration Courts. The case of *Chahal v United Kingdom* built on that

[7] Ibid
[8] Para 91, *Soering*
[9] Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box? C. Van den Wyngaert, *The International and Comparative Law Quarterly*, Vol. 39 No.4, (October 1990) p.p. 757 – 779
[10] Kindler v. Canada, No. 470/1991, UN Doc. CCPR/C/48/D/470/1991, Ng v. Canada, No. 469/1991, UN Doc. CCPR/C/49/D/469/1991; Cox v. Canada, No. 486/1992, UN Doc. CCPR/C/45/D/486/1992
[11] *Aranyosi and Caldararu* [2016] Q.B. 921
[12] *Romania v Zagrean* [2016] EWHC 2786 (Admin)
[13] *Grecu and Bagarea v Romania* [2017] EWHC 1427 (Admin)

of *Soering* by finding that even where deportation was sought for reasons of national security by virtue of the Applicant's conduct, they could not be deported if there was a real risk of an Article 3 breach in the proposed receiving state (in this instance India).[14] A very similar situation arose in the matter of *Saadi v Italy*, whose deportation to Tunisia was found to be contrary to the absolute protection afforded to him by Article 3 and upon the application of *Soering*. These decisions were significant – the cases involved allegations of terrorism and conspiracy to murder by the individuals whom the respective states wished to deport. The applicability of an Extradition decision in these circumstances meant that the host states had no choice but to continue accommodating these undesirable individuals. These decisions demonstrate the impact that extradition law has had not just on its own litigation, but also in other areas of law.

To conclude, within the context of Article 3, Extradition law has radically shaped the way that this right is interpreted and conveys a far more onerous responsibility on member states than that first envisioned by its signatories. Whereas it was previously thought that the observation of Article 3 was strictly a matter for the member state itself, the case of *Soering* meant that signatory states had a responsibility to consider the foreseeable risk of an Article 3 breach by any other state, where it was proposed to extradite or deport an individual to. If the member state was to expel the individual notwithstanding a real risk of an Article 3 breach, they themselves will be in contravention of Article 3. Article 3 has now been more widely interpreted to include prison conditions as being capable of amounting to inhuman and degrading treatment that means that Article 3 is now a regular matter in issue in the Extradition Courts of Europe. The interpretation and applicability of Article 3 was entirely recalibrated by one Extradition case.

Sarah Phillips
Macmillan Williams

Recent events

The DELF Annual Conference, 14th September 2018

What do you call well over a hundred extradition lawyers in a hotel basement? In this case - a resounding success.

The company was enhanced by the presence of Judges, academics, experts and others, all able to offer a different perspective on a whole sweep of different extradition issues. The generous surroundings of the aptly named Grange Hotel didn't hurt either.

The varied sessions were proof, if it were needed, that this is far from a narrow field. The pace of change to our law is unlikely to dwindle, nor should it, if it is to have a hope of keeping up with international and domestic changes. Policy; politics; legislative intent; case by case tactical decisions; "the little guy" v's "high net worth"; and an arresting display of legal acumen couldn't fail but impress the assembled delegates.

Considering issues such as: the appropriate limits to mutual trust Brexit and detention conditions in addition to the sometimes personal or philosophical views of others who have had experience of the extradition system - undoubtedly enriches the arguments we deploy daily. A special mention goes to Dominka Stepińksa-Duch (Raczkowski Paruch) for her explanation of the reality behind criticisms of the erosion of an independent judiciary in Poland. Practitioners should note her offer of *pro bono* assistance, using a network of Polish lawyers and Judges.

DELF would like to reiterate the thanks given to the conference sponsors, speakers and organisers, without whom the

[14] *Chahal v. United Kingdom* (23 EHRR 413)

event would have been impossible.

We must also repeat our congratulations to Sarah Philips (Macmillan Williams) as the winner of the inaugural John Jones Essay prize.

The chance to discuss our own different impressions on the day out of the confines of a work environment during the evening reception was also a vital part of the experience. Happily the duty of candour doesn't compel disclosure of the itemised bill from North Bank. We suggest any requests for further information are directed towards Ben Lloyd as our esteemed new chair.

Mary Westcott
Doughty Street

Panel 1: Extradition arrangements across Europe: Hot topics

Following an excellent introduction by Jago Russell, the DELF conference delegates were welcomed into the day's events with the first panel, *"Extradition arrangements across Europe: Hot topics"* chaired by Saoirse Townshend. In taking the lead, Dr Anna Oehmichen of Knierim & Kollegen explained that because the legal procedure adopted in Germany – where the court, rather than the police, decide whether a person should be tried or not and the mere fact of pre-trial detention says little, if anything, about the stage that the investigation has reached, the scope, to challenge whether a German warrant was premature, contrary to s.12A of the EA 2003, remained a viable option in the case of German requests (this was addressed recently in *James Fox v Public Prosecutor's Office Frankfurt Germany* [2017] EWHC 339). Dr Oehmichen then went on to describe the importance of understanding the decentralised German judicial structure because, as explained through a plethora of recent case law, it had a consequent effect of creating a lack of certainty and legal inconsistencies in the approach taken by German courts in extradition cases.

Gwen Jansen, Advocatuur, took to the stage next to speak of recent events in the Netherlands. Gwen explained that the Netherlands' historic trust and reliance on assurances was shaken a few years ago when the Court of Amsterdam, the only court in the Netherlands which deals with EAW request, was criticised for refusing to refer to the CJEU a number of preliminary questions posed by the defence about the correct interpretation of the law and the Framework Decision. A group of Dutch lawyers wanted to file a complaint with the European Commission about the refusals by the Court of Amsterdam and this seems to have let to the Court starting to ask more preliminary questions of the CJEU, Gwen explained that at the time of speaking there were 3 questions pending. The recent decisions of the CJEU as to the importance of obtaining information from the requesting state has also resulted in the Dutch courts conducting far more robust information gathering exercises when faced with difficult issues, including those relating to Polish trials conducted in absentia, assurances and on-going prison conditions in Bulgaria. Gwen gave a number of case specific examples including the recent *Poplawski* litigation which dealt with considered the difficulties of obtaining assurances as to where an individual would serve their sentence and the preliminary rulings from the CJEU in C-314/18 which concerned the legality of the refusal by the British to permit a Dutch citizen to return to the Netherlands to serve any sentence before all proceedings, including confiscation, had been concluded. Gwen concluded that whilst the Dutch Court's trust in the requesting states was, in essence, still intact the Court had recognised that it would sometimes need to ask questions, be they of the CJEU or the requesting state itself, before it could continue with proceedings.

Finally, the session concluded with the enlightening, and in equal measure shocking, appraisal of the Polish situation from Dominika Stępińska-Duch of Raczkowski Paruch. Dominika asked that the audience be under no illusion that the continued politicisation of the Polish judiciary through on-going reforms was eroding democracy. She addressed the question of what we, as EU lawyers, can do to help. First, we were told to keep talking about the issue; a steady increase in the draconian actions taken against those choosing to speak out was not only removing challengers from the front line but reduced those willing to put their heads above the parapet. This was particularly prevalent in smaller

towns where protection and support, compared to large cities, was less readily available. Dominika argued that keeping this issue on the international agenda however would bolster public awareness and encourage the fight for democracy. Second, we were asked to utilise extradition networks to engage with Polish lawyers and judges alike to obtain the necessary evidence needed to challenge extradition requests and expose the reality of the Polish criminal justice system. For example, they could demonstrate that continued budget cuts and a hardened desire to imprison will shortly create a disastrous concoction of overcrowded and under-resourced prisons. Third, we must ask as many preliminary questions of the CJEU as possible, in relation to this matter.

An insightful, sobering and powerful panel discussion.

Sophie Wood
Kingsley Napley

Panel 2: Brexit and Beyond: The future of extradition in the UK

This session brought together the expertise of panellists Professor John Spencer (University of Cambridge), Clare Montgomery QC (Matrix Chambers) and Jodie Blackstock (JUSTICE) under the chairmanship of Rebecca Niblock.
The panel considered six different scenarios (entertainingly illustrated by cartoon animals of various degrees of celerity) that may arise to govern extradition arrangements following Brexit. The first, the possibility that we would retain the EAW system, was dismissed as unlikely. It would necessitate amendment of the Framework Decision which could only be done on a treaty basis and Professor Spencer was not persuaded that the terms of Article 82 of the TFEU provided a sufficient basis for doing so. Loss of the EAW scheme would not only result in a loss of the CJEU as a consultative mechanism to question the correct interpretation and application of instruments but also the loss of 'bolt-on' measures including investigation and supervision orders.

The second scenario was cooperation based on the 1957 European Convention on Extradition (ECE). Whilst there is no legislative bar to reviving this scheme, it engenders a number of practical problems. Not only would it be slow (as slow as a snail...), the lack of uniformity across the scheme would require practitioners to grapple with the application of four different protocols and a multitude of reservations entered by different states.

A slower scenario still would be an extradition regime based on an individual agreement between the EU and the UK akin to that negotiated by Norway and Iceland based on the treaty making power set out in Article 218 TFEU. The panel felt that whilst there is likely to be political will to get on with the process of negotiations, there are likely to be political and constitutional difficulties encountered with negotiating with individual States on such matters as extradition of their own nationals. The resulting agreement would most likely look like an "EAW-light" scheme with a question mark over the retention or adoption of the procedural rights directives.

The final scenarios considered were the use of Article 28(3) of the ECE, akin to the historic arrangements between the UK and the Republic of Ireland based on a uniform law. It would essentially allow us to fall back on the ECE as between most of the EU but allow for a speedier, separate system. To achieve it however is even more time consuming and at the very least requires existing reservations to Article 28(3) which are based on the Framework Directive to be amended.

Likewise, a stand-alone judicial cooperation treaty was considered to be difficult to achieve in light of our weakened negotiating power and difficult to operate in view of the numerous different treaty arrangements that would exist. Finally, the negotiation of a series of bilateral extradition treaties would render the process politically difficult to achieve and complicated in practice to operate.

What is the most likely post-Brexit scenario? We'll be reaching for copies of the ECE as the bedrock on which we fall back whilst negotiations continue for an EU/UK agreement.

Reka Hollos
3 Raymond Buildings

Panel 3: The view from the inside: Prisons and extradition

The third panel of the day offered a rare insight into the workings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT'). Ben Keith (5 St Andrew's Hill) chaired the panel consisting of Committee members Dr Alan Mitchell, a Scottish GP and medical expert, and Vania Costa Ramos, a practising Portuguese lawyer.

The session began with an outline of the standards the CPT apply and the means by which a delegation undertakes an inspection. It was emphasised that the findings in each report are drawn from visits and it is on these inspections that the delegation look to standards that have been drawn out by international institutions and case law. Although the CPT does not set its own standards, often the authorities that the CPT turn to have developed as a product of what the CPT has found worked either positively or negatively on previous delegations. The panel discussed the importance of their wide-ranging powers during an inspection, including the ability to visit any place of detention with or without prior notification, their unrestricted access to all areas in a detention facility, their unfettered access to all documents and records, and the ability to speak confidentially with any detained person. Ms Costa Ramos explained the difficulties in discussions with detained persons in her role on the CPT, given her experience as a lawyer; the focus must be on their experience of detention, despite efforts by the inmates to discuss their own criminal cases.

Perhaps one of the more fascinating aspects of this panel's discussion was the role confidentiality played in the work of the CPT, both with respect to detained persons and to Contracting States. Reports produced by the CPT are confidential as between themselves and the Contracting State in issue, and publication, although encouraged, is not required. Only eight out of 47 Contracting States currently have an automatic procedure for publication and many states decline to publish or do so only after a considerable time period. This was, it seems, part of the bargain for such unfettered access and it was hoped that as more states turn to automatic publication, the pressure would increase on others to follow suit. Dr Mitchell also spoke, however, of the great benefit confidentiality brought with respect to detained persons, allowing them to speak openly with the delegation in the knowledge that nothing would be relayed to prison management without their express permission. While Dr Mitchell acknowledged this could present difficulties in providing accountability for certain acts of ill-treatment, he highlighted the powers the CPT had to act immediately when required, and the ultimate threat of a public statement should appropriate action not be taken in response to the CPT's report.

In Ms Costa Ramos' discussion of her domestic experience of extradition proceedings in Portugal, it became clear how crucial external monitoring by the CPT was in a climate of mutual trust. She explained that Portugal adopted a liberal approach to mutual trust and appeared to expect the same from foreign governments; as such, requests from abroad to provide assurances as to their prison conditions, or to allow experts to undertake an inspection, were not well-received. In such circumstances, the established CPT inspection mechanism was invaluable.

As the panel drew to a close, examples were provided by the panellists of instances where the CPT had been deliberately misled by prison authorities. In one well-known example in Ukraine, prisoners had been unchained from their beds when the CPT delegation arrived; an action brought to light by CCTV watched during the inspection. There were other instances discussed of false reports being provided or prison medical altering their medical conclusions in reports to prison authorities. In all, we were provided with a stark reminder of the realities of life inside and the progress that still needs to be made across Europe.

Rebecca Hadgett

Panel 4: The Special relationship with the USA: A case study

The last session of this excellent day focused upon UK-US extradition arrangements. Following a lively introduction from DELF's own committee Chair, Edward Grange, he asked the panel whether the phrase "special relationship" was truly representative of UK-US extradition arrangements from their various points of view.

David Bermingham kicked off the debate by focusing on his personal experiences. Formerly extradited from the UK to the US for fraud offences in connection with Enron and widely known as one of the "NatWest Three", he served 37 months in various prisons in the US as a result of his plea to fraud. He explained the plea bargain process and his lawyers' considerable, but then unsuccessful, efforts to encourage a change in the law to include a forum bar to extradition. The NatWest Three were charged with offences which could and arguably should have been tried before a Judge and Jury in England & Wales because the conduct took place in the UK.

Melanie Riley, his co-ordinated David Bermingham's public relations, provided a whistle stop tour through the various stages of the media campaign. She spoke to the importance of influencing the media dialogue to generate public support from the outset and what strategies were used in the fight to lobby the Government to introduce the forum bar. Whilst a proposed amendment to the Extradition Act 2003 was then "left to rot", the case is an important one as it paved the way towards the forum bar's later introduction.

Jason Masimore, who has previously worked for the US Attorney's Office described how "borders are not an issue" for American prosecutors. He explained that when he was working for the US Attorney's Office prosecutors "went after conduct, where that conduct lived" investigating "anything newsworthy". That approach does not seem to have changed. When asked about the plea bargaining system the panel stressed there are real pressures upon individuals facing a trial in the US but that prosecutors are not intending to put the innocent behind bars. It is important for individuals to know their tribunal as while some Judges "slam Defendants with a huge trial penalty" others do not. Since the forum bar was enacted, the determinative factor as to where the case will be tried is still in the hands of the prosecutor and whether the prosecutor's certificate is issued or not.

Roger Burlingame referred to recent high-profile cases of Laurie Love, Navinder Sarao, Richard O'Dwyer. He discussed the benefits of early dialogue with prosecutors and how to steer through the extradition process. He said that it can take a year to get a case to trial. Most prosecutors are willing to support bail packages if Defendants are willing to co-operate. House arrest and bail within the local community are options, in the same way as here.

The Panel referred to recent high-profile cases of Laurie Love, Navinder Sarao, Richard O'Dwyer and considered the benefits of early dialogue with prosecutors and how to steer through the extradition process. David Bermingham opined, by refence to the facts of a recent extradition case (the request for Stuart Scott for fraud offences), that the forum bar has been so significant that had the bar been in force when he was the subject of extradition proceedings in 2002, he would not have been extradited.

Hannah Hinton
Drystone Chambers

Upcoming Events

DELF will be holding an Autumn education event and a Christmas social - details will follow shortly.

Membership

Membership runs from January to December annually. If you wish to join DELF for the first time since 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.

Fees for 2018 are 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.

Please make your payments by bank transfer to:

Defence Extradition Lawyers Forum
Natwest
Sort Code: 60 40 04
Account Number: 32 49 95 82
IBAN details: GB97NWBK60400432499582
BIC: NWBKGB2L

For any queries, please contact enquiries@delf.org.uk

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