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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to the monthly Defence Extradition Lawyers' Forum newsletter. In this, our second edition we set out what we've been up to, give you details of two forthcoming events for your diary and review three important decisions from the Irish High Court, our own High Court and the CJEU.

Our recent activities

The possibility of an extradition northern 'hub'

We continue to monitor the proposal that extradition work should be undertaken outside of Westminster Magistrates' Court. Consideration has paused until the New Year. In the meantime we have been working on possible alternative proposals to make extradition proceedings more efficient, in particular through the increased use of video-links. The Committee has looked at how the law could be used or modified to facilitate this improvement. We will continue with our input into this consultation when it resumes.

Legal Aid difficulties

As we reported in last month's newsletter, District Judge Devas is feeding back to the Legal Aid Agency difficulties which our members have raised. Please do get in touch with us if you are experiencing particular problems.

Liaising with the Administrative Court Office

DELF Committee representatives are due to be meeting again with the Administrative Court Office in mid-December to provide feedback and assistance in the handling of extradition appeals. Topics will include encountering difficulties with release warrants, changing the mechanics of the fee payment system so that it is more workable for defence practitioners, and the court's approach to failures to comply with directions.

The Policy Subcommittee

The Policy Subcommittee will be considering the proposed changes to the Criminal Procedure Rules affecting extradition. The current proposed amendments to Part 50 are potentially significant for defence practitioners and their clients. We will provide more detail and seek views as the subcommittee progresses its work. Most recently, our submissions resulted in a draconian plan to restrict the use of evidence served out of time being scrapped.

Case Law Update

Minister for Justice and Equality v AM [2016] IEHC 568 (Irish High Court)

Uncertainty about the implications of the UK's recent 'Brexit' vote is widespread. How Brexit may impact the UK's participation in the EAW scheme, and the current extradition process within the UK, has already been the focus of considerable speculation and prediction. Perhaps less in focus has been the other side of the extradition equation: how EAWs issued by the UK and received in other Member States may be treated because of the Brexit decision. In this case the Irish High Court was confronted by a prompt, if not premature, argument against an order for extradition to the UK based upon the uncertainty caused by the decision to leave the EU.

AM was the subject of an EAW alleging the commission of multiple sexual offences. He resisted extradition on a number of grounds. One of the most significant arguments concerned delay and the requested person's ability to receive a fair trial on surrender to the UK. The straightforward delay argument advanced was that the complainants in the criminal prosecution had waited an inordinate amount of time before informing the police of their allegations. The passage of time was said to have resulted in a degrading of AM's memory and his ability to call on witnesses important to his defence. This argument met with the conventional response from the Irish court that the receiving state must be presumed to have safeguards in place against unfairness in the trial process. If delay ultimately prevented a fair trial, a remedy would be available.

A late initiative by the defence, however, was to expand the argument about unfairness by raising the UK's recent Brexit decision. In short, AM submitted that deference to the fair trial safeguards of other states was itself premised upon a high level of confidence which derived from membership of the EU, entailing adherence to certain minimum standards and protections. As the court noted in its decision, the issue emerged on the morning of the scheduled hearing and so the proceedings were adjourned to allow arguments to be developed for full consideration.

The argument advanced was that the Irish court could no longer consider the UK to be bound by its obligations under the Treaty of European Union, and further, that any failures by the UK to act in accordance with those obligations would no longer be actionable in the future. The requested person argued that absent any assurances from the UK, the future post-surrender legal landscape was too uncertain for the requested person to be extradited. An express presumption, contained within the Irish extradition legislation, regarding future compliance by requesting states with its obligations was itself founded upon the fact of membership of the EU and so provided no answer to the objection raised. If the presumption of compliance did not properly apply it was open for the court to refuse extradition.

On behalf of the Minister it was argued that AM's position was grounded on speculation not evidence. As a matter of fact Article 50 had not yet been triggered and the court was required to proceed on the basis of the law as it stood; i.e. that the UK is still a member of the EU and, additionally, is a signatory to the European Convention on Human Rights.

The court's analysis of the issue was unhesitating. It considered that the relevance to extradition of an argument about the UK leaving the EU was in the "*realms of fanciful speculation*". The court accepted there was a risk Article 50 would be triggered, but that it had not been triggered yet, and in any event, that would be followed by a lengthy negotiation period. The court considered its obligation was to deal with the extradition case before it according to the law and circumstances of the day, not on the basis of what may happen at some point in the future. The ordinary presumption of future compliance with obligations therefore applied with full force.

The court went further in its rejection of the argument advanced by the defence. It found that, even were the UK to leave the EU there was no doubt it would continue to comply with its obligations in relation to those extradited whilst the UK remained a Member State, and that it would continue to uphold fundamental rights. Furthermore, the court found that common sense would ensure future compliance by the requesting state. Any disregarding of obligations or rights would negatively impact the UK's ability to maintain and rely on extradition relationships in the future.

membership of the EU but a wider presumption of good faith underpinning extradition relationships between sovereign states in accordance with principles of mutuality and reciprocity.

In concluding its analysis, the court determined that the requested person had put forward no evidence to suggest that if surrendered to the UK he would not be entitled to raise the issue of delay and prejudice at a trial in the UK, nor that any risk existed because of the Brexit referendum result. Indeed the court held that "*The potential exit of the UK from the EU is raised as an issue at the level of the theoretical and it is not based in the reality of the principles underpinning extradition procedures*".

The court's decision is certainly unsurprising. The argument advanced was always vulnerable to criticism for being premature and speculative. It illustrates, however, the possibility of new arguments being advanced attacking the uncertainty of the UK's place within the EAW scheme (and wider EU criminal justice initiatives). This argument failed but may be refined and renewed in other jurisdictions as the Brexit process evolves and the implications for mutual cooperation become more (or less) clear.

Sunca and others v Romania [2016] EWHC 2786 (Admin)

Last month we reported on *Rusu*, a Romanian prison conditions judgment delivered at Westminster Magistrates' Court. At the beginning of this month, the High Court handed down its latest prison conditions 'super-judgment', also concerned, yet again, with Romania.

In *Sunca* the prison conditions argument was primarily considered in the context of a co-appellant's case; Mr Zagrean. He was discharged at first instance because of an acknowledgement by the Romanian authorities that in the immediate post-surrender process the requested person would be detained for a period of 'quarantine and observation' in Bucharest-Rahova Prison where it was not possible to observe the minimum space guarantees previously assured by the Romanian government. In circumstances where the evidence showed overcrowding of 26% and a detention period for people in Mr Zagrean's position of approximately four weeks, the judge held this presented a real risk of a violation of Article 3.

The background to Romanian prison conditions is unfortunate. Following earlier extradition decisions, it had become the practice of the Romanian authorities to meet concerns about its prison conditions by providing assurances to the UK courts (see, for example, *Florea I* [2014] EWHC 2528 (Admin); and *Florea 2* [2014] EWHC 4367 (Admin); and *Blaj* [2015] EWHC 1710 (Admin)). In addition to the evidence in Mr Zagrean's case, the integrity of Romania's assurances was undoubtedly further undermined by persuasive post-surrender evidence presented in the case of *Rusu* (see last month's newsletter for a summary), which, unusually, led to the discharge of a requested person because of doubt about the requesting state's compliance with an offered assurance.

In its judgment in *Sunca* the court rehearsed the history of assurances provided by the Romanian authorities concerning guaranteed minimum space for detained extraditees. It acknowledged the existence of evidence – including Romanian admissions – that post-assurance extraditees had been held in conditions inconsistent with those guarantees. It recorded that during the appeal in *Sunca* further evidence had been submitted by the Romanian authorities which sought to reaffirm the earlier assurance of minimum standards. Against this background the court had to grapple with the mounting evidence of assurances not being honoured and to determine whether future compliance could be anticipated.

The court began its treatment of the prison conditions issue by reaffirming the Article 3 principles and approach which apply to EAW cases set out in the Italian case of *Elashmawy* [2015] EWHC 28 (Admin). The court acknowledged that in closed conditions in a multi-occupancy cell a risk of conditions violating Article 3 standards arose where the floor space occupied is less than 3 square metres, or 2 square metres in an open or semi-open environment.

As to the new evidence from the Romanian authorities, the court set out the content in some detail, recording Romania's candid acknowledgement of failings and its apparent regret. The court detailed Romania's explanations for how those failings came about and its reaffirmation of its assurance in relation to future extraditions. As part of that reaffirmation the Romanians relied upon the use of monitoring mechanisms. Perhaps the most startling fresh evidence cited by the court was a transcript of a video presented by the requested persons which showed the Romanian Minister of Justice openly admitting to the Romanian

and allocated to the prison system. In answer to this evidence the Minister of Justice submitted a further response to the High Court in which she claimed to have used the word "*lie*" "*metaphorically*" and supplied fuller details of current budgeting arrangements, though maintained they were in any event irrelevant to compliance with assurances.

In its treatment of the evidence and submissions, the court reminded itself of the criteria for assessing assurances as set out in *BB v SSHD* [2015] EWCA Civ 9 (consistent with *Othman*). It explained that the assessment is relative: "*The evaluative exercise…occurs in a context, which includes the nature of the relationship between the UK and the jurisdiction in issue…Romania is not Libya as regards the context*". In the court's assessment the risks associated with overcrowding "*are not of the same character as the Libyan cases, where the concerns entertained were well along the torture end of the Article 3 spectrum*".

The High Court considered the Minister of Justice admitting to lying to the ECtHR to have been "*unfortunate*", and fairly identified the mystery in what it is to lie "*metaphorically*". Notwithstanding that concern, the court held that the presumption of good faith remained untarnished. This was in part because prison building and budgeting was not central to the practicability of the assurances offered, and that the source of the assurance was the State; something more enduring and weighty than any particular Minister.

The Court also relied heavily upon the generic presumption of good faith applicable to Convention members and to those within the EAW scheme and noted the availability of human rights protections in Romania.

Comfort was apparently also to be taken from the Romanian's reaffirmation of the assurance and strengthening of monitoring provisions. As for past breaches the court was in a forgiving mood. It considered that the circumstances in *Rusu* had to be understood in the context of a misunderstanding by the Romanians as to how the assurance should be operated rather than as a picture of systemic failings. In light of the reaffirmation, the misunderstanding had been set straight. The assurances now before the court were found to be specific and indicative of a desire to cooperate with the UK authorities.

Having absolved the Romanian authorities for past breaches the risk of future breaches of assurances was dealt with shortly. Notwithstanding its treatment of the evidence in *Rusu* the court then suggested "*There are other avenues by which the assurance can be monitored… the Rusu case demonstrates that Romanian extraditees maintain links with their UK solicitors, possibly through their families still in the UK, who can raise the issue in future as in Rusu. Monitoring by the UK Embassy is not only unnecessary but quite inappropriate*".

In totality, the Court found that the evidenced history of assurances having been violated combined with the 'metaphorical' lying of the Minister of Justice did not create substantial grounds for believing a real risk existed that the requested persons would face detention in conditions which violated Article 3. The recent evidence presented by Romanian authorities changed the position from that which had confronted the District Judge in Mr Zagrean's case; accordingly her decision to discharge was overturned.

The history of the High Court's treatment of EAW prisons conditions arguments means that this latest decision to throw up scaffolding around an obviously damaged and unstable situation in Romania comes as no surprise, though perhaps a disappointment following the recent decision in *Rusu*. The High Court's analysis is brief and reduces, in essence, to more determined adherence to broad principles of trust and confidence in the face of otherwise powerful evidence about the proven unreliability of assurances and the resulting existence of 'risk' of detention in conditions which violate Article 3. It may be a safe prediction that there is more to come on Romanian prison conditions in the coming months.

Conviction in absence, deliberate absence and retrial rights

Sunca is notable also for its consideration of the correct approach to section 20 of the Extradition Act 2003, dealing with convictions in absence, deliberate absence from trial, and the provision of retrial rights. Broadly, section 20 requires the court to consider in the case of a conviction in absence whether a requested person was deliberately absent from trial. If yes, he is liable to extradition, if no, he must be afforded a retrial on surrender otherwise he is eligible to be discharged.

Section 20 originally reflected Article 5(1) of the EAW Framework Decision. Article 5(1) was subsequently

section 20 must be construed in line with Article 4a and that the principle of conforming interpretation applied. The effect of *Cretu* was to make it substantially less difficult for a requesting state to satisfy a court that a defendant had been deliberately absent from trial. Subsequently, the CJEU considered the same issue in *Dworzecki C-108/16*. There, the court held that Article 4a contained autonomous concepts requiring uniform interpretation. The provision permitted a refusal to extradite where a requested person did not appear in person at trial unless the requesting state established that one of the conditions provided in the Article had been satisfied. Those provisions, which set out acceptable methods of effecting service of a summons upon the requested person, were designed to ensure "a *high level of protection*". By satisfying the criteria in Article 4a the requesting state could be sure that the rights of the requested person had been respected notwithstanding conviction in absence.

In *Sunca* the defence sought to argue, in part, that it could not be shown that the requested person had deliberately absented himself from trial. It was submitted that *Dworzecki* required it to be unequivocally established that the requested person was in fact aware of the scheduled trial and had actually received information about it.

The court concluded that there was no tension between *Cretu* and *Dworzecki*. The purpose of Article 4a was to ensure fair trial principles were safeguarded. The methods of service contained within Article 4a(1)(a)(i) were designed so that if one or more of those conditions applied the executing state could be satisfied that the requested person's fair trial rights had been protected and proceed to order extradition notwithstanding the requested person's absence from trial.

As the court made clear, Article 4a does not purport to be an exhaustive list of the ways in which effective service could be achieved. The ultimate question for the court to consider under this part of section 20 is whether extradition would result in a breach of fair trial rights. In assessing this consideration the court held that an executing judicial authority may take into account circumstances outside Article 4a which enable it to be assured that surrender of the requested person will not result in a breach of his fair trial rights.

In conclusion on the correct approach the court stated: "*Thus the approach in Cretu in interpreting section 20 remains good: a requested person will be taken to have deliberately absented himself from trial where the fault was his own conduct in leading him to be unaware of the date and time of his trial. Finally, we are clear that the emphasis in Cretu on the wording of the EAW, and the significance of the statements made within it as to the facts of the requested person's absence, accord with the decision in Dworzecki…*".

Mr Sunca was ultimately defeated by this analysis. The court endorsed the District Judge's approach of having regard to evidence about the requested person's conduct, in particular the fact that the he had allowed a false address to endure in the Romanian authorities' records. The court concluded that by this evidence the District Judge had been right to "*conclude that Mr Sunca had waived his right to be tried in person and was deliberately absent from the subsequent trial*".

Sunca is a useful reminder of how flexibly section 20 now works. It is an important protection which stands between a requested person and the serving of a substantial prison sentence abroad despite absence from trial. The assessment of whether absence was deliberate is therefore always critical. The factors which may be taken into account in the conduct of that assessment are now to be regarded as extremely broad.

Aaron Watkins

Providing an interesting contrast to the Divisional Court's interpretation of Dworzecki our colleague Vania Costa Ramos from Portugal provides this summary of the CJEU's decision and some interesting country specific information about Portugal.

In a judgment of 24 May 2016 in case C-108/16 PPU, Dworzecki , the CJEU ruled on the interpretation of Article 4a(1)(a)(i) FD 2002/584/JHA, as amended by FD 2009/299/JHA establishing that the concepts included in that provision should be construed as autonomous concepts of EU Law.

The CJEU underlined that "[t]he right to a fair trial enjoyed by a person summoned to appear before a criminal court thus requires that he has been informed in such a way as to allow him to organise his defence

CJEU ruled that it is a requisite of Article 4a(1)(a)(i) to demonstrate that the person actually knew about the date and place of the trial and that such information was provided enough in advance for the person to organise her defence effectively. The Court considered that this may be achieved by service in person, since in that case the person concerned has himself received the summons and, accordingly, has been informed of the date and place of his trial (§45). It could also be achieved by means of handing a summons over to a third party, but it must be unequivocally established that that third party actually passed the summons on to the person concerned; this was not the case with respect to Mr. Dworzecki (§48).

If these requirements are not established, the second part of Article 4a(1)(a)(i), which also aims at achieving the same high level of protection by ensuring that the person has been informed on the date of her trial, are not met since there is no unequivocal information that the person "was aware of the scheduled trial (§47). In such circumstances, the Executing State is allowed to assess whether other factors enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence" and order surrender (§50).

In Portugal service of the order setting up the trial date to a person who has made a statement of identity and residence (SIR) is made by postal delivery without acknowledgment of receipt. The postman will deposit the letter in the post-box and fill in a "post-card" in which she states the date on which she deposited the letter at the said address. This means of service clearly does not prove that the defendant has received the letter and is unequivocally aware of the date of her trial. It is a mere legal fiction that the person has become aware of her trial, since the postman deposited the letter in her post-box at the address given on the SIR. In my opinion therefore, that this means of service does not meet the test established by the CJEU for Article 4a(1)(a)(i) in Dworzecki.

Despite this, when Portugal acts as Issuing State, its courts typically mark field d) 3.1.a in the EAW form, indicating that the person has been summoned in person on a given date (which will be the fifth day counting from the day that the letter was deposited in the post-box by the postman). When facing such an EAW from Portugal, defence extradition lawyers should ask their court to clarify the circumstances of service and whether it was conducted by use of a letter without acknowledgment of receipt. They should also contact a lawyer in the Issuing State. This lawyer will be able to consult the case files and report on the circumstances of service of the order setting up a trial date.

Defence extradition lawyers should also be aware that there is no right to a re-trial under Portuguese Law, or a right to lodge an appeal on questions of fact which would allow for a fresh determination of the merits of the case, alongside the possibility to present a defence at this procedural stage and to request and produce new evidence. Dworzecki is a case that merits the attention of defence extradition lawyers and it should definitely be brought to the attention of Executing State authorities in matters concerning Portugal.

Vania Costa Ramos

Forthcoming events

Save the date!

Please join us for the DELF Christmas drinks on the evening of 6 December 2016 from 7pm. The venue will be The Well pub in Clerkenwell, when we plan to let you know the programme of interesting educational and social events we have planned for the year ahead.

A reminder that on **18 January** we will be holding an educational event at Doughty Street Chambers on billing in extradition cases; timed nicely to assist with paying off the post-Christmas credit card balance. The programme includes Andrew Keogh speaking to us. If you have not yet put this in your diary, please do. It's bound to be a popular and helpful event.

To secure a place at either of these events please RSVP to events@kingsleynapley.co.uk

Membership

Membership runs from January to December annually. If you wish to join DELF for the first time from 01 January 2017, 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.

If you are simply renewing your existing 2016 membership from 01 January 2017, please follow the payment instructions set out below.

Fees for 2017 will be 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

Membership fees are due by 31 December 2016, but if paid by 22 December 2016, a 10% discount will apply. 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 if the name is used as the reference on the bank transfer.

Please make your payments by bank transfer to:

- Defence Extradition Lawyers Forum
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