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DELF

DEFENCE EXTRADITION LAWYERS FORUM

# NEWS

Welcome to edition 24 of the Defence Extradition Lawyers Forum newsletter and the first edition of 2021 post-transition period. In this edition we have an article from Edward Grange examining the balance of the UK-US Extradition Treaty with reference to recent high profile cases. We also have a comprehensive update on the new regime under the TCA from Ben Keith, Sophia Kerridge and Edward Grange. Finally, the newsletter also contains our usual updates on recent work, some recent extradition related news and educational events. With many thanks to our contributors.

## A message from the Chair

Welcome to the 24th Edition of the DELF newsletter. It's our first post Brexit and the (partial) end of the EAW. We have reproduced an article from the New Journal of European Criminal Law on post Trade and Cooperation Agreement extradition with the EU. We have an upcoming roundtable discussion on the TCA on 22 April 2021.

In other news we would like to congratulate District Judge Paul Goldspring on his appointment as Senior District Judge (Chief Magistrate). We have recently met to discuss collaboration with Westminster (details below).

We wish his predecessor Mrs Justice Arbuthnot good fortune on her elevation to the High Court Bench.

We intend to continue with remote seminars and meetings for the foreseeable future and hope to be able to organise in person events in the Autumn.

**Ben Keith**
**5 St Andrew's Hill**

## Our Recent Activities

We continue to make representations on behalf of our members to the Criminal Procedure Rules Committee, the LAA, the Administrative Court staff and the Senior District Judge's office. If members have any issues they would like DELF to raise please email enquiries@delf.org.uk.

### Revised Codes of Practice

In November, DELF submitted its response to the Home Office consultation on draft codes of practice governing the exercise of police powers in UK extradition cases. The response placed a particular emphasis on oversight by the legal representatives of the Requested Person of search procedures.

The updated codes were published on 22 February 2021 and are expected to come into force later this year after some parliamentary delays. The updates reflect amendments to the Extradition Act 2003, PACE 1984 and the new provisional power of arrest in respect of specified Part 2 countries introduced by the Extradition (Provisional Arrest) Act 2020. The updates include additional clarity on how arrests are to be carried out in relation to this new power.

The guidance on search and seizure powers is particularly relevant. As the UK no longer has access to the European Investigation Order (EIO), it is anticipated that EU Member States will be more likely to seek to use search and seizure powers alongside an extradition request, as well as MLA requests.

**Áine Kervick**
**Kingsley Napley LLP**

## *Educational events and socials*

### The impact of the end of free movement on extradition

On 28 January 2021 we hosted a seminar exploring the impact of the loss of free movement on the Article 8 balancing exercise in extradition cases and the immigration rules clients will have to meet if they seek to return to the UK post extradition. Antonia Torr from Howard Kennedy spoke about the new immigration rules, EU settled status and the issues representatives will need to be aware of in advising clients. Myles Grandison of Temple Garden Chambers discussed the approach of the immigration courts to article 8 in deportation cases. James Stansfeld of Matrix explored the impact of these changes within the extradition context and discussed the real risk that extradition can now result in an individual's permanent removal from the UK and the need for the article 8 assessment to be rebalanced.

### European Court of Human Rights – Approaches to Article 3 and prison conditions: The Principles of complementarity with the CPT

On 11 February Mary Westcott chaired a fascinating discussion about the approach of the European Court of Human Rights to Article 3 and prison conditions. Tim Eicke, Judge of the European Court of Human Rights in respect of the UK (and Vice-President of Section IV of the Court) spoke about the court's approach to Article 3 in respect of extradition cases and Dr Alan Mitchell shared his insightful observations from his experience 'on the ground' in various prisons as UK member of the European Committee for the Prevention of Torture (CPT).

## *Upcoming Events*

### NJECL Event 23 April 2021

Please save the date for an event hosted by the New Journal of European Criminal Law on "the EU-UK Cooperation on Criminal Matters Post Brexit". 23 April 2021 from 12:30-15:00. Register in advance online: here

### DELF Seminar on Extradition with the EU post-Brexit – Details to follow

Round Table discussion on extradition with the EU post-Brexit. This will be a virtual round table in small groups on the challenges faced by practitioners post 1 January 2021. The discussion will be moderated by Rebecca Niblock, Edward Grange and Stefan Hyman. Time/date and details of how to sign up will be circulated to members shortly.

## In the balance: UK-US Extradition Treaty

Following the discharge of Julian Assange from a US extradition request at the beginning of this year, the UK-US Extradition Treaty remains firmly in the spotlight. Last month witnessed the extradition hearing of Autonomy co-founder Mike Lynch. The new US President has confirmed that the decision not to commence proceedings for the extradition of US citizen Anne Sacoolas (accused of killing Harry Dunn in a road accident in the UK in August 2019) is final. Even before an extradition request had been submitted for Ms Sacoolas, the Trump Administration were quoted as saying they were 'very reluctant to allow its citizens to be tried abroad'. Boris Johnson in February 2020, in response to a question from Jeremy Corbyn as to whether the Prime Minister would commit to seeking an equal and balanced extradition relationship with the US responded by stating "I do think there are elements of the relationship that are imbalanced. I certainly think it's worth looking at". This response could not have come at a better time for Mr Lynch, who had just been arrested on the US extradition request. 12 months on, however, and little has been done to address that perceived imbalance.

Mr Lynch is one of the UK's most prominent and successful businessmen, famously described as "Britain's Bill Gates". A British and Irish citizen who has lived in the UK his whole life, he is accused by the US Department of Justice of committing fraud (specifically wire fraud and securities fraud) relating to Hewlett Packard's takeover of Autonomy PLC – a British company listed on the London Stock Exchange of which Mr Lynch was the co-founder and CEO. It is alleged that Autonomy's value was artificially inflated before its sale to the Californian tech giant. Lynch is said to have mis-stated Autonomy's revenues, resulting in Hewlett Packard claiming to have overpaid by $8.8 billion.

This allegation is not new; the conduct forming the substance of the US Department of Justice ('DOJ') indictment (which dates back as far as 2011) has already been investigated in the UK by the Serious Fraud Office ('SFO'). They concluded as long ago as 2015 that there was insufficient evidence to provide a realistic prospect of conviction in relation to part of the conduct alleged and ceded jurisdiction to the DOJ on the rest. This latter decision may appear perverse given the alleged criminality took place in the UK, was perpetrated by a UK citizen and related to a UK headquartered and listed company. Controversially, the UK, unlike a number of other jurisdictions, has no discretion to refuse an extradition request based merely on the individual being a British citizen. This has led to many accusing the UK of "outsourcing" its justice system, particularly to the demands of over-zealous US prosecutors.

Logic dictates that if there is to be a trial of Mr Lynch, it should be in the UK. Indeed, Hewlett Packard, the complainant in the DOJ's case, chose to bring civil fraud proceedings in London, in what is reportedly the UK's largest ever civil trial. Importantly, judgment has yet to be handed down. David Davis MP – a long-time opponent of the US/UK Extradition Treaty – has criticised the decision of the DOJ to initiate extradition proceedings prior to the civil judgment as "extraordinarily inappropriate". However, even if Mr Lynch were to defeat the civil case brought against him, it would not result in the withdrawal of the extradition request or the US criminal case being discharged for lack of evidence (controversially the UK-US Extradition Treaty does not impose on the US the requirement to demonstrate a prima facie evidential case), although such a decision may well lend weight to arguments Mr Lynch will undoubtedly raise before the extradition courts that he should be tried in the UK and not the US.

It would seem perverse if Hewlett Packard were unable to prove on a balance of probabilities in the High Court in London that fraud had been committed and yet at the same time our extradition courts in London allowed the DOJ to continue to pursue the case before a US criminal court on substantially the same facts (where they would have to persuade a jury beyond reasonable doubt).

Unlike Anne Sacoolas, Mr Lynch will not have the benefit of having the extradition proceedings halted through political intervention, with the UK Home Secretary now only having a strictly limited role to play in US extradition proceedings. The ministerial powers were removed in 2013, the last year in which they were exercised for the benefit of Gary McKinnon by the then Home Secretary Theresa May. Instead, it will be left to an extradition court alone to determine Mr Lynch's fate

Because Mr Lynch will be unable to challenge extradition on the basis that there is insufficient evidence to demonstrate a prima facie case, the focus of his defence is likely to be the protection of the forum bar. The forum bar, brought into force in 2013, was intended to provide real protection against the extra-territorial, over-zealous overreach of US (and other) prosecutors. Over many years prior to its introduction, cases had regularly surfaced where the US sought the extradition of British nationals accused of crimes where the alleged conduct was carried out wholly or substantially in the UK; the NatWest Three, Gary McKinnon, Richard O'Dwyer and Christopher Tappin to name just a few. For the first five years of its existence, the forum bar failed to bite, leaving many to opine (myself included) that it was toothless in its application and illusory in its effect.

That all changed in 2018 when the High Court allowed the appeal of Lauri Love against his extradition from the UK to the US. The Lord Chief Justice ruled that his extradition was barred by reason of forum in that it would not be in the interests of justice for him to be extradited. Those who predicted the case was a one-off due to its unique fact pattern (myself again included) did not have to wait long to be proven wrong. Later the same year, the forum bar came to the rescue of a British former HSBC trader, a decision that reportedly caused outrage in the Eastern District of New York. Since then, no doubt the US authorities have been seeking an opportunity to temper the emerging powers of the forum bar and will therefore be hoping that Mr Lynch's case can turn the tide.

Given the erosion of the Secretary of State's powers to intervene in US extradition cases, there will be many opponents of the UK-US Extradition Treaty who will be hoping that Mr Lynch resists extradition; a win under the forum bar would demonstrate to all that it is sufficiently robust to stand up to the continued overreach of US jurisdiction. The City will also be keeping a close eye on developments amid rising concern that UK centric conduct involving the fallout from business deals between US/UK companies could result in their senior executives being hauled into a criminal court in the US many years later, rather than the same matters being investigated by a less aggressive SFO and, if appropriate, prosecuted in the relative comfort of Southwark Crown Court.

**Edward Grange**
**Corker Binning**

## Extradition under the EU–UK Trade and Cooperation Agreement

*This article was first published in the New Journal of European Criminal Law on 3 March 2021 and is available here with full references.*

### The UK–EU extradition regime prior to 1 January 2021

Until 31 December 2020, the United Kingdom was a participating Member State in the European Arrest Warrant (EAW) system. This allowed the United Kingdom to both seek extradition and to process extradition requests in line with the EAW Framework Decision. The Trade and Cooperation Agreement (TCA) sets out the United Kingdom's future extradition arrangements with the EU.

The UK Extradition Act 2003 (the Extradition Act 2003) incorporated parts of the EAW Framework Decision into the UK law. The statute split extradition proceedings into one of two groups. Part 1 proceedings applied to extradition proceedings subject to the EAW system. It set down specific timelines and expectations, streamlined to reflect the framework's emphasis on mutual trust and recognition between Member States and supported by a strong body of case law both at national and at European level. Part 2, on the other hand, applies to all other states with which the United Kingdom has extradition arrangements. It is subject to far more cumbersome and lengthy proceedings, requiring closer scrutiny and oversight and involves a level of decision-making by the executive.

The United Kingdom officially left the EU on 31 January 2020 after which there was a transition period that lasted until 31 December 2020. Art 4 and Art 126 of the EU–UK Withdrawal Agreement established that the EAW system remained in operation throughout the transition period albeit by allowing

the United Kingdom to be counted as a Member State for the purposes of the transition period. The United Kingdom did not adopt any statutory changes to the way in which it handled EAW requests during this period. The EAW regime continued to apply to extradition cases where the requested person was arrested prior to 11 p.m. on 31 December 2020.

There was some concern that the intertwining of the Withdrawal Agreement and the TCA has left old EAW cases in a difficult position. Firstly, the transition provisions on their face do not necessarily allow the United Kingdom to continue as a 'Member State' for the purposes of the Framework Decision even though the Withdrawal Agreement tries to apply that. However, the parties to the Withdrawal Agreement agreed expressly that the term 'Member State' as it appeared in the Framework Decision should be read as if it included the United Kingdom. Secondly, going forward the United Kingdom may end up applying different law to the same issues. Since 1 January 2021, the United Kingdom no longer has membership of the Court of Justice of the European Union (CJEU) and is not bound by its decisions. So as cases progress, the United Kingdom will develop its own law perhaps distinct from the approach of the CJEU and EU Member States. That conundrum is not an easy one to solve.

**Which legislation applies going forward**

On 24 December 2020, the United Kingdom and the EU reached an agreement, the TCA, setting out the terms by which their relationship on a wide range of issues would be governed. In Title VII, Part 3 of the TCA, is a section entitled 'Surrender' which deals with the issue of extradition.

This confirmed that the EAW was now a thing of the past insofar as the EU–UK relationship was concerned. The United Kingdom ceased to apply the Framework Decision. The United Kingdom, in its negotiations, had made clear that it did not want to participate in the EAW but still wanted a fast-track system of extradition in principle based on the Norway and Iceland surrender agreement with the EU.

The TCA was adopted into the UK national law by the European Union (Future Relationship) Act 2020 (EUFRA 2020), which received Royal Assent on 31 December 2020. It came into force at 11 p.m. the very same day.

Section 11 of EUFRA 2020 re-establishes that the 27 EU Member States and Gibraltar remain Part 1 states under the Extradition Act 2003. Norway and Iceland, previously Part 1 states, were redesignated to Part 2 territories (having become Part 1 territories when the extradition arrangement between themselves and the EU came into force). Sections 12 and 13 of EUFRA 2020 substituted any mention of the EAW Framework Decision in favour of the TCA. At first glance, the changes to Part 1 of the Extradition Act 2003 appear superficial. However, there are differences between the EAW Framework Decision and the TCA, which could drastically alter the way in which extradition will operate in practice between the United Kingdom and the EU27.

It is too early to say with any certainty how beneficial or not these changes are; however, it is clear that considerable efforts have been made to provide some continuity to what was generally perceived as a system of surrender that was less cumbersome than reliance on the European Convention on Extradition (CoE) 1957. On the other hand, there are some clear departures from the EAW regime which may well open the door to a more fractured and varied approach.

**TCA extradition**

The United Kingdom becomes a third country for extradition to and from the EU. This automatically has practical consequences for the United Kingdom's extradition proceedings since it limits the United Kingdom's access to certain data systems, namely the Schengen Information System II, through which EAW and security information is shared between EU countries. The United Kingdom now has to receive or disseminate extradition arrest warrants bilaterally or through the INTERPOL system. The United Kingdom's third-party status also affects the way that EU member countries can decide to respond to extradition requests from the United Kingdom, opting in or out of certain aspects of the TCA, as will be discussed in below.

Under the EAW regime, the CJEU had oversight and was the ultimate decision maker on how the Framework Decision should be implemented by Member States. The TCA has rejected the CJEU in this capacity, instead creating a 'Specialised Committee on Law Enforcement and Judicial Cooperation' that has the authority to, amongst other things, 'monitor and review the implementation and ensure the proper functioning of this Agreement or

any supplementing agreement'. The Specialised Committee will be made up of 'representatives of each party' who must have the appropriate expertise relevant to the issue in question. This Committee is effectively an Arbitration Committee and is no substitute for judicial oversight and control, nor independence and impartiality.

Nevertheless, while the TCA marks a clear departure from EU judicial mechanisms, the TCA is just as clear that adherence to the European Convention on Human Rights (ECHR) is nothing less than mandatory. As such, the rulings of the European Court of Human Rights (ECtHR) still very much apply.

The Framework Decision was based on 'mutual trust and cooperation'. The TCA does not use such language, instead stating at Art LAW.GEN.3:

"The cooperation provided for in this Part is based on the Parties' and Member States' longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically."

There is also a commitment to the ECHR although, as considered in the chapter on Human Rights, there are worrying potential derogations available in the future.

**Still an EAW?**

It is evident, when looking at the TCA's provisions on extradition, that in great part, it seeks to provide a level of continuity regarding extradition proceedings between EU Member States and the United Kingdom.
Warrant

The uniformity provided to extradition requests between EU Member States under the EAW regime was greatly assisted by the use of the 'Form A' which essentially squeezed the extradition request into a tick box exercise.

The law has been replaced with the simply named 'arrest warrant'. The content and form of the new arrest warrant as set out and contained at Annex Law-5: Arrest Warrant in the TCA mirrors the content and form of an EAW as set out in the EAW Framework Decision and the Extradition Act 2003.

Those who appreciated 'Form A' will no doubt be relieved to see that it has been replaced in the TCA by the form at Annex Law-5: Arrest Warrant, containing many of the same headings, including a list of offences where dual criminality is assumed. However, the dual criminality issue is not in fact fully settled because as yet it seems there has been no agreement to implement the Framework List clause in the TCA. Therefore, at the moment dual criminality will have to be proved in all cases except those offences falling within Article LAW.SURR.79(3) (a) and (b).

**Timelines**

Art LAW.SURR.95 of the TCA and Art 17 of the EAW Framework Decision both establish that where a requested person consents to their surrender, the final decision on executing the extradition request shall take place within 10 days after consent was given. In other cases, the final decision on executing the extradition request will be within a period of 60 days from the requested person's arrest. Reasons must be provided to the requesting country where there is any delay.

**Rights of the requested person**

Art LAW.SURR.89 of the TCA and Art 11 of the Framework Decision both confirm a requested person's right to a lawyer and interpreter/translator. The TCA expands on the EAW Framework Decision somewhat by including the right to consular services, as well as the right to a lawyer in the issuing state. The right to a lawyer in the requesting state is a welcome addition to the protections available to requested persons, albeit it is not clear how an individual can exercise that right and how such representation will be funded.

**Mandatory and optional grounds for non-execution of the arrest warrant**

Art LAW.SURR.80 of the TCA and Art 3 of the of the EAW Framework Decision are identical,

upholding the mandatory refusal of extradition requests where the offence is covered by amnesty in the executing state, where there is double jeopardy, or the requested person is under the age of criminal responsibility in the executing state.

The first part of Art LAW.SURR.81 of the TCA is identical to Art 4 of the Framework Decision. The additions towards the end of Art LAW.SURR.81 of the TCA merely incorporate features that can be found in other sections of the Framework Decision such as decisions taken in absentia and decisions motivated to prosecute people on the grounds of a certain protected characteristic (sex, race, religion, etc.).

**Political offences**

The EAW Framework Decision had no specific political offence exception that would allow extradition to be barred in cases where the conduct amounted to a political offence. Art LAW.SURR 82 of the TCA introduces a political offence exception. It establishes as a starting point that extradition cannot be refused on the grounds that the executing state views the conduct as a political offence. However, it allows the state to notify the Specialised Committee that this approach is limited to certain specified offences, mostly terrorism-related.

The idea of having a bar to extradition where there are suspicions that the request is politically motivated is not a particularly novel addition within the UK–EU extradition regime. The EAW Framework Decision at point 12 identifies 'political opinions' as one of the protected characteristics that can be a bar to extradition where there are reasons to believe that the extradition request is motivated to prosecute or punish the person for their political beliefs.

The political offence exception is different to the extraneous considerations bar to be found in the Extradition Act 2003 or the test under section 1 of the Refugee Convention 1951.18 Political offence relates to offences that are political in character – the best example of this in international law is Art 1(f) of the Refugee Convention. These offences tend to be overtly political – incitement to riot, exceeding executive powers and election fraud – as opposed to politically motivated requests that often take the form of fabricated charges of fraud but do not on their face look political. This exception would cover very few cases, for instance, the request for surrender of some leading Catalan nationalists would probably have fallen under this ground. It is an important new safeguard, albeit one that will be relied upon in very few cases.

**Some new additions: A departure from mutual recognition and trust**

**Principle of proportionality**

The Framework Decision contained no requirement that the extradition request be proportionate. As such, the new 'Principle of Proportionality' at Art LAW.SURR.77 is a marked addition. It is notable that this is the second Article in the Surrender section of the TCA, emphasising the importance it holds within this new extradition arrangement. It also appears to replace the principle of mutual recognition found in Art 1 of the EAW Framework Decision.

Art LAW.SURR.77 is a call for 'necessary and proportionate' cooperation between the states involved. It highlights that the following must be considered:

*'rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention'.*

An example of its application is provided at Art LAW.SURR.93, when considering the time limits within which to make the surrender decision, or if further information is required to guide the final decision on surrender. Unfortunately, there is (not yet) a place foreseen in the new EU–UK Arrest Form to address this explicit optional ground to refuse surrender. However, given the clear and explicit importance of this principle under the TCA, the issuing authorities should document somewhere in the extradition request their reasoned decision that the extradition request indeed meets the proportionality threshold.

While the principle of proportionality is new to the formal UK–EU extradition relationship, it was identified as a working principle in the Commission handbook on issuing and executing an EAW (EAW Handbook), although in a limited form. The Handbook recommends that issuing Member States should be alive to the

proportionality of their request. However, it is also clear that the EAW does not give the executing state a duty to assess the proportionality of the issuing state's EAW because this would undermine the principle of mutual trust and recognition. Any concerns about the proportionality by the executing state should be 'exceptional'. Here lies an important difference to the surrender procedure under the TCA: It is now a must, between all remaining Member States of the EU, when in doubt or when so asked by another Member State, to give reasons why the requested measure is proportionate.

The United Kingdom on the other hand, in 2014, adopted the concept of proportionality into the Extradition Act 2003 through the implementation of section 21A. This section introduced a bar to extradition if it would be disproportionate to extradite by taking into account (a) the seriousness of the conduct alleged to constitute the extradition offence, (b) the likely penalty that would be imposed if the requested person was found guilty of the extradition offence' and (c) the possibility of less coercive measures being taken against the requested person.

Interestingly, the TCA's principle of proportionality has taken the approach found in the EAW Handbook and in the Extradition Act 2003 and extended it so that proportionality is now a consideration 'throughout' the extradition or surrender process. There is no longer the assumption that mutual trust and recognition applies in this area, instead encouraging communication between the parties where proportionality concerns are live.

**End of dual criminality assumptions?**

Art LAW.SURR.79 of the TCA and Art 2 of the EAW Framework Decision contain the same list of offences that avoid the executing state having to consider whether the offence in question is subject to dual or 'double criminality'. The only minor addition is that bribery has been added to the corruption category. These offences must be subject to a maximum sentence of at least 3 years imprisonment in the issuing states.

However, under the TCA, there is no longer an assumption of dual criminality for offences falling within Article LAW.SURR.79(3) (a) and (b). In addition, the exemption of dual criminality control now only applies in cases where both the issuing and the executing State have made a Notification under Art LAW.SURR.79(4) to the Specialised Committee to formalise reciprocity on this issue. This need for a Notification is confirmed in the new arrest warrant form, warning that the tick box list of offences only needs to be filled in where a Notification has been provided. The United Kingdom has, to date, given no such notification.

In terms of the UK law, section 12 of EUFRA 2020 amended the Extradition Act 2003 to delete references to the assumptions of dual criminality established in the European framework. It was not replaced by anything that might suggest assumptions around dual criminality. As such, the starting point will be to assume that dual criminality must be proved in every case. It will be interesting to see how this plays out in practice and whether it will affect the good faith that previously existed between the United Kingdom and other EU Member States in this area.

**Nationality**

The Framework Decision only gave special status to nationals and residents of the executing state where the executing state took it upon itself to allow the subject to serve their sentence in the home country. The TCA retains this power and has added a new 'Nationality Exception'.

The starting point for the 'Nationality Exception' in the TCA is that the warrant should be executed regardless of the subject being a national of the executing state. However, it also provides an opt-out clause whereby any Member State can notify the Specialised Committee that their own nationals will not be surrendered to the United Kingdom (or vice versa). The agreement states that where a Member State does not extradite its own nationals, it should consider bringing domestic proceedings in relation to the criminal matters or explain why it cannot (principle of aut dedere aut judicare).

This is likely to be a real issue where the United Kingdom is the issuing country, particularly since this is not an uncommon position for countries to hold in relation to extradition requests from outside of the EU – Germany, Austria and Slovenia were quick to notify the General Secretariat of the EU that they refused to surrender their own nationals to the United Kingdom even under the EAW system during the transition period. 16 of the 27 EU States do not extradite their own nationals outside of the EU. This is a further area that may undermine the culture of

mutual cooperation and trust between the United Kingdom and other EU Member States.

**Assurances**

Art 5 of the EAW Framework Decision already allowed guarantees or assurances to be obtained from requesting countries where the subject was tried or sentenced in absentia; if there were concerns about whole life sentences being imposed; or in order to request the return of the subject to serve their sentence if they were a national of the executing state. Art LAW.SURR.84 of the TCA adds a further ground for assurance where there are 'substantial grounds to believe that there is a real risk to the protection of the fundamental rights of the requested person'. In such cases, the executing state can request a guarantee regarding the subject's treatment before it makes the decision about executing the warrant. This incorporates the reasoning of the CJEU in Aranyosi and the ECtHR in Othman. Therefore, for the first time, this case law on the 'real risk' test and assurances will be incorporated into an agreement rather than the case law.

This is a significant expansion that further underlines the importance of compliance with the ECHR by providing a procedural mechanism to facilitate ECHR compliance. The United Kingdom already makes regular use of the ability to seek assurances or further information from issuing states where there are concerns about ECHR compliance, usually over prison conditions, so this probably will not mark a significant change. The question is, will increased use of assurances lead the new extradition system down the route of more bilateral cooperation or will it lead to increased suspicion and lack of trust between the parties to the TCA?

**Conclusion**

Whilst the UK government announced on 24 December 2020 that its analysis of the deal in relation to extradition was a 'UK win', the TCA appears to be closer aligned to the EU's negotiating position. The United Kingdom sought fast-track extradition arrangements based on the Norway and Iceland surrender agreement with the EU rather than the EAW Framework Decision. In addition, they sought further safeguards to ensure that surrender can be refused if someone's fundamental rights were at risk, extradition would be disproportionate or if they were likely to face long periods of pre-trial detention. On the other hand, the EU sought extradition arrangements based on streamlined surrenders subject to judicial oversight with the possibility to waive dual criminality and to determine the applicability of political offences and to consider not extraditing own nationals.

Instead of scoring points to determine 'who won' the UK government should seek to ensure that its law enforcement agencies are not further hampered in their ability to investigate and prosecute cross border criminality as a consequence of its departure from the EU.

**Edward Grange**
**Corker Binning**

**Ben Keith and Sophia Kerridge**
**5 St Andrew's Hill**

**Member State notifications: Nationality**

Since the above article was published a total of 10 EU Member States have notified of their intention to exercise an absolute bar on the extradition of own nationals. This includes Croatia, Finland, France, Germany, Greece, Latvia, Poland, Slovakia, Slovenia and Sweden. In addition, Austria and The Czech Republic have indicated that their own nationals will only be extradited with their consent.

## Court Liaison

The Court liaison team continues to meet regularly with Westminster Magistrates' Court and the High Court. Given the issues with CVP and the changing COVID issues we have tried to keep members regularly updated with email circulars where there has been a change in policy.

We met with Senior District Judge Goldspring on 22 March 2021. We congratulated him on his appointment and discussed a number of issues. He confirmed that CVP hearings will continue by default until 12 April unless a judge directs otherwise. The position will be reviewed after 12 April. DELF and the SDJ agreed that the progress made in using CVP during the pandemic should not be lost and that we will work together to try and create a system that enables administrative hearings and other appropriate hearings to continue under CVP.

CVP is about to be replaced by the Common Platform. It is hoped that this will improve efficiency and functionality.

The SDJ remains concerned about the issues with accessing the cells with an interpreter and is in communication with the relevant departments to resolve the issues. However, he has implemented some measures in the cells including an additional phone. It is hoped this will be resolved soon. Please inform us if you continue to experience problems with this issue.

The Court is also concerned at the regular failure to comply with directions and frequent requests to amend the directions. SDJ Goldspring asked that practitioners take account the impact of the pandemic when fixing directions recognising that because of increased workloads it has been difficult for both practitioners and the court to comply with directions. We emphasised the extraordinary pressure that lawyers are under in the pandemic and that will be fed back to the judges. It is hoped that the Court will be more willing to provide longer time when first setting directions for work to be completed, but in the expectation that those directions will be met.

## Membership

Membership runs from January to December annually. If you wish to join DELF for the first time since 01 January 2020, please e-mail your name, professional title, firm / chambers / employer, e-mail address and the category of membership that you wish to join DELF under, with "DELF Membership" in the subject heading to the e-mail address membership@delf.org.uk and follow the payment instructions set out below.

Due to a lack of in person events last year we ended 2020 in a stronger financial position than anticipated. Our intention is to pass this benefit on to our members in in 2021 with discounted events as soon as they are possible.

Fees for 2021 are as follows:

**£50 -** Full Membership - Open (subject to approval by the Committee) to any Solicitor, Barrister or member of the Institute of Legal Executives practising in the field of extradition and legal academic staff, whose practice includes representing requested persons in extradition cases. Full membership is also open to lawyers practising outside of England and Wales whose practice includes representing requested persons in extradition cases

**£25 -** Associate Membership - Trainee Solicitors, Pupil Barristers and Paralegals

**£15 -** Correspondent Membership - Open to court staff and other lawyers practising in the field of extradition

Fees can be paid in a group payment by a firm or Chambers administrator, or can be paid individually. If you are paying for more than one member in the same transfer, please email the details of who you have paid for and at what levels of membership they are joining at to membership@delf.org.uk after you have transferred the membership fees.

If you are simply paying for your own membership fee, please use your name as a reference on the bank transfer. There is no need to email to confirm transfer in this case.

Please make your payments by bank transfer to:

Defence Extradition Lawyers Forum
NatWest
Sort Code: 60 40 04
Account Number: 32 49 95 82
IBAN details: GB97NWBK60400432499582
BIC: NWBKGB2L

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**Contacts**
***Current Committee member officers 2020-2021***

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**Vice-Chair** – James Stansfeld
**Treasurer** – Catherine Brown
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**Social Secretary** – Claire Kelly
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**Membership Secretary** – Kate Chanter
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