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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the Defence Extradition Lawyers Forum newsletter, edition 21. Unprecedented times for everyone. This Friday, 8 May, ought to have been our annual dinner. Instead we are sending you a bumper edition of the Newsletter with lots of material to keep you distracted over the long weekend and up to date on the latest extradition news, insofar as that is possible in this fast changing legal landscape. This edition contains a comprehensive legal round up from Alex Bailin QC, a legal update from James Stansfeld looking at the recent case law in respect of prison conditions and the Russian Federation, a case update from Mary Westcott in respect of prison conditions in Lithuania and an excellent discussion piece from Ed Grange and Danielle Reece-Greenhalgh in respect of 'Brextradition' and what that might look like. We also include an update from Hannah Hinton on her recent activities as Court Liaison Officer. With many thanks indeed to all our contributors.

A message from the Chair

Welcome to the 21st edition of the DELF Newsletter. I hope it finds all of our members in good health and staying well during the challenges that we are experiencing. In times of uncertainty it is important that the work of organisations like DELF continue and I want to thank the committee for their time and effort over the last few weeks in pushing through our agenda and assisting our membership during the current crisis.

In the absence of any education events we have put together a brilliant newsletter with fantastic articles and the usual round up of DELF work which has been spearheaded in the recent weeks by Hannah Hinton who has done a superb job marshalling the changes to the way Westminster and the RCJ are working during the current crisis and conveying that information to our membership.

We were extremely sad to postpone the Annual Dinner which was due to take place this month. We will endeavour to organise a suitable replacement when life returns to something resembling normality and government guidelines allow it.

As always DELF welcomes engagement with our membership and if there are any concerns, queries or issues you have that you need some assistance with please do not hesitate to contact either myself, or send an email to the admin and it will find its way to the right person to assist.

There are some things to look forward to, we are still launching the John Jones Essay competition this year, which is an issue close to all our hearts at DELF and we will be encouraging our membership to get the younger members of their teams involved and there will be a great prize on offer for the winner of the competition. More on that in due course.

In the meantime, I wish you all good health and look forward to seeing you all when we can resume DELF events in due course.

Katy Smart
Sonn Macmillan Walker

Our Recent Activities

Educational events and socials

Due to current events, our educational events and socials are on hold.

However, we continue to make representations on behalf of its members to the Criminal Procedure Rules Committee, the LAA, the Administrative Court staff and the Senior District Judge's office. If members have any issues they would like DELF to raise please email enquiries@delf.org.uk.

Legal Round-up

In these severely disrupted times, attention spans (mine included!) can be shorter than usual. With that in mind, this is a brief, bite-sized round up of some of the recent developments in extradition.

Live link for all extradition proceedings

Section 54 and Sch. 24, part 2 of the *Coronavirus Act 2020*, in force from 25 March 2020, amends s206A EA 2003 enabling all extradition hearings (Part 1 and Part 2) to be conducted via a live link, subject to an interests of justice test. Previously only remand hearings were caught by s206A.

Although many practitioners had previously opposed any widening of s206A, the current pandemic fundamentally alters the landscape – clearly a physical hearing cannot sensibly take place if it may expose any of those present to a risk of contracting a fatal illness. The amendment expires in two years under s89 *Coronavirus Act 2020*. Some matters are still being worked out e.g. duty solicitors are continuing to attend in person and most overnight arrests are still being produced in person – whether this can continue given the rapid spread of Covid throughout the UK prison estate is unclear. It is too early to make any grand predictions about how things will pan out. We will certainly need better video technology than Skype / Scopia for full hearings, especially those with interpreters. And an improved system for time marking of remote procedural hearings. But more fundamentally, as Covid-19 sweeps across the globe and each country's prison estate inevitably becomes infected and their criminal justice systems suspend normal operation, ought there to be serious discussions between key states about suspending the operation of extradition on humanitarian grounds? After all, the whole system of extradition is predicated on mutual recognition and no country's criminal justice system is currently functioning as intended, reflected by the fact that many individuals are now in limbo awaiting removal and are the subject of multiple applications to extend time under ss35 & 36 EA 2003 . Such a discussion would have major implications for custody cases in particular but since the problem is affecting us all, there needs to be some international discussion rather than localised patchwork solutions. In the meantime, huge credit is due to all those at WMC who have adapted to a completely new way of working without additional resources and any hint of complaint.

Iceland and Norway in Part 1

From 17 March 2020 Iceland and Norway changed from Part 2 territories to Part 1 territories. Under the *Extradition Act 2003 (Amendment to Designations) Order 2020* (SI 265/2020), neither country is, however, excluded from the dual criminality requirements. But after the Brexit transition period (which may be extended by Covid-19) these new Part 1 countries will presumably be re-designated as Part 2 countries once again. What a valuable use of precious Ministerial time.

Kuwait and Morocco in Part 2

The aforementioned SI also adds Kuwait and Morocco to Part 2, with whom the UK signed extradition treaties in 2016 and 2013 respectively, which are now implemented by this secondary legislation.

Provisional arrest without a UK court warrant

The *Extradition (Provisional Arrest) Bill 2020* is currently at Report stage in the House of Lords. The Bill creates a power of arrest, without a warrant, for the purpose of extraditing people for serious offences. The Bill obviates the need for a UK court issued arrest warrant in certain cases from a specified list of Part 2 countries: Australia, Canada, Liechtenstein, New Zealand, Switzerland, and the USA. The arrested person must be brought before a court as soon as practicable after the arrest. The main threshold conditions are that a provisional arrest certificate has been issued by the 'designated authority'; a domestic arrest warrant has been issued in the requesting state; the person is unlawfully at large; there are reasonable grounds for believing that the offence in the request is a 'serious extradition offence' (an extradition offence with a maximum sentence of at least 3 years). Contrary to rumour at the Queen's Speech stage, provisional arrest on the basis of Interpol Notices seems unlikely because the 'designated authority' is likely to be the National Crime Agency. But many serious questions remain. It is unclear why such a power is actually needed, given the existing provisional arrest warrant powers. The Explanatory Notes state that currently, an application for a warrant 'takes at least a matter of hours and creates a possibility that the person concerned could offend or abscond before being detained', which is correct but no evidence of such absconding actually having occurred was cited. The removal of the prior judicial warrant safeguard raises serious Article 5 issues and needs cogent justification. JUSTICE, the respected human rights NGO, was unconvinced it is made out.

Prison conditions

It is almost impossible to write anything about prison conditions without immediately being out of date. Plainly, the Coivd-19 pandemic will have a seismic effect on all prison conditions and consequent Article 2 and Article 3 arguments. Fair Trials have an excellent monitoring project during the pandemic, covering the effect on both prisons and criminal justice more generally: https://www.fairtrials.org/covid19justice .

Those applying for bail in light of the Covid-19 pandemic, should familiarise themselves with *Perry v United States* (3 April 2020), in which Dove J held (on a High Court bail appeal) that whilst prison conditions are not irrelevant to an application for bail, the Court would proceed on the basis that the prison service, in compliance with its duty of care, would accommodate prisoners in accordance with existing guidance; prisoners would be afforded proper Covid protection and such matters should be taken up with the prison authorities rather than having a dispositive impact on the bail application. Whether such an approach is tenable for individuals with health conditions which make them 'extremely vulnerable' under NHS Covid Guidance, or indeed as the spread of Covid continues throughout the UK prison estate making effective segregation extremely difficult, remains to be seen.

Also relevant is *Walaszczyk v Poland* [2020] EWHC 849 (Admin) in which Fordham J refused to adjourn an extradition appeal even though Covid was preventing any flights to Poland at the time of the appeal hearing.

The following cases were decided before the pandemic:

Russia – prison conditions in a variety of pre- and post-conviction locations and transports in the RF were considered in *Egorova, Tsurcan and others v Russia* (WMC, 9 Dec 2019, CM). In a detailed judgment, the Court held that the new monitoring system and accompanying assurances, which has been strengthened since *Shmatko*, was still insufficient to counter the Article 3 risks. Permission to appeal was refused by the High Court in March 2020, which effectively halts all extradition to Russia.

Hungary – the issue of assurances concerning prison conditions has been considered in a series of conflicting cases: *Arpasi* [2016] EWHC 64 (Admin); *Fuzesi* [2018] EWHC 1885 (Admin); *Zabolotnyi* [2019] EWHC 934 (Admin). The Supreme Court has granted *Zabolotnyi* permission to appeal on the following certified question:

> "Where a Court is obliged to assess an assurance given to the United Kingdom relevant to extradition, is it correct that the Court should exercise very considerable caution before admitting evidence which does not relate to an alleged previous breach of an assurance to the United Kingdom, but rather to an alleged breach of assurance to another EU member state? If yes, is it a correct approach that the Court should satisfy itself that such evidence is manifestly credible, directly relevant to the issue to be decided and of real importance for the decision in question?"

Latvia – Article 3 arguments regarding Latvian prison conditions failed in WMC in *Jasvins v Latvia* but the appellant succeeded in an abuse of process argument on appeal in *Jasvins* [2020] EWHC 602 (Admin).

Lithuania – In *Bartulis* [2019] EWHC 3504 (Admin) the High Court acknowledged serious deficiencies in the Lithuanian prison estate but found that post-conviction prisons were Article 3 compliant. Remand prisons had already been found to be compliant in 2018.

Portugal – Lisbon Central Prison was previously held to violate Article 3 in *Mohammed Nos. (1 & 2) v Portugal* [2017] EWHC 3237 (Admin); [2018] EWHC 225 (Admin). A subsequent assurance that Lisbon Central Prison would not be used was accepted in *Duarte v Portugal* [2018] EWHC 2995 (Admin). The Divisional Court in *Henriques v* Portugal [2019] EWHC 1998 (Admin) (in contrast to the approach adopted in some of the Hungarian cases) considered evidence of one proven and admitted breach in which an extraditee had mistakenly been taken to Lisbon Central Prison for several months, but held that was not enough to undermine the reliability of a general assurance that other prisons would be used in future to house requested persons.

USA – the California prison estate (with overcrowding and racialised gang based violence) was held to comply with Article 3, subject to certain assurances, in *Miao v USA*. But a High Court permission hearing is listed in 2020, which will be closely scrutinised in the light of the German Federal Constitutional Court's recent refusal to extradite to California, despite assurances as to conditions, because of "*ongoing systemic deficiencies*" which, in the Court's view, could not be adequately remedied to comply with Article 3. In *Hafeez v USA* [2020] EWHC 155 (Admin) the Court held that conditions in New York's MCC (including solitary confinement for 23 hours per day in a windowless cell) did not reach the Article 3 threshold, and the suggestion of Supermax detention was not made out.

Life imprisonment without parole (LWOP)

In *Hafeez v USA* [2020] EWHC 155 (Admin) the Divisional Court rejected an Article 3 argument based on LWOP. The ECtHR in *Kafkaris v Cyprus* (2009) 49 EHRR 35 had previously held that for LWOP to comply with Article 3, national law had to afford the possibility of a parole review at some point and the review mechanism had to be apparent from the outset of the sentence. In *R (Harkins) v Secretary of State for the Home Department* [2014] EWHC 3609 (Admin), the Divisional Court found that the subsequent ECtHR decision of *Trabelsi* (which applied *Kafkaris* and found that the US review system was not Article 3 compliant) was 'wholly unreasoned.' The Divisional Court in *Hafeez* followed *Harkins* and declined to apply *Trabelsi*. The US compassionate review scheme allowed release based on rehabilitation when combined with other factors. And executive review was adequate in relation to clemency applications. Permission to appeal to the Supreme Court is being sought.

Forum bar

Since *Love v USA* [2018] EWHC 172 (Admin), some forum bar cases have succeeded such as *Scott v USA* [2018] EWHC 2021 (Admin). Following DJ Tempia's discharge on forum bar grounds in *USA v McDaid* (28 Feb 2019), the USA has been given permission to appeal and a High Court hearing is pending in 2020.

US domestic courts continue to grapple with the DoJ's expansive theories of extra-territoriality which often form the basis of extradition requests to the UK. In February 2020, a federal judge in *US v Hoskins* acquitted the former UK executive, who had never travelled to the US and who was employed by Alstom's parent company in France, by ruling that prosecutors had failed to prove he violated the Foreign Corrupt Practices Act when acting as an agent of Alstom's US subsidiary. In December 2019, a jury in the EDNY acquitted a Lebanese citizen indicted in a conspiracy to commit wire fraud, money laundering and securities fraud, arising from alleged kickbacks paid to Mozambican

government officials and investment bankers, on the basis that the indictment lacked a sufficient nexus to the US.

Alex Bailin QC
Matrix

Legal Update

The end of extraditions to Russia for the foreseeable future?

On 9 December 2019, the Senior District Judge (SDJ) handed down a judgment in Russian Federation v Tsurcan, Egorova, Kindrachuk & Smychkovsky ordering the discharge of four individuals (the RPs) who were the subject of separate extradition requests from the Russian Federation (RF). The cases had been joined by the SDJ to consider and determine, as a preliminary issue, whether the RPs' faced a real risk of a violation of article 3 ECHR and whether there was sufficient independent monitoring within the RF to ensure that any assurances relied upon were reliable and met the article 3 risk. The decision to join the cases followed a series of cases, starting with the decision in Shmatko v RF [2018] EWHC 3534, in which the Divisional Court concluded that effective independent monitoring was a critical factor in any assessment of the reliability, or otherwise, of any Russian assurance. Following that decision the SDJ discharged extradition requests in two separate cases, RF v Zmikhonovskiy and RF v Sokolov. In both judgments, the SDJ concluded, following Shmatko, that the assurances did not meet the article 3 risk due, in part, to the lack of independent monitoring, following the emasculation of the Public Monitoring Commissions (PMCs) by, inter alia, the curtailment of their independence, the replacement of human rights experts with law enforcement officials, the monitoring of conversations between PMC members and prisoners, and the lack of any activity from the new PMCs. The RF did not appeal either decision.

In her judgment in Tsurcan et al, the SDJ noted that she had joined the cases together because the High Court and Westminster Magistrates' Court had spent the "last two years looking at the same arguments time and again" and it was the SDJ's intention to look at "prison conditions and the monitoring of any assurances given". Following the hearing, at which Professor Judith Pallot gave evidence on the continued lack of any effective monitoring and the increased awareness of systemic torture and mistreatment throughout the prison estate, the SDJ considered the article 3 risk in respect of each individual, the risk of torture and the effectiveness of any independent monitoring. During the hearing the RF appeared to abandon the PMCs as being capable of providing effective monitoring and provided 'assurances' that Regional Commissioners for Human Rights (CHRs) would provide monitoring of the conditions in which each RP was detained. The SDJ concluded that she had no difficulty in finding that PMCs cannot effectively monitor assurances, due their lack of independence and effectiveness. She concluded that CHRs were not effective either, a point starkly demonstrated by graphic video footage of an assault by 18 prison staff of a Mr Yaroslav, where the complaint by the CHR to the prosecutor was not acted on for about a year and only once the video had been published online.

In stark conclusions, the SDJ held that her concerns about the risk of article 3 violations were not about overcrowding, but were about the "systemic violence in many of the penitentiary institutions" in the RF and that "there is not an effective system against torture and ill-treatment" in the RF. In the absence of effective monitoring, she concluded that each RP faced a real risk of a violation of article 3 ECHR.

The judgment also sought to identify what the RF would need to provide in order to successfully obtain extradition. In addition to specific issues to the RPs, the SDJ identified the need for assurances in respect of transportation for two of the RPs and, crucially, that the British Embassy should be asked to consider whether it would be willing to monitor the assurances as a means of providing effective monitoring.

The RF applied for permission to appeal, criticising not only the SDJ's extensive findings and approach, but her failure to permit the RF further time to obtain the information she identified in her judgment as being necessary in any future request. On 19 March 2020, Mr Justice Robin Knowles refused the RF permission to appeal and in his written reasons he noted that "On the findings made the Court's decision is plainly correct. There is no room for an appeal" and that the "Respondents are correct to describe the approach adopted by the proposed Appellant as 'providing a rolling series of reactive assurances and ad hoc proposed means of monitoring…in the hope it eventually satisfied a tribunal at some stage' and 'as inappropriate and unfair'". The RF did not seek to renew their application for permission to appeal.

The clear consequence of the decisions in this case, is that extraditions to the RF will not take place until such time as the RF establishes an effective independent monitoring system and addresses the systemic use of torture and mistreatment across the prison estate. Any future extradition request from the RF will now have to commence with the identification by the RF of a clear system of independent and effective monitoring and, arguably, detailed information on the systemic use of torture. Absent that information, it appears to be clear the intention of the Court that fresh RF requests will not be entertained, for the Court is not willing, quite rightly, to allow complex cases to be litigated when the result is inevitable. There is a powerful argument that unless the necessary information is included in the request, the individual should not be arrested and the Metropolitan Police and the Home Office should both ensure they are aware of the wide ranging impact of this decision and the need for the RF to address the issues before they have any prospect of successfully obtaining extradition. If there is an arrest without that information, those representing the individual should not only seek unconditional bail but should ensure the Court provides a strict timeframe for the RF to provide the information.

It is, however, very difficult to see what information the RF will be able to provide. With respect to the SDJ, the suggestion that the British Embassy ought to step forward and monitor the assurances is fraught with difficulty. Firstly, the British Embassy has no legal authority to visit those detained in the RF who are not British citizens (even if they had been extradited from this jurisdiction). Secondly, the ability of British diplomats to operate in the RF is at the whim of international politics and the fluctuating and often poor relationship between the UK and the RF. That cannot provide a reliable means of an assurance during the life of a prison sentence. Thirdly, the resources available are likely to be severely limited and it is not difficult to imagine that Her Majesty's Ambassador to the RF is likely to need to prioritise, and have her staff prioritise, those matters which advance the political, economic and social interests of the UK, as opposed to visiting remote prisons in the RF to follow up on the wellbeing of foreign nationals.

I would suggest that effective monitoring is, however, no longer the primary issue. The evidence in this case included evidence of 'torture zones' in the RF and beatings of prisoners either by prison staff or prison activists, acting on orders from the authorities. The SDJ concluded for three of the four RPs that even if there was effective monitoring, the assurances would be insufficient because of the risks of violence, which crossed the article 3 threshold. The evidence of torture and mistreatment was widespread and as the Divisional Court held in Marku & Murphy v Greece [2016] EWHC 1801 (Admin), addressing the risk of violence is not a matter for assurances, it is a question of putting in place remedial measures to remove the risk. That is obviously not a quick process and it is notable that in the four years since the decision in Marku, which focused on the risk of violence in Korydallos Prison, there has been no extradition to Greece where there is a risk of detention in Korydallos Prison. Those representing individuals who are subject to requests from the RF should expect to see detailed evidence on the remedial measures that have been put into place to prevent torture and mistreatment. There is, after all, no point in having effective monitoring if those being monitored are being assaulted to ensure they do not complain.

The issues facing the RF in any future request are significant and there are no obvious means by which the proper concerns of the courts can be allayed. The issues are systemic and institutional and the solution is likely to require fundamental institutional changes in the RF. The prospects of a successful extradition to the RF in the foreseeable future must be slim.

The RPs were represented on appeal by Hugo Keith QC & Aaron Watkins instructed by Peters & Peters, Bindmans and then Sonn Macmillan Walker, and Alex Bailin QC, James Stansfeld & Ben Keith instructed by Cambrose Solicitors and Alexander Johnson Solicitors respectively. The RF was represented by Peter Caldwell and Catherine Brown.

James Stansfeld
Matrix

Rule of Law & Poland

On 29 April 2020, the European Commission launched further infringement proceedings against Poland due to the "muzzle law", or new judicial disciplinary regime (in force since 20 February) fundamentally undermining the judicial independence of Judges and their ability to apply EU law.

These are the fourth set of infringement proceedings against Poland in as many years. The third set of proceedings continue and have already led the CJEU (on 8 April 2020) to order the temporary suspension of the judicial

disciplinary powers of the Supreme Court.

https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772

Lithuania at Westminster Magistrates' Court

Representatives participating in telephone hearings at Westminster Magistrates' Court are likely to have heard references to on-going cases litigating the issue of Lithuanian prison conditions.

There are five joined "accusation" EAW cases now allocated to DJ Goozée and currently listed on 27 - 29 May 2020 (represented by MW and Birds).

This issue persists, despite, or depending on your perspective, partly because of, previous decisions in this jurisdiction on the topic including Aleksynas & Others v Lithuania [2014] EWHC 437 (Admin), Jane v Lithuania (No. 2) [2018] EWHC 2691 (Admin) and Bartulis & Others v Lithuania [2019] EWHC 3504 (Admin). The appeals of Jane and Bartulis, concentrated on conditions for accused and convicted persons respectively. In broad terms, whilst Jane confirmed the presumption of ECHR compliance was rebutted for accused persons, Bartulis found that was not the case for convicted persons.

Prison conditions are notably dynamic. During the first part of 2019, Lithuania closed Lukiskes prison, the most prominent focus for international criticism for poor conditions for remand prisoners. Two other designated remand prisons remain operational, Šiauliai and Kaunas. Lithuania introduced new rules for the allocation of pre-trial prisoners in 2019, seemingly at any place of detention, as opposed to in specific remand institutions.

On 3 April 2020, the Lithuanian Prison Department issued a further guarantee that applies "to persons surrendered from the UK to Lithuania under EAW", apparently replacing or at least amending the assurances ("guarantees") considered by the Divisional Courts in Jane and Bartulis. The assurance concludes with the following:

"We also draw to your attention that due to the quarantine regime introduced by the decision of the Government of the Republic of Lithuania, in the view of the danger caused by the spread of COVID-19 disease, the work of Lithuanian institutions is encumbered, which might have an impact on the implementation of the assurance."

At the time of writing, there is not yet any decision assessing the sufficiency of the new assurance. The severe consequences for our own prisons are well known, due to the combined blows of the impact of the pandemic, near total "lockdown" and what the CPT most recently labelled as a pre-existing "deep crisis" in our prison estate. What, if any, impact similar struggles prisons in requesting jurisdictions will have on Article 3 ECHR arguments and how long any significance will last, remains to be seen. The argument continues …

Mary Westcott
Doughty Street Chambers

'BREXTRADITION'

An analysis of the surrender arrangements between the UK and EU 27 post-Brexit

The break-up is official. The UK is not only separating from the EU, but it will become formally divorced on 31 December 2020 when the transition period comes to an end. This article explores the extradition landscape beyond the end of the transition period and considers whether as a result of Brexit, the UK will live to regret losing custody of the European Arrest Warrant ('EAW').

Current extradition arrangements

Since 2002, the Council Framework Decision on the European Arrest Warrant ('FD 2002') has operated to fast-track the surrender of suspects and convicted individuals across the physical borders of the EU. Underpinned by the principle of mutual trust and recognition, the FD 2002 abolished extradition between member states and replaced it

with a system of surrender between judicial authorities. The birth of the EAW removed the complexities and potential for delay inherent in the multilateral European Convention on Extradition 1957 ('ECE') and removed decision making away from the political arena. Member States are defined as 'Category 1' territories under Part 1 the UK's Extradition Act 2003 ('EA 2003').

In 2017, nearly 18,000 EAWs were issued across the EU, with the most common offences being fraud and corruption, drugs, human trafficking, counterfeiting, terrorism and serious criminal damage. The UK has been an active user of the scheme since the implementation of the FD 2002 through the EA 2003. From 2009 to 2017, the UK issued a total of 2,229 requests to other member states, securing the return of 1,221 individuals of 1,441 arrested. In the same time period, a total of 9,646 individuals were extradited from the UK pursuant to EAWs, out of a total of 13,390 arrests. The National Crime Agency ('NCA') statistics demonstrate a steadily increasing number of EAWs (issuance and surrender) since 2009. The European Commission statistics demonstrate that this trend is EU wide, with the number of total issuances increasing from 6,894 in 2005 to 17,941 in 2017.

The nature of EAW transmission ensures that the time between a request being activated and a Requested Person appearing in court can be a matter of days. According to the European Commission, the average length of time it took for a Requested Person to be surrendered with consent was 15 days, and without consent was 40 days.

The transition period

EAWs issued and executed by the UK will continue until midnight on 31 December 2020, when the transition period in the UK comes to an end and the EAW will disappear from the UK legal landscape alongside many other EU-wide criminal justice instruments.

However, until then, requests for surrender from the EU27 will continue to be dealt with under the existing legislation. As the deadline draws near, it is likely that outgoing EAWs from the UK will be more intensely scrutinised (and possibly refused) by courts in other member states as mutual trust and recognition ebbs ever further away.

What's next?

On 27 February 2020, the UK government published its mandate for the next phase of Brexit discussions. It is clear that the EAW (in addition to other EU measures and tools in the field of criminal justice) does not form part of the government's plan. The UK's Serious Fraud Office ('SFO') identified the UK's withdrawal from the EU as a 'strategic risk' that could lead to adverse effects on its ability to investigate and prosecute.

In lieu of the EAW, the UK government proposes "fast-track extradition arrangements, based on the EU's Surrender Agreement with Norway and Iceland which came into force in 2019, but with appropriate safeguards for individuals beyond those in the European Arrest Warrant." No details have been provided to suggest how such an agreement might be reached, nor the scope of the proposed "additional safeguards" or to whom those safeguards actually apply.
In light of the fact that the EU's Surrender Agreement with Norway and Iceland was agreed in principle in 2006 and took another 13 years to come into force whilst Member States entered their declarations and notifications, it is likely the end of the transition period will come too soon with no final resolution, particularly given the Prime Minister's stated intention to conclude discussions (whether or not a deal is reached) by June 2020. Negotiations are not likely to be helped by the emergence of COVID-19 as governments' turn their attention to events at home in an attempt to prevent the spread of the new virus.

UK extradition practitioners now operate on the almost inevitable assumption that, as of 1 January 2021, the UK will revert to the provisions of the European Convention on Extradition 1957 ('ECE 1957') as forming the basis of our extradition relationship with the EU27.

Reliance upon the ECE 1957

In order to give effect to the ECE 1957, all EU Member States currently designated as 'Category 1' territories for the purpose of the EA 2003 will be re-classified as 'Category 2'. This will bring them within the remit of Part 2 of the EA 2003 that contains the provisions for the UK's extradition arrangements with countries with which it has a bilateral treaty or multilateral treaty obligation. A sub-category of these Category 2 countries will be those which are designated by the Home Secretary as having exemption from the requirement to demonstrate a prima facie case against a Requested Person.

Council of Europe countries who are not Member States (as well as Israel, Republic of Korea and South Africa) but who are signatories to the ECE 1957 are currently designated as not having to demonstrate a prima facie case. In the absence of a deal making specific provision to the contrary, it is anticipated that the EU27 will join that list. In practical terms, the re-classification of the EU27 as Category 2 territories will make the procedure for requesting and securing the return of Requested Persons from the UK more cumbersome and lengthy. The time limits applicable to extradition proceedings under Part 2 of the EA 2003 are significantly longer than those under Part 1. For instance, the time between arrest and the extradition hearing should be no longer than 21 days in Part 1 cases but can be up to four months in Part 2 (provisional arrest) cases. The physical transmission of requests will be via diplomatic channels introducing an element of politicisation to the process of extradition between the UK and EU27.

Drawbacks of the ECE 1957

Be under no illusions – reverting to the ECE 1957 for extradition arrangements between the UK and EU27 is an inferior option to the system currently in place and is not an adequate substitute for the EAW. The UK's lack of access to the second-generation Schengen Information System ('SISII') will have a catastrophic impact upon the UK's ability to receive up to date alerts in respect of wanted persons. Requests for extradition will have to be sent through diplomatic channels and in the UK will be received/issued by the Home Office. Amendments to the EA 2003 by way of a statutory instrument (currently in draft) will enable individuals to be arrested without an arrest warrant upon receipt of a valid request from a specified Category 2 territory or upon sight of a judicial document which indicates that such an arrest warrant exists for a 'serious extradition offence'. The countries currently listed in the draft statutory instrument do not include the EU27, but likely will do in the future upon amendment by the Secretary of State.

A further mechanism for arrest in the UK is the INTERPOL red notice and diffusion system. Typically, red notices are not issued by the EU27 for individuals where SISII would be sufficient and more effective at locating individuals and pursuing their surrender. The UK does not currently give effect to Red Notices but may do so in light of the provisions of the statutory instrument cited above. With the UK no longer having access to SISII alerts, designated authorities within the EU27 may be required to circulate data via both SISII and INTERPOL channels. Not only will this result in a greater burden on those authorities but will likely lead to a far greater number of individuals "staying safe" in the UK, not crossing borders and therefore not exposing themselves to an INTERPOL alert.

Concerns about the UK becoming a 'safe haven' for criminals are not unfounded, particularly as the UK adjusts to the new regime. An individual who commits an offence in an EU27 state and manages to enter (and stay in) the UK after 1 January 2021 is inevitably (unless the UK begins to give direct effect to INTERPOL red notices) less exposed to the risk of being located, arrested and embroiled in extradition proceedings in circumstances where UK law enforcement will no longer receive SISII alerts and where the bureaucratic burden on Requesting States in issuing extradition requests will be inherently higher. It is not unreasonable to assume that requests for extradition of individuals charged or convicted of minor offences in EU27 states will diminish; an unsatisfactory outcome both for victims of crime in the EU and for communities and the criminal justice system in the UK where those individuals may choose to continue their criminal exploits.

The streamlined 'Form A' that is uploaded to SISII will no longer apply, meaning requests for extradition will no longer be contained on a tick box proforma. In addition, of the framework list of 32 offences for which dual criminality is assumed, will no longer apply in the UK. It is notable that the Norway/Iceland agreement includes the abolition of dual criminality for precisely the same list of offences, with a requirement that the offence carries a sentence of three years or more, and with an opt-out clause built in. Whether or not the UK would agree to sign up to the effective re-introduction of the Framework List is currently unclear.

Absent such a deal between the UK and the EU27, Article 2 of the ECE 1957 demands that extradition be granted in respect of offences which are punishable in both the Requesting and Requested State by a sentence of one year or more. In circumstances where an individual has already been convicted, a sentence of four months or more must have been imposed. Whilst dual criminality is known to be a flexible concept, it will inevitably open up arguments not currently available to individuals wanted for a framework list offence that dual criminality is not satisfied. Whether this will delay the extradition process further or increase the number of cases which result in challenges at the higher court level where the offences may be more country-specific remains to be seen.

Conversely, some of the most commonly utilised arguments in resisting EAWs in the UK, such as the insufficient

particularisation of the EAW or the absence of a prosecutorial decision , will cease to apply in challenging extradition as the equivalent provisions are not to be found in Part 2 EA 2003. The same applies to the proportionality bar contained within Part 1 (but not in Part 2), which was a welcome addition to the EA 2003 in 2014. The proportionality bar enshrined more fundamentally an obligation on the UK courts to balance the Convention rights of a requested person against the nature of the alleged offending behaviour as well as to consider whether less coercive measures would be available. Although compatibility with Convention rights must be considered , this is a standalone argument to be made in respect of the consequences of extradition itself rather than as part of a qualitative assessment of the alleged conduct. Given the extraordinary impact which extradition inevitably has on the lives of those involved, this is an unfortunate loss to the legislative framework.

Although the ECE 1957 demands very similar formalities in respect of the request and supporting documentation to be provided in support of an extradition request, the requirements as to detail are less onerous upon the Requesting State. Requests which, under the current regime, may be too vague to satisfy the Section 2 threshold could be more readily acceptable to the UK courts as of 2021. Currently, Part 1 requests are explicitly required to include particulars of identity, any other warrants in place, the circumstances of the conviction or alleged offending (including the relevant conduct, time and place of commission and applicable legal provisions) and details of the sentence applicable or imposed. The equivalent provisions in Part 2 require only that the request includes a statement that the person is accused (or has been convicted) in the Category 2 territory of the commission of an offence specified in the request. The judge must then determine whether the documents within the request consist of or include particulars of "the person whose extradition is requested" and "the offence specified in the request" as well as the arrest warrant (in accusation cases) or certificate of conviction. Whilst Article 12 ECE 1957 does contain detail as to the particulars required in a request (which largely is reflected in the Part 1 criteria), this was not transposed in respect of Part 2 requests. Whether the legislation is amended to more adequately deal with this lacuna or whether the courts will be left to interpret the issue in line with existing authority remains to be seen.

Perhaps the most important impact of the reversion to the ECE 1957 is the constitutional bar in some EU Member States to the extradition of own nationals. Some of those countries apply exceptions to individuals requested pursuant to an EAW, applying the principle of mutual trust and recognition. However, there will be no obligation (and little political will) for those states to extend this exception to the UK once it has left the EU. Reservations to the ECE 1957, entered at the time of signing, will operate to block the return of Requested Persons to face trial or sentence in the UK. Germany, Austria and Slovenia have already declared their intention not to extradite own nationals during the transition period. Currently, 16 of the EU27 entered the same reservation into the ECE 1957 in respect of own nationals. Other countries may follow, particularly in the event of the UK resolving to abolish the applicability of the European Convention on Human Rights via its domestic legislation; the Human Rights Act 1998.

The UK may additionally find obstacles in procuring extradition from France, Denmark and Hungary in respect of particularly vulnerable defendants due to specific reservations regarding ill-health and hardship of requested persons. It may also struggle to request (for example) the extradition of any individuals wanted on IRA related terrorism charges, given the historic political conflict and the operation of Article 3 ECE 1957, which prohibits extradition for offences "regarded by the requested Party as a political offence or as an offence connected with a political offence." This provision was largely muted by the implementation of the FD 2002, with the availability of political arguments reduced simply to requests which were demonstrably political in motive.

Conclusion

Whatever happens during the remainder of the transition period, there is unlikely to be agreement reached that would see the UK continue to participate in the EAW scheme or indeed a similar scheme. The UK will resort to a former partner – the ECE 1957 – for its extradition arrangements with the EU27, a relationship that is likely to have become somewhat stale since its introduction 63 years ago. Despite all the criticisms over the years of the EAW the UK will likely regret leaving not only the EU27 but the loss of the crime fighting measures and tools that came with the relationship, a relationship that was set to continue to blossom in the future as all Member States continued to work together. Instead the UK will be left to wilt.

Edward Grange and Danielle Reece-Greenhalgh
Corker Binning

Eurojust and the European Judicial Network

Questionnaire on CJEU judgments in relation to judicial independence

On 6 April 2020, the Eurojust and the European Judicial Network published a questionnaire including responses on the CJEU's judgments in relation to the independence of issuing judicial authorities and effective judicial protection.

The compilation includes a brief summary of the most relevant judgments that the ECJ delivered on this issue between May and December 2019, and the replies received from member states, the United Kingdom and Norway in relation to the following issues:

- Whether public prosecutors can issue an EAW;
- What authority ultimately takes the decision to issue an EAW;
- Whether national law guarantees the independence of the public prosecutors from the executive;
- Whether, in those countries where a public prosecutor can issue an EAW, such a decision, and in particular its proportionality, can be subject to court proceedings which meet in full the requirements inherent in effective judicial protection;
- What legal or practical measures have been taken to address the issue in the member states affected by the ECJ's judgments;
- Any other additional information, including recent developments in national law or certificates issued to ensure compliance with the requirements set by the ECJ's case law.

This is presented as a useful first reference point for all those seeking to challenge the validity of an EAW on the basis that it did not emanate from an "issuing judicial authority" with the requisite objectivity and independence.

On 27 May 2019, proceedings relating to the execution of European Arrest Warrants (EAW) were issued in respect of joined cases OG (Cases C-508/18 and C-82/19) ECLI:EU:C:2019:337, as well as in case PF (Case C-509/18) ECLI:EU:C:2019:457. The judgments related to the concept of "issuing judicial authority" in the context of EAW under Article 6(1) of the EAW Framework Decision (2002/584/JHA), and the surrender procedures between the member states. In the respective decisions, the ECJ clarified the requirements of objectivity, independence and the need for effective judicial protection that must be afforded to the requested persons if an EAW is issued by a Public Prosecutor's Office.

Court Liaison

Ordinarily DELF meets with the Chief Magistrate on a quarterly basis. Since the virus outbreak we have stepped up the communication channels in order to understand and discuss the dramatic changes to Court practices and identify for the judiciary the problems that practitioners are facing in these unprecedented times. As HMCTS has been developing new systems to deliver services for priority work, at pace, we have kept up with the policy and technology changes that are being implemented and we try to pass those on to our membership where possible. DELF has formed a subcommittee to deal with the responses to the constant changes and to help with membership queries.

We prepared a comprehensive document reflecting on the impact of the coronavirus upon extradition proceedings at Westminster Magistrates' Court and we proposed various recommendations for the Court to consider. The document is uploaded to the website, should you wish to review it. The Chief Magistrate accommodated a virtual meeting with DELF to discuss matters arising in it and allowed us to lobby the Court on a number of important issues. One change to the procedure for considering bail change of circumstances was acted upon immediately as was the request for video link time slots to be provided on the published court lists. We were reassured that the judiciary agreed on many of the points raised and that the IJ would help to find solutions.

In addition to the upheaval at WMC the Prison Service introduced a new system for lawyer-client conferencing. The system presently does not allow lawyers to meet remotely with their clients unless there is a Court hearing date. For our appellate work it is important that legal representatives have the opportunity to meet and take instructions from their clients as after initially lodging an appeal notice with provisional grounds of appeal. DELF raised this problem with the Legal Manager at the High Court who has lent support to this cause and referred to the Prison Service on this

issue. We hope that the Prison Service will soon respond and correct the problem.

I would personally like to thank Catherine Brown, Saoirse Townsend, Chirag Patel and our Chair, Katy Smart, for their tremendous efforts on the sub-committee.

Hannah Hinton
Serjeants' Inn Chambers

Upcoming Events

We have no upcoming events at the moment.

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 2020 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.

Please make your payments by bank transfer to:

Defence Extradition Lawyers Forum
Natwest
Sort Code: 60 40 04
Account Number: 32 49 95 82
IBAN details: GB97NWBK60400432499582
BIC: NWBKGB2L

For any queries, please contact enquiries@delf.org.uk

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Current Committee member officers 2020

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Vice-Chair – Ben Keith
Treasurer – James Stansfeld
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Social Secretary – Claire Kelly
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