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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the Defence Extradition Lawyers Forum newsletter, Issue 18. The 'hot topic' this month is undoubtedly the recent CJEU decision concerning the independence of public prosecutors - Dr. Anna Oehmichen reports on how it has been received in Germany, Elise Martin-Vignerte provides the Irish perspective and Ben Lloyd & Adam Payter share their insights on the impact it may have in UK courts; we also have some fantastic Brexit updates from Myles Grandison and Albert Janet and Will Hayes reports on this year's glamorous DELF Annual Dinner.

A message from the Chair

Dear Member,

It remains my pleasure to introduce our excellent newsletter!

The first quarter of 2019 has again shown DELF going from strength to strength. We had a fantastic Dinner on 24 May 2019; huge thanks to all those who attended, in particular our guests of honour: Senior District Judge Arbuthnot and Edward Fitzgerald QC (our President). Special thanks must go to Sir Julian Knowles for his sparkling speech! We are very grateful to him and for his continued support of DELF. We remain sorry to those who were not able to secure a ticket; we have already started thinking about next year's Dinner and no doubt a yet even bigger venue will be considered!

It was my privilege to formally launch our annual essay competition in the name and memory of John Jones QC at the Dinner. John was a tremendous colleague and friend to many of our members and he continues to be sorely missed. Details of the competition will be announced very shortly, with the winner announced at our annual Conference on 13 September 2019.

In terms of our annual Conference, please do save the date: **13 September 2019**. Details will be released shortly, with tickets then going on sale. If last year's event is anything to go by, this year will be a superb day (and evening!)

DELF continues to strive to represent your interests and we had a very constructive meeting with the Senior District Judge in April. Please do continue to get in touch with any issues you would like us to raise on your behalf. One thing we are always asked is to provide concrete examples of any issues that arise, so please do pass them on. Our Committee also had a good meeting with the LAA and continues to raise issues of concern with them.

Thank you very much indeed for your on-going support. We really do appreciate it. As ever, if you have any issues

you would like to raise please do get in touch.

Ben Lloyd
6KBW

Our Recent Activities

DELF Annual Dinner

The key social event in every extradition practitioner's diary took place on 24 May: the DELF Annual Dinner.

Lawyers in black tie descended upon Shoreditch's super classy hotel, The Curtain, no doubt feeling slightly out of place as they made their way through the Friday night crowds of beards and knitted jumpers lining the streets in this hub of hipster London, with not a suit to be seen.

It was great to see so many from the world of extradition in attendance. The evening offered a welcome opportunity to speak to friends and familiar faces whilst also allowing for the forging of new relationships.

Guests were treated to a delicious meal in the hotel's ballroom, following which DELF chairman Ben Lloyd introduced the after-dinner speaker, Mr Justice Knowles, who delivered an excellent speech containing a brilliant mix of cheeky humour and valuable judicial insight. Once the jokes were out of the way (a Photoshopped picture of Ed Fitzgerald QC and Ben Cooper as Batman & Robin being a particular favourite), Mr Justice Knowles offered some sage advice for those appearing before the High Court, reminding those in attendance that it is called the High Court for a reason, and that lawyers should not forget the formality required and rules to be observed. Inevitably Brexit was mentioned and Mr Justice Knowles expressed confidence that whatever may happen, extradition lawyers will still find interesting arguments to raise before him and his judicial colleagues.

A live band provided the soundtrack to the remainder of the evening, delivering a rendition of classic covers to see out the end of what was a superb night.

Will Hayes
Kingsley Napley LLP

What Brexit really means…

Introduction

In an era in which Governments could hardly be criticised for being slow to introduce new legislation to combat crime, it is perhaps ironic that, upon the UK's withdrawal from the European Union ('Brexit'), we will be reverting to a Convention from the 1950s to govern our extradition arrangements with fellow Member States. Following Theresa May's announced departure, coupled with the Conservative Party's worst performance at the ballot box in 200 years, the risk of a no deal Brexit is ever more heightened as leadership contenders vie to appease the voters that have deserted them in droves.

This article will set out the European Commission's assessment of the risks and likely impact that our exit from the European Union will have on police and judicial cooperation ('cooperation') between the UK and other Member States in the event of a no deal scenario.

Impact

In a communication dated 10th April 2019[1], the European Commission set out the three main areas of cooperation that will be affected in the event of a no deal Brexit. As the Commission is keen to stress, the UK's inability to have recourse to the current arrangements does not mean that there will cease to be cooperation between the EU and UK; but simply that alternative legal instruments will need to be resorted to, many of which are arguably inferior.

In summary, upon the date of our withdrawal:

- The UK will be disconnected from all EU networks, information systems and databases;
- The UK will no longer be able to participate in the EU agencies i.e. Europol and Eurojust, and will be treated as a third country; and
- Judicial cooperation procedures i.e. the EAW scheme, will no longer be pursued within an EU framework.

Given the interests of our readership, following a brief overview of points 1 & 2, the focus of this article will be upon the impact on extradition.

Disconnection from the EU's databases

After Brexit, the UK will be prohibited from accessing the EU databases upon which our police, prosecutors and security forces have become so reliant over recent years. Consequently, our agencies will no longer be able to e.g. instantly check if there are SIS II 'hits' on someone in their custody, undertake criminal record checks on ECRIS or access EURODAC in order to compare fingerprints to establish whether an individual has previously claimed asylum in one of the Member States.

Of equal concern is the expectation that SIS alerts placed onto the database by UK agencies before Brexit will need to be deleted. As noted by the Commission, the alerts "*become quickly outdated and therefore cannot serve as a basis for taking coercive measures on persons…[a]cting upon outdated alerts could create a serious risk for the protections of fundamental rights (e.g. the arrest of a person who has in the meantime been acquitted).*" This will no doubt hamper the ability of police forces across the continent to arrest those wanted in the UK unless or until our agencies have resorted to other alerts i.e. Interpol notices.

Participation in EU agencies

In the absence of a deal, the UK will no longer be able to participate in the activities of agencies such as Europol and Eurojust. Instead, it will be treated as a third country with no specific cooperation agreement in place. Given this status, there may well be limits on the data that either agency is willing or able to share with the UK. Although there exists an ability to share data with such a third country, it is likely to be done on a case by case basis, which has the potential to lead to delays.

Judicial cooperation in criminal matters

According to the Commission's communication:

"*In case of a no-deal, Union law stops applying to all cases in the area of judicial cooperation in criminal matters that may be pending in relations with the United Kingdom.*

Therefore, in case of a no deal, as from the withdrawal date, EU27 Member States (a) may not proceed further pending judicial cooperation procedures involving the United Kingdom and (b) may not issue new such judicial

[1] Communication from the Commission addressing the impact of a withdrawal of the United Kingdom from the Union without an agreement: the Union's coordinated approach. (COM (2019) 195 final.

cooperation procedures involving the United Kingdom on the basis of Union law."

In an attempt to quell concerns that, come Brexit, all those held under the authority of an EAW would be released, Parliament introduced a transitional clause (regulation 57) to the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 ('the Regulations'). According to the explanatory notes *"That provision will mean, for example, in the case of a person arrested under a Part 1 warrant prior to commencement day, a decision will be taken by the courts on that person's extradition in accordance with the Part 1 regime."* This appears to accord with Article 62(b) of the Withdrawal agreement, which provides *"Council Framework Decision 2002/584/JHA1 shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released"*.

However, in the event of a no deal Brexit, there are question marks over whether Member States would consider, under their own domestic law, that an EAW executed in the UK remains valid after the withdrawal date. In the Commission's communication, they state *"whether such pending cases will be discontinued or not is not a matter of the Union law.* ***It depends on the internal legal order of each of the EU27 Member States, their national laws on cooperation with third countries or binding international agreements****"* (emphasis added). Accordingly, notwithstanding Parliament's endeavours to cushion the fall from the cliff edge, Member States may have their own obstacles to pursuing an extant EAW with a non-Member State.

What is abundantly clear is that following Brexit, all new requests will be governed by the European Convention on Extradition 1957 ('ECE'). The Regulations, which will come into force after Brexit, will designate all Member States as Category 2 countries under the Extradition Act 2003 (Regulation 56). The purpose of this re-designation is, according to the Explanatory Notes, to "*enable the UK to comply with its obligations under the European Convention on Extradition 1957, which will provide the basis for extradition between the UK and the member States once the EAW scheme ceases to apply.*"

There is no doubt that the ECE was, at the time, an important advance in terms of cross-border judicial cooperation in criminal law. However, even before the terrorist attacks on the World Trade Centre in New York, there was recognition amongst Member States that the procedures relied upon for extradition required an overhaul. The preamble to the EAW Framework Decision provides: *"the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures."* The aforementioned terrorist attack in September 2001 provided the impetus to address the issues inherent in the previous system with greater expedition.

So, is the ECE fit for purpose, given the growth in trans-national crime and the proliferation of extradition requests issued between Member States? In short, no.

The government recognises the importance of the EAW and the weaknesses of the ECE. It will be recalled that as recently as 2014, the UK opted back into the EAW Framework Decision, along with 34 other measures. At the time, the Home Secretary, Theresa May MP sought to persuade MPs to vote in favour of opting in by stating "*if we were to vote against the motion tonight and did not opt back in to the measures—because a vote against the motion tonight would be a vote against the package of 35 measures—we would find ourselves kicked out of Europol within weeks and our extradition arrangements would be thrown into legal uncertainty, potentially for years. That would risk harmful individuals walking free and escaping justice, and would seriously harm the capability of our law enforcement agencies to keep the public safe*". In her criticism of the alternative, i.e. recourse to the ECE, the Home Secretary stated "*I have been absolutely clear in the remarks I have just made that there is one crucial aspect that would cause us problems: the length of time that extradition procedures would take.*"

The ECE has many flaws which have been examined in greater detail elsewhere. In summary, delay is inherent in a

system that provides 2 months for the Home Secretary to order extradition, coupled with the need to send requests and queries through diplomatic channels. Secondly, there will be a rise in the number of people avoiding extradition to the UK, as many Member States have provisions in their domestic legislation preventing them from extraditing their own nationals to countries outside the European Union. Thirdly, whilst all Member States have ratified the ECE, it is understood that not all of them still have domestic legislation in place to enable them to have recourse to it.[2] Additionally, not all Member States have ratified the 4 additional protocols to the ECE. Fourthly, the need to conduct extradition arrangements through the ECE is likely to increase costs for all involved, as Member States will have to create tailored requests for the UK, as opposed to circulating the EAW across the European Union.

Conclusion

Police and judicial cooperation amongst Member States is of the utmost importance, given the rise in cross-border criminal offences. Those vying to be the next Prime Minister will do well to remember the risks of a no-deal Brexit on the security of the United Kingdom.

Myles Grandison
Temple Garden Chambers

To be, or not to be, a judicial authority? That is the question…

The European arrest warrant scheme was heralded as the great simplifier; extradition between States was to be abolished and replaced by a streamlined process of surrender between judicial authorities. It was, after all, the exchange and mutual respect of judicial decisions (see the *Council Framework Decision 2002/584/JHA of 13 June 2002* on the European arrest warrant and the surrender procedures between Member States: 'the FD'). On the face of it, doesn't "judicial" just mean "judicial" – in other words a court or judge? Who, back in 2002, would have thought that 17 years later the definition of "judicial authority" would still be the subject of litigation at the European Union's highest Court?

Lawyers in the United Kingdom were of course alert to this issue and in Julian Assange's greatest contribution to the law of extradition (to date), the UK Supreme Court in 2012 held that the term "judicial authority" in section 2 of the Extradition Act 2003 was to be accorded the same meaning as it had in Article 6 of the FD, and that a European arrest warrant issued by a public prosecutor was a valid Part 1 warrant issued by a judicial authority. The Supreme Court noted that uniformity within the EAW system required each member state to give the same meaning to "judicial authority". The phrase was capable of a narrow interpretation – just a judge or court, or a wider meaning which would include a public prosecutor. In adopting the wider meaning, one of the important considerations was the practice of the parties to the FD and that, as a number of states had subsequently appointed prosecutors as issuing judicial authorities (and had done so without objection from other states), there was a sufficient practice to establish the member states' agreement. As such, a prosecutor fell within the meaning of a "judicial authority". Germany and Lithuania (in relation to conviction warrants) were highlighted as examples of countries that had assigned its Ministry of Justice as a judicial authority (*Assange [2012] UKSC 22*).

Following quickly on from that, the Supreme Court in 2013 held that an EAW issued by a ministry for a convicted person could be regarded as issued by a judicial authority if the ministry issued the EAW at the request of, and by way of, endorsement of a decision that the issue of such a warrant was appropriate and made by the sentencing court or some other judicial authority. Certain EAWs originating from requests from the Lithuanian prison service did not meet this requirement (*Bucnys & Otrs v Ministry of Justice, Lithuania [2013] UKSC 71*).

Insofar as public prosecutors are concerned, the UK courts have hitherto continued to be faithful to Assange. The

[2] See House of Lords Select Committee report on Brexit: Future UK-EU Security and Police Cooperation, at paragraph 137.

Divisional Court, in a judgment handed down on 11 March 2019, held that recent CJEU decisions supported the Supreme Court's decision that a public prosecutor could be a judicial authority (*Krupeckiene v Lithuania [2019] EWHC 569 (Admin); and see Criminal proceedings against Ozcelik (C-453/16 PPU) [2017] 4 W.L.R. 9 and Criminal Proceedings against Kossowski (C-486/14), [2016] 1 W.L.R. 4393*). It was also noted that the CJEU had not applied any particular test in making that determination; it simply assumed that any public prosecutor in a Member State administered justice and was thus a judicial authority under the FD. The Divisional Court noted that the Supreme Court of Ireland had referred to the CJEU the question of whether the Lithuanian public prosecutor was a judicial authority, but no decision had at that time been taken: a stay was not required.

However, the CJEU has now in fact handed down its decision and it has moved the goalposts. On 27 May 2019, the CJEU gave judgment in the cases *of Public Prosecutor's office of Lübeck* (*C-508/18 OG*), *Public Prosecutor's office of Zwickau (C-82/19 PPU PI)* and in *Prosecutor General of Lithuania (C-509/18 PF*). The Court considered two Lithuanian nationals and one Romanian national who were challenging the execution of European arrest warrants issued by German public prosecutor's offices and the Prosecutor General of Lithuania (in an accusation case).

It was contended that the German public prosecutor's offices and the Prosecutor General of Lithuania were not competent to issue a European arrest warrant on the basis that they were not a "judicial authority". It was submitted that the prosecutors were not independent of the executive since they were part of an administrative hierarchy headed by the Minister for Justice.

In short, the CJEU ruled that the German prosecutor's offices do not provide a sufficient guarantee of independence from the executive for the purposes of issuing a European arrest warrant. The German legislation did not preclude their decisions to issue a European arrest warrant from being subject to an instruction from the relevant Minister for Justice. Accordingly, those public prosecutor's offices did not appear to meet one of the requirements of being regarded as an "issuing judicial authority", namely the requirement to provide the executing judicial authority the guarantee that they are independent.

However, it appears that the Prosecutor General of Lithuania may be considered to be an 'issuing judicial authority', in so far as the role affords him a guarantee of independence from the executive with regards EAWs. Importantly, the final decision on this issue will be left to the Supreme Court in Ireland to assess.

In the short term, this decision is very significant. First, any German EAWs currently before the UK courts may need to be withdrawn and affected requested persons discharged (it may be that affected EAWs will re-issued by a different judicial authority but there can never be any guarantee of that). Secondly, it remains to be seen whether the CJEU's decision will have a wider impact on any other EU jurisdictions; but, defence practitioners (being as curious and as creative as ever) ought to be alive to this possibility and consider carefully whether the CJEU decision can be applied to other EU jurisdictions.

As the CJEU has now emphasised, the important question is whether a public prosecutor's office is exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice. The authority responsible for issuing a European arrest warrant must act independently in the execution of its functions, even where that arrest warrant is based on a national arrest warrant issued by a judge or a court. It must be capable of exercising its functions objectively without being exposed to the risk that its decision-making power is subject to external directions or instructions, in particular from the executive.

No doubt if the Swedish authorities do eventually decide to issue a new EAW against Julian Assange, they would be well advised to ensure it is issued by a Judge as opposed to a public prosecutor.

This article has also appeared on the 6KBW blog: https://blog.6kbw.com

Ben Lloyd & Adam Payter

Update from France

Is France the least badly prepared country to face a hard Brexit?

Shortly after the British vote of 23 June 2016, the French Senate set up a monitoring group composed of 20 senators, tasked with the follow-up of the UK's withdrawal from the EU. This group has published several reports and conducted hearings in Paris, as well as visits to Berlin, London, Belfast, Dublin, Brussels and Strasbourg.

A few days before the cut-off date of March 29, 2019, as the UK seemed to be in a political impasse, the French Senate held a symposium with economic stakeholders and public authorities to assess the risks triggered by a hard Brexit and its potential impact on French economy, and to identify potential benefits which could be derived from the reorientation of economic flows following Brexit. While a senator called Brexit "*an economic and geostrategic nonsense*", it was also acknowledged that it could present invaluable opportunities for French regions to strengthen their attractiveness and attract new business and investment.

At the opening of this conference, the President of the Senate called for a renegotiation of the Dublin and Schengen agreements and for a harmonization of the asylum rules. Subsequently and throughout the day, the senators and the other participants expressed their views and called for the implementation of pragmatic solutions.

The Chairman of the Senate Committee on Foreign Affairs and Defense reminded that France is the only European military power whose capabilities and doctrine are comparable to those of the UK. He assured that France will continue its bilateral cooperation with the UK under the 2010 Lancaster House Treaties, confirmed and expanded in 2018 at a summit between Prime Minister May and President Macron at Sandhurst.

To address the emergency at hand, a law was passed on 19 January 2019, allowing the executive to adopt regulations pertaining – among other things – to road transport, to new infrastructure for border controls and to the continuity of rail traffic in the Channel Tunnel. Already 700 additional custom officers were hired.

As regards sanitary and phytosanitary controls, there should be no reason to change the controls currently operated, as the UK still applies the European standards. But the day these standards are abandoned, heightened controls will need to be carried out.

MP's have been working in parallel on an "*orderly exit*" hypothesis as well as on a no-deal scenario. The latter option elicits much more concern as it implies more constraints, more controls and hassles, and less fluidity.

It is estimated that about 30,000 French companies will be affected by Brexit. Hence, economic players need to be regularly informed of the anticipated changes. To this end, the French government has created the website brexit.gouv.fr which aims to provide useful information to businesses, French citizens residing in or travelling to the UK, as well as to British citizens residing in or travelling to France. It seems to be in French only…

- As one senator pointed out, France is considered by the European Commission to be the "*least badly prepared*" member state to meet the Brexit challenge. However, the risk of an economic shock remains high, especially for small and medium-sized enterprises which rely on the British market, but will face increased customs formalities and trade barriers. It is particularly difficult for such small businesses to become familiar with new procedures and to keep abreast of new legislation and unexpected developments. By October 31, they will hopefully know where they stand. However, considering the on-going psychosis, October 31 may come and go, and Brexit will remain just as volatile and unpredictable.

Albert Janet Hérès

CJEU rules that German public prosecutors are not sufficiently independent – a view from Germany

On 27 May 2019, the CJEU followed the Advocate General's opinion in ruling that the German public prosecutor lacked the required independence to be considered a "judicial authority" that is competent to issue EAWs (Joined Cases C-508/18 and C-82/19 PPU).

Like the opinion of the Advocate General on the same matter which was delivered on 30 April 2019, the judgment was met with much surprise and even shock in Germany. Reactions ranged from some commentators saying it was "an unfortunate wrong decision", to others remarking it was a decision "to be welcomed as the CJEU has underlined the importance of the independence of the judicial authority".

The so-called 'external right to instruction' of the Ministry of Justice on German public prosecutors has been debated in Germany for decades, and although there are few cases in which the minister actually made use of it, the mere existence and possibility of exercising this right casts a shade on the independence of the prosecution. Notably, one case which received much public attention resulted in the forced retirement of the then Attorney General of Germany, Harald Range, who claimed that the then Minister of Justice, Heiko Maas, had interfered with his investigations (cf. here).

In my view, the German public prosecutors may appear independent on paper but hardly ever are in practice. This is not actually so much related to the 'external right to instruction' (except for maybe in very few political sensitive cases). Rather, their independence is jeopardised for other reasons including the nature of their role, their structure, and incentives for career promotions, which do not allow them to be entirely independent.

The German legal requirement that they should investigate both incriminating and exonerating material (the famous s. 160(2) of the German Code of Criminal Procedure to which the Public Prosecutor of Lübeck referred in his submission before the Irish Supreme Court, cf. para. 2.6 of the referral, available here) is apparently hard to comply with. One prosecutor even once told me openly in a trial, in which I asked to request evidence from abroad via mutual legal assistance, that this evidence was not necessary as it would only be exonerating. He told me that given that he needed to prove the guilt and not the innocence of the defendant it wasn't necessary to include this evidence in the case…

Moreover, the decision to issue an EAW is not simply an execution of the domestic arrest warrant, (which will always form the basis of the EAW in Germany), but it is actually another, independent decision on the liberty of the person, which therefore requires judicial review. It is astonishing that this outcome is met with so much surprise in Germany, since everybody knows that our constitutional law, Art. 104(2) of our Basic Law, always requires a judicial decision on the deprivation of liberty of a person. The Advocate General is right in his opinion that EAWs have a stronger impact on the freedom of a person than domestic warrants, as they may lead to custody being imposed for up to 120 days.

In light of this reality, the decision of the CJEU can only be welcomed. Especially at times when the independence of the judiciary is seriously questioned in some Member States, the CJEU should take a clear stand on what independence actually entails.

In practice, the CJEU's decision will have an immense impact – it will lead to European wide applications to discharge German EAWs. But what will happen then? The German judicial authorities which are no longer a judicial authority within the autonomous interpretation of the CJEU will have to respond to foreign authorities as to whether there is any reason why the EAW should still be upheld. They may request courts to decide on this matter, but whether the court's competence for the domestic arrest warrants has any statutory legal basis to issue EAWs is doubtable. The

German notification under article 6.3 regarding the EAW of 2006, published on 02.08.2011, states that 'under Article 6 the competent judicial authorities are the Ministries of Justice of the Federal Republic and of the Länder. As a rule, these have transferred the execution of the powers resulting from the Framework Decision for the submission of outgoing requests (Article 6(1)) to the public prosecutor's offices of the Länder and to the regional courts, and the powers to meet incoming requests (Article 6(2)) to the chief public prosecutor's offices of the Länder'. The relevant domestic agreements concerning this delegation generally delegate the power to issue EAWs to the locally competent prosecutors. In the long run, it may mean that the district courts (*Amtsgerichte*), which are currently only competent to issue domestic warrants, will also now receive applications from the prosecution to issue EAWs. It can only be hoped that they will take this task seriously, and not simply copy-paste the prosecutor's request. It is also hoped that they will, unlike the prosecutors who are leading investigations, not only consider investigative tactical aspects, but especially take into due consideration the principle of proportionality when deciding whether the case requires not only a domestic but also a European arrest warrant with all the consequences this may entail.

However, the effects may be even wider, as Germany is not the only country in which EAWs can be issued by public prosecutors.

It is noteworthy that on 27 May 2019, the CJEU also ruled that the Lithuanian Prosecutor General who is competent to issue EAWs in Lithuania was a judicial authority, within the meaning of Article 6(1) of the Framework Decision on the EAW (Case C-509/18). The difference with regards to the German public prosecutor was based on the different structure of the roles. The Lithuanian Prosecutor General was considered independent from the judiciary and from the executive; this allowed him to qualify as a "judicial authority" within the meaning of the EAW FWD. In light of this, it is yet to be seen how other public prosecutors from other Member States will be assessed. Other countries where their public prosecutors are competent to issue EAWs are, for instance, Austria, Bulgaria, the Netherlands, Portugal (but in Portugal judges may also issue EAWs), Romania (in certain cases) and Sweden. Moreover, in Belgium, Luxembourg and Italy, public prosecutors are competent to issue EAWs regarding execution of a sentence, and in Estonia and France, public prosecutors are competent for prosecution EAWs.

Dr. Anna Oehmichen
Knierim & Kollegen Rechtsanwälte

Lithuanian Prosecutors, an independent authority? - view from Ireland

In two preliminary judgments on 27/05/2019 the CJEU ruled on the independence of German (C-508/18 and C-82/19 PPU) and Lithuanian prosecutors (C-509/18). While it followed the Advocate General's opinion in finding the German prosecutor not to be an issuing judicial authority [IJA] within the meaning of art. 6(1) of the European Arrest Warrant [EAW] Framework Decision the Court found the Prosecutor General of Lithuania to be one such, subject to proof to the Irish Court of the existence of control by the Lithuanian courts over its decision to issue an EAW.

The CJEU affirms a dual level of protection of the fundamental rights of the person sought for surrender. The first level is reached when domestic courts ensure that "all safeguards appropriate to the adoption of that type of decision" when a national warrant is issued. The second level of safeguard occurs with the control of the proportionality of the use of an EAW. This second control is key when the IJA is not itself a court, in that case the decision to issue an EAW must be subject to review by the court (para. 52-53 C-509/18).

In the case of P.F. (C-509/18), the CJEU referred the case back to the Irish Supreme Court to assess if the decision to issue an EAW made by the General Prosecutor of Lithuania can be subjected to judicial review. Thus while the Lithuanian prosecutor presents a statutory independence enshrined in the Constitution protecting it from external pressure the potential nonexistence of judicial review of its decision could exclude it from being acknowledged as IJA.

A new ground of objection to surrender is now open. By laying down criteria to identify an IJA the CJEU allows us to raise the issue of the independence of the potential IJA. While this will certainly raise concerns for "continental systems" where prosecutors are linked to their Department for Justice (see Anna Oeichmichen's observations above) it will have a lesser impact on common law systems like Ireland. The EAW Act 2003 designates the High Court as IJA with jurisdiction to issue an EAW following an application of the Director of Public Prosecution. When endorsing an EAW the High Court will ensure that criteria sets out in Section 3(1) of the Act are fulfilled, in particular the gravity threshold. Interestingly, this section does not require from the High Court a review of the proportionality of the measure which calls into question the compliance of its control with the "proportionality" safeguard required by the CJEU.

The application of CJEU ruling by national courts will soon draw a map of "compliant" IJA. The circulation of national case law between practitioners will be essential to ensure uniform application of the criteria across Europe. Further preliminary references will undoubtedly arise. These two rulings are a first step toward the questioning of independence of prosecutors in more general manner in CJEU case law - monitoring their application should open new avenues for the defence and supplement argument based on the ECtHR criticism of prosecution's independence.

Elise Martin-Vignerte
MacGuill and Company

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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