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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to edition 23 of the Defence Extradition Lawyers Forum newsletter and the last edition of the year that was 2020. We are now all well familiar with the use of CVP but we are still waiting for confirmation as to what 2021 will hold for extradition to and from the UK.

In this edition we provide updates on our recent work and educational events including an update from Peter Caldwell on the DELF response to the Home Office consultation on the revised Codes of Practice governing police powers in UK extradition cases and an update on Court Liaison. We are very pleased to announce the winner of the John Jones Essay Competition and publish the winning essay. We also have an interesting update from Ben Joyes on a Romanian case recently heard by the Divisional Court and an article from Andrea Puccio in Italy who examines the principle of non bis in idem and its evolution in European case law. With many thanks indeed to all our contributors.

A message from the Chair

Dear All,

It is a great pleasure to introduce the DELF newsletter. I would like to thank Katy Smart as outgoing chair for all of her work during the past year. It has been a difficult job keeping the organisation going during lockdown and she did an exceptional job.

DELF continues to work on your behalf organising events and liaising with the Courts. We have already had two fascinating seminars on US Prisons and the Polish Judicial System. We have two more seminars in the New Year. The first is on the impact of the end of free movement on extradition (28 January 2021). The second is a seminar on the European Court of Human Rights and Article 3 planned for February.

As soon as regulations allow we will have some face-to-face meetings but for the immediate future our events will be via Zoom. We are in the process of developing our website to try and create a small case law database of unusual decisions. Hopefully we will have more news on this in the new year.

This edition also sees the winning essay from the John Jones QC essay competition. I'd like to thank all the entrants for their excellent contributions and the judges for giving up their time to choose a very worthy winner.

Finally, I would like to thank the Court Liaison Officers, Hannah Hinton, Saoirse Townshend and Catherine Brown; they have done a huge amount of work in meeting with the Courts and communicating the issues that the members have raised. For 2021, we have formed a small group of committee members for court liaison. Please let us know of any issues or feedback for us to raise with the courts.

Ben Keith
5 St Andrew's Hill

Our Recent Activities

We continue to make representations on behalf of our 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.

DELF responds to Home Office Consultation on revised Codes of Practice

DELF has submitted its response to the Home Office consultation on draft codes of practice governing the exercise of police powers in UK extradition cases.

The draft under consultation (here) is a revision of existing codes of practice concerning the arrest, transport and detention of individuals subject to an extradition request – as well as related search and seizure powers. The consultation sought views from practitioners and other interested parties as to whether the draft codes are correct and applicable for "operational demands", while protecting the rights of individuals sought for extradition.

The revised draft reflects changes made to the relevant PACE codes and the changes arising from the new power of arrest brought about by the Extradition (Provisional Arrest) Act 2020.

While police practice should always be to refer to the most recent PACE codes in the context of any arrest, the amendments in the draft codes of practice have been updated to reflect the most recent amendments to PACE codes. Following the expiry of the Brexit transition period, and in the event that no equivalent provision to the European Investigation Order is agreed, it is likely that EU Member States will make more use of search and seizure powers ancillary to an extradition request, as well as MLA procedures under the 1959 Convention. With that in mind DELF has made recommendations to permit proper oversight by the legal representatives of the Requested Person of search procedures – particularly those attended by representatives of the requesting state.

The draft codes anticipate the coming into force of section 74A of the 2003 Act (as amended by Extradition (Provisional Arrest) Act 2020 c. 18 Sch.1(1) para.2), which provides for a power of arrest where the NCA has issued a certificate under section 74B. The new power of arrest, which applies only to Part 2 of the 2003 Act, is a significant revision to police powers, permitting designated states to obtain arrest without a warrant issued by a Court.

The Home Office has stated that the codes should be adequately reflected and available in all police guidance and resources to ensure consistency of operational practice. With the experienced Metropolitan Police extradition squad losing its monopoly on arrests in Part 2 cases, the need for awareness of and compliance with effective codes of practice is greater than ever.

Peter Caldwell
Doughty Street Chambers

Educational events and socials

Poland – The threat to judicial independence

On 25 November, we hosted a virtual event with our panel of: Anthony Hanratty (BDB Pitmans), Maria Radziejowska

(Pietrzak Sidor and Partners), Agnieszka Niklas-Bibik (a judge sitting in the Regional Court of Słupsk), and Saoirse Townshend (Temple Garden Chambers). The event discussed the on-going situation in Poland and the serious threat to judicial independence posed by the recent Constitutional changes.

USA – Article 3, Life Without Parole and Covid: should the USA be treated any differently to EU countries?

Wednesday 14 October saw DELF embrace the "new normal" and host its first ever virtual education event, exploring Article 3 and sentences of life without parole ("LWOP") in the USA in the COVID-era. At the helm was Alex Bailin QC, joined by Roger Sahota of Berkeley Square solicitors and Lindsey Lewis of Dratel & Lewis in New York.

Roger updated us on the most recent developments in Sanchez v UK. Following the granting of Rule 39 relief, Strasbourg is now on a potential collision course with the English High Court over the circumstances in which "irreducible" life sentences can properly be mitigated by the US. It will particularly be concerned with the UK's refusal (in both Sanchez and Hafeez) to follow the authority in Trabelsi, which found that the "presidential pardon" and "compassionate release" mechanisms are insufficient to remedy the real risk to Article 3 posed by LWOP.

Lindsey provided a comprehensive (and rather bleak) assessment of current detention conditions within the US. With a focus primarily on MDC and MCC, she described the chronic overcrowding and understaffing which pervades the entire system. A hiring freeze from 2016 to 2018 has led to shortages which risks the safety and security of inmates, particularly those with mental health conditions. The power and heating cuts at MDC in January 2019, and the death of Jeffrey Epstein at MCC in August 2019 served as illuminating examples of the institutions' failings. The Covid-19 pandemic has only served to make a "bad scenario even worse."

Before taking questions from the (virtual) floor, Alex Bailin provided his sceptical assessment of the High Court's willingness to rely on targeted assurances (as in USA v Miao). In response to questions, Lindsey outlined the internal complaints procedures for inmates at MDC/MCC, and the limited scope for judicial intervention post-conviction.

Danielle Reece-Greenhalgh
Corker Binning

Upcoming Events

28 January 2021 - The impact of the end of free movement on extradition

A seminar exploring the impact of the loss of free movement on the Article 8 balancing exercise in extradition cases and the immigration rules clients will have to meet if they seek to return to the UK post extradition.

Details will be circulated in advance.

John Jones Essay Competition 2020

The topic for this year's competition was: "Under what circumstances might extradition from the UK to China be possible?" and the Judges were The Chief Magistrate Emma Arbuthnot, Anand Doobay of Boutique Law Solicitors and our President, Edward Fitzgerald QC.

The topic of extradition to China remains as yet only an academic possibility. This year's competition saw a very high standard of entries that grappled with the human rights risks raised by the question. The judges found the entries thought provoking, original and showed some impressive research. They were unanimous in selecting the winning entry: Alex Davidson who is a pupil barrister of 2 Bedford Row is the winner and recipient of this year's £750 prize money.

The runners up will each receive membership of DELF for 2021. The winning essay appears below.

Under what circumstances might extradition from the UK to China be possible?

> *"Through the ups and downs, let's stick together. Let's stick together to grow our economies. Let's stick together to make Britain China's best partner in the West. Let's stick together and create a golden decade for both of our countries. Britain and China: we'll stick together."* George Osborne, speech to the Shanghai Stock Exchange in China (22 September 2015).

It was five years ago that the golden age of Sino-UK relations was declared by the then Chancellor of the Exchequer, George Osborne. Since then, the relationship between the UK and the People's Republic of China ("China") has drastically deteriorated. It is for this reason that, at first blush, the prospect of the UK acceding to an extradition request from China seems unlikely. This essay will suggest that, while there are at least in theory circumstances under which extradition from the UK to China might be possible, the prospects of success are indeed low. The essay will begin by discussing recent events in order to contextualise the question. It will then analyse the current mechanisms by which extradition may occur and their likelihood of success.

Setting the Scene

The British Foreign Policy Group has recently published a report on UK-China relations (The British Foreign Policy Group, After the Golden Age: Resetting UK-China Engagement (July 2020)). It paints the picture of a fractious relationship between the UK and China. The report explains that China is now perceived as a malevolent presence, choosing a path of authoritarianism over liberalism. There are now several contentious areas of engagement between the UK and China. By way of example, the UK Government has introduced a ban on purchasing 5G equipment from the Chinese technology company Huawei due to security fears. The UK has also accused China of gross and egregious human rights abuses against the Uighur people (BBC News, "UK accuses China of "gross" abuses against Uighurs" (19 July 2020)), with recent talk of imposing Magnitsky sanctions on Chinese officials (Hansard (HC), 12 October 2020, vol 682, cols 27WH to 50WH). Yet perhaps one of the most contentious issues is the recent incursion of China into the semi-autonomous territory of Hong Kong.

The UK has no extradition treaty with China as such, however, it did until recently maintain an extradition treaty with Hong Kong, a special administrative region of China. On 30 June 2020, the Standing Committee of the National People's Congress of China formally passed a new National Security Law concerning Hong Kong (The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law")). The National Security Law has a wide extraterritorial ambit, criminalising acts of secession, subversion, terrorism, and collusion committed by anyone, anywhere.

A significant number of countries, led by the UK, have expressed concern over the National Security Law, not least due to it threatening the one country two system principle. A particular threat was said to be posed to those extradited to Hong Kong, who would be exposed to human rights violations and extradition to mainland China. On 20 July 2020, the UK announced that it would indefinitely suspend its extradition treaty with Hong Kong. This suspension was in part to safeguard against attempts by China to use the National Security Law to seek the extradition of pro-democracy activists. In a sign of worsening relations, just over a week later, China retaliated by announcing the suspension of its Hong Kong extradition treaty with the UK. It is against this backdrop – a frayed relationship and suspended extradition treaties – that present mechanisms to secure extradition from the UK to China will be assessed.

Current Mechanisms

That China might seek extradition from the UK is more than a merely hypothetical scenario. The UK has held its arms open to those fleeing Hong Kong in the wake of the National Security Law, many of whom have been outspoken against China. A striking feature of the National Security Law is its extraterritorial scope: it criminalises those who engage in prohibited conduct outside Hong Kong (National Security Law, art.38). China has already issued arrest warrants for activists living in the UK for engaging in secession and collusion with foreign forces contrary to the National Security Law.

Two questions then follow: first, what current mechanisms exist to extradite individuals from the UK to China; and second, how likely are they to be availed?

While there are currently no active extradition treaties in place with mainland China or Hong Kong, an individual may still be lawfully detained in the UK and extradited to China. This would occur through the UK entering a special

extradition arrangement with China in respect of a specified person. The procedural sequence would, in summary, be as follows:

1. the Secretary of State would first consider whether to enter into an ad hoc extradition arrangement with China, there being no requirement to do so;
2. if an agreement was reached in principle, the UK and China would reach a Memorandum of Understanding in respect of the specified person;
3. the signing of the Memorandum of Understanding would lead to the issuing of a certificate by the Secretary of State that arrangements have been made between the UK and China (Extradition Act 2003, s.194(2));
4. the issue of the certificate would trigger the statutory extradition machinery contained in Part II of the Extradition Act 2003 (Extradition Act 2003, s.194 (3)). Thus, China would be treated as a category 2 territory for the purposes of the Extradition Act 2003;
5. arrest of the individual could take place pursuant to a warrant issued by an appropriate judge or under a provisional warrant (Extradition Act 2003, ss.71 and 73);
6. an extradition hearing would take place and, if the necessary requirements were met, the case would be sent to the Secretary of State (Extradition Act 2003, s.87(3)); and
7. if the Secretary of State decided that none of the prohibited reasons applied, an order would be signed that the individual be extradited to China (Extradition Act 2003, s.93 (4)).

This takes us to our second question: just how realistic is the prospect of an individual being extradited from the UK to China under a special extradition arrangement? While each case will of course turn on its own facts, there are likely to be two main hurdles. First, difficulty would arise at the outset in reaching an agreement. Ad hoc extradition agreements are rare, and it is here where the current geopolitical climate would enter the foreground. It has been suggested that the UK may have less trust in countries with whom there are no extradition treaty arrangements, resulting in the UK being slow to enter such ad hoc arrangements (Ivor Stanbrook and Clive Stanbrook, Extradition: Law and Practice (2nd ed 2000), p.232.). The fractious relationship between the UK and China would certainly make this the case were discussions ever entered into. Distrust would stem from specific concerns that have been raised by the UK regarding China's compliance with the rule of law and human rights standards.

The second difficulty is that, even were an ad hoc extradition agreement reached in principle, an extradition request would have to make its way through the statutory scheme in Part II of the Extradition Act 2003. The potential difficulty in doing so is illustrated by the Government of Rwanda's unsuccessful attempts to extradite individuals from the UK allegedly involved in the Rwandan Genocide due to fair trial concerns (See Brown v Rwanda [2009] EWHC 770 (Admin); and Rwanda v Nteziryayo [2017] EWHC 1912 (Admin)).

For one, China would have to meet the prima facie requirement by adducing sufficient evidence that there is a case to answer (Extradition Act 2003, s.84(1)). Difficulty would then likely arise due to human rights concerns. Part II of the Extradition Act 2003 requires a judge to decide if there are any bars to extradition – one of which concerns the prospect of facing an unfair trial by reason of, inter alia, political opinions (Extradition Act 2003, s.81) – and to consider more generally whether the person's extradition would be compatible with ECHR rights (Extradition Act 2003, s.87(1)). A requested person would therefore likely point to reports of poor prison conditions in China to show substantial grounds for believing there to be a real risk to article 3 ECHR rights. So too would a requested person likely seek to adduce evidence that they would suffer a real risk of a flagrant denial of justice if extradited to China in breach of Article 6 ECHR. This would be particularly pertinent for pro-democracy protesters: where requested persons are seen as "political opponents" of the government, "a very high level of anxiety would be justified as to their prospects of a fair trial" (Rwanda v Nteziryayo [2017] EWHC 1912 (Admin) at [150]). Were China to seek extradition on the basis of offences under the National Security Law, eyebrows might also be raised as to whether the requested person's conduct constitutes an "extradition offence" within the meaning of Part II of the Extradition Act 2003.
For completeness, it is worth briefly mentioning how the Interpol Red Notice regime might affect the prospects of extradition. The primary function of a Red Notice is to aid in provisional arrest with a view to extradition. China could therefore request the issue of a Red Notice. However, this would not guarantee arrest, far less extradition; it would fall on the UK to decide what legal value it gave to the Red Notice. By virtue of Article 3 of Interpol's Constitution,

Interpol may also refuse to issue the Red Notice due to the offence's political hue. Indeed, Interpol's own guidance warns that offences of treason and sedition – and thus the offences with which the National Security Law is concerned – have consistently been considered to fall within the scope of Article 3 (Interpol, Application of Article 3 of Interpol's Constitution (2nd ed 2013) p.21.).

The Extradition (Provisional Arrest) Act 2020 is now in force. The Act addresses a capability gap by amending the Extradition Act 2003 to allow the arrest of a wanted person (such as one who is sought pursuant to a Red Notice) without having to obtain a warrant from the court. Although it will increase the likelihood of securing arrest, it will not impact on the extradition process. Tellingly, the arrest power will also not be exercisable in response to extradition requests from China. In fact, quite remarkably, an amendment was tabled to ensure that the Bill did not apply extradition requests from China and Hong Kong, further demonstrating a clear intention to prevent extradition from the UK to China (*Hansard* (HC), 8 September 2020, vol 679, col 540).

It is for the above reasons that the prospect of the UK entering into a special extradition agreement with China, and a request successfully making its way through the extradition process, is low.

Concluding thoughts

Extradition from the UK to China could only be achieved through a special extradition arrangement, reactivation of the Hong Kong extradition treaty, or a fresh extradition treaty with China. An ad hoc extradition agreement is unlikely for the reasons given above. A brief scan of the horizon also suggests that other avenues are equally as unlikely. Sino-UK relations would have to improve markedly for any of the three avenues to be availed.

It is to this end that one must remember that trust is a vital ingredient in extradition relations. Greater adherence must be shown by China to the rule of law to inculcate sufficient trust. In the context of the National Security Law, close attention should be paid to Articles 4 and 5, which state that human rights shall be respected, and the rule of law adhered to. Should this transpire to be more than mere lip service, it is conceivable that the Hong Kong extradition treaty will be revived. Given that China is not on a path to become a democracy, the prospect of extradition from the UK to China will remain low.

Alex Davidson
Pupil Barrister
2 Bedford Row

The conundrum of specialty protection in Romania

On 11 and 12 November 2020, Holroyde LJ and Swift J, sitting as a Divisional Court, heard the case of Enasoaie v Romania. Judgment is awaited. This short piece seeks to set out the basis for the specialty challenge mounted in Enasoaie.

Section 11(1)(f) and section 11(3) of the Extradition Act 2003 ("Act") provide that a requested person must be discharged if his extradition is barred by specialty. Pursuant to section 17(1) of the Act, a person's extradition is barred "by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory." At the time of writing, the UK has specialty arrangements with Romania through the application of article 27(2) of Framework Decision 2002/584/JHA ("Framework Decision") which provides that, subject to exceptions not material to this piece, a "person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered." The key issue for determination under section 17 is whether the specialty arrangements in the requesting territory are "practical and effective" (Hilali v Spain [2006] EWHC 1239 (Admin)).

Following an extradition hearing on a 'conviction warrant' containing 12 offences, Mr Enasoaie was discharged in respect of three offences on the basis that dual criminality was not made out under section 10 of the Act. Extradition was ordered in respect of the remaining nine offences. Upon surrender, the Romanian authorities would be required therefore to disaggregate the sentence imposed for the discharged offences from the sentence imposed for the extradition offences. The principle of specialty was engaged.

The problem of sentence disaggregation in Romania was forecast in Edutanu v Romania & Romania v Barbu,

Smadeci and Pascariu [2016] EWHC 124 (Admin). In response to a CPS request seeking confirmation that only the part of Mr Pascariu's sentence relating to extraditable offences would be executed, the Romanian authorities stated that his sentence was "irrevocable" and that disaggregation was impossible. However, the EAW issued in respect of Mr Pascariu was ultimately held to be invalid pursuant to section 2 of the Act, so the specialty argument was not addressed conclusively.

The issue then reared its head before Westminster Magistrates' Court in January 2020. District Judge Goozee, in Romania v Vlangar, held that the evidence before him "displace[d] the strong presumption that the Romanian authorities [would] act in accordance with their international obligations in respect of specialty" and that there were "no effective specialty arrangements in place."

In March 2020, an expert report was obtained from a Romanian lawyer and served in the appeal proceedings in Enasoaie. The expert concluded that there was no effective domestic remedy available to the Appellant to enable him to enforce his specialty rights. The provision of Romanian law adopted to give effect to article 27(2) of the Framework Decision is article 117(2) of Law 302/2004; however, the latter does not provide a specific remedy. The expert stated that the only legal mechanism potentially available to Mr Enasoaie to give effect to specialty was article 598 of the Criminal Procedure Code ("CPP"), which provided a basis for a convicted person to challenge the enforcement of a criminal judgment. However, the expert, having referred to several national decisions concerning the ambit of article 598 CPP, ultimately concluded that the principle of res judicata would prevent a Romanian court from carrying out the disaggregation process in the Appellant's case. Perhaps understandably given the absence of a formal system of binding precedent in Romania, the domestic courts did not speak with one voice as to whether enforcement challenges were available specialty cases.

In August 2020, a second report from the same expert identified a contemporary decision issued by the Romanian High Court of Cassation ("HCC") (no. 15/28 May 2020). The HCC decision records that the Timis Court "unmerged" an underlying sentence in order to give effect to the principle of specialty where the requested person had been surrendered to Romania in respect of some – but not all – offences on an EAW. Following this, the Timis Court issued a request to the HCC for a "preliminary order" concerning a "genuine question of law". In answer, the HCC held that the principle of specialty was not applicable in these types of cases. The HCC considered that the inapplicability of article 598 CPP in these circumstances was clear and unambiguous; it therefore ruled that the request for a preliminary order was inadmissible.

The decision of the HCC raises clear concerns as to the effectiveness of specialty protection in Romania. Can the domestic arrangements in Romania really be described as 'practical and effective' if a surrendered person must rely upon a lower court disapplying the decision of the HCC? Further, whilst the Timis Court did disaggregate the sentence, the argument in Enasoaie was that it would not do so again in light of the subsequent decision of the HCC. Considering the factual situation in Romania, Brodziak v Poland [2013] EWHC 3394 (Admin) – which is the current lead case on Poland and specialty – is reasonably distinguishable. In rejecting the section 17 argument, the Divisional Court in Brodziak relied heavily upon expert evidence that referred "to the possibility of a judgment being quashed 'in extraordinary proceedings'", and placed great weight on the absence of any "evidence…of even a single case in which an extradited person has been required in practice to serve a sentence relating in whole or in part to an offence for which he was not extradited." For the reasons set out above, there is a strong case to suggest that the main justifications given in Brodziak are not applicable in the Romanian situation.

In the case of Romanian requests issued after 31 December 2020, the specialty issue remains live. In a no-deal scenario, Romania will be *redesignated* as a Category 2 territory (see section 56 of the Law Enforcement and Security (Amendment) (EU exit) Regulations 2019) and specialty issues will be addressed under section 95 of the Act as a function of the Secretary of State. Extradition to Romania will take place pursuant to the European Convention on Extradition 1957, article 14 of which mirrors article 27 of the Framework Decision. If a deal is secured and the draft text of the Agreement on the New Partnership with the United Kingdom of 18 March 2020 becomes law in the UK, requested persons will be entitled to rely upon the specialty provisions set out at article 106 of that instrument. However, in either scenario, the explicit bar provided by section 17 of the Act will no longer operate.

It is hoped that the soon-expected judgment in Enasoaie will grapple with the problems concerning specialty protection in Romania. However, the manner in which the lower courts in Romania choose to apply the decision of HCC remains to be seen.

Ben Joyes is a member of the DELF committee. He was led by Jonathan Hall QC of 6 KBW College Hill and

instructed by Harry Grayson of Shaw Graham Kersh in the case of Enasoaie v Romania.

Ben Joyes
9 Bedford Row

Double jeopardy in case-law of the European Courts and the Italian Supreme Court

In recent years, both Italian and international courts have issued many decisions regarding the principle of non bis in idem or double jeopardy. The principle has undergone an important transformation, started by the European Court of Human Rights, examined by the European Court of Justice and lastly transposed at national level. This process has changed the features of that principle and led to the legitimation of the systems characterised by double jeopardy.

Non bis in idem

First of all, the principle of non bis in idem means that no legal action can be pursued twice on the same facts and, if started, it cannot be continued. The spirit of the rule safeguards the authority of res judicata and legal certainty. This is stated, at national level, by the Italian Criminal Procedure Code (art. 649), implicitly supported by the Italian Constitution (art. 25 and 111). At international level, this principle is stated in:

- Article 4, p.1, of the 7th Additional Protocol to the European Convention of Human Rights;
- Article 50 of the EU Charter of Fundamental Rights.

International law

In 2014, the European Court of Human Rights, in the well-known Grande Stevens v Italy case, established the full and 'automatic' incompatibility of the systems based on double jeopardy with Article 4 and required the termination of the pending proceedings when the first one concludes.

This decision should be taken:

- in the presence of idem factum (the same defendant and the same factual circumstances of time and space);
- in the event that the sanction formally classified as administrative should be considered a criminal penalty, according to the Engel criteria (1: national legal classification of the offence; 2: intrinsic nature of the offence; 3: severity of the penalty) laid down in Engel v The Netherlands in 1976.

In 2016, the Court of Strasbourg, came to the opposite conclusion, through the reversal held in A and B v Norway. Finding that the principle of non bis in idem does not create legal conflict with the double jeopardy systems (criminal and administrative - but intrinsically criminal), if there is a sufficiently close substantial and temporal link between the criminal and administrative proceedings.

In other words, given the verification of the idem factum and the criminal nature of the administrative sanction, the link will be sufficient if:

- the two proceedings pursue complementary objectives regarding the same protected legal interest;
- the double penalty is foreseeable by the defendant;
- the two proceedings are related, so that duplication of the collection and assessment of evidence can be avoided. Furthermore, interaction between the two different judicial authorities needs to be established;
- the overall proportionality of the penalties is ensured, for the purpose of avoiding harshness;
- the two proceedings, even if not consecutive, do not give rise to long term procedural uncertainty, unduly lengthening the proceedings.

As a result, the European Court of Human Rights has abandoned the automatic link between double jeopardy and violation of Article 4 of the 7th Protocol of the Convention. In this way, it has allowed the coordination of parallel proceedings, if intended to ensure a single and foreseeable penalty.

In 2018, the European Court of Justice (through Menci v Italy, Garlsson Real Estate v Consob, Di Puma and Zecca v Consob), confirmed the sustainability of a double jeopardy system in tax and market abuse areas, welcoming the new

approach of the European Court of Human Rights.

The European Court of Justice, (whilst it did not deny that the combination of penalties represents a limit to the principle of non bis in idem) stated that double jeopardy is consistent with article 50 of the EU Charter of Fundamental Rights. This conclusion can be reached only if the national rules meet certain criteria that are defined in A and B v Norway (with particular regard to overall proportionality of penalties).

It is for the national court to determine if the burden on the person affected by two penalties represents an unduly harsh punishment, having regard to the seriousness of the offence. In that case, the judge could potentially disapply the conflicting domestic provisions, given that article 50 of the EU Charter of Fundamental Rights is a directly applicable principle and it can be exercised immediately.

Therefore, the European Court of Justice has affirmed that where a criminal conviction is designed to penalise the relevant criminal offence in an effective and proportionate way, it is not possible to impose a further administrative sanction. Similar conclusions also apply where there has been an acquittal due to lack of evidence; this will prevent the opening or the continuation of the administrative proceedings.

Italian domestic law

The Italian Supreme Court has accepted all the principles established by the European courts, following them at national level both in tax and market abuse areas.

In particular, in the Chiarion Casoni case (Cass pen, Sez V, 2018, October 31st, n. 49869), the Supreme Court affirmed that verification of the proportionality of penalties requires the disapplication of the rules on sanctions related to the second proceedings either in full or partially (ie imposing a punishment that is less than the minimum). This assessment must be on a case by case basis, also keeping in mind any possible reduction of penalty due to incentive procedures (Cass pen, Sez V, 2019, February 5th n. 5679).

Conclusion

The case law makes clear that the principle of non bis in idem has undergone a transformation. It is no longer a formal procedural guarantee against double jeopardy, but is now a substantial form of protection for proportionality of sanctions; thus legitimising, in certain circumstances, systems which allow for both civil and criminal enforcement (for example, in the case of economic crime).

In the view of the European Court of Human Rights, the temporal link between the two proceedings is still important (to such an extent that it leads to violation of non bis in idem, as in Nodet v France of 2019). On the contrary, with regard to the European Court of Justice and the domestic case-law, the criterion of proportionality of the penalties now carries more weight.

Andrea Puccio
Puccio – Penalisti Associati
Italy

Court Liaison

The Court liaison team continues to meet regularly with Westminster Magistrates' Court and the High Court. Given the issues with CVP and the changing COVID issues we have tried to keep members regularly updated with email circulars where there has been a change in policy. We will continue to liaise with the Court and in particular the new Chief Magistrate when they are appointed. Below are the results of our discussions with the Court:

The following guidance can be given with regards to the use of CVP:

- The "interests of justice" test will be applied in every case when considering whether a hearing can take place by way of CVP.
- Parties can apply for CVP for extradition hearings (applications are likely to be granted where requested persons are not giving evidence or where the issues are straightforward).
- Regarding any other hearings, including VLRs, these can routinely be conducted via CVP.

- CVP is available in all court rooms (except currently for courtroom 2 and 4 which are used for extradition hearings). Hearings can occasionally be moved to another courtroom to facilitate CVP. If it is not possible, then parties will need to be in attendance as a live link will not be feasible. Westminster is endeavouring to secure additional live link equipment for those courtrooms.
- Applications for CVP can be made in writing to the Judge and Court before the hearing.
- Lawyers must have a good quality and stable WiFi connection. If it is not, then that will make it less likely to be in the interests of justice.
- If possible, judges and prosecutors will also be encouraged to log in to CVP on individual computers so that all parties can see and hear properly. Parties not speaking will need to be muted in order to avoid feedback noise.
- Regarding conferences for CVP hearings, there is a way for legal representatives to log in to CVP remotely (i.e. not physically through the video-link booths at Westminster) before and/or after the hearing.

  Legal representatives for the Requested Person can use this link: https://join.meet.video.justice.gov.uk/HMCTS/#/

  Use the drop down menu or type in the correct address to find the correct conference booth for the court. E.g.vcchmpwandsworth1@meet.video.justice.gov.uk for booth 1 and vcchmpwandsworth2@meet.video.justice.gov.uk etc.

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.

Due to a lack of in person events this year we are ending this year in a stronger financial position than anticipated. Our intention is to pass this benefit on to our members in in 2021 with discounted events as soon as they are possible.

Fees for 2021 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

Contacts

Current Committee member officers 2020-2021

Chair – Ben Keith
Vice-Chair – James Stansfeld
Treasurer – Catherine Brown
Educational Secretary – Anthony Hanratty
Social Secretary – Claire Kelly
Policy Officer – Peter Caldwell
Membership Secretary – Kate Chanter
Equality and Diversity Secretary – Mary Westcott
Court Liaison Group – Chaired by Ben Keith and James Stansfeld

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Editor: If you would like to contribute, please contact our editor Áine Kervick at akervick@kingsleynapley.co.uk