ISSUE 19: 6 December 2019

DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the Defence Extradition Lawyers Forum newsletter, Issue 19. After a longer than anticipated break this issue contains a full recap of the DELF Annual Conference on 13th September 2019, with many thanks to Fred Allen, Will Hayes, Rebecca Hadgett and Emily Elliott for their contributions. In addition we have Hannah Hinton's update on the work of the DELF Court Liaison Committee and some news about exciting upcoming events!

A message from the Chair

It is my absolute pleasure to be appointed as Chairperson of DELF. DELF continues to do excellent work furthering the interests of our members and assisting in creating a strong network of extradition lawyers. I am proud of the work that DELF undertakes and I hope that its achievements will continue over the next year. Firstly, I would like to thank the outgoing Chair, Ben Lloyd for all his hard work over the last twelve months. Secondly, a huge thank you to those that spoke at the Annual Conference and not least to Ben Keith for his superb organisation skills (again). It was a hugely successful event and was thoroughly enjoyed by all that attended.

Looking ahead, the next 12 months could be potentially significant for extradition lawyers, Brexit still looms and undoubtedly it will bring about change for the way we defend extradition cases and there are waves of on-going litigation in respect of prison conditions and what constitutes a judicial authority.

At the AGM in October, the committee was re-appointed and new positions were created. Mary Westcott, is the forum's diversity officer and Hannah Hinton has become the court liaison officer (more of Hannah's work below).
I am very excited about the year ahead, we have some excellent education events planned and of course the Annual Dinner will be held again in May. Thank you all for your support and Happy Holidays!

Katy Smart
Sonn, McMillan, Walker

Court Liaison

In November the DELF court liaison committee met with the Chief Magistrate and a member of the Westminster International Jurisdiction Office ("IJ"). The Court has helpfully agreed to look into a number of issues of concern, including telephone contact with the IJ, security depositing release, interpreter bookings, expert fees, providing copies of the 'blue form' to all parties and making video-link listings visible on the public information provided in advance of hearings. DELF will approach the Bar Council to suggest Westminster Magistrates' Court be added to their ID scheme list of participating courts and approach the LCCSA in the same vein. DELF proposed that the rates for travel and accommodation for experts be made known in advance, as they are under the LAA scheme, and that interpreters be booked to attend from 9.30am and 1.30pm for pre-court conferences when they are being booked for extradition hearings. The Court reassured the committee that the cell visiting hours have been extended. Access is from 9am for the morning session and 1.30pm for the afternoon session. With regard to 'policy' cases, the Court will provide such updates as are necessary and underscored that adjournments are considered in a case by case basis but that Westminster would always seek to progress hearings regardless of progress of cases in the High Court. DELF has been provided a contact for observations regarding court facilities.

The committee has also made contact with Administrative Court and will be proposing a new section is added to the appeal form for 'other applications' to be made, under one fee, at an early stage. This will enable Applicants to notify the Court of difficulties meeting the deadline for filing perfected grounds in complex cases or during the holiday seasons and, for example, to seek early extensions to a representation order to include a junior and a QC.

We continue to listen to any feedback from members and are very grateful to both Courts for engaging with DELF over these practical issues. Please contact membership@delf.org.uk with any ideas or concerns you have regarding court processes.

Hannah Hinton
Drystone Chambers

DELF Annual Conference

European extradition law

Anthony Hanratty of BDB Pitmans chaired a panel comprised of lawyers from across the continent: Maria Radziejowska of Piertrzak and Sidor in Warsaw; Asya Mandzhukova of Mandzhukova, Shopov, Petrov Law Firm in Sofia; and Arturas Gautauskas of Primus Derling in Vilnius.

Arturas talked of the closure of Lithuania's Lukiškės prison, which had been the subject of significant international criticism. He warned, however, that he did not foresee a substantial improvement in prison conditions in the next two years, and that that the problematic Siauliai remand prison remained open. He explained the jurisprudence on the meaning of "judicial authority" in Lithuania from European and Lithuanian courts; and underlined the importance of working closely with Lithuanian lawyers on Lithuanian issued EAWs to co-ordinate defence work.

Asya spoke to the structural problems with the judicial and prosecutorial system in Bulgaria and how this affected criminal cases being brought there. She explained that it was officially recognised that judicial power, and the investigative and law enforcement bodies of Bulgaria could become hostages of political or corporate interests; and that there was potential for the Minister of Justice to have direct or indirect influence over criminal proceedings. She also explained problems with the Prosecutor's Office being involved in PR campaigns against defendants before criminal trials, and issues with Bulgarian prison conditions. Practical guidance was given on challenges to arrest

warrants issued in Bulgaria.

The problematic recent reforms to the Polish judicial system have raised concerns about the degradation of the rule of law in the country, and this issue has been the subject of litigation in European extradition courts. Maria Raziejowska was able to offer some encouraging news about the resilience of Polish judges, determined to maintain their independence. She also highlighted indicators of political interference in criminal cases that could help requested persons charged in connection with them challenge extradition. Maria explained the limited nature of formal challenges in Poland to EAWs issued there, and how negotiations with judges could unfold outside of formal challenges.

The panel's discussion demonstrated the benefits of working with lawyers in a requesting state at the earliest opportunity, and the value of DELF's international reach. Co-operation between defence lawyers across the continent will no doubt continue to be of great value regardless of whether or how the UK decides to extricate itself from the EAW system.

Fred Allen
Kingsley Napley LLP

Trauma, Mental Health and Extradition

The second panel offered a rare opportunity to hear directly from those who often contribute so much to our cases: medical experts. Mary Westcott (Doughty Street Chambers) chaired the panel consisting of Dr Juliet Cohen, Head of Doctors at Freedom from Torture, and Professor Keith Rix, Consultant Forensic Psychiatrist. The panel gave helpful, practical tips and answered some of the most common questions. Here are the highlights.

How do we pick the right expert to instruct?

Be aware of the distinction in role and expertise between psychologists and psychiatrists. A psychologist studies human behaviour and is of particular value when looking at how normal people react to abnormal events, for example, sexual assault survivors. Further, a psychologist can assist when considering how best to help a client to express themselves, and whether they have a learning difficulty or leaning disability.

A psychiatrist is medically trained and will be of most value diagnosing and treating mental disorders. If mental capacity is in issue, it is possible to obtain a general opinion from a doctor but you will be best served by obtaining a formal assessment from a psychiatrist.

On a practical note, Professor Rix advised seeking out an expert you've used in the past and asking them to recommend someone in the particular field or with the particular expertise that you are looking for.

To what extent do you believe everything you're told? What independent signs might you look for to support your conclusions?

The short answer from both experts was not to take what is being said at face value but to carry out a critical assessment. Dr Cohen reiterated that any doctor will assess what they are being told in light their experience and their expertise. They will ask specific clinical questions that an ordinary person would not be able to fabricate and then proceed to carry out an examination of that individual's mental state and consider any physical evidence before forming an opinion. Professor Rix observed that he will take a history, observe the patient and set that in the context of how those conditions present in ordinary clinical practice to consider whether there is consistency with what other people have documented or what has been written about in medical records, such as from a GP, detention centre or hospital.

Often, mental disorders will have no physical signs. In the case of suspected victims of torture, physical signs can change and resolve fully over time. For example, bruising from blunt force trauma. The sort of physical evidence that may not resolve over time, such as cuts, burns or scarring can be telling because of their location or grouping. There

are some characteristic injuries that are formed from the use of handcuffs or suspension.

The critical assessment comes into play when considering physical findings as well. In line with guidance from the Istanbul Protocol, Dr Cohen will consider fabrication as a specific direction. Even when looking at a particular scar that may be attributable to torture, alternative explanations for the production of that scar will be considered.

How best can we assess the overall impact extradition would have on a person? How best can we present that to the court?

For a court to understand the overall impact of extradition on a person, much depends on the expert understanding the legal tests that the court is going to apply and understanding the terminology. For this reason, the clarity and detail of instructions is important. Professor Rix advised that those instructing should not be afraid to "*teach a granny to suck eggs*": set out in detail the applicable legal tests, be prepared to illustrate those tests and do not assume that the expert knows all of this - provide your expert with as many facts as possible. The strength of a report will depend on whether the overall opinion is reasoned, cogent and clear. If the opinion is clear but it is not well supported in the reasons, send it back and ask for it to be put in better terms. The expert may or may not thank you for it but they will have learned something about the preparation and writing of reports.

In terms of presenting the evidence to a court, Dr Cohen advised obtaining as much information as possible for the expert to base their opinion on. This includes medical records (although not everyone will seek help from a doctor or feel able to) and any information about access to treatment in that country, whether Country of Origin Reports from the Home Office or any other external research.

How do we combat a reaction we may have about credibility?

Dr Cohen emphasised that one of the most important things to remember is that there is no single presentation: different people have different personalities, will have experienced different things and so any new experience will impact in a different way. Country of origin may also play a part. Mary Westcott agreed and gave as an example the misunderstanding of cultural habits in Rwanda where, for example, the absence of eye contact was misunderstood as not credible.

Whilst the most common expectation is that someone who has been through a traumatic experience would present as distressed or crying, others may shut down and not be able to verbalise their experience, provide detail or elaborate. The number of tears someone sheds is no indication of the extent of the impact on them.

In addition to presentation, the manner of disclosure will often vary. Trafficking victims will often only disclose that fact after being in therapy and over a number of sessions. When they initially present, they may give their first account as that told to them by the trafficker; this may shift over time. Memory is fallible and many factors can influence how an event is described. One practical means of addressing this would be to take a statement over several points in time before finalising and serving it and setting out in that statement the individual's difficulties with recounting events in order to help reduce the impact of cross-examination based on inconsistencies.

How is the best way of getting evidence from a client without re-traumatising them?

There is no single way. If you get the feeling that there is a topic your client is finding difficult to talk about, Dr Cohen advised making that observation to them. Talking around the topic and asking if they feel able to talk about it. Sometimes with reassurance an individual can slowly open up, but it may not happen all in one go. Be conscious that the interpreter could be affecting that individual's ability to open up: are they of a different gender? Are they too close ethnically?

If you have spent time talking about a topic in detail, at the end of the conversation spend a few minutes bringing them back to the here and now, checking in with how that person feels and setting out what is going to happen next.

Record how your client reacts to the things that they are describing or being asked to describe and include it in the

letter of instruction to alert the expert to what may happen when they see that individual.

How do you deal with it when judge dismisses your report?

Dr Cohen expressed the view that as a matter of principle, judges shouldn't be making clinical assessments themselves as they are not the medical experts in the area. This means they should not make an assessment preferring another cause for the client's presentation, they should not speculate as to the nature of the clinical conditions or why someone didn't seek treatment. If the expert's expertise is established and the report is coherent, it should not be disputed other than by an individual with the same level of experience.

Professor Rix advised looking at the judgment in the round and seeing whether the judge had taken into account matters which amounted to a misrepresentation of the clinical facts of the case. For example, if the expert relied on the client's increased startled response which presented on multiple occasions during consultation to form a diagnosis of PTSD but the judge has discounted that by stating everyone is startled by loud noises that could be challenged as a misrepresentation. But where the judge has looked at everything in the round of which the medical report is one part, which is unlikely to be open to challenge.

Rebecca Hadgett
3 Raymond Buildings

Political corruption in extradition and asylum proceedings

Ben Keith convened a panel to discuss the intersection and crossover between extradition requests, which are resisted on political grounds, and asylum claims.

Initially the discussion explored the difficulties in both forums. Nataliya Burns of Montecristo LLP emphasised the importance of properly preparing the claimant's witness statement in the immigration proceedings, to explain why the claimant fears persecution. She explained how the Home Office poses a set list of questions, which are focussed on political party membership, political views, and political activity. As Nataliya pointed out, this does not account for those individuals who are not party political but who have upset their government in a different way. The emphasis is then on the claimant to explain the political context.

As John Lough of Chatham House explained, the political context might be driven by other factors. He set out how, in many of the countries in which these cases arise, there is often a fusion of business and politics: to sustain business, one has to have some sort of political foothold. It is therefore not uncommon for business owners to become directly involved in politics, openly support candidates in an election, and make monetary donations. The issue then arises when a conflict in business spills into a political conflict.

However, in comparison to the extradition process, it was generally observed by the panel that the judges in the immigration setting understood the political context of a case better. Katy Smart of Sonn MacMillan Walker said that a key difference was the use and value of anonymous witnesses, which are particularly important for political cases. She explained how this is still unusual practice in extradition cases and applications for anonymity are not always granted. Even in cases where it is permitted, the credibility attributed to the witness is less than in the immigration sphere, where the tribunals are much more familiar with anonymous evidence. Nataliya explained how evidence in immigration tribunals is treated in confidence and not disclosed to the government or authorities of which the claimant fears persecution, which naturally allows for more detailed evidence.

Katy also observed that it is possible to get concessions from the Home Office about the credibility of the client, but that this would never happen in Westminster Magistrates' Court until the final stages of the hearing.

The panel agreed that asylum claims have a greater chance of success, as opposed to the process of resisting extradition on politically motivated grounds. It was observed that, if the extradition courts go first, they do not necessarily have all the information before them and decisions can be made in a way that should not. Katy brought

this to life when recalling a recent case. She explained how they were quickly served with extradition assurances. Subsequently, as part of the asylum proceedings, the Home Office provided photos of the prison cell where her client was going to potentially spend the rest of his life. Helpfully, these time-stamped photos demonstrated that the cells were the same cells as five years previously, despite the aforementioned assurances. They were able to identify this to the immigration proceedings, proving that, independent of all the evidence they were gathering themselves, there was evidence to distrust what was being said by the state.

However, it was also noted how it is sometimes advantageous to run the asylum claim in the background, before alerting the extradition courts, as that information is likely to be relayed to the requesting state. There are also difficulties with the timing and length of the asylum process. In Ben's experience, a genuinely political claim will be refused by the Home Office in the first instance to allow a judge to consider the matter, which can delay the process to three years. The panel finished by opening up the discussion to the audience, who contributed their own experience of the difficulties in both forums and the overlap between the two areas of legal practice.

Emily Elliott
Kingsley Napley LLP

How to remove an Interpol Red Notice

Andrew Smith of Corker Binning chaired the final panel of the day, discussing how to remove an Interpol Red Notice with Alison Macdonald QC (Matrix Chambers), Anand Doobay (Boutique Law) and Rachel Scott (3 Raymond Buildings). The speakers shared their views on nine key questions highlighting some of the most important points lawyers should consider when dealing with Red Notices.

As the speakers acknowledged, anybody can read Interpol's constitution, its 'Rules on the Processing of Data' or the 14 published CCF decisions, but Interpol remains a somewhat mysterious organisation and there is a distinct lack of information about how it works in practice. It was therefore extremely valuable to hear the panel share its insight into the workings of Interpol and the approach it takes to Red Notices.

On the differences between writing to Interpol pre-emptively asking for a Red Notice not to be issued and applying for an existing Red Notice to be deleted, the panel expressed doubt over whether Interpol's General Secretariat carries out any proper review when an NCB requests the publication of a Red Notice, even though it is supposed to apply the same principles as the CCF Requests Chamber. This makes it all the more important that pre-emptive representations from the requested person are on file so that when an NCB does request the publication of a Red Notice, Interpol will not solely be acting on the information presented by the NCB.

Commenting on the fact that clients are often worried about the information they provide to Interpol being shared with the requesting state, the panel explained that whilst steps can be taken to protect against this, clients should be advised that this could have an impact on how persuasive the representations will be.

Referring to the fact that Interpol publishes extracts from only some Red Notices on its website, the panel noted that it is not always clear why some are published instead of others, and that many of the individuals concerned are ordinary people. It was suggested that this could be an intentional move by the requesting state, given the disproportionate effect publication can have on the lives of ordinary people compared to those whose alleged criminality is likely to already be well known.

A particularly interesting part of the discussion looked at the interplay between UK extradition proceedings and Red Notices. The panel referred to cases where discharge of a requested person on the basis of extraneous considerations or incompatibility with Convention rights has not automatically resulted in a finding by the CCF that continued publication of a Red Notice would violate Interpol's rules. The rationale behind this, it was suggested, was that there might have been an important change in circumstances since the discharge, such as an improvement in conditions in the requesting state or a change of government.

For those cases where there has been no extradition or immigration decision, the panel suggested that proving violations of article 2 (human rights) and article 3 (political motivation) of Interpol's constitution should be approached in the same way as with resisting an extradition request on these bases. This would mean assembling the same evidence, including country reports, other general evidence and expert reports specific to the case, trying to find NGOs who agree with your arguments (as Interpol seems to attach weight to the views of other organisations) and referring to linked cases in which there have been helpful decisions. It might also be possible to rely on the support of other NCBs, if you can find another member of Interpol who is willing to intervene in your case. This can have a huge impact on the CCF's decision.

However, the panel warned that there can be a downside to submitting all of this information and supporting evidence. You risk giving away the arguments and supporting evidence which will be deployed in the extradition proceedings and the requesting state has the opportunity to remedy any problems with its case. You might also provoke an extreme reaction. Where, for example, you draw Interpol's attention to the fact that the requesting state has failed to submit an extradition request in a timely manner; this might actually force the country into taking that very step.

Finally, the panel highlighted the risks which remain for clients whose Red Notices have been deleted and who wish to travel. Clients tend to fixate on Red Notices and assume that once they have gone they can travel freely. In reality, however, the position is not so straightforward. For example, Interpol data is sometimes transferred to a country's national database and is not automatically deleted when it is removed from Interpol's database. Other countries print hard copies of the data and so may be acting on information which is out of date. It should also not be forgotten that ordinary lines of communication between countries will continue to operate, whether or not a Red Notice has been removed. In addition, whilst diffusion notices should not be used if a Red Notice has been deleted, it is doubtful whether this is the reality and it is far more difficult for Interpol to exercise control over the distribution of these notices.

These were just some of the points raised in what was an excellent discussion between four lawyers very well placed to offer insight on this topic. All of those in attendance no doubt left the conference with many new ideas for how best to approach cases of this nature in future in order to secure the removal of a Red Notice.

Will Hayes
Kingsley Napley LLP

Update

With thanks to Harriet and Dr Anna Oehmichen for the update relating to the Advocate General's Opinion in Joined Cases C-556/19 PPU Parquet général du Grande Duché de Luxembourgh and C-626/19 PPU Openbaar /ministerie and in Cases C-625/19 PPU and C-627/19 PPU Openbaar Ministerie, specifically that French prosecutors are not deemed sufficiently independent to issue EAWs (like German ones), and "a person requested under an EAW issued by a public prosecutor's office in a Member State which participates in the administration of justice and has a guaranteed independent status must be able to challenge that warrant before a judge or court in that State, without having to wait until he is surrendered, as soon as the warrant has been issued (unless this would jeopardise the criminal proceedings) or notified to him".

Past events

DELF Christmas Drinks

Thanks to so many people for coming to DELF Christmas drinks earlier this week; it was great to see so many of you there.

Upcoming events

Mutual Legal Assistance Seminar

There will be an educational event on Mutual Legal Assistance towards the end of January 2020. Further information will be provided soon.

Membership

Membership runs from January to December annually. If you wish to join DELF for the first time since 01 January 2020, 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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