ISSUE 15: 4th December 2018

DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the Defence Extradition Lawyers Forum newsletter, edition 15. In this edition Juliet Wells considers the Irish Supreme Court's preliminary references to the CJEU seeking (further) clarity as to whether or not a public prosecutor can be a "judicial authority" for the purposes of the Framework Decision; Luce Smithuijsen updates us on two decisions from Holland, the first concerning prison conditions in the context of extradition to Bulgaria and the second relating to Article 6 considerations in relation to extradition to Morocco. Finally, following the sell-out Autumn Educational Lecture Ben Keith considers the recent competition to be President of Interpol.

A message from the Chair

It remains my pleasure and privilege to write this part of the DELF newsletter. We continue to be a busy and thriving organisation. At our recent AGM our excellent Officers and Committee were (re)elected, and I am delighted to welcome Peter Caldwell as our new Policy Officer. We continue to work on your behalf to raise issues that concern you, our members, and wider colleagues. The Senior District Judge has kindly agreed to meet us in the very near future and we will be raising a number of the issues that you have asked us to.

Please do get in touch if there are things you would like us to raise. We had an excellent Seminar on 22 November 2018 on Interpol and Red Notices (more below) and we are all looking forward to our Christmas Social, on 10 December 2018 (again more below). DELF is only ever as good as our members, and we look forward to thanking you all for your continued support at our party. The new year will see us starting to plan our annual dinner, launching the John Jones QC essay competition, and arranging further seminars on hot topics such as assurances and Brexit. 2019 promises to be an interesting year, one way or another! Thank you all for your continued 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

A commentary on the Irish Supreme Court's preliminary references in *Lisaukas* and *Dunauskis*

In a year in which the Irish courts have made extensive use of the preliminary reference procedure in EAW cases, *Minister for Justice and Equality v Lisauskas* [2018] IESC 42 and *Minister for Justice and Equality v Dunauskis* [2018] IESC 43 (now joined Cases C-508/18 and C-509/18 before the CJEU) deserve particular attention. In *Lisaukas* and *Dunauskis*, the Irish Supreme Court has invited the CJEU to further develop its jurisprudence on the meaning of 'judicial authority' in Art. 6(1) of the 2002 Framework Decision.

In both cases, the EAW was issued by a public prosecutor – in *Lisaukas*, by the Prosecutor General for Lithuania, and in *Dunauskis*, by the Lübeck Public Prosecutor in Germany.

The Prosecutor General for Lithuania is empowered by Art. 69(1) of the Lithuanian Criminal Procedural Code to issue EAWs. According to the evidence adduced by the parties in *Lisaukas*, he is fully independent of both the executive and the judiciary, and his function is to direct pre-trial investigations and prosecute criminal cases before the courts (Art. 118 of the Lithuanian Constitution). Perhaps surprisingly, the feature of this institutional set-up which gave the Irish Supreme Court cause for concern was the Prosecutor General's independence from the judiciary. The court noted that as a matter of Lithuanian constitutional law, the Prosecutor General is not conceived of as part of the judicial corps and does not perform judicial functions: by Art. 109 of the Lithuanian Constitution, the 'administration of justice' is a task entrusted solely to the courts; and rulings by the Lithuanian Constitutional Court in 2004, 2006, 2008 and 2011 have confirmed that public prosecutors in Lithuania did not 'administer justice'.

Similarly, in *Dinauskas*, the Irish Supreme Court noted that the Lübeck Public Prosecutor is independent of the courts, and is prohibited from performing 'judicial functions' (section 151 of the *Gerichtsverfassungsgesetz*). However, in contrast to *Lisaukas*, the respondent in *Dinauskas* was adamant that, notwithstanding the separation of the Lübeck Public Prosecutor's office from the judicial branch, he was an integral part of the judicial system inasmuch as he had no purely executive (or 'decision-making') powers, he 'worked towards the jurisdiction of the courts', and he was tasked with ensuring that criminal investigations and proceedings are rule of law-compliant.

There was an additional characteristic of the Lübeck Public Prosecutor's office which troubled the Irish Supreme Court, namely that it was constituted within the executive branch of government (specifically, the Ministry of Justice of Schleswig-Holstein). Further, there was scope for the Ministry of Justice to issue mandatory 'instructions' to the Director of Public Prosecutions of Schleswig-Holstein, which could in turn issue orders to the Lübeck Public Prosecutor – although it appeared that this power was limited by the fact that such instructions must be lawful, were described by the issuing authority as 'service instructions' (the precise meaning of which was not clear), and had to be notified to the President of the *Landtag* (the state parliament).

The Irish Supreme Court has identified two possible criteria which should be satisfied in order for a public prosecutor to count as a "judicial authority" for the purposes of Art. 6(1) of the 2002 Framework Decision: first, he must be independent of the executive; and second, he must administer justice or participate in the administration of justice.

As to the first limb, it was tolerably clear that the Prosecutor General for Lithuania is independent of the executive, but it was not clear whether the Lübeck Public Prosecutor was sufficiently independent. In particular, the further information supplied by the respondent suggested that he was functionally independent of the Schleswig-Holstein Ministry of Justice, but did the residual ability of the Ministry to issue instructions to the Director of Public Prosecutions, which might in turn be cascaded down to the Lübeck Public Prosecutor, mean that he was to be regarded as an official of the executive?

As to the second element of the proposed test, the Irish Supreme Court asked whether the domestic law of the requesting state could determine whether the public prosecutor was a participant in the administration of justice (a question which would seemingly be answered in the affirmative in Germany, but in the negative in Lithuania). If not, and the second limb must be answered by reference to objective criteria, what functions must a public prosecutor be empowered to perform in order to count as a 'judicial authority' for the purposes of Art. 6(1)?

At first blush, it seems unlikely that the CJEU will find that the Prosecutor General for Lithuania and the Lübeck Public Prosecutor are not judicial authorities within the meaning of Art. 6(1) of the 2002 Framework Decision. The use of public prosecutors as issuing judicial authorities in many (civil law) member states is entrenched. First, the multilateral extradition arrangements which obtained under the European Convention on Extradition 1957 had always allowed for the issue of provisional arrest warrants by public prosecutors. Second, the original draft of the 2002 Framework Decision expressly contemplated that EAWs might be issued by public prosecutors. Third, although the references to public prosecutors dropped out of the final text, a significant proportion of member states continued to empower their public prosecutors to issue warrants under the new scheme. Fourth, as was noted by the majority in *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, no criticism was made of that practice by the Commission reports into the operation of the EAW system, published between 2006 and 2009. And fifth, in *Criminal Proceedings Against Özçelik* (Case C-453/16 PPU), the CJEU found, without any apparent difficulty, that the 'judicial decision' required by Art. 8(1) of the 2002 Framework Decision (that is, the underlying national arrest warrant on which the EAW was based) could competently be issued by a public prosecutor. All this will come as no surprise to a continental lawyer. The office of the public prosecutor has a long history in the civilian tradition, and as a result civil law prosecutors tend to have a much more complete responsibility for various aspects of pre-trial procedure (including investigating offences) than does the CPS in England and Wales. Equally, civil law prosecutors are typically afforded a special status as civil servants drawn from the same class or *corps* as judges, and have similar constitutional duties to discharge their functions without bias and to uphold the rule of law.

Despite this, the Irish Supreme Court's references should make a valuable contribution in forcing the CJEU to engage with the issue of what specific qualities a 'judicial authority' (and in particular a public prosecutor) should possess in order to achieve the aims set by Art. 6(1) of the 2002 Framework Decision. This is not something the CJEU has grappled with to date: in *Criminal Proceedings Against Poltorak* (Case C-452/16 PPU), and *Criminal Proceedings Against Kolvalkovas* (Case C-477/16 PPU), the CJEU determined that a police service and a ministry of justice were not competent to issue EAWs, since they were classically executive bodies and simply could not be regarded as 'judicial authorities' in the ordinary sense of that term. In *Özçelik*, a public prosecutor was competent to issue a 'judicial decision' (namely, the underlying national arrest warrant) for the purposes of Art. 8(1) of the 2002 Framework Decision, but no close analysis of the qualities of the public prosecutor concerned was undertaken: see paragraph [34] of the decision, and in particular the way in which the CJEU simply adopted its reasoning in paragraph [39] of *Criminal Proceedings Against Kossowski* (Case C-486/14), without any consideration of the similarities and differences between the public prosecutors concerned.

Yet each of the decisions in *Poltorak*, *Özçelik*, and *Kolvalkovas* clearly set out the rationale for stripping out executive involvement in the issue of EAWs (namely, to make the surrender regime more speedy and effective, and to ensure an adequate level of fundamental rights protection where a warrant is issued), and it was with that rationale expressly in mind that the various bodies in those cases were held to be (or not to be) 'judicial' for the purposes of the 2002 Framework Decision. Applying the logic of those cases, there must (as the Irish Supreme Court has recognised) be

scope in appropriate cases to scrutinise the qualities of the issuing authority, in order to determine whether it is equipped to realise the aims of Art. 6(1). Put another way, it cannot be right that it will always be sufficient, for the purposes of Art. 6(1), for the issuing authority to merely bear the name 'court' or 'public prosecutor'.

That said, one of the concerns that appears to animate the Irish Supreme Court's reference in *Dinauskas*, namely that a public prosecutor may not be a 'judicial authority' merely because it sits within the executive branch, is debatable. For a start, it is worth noting that the institutional apparatus surrounding public prosecutors' offices will vary widely between member states, and public prosecutors may frequently (for reasons of legal history or fiscal convenience) be creatures of the executive. The further information in *Dinauskas* stated the problem concisely when it said "The public prosecutor's office is recognised as an institution *sui generis* and acts as a connective link between the executive branch and the jurisdiction". An institutional, rather than functional, analysis of a public prosecutor acting as issuing authority is thus unlikely to be helpful, and may well obscure more than it reveals. The analysis should concentrate instead on the nature and extent of the institutional links between the public prosecutor and the executive branch, in order to identify whether the prosecutor is *in practice* dependent on the executive to such an extent that the 'high level of mutual trust and confidence' on which the EAW scheme is predicated is undermined. Viewed from this perspective, the decisive feature of *Dinauskas* will be the power of the Schleswig-Holstein Ministry of Justice to cascade 'instructions' down to the Lübeck Public Prosecutor.

As to the second limb of the test proposed by the Irish Supreme Court, it is doubtful that issuing authorities must be integrated into the judicial branch and perform classically judicial functions. On a purposive analysis, it is hard to see how a court's traditional function as an inter partes dispute resolution mechanism is a prerequisite for issuing an EAW. Rather, given that the aim of judicial intervention at the stage of issuing an EAW is to guarantee the requested person's fundamental rights, ensure that the EAW is proportionate, and so on, the argument should focus on whether a public prosecutor is constitutionally tasked with, and capable of, ensuring that the fundamental rights of the suspect are protected in the discharge of his official functions. If de facto independence from executive interference is the *negative* characteristic that judicial authorities must possess, then it is the duty and ability to protect the requested person's fundamental rights – and not the performance of classically judicial functions – that is its *positive* corollary.

Whatever the ultimate outcome in *Lisaukas* and *Dunauskis*, it is to be hoped that the questions posed by the Irish Supreme Court will compel the CJEU to engage in a detailed functional analysis of the public prosecutors concerned, which may bear fruit in other cases. If so, it seems that *Poltorak*, *Özçelik*, and *Kovalkovas* will not be the last word on the meaning of 'judicial authority' in Art. 6(1) of the 2002 Framework Decision.

Postscript: Since writing this case comment, the Divisional Court's judgment in Lis, Lange and Chmielewski v Poland [2018] EWHC 2848 (Admin) has been handed down. At paragraph [57], the court decided that despite the steps taken by the governing Law and Justice Party since 2015, the Polish courts cannot be regarded as "lack[ing] independence to the degree which require[s] them no longer to be treated as constituting judicial authorities within the [EAW] scheme". If they could be so regarded, the CJEU would have been unable to come to the conclusions that it did in [Celmer]. Further, if the courts of Poland were no longer 'judicial authorities', the entire EAW scheme would in effect have to be suspended in respect of Poland, and that was a step reserved to the European Council under the Art. 7 TEU process. That cauterises the argument that a member state's judicial system has become so subservient to the executive that its courts no longer possess the qualities of 'judicial authorities', since that point can only be reached as and when the EAW scheme has already been formally suspended. But at the same time, it implicitly recognises that even courts are capable of losing their status as 'judicial authorities', and it does not prevent scrutiny of the qualities of a particular court, tribunal, or other body with power to issue EAWs. Where one door closes, another may open.

Juliet Wells
Temple Garden Chambers

Update from Holland

Bulgarian prison conditions (Stara Zagora prison)

On November 2nd 2018, the Amsterdam District Court held that their questions regarding a possible violation of article 3 ECHR / 4 EU Charter had not been answered sufficiently by the Bulgarian judicial authorities. Therefore, the Dutch court was not convinced that the detainee, when extradited, would be given the minimum amount of personal space (three square metres). This would imply breach of the prohibition of inhuman or degrading treatment or punishment. Therefore the court decided that extradition to Bulgaria at that time would be irresponsible.

Furthermore, the court held that the amount of time taken up by this case had exceeded the reasonable time period. Eleven months had passed, during which time the Bulgarian judicial authorities had had multiple opportunities to provide the necessary information and answer the relevant questions. In addition, the guilt of the detainee had not yet been established. For all of these reasons, the Amsterdam Court ruled that the EAW case should be declared inadmissible.

This judgment ensures that this particular detainee will not be extradited to Bulgaria in the future, but it also raises a threshold with regard to extradition of other detainees to Bulgaria.

The decision by the Amsterdam Court is accessible via:
https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:7923

Extradition to Morocco violates article 6 ECHR

The Dutch Supreme Court has ruled on 30 October that an extradition to Morocco should be refused as it would result in a flagrant violation of article 6 ECHR. The Court ruled that there were reasons to assume that the Moroccan courts would allow evidence obtained by torture to be used in the proceedings against the requested person.

The Supreme Court reiterated that the system of mutual trust between States entails that extradition can only be refused for human rights reasons if:

1. the requested person will be exposed by the extradition to the risk of flagrant violation of one of the rights attributed to him by the ECHR; and
2. the requested person will not have access to any remedy referred to in art. 13 ECHR or art. 2(3) ICCPR.

The Zeeland-West-Brabant District Court had ruled that both prongs of this test had been satisfied and refused extradition to Morocco.

The prosecution service appealed this decision to the Supreme Court. It argued that i) the District Court should not have declared that the fair trial assurances provided by the Moroccan authorities were too vague and insufficient and therefore that step one of the Supreme Court test was not satisfied; and ii) the District Court had failed to sufficiently substantiate why the requested person would not have an effective remedy in Morocco and that therefore step two of the Supreme Court test was not satisfied.

The Supreme Court rejected both arguments. As to the first argument, it held that the District Court had rightly held that the Moroccan assurances were insufficient because they did not address at all the risk identified by the District Court (namely that statements obtained through torture would be used against the requested person).

The Supreme Court also rejected the second argument of the prosecution service. It held that the District Court had based its decision on various judicial decisions and reports by (amongst others) Human Rights Watch, the United

Nations Working Group on Arbitrary Detention, the United Nations Human Rights Committee and Amnesty International. All of these reports showed that (evidence obtained by) torture regularly occurs in Morocco, particularly in respect to investigations concerning political cases and security. Confessions appear to be of decisive value, even when there is no other evidence to substantiate the allegation. The reports also showed that, notwithstanding provisions of Moroccan law prohibiting this, confessions obtained by torture are (sometimes) allowed into evidence and that prosecutors and judges do not always investigate how confessions were obtained. In light of those reports, it could be established according to the District Court that there was a real risk that statements made by the fellow suspects of the requested person had been obtained though torture and would be admitted into evidence, in particular since the requested person was a suspect in a politically sensitive case (he is a prominent member of the Rif Movement). The Supreme Court held that although the District Court had not explicitly addressed the question of whether or not an effective remedy would be available in Morocco, it was implied in the District Court's findings (which in turn referred to the various reports) that the availability of such an effective remedy was unlikely. The Supreme Court therefore held that the District Court had rightly held that second stage of the test had also been satisfied.

As a result the prosecution appeal was rejected and the District Court's decision refusing extradition to Morocco has become final.

The full text of the decision of the Supreme Court is available via:
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2018:2019

Prison conditions in Portugal

On 26 July 2018, it was held by the Amsterdam District Court that extradition to Caxias prison and Setúbal prison in Portugal should be refused as the living conditions there entail a real risk of violation of article 3 ECHR. This risk has not yet diminished, but on 14 August 2018 the Netherlands received a guarantee from the Portuguese judicial authorities that extradited persons from the Netherlands will not be transferred to these facilities "in all EAWs pending in the Amsterdam court". Therefore, the Netherlands are still able to extradite to Portugal.

This decision by the Amsterdam Court is accessible via:
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2018:7923

Luce Smithuijsen
Jahae Raymakers, Holland

Recent Events

Following the sell-out DELF Autumn Seminar on Red Notices and Interpol with Nick Hearn, Rebecca Meads and Eka Iakobishvili on 22nd November 2018, Ben Keith reflects on the controversy surrounding the organisation's recent presidential competition.

The appointment of the Kim Jong Yang of South Korea as president of Interpol is to be welcomed. The possibility of appointing Prokopchuk was a plot straight out of a spy movie. Interpol does not have its own officers or secret agents, in spite of what the movies might have us believe but the appointment would have moved Interpol even closer to being a puppet of despotic regimes.

Interpol Red Notices are meant to be part of the extradition process, they are the envelope that contains the extradition request, or at the very least the warning to arrest someone. The problem is that Interpol is a police information sharing

organisation without the credibility of state to state cooperation or the security of the intelligence services.

Interpol's job is to find criminals by sharing information and executing extradition requests - the problem is that there is no proper filter of the requests. Cooperation with the likes of China, Russia, Turkey and the UAE expose the system to fundamental abuse.

Russia frequently issues Interpol Red Notices to ask for arrest and extradition of political opponents and business people, whose interests do not align with the regime. The pursuit of Bill Browder by the repeated issuing of Red Notices is just one example of the continued pursuit of political opponents. The attempt to get Prokopchuk elected is the Russian state acting out McMafia in real life.

The President is the figure-head of the organisation, without huge power, the real power lies with the General Secretary presently Jürgan Stock a German lawyer. Reports that Prokopchuck may run for election to be General Secretary in 2020 would be an exceptionally worrying development and would give Russia real power over the organisation.

This election comes as a result of disappearance and subsequent arrest of its previous Chinese President Meng Hongwei. He disappeared for several days and then reappeared charged with corruption; it is still unclear what he is charged with or what happened. Interpol are not even able to police its own members or President.

The attempted coup in Turkey has seen unprecedented repression of civil society. The thousands of judges, lawyers, human rights activists and civil servants incarcerated on a whim, in the same vein as Stalin's terrors, where being on the list was enough, irrespective of wrong doing. Turkey placed 1000's of disbursement notices on the Interpol system requesting extradition.

There are some positives, Fair Trials have worked tirelessly to try and make changes to the organisation. They have had some success in communicating concerns. The use of the new asylum policy by Interpol has begun to bite, and there are more requests being discharged by the Committee for the Control of Files (CCF) on the basis of refugee status and political motivation. Asylum law does not interact well with extradition law in the UK, neither Westminster nor the First Tier Tribunal fully understand what happens in each other's respective processes, although in my experience both are willing in the right type of case to adjourn and wait for each other. The facts have to be right for that process to be effective but in political cases it is often better to have only one set of proceedings going at once. Once a client has an asylum grant, Interpol will more readily remove the red notice, often very quickly. I have concerns about the confidentiality of such a procedure and the risks of revealing the grant of asylum to the CCF but so far in my experience they have been reasonable and have not disclosed that fact to the requesting state.

Trying to remove a Red Notice is complex and very similar to litigating a politically motivated case with the added difficulty of everything being in writing to a committee in Lyon which has not yet held a hearing to consider a removal request. There are often issues of reputation management and political negotiation needed to support such a removal and to show how the system is manipulated for political ends by a requesting state.

Luckily at least for now Interpol has not appointed Prokopchuk which would have handed legitimacy for abuse of Interpol to Putin and put his cronies in charge. However, there is much change needed to stop Interpol being manipulated.

Ben Keith
5 St Andrew's Hill

Upcoming Events

Christmas Drinks

We look forward to seeing some of you at DELF's Christmas drinks event this year which will take place on 10 December 2018, from 6.30pm at the Clerkenwell & Social, 2-5 St John Square, London, EC1M 4DE.

The event is proving very popular so please do email us (admin@delf.org.uk) to reserve your place so we can be sure there'll be space for you! A confirmation mail, which will be your entry ticket will be sent to you a week before the event. We look forward to seeing you there!

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

Contacts

Contact us at enquiries@delf.org.uk
To join, email membership@delf.org.uk
Website: www.delf.org.uk

Follow us on twitter: @DELF_Lawyers

Editor: If you would like to contribute, please contact our editor Katherine Tyler at ktyler@kingsleynapley.co.uk