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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the 26th edition of the Defence Extradition Lawyers Forum newsletter. This edition follows our Annual Conference and provides a summary of the fascinating discussions led by our panellists and a very timely and relevant case update by Peter Caldwell examining recent case law concerning Poland. With many thanks to our contributors.

A message from the Chair

Welcome to the latest edition of our Newsletter. We were delighted that so many of our members, including those from outside the UK, were able to join us for our Annual Conference on 15 October 2021, which was a huge success. I would like to thank all those on the Committee who worked hard to get the conference up and running, and to our fantastic panellists who provided a fascinating, thought provoking and sobering day. This Newsletter contains a summary of each Panel's discussion and a helpful summary of the critical decision of the Divisional Court in *Wozniak v Poland* [2021] EWHC 2557.

We are also delighted to have launched the 2021 John Jones QC Essay Competition. The deadline for entrants is 17 December 2021 and the first prize is £750, with second prize receiving £250 and the top three having free membership of DELF and a free copy of the recently published Extradition law: a practitioner's guide. The details are in this newsletter, and I would encourage all those who are eligible to enter, and for those who are not, to encourage the junior members of their firms or chambers to do so.

This is my first Newsletter as Chair of DELF and I would like to briefly outline our plans for the year. As well as Christmas drinks (to be announced shortly), the return of the annual dinner, a summer party and educational events throughout the year, we want to build on our relationships with our international members to help further collaboration between defence extradition lawyers across jurisdictions. To start this work, we are putting together an international members' sub-committee and launching in this newsletter our advert for one of our international members to formally join the Committee.

I hope you find this an informative and interesting read. Many thanks to all the contributors and for Áine Kervick for her tireless work in putting it together. As always, if you have any ideas of what DELF can do for you, of educational events, or issues that you want us to raise your behalf with the courts, please do not hesitate to get in touch.

James Stansfeld
Matrix Chambers

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.

Invitation for one International Member to join the DELF Committee

To help develop and build our relationships with our members outside the UK, the Committee would like to appoint one of our international members to join the Committee as our International Officer. If you are outside the UK and interested in joining the Committee, please can you send expressions of interest with a short paragraph detailing what you consider DELF could do for international members to admin@delf.org.uk by **26 November 2021.** The Committee will then be asked to vote to appoint one applicant.

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. 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 Paul Goldspring, Edward Fitzgerald QC and Jasvinder Nakhwal will select the winning essay.

The competition is open 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:

On 23 September 2021, the High Court dismissed the appeals of *Wozniak & Chlabicz v Polish Judicial Authorities* [2021] EWHC 2557 (Admin).

If the Supreme Court decides that it is permitted to depart from the decisions of the CJEU in *LM* and *L and P*, how should it answer the following question:

Is the test set out in *LM* and *L and P* correct? That it is only if the European Council were to adopt a decision under Article 7(2) TEU, that the executing authority could refuse extradition due to 'generalised deficiencies', without having to carry out a specific assessment (see §§ 58-59 of *L and P*)?

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

The closing date for entries is 4pm on **17 December 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 January 2022.

- The winner of the competition will receive a prize of £750, a copy of Extradition Law: a practitioner's guide by Rebecca Niblock and Ed Grange and membership to DELF for 2022.
- Second place will receive a prize of £250, a copy of Extradition Law: a practitioner's guide and membership to DELF for 2022.
- Third place will receive a copy of Extradition Law: a practitioner's guide and membership to DELF for 2022.

CPT Update

On 9 November, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published its 2020 visit report on police and prisons in Spain. Available here.

On 4 November, the CPT issued a public statement on Bulgaria. Available here.

At the end of October, the CPT held its 106th plenary meeting during which it adopted the reports on its periodic visits to Switzerland (March/April 2021) and the UK (June 2021) and also on its ad hoc visits to Georgia and Romania (May 2021).

DELF Annual Conference – 15 October 2021

On 15 October 2021, DELF hosted its annual conference at the Honourable Society of Lincoln's Inn. Anand Doobay of Boutique law delivered an excellent Keynote speech and began by noting the change in scale of extradition proceedings in England and Wales with 3 cases in 1960 and over 2,000 arrests by 2015-2016 and moving to discuss the impact of Brexit. He also discussed the difficulties with assurances particularly as monitoring remains patchy and the courts move from considering whether there have been any breaches at all to whether the breaches have been systemic. Lastly, he touched on tagged curfews and the impact of the pandemic on bail conditions and the difficulties with monitoring equipment by EMS which have serious consequences for defendants made subject to those conditions, especially where there is no evidence of attempts to flee.

We have a summary of each panel below. With many thanks to all of our panellists and speakers.

Panel 1: The Erosion of the Rule of Law in Europe

The DELF 2021 Conference began with a panel discussion focussing on "The Erosion of the Rule of Law in Europe" chaired by Rebecca Hill with Laurent Pech, Professor of European Law at Middlesex University, Maria Ejchart-Dubois, Lawyer at the Polish Commission for Human Rights and co-founder of the free courts civic initiative and Clare Montgomery QC, Matrix Chambers (lead counsel for Wozniak & Chlabicz), all providing expert insight.

Rule of Law Backsliding

The general mood of the panel was one of concern and fear for the future as the Rule of Law in Europe has increasingly come under threat, as evidenced not only by developments in Hungary and Poland, but other countries in Europe with the UK not immune to such criticisms. This session primarily dealt with developments in Poland, well known by extradition practitioners since the 2015 election of the populist PiS party, which Professor Pech described as "rule of law backsliding". He defined this as the process through which elected public authorities deliberately implement blueprints designed to systematically weaken, capture and/or annihilate internal checks on power. Firstly, the independence of the judiciary, prosecutors and broadcast media is attacked. Secondly, lawyers, academics and civil society groups are targeted.

The panel explored how these changes are possible. A false narrative is created to encourage the belief that fundamental changes to the judiciary are required and to justify the systemic destruction of an independent judiciary. Unconstitutional changes are then presented as constitutional. The checks and balances provided by an independent judiciary and media which are vital to a democracy are deliberately undermined resulting in rule of law backsliding.

Political influence overriding judicial independence

A discussion took place regarding the steps taken in Poland to dismantle judicial independence and the rule of law. These were summed up as:

1. No independent prosecution service (as it is now under the control of the Minister of Justice);
2. The unconstitutional re-establishment of the National Council of the Judiciary whose members are made up of those elected by the ruling majority and whose powers include appointment, promotion and discipline of judges (Addendum: Poland's NCJ was expelled from the ENCJ on 28 October 2021, the first ever NCJ to be expelled). This has led, in Poland, to an increasing number of courts being composed, in part, by what the panel described as "fake" judges;
3. The "muzzle" law preventing judges from questioning judicial "reforms" and the irregular appointments made by the neo-NCJ and punishing those who do;
4. The lowering of the retirement age of ordinary judges and forced retirement of Supreme Court judges as well as the mass dismissal of the presidents and vice-presidents of ordinary courts, resulting in 100's of judges being placed into early retirement and/or replaced by political appointees combined with the arbitrary power of the executive to allow some judges to work beyond retirement age (both the ECJ and the European Court of Human Rights (ECtHR) have found against these measures since);
5. The use of the irregularly composed now captured 'Constitutional Tribunal' of Poland to make it unconstitutional for the Judiciary to directly apply EU Law and ECtHR judicial requirements in particular as regards the 'established by law' criterion;
6. The (unconstitutional) creation of the Disciplinary Chamber of the Supreme Court (the independence of which is not guaranteed) which has inter alia the power to lift immunity from prosecution of judges, which results in their automatic suspension from office and reduced salaries; and
7. Harassment of lawyers who are also subject to similar disciplinary sanctions.

The result is that Poland's Supreme Court has effectively become contaminated with irregularly appointed individuals. Judges seeking to comply with EU & ECtHR rulings are harassed, investigated and/or sanctioned by the Disciplinary Chamber creating a chilling effect on judges. Ordinary courts have been purged with 140-170 Presidents and Vice Presidents arbitrarily dismissed and replaced with those friendly to the Minister of Justice. Poland has become a "legal black hole" (Addendum: for the first time in the history of the EU, a (Polish) judge has been suspended for seeking to send rule of law related questions to the ECJ).

Maria Ejchart-Dubois, who currently practices in Poland, introduced a more personal note: "Our world collapsed,

lawyers were not prepared for this. The values lawyers believed in simply disappeared. Substantive and legal argument no longer mattered." She commended the brave judges who "face intensive repression", the "activism of lawyers" and Poland's long history of protest and strong civil society. There have been some successful legal challenges such as Kuba, an administrative court judge, (Joined Cases *C-585/18, C-624/18* and C-625/18 *A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy*), where, in 2019, the CJEU ruled that the disciplinary chamber of the Supreme Court is not an independent court and the composition of the judiciary within the chamber is not an impartial or independent tribunal (Kuba was reinstated) and the case of the judges Broda and Bojara (applications no. *26691/18* and *27367/18*) where in 2021 the ECtHR held that their arbitrary dismissals as Vice-Presidents of a court violated Article 6 of the European Convention on Human Rights (ECHR).

Sadly, these successes are far outweighed by the significant number of judges forcibly retired or dismissed from senior leadership positions without remedy and the appointment and promotion of many "fake judges", who currently make up over 19% of the judiciary.

What hope for the future?

The panel were pessimistic about the future concluding that the extreme position adopted by the irregularly composed Constitutional Tribunal of Poland (which interprets the Constitution) undermines all mutual trust in EU law. This will inevitably impact on EAWs. The EU is finally "waking up" to the dangers of this erosion in the rule of law. Poland (and Hungary) has been subject to Article 7(1) TEU proceedings, infringement action is pending plus daily fines of over 1 million Euros. The ECtHR is also likely to prioritise Polish cases so we should expect a "tsunami of ECHR/CJEU litigation". The panel felt it was unlikely the Polish Government will enter into a short-term compromise, but by failing to do so they will inevitably lose every case in the CJEU and ECtHR. To date there have been around close to 100 Polish Rule of Law cases in the ECtHR and CJEU, soon there will be 1,000's.

The panel concluded it is likely that all judges will eventually need to reapply for their jobs via the compromised neo-National Council of the Judiciary (recently expelled from the ECNJ due to its lack of independence and active complicity in undermining judicial independence in Poland) and the Government will ultimately control all judiciary in Poland, via a forthcoming "flattening" of the court structure. The ability to have a fair trial will be dependent on the courage and wisdom of individual judges. With 130 disciplinary proceedings pending, judges operate in a climate of fear and uncertainty where legitimate rulings could result in disciplinary action. The only way the Rule of Law could be rebuilt, in the panel's view, is for Poland to follow, fully and promptly, the judgments of the CJEU and ECtHR which provide clear guidance on how this can be remedied. However, the political space and will is required to make such changes and this does not currently exist.

The panel raised concerns about the impact these "reforms" have had on the minds of Polish society and judges and encouraged European lawyers to be consistent and use all legal tools available to challenge the Polish system. A helpful website exists to identify all "fake judges" to establish when or by whom they were nominated to assist with legal challenges in this area.

Wozniak & Chlabicz (Wozniak v the Circuit Court in Gniezno and Wojciech Chlabicz v Regional Court in Bialystok [2021] EWHC 2557 (Admin)

The first session concluded with commentary on the recent landmark judgment of *Wozniak* (see detailed analysis below) where Clare Montgomery QC acted as leading counsel for the two appellants. This decision was disappointing but not altogether surprising given that the Court confirmed it was bound by CJEU decisions prior to 31 December 2020: the rulings in *LM (C-216/18 PPU*) and *L and P applied (C-354/20 PPU and C-412/20 PPU*). Therefore, where evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing state exists, a specific, precise and individualised analysis is still required to show such deficiencies have a specific impact on a particular case. An automatic refusal of a European arrest warrant requires a decision by the European Council to suspend the Framework Decision 2002/584 in respect of Poland.

The panel described this as Kafkaesque. No one will know in advance who the tribunal will be as they are randomly selected. If it consists of a fake judge, the legitimacy of the judge cannot be challenged in Polish law and a reference to the CJEU is not possible. The Irish Supreme Court has recently recognised the impossibility of this situation and noted the troubling developments in the rule of law since *LM*. In July 2021 it made a further reference to the CJEU (*W O, J L v Minister for Justice and Equality (C-480/21))* dealing with this issue.

Practitioners were advised that requests for further information under Article 15 Framework Decision should still be made of the Polish Judicial Authority, such as the potential identity of the judges, undertakings regarding their independence and impartiality, the ability to challenge their appointment, and an assurance that the trial will be conducted in accordance with Article 6 ECHR, even if no response is forthcoming.

The panel were disappointed that the Admin Court did not grapple with the reality that as soon as the system is challenged in Poland, those challenging become the target for retribution.

The panel acknowledged that as long as the Framework Decision 2002/584 applies the principle and assumption of mutual trust and confidence remains an obstacle, as does the political investment in the EU of bringing and keeping Poland within the EU.

However, the fight goes on with a further challenge in sight with the Irish Supreme Court CJEU reference, an Amsterdam CJEU reference to be heard in November and the pending *Wozniak* application for permission to appeal to the Supreme Court. Whether CJEU case law is still binding, or the Supreme Court can diverge from it, and the possibility of challenging whether a judge is properly considered an issuing Judicial Authority, will be the subject of further judicial exploration (Addendum: A Norwegian court recently refused a surrender to Poland on the ground, inter alia, that there is now a 'significant greater danger and probability' that the Polish court which may try the suspect may not consist of lawful judges) .

What difference does the Trade and Cooperation Agreement (TCA) 2020 make?

The Framework Decision 2002/584 and Article 7 (TEU) no longer apply to extradition arrests post Brexit and the TCA 2020 applies. The status and binding nature of CJEU rulings is uncertain. Arguably CJEU case law should no longer apply in UK law and post Brexit arrest warrants should not be bound by the decisions in *LM, L & P* or indeed *Wozniak*. This will be the next focus of attention by the courts.

The TCA 2020 reinforces the principle of mutual trust and confidence and the assumption that issuing States will comply with such principles. The panel suggested practitioners should start with establishing if these basic principles exist:

1. Is the individual judge who issued the EAW an independent Judicial Authority?
2. The above question should not only consider the independence of the person issuing the arrest warrant but their structural position ie can they act independently once in office?
3. Is judicial oversight or an independent assessment of that person capable of review before the request is issued?
4. Is a reference to the CJEU possible?
5. If such arguments regarding the authorising process fail, submissions regarding Article 6 fair trial still exist.

The panel noted that an attack on the authorising process is always preferable as this refers directly to the challenges posed by the erosion of the rule of law. The bar for a successful Article 6 challenge is set so high it is very difficult to meet.

This first session concluded with an illuminating Q&A session and debate on the future. For some players in the Polish Government, it is a matter of political survival not to restore the rule of law. Fines imposed may not be paid which could result in the EU withdrawing funding. It was felt that Poland is not yet ready for "Polexit" as

membership of the EU in Poland is popular, but that may change if EU funding is withdrawn. The threat to mutual trust cannot be underestimated and other national courts/governments may follow Poland's example and start to ignore the CJEU. If the EU becomes "a la carte" this undermines the principle of its foundation and may cause it to contract. The impact of developments in Poland cannot and should not be underestimated.

Kate Goold
Bindmans LLP

Panel 2: Russia, Belarus and Eastern Europe – recent geopolitical developments

Panel 2 was a fascinating and sobering discussion that examined Russia's current political problems and the impact of its reach for neighbouring countries. It was chaired by Mark Summers QC with John Lough of Chatham House, Siarhej Zikratski a lawyer based in Belarus and Judith Pallot, Emeritus Professor of Christ Church, Oxford.

The panel began with a discussion examining how Western countries have responded to developments in Russia and Eastern Europe over time and how ill equipped Western nations have been to deal with Russia's skill at spotting changes underway in western societies and exploiting divisions therein. It was noted that change is expected as President Putin's leadership is faced with the problem of succession and the current regime feels the need to protect itself and this is, in part, the impetus behind the current crackdown in Russia on civil society and further afield in respect of Russia's involvement in Belarus.

It was noted that succession becomes increasingly difficult to manage the longer Putin remains in power and many commentators consider the current political system within Russia to resemble the situation in the 1980s in that the system cannot innovate because it fears radical reform and so controlling the current political situation and postponing inevitable change becomes a priority (see, for example, the treatment of Alexei Navalny). This uncertainty increases as we approach 2024 when Putin's 4th term ends and so, in an effort to control, we are likely to see Russia continue to pursue its enemies at home and abroad but with increased vigour; this will likely be through efforts to manipulate Interpol, politically motivated civil proceedings in the UK, commissioned criminal cases arising from inter-elite disputes and the use of the media to attack political adversaries. The picture painted for the future of the regime was bleak and it was agreed that Belarus is a testing ground for the types of repression that we could see in Russia in future.

Key themes

Consistent themes emerged in respect of Russia and Belarus in terms of the use of extradition and Interpol against citizens and political activists, repressions arising from the defence of political activists and violence in places of detention. Russia's abuse of Interpol is well documented and 2021 saw the publication of information confirming that Belarus had sent various requests to Interpol in respect of political matters which were refused as they were political in nature. In September 2021, a Belarusian citizen was detained in Poland as he had been flagged on the Interpol system and he was later released as the request was political in nature; the well-publicised case of Roman Protasevich was briefly discussed. Whilst Belarusian citizens may feel relatively safe in European countries, the same cannot be said of those who are in Russia and it is understood that Russian special services are involved in some kidnapping cases of Belarusian citizens.

In respect of fair trial rights in Belarus, lawyers for activists are routinely targeted by the state and there is limited access to legal representation in any meaningful sense. For example, the right to confidential and restricted documents between lawyer and clients is not assured, the first communication between lawyer and client takes place after any criminal trial has begun and is limited to around 5 or 10 minutes without any confidentiality and many cases take place in closed court.

Prison conditions

Prison conditions were a key theme for this panel and we were helpfully provided with background to the Soviet prison model which was established in the 1930s in the Gulag and was developed to mobilise resources in the periphery of the Soviet state as a system of forced labour. The model in Belarus today would be considered a "pure soviet model" prison estate. Key features which have been carried over from the Soviet era include: collectivism (expressed in dormitory accommodation), self-government (prisoners holding functions including discipline), militarisation (prison officers holding military ranks), extreme secrecy, harsh penal culture generally. New features that have emerged are: corruption, domination by professional gangs, torture and inhuman and degrading treatment (although there is limited knowledge of the level of torture during the Soviet era as a comparator).

The poor conditions of Russia's prisons are well established and known to extradition practitioners. The position in Belarus is very similar with very poor conditions, serious overcrowding and many reports of torture. It was noted that a difference between Belarus and Russia in respect of prison conditions arises from Russia's membership of the Council of Europe and for extradition purposes that means that there is no prima facie case required in Russian cases. Until relatively recently, section 81 of the Extradition Act 2003 and Article 6 have served reliably to prevent extradition to Russia in the vast majority of cases. However, it was noted that there seems to be some battle fatigue growing in relation to Russia and that, at present, arguments around prison conditions are keeping that particular door open for now. As a positive, Russia's membership of the Council of Europe does apply some leverage on the system towards reform and since the 1990s the number of prisoners has halved. However, in terms of physical conditions there has been limited improvement. There have been some attempts to reform the prison system in Russia and the most recent relates to a proposal for a multi-functional super prison to be built in each region with less serious offenders to be sentenced to forced labour (which will further reduce the prison population figures).

From a practitioner's perspective, there was a discussion about the impact of a state-run assault on civil society organisations and how this limits the information coming from Russia which describes the reality of the situation on the ground, particularly in respect of prison conditions. This contributes overall to a view that Russia may not be a very nice place but that it is stable; when in fact torture within the prison system (as an example) appears to be highly organised. The clampdown on civil society means that the reality of the system is less visible and lawsuits against those who criticise the existing regime deter non-Russia based specialists from describing how the system is working in practice. This practice was described as part of a wider process to close down criticism and alter perceptions of Russia.

Ultimately, the panel concluded with grim realism in respect of the limited impact practitioners from the outside can have for political activists on the ground in Belarus at this time but with a call to continue to raise important questions about human rights and the treatment of citizens in the Russia and Belarus whenever possible in order to keep the subject on the agenda in the hope that the message of what is really taking place is heard and not hidden.

Áine Kervick
Kingsley Napley LLP

Panel 3: Alternative actions and remedies post-extradition

Panel 3 considered practical aspects of countering extradition requests with specific regard to causes of action before different international bodies, courts and tribunals. The session, chaired by Alison Macdonald QC, considered three case studies which were described as "concrete factual examples" about how international procedures had been used in different cases. The conference heard from Jessica Finelle, a partner at the French firm of Zimeray & Finelle; Alex Tinsley of 9 Bedford Row and Christophe Deprez of Jus Cogens, a Brussels-based human rights law firm.

Jessica Finelle- Carlos Ghosn

We first heard about the case of Carlos Ghosn, the Lebanese businessman who was detained in Japan from 19 November 2018. Under Japanese law, suspects can be detained for up to 23 days without charges being brought. In that time he had no access to the case file and he was extensively interviewed by the prosecution in the absence of his lawyer. Multiple requests for bail were refused. Many people are not aware that the Japanese criminal justice system has been subject to significant criticism.

99% of people before its courts are convicted. The UN Human Rights Council's Working Group on Arbitrary Detention considered his case and whilst Japan has not ratified the protocol the group was able to make an assessment as to the nature of Mr Ghosn's detention. It is in these circumstances that Japan knows that they are being monitored by these international bodies and whilst none of the decisions of the working group are binding they are clearly declaratory and are used to highlight concerns and give publicity to a case such as this. In any event Mr Ghosn was released on bail (under very strict conditions) in March 2019, then incarcerated again and placed under house arrest, before absconding to Lebanon in December of that year. Even though Ms Finelle's law firm is currently not involved in the proceedings against Mr Ghosn in France, her view is that the French procedure will try to rely on elements from the Japanese authorities. It will then be argued that the evidence from Japan is contaminated by the violations of his human rights he has already suffered, as found by the UN Working Group on Arbitrary Detention.

Alex Tinsley – Kokorev v Spain

The next case study concerned the case of Vladimir Kokorev, his wife Julia Maleeva and their son Igor Kokorev. They consented to their extradition from Panama to Spain in 2015 for alleged offences of money laundering. However they were then detained for two years and they still have not been tried six years after their extradition took place. Three issues were discussed. First, the allegations changed after extradition and it is argued that their detention in Spain became based on the new matters, which were not the subject of the extradition request. It is therefore argued that there has been a breach of specialty between Panama and Spain. Second, there is concern regarding the Spanish procedure which permits the withholding of access to the case file. Even though the law was amended in 2015 to require disclosure of key documents for those deprived of liberty, case-law fully articulating the requirement emerged only after these detentions. In the Kokorevs' cases, even the detention decisions themselves were initially redacted, and the case file itself was not disclosed to the defendants until well over a year after their arrest, which it was argued limited the scope to challenge detention effectively. Third, the proceedings themselves have taken a very long time. The highly-publicised investigation has lasted since 2009 and the whole Kokorev family has lived in a state of uncertainty since then.

Alex spoke to the remedies pursued on behalf of Igor Kokorev. Reference was made to a Constitutional Court challenge in respect of the length of proceedings. A complaint has been brought before the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil & Political Rights (ICCPR). The complaint, drawing on ECtHR case-law under Article 5 ECHR, argued that breach of a specialty obligation crystallising in deprivation of liberty entails arbitrary detention contrary to Article 9(1) ICCPR; that withholding of evidence material to detention infringes the right to effective judicial review of detention under Article 9(4) ICCPR; and that overall length of proceedings for the purposes of Article 14 ICCPR should be measured as from the point a criminal proceeding first has an impact on the person and places the person in uncertainty. The complaint is under consideration as to admissibility and merits.

Christophe Deprez – Nizar Trabelsi

Mr Trabelsi was tried and sentenced in Belgium to 10 years' imprisonment for his association with Al-Qaida and for plotting to attack US targets, including American soldiers, at the Belgian Kleine-Brogel Air Base. Before the expiration of his sentence the US issued a request based on a series of terrorism related charges.

The US prosecution sought help from the Belgium government but, clearly, his extradition to the US could not be executed on the basis of the same conduct. In the extradition process, Belgian courts thus excluded the Kleine-Brogel episode from the scope of any extradition. His extradition from Belgium was further subject to an interim measure pursuant to Rule 39 of the Rules of the European Court of Human Rights which was imposed on 6 December 2011 on grounds of Article 3 ECHR. However, before the Strasbourg Court could rule on the substantive application Mr Trabelsi was extradited on 3 October 2013 to the United States in defiance of the Strasbourg Court's order. Back in Belgium, urgent civil proceedings were brought to force the Belgian government to take diplomatic measures with a view to having the US government comply with the specialty limit initially imposed by Belgian courts.

The case was ultimately taken to the Court of Cassation in Belgium which confirmed that, because the limit on extradition was initially inspired by the *non bis in idem* principle, respect for specialty was not only due to the requesting state but an individual right and that Trabelsi had standing to have that right enforced before a Belgian court.

Discussion and conclusions

There was then a discussion comparing the different bodies. Is the UN a more effective organisation than the ECtHR? The UN working group is said to be more flexible than Strasbourg and more "user friendly". However it is known for declaring that Julian Assange was in a "state of arbitrary deprivation of liberty" when he had fled to the Ecuadorian Embassy where he resided, in breach of his lawfully imposed bail conditions, in order to avoid extradition to Sweden.

The *Trabelsi* case demonstrated the importance of working with lawyers from other jurisdictions and, importantly, the representations have been paid for by US Legal Aid. In relation to the Spanish case there is the potential to make submissions for a warrant to be withdrawn but the remedies in the international domain are worthy in themselves. However it seemed that the session demonstrated that the strongest tool to resist extradition remains with domestic as opposed to international courts. The *Kokorev* case has provided ample opportunities to achieve justice for the individuals concerned when, in the other two cases, both the UN and the ECtHR's rulings were mainly ignored by the governments concerned.

Benjamin Seifert
Temple Garden Chambers

Panel 4: Political corruption and the abuse of Interpol

The final panel of the day dealt with victims of Interpol and despot states. The four panellists were Matthew Hedges, an academic who was arrested, tortured, detained and convicted in UAE for allegedly spying for the UK government without any evidence, Ali Issa Ahmad who was arrested and tortured for wearing a Qatar football shirt in the UAE, Ms Bota Jardemalie, Kazakh human rights lawyer and Dr Mamtimin Ala, Uyghur activist and European representative for the East Turkistan Government in exile.

The Panel told their stories and those of some of their friends and associates and described how persecution and repression from repressive governments can reach across borders. The very personal insights into the abuse suffered is a poignant reminder of the suffering that individuals who are the subject of legal proceedings can undergo and highlighted that much of the work we do is about the people involved more than the law.

Matthew Hedges, a British academic, was unlawfully arrested in the UAE in May 2018. He was held in solitary

confinement, tortured and eventually coerced into making a false confession. After 7 months, he was falsely convicted of spying for the British Government and was sentenced to life imprisonment. After heavy international pressure, he was finally released.

Ali Issa Ahmad is a British football fan who, in January 2019, was forcefully detained and tortured in the UAE for wearing a t-shirt with the flag of Qatar during the Asian Cup football tournament. Ali was beaten up by plain-clothes police officers and taken to prison where he was stabbed. He was only released after international pressure and agreeing to admit to wasting police time. He gave graphic descriptions of the mistreatment and torture he had suffered.

In relation to Interpol and the abuse of its system by the UAE Matthew Hedges explained how he and Ali Issa Ahmad were campaigning to prevent the election of the UAE candidate for the president of Interpol Mohamed Al-Raisi from being elected as they hold him responsible for their mistreatment and torture in UAE custody.

Ali Issa Ahmad said: “General Al-Raisi didn’t show any concern for justice or human rights. The world police ‘Interpol’ is very big and has a heavy responsibility. I believe general Al-Raisi does not deserve this honour because he failed to even bring his attention to my case. I hold him responsible for my case. I was under his command detained and stabbed and kept in prison despite being innocent”.

Bota Jardemalie is a Kazakh human rights lawyer based in Belgium. She has been the subject of a politically motivated Red Notice, and has seen many of her associates at risk of extradition and kidnapping. Her family are at serious risk and her brother remains detained in Kazakhstan. Due to her association with the former opposition leader Mukhtar Ablyazov she has been a target of the Kazakh authorities who have pursued her in Belgium. The court system has been misused through Mutual Legal Assistance requests which have resulted in Kazakh officials being allowed to attend the search of her property. Private security contractors were also sent to intimidate her and as a result several individuals received criminal convictions. She continues to be harassed whilst she fights for human rights in Kazakhstan.

Ben Keith
5 St Andrew’s Hill

Case Update:

***Wozniak v The Circuit Court in Gniezno, Poland, Chlabicz v Regional Court in Bialystok, Poland* [2021] EWHC 2557 (Admin) (23 September 2021)**

These two extradition appeals raised common issues about the impact on extradition from the UK to Poland of legislative developments in Poland since 2015 affecting its judiciary.

W argued that the Respondent is no longer a judicial authority within the meaning of Article 6(1) of the EAW Framework Decision because of the legislative changes in Poland, and thus that his EAW was therefore not a valid Part 1 warrant pursuant to s 2 of the EA 2003, which requires such warrants to have been issued by a judicial authority. The appeal of C put his case on the ground that by reason of those same legislative changes his extradition would violate Article 6 of the ECHR and is thus barred by s 21A of the EA 2003 because of the legislative changes in Poland.

In the course of a lengthy judgment, Dame Victoria Sharp P. recalled the factual background to the legislative changes in Poland that had affected judicial independence. The Court referred to the European Commission’s *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland* (the Reasoned Proposal) given in December 2017. For further background the Court adopted the summary given in *Lis No.1*, at [6]-[25].

Domestic consideration of the impact of these changes had been prompted by the Irish High Court's reference to the CJEU in the case of *Celmer*. In *Lis and others v Regional Court in Warsaw, Poland and others* [2018] EWHC 2848 (Admin) (*Lis No 1*) the Divisional Court reserved its judgment pending the decision of the Grand Chamber in July 2018. The Grand Chamber's judgment on the Irish reference, reported as *Criminal proceedings against LM* [2019] 1 WLR 1004, where the Grand Chamber promulgated a two stage process akin to that adopted by the CJEU in *Aranyosi*: first to assess whether there are systemic or generalised deficiencies, and only then to engage in a specific assessment of risks to the individual.

Significantly, for the future development of the law, the CJEU held that the only circumstances in which an executing judicial authority would be required to refuse automatically to execute an EAW, without having to carry out any specific assessment to the individual would be if the European Council were to adopt a decision determining, *per* Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State [72].

Continuing its review of the legislative developments, the Divisional Court noted the decision of the European Commission to commence infringement proceedings against Poland in February 2020, before turning to the decision in *L and P* (December 2020). Once again the CJEU had been invited to consider the sufficiency of a systemic lack of judicial independence and again the CJEU rejected the submission that the circumstances in Poland could allow an executing authority to dispense with a second stage enquiry into the circumstances of the individual.

Summing up the arguments the Court noted that the parties were agreed that on the status of decisions of the CJEU following the UK's exit from the EU; decisions prior to 31 December 2020 were binding on the Court and that the Court was entitled to have regard to decisions after that date. Accordingly, the Court was always bound to apply the decisions in *LM* and *L and P*.

The appellants submitted that the *Aranyosi* Stage 1 was passed and pressed the Court to make enquiries under Article 15(2) of the Framework Decision as to the identity of the trial judge and seek assurances that the judge would not be subjected to disciplinary measures – though the Court felt it unlikely that the appellants would accept at face value whatever replies came back. It was conceded by the Appellants that the decisions in *LM* and *L and P* precluded a challenge before the High Court on the basis (a) that the Respondent courts cannot be issuing judicial authorities for purposes of the EAW Framework Decision or the EA 2003 because they lack the requisite independence or (b) whether a body is to be regarded as a judicial authority cannot depend solely on the outcome of the Article 7 TEU process, but that sufficient structural erosion by way of legislative changes affecting independence could produce the same outcome.

The Respondent judicial authorities, whilst disputing that stage 1 had been met, directed their submissions to the absence of specific risks to the Appellants. The Respondents submitted that to extrapolate general systemic deficiencies as a general risk to the Appellants constituted a process of circular reasoning that was inconsistent with the decision in *L and P*.

The Court had no hesitation in answering the question whether the *Aranyosi* test is satisfied as plainly "yes". Whilst the Court had no jurisdiction to make an Article 15(2) request, as the Court was not an executing judicial authority, the Court could make a request from its inherent jurisdiction; it did not require further information to decide the appeals. Applying the analysis in *Orobator*, which had held that it is possible, even in a state where the judicial authority is not fully independent, for a trial to take place that is not flagrantly unfair, the Court rejected the submission that a lack of independence would necessarily result in a flagrantly unfair trial.

Considering then the matters relevant to the cases of the individual appellants the Court concluded that it was not

satisfied the evidence shows there is a real risk of the breach of the essence of their right to fair trial under Article 47 of the Charter, or of a flagrant denial of justice:

- There was no evidence that the individual Polish judges who issued their EAWs were not independent judicial authorities.
- Structural weaknesses in judicial independence arising from the reformed judicial appointment process in Poland do not lead to the conclusion that judges appointed under it lack independence once in office.
- The decision of the ECtHR In *Reczkowicz* emphasised that its decision was only concerned with the Disciplinary Chambers, and that it was *not* concerned with 'the legitimacy of the reorganisation of the Polish judiciary as a whole'.
- The evidence was insufficient to demonstrate that systemically and generally there is interference in cases before the Polish criminal courts.
- Finally, the Court noted the right to be defended by lawyers; the availability of legal aid; the right to cross-examine witnesses, to call evidence and make legal arguments at a trials which would be held in public - safeguards in relation to fair trial rights previously identified in *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin), [97].

Comment

Ultimately, the Court had been bound to apply the decision in *LM* and *L and P*, which militated against any finding of a risk to the Appellants. Despite concerns as to the availability of a fair trial in Poland, the bar on an Article 6 challenge is set so very high that there is little chance (despite the prospect of worse to come), that an individual could ever surmount it. The solution may be to reassess whether the *Aranyosi* principles are really the best means of addressing fair trial rights in a jurisdiction facing a complete collapse in the independence of its judiciary. But that is a question only capable of being answered by the CJEU, or perhaps the Supreme Court, or even perhaps, the winner of the DELF John Jones QC Essay Competition.

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