

The impact of Coronavirus upon extradition proceedings at Westminster Magistrates' Court

Introduction

1. DELF appreciates that Westminster Magistrates' Court is dealing with an extraordinary set of circumstances, and that judges, staff and lawyers are working exceptionally hard to keep the Court running, keeping court users' safe and ensuring justice is achieved. This document is intended as a preliminary note for discussion on DELF's concerns regarding the application of the Coronavirus Act 2020 ("CA 2020") and the extension of the use of live-links in extradition proceedings, as well as other aspects of changes to extradition work.
2. Feedback from DELF's members on proceedings conducted since the COVID-19 emergency measures were brought in and practical suggestions for the conduct of the work remotely are also included as Annex 1.
3. DELF would welcome a court-users meeting to discuss these matters as soon as possible.

DELF's position in respect of the use of live-links for hearings

Summary

4. DELF understands that the Court hopes to begin hearing full extradition hearings in one court each day, in addition to Court 3, for one week from 20th April 2020, leading up to two hearings courts per day from 27th April 2020.
5. DELF has been working with the Court and CPS management to assist with the roll out of video link hearings for urgent work. DELF welcomes the use of Skype for Business and/or CVP for urgent work. Our understanding of "*urgent work*" with reference to HMCTS guidance means, principally, remand work. i.e. any CTL or bail matters as opposed to full extradition hearings. However, even in those hearings, the Court should safeguard the requested person's full engagement in those hearings when the matter is not a 'lawyers only' hearing.
6. It is DELF's position that EHs are not "*urgent work*" and hearings requiring the physical attendance of any of the parties at court should be adjourned until it is safe to return to Court, this is dealt with in further detail in Annex 1.
7. DELF wishes to emphasise the usual timeframes for extradition do not apply, and therefore the need to "*make progress*" should not be at the expense of the requested person having a fair hearing. With regard to Part 1 cases, the UK's obligations under Article 17 the Framework Decision to determine EAW requests within 60 days (extended to 90), is clearly not applicable during these extraordinary times, particularly where no EU country is surrendering or receiving extraditees.

8. DELF has serious concerns, doubtless shared by the CPS and the Judiciary, that the live-link facilities presently available within the extradition courts are not fit for purpose especially when it comes to evidence based hearings, i.e. hearings with one or more witness.
9. All parties must be given the opportunity to provide submissions on the interests of justice test *before* it takes place (particularly for full extradition hearings). Live link hearings can only take place if it is in the interests of justice. Although each case will need to be considered on its own merits, the **presumption should be against such a hearing taking place via video link where such a hearing involves live evidence**. DELF believes that it is unlikely to be the norm that the interests of justice test is met in the case of full extradition hearings where live evidence is to be called. The test may be met in rare cases where it is in the requested person's best interests to have such a hearing via live link, i.e. if it is highly likely s/he will be discharged. Similarly, if the issues at an extradition hearing are purely technical (e.g. s.2/10 EA 2003), it may be in the interests of justice to proceed.

Detailed representations

Change in law

10. As of 25 March 2020, a person may attend an extradition hearing under both parts 1 and 2 of the Extradition Act 2003 (EA 2003) by live link, whereby all persons taking part in the hearing can see and hear, and be seen and heard by, all other persons only if the judge is satisfied that "*it is in the interests of justice to do so*": see ss.206A and 206C of the EA 2003.¹

Interests of justice test

11. In DELF's view, it should not be assumed that the interests of justice test will be met for any given hearing but should be considered on a hearing by hearing basis. It may be possible in relation to the most simple case-management hearings to deal with the interests of justice test briefly. However, for full extradition hearings, a detailed consideration of the interests of justice test should be undertaken. If the technology is not adequate then it is clearly not in the interests of justice for a hearing to proceed. Some latitude is expected to be given while the technology is tested and for non-substantive hearings. However, if an extradition hearing is commenced via live link after a direction has been given and if it subsequently becomes apparent the case cannot proceed in the interests of justice then that direction should be capable of review.
12. Relevant factors are likely to include the impact on the fairness of the proceedings, public safety, practicality and the opportunity for the media to scrutinise the proceedings, particularly in high profile cases. A significant factor is the ability of a requested person's family to "attend" the hearing as a witness and/or to offer support.
13. A useful starting point may be the non-exhaustive list of circumstances in s.51(7) of the Criminal Justice Act 2003 ("CJA 2003") that a judge must consider before making a

¹ Section 54 of the CA 2020 temporarily extended the availability of live links to hearings listed in schedule 24. §§8-10 of schedule 24 modified ss.206A and 206C of the 2003 Act, which are the provisions governing the use of live links in extradition proceedings. The relevant provisions will expire at the end of the 2-year period after the Act came into force: see s.89 of the 2020 Act.

direction for a person to take part in criminal proceedings by audio or video link: (a) the person's availability; (b) the need for them to attend in person; (c) the person's own views; (d) the facilities available at the location from which the person will take part; (e) whether the person can take part effectively; and, in the case of witnesses, (f) the importance of their evidence; and (g) whether a direction might tend to inhibit any party to the proceedings effectively testing their evidence.

14. Additionally, the guidance provided by the Crown Court under the CA 2020 is informative as it does not envisage hearings where there is more than one witness, a defendant, giving evidence.
15. Whether the interests of justice test can be met for full extradition proceedings is of particular concern. There are foreseeably a number of problems, which relate to all hearings where the attendance of the requested person is required, which can be assessed with reference to s.51(7) CJA 2003:
 - (a) parties, including their legal representatives, may not be available due to illness;
 - (b) they may be subject to Government rules upon self-isolation;
 - (c) the requested person's view on whether it is in her/his interests to have a hearing via live-link is important and may include, if on bail, risk factors and practical factors such as travel distance, childcare, vulnerability of household members;
 - (d) importantly, the Court will need to know whether the requested person has the technical facilities – in prison whether this can be accommodated; or if on bail, whether they have the technical capabilities; smart-phone; unlimited wi-fi etc; DELF considers witnesses cannot take part effectively where the quality of evidence, in particular a witness' credibility is at issue in particular the opportunity for requested persons to give a positive impression is likely to be seriously diminished. A requested person will not be able to take part effectively if there is no mechanism for requested persons to give instructions before and during the hearing, and also after the hearing, for those on bail there may be better engagement prior to the hearing but issues do arise on the day which advocates will need an opportunity to explore. Generally speaking counsel would not share direct contact details with their lay client;
 - (e) the importance of the evidence heard via live link is obvious, particularly in cases where the requested person's fugitive status is relevant to Article 8 ECHR and in other cases where human rights issues arise such as Article 3 ECHR;
 - (f) both sides may feel that it is difficult to cross-examine a requested person or any other witness effectively via video-link, that may be apparent before the hearing or during the hearing itself, as such these live link decisions should be capable of being revisited both shortly before, and during the hearing.
16. DELF's view is that even if the requested person is able to participate properly, it is unlikely to be in the interests of justice for the case to proceed over video link where credibility is an issue (almost every Article 8 case) and where cases are more complex; for example where there are multiple witnesses, particularly experts. Although each case will need to be

considered on its own merits, the **presumption should be against such a hearing taking place via video link where such a hearing involves giving live evidence.**

17. It is acknowledged that it may be appropriate for full extradition hearings to proceed over video link in rare cases where it is in the requested person's best interests, i.e. if the requested person has served their sentence on remand for extradition proceedings, and the hearing is simply for them to be discharged. Similarly, if the issues at an extradition hearing are purely technical (e.g. s.2/10 EA 2003) and no live evidence is to be heard (consequently no issues of credibility are at stake, and it is unlikely that detailed face-to-face instructions would need to be taken). This view is of course predicated on other factors being met so that the requested person can properly participate in the hearing.

Recommendations

18. In light of the above observations, DELF makes the following recommendations as a foundation for discussion:
- (i) Unless and until adequate video link facilities are in place in the extradition courts, full extradition hearings should be adjourned.
 - (ii) In the event that adequate video link facilities are available, the interest of justice test will need to be undertaken in every case, but there ought to be a presumption against full hearings proceeding via video link, save for those cases falling within the rare categories identified above or where all parties are in agreement. All parties must be given the opportunity to provide submissions on the interests of justice test *before* it takes place (particularly for extradition hearings).
 - (iii) All other hearings ought to take place with the advocate by video-link, not telephone as it is currently, unless all parties agree to a telephone hearing, for example in straightforward case management hearings or bail variations.
 - (iv) There must be sufficient opportunities in all types of hearings for private conference(s) between lawyer and client as the need arises. Pre-court conferences should be standardised perhaps by the use of a spider phone in the video link booth area at court which could be attended by a member of court staff.
 - (v) The ability of family/supporters to hear the case "on mute", in the same way the press must be able to participate, to ensure open justice should be considered.
 - (vi) The decision to authorise a hearing by live link must be reviewable.
 - (vii) DELF would welcome advance notice of the Court's proposed technology for any hearings beyond 20th April 2020 so that advocates can ensure that they have the relevant technology.
 - (viii) DELF members are likely to wish to make representations as to how such proposals affect their individual cases, ideally at a hearing.

ANNEX 1

DELF feedback on telephone hearings and recommendations upon other aspects of temporary changes to extradition work at WMC

DELF members were invited to provide feedback on their recent court appearances in order to assist court users in working with the court in order to resolve issues that have arisen following the way extradition proceedings are conducted due to the amendments made to the Extradition Act 2003 by the Coronavirus Act 2020. Several key areas arose from the feedback we received and are set out in this document.

1. **Initial hearings conducted remotely** – There is concern from our members, particularly solicitors as to how initial hearings can be conducted completely remotely, particularly given the issue with signing legal aid forms. However, DELF notes and welcomes the temporary practice that some jailors have adopted where they have assisted the court with printing and scanning legal aid forms after being signed by the requested person in the video-link booth. DELF is unaware of any obligation/guidance which ensures this is done in each case. However, generally, the use of remote access for initial hearings is welcomed during the emergency situation as a result of the pandemic for the safety of requested persons, advocates and others involved in these hearings.
2. **Time markers/listings** - Many advocates have reported that the lack of time markers has caused significant difficulties in that some advocates were told by the court that they would be called back, yet there was no call back or a time marking was given but not observed. Advocates were then told that the case had already been dealt with in their absence when they phoned back later in the day. There have been individuals just waiting on the phone for hours for a short hearing. This has particularly affected those with responsibilities for toddlers and young children. There is impact on lawyers, both in terms of cost (there is no remuneration for wait time and the current arrangement can lead to wait times from 10 am to 4 pm) and in terms of practical arrangements (e.g. inability to fix conferences/other hearings/plan work around what would otherwise be a very short hearing). Members have reported a lack of information regarding the dial in codes for hearings and have resorted to finding information out via word-of-mouth.
3. **Private conference with requested persons** - It is currently impossible for representatives to conduct a private conference with clients. That was felt particularly acutely in a recent case where the requested person expressed suicidal thoughts during the course of the remand hearing. Although the court sought to assist by clearing the court so that the advocate could have a consultation with the requested person, it was impossible for the advocate to be aware whether the court had been entirely cleared, or whether anyone entered or left the court thereafter and there were interruptions from advocates dialling in for other cases during the consultation. In addition, the court recording equipment could not be turned off. Whilst some prisons are facilitating conferences remotely, so lawyers may hold pre-hearing conferences, these cannot always be arranged and representatives have found it very difficult to make the arrangements. With regards to the lack of post court conferences, that proves particularly difficult for advocates and requested persons where a judgment is handed down and there is no opportunity for a private post court conference, particularly given the very tight timescales for the lodging of appeals.

4. **Physical attendance at court –**

- (a) Subject to any revised guidance from the Government, DELF would seek to resist the court's requirement for requested persons to attend in person. Requested persons often have to travel a significant distance to court and are reliant on public transport which may place them in breach of the Government's social distancing guidelines. The requirement to attend court is likely to cause anxiety for their own safety and that of their family members, particularly if they live with a high-risk individual.
- (b) Similarly, DELF is concerned that advocates are at risk if their attendance is mandated. In the event that the Court is content for advocates to attend remotely, DELF is concerned that client-advocate relationships may be more difficult to maintain if representatives are not physically present at court, and thus undermine confidence in them as the requested person's representative. DELF is concerned that pressure will be put on some advocates to attend and others will be compelled to return work which is indirectly discriminatory. Some advocates live with high-risk individuals and/or may be in a vulnerable group themselves, required to self-isolate or are caring for young children at home.
- (c) Requiring all or some of the parties to attend court particularly for hearings that cannot be regarded as "*essential*" is likely to be contrary to the Government's current social distancing guidelines. Consequently, DELF suggests hearings requiring physical attendance at court are adjourned until there comes a time where all parties can attend court safely.
- (d) In the event that the Government guidance is revised to provide for non urgent court work to be conducted, DELF would welcome information as to how cleaning and distancing measures have been put in place at the court in order to assess risk to advocates and requested persons and their families.

5. **Change of circumstances (bail)** - There was a communication from the court in which it was stated that the court intended to deal with Notices for Bail Applications on the basis of a change of circumstances on the papers only. DELF has significant concerns over the use of that system.

- (a) The Bail Act 1976 and CrimPR Rule 14, envisage a hearing to be listed unless the application concerns a bail variation. Consequently, DELF is concerned as to the lawfulness of the proposal to deal with this aspect of the application without a hearing.
- (b) Furthermore, aside from the possibility for matters to be dealt with in that way as a matter of law, the practical difficulties that arise are that a determination of such applications are a contentious matter and often involve an engagement and dialogue with the advocates as to the merits of the application and the basis upon which it is asserted that there is a change in circumstances.
- (c) The determination that there has been a material change in circumstances is a precedent fact to that application and, respectfully, it is therefore difficult to see how that aspect of the application can be divided from the substantive bail application.

- (d) Furthermore, particularly during these unprecedented times where there are concerns as to the ability of the prison service to cope with the COVID-19 epidemic, a requested person's family may wish to attend court to witness applications in relation to bail and hear the reasons the Court has given in determining whether there is a change of circumstances. That would not be possible if that aspect of the application is dealt with on the papers alone.
 - (e) In terms of remuneration, unless there is an extension to the legal aid certificate to include an advocate, solicitors would be responsible for drafting the applications. DELF considers the consideration of the "change in circumstances" aspect of the application on papers would mean that fuller arguments need to be pleaded in the forms (depending upon the change asserted) and in some cases, supporting skeleton arguments and documents would need to be provided to the Court. The extra work would not necessarily be remunerated under the LAA arrangements.
6. **Preparation** – (a) those with primary school children and younger are losing out on time they would otherwise have to work on their cases. The potential ramifications of this are obvious regarding compliance with deadlines, ability to 'attend' court and pressure to return work. (b) Staff absences have affected preparation, as has the prison lockdown and lack of conferencing at court for custody cases. (c) Properly establishing rapport / giving robust advice etc is much more difficult remotely. (d) There is a difficulty in extradition hearings proceeding in the near future due to childcare pressures, staff absences and, in custody cases, a lack of conferences which significantly hinders representatives' abilities to prepare. Conferencing is an issue which solicitors are taking up with the prisons directly but support from the Court would be welcomed.

Recommendations

In light of the feedback received from members, DELF respectfully makes the following suggestions to assist the running of the court during the COVID-19 crisis:

1. **Court business** – That video link hearings involving live links with the prisons are conducted in the morning and other applications in the afternoon.
2. **Time markers** – Advocates need to be informed if the case is a prison VLR and DELF welcomes the recent court lists which have included the time slots for VLR hearings. For other short hearings, not within the prison VLR list, DELF would welcome general time markers to be provided to advocates by close of business the day before, e.g. 10-11; 11-12, 12-1, 2-3, 3-4 as an alternative or supplemental to point 1.
3. **Communication with advocates** – The day before the hearing, all advocates ought to be contacted with the dial/video-in details and a time-slot, or it should be posted on the Court's website.
4. **Website** - DELF considers that the court website would be a useful resource for all firms and advocates. If information were provided via the website, that is likely to reduce the number of urgent calls/emails being made to the IJ office.
5. **Judicial rota** – Although it is accepted that it will be subject to change, DELF would welcome the circulation of the weekly judicial rota to allow advocates to directly contact judges or legal advisers/court associates for case-management decisions and to ensure they

have all of the required papers. Presently, due to the points made above, the rota is of particular importance.

6. **Consent orders** - If there is an uncontentious application to vary a condition of bail or to amend directions in a case, these can be dealt with by way of a consent order, thereby avoiding the need for a hearing.
7. **Bail** - DELF welcomes the Court's recent practice of prompt sending of the bail form to the relevant parties over email. However, DELF opposes the change in circumstances aspect of bail applications being dealt with on papers without a hearing, for the reasons set out above.
8. **Private conferences** - There must be sufficient opportunity in all types of hearings for private conference(s) between lawyer and client. Pre-court conferences ought to be standardised, perhaps by the use of a spider phone in the video link booth area at court which could be attended by a member of court staff. For custody judgement hearings a 15 min post court conference should be included.
9. **Contact with prison Governor(s)** - Prisons should be asked to help facilitate signing and return of documents at defence request and to facilitate conferencing remotely so as to ease the pressure upon the Court by helping lawyers prepare cases and observe Court deadlines.