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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to edition 22 of the Defence Extradition Lawyers Forum newsletter. As the Covid crisis continues on a global scale, government talks and media commentary about Brexit has slowed down somewhat. Nonetheless Brexit remains as relevant as ever to our work and as we enter the last quarter of 2020 the future of extradition between the UK and Europe is no clearer.

This edition contains a number of articles both from and about our European colleagues with the impact of Brexit central to the analysis. Ben Keith and Louisa Collins examine the impact the German Cum-Ex litigation may have for the UK; Dr. Mayeul Hiéramente and Dr. Anna Oehmichen discuss a recent German case involving the principle of *ne bis in idem*; from the Netherlands, Thom Dieben and Luce Smithuijsen explore the impact of a recent Dutch refusal to extradite for sentence in circumstances where the UK did not provide a written judgment. Peter Caldwell provides a case note on a recent decision considering the Lithuanian prison estate and a "Covid Caveat". We also include an update from our Court Liaison Officers Saoirse Townshend and Catherine Brown. With many thanks indeed to all our contributors.

A message from the Chair

Dear Member, It remains my pleasure to introduce our newsletter! This issue contains some brilliant articles and some interesting updates for the work that DELF continues to do.

September marks the end of my tenure as Chair of DELF and I will be handed the reins over to Ben Keith of 5 St Andrew's Hill. He will formally take over the role as of 30 September 2020 at the AGM. I wish Ben every success and thank him for the support he has provided in the role of Vice-Chair.

It has been the most unusual year and extremely hard work for those on the committee that have been assisting me in dealing with the fall out of the Pandemic. It was very sad not to host the Annual Dinner or the Annual Conference but I am delighted that we have been able to launch our annual essay competition in the name and memory of John Jones QC. John was a tremendous colleague and friend to many of our members and he continues to be sorely missed. Details of the competition can be found below and will also be circulated separately by email.

DELF has been continuing to support our member through our liaisons with Westminster and the Admin Court. There

is an update on those communications below. Please do continue to get in touch with any issues you would like us to raise on your behalf. We are always asked to provide concrete examples of any issues that arise, so please do pass them on. Thank you very much indeed for your on-going support. We really do appreciate it. As ever, if you have any issues you would like to raise please do get in touch.

Katy Smart
Sonn Macmillan Walker

Our Recent Activities

Educational events and socials

We are pleased to inform our membership that we will be restarting education events, albeit virtually. The first will be kicking off in October with a second to follow in November. Please watch out for the information on these events to follow in due course.

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.

John Jones Essay Competition

John RWD Jones QC was a superb barrister, specialising in extradition, international law and human rights. He represented clients in many of the leading cases of the day, including Charles Taylor, the former president of Liberia, and Julian Assange, founder of Wikileaks. John was also a gifted academic lawyer, with publications including a textbook with Antonio Cassese, the eminent international lawyer, and a leading practitioner text on extradition. John sadly passed away in April 2016 and DELF continues to honour his memory through its annual essay competition in his name.

A judging panel consisting of the Senior District Judge Emma Arbuthnot, Edward Fitzgerald QC and Anand Doobay will select the winning essay.

The competition is open in the United Kingdom to those studying law at undergraduate or postgraduate level, students of the Graduate Diploma in Law, the Legal Practice Course, the Bar Professional Training Course, trainee solicitors, pupil barristers, and legal practitioners up to 3 years PQE or call.

The essay question is: **Under what circumstances might extradition from the UK to China be possible?**

The essay should be no more than 2000 words in length including footnotes.

The closing date for entries is 4pm on 1 November 2020. Entries should be submitted to the following email address: essay@delf.org.uk

The entrant's email should include entrant's full contact details and details of the entrant's academic institution / firm / chambers. The essay should be sent as an attachment to the email and the attachment itself should not contain the entrant's name or any identifying details.

The entries will be judged according to the quality of academic and legal argument. The decision of the final judging panel will be final.

The winner will be formally announced in December.

The winner of the competition will receive a prize of £750, 2021 Annual Membership to DELF and £100 in book

Cum-ex trading files and extradition from the UK: what next?

A German court recently convicted two former London-based investment bankers in respect of the "cum-ex" trades. Their convictions were the first of their kind in Germany in respect of this type of controversial financial fraud under the German article 370 of the German Fiscal Code – tax evasion. This type of trading was accepted as a common practice by sophisticated equities traders up until 2012 and there is much controversy because the German authorities allowed the practice to continue for many years and are not alleging all the actions were dishonest.

This case shines a spotlight on a wider issue that companies need to be aware of so that they can be considering what processes and measures to adopt ahead of the UK's withdrawal from the EU. Despite the tax evasion in this case being to the sum of several million euros, the two now convicted traders managed to avoid prison sentences. The cum-ex scheme operated in numerous European countries and the investigations taking place involve hundreds of suspects.
In Germany some 900 people are being investigated, which is expected to lead to a large number of prosecutions not only in Germany but also elsewhere in Europe, including the UK. The UK's financial sector should be aware that we can expect this to give rise to an increase in related extradition requests; there are allegedly several hundred potential suspects located in the UK.

This is because in multi-jurisdictional cases such as this one, there is an important question mark over whether an individual conducting the corporate crime in the UK should face prosecution over here rather than be extradited back to their home country. This is a ground upon which a challenge to extradition can be made. The UK's exit from the Brexit transition agreement on December 31 means this may all change soon.

This is not unfamiliar territory in that the UK courts have dealt with many such extradition cases before, involving cross-border financial crime but the European Arrest Warrant (EAW) is, as things stand, in its last year of operation. This will make it difficult to investigate cross-border financial crime (such as cum-ex) in the UK. The new proposed procedures are not speedy and efficient and the sharing of data and cooperation in investigations will make communication between law enforcement cumbersome and difficult. For instance, the European Investigation Order which allows for speedy cooperation between law enforcement will no longer be in force; to achieve cooperation, much slower diplomatic channels will have to be used. As a result, the extradition arrangements will become more complex and lengthy as cooperation will no longer be on a judicial basis.

As part of the withdrawal plans under Brexit, the UK government is planning not to opt back into the EAW scheme. Similarly, other mechanisms used to combat crime, such as the European Investigation Order and membership of Europol and Eurojust, are only available to full EU members and the UK may not benefit from this following withdrawal. The failure to properly negotiate a package of cooperation in criminal matters in extradition and cross-border assistance may well severely hamper law enforcement efforts, as it will decide whether or not criminal charges such as these are brought about in the UK or not.

It will be interesting to see if the new system retains the same protections as the present EAW system. There has been plenty of criticism of the EAW but its gradual reforms in the UK have meant there are some additional protections available to defendants that are not available in non-EU cases, such as the proportionality bar, which only applies to EU territories and obliges the UK courts to balance the European Human Rights Convention on the rights of a requested person against the nature of the alleged offending party, and to consider whether less-coercive measures are available.

Further, the use of Section 12A of the Extradition Act 2003 the "charge or try" bar, is only relevant to EAWs. This prevents extradition where the prosecuting authority has not reached a decision to charge or try an individual but is merely investigating. Many EAWs are issued before a decision has been made and are essentially used by jurisdictions as an investigatory tool and not for the proper purpose of extradition.

Shoot first, ask questions later

The German authorities in particular have a tendency to issue EAWs before a proper decision has been made. In a multi-handed allegation of revenue fraud issued by German prosecutors in 2018, a series of EAWs were issued, leading to arrests of dozens of UK- based individuals and extradition litigation followed. Challenges were brought against the German authorities in respect of charges that were substantially modified during the course of the

proceedings.

In Malik and Others v Public Prosecutors Office in Augsberg, Germany [2018] EWHC 3479 (Admin) Germany requested extradition in relation to a series of allegations of complex Missing Trader Intra Community (MTIC) frauds. Many of the cases were issued before the decision to prosecute had been made and Germany had to rectify the position as the case progressed over a series of years. Many of those defendants returned voluntarily to Germany to discover they were not wanted for prosecution and were back in the UK the following week.

While it is difficult to resist extradition to Germany, it is by no means impossible. Its failure to adequately draft the allegations means there is often plenty of further information provided by Germany to illustrate the conduct alleged. In multi-jurisdictional cases such as cum-ex, whether under the EAW scheme or under a newly negotiated arrangement, these inadequacies are likely to continue, particularly where the request has been issued before the investigation has progressed sufficiently.

Germany does not extradite its own nationals outside of the EAW scheme. It is one of the EU states that has said it will not extradite its nationals to the UK under any replacement extradition scheme; the UK, however, will extradite to Germany. Other EU member states, including Austria and Slovenia, have suggested they will not extradite their own nationals to the UK, following our withdrawal.

The German court's conviction of the two former London-based cum-ex traders reminds us there are hundreds of individuals within the financial sector who are being investigated for fraud, and questions remain as to where their trials should be heard and in which jurisdiction they should be convicted. The UK's financial sector must remain alert as to how extradition arrangements are negotiated, as they will provide an instrumental role in proper regulation of its financial sector post-Brexit.

Unfortunately, with a significantly reduced time for negotiation due to the COVID 19 pandemic, the UK risks the prospect of a poorly negotiated extradition arrangement. Members of the Lords EU security and justice sub-committee have raised fears of this leading to the UK being left with inadequate intelligence-sharing tools.

Considering these limitations, the UK faces the prospect of becoming isolated from international cooperation making the UK banking sector's position to combat financial crime precarious. The Director of Public Prosecutions has gone on record to highlight the concerns of UK law enforcement about the lack of planning. If it replaces the existing simple processes of speedy law enforcement and intelligence cooperation agreements with cumbersome diplomatic channels, the UK risks adding many layers to the process of regulation and investigation of financial crime.

Ben Keith and Louisa Collins
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Legal Update - Germany

Citizenship of the union or ne bis in idem as a new panacea in extradition cases?

The jurisprudence of the Court of Justice of the European Union (CJEU) has influenced the way Member States address extradition in the EU and beyond its borders. It has laid down a myriad of principles, procedures and guidelines that national courts will (have to) follow and it will continue to shape the way European judges and prosecutors deal with requests for extradition or other forms of international cooperation in criminal matters. Even ardent supporters of Brexit will have to acknowledge that the UK relationship with its European neighbours will remain heavily influenced by decisions of the Luxembourg court.

A recent decision by the Higher Regional Court Frankfurt (19 May 2020, 2 AuslA 3/20) exemplifies the influence the CJEU jurisprudence has on German national courts and the implications it can have for third countries requesting extradition from an EU Member State. The decision, while not containing a very detailed reasoning, is noteworthy for multiple reasons: The Higher Regional Court Frankfurt decided to refuse extradition to the United States on the basis that the person in question, an Italian citizen, had been previously convicted by an Italian court for the same conduct.

In previous decisions, Higher Regional Courts have held that the principle of ne bis in idem, as stipulated in article 54 of the Convention Implementing the Schengen Agreement (CISA), does not apply to extradition proceedings (see Higher Regional Court Munich, 7 December 2012, OLG Ausl 14 Ausl A 1156/12 (274/12); Higher Regional Court Frankfurt, 12 November 2013, 2 Ausl A 87/13). The departure from its own jurisprudence is even more surprising since there has been no explicit CJEU decision requesting Member States to extend such protection to other EU citizens.

The Decision

The case at hand has a rather unusual background. The person sought for extradition by the US, an Italian woman, is accused of fraud in connection with the forgery of multiple paintings in the period between 2002 and 2007. She was convicted for her participation in such acts by an Italian court and was sentenced to a suspended prison sentence of one year in 2013. Upon review of the US extradition request and the supporting documents, the Higher Regional Court of Frankfurt concluded that the conduct as defined in the extradition request is the same conduct for which she had already been tried and convicted by the Italian authorities.

The Higher Regional Court further noted that the extradition treaty between Germany and the United States allowed Germany to refuse an extradition if the person sought had been convicted for the same conduct by a German court. Taking note of the CJEU decisions in the cases of Petruhhin (6 September 2016, C-182/15) and Pisciotti (10 April 2018, C-191/16) the judges concluded that the *ne bis in idem* principle as enshrined in Article 8 of the US-German Extradition Treaty should also apply to a conviction by a court of another EU Member State.

Applying the reasoning of the CJEU decisions regarding free movement and non-discrimination of EU citizens in the cases Petruhhin and Pisciotti, the Higher Regional Court argued that it would amount to a discrimination of other EU citizens if German courts were allowed to refuse extradition of a German citizen convicted by a German court but not an Italian citizen convicted by an Italian court. Furthermore, if both the US and Italy were seeking the extradition for the purpose of prosecution, the Italian request would take precedence. It would therefore not be acceptable to grant the extradition to the US if the Italian courts already had dealt with the same case.

The Principle of Free Movement as Basis for the Present Decision

Although the Higher Regional Court predominantly relied on the principle of discrimination and *ne bis in idem*, it was, in essence, the freedom of movement of EU citizens which the Frankfurt judges invoked: Article 21 (1) of the Treaty on the Functioning of the European Union (TFEU) stipulates:

"*Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect*."

While the principle of *ne bis in idem* in the US-German Extradition Treaty was only limited to the national dimension, i.e. a previous conviction for the same acts in Germany, it is not so much related to non-discrimination, if German courts deny extradition to third countries based on previous convictions in other EU Member States, but rather on the freedom of movement. Had the requested person been of German nationality, but previously been convicted in Italy, the national *ne bis in idem* would likewise not have impeded extradition. It was thus not so much the principle of non-discrimination, but rather the principle of free movement which led to the Court's assessment to deny extradition of another EU citizen.

Background

The extradition of EU citizens to third countries has always been a bone of contention in German as well as EU extradition law. The fragmented nature of the extradition law regime (constitutional safeguards, EU law, bilateral extradition agreements and national law) can lead to consequences hardly compatible with the practical realities of an integrated and inter-connected Europe. It is difficult to accept that even in 21st century Europe, with the free movement of citizens and close cooperation in criminal matters practiced and guaranteed for decades, it was still a reality that the protection of the transnational *ne bis in idem* principle could not effectively protect EU citizens from extradition to a third country.

The recent changes, triggered by a more active CJEU and national courts willing to reflect on the European dimension of procedural and human rights, are a step in the right direction. The Higher Regional Court of Frankfurt is correct

when it emphasizes the need to guarantee the free movement of citizens in Europe. The CJEU noted that the right to free movement is not absolute but that it "may be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures" (CJEU, Petruhhin, 6 September 2016, C-182/15, para. 38). This led the CJEU to conclude that an extradition to third countries could generally be accepted given that "extradition is a procedure whose aim is to combat the impunity of a person who is present in a territory other than that in which he has allegedly committed an offence" (passim, para. 39).

It is this argument advanced by the CJEU that one should give further consideration as it is where the *ne bis in idem* principle is of primary importance. The fact that the EU Member States agreed on Article 54 of the CISA and Article 50 of the EU Charter of Fundamental Rights (the Charter) demonstrates a deliberate decision to allow citizens – even those having been convicted or acquitted in criminal proceedings – living in the EU to travel freely in the EU. They serve as a necessary protection to allow EU citizens to benefit from the right enshrined in Article 21 (1) of the TFEU. In other words: criminal proceedings against or arrests of a citizen for a conduct he or she has already been convicted for or acquitted for are to be considered as a violation of the right to free movement.

Even though the Higher Regional Court of Frankfurt rightly pointed out that an extradition of an Italian citizen convicted by an Italian court would also lead to a(n) (indirect) discrimination, it should not be the main argument on which basis courts ought to refuse an extradition. It should not matter if the Italian court convicted an Italian citizen. The same protection should be accorded to a French or German citizen convicted by the Italian judicial system. The fundamental importance of the right to free movement (see also S. Schomburg/Wahl, in: Schomburg/Lagodny, Internationale Rechtshilfe in Strafsachen, Teil III E 1, Art. 54 SDÜ para. 25a) and the need to allow even a person once convicted for a criminal offence to benefit from this fundamental right and to reintegrate society ought to be sufficient to extent the protection of the *ne bis in idem* principle to all EU citizens.

Challenges Ahead

The present case, if taken as a precedent by other European courts, may be of particular relevance for the United Kingdom. In the wake of BREXIT and in the absence of any special EU-UK agreement regulating extradition after 31.12.2020 (cf. Grange/Reece-Greenhalgh, An Analysis of the Surrender Arrangements between the UK and U27 Post-Brexit, in: Corker Binning, The Knowledge 04/2020, p. 17; the draft Agreement on the New Partnership with the United Kingdom of 18 March 2020 not being concluded as of now, cf. https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/guide-negotiations_en), the UK may soon be treated as a third state in MLA matters, and extradition requests from the UK might then be rejected for any EU citizen, if they have either been requested via European Arrest Warrant (Petruhhin) or previously judged (Higher Regional Court of Frankfurt) by their respective home country.

Further, one may ask why this case did not land before the CJEU and how this case may influence the CJEU's case law. One may well recall that the Administrative Court of Wiesbaden, Germany, had already referred a *ne bis in idem* case to the CJEU for a preliminary ruling on 3 July 2019 (case C-505/19, still pending at the time of submitting this case note, i.e. 28.07.2020). In that case, the CJEU had to rule on the scope of Art. 54 of the CISA, in conjunction with Article 50 of the Charter, with regards to a red notice filed with Interpol by a state outside of the EU. The red notice was issued in relation to bribery allegations for which the Public Prosecutor of Munich had already investigated the requested person and ultimately discontinued them against the fulfilment of a monetary obligation pursuant to s. 153a (1) of the German Code of Criminal Procedure. Within the Schengen area, such a result would generally impede parallel investigations based on s. 54 CISA (cf. CJEU, judgment of 11 February 2003, Hüseyin Gözütok and Klaus Brügge, joint cases C-187/01 and C-385/01). Similarly to the case at hand, the Wiesbaden Court referred to the CJEU's decision in Petruhhin (C-182/15) to justify the application of Art. 21 TFEU not only between EU Member States, but also in relation to third countries when Interpol is used as an intermediary to pass on arrest requests from third states to Member States (ibid, para. 14). The Wiesbaden Court opined that such a broad interpretation of the scope of Art. 21(1) TFEU was necessary, in particular, because the protection, existing on the basis of the CJEU's Petruhhin decision against unlawful extradition by affording the Member State, of which the person concerned by the red notice is a national, the opportunity to issue a European arrest warrant could not have any effect here, "because the prohibition of double jeopardy precisely precludes the issuing of a European arrest warrant".

In their decision, the Frankfurt judges refrained from even discussing whether to refer their case to the CJEU, nor did they even mention the Wiesbaden Administrative Court's referral in their decision. Indeed, practical considerations may have motivated the court to refrain from a referral, as the requested person was until then in extradition detention

and a referral might have prolonged such detention. The Frankfurt Court may not have been aware of the theoretical possibility of granting bail in such a case, as this rarely happens in German extradition cases (one prominent exception being the case of the Catalan leader Puigdemont). The CJEU might, however, take the Frankfurt court's considerations into account, when dealing with the referral from Wiesbaden. A small positive sign from Luxembourg in this regard may be that at least, another referral from the same court of Wiesbaden, in which the latter put into question its own independence, has been ruled favourably: German courts at least are independent, though their nomination, assessment and promotions fall into the competence of the ministry of justice (judgment of 9 July 2020, C-272/19).

Moreover, there is some hope that the present case, possibly jointly with the currently pending referral case of the Administrative Court of Wiesbaden (case C-505/19) could be another step towards the gradual emergence of a transnational *ne bis in idem*, beyond the scope of Art. 50 of the Charter and Art. 54 of the CISA. A transnational *ne bis in idem* was proposed by legal scholars for many years and thus was recognised in the so-called non-binding Princeton Principles on Universal Jurisdiction (Principle 9). Likewise, international treaty law recommends that the involved states agree on who should prosecute to avoid concurrent jurisdiction (cf., e.g. UN Convention for the Fight against Transnational Organised Crime, Art. 21; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 4.3; see also EUROJUST's Guidelines for deciding 'which jurisdiction should prosecute?', revised 2016).

Moreover, similarly to Frankfurt, two French courts denied prosecution based on previous convictions in the US (cf. Stephenson, Guest Post: Does International Law Require an International Double Jeopardy Bar?, GAB 18 October 2016, online available at: https://globalanticorruptionblog.com/2016/10/18/guest-post-does-international-law-require-an-international-double-jeopardy-bar/). However, at the international level, the transnational principle of double jeopardy is not (yet) recognised, neither as a general principle nor as customary international law (cf. Thalmann, Reasonable and effective universality: conditions to the exercise by national courts of universal jurisdiction over international crimes, 2018, p. 33; see also Costa Ramos, Ne Bis In Idem e União Europeia, 2009, p. 65, both with further references;). The US Supreme Court's doctrine on "separate sovereignty" as an exception to double jeopardy, of course, thwarts this development, but fortunately, this is just one jurisdiction out of 193 in the world, and there might be more to come.

Dr. Mayeul Hiéramente, Hamburg, Germany
Dr. Anna Oehmichen, Mainz, Germany

Dutch court refuses execution of UK judgment

On 29 April 2020, the district court of The Hague delivered a remarkable judgement which could have major consequences for the ability to execute, in the Netherlands, UK sentences imposed after a jury trial.

The case involved a Dutch national who had been convicted to two years imprisonment by the St Albans Crown Court in the United Kingdom for stealing a motor vehicle. Initially, the Dutch authorities, upon request, agreed to execute this sentence (in part). The United Kingdom accepted this partial execution.

The applicant subsequently initiated legal proceedings in the Netherlands against the Dutch State. He argued that his sentence could not – neither integrally nor partially – be executed in the Netherlands, as not all of the formal requirements had been met by the British authorities.

The requirements to be met in executing a foreign sentence are laid down in the Convention on the Transfer of Sentenced Persons (CTSP). One of these requirements is that the sentencing state (UK) provides the administering state (NL) with a certified copy of the judgment and the law on which it is based (art. 6 CTSP). According to the applicant, the United Kingdom had not fulfilled this prerequisite, as only the certificate of conviction, the case summary and the Crown Court Minute Sheet had been produced. These could not be equated to a written judgment, argued the applicant.

The district court held that the execution of foreign sentences is grounded on the principle of mutual trust between states parties to the CTSP. This mutual trust ensures flexibility and efficiency. However, the court held, this principle does not apply when it is established that there has been a flagrant disregard of the fundamental principles of criminal

justice (ex art. 6 ECHR) in the proceedings leading to the conviction. In such a case, execution of the foreign sentence can be denied.

It is for this reason, the court stated, that the sentencing state must provide a copy of the judgment – after all, this not only serves the purpose of informing the administering state of the penalty, but also provides the opportunity to assess whether there has been a breach of fundamental principles during the proceedings. The written judgment ensures that the administering state is able to verify the lawfulness of the sentence.

In Taxquet/Belgium, the ECtHR stated that jury trials resulting in unsubstantiated verdicts require additional procedural safeguards to enable the convicted person to understand the reasons for his conviction. According to the district court, the documents provided by the United Kingdom in the applicant's case contained insufficient information to assess whether these safeguards had been in place.

The documents provided (certificate of conviction, case summary and Crown Court Minute Sheet) gave no insight into the applicant's case and the question whether the proceedings had complied with the fundamental principles of art. 6 ECHR. Consequently, the United Kingdom had not fulfilled the requirements under the CTSP and the Dutch authorities were not allowed to execute the sentence. The court found that doing so would constitute an unlawful act (tort) by the State and prohibited the State to follow through on the execution.

This outcome is remarkable, as it sets a precedent for further execution requests regarding sentences imposed by jury trials, lacking a written judgment. As far as we are aware the Dutch State has appealed the judgement. It is unclear when the Court of Appeal of the Hague will rule on this appeal.

Thom Dieben, JahaeRaymakers and Luce Smithuijsen, Hertoghs Advocaten Attorneys-at-law; Amsterdam

European Parliament Research Service Study on EAW

On 15 June 2020 the European Parliament Research Service published a report (the Study) setting out its assessment and conclusions on the implementation of the EAW Framework Directive. It is available online here: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2020)642839

It contains recommendations on how to address the shortcomings identified by the Study. It concludes that the EAW has simplified and sped up handover procedures, including for some high profile cases. However, it highlights a number of outstanding challenges relating to core debates concerning judicial independence, the nature of mutual recognition and its relationship with international and EU law and values, constitutional principles and additional harmonisation measures. The Study found that there are gaps in effectiveness, efficiency and coherence with other measures and the application of digital tools. The Study recommends targeted infringement proceedings, support to judicial authorities and hearing suspects via video-link where appropriate to avoid surrender whilst ensuring the effective exercise of defence rights, as well as a range of measures aimed at achieving humane treatment of prisoners. It also recommended a review of the EAW as part of an EU judicial cooperation code in criminal matters.

Case Note

Gerulskis & Zapalskis v The Prosecutor General's Office, Lithuania [2020] EWHC 1645 (Admin)

The Coronavirus pandemic continues to present a challenge for all prison authorities seeking to respect the human rights of detainees. The practical problems occasioned by the risks of transmission of the virus, the care and isolation of those diagnosed and the reduction of available prison staff all place a premium on the containment of prisoners rather than their rehabilitation. From a UK perspective at least, these risks have not led to a different approach to bail decisions and the number of pre-trial detainees has continued to rise as the capacity of the criminal justice system to provide a timely trial has fallen. What then of states whose prisons have been found in the past to be seriously deficient?

In the cases of Gerulskis and Zapalskis the Divisional Court looked once again at the weaknesses within the

Lithuanian prison estate, said by the Lithuanian prison authorities themselves to be "encumbered" by the Coronavirus crisis.

By an odd coincidence, the Court handed down its decision on the same date as the High Court in Ireland gave its ruling in the case of Liam Campbell, wanted in Lithuania on weapons trafficking charges. Mr Campbell had previously spent four years in custody in Northern Ireland during an earlier attempt to extradite him to Lithuania and had been discharged by the High Court in Northern Ireland, [2013] NIQB 19, on Article 3 grounds, at that time departing from the view of the English High Court.

The 2013 Campbell decision reflected an international consensus only later acknowledged by the English High Court that conditions in some remand prisons in Lithuania, and certainly in Lukiskes remand prison, presented a real risk of a detained individual suffering inhuman or degrading treatment, and would thus infringe article 3 of the ECHR. Over the subsequent years the state of Lithuanian prisons has been examined in a series of cases, recently those of Mr Guy Jane and then the appeals of Bartulis and others which concluded earlier this year (Jane v Prosecutor General's Office, Lithuania [2018] EWHC 1122 (Admin) "Jane No.1"; Jane v Prosecutor General's Office, Lithuania [2018] EWHC 2691 (Admin) (Jane (No.2). Jane v Westminster Magistrates' Court [2019] EWHC 394 (Admin); [2019] 4 WLR 95 was a separate challenge to Mr Jane's continued detention when he had not been surrendered within the permitted period; Bartulis and others v Prosecutor General's Office, Lithuania [2019] EWHC 3504 (Admin)).

As the remand prison at Kaunas had not previously been the subject of an adverse finding, it had been used from March 2013 as the basis of an assurance, which stood until it was revoked in 2016, prompting the litigation in Jane (No.1). In that case, Lithuania, having lost the presumption of compliance in respect of remand prisons (apart from Kaunas), was given an opportunity to provide an assurance as to Mr Jane's treatment. In due course it provided seven, with a further assurance dated 7 August 2018 promising minimum conditions of 3m2 at Kaunas Remand Prison, Lukiskes Remand Prison – Closed prison or Siauliai Remand Prison accepted by the High Court in Jane No.2.

So matters stood until the challenge in Bartulis and others which focussed not so much on the space available to inmates, although the physical conditions of the prisons were relevant, but, having regard to the observations in the CPT's report of February 2018, on the risk of violence from other inmates of the prisons. The decision noted that Lithuania had not lost the presumption of compliance with Article 3, and for that reason the Court did not seek to rely on the assurances offered. However the Court emphasised "it is important nevertheless to stress that, once given, they must be adhered to in respect of any prisoner extradited from the UK to Lithuania, since the terms of the assurances are offered expressly to all". It was noted that breach of assurances might prove significant in the future.

On 3 April 2020, however the Lithuanian authorities filed a letter in a number of pending cases which referred to the COVID-19 pandemic and stated that "in the view of the danger caused by the spread of COVID-19 disease" the management of the Lithuanian correctional system could be "encumbered" in the near future. It stated that the guarantees in the letters of 7 August 2018 and 8 July 2019 "will not be applied from the moment of signing this letter". An attached letter promised a minimum space allocation of no less than 3m2, but stated "in the view of the danger caused by the spread of COVID- 19 disease, the work of Lithuanian institutions is encumbered, which might have impact on the implementation of the assurance."

That qualification, referred to as the COVID caveat, founded the Appellants' principal ground of appeal: that because the Lithuanian prison system was overstretched or "encumbered" by reason of the Coronavirus crisis, that put at risk their capacity to provide the minimum conditions of 3m2.

The submission was supported by further evidence considered by the Court concerning the treatment of others extradited to Lithuanian, including Mr Jane and Mr Kmitas, (a co-appellant in Bartulis), who complained that they had not been given the conditions they had been assured they would receive and certainly in respect of Mr Kmitas, that his conditions did in fact breach Article 3.

The evidence on the breach of assurances was disputed by the Respondent and the Court, though conceding it had not heard live evidence, found that whilst Mr Jane and Mr Kmitas may not have been detained precisely in accordance with terms of the assurance, they had not been held in non-compliant conditions.

The Court likewise rejected the Appellant's challenges in relation to the impact of Coronavirus, commenting favourably on the transparency of the information provided by the Lithuanian authorities. Lord Justice Dingemans noted that there is no COVID-19 in the prisons in Lithuania at the moment, but went on to state that "evidence of

deficiencies in a system, even if systemic, does not necessarily imply that there will be an infringement of human rights and there must be a minimum level of severity in all the circumstances of the case to amount to an infringement, this takes account of the duration of the conditions, see paragraphs 54 and 59 of Dorobantu v Romania."

Certainly, the threshold of a minimum level of severity must be met to constitute an infringement, but the prospect of such an infringement occurring must only be a real risk. Applying the Article 3 test in terms of whether there "will be an infringement" might be said not to be an assessment of risk at all. The Appellants had submitted that it was to that risk, that the "impact" anticipated in the April letter had referred, and about which the Lithuanian authorities had been candid.

This time around then the decision of the Divisional Court is quite consistent with the judgment in Mr Campbell's case; Ms Justice Donnelly of the Irish High Court finding no evidence of a risk of inhuman or degrading treatment arising in Mr Campbell's case. Despite the relaxation of the restriction on non-essential travel, when exactly anyone will be returned to Lithuania remains an open question.

Peter Caldwell
Doughty Street Chambers

Court Liaison

The Court Liaison Sub-Committee of DELF has been very busy in "Lockdown" and has continued to liaise with Westminster Magistrates' Court regarding the arrangements for remote attendance. On 10 August 2020, DELF provided the following update in respect of hearings from 1 August 2020:

1. **Hearings other than full EH hearings (CMHs, bail variations etc):**

   a. *If RP is present (either by CVP/PCVL or in person): CVP may continue to be used by advocates (where available). Telephone may not be used.*

   b. *If RP is not present: CVP (where available) and telephone may continue to be used by advocates.*

2. **Full EHs:** *telephone is not to be used. The RP and advocates may appear by CVP (if available) if the interests of justice test is met (e.g. where the RP is not giving evidence).*

3. **Advocates' vulnerability:** *CVP may continue to be applied for but note that the Government Guidance has changed as of 1st August to only cover those who are "clinically extremely vulnerable". The interests of justice test in the Coronavirus Act 2020 will apply.*

4. **List prosecutor:** *must be in court.*

5. **Increased use of CVP:** *Currently there are seven CVP licences in the Central Division and they are shared across crime and international jurisdiction as well as at Hendon and City of London Magistrates' Courts. At Westminster there are two in use in the crime remand courts and up to two in use for IJ hearings.*

   Whenever CVP is used, HMCTS is required to host it which requires an additional member of staff. During lockdown, hosting was facilitated by legal advisers and court associates who were working remotely. Responsibility for hosting has now transferred to the operational staff who are currently being trained.

   Once HMCTS has sufficient staff trained, the Court hopes to move to using CVP for the prison video link hearings in Court 11 and potentially in Court 10, which will enable lawyers who have been granted a live link application to join by CVP. It is hoped that can be achieved within the next couple of weeks. The Court hopes to have more CVP licences within the next month.

A further update from the Court was received on 17 August 2020:

Westminster Magistrates' Court has been reviewing the international jurisdiction workload and sittings in response to judicial concerns regarding the delays which are now building in listing extradition hearings.

In response to lockdown restrictions in March, initially the Court suspended hearings and simply managed remand custody cases and new arrests. Gradually hearings have resumed in line with the recovery plan and there are now 2 IJ remand courts and 2 IJ hearing courts per day.

Prior to lockdown restrictions the Court sat three hearing courts and one remand court.

Currently the Court is adjourning up to one third of the scheduled final hearings each day which can no longer be sustained. Hearings are now being fixed as late as November and December 2020.

Therefore with effect from Tuesday 1st September the third hearing court will resume. In order to provide additional capacity to reduce the delays, the Court will return to running one IJ remand court on Tuesdays, Wednesday and Thursdays with the second remand court converting to an additional IJ hearings court. That provides immediate capacity to list new cases much earlier and any hearings that have to be vacated or adjourned by a Judge can be accommodated quickly. The Court will have hearing sessions available from September.

In order to accommodate this plan, the configuration of IJ courtrooms will return primarily to the first floor with Court 10 remaining the additional remand / hearing court. This option presents some challenges in accommodating CVP, which will be more limited. However, making other changes to the configuration of courtrooms at Westminster would significantly impact on the crime courts and their workload, so the Court has opted for the below sitting pattern. The Court has identified those courts to try to ensure that the work and footfall is more evenly distributed across the three floors to manage social distancing measures.

The sitting pattern from 1st September will be as follows:

Monday IJ Hearings Courts 1,2 & 4.
IJ Remands (all day PCVL) – Court 3.
IJ remands and new cases – Court 10.

Tuesday IJ Hearings Courts 1,2 & 4 and 10.
IJ Remands (½ day PCVL + new cases) – Court 3.

Wednesday IJ Hearings Courts 1,2 & 4 and 10.
IJ Remands (½ day PCVL + new cases) – Court 3.

Thursday IJ Hearings Courts 1,2 & 4 and 10.
IJ Remands (½ day PCVL + new cases) – Court 3.

Friday IJ Hearings Courts 1,2 & 4.
IJ Remands (all day PCVL) – Court 3.
IJ remands and new cases – Court 10.

We are told that the Court will only be able to offer limited CVP for hearings - in one courtroom on the first floor using the moveable Scopia equipment or in Court 10. If the hearing is listed in a courtroom which cannot accommodate CVP then unfortunately a live link direction will not be available. This is already in line with the current directions for final hearings where the RP and

advocates can appear by CVP <u>if available and the IOJ test is met.</u>

If the Court cannot accommodate CVP for custody cases, the starting point is the RP will be produced for the final hearing.

HMCTS are still waiting for news on funding for additional video conferencing equipment for Court 2 and 4 and the video conferencing equipment installation date in Court 1. It is hoped that the additional equipment will offer more flexibility.

DELF has also attended several meetings regarding the **Prioritisation of Prison and Court Video-links** with Her Majesty's Courts and Tribunal Service, the Crown Prosecution Service and Judiciary, and has the following update as of 23 July 2020:

- Additional funding has been secured to increase video-conferencing in prisons. Unfortunately, the priority list did not include HMP Wandsworth. However, DELF raised the importance of conferencing in extradition cases due to Framework obligations. There is now a dedicated room at HMP Wandsworth where only extradition conferencing can take place.

- In terms of face to face visits in prisons, guidance is about to go out to prisons concerning whether 2m or 1m social distancing is necessary. A risk assessment needs to be done by each prison but the Guidance will be available shortly.

- There is also a Guidance document for the prioritisation of prison video slots for Parole Board, Magistrates' and Crown Court work. The Guide takes account of extradition hearings.

Please continue to report any concerns or feedback on these issues to DELF.

Saoirse Townshend
Temple Garden Chambers

Catherine Brown
Furnival Chambers

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.

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