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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

We are very pleased to bring you this month's newsletter which includes case updates from Germany by Dr. Mayeul Hiéramente, the winning essay from the John Jones QC essay competition and updates on our recent in person events this year which considered the legal implications of sanctions in the context of the Russian war in Ukraine and the impact of the Trade and Cooperation Agreement for Part 1 requests. With many thanks to all of our contributors and to all those who have assisted DELF as we have transitioned to a return to in-person events.

A message from the Chair

Welcome to the latest edition of our newsletter. We hope you find it an interesting and informative read. It has been a busy few months for DELF, culminating in the return of our Annual Dinner, which was a truly fantastic evening, rounded off with some excellent karaoke. Thank you to all involved in organising it and to Mrs Justice Arbuthnot for an excellent keynote speech. We have also had some interesting seminars, have made representations to Parliament about Russia, and are delighted to have announced the winner of the John Jones QC Essay Competition. Many congratulations to Sapan Maini-Thompson for an excellent essay and thank you to all whom entered the competition. Sapan's essay is in this newsletter and is certainly worth a read. Thank you also to our colleagues in Germany for two insightful articles.

Looking forward, we are delighted to announce that we will be hosting summer drinks on 14 July 2022 at The Fence in Farringdon. We will also shortly be announcing a date for a seminar aimed at our members who are relatively new to extradition and please look out for the announcement for the date of DELF's Annual Conference 2022. We are also meeting with the Administrative Court alongside the ELA on 28 June 2022 and if you have any comments or issues you would like us to raise, please e-mail enquiries@delf.org.uk.

As ever, if you have any thoughts on how DELF can represent your interests, please do not hesitate to contact me.

James Stansfeld
Matrix Chambers

Our Recent Activities

DELF Annual Dinner – 27 May 2022

The DELF Annual Dinner took place at the Brewery in London on Friday 27 May 2022. We hope that those of you who attended had as much fun as we did. We were very grateful to be joined by the Right Honourable Mrs Justice Arbuthnot who gave an excellent, and very entertaining, keynote speech. Thank you to all those on the committee who worked tirelessly to put such a fantastic evening together.

Criminal Procedure Rules Committee

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.

High Court Liaison

We will be participating in a court user liaison meeting with the High Court later this month in order to make representations on behalf of our members. If you have any comments or issues you would like to raise, please email enquiries@delf.org.uk by Friday 24 June.

Educational events and socials

7 April 2022: Russia and Ukraine – Exploring the Impact of sanctions, the practicalities and ethics of representation and what the future holds

On 7 April, DELF hosted a hybrid seminar from the offices of Kingsley Napley on the future of Russia's involvement in the international community, the Ukraine Justice Alliance and the practicalities and ethics involved in representing those subject to, or at risk of, sanctions.

We were delighted to welcome as our panellists for the evening, **Professor Judith Pallot**, Emeritus professor of Russian and Soviet Geography at the University of Oxford; **Sergey Golubok**, prominent lawyer and human rights defender; **Dr Anna Bradshaw**, Partner at Peters & Peters and co-editor of *The Guide to Sanctions*; and **Ben Brandon**, Partner and Barrister at Mishcon de Reya and member of the Ukraine Justice Alliance. The event was chaired by **Áine Kervick**, Senior Associate at Kingsley Napley and DELF committee member.

Providing context for the focus of the seminar, the discussion opened with an acknowledgement of the escalating war in Ukraine and the tragic events unfolding at the present moment. In response by the UK, there has been a series of sanctions against Russia, the scale of which is unprecedented.

The panel opened with an examination of the impact of the war in Ukraine on Russia's position in the global order. The use of soft and hard powers in Russia was discussed and their potential to shape international behaviour and outcomes including the evolving political powers in Russia with the decline in influence of those perceived to be oligarchs. As a halfway point between soft and hard power, the use of sanctions in Russia as a political tool and alternative to war was discussed: in particular, what is the practical impact of these sanctions from a Russian perspective? Is there a tension between the utility of sanctions as a political tool and the increased harm of the sanctioned party / country?

Flowing from this conversation, the practicalities of the application of sanctions from the UK were discussed. Specifically, are sanctions meeting their intended purpose? How good is the UK at enforcing them? And when might we see the effects of the current sanctions' regime? It was concluded that April was too soon to see any real impact of sanctions as supplies and production will not yet be impacted and that September 2022 may be a time to revisit the impact. The panellists also considered the rule of law issues that arise around the types of sanctions regimes that are currently being imposed on Russia and practical considerations when representing those who are subject to such sanctions. It was observed that rule of law issues connected to such sanctions regimes may go some way to undermining their effectiveness longer term.

In addition to sanctions, practical options were explored in anticipation of any future supranational legal action, such as evidence gathering in a conflict scenario, reparations for those who have suffered harm (including reparations from sanctions), and penalties for sanctions breaches. The seminar concluded with our panellists and attendees sharing ideas about the role legal practitioners in the UK can play and what we can do to assist on the ground in Ukraine through organisations such as the Ukrainian Justice Alliance, which to date is on track to be the largest mobilisation of the international private sector in solidarity against an act of war. Direct contact can be made with the UJA here: https://ukrainejusticealliance.com/contact

DELF members will be aware extradition to Russia is in practice suspended (albeit not in law) through the approach taken by the CPS and Westminster Magistrates' Court to date. DELF has been holding meetings to discuss our response and has been in contact with relevant UK authorities. If you have any suggestions for DELF in respect of this issue, please email Danielle Reece-Greenhalgh at drg@corkerbinning.com.

Sameera Abdulrehman
Kingsley Napley LLP

12 May 2022: Emerging trends in Part 1 cases post-TCA

There was more than one pregnant pause in the Matrix seminar room filled with evening May sunshine as DELF members assembled – in real life – to chew over hypothetical post-EAW challenges to extradition. Far beyond the semantics (TCA / TaCA?) we were schooled by **Rebecca Niblock** (Kingsley Napley), **Stefan Hyman** (9 Bedford Row) and **Edward Grange** (Corker Binning).

The starting point is that because TCA is a treaty as opposed to a Framework Decision, it does not engage with the Extradition Act 2003 in the same way. We have moved on from the way in which the EAW Framework Decision influenced our domestic law because of the principle of conforming interpretation (per *Pupino*). Rebecca Niblock explained the possible mechanisms by which TCA could be said to influence our domestic law ("instruments of interpretation"). High up the list is S29 of the EU (Future Relationship) Act 2020 which contains a broad "sweeping up mechanism".

The eager reader should consider *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454 (especially paragraphs 75 to 78). In the extradition context, see further *Badea v Romania* [2022] EWHC 1025 (Admin) in which Fordham J grappled with whether one part of TCA (Article 597 regarding proportionality) meant a modified approach to Article 8 ECHR assessments was required. (Spoiler: No modification is needed due to TCA, but *obiter* Fordham J noted the special category of people entitled to re-trial might be different per *Konecny*.)

The interactive format worked well with (mostly) erudite discussion with the floor about the possible new arguments that could be deployed in Part 1 cases. It would do a disservice to the details to try to capture them here, but for example, practitioners are well advised to watch out for which EU Member States have exercised opt out provisions that can impact on reciprocity.

The final note was one of possibilities, perhaps tempered by the somewhat fearsome clash of legal principles (and acronyms). The homework for us all on the post-Brexit landscape has only just begun, with potentially new takes on familiar issues such as mutual trust, specialty, human rights and political offences. Hopefully this was the inception of some exciting novel arguments to come. DELF is extremely grateful to this especially scholarly panel and Matrix for their hospitality in making this rescheduled event happen. It was worth the wait.

Mary Westcott
Doughty Street Chambers

Case Update: Germany

Extradition Proceedings and Refugee Status in Germany - Current Developments

Article 3(2) European Convention on Extradition (ECE, CETS 024) stipulates that an extradition shall not be granted:

> "*if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.*"

Section 6(2) IRG (Act on International Mutual Assistance in Criminal Matters) transposes this obligation into German law. It is evident from the wording of Article 3(2) ECE and section 6(2) IRG that the issues to be determined in extradition proceedings are those relevant in proceedings regarding applications for political asylum. It stands to reason that persons fulfilling the criteria set out in article 1A(2) of the Convention relating to the Status of Refugees have a valid claim to oppose an extradition request from the country of their nationality. The German Constitutional Court has repeatedly emphasized the close connection between refugee law and extradition law (see e.g. *Constitutional Court, Decision dated 14 November 1979, no. 1 BvR 654/79*) and has rightly remarked that the fact that an EU Member State has granted protection to a citizen of the requesting state strongly suggests the illegality of an extradition to said state (see e.g. *Constitutional Court, Decision dated 2 February 2016, no. 2 BvR 2486/15*). It is, however, subject to much debate whether or not a positive decision to grant the person pursued the status of refugee binds the authorities and courts in an extradition case.

Background

Section 6 of the German Asylum Act stipulates:

"Decisions on asylum applications shall be binding in all matters in which the recognition as being entitled to asylum or to international protection as defined by Section 1 (1) no. 2.are relevant in law. ***This shall not apply to extradition procedures*** *or to procedures pursuant to Section 58a of the Residence Act."*

The Constitutional Court has not objected to this provision and has highlighted that an extradition requires a decision by the Higher Regional Court and that this Court is well-equipped and under the obligation to review the possibility of political persecution (see e.g. *Constitutional Court, Decision dated 23 February 1983, no. 1 BvR 1019/82*). The Constitutional Court previously held that a similar approach is warranted in case of a positive decision by another EU Member State granting the status of refugee (*Constitutional Court, Decision dated 14 November 1979, no. 1 BvR 654/79*). The Constitutional Court decided that, while such decisions might strongly suggest the existence of political persecution and require a careful assessment of the legality of an extradition, the decision by another State could not bind the German authorities. It argued in its 1979 decision that the practice of granting refugee status varied widely across Europe and therefore would not allow German authorities to merely rely on the outcome of foreign proceedings.

For decades, German Higher Regional Courts referred to the above-mentioned 1979 decision and refused the argument that decisions by foreign authorities might bind German authorities in extradition proceedings. The subsequent changes to European refugee law and the fact that procedures have been harmonized in the EU were commonly ignored. This started to change with a 2019 decision in which the Constitutional Court clarified that it has not yet been decided by the Constitutional Court whether a decision by another EU Member State has to be considered as binding. It suggested that this issue might have to be brought before the CJEU (see *Constitutional Court, Decision dated 22 October 2019, no. 2 BvR 1661/19*).

The relevance of article 267 TFEU in German constitutional law

The fact that EU law might be relevant for the application of German extradition law and the interpretation of the Act on International Mutual Assistance in Criminal Matters is of practical relevance to German extradition proceedings. Section 29(1) stipulates that the prosecutor has to apply for the Higher Regional Court to give a decision in respect of whether extradition is permissible. There is no possibility for appeal and so the only option for (limited) review is by way of a constitutional court complaint. As a consequence, article 267(3) TFEU would apply if the criteria set out in article 267(1) TFEU are met. Failure to request a preliminary ruling from the CJEU might in turn lead to a violation of

the German Basic Law and can be challenged in a constitutional court complaint. Article 101(1) s. 2 of the German Basic Law reads as follows:

> *"No one may be removed from the jurisdiction of his lawful judge."*

The Constitutional Court has repeatedly decided that the CJEU is a "lawful judge" in the sense of article 101(1) s. 2 and that violations of the obligation set out in article 267(3) TFEU can be considered in violation of the article (for the details see *Constitutional Court, Decision dated 30 March 2022, no. 2 BvR 2069/21*, paras. 36 et seq. with further references). This jurisprudence is especially relevant with regards to extradition proceedings in which the Constitutional Court has repeatedly decided to strike down decisions by Higher Regional Courts despite a lack of an explicit challenge by the complainants (e.g. *Constitutional Court, Decision dated 30 March 2022, no. 2 BvR 2069/21*, para 35; *Constitutional Court, Decision dated 19 December 2017, no. 2 BvR 424/17*, para 36).

The decision 2 BvR 2069/21

In the underlying extradition proceedings, the Turkish authorities had requested the extradition of a Turkish citizen of Kurdish descent for the alleged murder of his mother. The requested person objected to the extradition and highlighted that the Italian authorities have granted him refugee status. He claimed that the charges were brought because of his alleged (prior) affiliation with the PKK. The Higher Regional Court in Hamm refuted these claims, *inter alia*, on the basis of the nature of the crime and witness statements provided by the Turkish authorities. The Higher Regional Court also decided that the decision by the Italian authorities granting the status of refugee would not bind the German courts. The Constitutional Court decided that the reasoning by the Higher Regional Court violated article 101(1) s. 2 of the German Basic Law by refusing to address a possible relevance of EU law and a possible need to request a preliminary ruling from the CJEU (*Constitutional Court, Decision dated 30 March 2022, no. 2 BvR 2069/21*, para 52).

The Court then proceeded to discuss the relevant EU law that might be of relevance to the case:

It first notes (para 47) that article 9(3) of the Directive 2013/32/EU contains a provision that prohibits extraditions during ongoing applications for international protection under certain circumstances (prohibition of *non-refoulement*). It refers to commentators who deduce from the phrasing of this provision that an extradition must be impermissible once the requested protection has been granted (para 48). The Court further notes that some commentators have argued that articles 44 and 45 of the Directive 2013/32/EU as well as articles 11, 12 and 14 of Directive 2011/95/EU contain specific safeguards for the withdrawal of international protection and that these safeguards might be circumvented if one were to address these issues solely in extradition proceedings before a German Higher Regional Court. These provisions, so has been highlighted by these commentators, enumerate the reasons for a possible withdrawal of the protection and do not allow for a mere reassessment by a different Member State. The Constitutional Court also notes that other commentators disagree with this assessment and have emphasized that the above-mentioned provisions do not contain any explicit provision stating that decisions to grant international protection are binding for other EU Member States and that there might be a need for a reassessment in light of the new facts contained in an extradition request. While all commentators agree that there are international obligations that have to be respected even in extradition proceedings, not all agree that there is a need to consider decisions by other Member States as binding.

The Court finally notes that the CJEU has not addressed this issue in its jurisprudence and concludes that, given the above-mentioned ambiguities of the two directives, the Higher Regional Court could not have considered this to be a case of an "acte clair" or "acte éclairé".

Comments

The decision by the Constitutional Court is of utmost importance and, given the nature of the case, will probably result in a request for a preliminary ruling by the CJEU. The CJEU might then also be guided by the following aspects: The relevant directives are certainly to be interpreted in light of article 78(2)(a) TFEU which emphasizes the need for "*a uniform status of asylum for nationals of third countries, valid throughout the Union*". This suggests a need for recognition of asylum decisions by other Member States without which the "validity" of the status would be in doubt.

The Charter of Fundamental Rights of the European Union not only grants persons a right to asylum (article 18) and a right not to be expelled or extradited in cases of political persecution (article 19) but also the freedom of movement of nationals of third countries residing legally in one Member State (article 45(2)). Directive 2003/109/EC as amended by Directive 2011/51/EU contains specific provisions granting freedom of movement to beneficiaries of international

protection. Articles 12(3a) and (3b) guarantee that one Member State may not expel a person to the third country without approval by the Member State which has granted international protection in the first place. Recital 10 of Directive 2011/51/EU states:

> *"Where a Member State intends to expel, on a ground provided for in Directive 2003/109/EC, a beneficiary of international protection who has acquired long-term resident status in that Member State, that person should enjoy the protection against refoulement guaranteed under Directive 2004/83/EC and under Article 33 of the Geneva Convention. For that purpose, where the person enjoys international protection in a Member State other than the one in which that person is currently residing as a long-term resident, it is necessary to provide, unless refoulement is permitted under Directive 2004/83/EC, that that person may be expelled* ***only to the Member State which granted international protection*** *and that that Member State is obliged to readmit that person. The same safeguards should apply to a beneficiary of international protection who has taken up residence but has not yet obtained long-term resident status in a second Member State.*

The objective of these Directives is to grant freedom of movement to beneficiaries of international protection and to allow them to integrate into European society. The same reasoning should apply to extradition proceedings which are similar in nature. Article 19(2) of the Charter of Fundamental Rights of the European Union addresses both situations and clearly states:

> *"No one may be* ***removed, expelled or extradited*** *to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

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Case Update: Germany

Higher Regional Court Brandenburg, Decision dated 11 March 2022, No. 1 AR 9/22 (AS) – Refusal to Extradite to the Russian Federation

On 11 March 2022 the Higher Regional Court Brandenburg delivered a blow to present and future extradition requests from the Russian Federation to Germany. It took note of the illegal intervention in Ukraine and the subsequent announcement by the Russian government to terminate Russian membership in the Council of Europe and the European Convention on Human Rights and declared the extradition to be in violation of section 73 Act on Mutual Assistance in Criminal Matters.

The decision

The Court had to rule on the legality of an extradition for execution of a sentence of 16 years imprisonment in a white-collar crime case. The relevant offences date back to between 2012 and 2014 and the underlying Russian *in absentia* judgment was issued in 2017. In a prior decision, the Court had requested diplomatic assurances from the Russian Federation containing guarantees of a right to a re-trial, an effective defence and conditions of imprisonment in accordance with Article 3 ECHR. These doubts notwithstanding, the Court had decided on 24 February 2022 to issue a warrant for an arrest pending extradition (section 15 Act on Mutual Assistance in Criminal Matters).

A mere 15 days later the Higher Regional Court completely reversed course and – in agreement with the assessment by the public prosecution office – declared the extradition to the Russian Federation to be impermissible. The rather short reasoning of the decision is noteworthy in that it is entirely disconnected from the case at hand and hints at a strategic decision to refuse all Russian requests for extradition. The Court emphasizes that the Russian invasion of Ukraine violates international law and raises doubts as to a Russian willingness to comply with its international human rights obligations. It further notes that the Russian Federation had declared its willingness to end its membership in the Council of Europe and concludes that this will affect Russian compliance with Article 3 of the Statute of the Council of Europe. It also takes note of the decisions by the Committee of Ministers revoking certain rights of the delegation of the Russian Federation.

The conclusion is two-fold: The Court declares that the above-mentioned developments give reason to believe that

Russian compliance with international human rights obligation is *systemically* insufficient. The Court therefore suggests that minimum standards as required by Article 3 ECHR are generally not met by the Russian Federation. The Higher Regional Court further declares that the current behavior by the Russian government raises doubt as to the reliability of Russian diplomatic assurances.

Comments

In light of the subsequent (complete) exclusion of the Russian Federation from the Council of Europe as well as the continued disregard of fundamental human rights by Russian forces in Ukraine, it is likely that other German courts will continue the restrictive approach laid down by the Higher Regional Court Brandenburg even though the Russian Federation remains (28 April 2022) a member to the European Convention on Extradition.

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The John Jones QC Essay Competition 2021

Congratulations to the winner of the John Jones QC Essay Competition 2021: Sapan Maini-Thompson of No 5 Chambers.

The judges of the John Jones QC Essay Competition were thoroughly impressed by the submissions this year. The essays were all well-considered and of a very high standard. Clearly, the candidates applied much detailed thought to the subject in question. Of these four essays, the judges particularly commended Rosa Bennathan's essay for its structure and for providing good context for the discussion. Considering all four essays, they felt that Sapan Maini-Thompson's was the best-argued and most comprehensive and incisive, and therefore, decided that to be the winner, with Rosa Bennathan taking second place and Joseph Sinclair in third place. Many congratulations to all!

The Essay Question

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 Winner:

There is no dispute that the independence of the Polish judiciary is under serious strain. Despite a plethora of adverse judgments from the CJEU and the ECtHR, moreover, the Polish government's authoritarian encroachment upon the justice system shows no sign of relenting. Plainly, this has grave implications for the principle of mutual trust which is premised on bilateral respect for the rule of law. The test developed by the CJEU in *LM/LP* ("the *LM* test") sought to achieve a workable balance between protecting an individual's right to a fair trial and safeguarding the core EU principle of mutual recognition.

In this endeavour, the *LM* test fails for three reasons. First, it is doctrinally unsound because it is premised on an unreasonably rigid interpretation of Article 7 TEU. Second, it is normatively unsatisfactory because it unduly privileges mutual trust over the protection of individual rights. Third, it is of limited practical value because it fails to grasp how the structural diminution of judicial independence undermines the assessment of procedural fairness in an individual case. In sum, the test is incapable of safeguarding the rule of law and therefore incorrect. Accordingly, should the Supreme Court decide it is permitted to depart from the decisions of the CJEU in these cases, it should rule the *LM* test is no longer fit for the disposal of Polish extradition warrants.

Institutional and Doctrinal Quandaries

The first reason the *LM* test is incorrect is because its two steps operate in a political context which is corrosive to the rule of law. The requirement upon national courts to carry out a "specific assessment" in absence of a Council decision under Article 7(2) is consistent with the demands of mutual trust. Nevertheless, whether a body is to be regarded as a judicial authority cannot, and ought not, depend solely on the outcome of the Article 7 process. This is for two reasons. First, it unjustifiably renders the Council the guardian of judicial independence. Second, it wrongly prioritises an outdated reading of the EAW Framework Decision - a piece of secondary legislation - over primary principles on the rule of law.

By reserving the assessment of "generalised deficiencies" to the Council, the LM test surrenders the rule of law to political fiat. This is because even if the Council voted to activate the preventive mechanism of Article 7(1), the sanctioning procedure under Article 7(2) is conditional on the unanimity of the Council. If the probability of facing disciplinary sanction is politically contingent, the deterrent value of Article 7(2) is rendered obsolete, which results in impunity for the rule of law backsliding state. Indeed, if the CJEU's position on Article 7 is taken to its logical conclusion, Poland could become an electoral dictatorship and if the Council failed to agree to apply sanctions under Article 7(2), national courts would still be compelled to assess each EAW on a case-by-case basis (see here). Such a proposition is absurd. Even in more ordinary circumstances, such as those in *Wozniak*, strict conformity to the Article 7 process majorly limits the capacity of national courts to rely on otherwise persuasive evidence regarding the issuing state's judicial integrity.

Not only is the CJEU's construal of Article 7 perverse in its absolutism, its interpretation is also doctrinally contestable. As Petra Bárd and Wouter van Ballegooij argue, the CJEU's reading of Article 7 "disregards the historical evolution of Article 7 TFEU". In their submission, "the reason Recital 10 [of the Framework Decision] is silent about current Article 7(1) TFEU [post-Lisbon Treaty] is that it did not exist at the time the Framework Decision had been drafted." They submit that "since a preventive arm has been added in the meantime, one could argue that the drafters of the Framework Decision intended to refer to Article 7 as such, and the preventative arm should also be read into Recital 10" (Bárd, P. and van Ballegooij, W. (2018) '*Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM'*, NJECL, 9(3), pp. 353–365).

This interpretation of the EAW Framework Decision, in contrast to the CJEU's maximalist approach, is preferable for two reasons. First, because it allows for the Decision to be read consistently with the fundamental values in Article 2 TEU, which underlie the EU's whole legal order. Second, because it accounts for the "inherent asymmetry between the individual and the state, especially in the area of criminal law" (*Ibid*). In assessing the merits of the CJEU's construal of Article 7, therefore, the Supreme Court should be careful to avoid the political deference inherent to the European Court's jurisprudence. Indeed, Brexit surely affords the UK courts greater flexibility given the TaCA is the new applicable regime.

Normative Deficiencies

The second reason the *LM* test is incorrect is because it establishes an unjust balance between mutual trust and the individual right to a fair trial. The foundational error in the *LM* test is the artificial way in which it detaches a requested person's procedural rights from the rule of law writ large. The basis for this error is the conceptually flawed analogy drawn by the CJEU to the case of *Aranyosi* and *Căldăraru*, which concerned the compatibility between prison conditions and Article 4 of the Charter of Fundamental Rights (Aranyosi and Caldararu [(C-404/15 and C-659/1 PPU)]). The CJEU's transposition of the "general" and "individual" prongs from *Aranyosi* is problematic because it imposes a false equivalence between detention conditions and judicial independence in terms of how they affect the rule of law (see here).

In fact, these are discrete issues with distinct implications. Whereas a specific prison might exceed generalised deficiencies in the overarching detention regime, it does not follow that a particular tribunal can necessarily avoid the institutional curtailment of judicial independence, especially considering independence must be perceived as well as exercised. This is to confuse the particularised violation of a fundamental individual right with a structural attack on the rule of law.

The problem with the CJEU's approach in *LM*, therefore, is that it sought to address "the failures of the rule of law through the prism of the violation of an individual fundamental right" (see here). This conflation occurred because the CJEU failed to distinguish between the different purposes of the norms enshrined in Article 47 of the Charter and Article 19(1) TEU. As Laurent Pech and Dimitry Kochenov have succinctly put it, "a right is not a principle and vice versa" (see here). The result is a test which seeks to safeguard judicial independence without actually relying on the

principle of judicial independence. The Court might have avoided this pitfall had it followed its prior ruling in *Associação Sindical dos Juízes Portugueses*, where it held in reference to Article 19 that a lack of judicial independence jeopardises all fundamental rights, not just the right to an independent tribunal as an element of the right to a fair trial (Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*).

Practical Unworkability

The normative inadequacy of the *LM* test underpins its practical unfitness. The second step of the test requires a requested person to prove "specifically and precisely" how a systemic breach of the rule of law affects their case individually. This exacting standard places a disproportionate burden upon them because it assumes first that relevant information is available and second that they have the resources to obtain it. Theodore Konstadinides articulates the difficulty of a scenario in which a requested person is compelled to demonstrate how "the judicial reforms in question have affected the independence of the judge who will conduct her/his own hearing whilst being ignorant about the identity of that judge" (Konstadinides, T., (2019). *Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: LM*. CMLR. 56 (3), 743-769). There is the additional issue that protracted investigations on the part of executing authorities undermine legal certainty by adding undue complexity to the process.

A recent example from the Amsterdam District Court exhibits hard limits to the judicial dialogue envisioned by the *LM* test. In the Dutch case, the sending court failed to receive answers to questions it had asked of the Polish authorities concerning the Disciplinary Chamber of the Polish Supreme Court. It consequently refused extradition and made a (pending) preliminary reference inviting the CJEU to limit the *LM* test to its first step. In a 2019 case, moreover, the Higher Regional Court of Karlsruhe at para [70] made surrender to Poland dependent on the German embassy being allowed to take part in the trial in Poland and visit the defendant in custody. This innovative solution, however, is arguably contrary to the EU's principle on mutual recognition, not to mention it being logistically unsustainable as a policy.

There is the further problem that even if a Polish court provided assurances as to its independence, how could a UK judge necessarily trust that the issuing court was not under political pressure? Clare Montgomery QC made this point forcefully in *Wozniak*. Seeking an "island of legality" in a "sea of procedural illegality" [168] is indeed highly risky (Wozniak & Chlabicz v Poland [2021] EWHC 2557 (Admin)). It would require an improper leap of faith to believe that a captured court would admit its lack of independence. Thus, in the face of a test which presents a false dichotomy between a rigid conception of "general" and "specific" risks, it entails circular reasoning to insist, as the High Court did, that there was "no evidence" of any features of the Appellants' specific cases which would justify a refusal to execute their EAWs.

How should the Supreme Court decide the case?

The preceding arguments lead to one of two conclusions. Either the Supreme Court should adopt a (diplomatically costly) freezing mechanism to suspend the UK's extradition relationship with Poland pending rescission of the judicial reforms. Or it should reformulate the *LM* test and place a significantly higher premium on rule of law considerations. The 2021 decision of the Vestfold District Court in Norway offers an intriguing basis upon which the *LM* test might be reconfigured, which is pertinent also because Norway operates a near equivalent legislative regime to the UK. The District Court found that following the decisions of the ECtHR in *Reczkowicz* and the CJEU in C-204/21 and C-791/19 (*Reczkowicz v Poland*, Application 43447/19 (2021); *Commission v Poland* (2021)), there is now a "significantly greater risk and probability" that a Polish court might be comprised of a judge that is not a lawful judge according to Article 6 of the ECHR.

The Court argued the two-step test in *LM* should be adapted so that "the greater the general risk for a breach, the less specific grounds for a breach of Article 6 of the ECHR should be required in the specific case" (see here). On the facts of the case itself, the Court held there were "substantial grounds" to believe there would be a breach of the right to a fair trial and so, in effect, it dispensed with any specific assessment of the defendant's case. Overall, the Norwegian approach has two benefits. First, a greater presumption of "generalised deficiencies" reduces the standard of proof in the "specific assessment", better ensuring equality of arms between the requested person and issuing state. Second, it precludes a de facto suspension of the EAW in relation to Poland.

Conclusion

The test set out in *LM* and *L* and *P* is incorrect principally because it establishes the wrong balance between the

competencies of the European Council and national courts in the assessment of an issuing state's compliance with the rule of law. It further suffers from normative and practical limitations which can only be remedied by re-focusing the test on judicial independence as a precondition of all fundamental rights. If the Supreme Court decides it can depart from the decisions of the CJEU, it should grant English courts the authority to assess the impact that generalised deficiencies in the Polish judiciary could have on the treatment of requested persons.

Sapan Maini-Thompson
No 5 Chambers

CPT Updates

The Council of Europe anti-torture Committee visits Latvia – see article

The Council of Europe anti-torture Committee publishes its report on Albania – see article

The Council of Europe anti-torture Committee publishes its report on Romania, highlighting that the challenges facing the prison system remain extensive – see article

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