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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the Defence Extradition Lawyers Forum newsletter, edition 16. In this edition Rebecca Niblock explains how a no deal Brexit is likely to affect the operation of UK extradition under the EAW scheme; Fred Allen considers the High Court's decision in R (Lazarov) v Westminster Magistrates' Court and Dr. Anna Oehmichen and Dr. Mayeul Hieramente analyse the recent refusal by the Higher Regional Court of Dusseldorf to execute a judgment against a former member of Colonia Dignidad, convicted in Chile as an accessory to the sexual abuse and rape of minors. We also set out the conclusions of DELF's meeting with the Senior District Judge, in relation to which, if you have any comments please do get in touch.

A message from the Chair

Dear Member,

A very happy new year to you! Welcome to this first newsletter of 2019. January sees a busy time for DELF and in particular our wonderful administrative assistant (Marie-Anne Sarlet), who does sterling work in dealing with our new membership applications and in processing our renewal fees from existing members! Can I take this opportunity to issue a very polite reminder to those who have not yet renewed for 2019 – we have an exciting year ahead and I don't want you to miss out! We will shortly be announcing dates for a number of events, including our Spring seminar and our ever-popular Annual Dinner (which due to over subscription continue to be members only events).

As ever, we strive to represent our Members and will continue to do so. As you will have seen from our recent circular (and see below), we have held meetings with the Senior District Judge and her team and have another meeting in the diary for the Spring. We are very grateful to the Chief Magistrate who is very keen to hear from us. But we can only raise issues if we know about them, so please do continue to get in touch. We are currently working on the issue of experts' attendance fees and applications for certificate for counsel, amongst other matters. Please also do watch this space for the second year of the John Jones QC Essay Competition. John remains very close to all of our hearts and we look forward to launching the prize again in 2019.

Thank you to those who attended our very successful Christmas drinks; it was good to round off 2018 in cheer and I

look forward to making 2019 a very successful year for DELF.

Finally, a big thank you to all those who have contributed to this Newsletter; some fascinating articles below and we really are very grateful! Thank you all for your continued support and please do drop us a line.

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. Towards the end of last year we met with the Chief Magistrate. It was a very useful meeting and we are very grateful to Senior District Judge Arbuthnot, and her staff, for agreeing to look into a number of important issues. Amongst them are:

- In non-contentious cases (directions) and / or bail variations, the Court is happy to list the case and indicate that parties / advocates do not need to attend.
- The Court is giving consideration to the possibility of using telephone hearings for administrative hearings.
- The Court is willing to consider proposals to assist with lawyers obtaining instructions in relation to 'consent' at video link hearings. At present, the IJ office is happy to scan a document to the prison from the advocate when they scan the consent form to HMP Wandsworth for signature.
- The SDJ will raise with other judges the issue of bail conditions involving the surrender of a defendant's spouse / partner's passport or travel documents.
- DELF is preparing a submission to the Chief Magistrate in relation to the payment of attendance fees for expert witnesses.
- DELF is preparing a submission in relation to applications for certificate for counsel. All decisions are made by either SDJ Arbuthnot, DSDJ Ikram, DJ Coleman, DJ Snow, or DJ Grant. There is no designated means of appealing but the Court will consider changes of circumstances.
- Advocates who have difficulty seeing their clients over the lunch adjournment should raise this with the judge in court.
- Unfortunately there is no space at Court for a designated room for cyclists to change.
- The Court wants to be notified of any practical issues (such as lights not working in video link rooms etc).

We will be holding another meeting with the Chief Magistrate very soon and we continue to welcome, and encourage, our Members to raise issues with us so we can continue to work on your behalf.

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

Legal Update

"A sorry state of affairs" – Lazarov v Bulgaria and R (Lazarov) v Westminster Magistrates' Court

In the case of Lazarov v Bulgaria the High Court found itself in some legal difficulty as it sought to deal with an appeal against an extradition judgment from Westminster Magistrates' Court that was replete with mistakes.

The High Court found a catalogue of errors in the judgment including:

- References to incorrect counsel;
- References to Romania and its judicial system when the extradition request was from Bulgaria; and
- A description of the Requested Person as a single man with no children and no convictions in the UK.

The Requested Person's witness statement detailed that he lived with a partner and two step children, and the PNC record showed that he had been convicted of a "fly tipping" offence.

The latter mistake was particularly troubling as the Requested Person had sought to resist extradition on the basis that it would violate his right to family life protected by Article 8 ECHR. There was some consideration, given these errors and how awry the paragraph numbering had gone, as to whether the judgment was a poorly done copy and paste job. The District Judge responsible remained anonymous and his blushes were spared.

The High Court found that the errors had "the cumulative effect that the reasons simply cannot be considered as addressing the true and actual facts of this case at all". It was then faced with the challenge of how to dispose of the case. The High Court felt that they were not in a position to allow the appeal on the basis that the District Judge would have been required, if properly directing himself, to order the Requested Person's discharge. At the same it was felt that there could be a serious injustice if the High Court were to take no action "in a situation which may be relatively finely balanced for and against extradition" where "an order for extradition has been made on the basis of reasons which contain so many errors that they simply do not engage the true facts of the case at all".

In the Immigration context the Upper Tribunal has a power to remit an appeal back to the First-tier Tribunal in certain circumstances but there is no such power in extradition proceedings when the High Court is hearing an appeal from a Requested Person. The solution, it was determined, was to be found in an application for judicial review of Westminster Magistrates' Court but no such application had been made. Hasty arrangements for lodging were made on the day of the appeal hearing. At a rolled up hearing dealing with the judicial review and adjourned extradition appeal matters, the judge accepted both the application for judicial review and the application to file it out of time. The Magistrates' Court judgment was quashed and a direction was made that the application for extradition must be reheard and reconsidered from scratch by a different District Judge, experienced in extradition.

The High Court expressed sympathy with the workload of extradition judges but also disquiet at the way in which the case had been managed. It was noted that upon receipt of the judicial review claim form, Westminster Magistrates' Court had e-mailed the parties to say that the District Judge had "provided the incorrect judgment". This was some six months after judgment had been made and after the High Court had refused permission to appeal on the papers on the basis that "the decision is not arguably wrong and the appeal has no reasonable prospects of success". It was also noted that the appeal was "resolutely resisted" by the CPS Extradition Unit right up to, and during, the hearing in the High Court. The late e-mail from Westminster Magistrates' Court was described as disclosing "a sorry state of affairs".

The appeal raises interesting questions about the relationship between judicial review and extradition appeals. Judicial review is usually only available when there is no alternative remedy. In an extradition case similar to Lazarov, where there is a catalogue of errors at first instance and it is also at least arguable that the appeal should be allowed, it may not be clear whether an alternative remedy is available until judgment in the appeal, or a strong indication of what that will be, has been made. In this situation the Requested Person is faced with the unenviable choice as to whether to commence two parallel actions, to hope that their extradition appeal is allowed, or to hope that a High Court judge will show the same pragmatism that was demonstrated in Lazarov.

There was much talk about the exceptionality of the case and a statement that "[t]his judgment and my decision are no

warrant or precedent at all for the incursion of judicial review into the field of extradition, which has a complete statutory framework." Given the well-publicised problems with the underfunded criminal justice system, and the High Court's own finding that there was a lacuna in the statutory framework it remains to be seen how exceptional the Lazarov case is.

Fred Allen
Kingsley Napley

What to expect: Extradition after a No Deal Brexit

With the 29th March 2019 just around the corner, and an agreement on the UK's withdrawal from the EU looking increasingly unlikely, DELF members may be wondering about the consequences of a no deal Brexit for European Arrest Warrants.

The government's answer can be found in the draft statutory instrument: the Law Enforcement and Security (Amendment) (EU exit) Regulations 2019. These regulations make clear that a no deal Brexit spells the end of the EAW. The proposed mechanism for the continuation of extradition relations with the remaining EU member states is a re-designation of all Part 1 territories to become Part 2 territories. Extradition requests from EU member states will thus be administered according to extradition arrangements under the 1957 European Convention on Extradition.

Changes

A reversion to the 1957 Convention would lead to significant changes. Most obviously, those facing extradition requests from EU member states would no longer be subject to the expectation (not always, of course, met) of a fast track surrender. The "cornerstone" of mutual recognition cited in the preamble to the EAW Framework Decision would cease to apply, although the impact of this may be limited: as Council of Europe countries also enjoy the advantage of mutual trust. Furthermore, whilst judicial enthusiasm for the principle of mutual trust was initially shaky, over the 15 years that have passed since the 2003 Act, it has become firmly entrenched.

Whilst the NCA would see a decrease in its extradition related workload, a corresponding increase may be anticipated by the extradition lawyers at the Home Office, given that all extradition requests would have to be certified by the Secretary of State for the Home Department.

Should a no deal exit from the EU come to pass, practitioners will no doubt be disappointed to see the end of some of the provisions we have come to know and love, in particular section 12A and section 21A of the 2003 Act.

We would see the end of the Framework Offence as the 1957 Convention provides no equivalent to the Framework List to establish an offence as an extradition offence; it would become necessary to look for dual criminality.

Fortunately for the busy extradition squad at New Scotland Yard, it no longer has responsibility for arresting those subject to Part 2 extradition requests outside the Metropolitan Police area: the police force local to the requested person now has responsibility for both Part 1 and Part 2 arrests.

Extradition for the EU-27 following a no deal Brexit

Although the amendments required to bring domestic legislation into line are relatively straightforward, not all EU member states will simply be able to revert to the 1957 Convention when extraditing to the UK. One of the more difficult problems is that of Ireland, which did not apply the 1957 Convention to the UK prior to the Framework Decision and, when the 2003 changes came about, repealed the relevant parts of its 1965 Extradition Act which was modelled on the 1957 Convention. To deal with this problem, in December 2018 the Taoiseach brought forward

unilateral plans to apply the 1957 Convention to the UK, based on an "assumption of reciprocity", justified by the UK's pre-existing commitment to extradite its own citizens. This proposal was outlined to the Dail on 24th January 2019 but until it is concretized in second stage Bill form on 22nd February 2019 it could change, particularly given political pressure.

Another change, for import extraditions to the UK only, will be the return of the nationality bar. The Framework Decision did away with this, and although the UK has never applied the nationality bar as a requested state, a reversion to the 1957 Convention would see those member states which do refusing to extradite their own nationals to the UK. This would have a particularly unfortunate consequence in the case of Ireland once again: as it stands the Irish nationality bar would extend to all Irish citizens, regardless of residence or dual nationality. Given Ireland automatically grants citizenship to people born in the north of Ireland, or to Irish Grandparents, on application, there are an estimated 6 million potential Irish Citizens living in the UK. These people could (in theory at least) claim Irish citizenship, commit a crime, walk across the border and evade extradition back to the UK.

Existing EAWs

Anecdotally, it does not appear that the anticipated rush to execute existing EAWs has come to pass. With police forces under pressure to deal with domestic offences, it is not clear that our approach to the 29th March will necessarily lead to a surge to execute EAWs in advance of that date. For those that have been arrested (including those subject to provisional arrest) prior to exit day, the regulations have put in place saving provisions to allow those proceedings to continue.

Other measures

The UK would no longer be a member of Europol or Eurojust. The UK would no longer have access to ECRIS or the European Judicial Network. The implementing legislation, the EIO Regulations, would be revoked, however saving provisions would allow those parts of the EIO Regulations that allow for temporary transfer of a prisoner who is yet to return to the UK to be retained. For this transfer to be effective in practice, equivalent saving provisions would need to be introduced in the EU-27. At present, the Commission is working on the public presumption that this provision will be Article 62(1)(a) of the Withdrawal Agreement. Clearly in a No Deal situation this will not apply, while an equivalent unilateral provision is likely, the private No-Deal preparations of the Commission are beyond the scope of this article. There would be saving provisions for EIOs that are either part way through execution on Brexit day, or that are received before that date. The UK would cease to have access to the Schengen Information System – no more SIS II alerts. The 2000 Convention on Mutual Assistance in Criminal Matters would also cease to apply.

Rebecca Niblock
Kingsley Napley

Update from Germany

Chilean judgment against former Colonia Dignidad physician not executed

On 20th September 2018, the Higher Regional Court of Düsseldorf, Germany, had to decide whether to execute a judgment against a former member of the Colonia Dignidad in Chile (H), for accessory to sexual abuses and rape of minors carried out by the founder and former leader (S) of the sect and agricultural commune. The case concerned a former medical doctor of the colony, and German national, who had fled Chile in 2011 after being sentenced to a five year's prison sentence by the Court of Appeal of Talca, Chile.

In Germany, like in many other civil law countries, extradition of nationals is generally prohibited at constitutional level, the only exception being surrender in the context of an EAW or the extradition to international criminal

tribunals.[1] It is for this reason that Chile's initial request to extradite H was rejected, and that the Chilean authorities, in consequence, issued a request to enforce the foreign judgment against H in Germany.

Procedural History

H had been sentenced to 5 years and 1 day by judgment of 16.11.2004 by the District Court of Parral/Chile, for accessory to "indecent abuse" of 26 under-aged persons in the period between 1993 and 1997. On 6.1.2011, the Court of Appeal of Talca/Chile confirmed the judgment but reduced the penalty to 4 years. In May 2011, H travelled to Germany, where he has been living since. By decision of 25.1.2013, the Supreme Court of Chile issued a so-called "surrogating judgment", by which H was convicted in his absence to a prison sentence of 5 years and 1 day. The charges included accessory to rape of minors under 12 years old in 4 cases and accessory to sexual abuse of minors in 16 cases. This decision has become final.

Facts of the case according to Chilean judgment

Villa Baviera, formerly Colonia Dignidad, is a big farmland in the Chilean community of Parral. The community, originally inhabited mainly by German emigrants, was founded as a welfare and education society in the early 1960s which inter alia included a so-called "intensive boarding school" for local children. Between 1993 and 1997, S as the leader of the community abused several of the minors staying at that boarding school. H was a physician and head of the hospital of Villa Baviera. He was member of the management at Colonia Dignidad and had co-founded the intensive boarding school. This prominent position led the Chilean court to believe that S could not have committed the abuses without H's approval and support. Further, it is alleged that H assisted S, amongst others, by

- physically examining the minors who had become the victims of abuse,
- collecting documents to provide alibis for S
- touching base with S while he was sought by the police
- "distorting the truth" about S' activity in Bulnes rather than in Villa Baviera and about his residence
- postponing in some cases his own appearance in court
- avoiding to mention the persons in charge of the minors
- helping his wife and his adopted son to leave the country in the moment in which the subpoena was about to be executed
- interrogating different persons regarding their situation

Chile requested H's extraditionor alternatively, execution of the sentence in Germany. The extradition was rejected on the grounds of H's German nationality. On 14th August 2017, the Regional Court of Krefeld declared the execution of the sentence admissible and converted the Chilean sentence to imprisonment of 5 years and 1 day (see decision of the Krefeld court, case no. 21 StVK 218/16). The Regional Court assessed in great detail possible violations of fair trial rights by the Chilean courts but ended up rejecting them in their entirety. H appealed the decision to the Higher Regional Court in Düsseldorf where the proceedings took an unexpected turn.

Legal assessment of the Higher Regional Court of Düsseldorf

The Higher Regional Court of Düsseldorf found the complaint admissible and well-founded.[2] It rejected the execution of the Chilean judgement by virtue of Section 49 (1) No. 3a of the German Act on International Cooperation in Criminal Matters (AICCM) which states:

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[1] Article 16(2) of the German Constitution, which was amended to implement the Rome Statute and the Framework Decision on the European Arrest warrant, now reads as follows:
(2) No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.

[2] Higher Regional Court of Düsseldorf, 20.9.2018 (III-3 AR 158/17).

"The enforcement shall not be admissible unless […] under German law notwithstanding possible procedural obstacles and, if necessary mutatis mutandis, a criminal penalty […] could have been imposed in respect of the offence on which the foreign judgment is based".

It noted that the offences committed by S are punishable under German law but concluded that H could not be held liable for aiding S in the commission of his crimes, Section 27 (1) of the German Criminal Code (GCC). While noting that the AICCM does not require the German courts to make a full-fledged assessment of the criminal liability under German law, the Higher Regional Court of Düsseldorf then proceeded with a detailed analysis of the Chilean judgement in light of the German jurisprudence regarding Section 27 (1) GCC. It first addressed the argument that H's position in the Colonia Dignidad might lead to liability for aiding the commission of the crimes committed by S. It reviewed the recent jurisprudence of the Federal Court of Justice[3] and other courts dealing with the criminal responsibility of guards in Nazi concentration camps and determined that the mere fact that H was in a leadership position in an organisation like Colonia Dignidad – a commune that has no criminal objectives per se – does not suffice to establish a criminal responsibility under German law. The Higher Regional Court also determined that the specific acts referred to by the Chilean judgement also did not qualify as aiding in the sense of the norm, since the judgment did not establish any concrete (psychological) support to S. It proclaimed that further investigations or requests from the Chilean authorities are not warranted.

Comment

In this remarkable decision, the German Court denied MLA on purely legal grounds. The clear focus was on the German dogmatic approach to criminal liability for assistance. The detailed analysis under German law is certainly due to a surprisingly broad interpretation by the Chilean courts. The fact that statements by the complainant that were also meant to protect himself from criminal prosecution were considered as acts of assistance will have raised concerns regarding the fairness of the whole trial and the respect for the *nemo tenetur* principle. The Court may also have been influenced by the fact that German prosecutors had opened investigations against H, so that rejecting MLA would not necessarily lead to impunity.[4] In light of the on-going criminal investigations against H, the decision of the Düsseldorf Court shows the importance of upholding fair trial standards of presumed innocents, without regard to political or public demands. It sends an important message that criminal punishment requires the establishment of individual guilt and that the new jurisprudence on criminal responsibility of members of the Nazi regime, e.g. the Demjanjuk[5] case in 2011, deals with an extraordinary situation and should not be used lightly to advocate for a general criminal responsibility for persons that were "part of the system".

Dr. Mayeul Hieramente, FHM lawyers, Hamburg
Dr. Anna Oehmichen, Knierem & Kollegen

Recent Events

DELF's Christmas Drinks

It was great to see so many of you at the DELF Christmas party on 10th December 2018 and to round off a busy year in the world of extradition. It is so nice to see so many of you at our social events and look forward to seeing some of you at the Annual Dinner later on in the year.

[3] BGH, 20.9.2016 (3 StR 49/16).
[4] Cf. https://www.ecchr.eu/en/case/colonia-dignidad-sect-leaders-should-serve-jail-time-in-germany/.
[5] Regional Court of Munich, 12.5.2011 (1 Ks 115 Js 12496/08). See also the cases against the "bookkeeper" of Ausschwitz Oskar Gröning at the Court of Lüneburg (https://trialinternational.org/latest-post/oskar-groning/), or the currently on-going trial against a 94-year old, former guard of Stutthof, before the Regional Court of Münster (https://www1.wdr.de/nachrichten/westfalen-lippe/landgericht-muenster-kz-aufseher-100.html).

Upcoming Events

Educational Event

We will be holding an educational event in the Spring and will be circulating details shortly. 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 2019, 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 2019 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 transfer in this case.

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