ISSUE 30: FEBRUARY 2023

DELF

DEFENCE EXTRADITION LAWYERS FORUM

# NEWS

Welcome to edition 30 of the Defence Extradition Lawyers Forum newsletter. This is a very exciting edition, not least because it includes the winning essay of the John Jones KC Essay Competition 2022. We also have a summary of all the panels at our annual DELF conference and two fascinating updates from Germany which look at the application of the principle of ne bis in idem in extradition proceedings. We also bring you our usual updates on on-going activities, CPT reports and recent educational and social events. Many thanks, as always, to all our contributors.

## A message from the Chair

I am delighted to present the thirtieth edition of the DELF newsletter, and my first as Chair. It is a privilege to be taking on the role, and I look forward to an exciting year ahead continuing the great work of this very special organisation. My thanks go to James Stansfeld for his excellent stewardship as outgoing Chair, to those Committee members who have stepped down after years of dedicated contribution, and to the current Committee (in advance) for their hard work to come, particularly Catherine Brown as Vice-Chair.

We look forward to an interesting programme of both educational and social events in the coming weeks and months. For our first event of the year, we had a timely update on Article 8 developments in immigration and extradition. Next up, we will be assisting our new and junior members by hosting "An Introduction to Extradition" seminar and networking drinks to coincide with those first forays at Westminster Magistrates Court. Keep an eye on our Friday bulletins for information about new and upcoming events. In the next few weeks we hope also to launch our brand new website, currently in development after technical issues brought our old site down. My thanks go (as ever) to our patient and resilient Administrator, Harriet Devey, for keeping things afloat.

I hope you enjoy this edition of the newsletter, which includes a reminder of all the fantastic panels at September's Annual Conference, two updates from our colleagues in Germany and the winning entry from this year's John Jones KC Essay competition, which is well worth a read. The high calibre of the entries is incredibly encouraging for the future of the extradition community, and I am delighted that the competition continues to attract such interest and talent.

DELF is here to represent your interests in whatever way we can. As ever, do not hesitate to contact us with ideas, views and issues.

Danielle Reece-Greenhalgh
Corker Binning

## *Upcoming Activities*

### 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

## *Recent educational events and socials*

### ELA/DELF Christmas Social – 7 December 2022

DELF hosted its joint Christmas Social with the ELA at the Exmouth Arms, Exmouth Market on 7 December 2022. Tickets sold out at record speed for this event, wonderfully organised by our social secretaries Rebecca Hadgett and Fiona Haddadeen, alongside Reka Hollis of the ELA. The evening was full of festive cheer and delicious food - it was great to see so many familiar faces catching up over a glass of mulled wine (or two)!

### John Jones KC Essay Competition 2022 – winner announced

The judges of the John Jones KC Essay Competition 2022 (Julian Knowles J, Peter Binning and Mark Summers KC) were thoroughly impressed by the submissions this year. The essays were all extremely high quality and collectively they bode well for the future of the extradition lawyers' community. The winning entry was from Patrick McBride and in second place was Poppy Cleary - many congratulations to both of them and thank you to all who entered the Competition. Patrick's winning essay is in this newsletter.

### Article 8 post-Brexit: Developments in Immigration and Extradition - 23 February 2023

Our first educational event of the year took place on Thursday 23 February at Fladgate LLP, 16 Great Queen Street, London EC2B 5DG at 6.30pm. Myles Grandison of Temple Garden Chambers considered the recent developments in extradition law and Antonia Torr of Fladgate LLP provided an update on the immigration system from the perspective of EU nationals. A full update of this great event will follow in our next edition.

### DELF Annual Conference – 23 September 2022

The DELF Annual Conference took place on Friday, 23 September 2022 at the Ashworth Centre, Honourable Society of Lincoln's Inn. Below is a reminder of each of the topics covered by our fantastic panels throughout the day:

### Panel 1 – Political persecution in Turkey

The first talk of the DELF conference was chaired by Ben Keith of 5 St. Andrew's Hill and focused on political persecution in Turkey.

Coşkun Yorulmaz from the London Advocacy Group outlined unprecedented numbers of people in Turkey finding themselves at the receiving end of the persecution following a failed coup attempt: 1.5 million people have been under investigation for ambiguously defined terrorism-related offences, 600,000 people were arrested and 300,000 remain in prison, with torture being used on an industrial scale. Coşkun noted that the Council of Judges and Prosecutors, a body responsible for discipline, promotions and demotions of Judges and Prosecutors has undergone a significant re-structure under Erdoğan. In 2017 Erdoğan nominated the Minister of Justice to be the head of the Council, which significantly diminished its already flailing independence. Erdoğan continues to target the legal profession – immediately after the failed coup he dismissed all members of the Court of Cassation, arrested 180 of them and appointed 300 new members, all loyal to him and under his control. A Judge who acquitted Erdoğan of corruption charges in 2003 became the Head of the Court of Cassation (on Erdoğan's appointment). Judges of the Constitutional Court were also arrested and many of them remain in solitary

confinement until today. Coşkun noted that Erdoğan continues to target not only legal institutions, but also lawyers, many of whom have been imprisoned and/or lost their licences to practice law. The reshaped judiciary and attacks on lawyers leave the door wide open to widespread abuse of the law.

Dr Sanya Karakas acted as an expert in Turkish extradition cases since 2002. Dr Karakas gave various examples of cases where Turkey recently sought extradition. One such case, Akgul, was a request to the UK for a person convicted in Turkey in 2011 for providing food and sheep to the PKK (Kurdistan Worker's Party). Akgul's gave an account of torture in Turkey, which included being used as a human shield. Another example Dr Karakas gave was an extradition refusal in a case where prosecution in Turkey was ongoing, despite complete lack of evidence. Extradition requests from Turkey have also been refused in cases where the Turkish authorities did not have any political motivation to bring the accused person to Turkey – the refusals were on the basis that Turkey's assurances in relation to prison conditions could not be trusted. On the point of Turkish prisons, Dr Karakas noted that there were no specific wings for political prisoners in Turkey, but each prison would have special wards or rooms for such prisoners. Dr Karakas also noted that use of torture in Turkish prisons is systemic, particularly since the failed coup. Overcrowding in prisons remains an issue as well, with cells designed for 7 prisoners housing up to 45 individuals. New, worrying patterns also emerge in enforced disappearances, with people disappearing and resurfacing in police custody after a significant time period. One example given was of two Kurds who were detained by soldiers in Van and found in the ICU two days later, having been dropped from a military helicopter, with one sadly not surviving. Lastly, but importantly, Dr Karakas pointed to a chronic lack of effective investigations into allegations of widespread torture in prisons.

Hannah Raphael spoke about the Turkish extradition request concerning five senior members of the Fethullah Gulen Terror Organisation (FETO), including Akin Ipek, Ali Celik and Talip Buyuk. The indictments in Turkey included a series of offences: from stealing exam papers to terrorist financing. Ipek's lawyers were arrested in Turkey and so were his colleagues, family members and judges who released people connected to Ipek. Turkish authorities struggled to build the case against Ipek as it did not find people to give evidence against him. Witnesses in the UK extradition hearing gave evidence anonymously. The extradition request was challenged on the basis of Articles 2,3,5 and 6 of the ECHR, losing on Articles 5 and 6. The judge was however happy to accept that the judicial independence in Turkey was completely dismantled. Hannah also spoke about the case of Ozcan, a British citizen and a human rights activist – the chair and founder of an NGO Dialogue Society, whose extradition request was a result of statements made concerning the failed coup. The request was dismissed at a preliminary hearing on the grounds of the Turkish government's failure to provide sufficient information identifying Ozcen's criminal conduct. Hannah also noted another case she worked on, which the CPS decided not to pursue as the extradition request did not contain extradition offences.

The discussion following the panelists' presentations centred on how the Turkish government has approached extradition requests, including approaching prominent political figures to ask for support in extraditing Turkish activists (Erdoğan approaching Trump's son in law regarding extradition of Zaraf and Gülen). It was noted that countries like Sweden (a stronghold for Kurdish activists) and Finland do not entertain Turkish extradition requests; in Finland extradition requests from Turkey do not even make it to court. The discussion also focused on whether there were any alternatives to reactive litigation and the People's Court in Geneva was mentioned and so was a preparation to arrange an application to the ICC against Erdoğan. It was noted that there currently exists no forum or a committee that can debate real issues with designated countries. It remains obvious that extradition requests from Turkey are a political tactic, and it was queried whether the CPS should take a stand by preventing warrants from being issued in the first place. It was also noted that better co-operation between criminal courts and immigration tribunals could help to understand whether or not requests for non-political offences are in fact veiled political ones.

Magdalena Zima
Kingsley Napley LLP

## Panel 2 – Protections under s.20 Extradition Act 2003, the entitlement to a re-trial with a focus on Italy and Romania

With the High Court having recently certified points of law of general public importance in relation to the interpretation of section 20 in Bertino [2022] EWHC 665 (Admin) and Merticariu [2022] EWHC 1507 (Admin), this panel considered re-trial rights under Part 1 of the 2003 Act. Chaired by Graeme Hall (Doughty Street Chambers), panelists Mihai Mares (Mares & Mares), Andrea Saccucci (Saccucci and Partners) and Rachel Scott (3 Raymond Buildings) provided valuable insight into re-trial rights from a domestic and European perspective.

Rachel Scott opened by providing a clear and helpful overview of the operation of section 20 and the key authorities in relation to its interpretation. It established a three-part test, requiring the courts to consider first, whether the RP has been convicted in his presence, if he has not, whether the RP deliberately absented himself from the proceedings, and, if not, whether the RP is entitled to a re-trial or review. 2014 brought about a sea change in the application and interpretation of section 20 as the English courts were required to give effect to the Framework Decision, in particular Article 4a, and apply the principle of conforming interpretation. Important issues for practitioners considering section 20 include:

- identifying the event as the scheduled date and place of the trial which engages section 20;
- how it is said the defendant had actual knowledge of the event such that absence can be held to be deliberate;
- whether there is a right to a re-trial, and whether the exercise of that right is subject to procedural requirements considering the differing schools of authority (cf. Da an Chen v Romania, BP v Romania).

Mihai Mares, a criminal lawyer from Romania, provided the Romanian perspective. Article 466 of the New Code of Criminal Procedure was introduced in order to bring the Romanian legislative provisions in line with the requirements of Article 4a of the Council Framework Decision. The provision allows for the reopening of proceedings where the Requested Person was tried and convicted in absentia, which request for a retrial can be made within one month of the date on which the convicted person became aware of the criminal case against him. The following conditions need to be satisfied to establish a conviction in absentia:

1. The defendant was not legally summoned for the trial and had no knowledge of the trial by official means; or despite having knowledge, s/he was lawfully absent and not able to inform the court.
2. None of the following situations must apply: (i) the Defendant had a chosen lawyer or proxy who was present at least once at any time during the trial; (ii) after conviction, the defendant filed an appeal, waived his right to file an appeal or withdrew an appeal; and (iii) the defendant requested a trial in absentia.
3. The sentence must be final.

A person who was heard in the criminal investigation phase as either a suspect, a defendant or an accused will be deemed to have become aware of the obligation to notify any change of address so that if s/he is then summoned to that address, even many years later, s/he will be taken to have been aware of the criminal proceedings and as such would not be entitled to a re-trial on conviction.

Andrea Saccucci provided the Italian position, which bears similarities to Romania. Reforms took place to the Italian Code of Criminal procedure in 1989, 2005 and again in 2014 to bring it in line with European standards.

The 2014 reform has done away with the possibility of trials in absentia, unless one of the mandatory implied waiver of presence cases applies. For example, a defendant will be presumed to have implicitly waived his right to be present at trial where he has appointed a lawyer of his choice or where he has designated an address for service at any stage of the proceedings and does not inform the authorities of any subsequent changes to that address.

In all other cases, the judge at the preliminary investigation will stay the proceedings as they cannot continue in the absence of the defendant.

There is an important temporal restriction, however, since the 2014 reform only applies to proceedings which were pending at first instance in 2014 (or thereafter) and in which no decision to proceed in absentia had yet been made. The well-known length of criminal proceedings in Italy means that it is possible to still be dealing with convictions in absentia rendered by the Italian courts under the previous legislation.

Mr Secucci was not persuaded of the High Court's decision in Bertino, querying whether it is reasonable to expect someone who has been interviewed in connection with an alleged minor offence to notify the authorities of any change to his designated address for service for the many, many years it may take to reach the conclusion of the preliminary investigation phase and charge the person concerned. At present, a failure to report changes to the designated address creates an irrebuttable presumption of knowledge and the consequent possibility of being tried in absentia. This is very much a space to watch.

Reka Hollis
3 Raymond Buildings

## Panel 3 – The European Public Prosecutor's office: its jurisdictions and relevance to the United Kingdom

Our third panel discussed the role of the European Public Prosecutor's office, chaired by Rebecca Niblock (Kingsley Napley LLP) and featuring Cecile Soriano (European Delegated Prosecutor), Elise Martin-Vignerte (MacGuill & Co Solicitors) and Gulia Guagliardi (Studio Legale Giovene).

Cecil, who is one of four European Delegated Prosecutors (EDPs) in France, opened with a fascinating overview of the European Public Prosecutor's office ('EPPO') - how it functions, its structure and its successes so far. She spoke about a number of features of the EPPO which make it 'revolutionary', including its independence from the member states and European Institutions. Cecil explained how this gives the EPPO the unique ability to develop criminal policy at EU level, so to ensure consistency in approach across all member states. Since the EPPO began operations in June 2021, over 3000 crime reports have been opened and it was suggested that in the future we may see the expansion of the EPPO's jurisdiction to include environmental crimes.

Elise Martin-Vignerte then shared her thoughts on how the EPPO can work with non-participating member states on cross-border criminal investigations and proceedings. Elise explained that it is possible for the EPPO to collaborate with non-participating member states through existing treaties which engage with the jurisdiction of the EPPO – for example, the UN Convention against Corruption, the UN Convention against Transnational Organised Crime or Conventions on Mutual Legal Assistance. It is also possible for there to be bilateral co-operation agreements, with the US very recently signing a working agreement with the EPPO to facilitate co-operation for investing and prosecuting offences. As for the UK, the EU has notified the UK that the EPPO is a competent authority for the purposes of the Trade and Co-operation Agreement ('TCA'), specifically in the context of matters involving mutual assistance and freezing and confiscation proceedings. Elise noted that the EPPO is still a very young body, so it will be interesting to see in the coming years how these frameworks operate in practice.

Giulia, who is currently president of the European Young Lawyers Association, then spoke about a number of potential issues with the EPPO from the perspective of defence practitioners. She said that she agreed with Cecil that the EPPO was 'revolutionary' and did mark a turning point in the field of cooperation, but that there are various risks with the current model. She highlighted procedural issues including difficulties surrounding the admissibility of evidence gathered abroad in other member states and the risk of divergence in national legislation leading to forum shopping, as well as practical points such as the lack of coordination of legal aid measures across member states.

So, while it is not yet clear what the future holds for the EPPO, it was great to hear such a range of views on the topic from our panel - we will certainly have to continue the discussion as the EPPO finds its feet.

Maeve Keenan
Kingsley Napley LLP

## Panel 4 – What's the one thing you would change about our extradition law – and why?

The final talk of the day was chaired by Edward Fitzgerald KC of Doughty Street Chambers. The four speakers were asked, what's the one thing you would change about our extradition law – and why?

Hugo Keith KC of Three Raymond Buildings proposed introducing an obligation on the CPS to consider whether an extradition request is in the public interest. He argued that there should be an obligation to consider whether or not to continue and noted that there is currently no power to discontinue proceedings unlike in the criminal justice sphere.

Rosemary Davidson of 6KBW put forward the introduction of a general bar of oppression. She argued that the current legal framework operates as an ineffective patchwork of bars and human rights. This leads to strained judicial reasoning and cases that fall between the cracks where there are potentially strong arguments on oppression but the judge has no route to discharge.

Andrew Smith of Corker Binning proposed a two-part change to the prima facie test under section 84 of the Extradition Act 2003 (s.84). Firstly, that the s.84 test should be reinstated for all Part 2 countries (apart from New Zealand, Australia, Canada and the US). Issues were raised regarding countries who are signatory to the European Convention such as Russia and Israel which are not presently required to establish a prima facie case. It was argued that an examination of the evidence would illuminate relevant issues and importantly identify whether the requesting state is acting in good faith. Secondly, that there should be changes to the application of the test under s.84. Three changes were suggested: (1) make the hearsay provisions in s.84(2) and (3) more akin to gateways in criminal law; (2) amend s.84 to make it easier for the defence to cross examine witnesses (subject to exercise of judicial discretion); and, (3) expand the disclosure obligations of the CPS.

Finally, Mark Summers KC of Matrix Chambers proposed that we should dig up Lord Upjohn! (or test assurances properly). He raised issues regarding the presumption of compliance with assurances, and the allowance of assurances whenever a country chooses to produce one. He argued that we should not allow countries to produce assurances late in the day, and he convincingly argued that we should have a judiciary prepared to ask the difficult questions and go behind assurances.

Each proposal was subject to lively questioning from the floor and the Chair before being put to a vote where Mark Summers KC's proposal was the crowd favourite. Has anybody checked Lord Upjohn's grave since the conference?

Lucy Reynolds
Boutique Law LLP

## John Jones QC Essay Competition Winner 2022

### 'What place does the political offence exemption have in modern extradition law?'

The question at hand has both descriptive and prescriptive elements: what is the position of the political offence exemption in modern extradition law, and what should it be? This essay will argue that despite its decline, the political offence exemption still has a valuable role to play. To overcome its deficiencies, though, it must be refreshed and redefined in a manner bold enough to embrace its ideological origins.

#### Definition and origins

At its most basic level, the political offence exemption ('POE') provides that requests for extradition will be refused where the underlying offence is political in nature. There is no universal definition of a political offence; the question of categorisation is for the requested state to resolve.

The POE emerged in the flowering of liberalism after the American and French Revolutions in the late eighteenth century. As revolts rocked Europe in the nineteenth century, liberal powers saw revolutionaries as heroes. The POE avoided complicity in the punishment of dissidents by despotic regimes.

The sweeping original formulation of the POE granted protection to violent and otherwise unpalatable behaviour. This soon led to restrictions. In 1856 Belgium pioneered the attentat clause to exclude assassinations of heads of state from the protection of the exemption. Over the years since, actions like aeroplane hijacking and hostage taking have also been excluded. Many other carve-outs feature in recent bilateral treaties, including in relation to substantial property damage.

#### Current position

The POE has a long history and remains in some regards well established: it features, for example, in the UN Model Treaty of Extradition 1990. However, its inclusion in extradition treaties has grown much rarer in recent years. The European Arrest Warrant abolished it altogether within the European Union. In the UK, the Extradition Act 2003 broke with a tradition extending back to 1870 by not including a POE. In the Assange case, it was found that this departure clearly expressed Parliament's intention to do away with the POE. Further, Mr Assange was found to derive no enforceable rights from the POE contained in the US-UK Extradition Treaty of

2007. Though that first instance judgment is open to appeal, its reasoning seems on firm legal ground given recent Supreme Court jurisprudence on unincorporated treaties.

## Arguments for the POE

### 1. Humanitarian concern for the requested person

The primary concern is that suspected political offenders may not be granted a fair trial. (Concerns around torture have been allayed within the Council of Europe by Soering v UK). However, the POE is a weak means of protecting a requested person from an unfair trial.

First, suspects may face unfair trials even for non-political offences. This problem is better addressed by the discrimination clause that is commonplace in extradition treaties and is incorporated into the 'extraneous considerations' provisions of the Extradition Act 2003.

Second, is the rationale behind this concern that there can be no fair trial for a political offence? If so, why do political offences remain on the statute books domestically? Does the UK believe itself exceptional in this regard? Mutual trust and respect would seem to dictate that we credit the judicial systems of fellow democracies with the ability to conduct such proceedings fairly.

### 2. Political offences are different

It has been suggested that political offences lack an element of malice or self-interest, and that political offenders are therefore less deserving of punishment. Again, this contention begs the question of why we choose to punish political offences domestically. One answer might be to preserve the stability of our state and our democracy. Why then should we not assist fellow democracies to do the same, by cooperating in the extradition of those who threaten them?

### 3. Self-interest

The POE has been described as a mechanism by which states advance their own self-interest. The theory goes that operating a blanket ban enables a requested state to maintain that a refusal to extradite involves no element of discretion and no picking of sides in any internal conflict within the requesting state. This is diplomatically advantageous: it preserves relations with current governments and avoids antagonising rebels who may later come to power. This notion may be particularly attractive as autocracies gain influence in the modern world.

However, determining what constitutes a political offence inevitably involves making value judgements. The more restrictions have been made to the POE, the more obviously political those judgements have become. States may also choose how far to restrict the POE with a particular treaty partner based on their assessments of that partner's judicial system and constitutional safeguards. In jurisdictions where individual decisions on extradition or categorisation of offences lie with the executive rather than the judiciary, the veneer of neutrality is even thinner.

### 4. Advancement of liberal ideals

The POE emerged to protect revolutionaries, and thereby to advance the liberal ideals for which they fought.

The efficacy of the POE in fulfilling that purpose fell into doubt as it increasingly protected individuals who had striven to undermine or destroy liberal values. Yet restrictions on the POE have focused on the types of acts committed by requested persons, rather than on their motivations. Once a requested person's motivations have been established as political, courts have refused to "inquire whether a 'fugitive criminal' was engaged in a good or a bad cause". This arguably protects the judiciary from politicisation and ensures consistent application of the POE as a legal rule. Conversely, courts have at times appeared to vary the application of the POE according to their sympathy with the cause of the requested person. This may avoid protecting opponents of democracy. Under the current formulation of the POE, however, it is unprincipled and risks arbitrary or discriminatory decision-making.

Of course, even today many of those accused or convicted of political crimes are resisting tyranny. Moreover, democracies must not be complacent. Democratic backsliding in Hungary and Poland has been well documented.

Cases like those of Julian Assange and Clara Ponsatí raise questions about what constitutes legitimate political conduct within a democracy. Indeed, it has been contended that a 'ghost' form of the POE was applied even within the EU in regard to Spanish requests for the extradition of the Catalan politicians (including Ponsatí) who had conducted an unauthorised independence referendum. This indicates that the POE is still relevant and necessary.

## Arguments against the POE

### 1. "Out of date"

Political offences are different now: methods, ideology and technology have all changed. The targeting of civilians has become widespread. Where revolutionary conflicts were once localised, for some the struggle is now against liberal democracy in general. Modern weaponry is capable of huge destruction. These factors all militate towards reform or abolition of the POE. However, technological advances also mean that political offences may now be committed online outside the territory of the requesting state. This development prefigures an increase in both the salience of extradition and the need for safeguards such as the POE.

### 2. Do other mechanisms do its work better?

The POE is only one safeguard in the sphere of extradition. Other safeguards include the discrimination clause, the system of asylum and the use of a human rights framework. But these safeguards do not all cover the same ground.

The discrimination clause takes no account of the nature of the alleged offence. Thus, while it may be effective at protecting the rights of the requested individual, it does little to protect the ideals that person has promoted.

The non-refoulement principle in asylum law is an almost identical legal provision to the discrimination clause. It also has its own version of the POE: refoulement is permissible if a refugee has committed a serious crime, unless that crime is political. The arguments made in this essay apply also to that provision.

Human rights also protect the requested individual to some extent, but the bar is high: per Strasbourg, there must be a real risk of a flagrant breach of an important right for extradition to be prevented. Where Article 3 ECHR is not engaged, a requested person might seek to defeat an extradition for political offences on Article 10 grounds. However, prior indications of the European court do not bode well for such an approach. Moreover, a human rights perspective must also take into account the rights of victims in a way that the POE does not. This may curtail the protection it offers to political offenders.

Upon analysis, then, the POE plays a unique role within the landscape of safeguards in modern extradition law.

## Ideas for reform

Some have suggested that an international court should be set up to deal with political offences, in the mould of the ICC or the ECtHR. Others have advocated for the revival of a broad POE, combined with the extension of extraterritorial jurisdiction so that political offences can be tried in the requested state. However, these proposals would impose increased burdens on the international community and the requested state. An international body would also require an international definition of a political crime, which would be difficult to agree.

There is an alternative: liberal democracies should have the courage of their convictions. They should reformulate the POE so that it expressly protects liberal democratic values.

The reformulated POE could operate negatively, denying protection to activities aimed at the destruction of those values. As Article 30 of the Universal Declaration of Human Rights shows, it is necessary for democracy to be able to defend itself. As such, it is appropriate to exclude from an instrument's protection acts aimed at the destruction of the rights and values that the instrument was conceived to serve.

Alternatively, the new POE could operate positively, protecting only justifiable acts done to further democratic values. This option would likely provide less generous protection. Certainly, the standard of justifiability ought not to be too onerous. Terrorism and the targeting of civilians could be excluded from the purview of the POE, but it may be realistic and appropriate to protect discriminate, proportionate violent activities.

Putting the reformulated POE on a statutory footing would mitigate constitutional concerns: courts would merely be following the instructions of Parliament. In any event, such concerns appear to have receded. As Lord Lloyd-Jones has pointed out, where UK courts were once reluctant to examine the conduct of foreign states, a "striking shift in attitude" has seen them become far more comfortable in doing so.

### Conclusion

There is a place among the range of safeguards in modern extradition law for a reformed political offence exemption. The exemption was conceived to protect liberal democratic values; its reformulation should make that commitment concrete.

Patrick McBride

## Case Update: Germany

### Application of the principle of ne bis in idem in extradition proceedings pursuant to Article 50 CFR on the basis of a termination of criminal proceedings by a prosecuting authority

On 19 May 2022 the German Constitutional Court issued a decision (case no. 2 BvR 1110/21) that might become of great importance for the interpretation of the scope of Article 50 Charter of Fundamental Rights of the European Union ('CFR') and is likely to have major practical implications. According to the Constitutional Court, the principle of *ne bis in idem* pursuant to Article 50 CFR is applicable in extradition proceedings and can be extended to prosecutorial decisions that provide, while not explicitly binding by law, sufficient reasons to trust in their finality. The Constitutional Court considers a case to be "finally disposed of" in the sense of the ECJ decision in *Kossowski* (ECJ, Judgment, 29 June 2016, C-486/14).

### Background

Under German law, the public prosecutor can terminate criminal proceedings *inter alia* on the basis of the following provisions: Pursuant to Section 170 (2) German Code of Criminal Procedure, criminal proceedings can be terminated if there is no sufficient reason to bring an indictment. Pursuant to Section 154 (1) German Code of Criminal Procedure, criminal proceedings can be terminated with regard to certain offences if the sanction that may be imposed for these offences is not of considerable weight in comparison to a sanction that the accused has to expect for another offence. Neither of these two options available to the public prosecutor to terminate criminal proceedings leads, as such, to a final closure that would, under German law, definitively and explicitly bar further prosecution.

### The underlying case

In order to understand why the Constitutional Court nevertheless asserted the principle of *ne bis in idem* against the background of the aforementioned provisions, it is important to understand the development of the underlying case: In 2014, Czech authorities shared information with German law enforcement authorities resulting from telecommunication surveillance that related to allegations of cross-border drug trafficking between the Czech Republic and Germany. On this basis, the German Public Prosecutor's Office in Chemnitz initiated a criminal investigation against the accused person, conducted its own surveillance of telecommunication and searched her house. During the search, marijuana was seized and the accused was arrested. In the course of the further investigation, she was questioned several times. In 2015, the Chemnitz Public Prosecutor's Office indicted the accused person. Simultaneously, the prosecution of certain offences was terminated pursuant to the above mentioned Section 154 (1) German Code of Criminal Procedure, as the sanction that was to be expected was not significant in view of the offences covered by the indictment. The accused was subsequently convicted on the basis of her comprehensive confession and, crucially, the criminal proceedings regarding the offences terminated under Section 154 (1) German Code of Criminal Procedure were not re-opened afterwards. In April 2018, the said offences were again brought to the attention of the Chemnitz Public Prosecutor's Office and this time the proceedings were terminated pursuant to the above mentioned Section 170 (2) German Code of Criminal Procedure, as the public prosecutor saw no reason to revise its prior decision to terminate the investigation pursuant to Section 154 (1) German Code of Criminal Procedure.

Eventually, in September 2018, the Czech authorities issued a European arrest warrant for the offences in question. The competent prosecutor in Germany argued that the termination pursuant to Section 154 (1) German Code of Criminal Procedure does not satisfy the criteria set out in Article 50 CFR and, therefore, decided not to refuse to execute the European arrest warrant. The competent Higher Regional Court in Dresden considered the prosecutor's arguments to be valid and, in March 2021, declared the extradition to the Czech Republic admissible.

## The decision by the German Constitutional Court

The accused person succeeded with a constitutional complaint against the decisions by the Public Prosecutor's Office and the Higher Regional Court. The German Constitutional Court declared that Article 50 CFR also applies to extradition proceedings (see now also ECJ, Judgment, 28 October 2022, C- 435/22 *PPU*, para. 70) and that these decisions had violated Article 50 CFR.

In its decision, the Constitutional Court pointed out that the principle of *ne bis in idem* previously determined by Article 54 Convention Implementing the Schengen Agreement ('CISA') is now, according to the case law of the ECJ, enshrined in Article 50 CFR which stipulates that no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he has already been finally acquitted or convicted within the European Union in accordance with the law. The Constitutional Court stated, in line with the case law of the ECJ, that in principle even a decision by a prosecuting authority to discontinue an investigation which does not enforce any sanction but has the effect of finally terminating the national criminal proceedings can trigger the principle of *ne bis in idem*. It added that, according to the ECJ the question of a "final" termination has to be answered on the basis of the law of the Member State where the decision in question was reached. Furthermore, the Constitutional Court referred to the case law of the ECJ according to which the decision has to be made on the basis of a determination as to the merits of the case.

The Constitutional Court then applied these standards to the relevant provisions of the German Code of Criminal Procedure and, on this basis, examined whether the decisions of the Public Prosecutor's Office and the Higher Regional Court, according to which an extradition would be admissible, violated Article 50 CFR: According to the Constitutional Court, the facts that there had been a thorough investigation, that the criminal proceedings had not been reopened after the conviction and that the proceedings had been terminated again in 2018 pursuant to Section 170 (2) German Code of Criminal Procedure entitled the accused person to trust that no further criminal prosecution would take place with regard to the said offences. Hence, the decision of the public prosecutor terminating the criminal proceedings had created a basis of trust and had to be considered as finally closing the investigation procedure.

Therefore, the Constitutional Court found that the decisions declaring extradition admissible were in violation of Art. 50 CFR and had to be overturned.

## Comments

The decision of the German Constitutional Court prioritises the protection of the trust that a formerly accused person has in the termination of criminal proceedings. It thereby strengthens the right to freedom of movement as guaranteed by Article 45 CFR. The Constitutional Court has gone beyond the view previously expressed by the ECJ in its interpretation of the *ne bis in idem* principle laid down in Article 50 CFR and, formerly, Article 54 CISA and develops the case law further.

In the context of its own interpretation of Article 50 CFR, the Constitutional Court primarily cites the ECJ's decision *Kossowski* (ECJ, Judgment, 29 June 2016, C-486/14). In that decision, however, the ECJ explicitly mentions two separate requirements for the "final" element of the *ne bis in idem* principle which – as the ECJ puts it – must be met cumulatively ("*in the first place*", paragraph 34, and "*in the second place*", paragraph 42). On the one hand, the ECJ requires that the decision "*was given after a determination had been made as to the merits of the case*" (paragraph 42). In the present case, the termination of the proceedings was preceded by the evaluation of telecommunication surveillance measures, a house search as well as the repeated interrogation of the accused person. It was therefore reasonable to conclude that the prosecution authorities had carried out a detailed investigation, thereby fulfilling one requirement. On the other hand, the ECJ requires that "*further prosecution has been definitively barred*" which must be assessed on the basis of the law of the state in which the decision has been taken (paragraph 34 f.). Therefore, a determination of the legal effects of the relevant decision is necessary.

This is where it gets interesting: As mentioned above, neither the termination of criminal proceedings according to Section 170 (2) nor according to Section 154 (1) German Code of Criminal Procedure leads to a final closure that would definitively bar further prosecution. This is also apparent from the settled case-law of the highest German criminal court and the Constitutional Court even explicitly points to this circumstance. There is no explicit provision under German law that such decisions are final and binding. It has nonetheless been accepted by German prosecutors and Courts that even these types of decisions can create a basis of trust and that a formerly accused person can legitimately assume that a case will not be reopened without valid reasons.

The Constitutional Court states that the accused person and the general public have an interest in the reliability of the decision made by the Public Prosecutor's Office. The termination of proceedings not only relieves an accused person of the burden that criminal proceedings entail, but it is also meant to guarantee legal certainty. In order to do justice to these interests, every termination of the criminal proceedings by the Public Prosecutor's Office requires a certain consistency and any reopening of previously terminated proceedings should only take place if there is an objectively plausible reason. As a specific reason for the trust in the reliability of the decision to terminate the proceedings in the present case, the Constitutional Court refers to the fact that after the judgement against the accused person had become final, the Public Prosecutor's Office did not reopen the proceedings and thus apparently continued to assume that an expected sanction would not have a significant impact in comparison to the sentence that had already been handed down. Against this background, the Constitutional Court regarded the decision of the Public Prosecutor's Office to terminate the proceedings as final within the meaning of Article 50.

As far as we can tell, the ECJ has so far, always required a formal decision that definitively bars any further prosecution for the application of *ne bis in idem* principle according to Article 50 CFR or, formerly, Article 54 CISA. Therefore, extending the application of Article 50 CFR to decision of a public prosecutor that “only” establish the trust that no further prosecution will take place, as the German Constitutional Court has now done, goes beyond the view previously expressed by the ECJ. The decision might nonetheless find the acceptance of European judges as it has always been highlighted in the ECJ’s jurisprudence that it is up to the Member States to determine what cases are “finally disposed of” by national courts and prosecuting authorities (see ECJ, Judgment, 29 June 2016, C-486/14 *Kossowski* para. 35). Whether the reason for such final disposal is a level of legitimate trust in the finality of the prosecutorial decision in a specific case or a legal provision explicitly determining such finality in the abstract should not matter much from a European perspective.

This evolution of the *ne bis in idem* principle by the Constitutional Court must be taken into account by all defence lawyers involved in extradition proceedings from or to Germany who should emphasise any and all aspects that give rise to the trust that no further prosecution will take place. Similarly, German public prosecutors and courts must keep this decision in mind if they conduct criminal proceedings and an authority of another EU Member State has previously terminated an investigation in such a way that a basis of trust is established under the law of that Member State.

Beyond that, we very much hope that the Constitutional Courts of other (EU Member) States, but also the ECJ, value the protection of trust in a termination of criminal proceedings similarly high.

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## When is an extradition decision binding? Recent case law on double jeopardy as a defence against extradition

Despite the clear wording in Art. 50 of the Charter and Art. 54 of the CISA, even after successfully fighting extradition in one EU Member State, the decision obtained does not bind another Member State. The person prosecuted faces the risk of (multiple) re-arrests and extradition procedures when entering another Member State.

Moreover, currently, it is not possible to challenge a request for extradition or an EAW at EU-level with binding effect on all Member States. In addition, the means of accessing and deleting messages in the Schengen Information System (SIS) and INTERPOL alerts – which themselves can serve as a legal basis for arrest pending extradition – are extremely limited and ineffective, especially because access to those databases is highly dependent on the issuing Member State's cooperation.

The European Criminal Bar Association (ECBA) has published a statement on 16 May 2022 calling for the recognition of extradition decisions. In particular, the Member States were called upon to accept a binding effect of extradition decisions by courts of a Member State in certain scenarios:

- The ECBA paper accepts, that due to a lack of harmonization of the local criminal laws in the Member States, certain decisions cannot have binding effect.
- However, the paper argues that certain judicial decisions have a fundamental and pan-European nature and therefore must be binding on other Member States. This applies to cases of double jeopardy (ne bis in idem) with regard to the acts covered by an SIS or INTERPOL notice. These should be binding upon all Member States. The same applies for judicial decisions refusing extradition on the grounds of Art. 12 of EAW-FD (prosecution based on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation) and decisions finding disproportionality of an extradition.
- The paper further argues that certain decisions should at least have a temporary binding effect. The finding by a court of a Member State refusing extradition due to a risk of ill-treatment or a risk of flagrant denial of justice in the requesting state should be recognised across the EU until the requesting State proves that the risk no longer exists.

The aforementioned issues are also reflected in current and recent proceedings before the CJEU as well as local German Courts:

In the proceedings against WS (C-505/19), a German citizen against whom proceedings were terminated in Germany triggering *ne bis in idem* under Art. 50 of the Charter and Art. 54 of the CISA, the CJEU accepted that WS may not be wanted, arrested or extradited to a non-EU-Member State if a judicial decision exists confirming that the request for extradition from that third country relates to the same facts. To my knowledge, throughout Europe, there is currently no procedure enabling WS to obtain such a decision which binds all Member States. As a consequence, WS would still risk arrest and extradition when entering another Member State.
In the most recent case (C-435/22 PPU, HF), the Munich Higher Regional Court raised the question, whether Article 54 of the CISA in conjunction with Article 50 of the Charter prohibit the extradition of a third-country national to a non-EU-country.

The arrested individual – a Serb national – had already been tried and convicted in Slovenia. In the case at hand, the Slovenian courts had not only convicted the individual in 2012 but had also declared a later extradition request from the United States in 2018 inadmissible. When refusing extradition, the Slovenian court argued partially on the basis of ne bis in idem and further argued that the US had failed to describe an offence punishable under Slovenian law. Now, the United States are seeking extradition of the same person from Germany based on the same indictment that formed that basis of the earlier extradition request to Slovenia which referred to the offences named in the initial Slovenian judgment.

Following the ECJ in WS (C-505/19) at least the first part should have been binding upon the Munich court. However, the Munich Higher Regional Court argued that WS only referred to arrest and the wanted notice but not the extradition. In addition, the court argued that WS does not relate to foreign nationals but only to EU-citizens aiming to exercise their right under Art. 21 of the TFEU. Due to this second aspect, the decision could be of particular relevance for UK-citizens who could – according to the Munich court – no longer enjoy the protection of Art. 50 of the Charter. This view, however, would disregard the clear and unambiguous wording of Art. 50 of the Charter and 54 of the CISA since both constitute an independent judicial guarantee rather than an annex to Art. 21 of the TFEU.

In his opinion from 13 October 2022, the Advocate General strongly argued that the principle of ne bis in idem should apply and stop extradition in a case like HF.

In its decision of 28 October 2022, the Grand Chamber of the ECJ provided a very clear ruling whereby Art. 54 of the CISA and Art. 50 of the Charter not only prevent another criminal conviction within the EU but also extradition to a non-EU-Member State. In addition, the court clarified that Art. 54 of the CISA and Art. 50 of the Charter also protect non-EU-citizens irrespective of their immigration status.

Referring to the WS-decision, the Grand Chamber sets out that the principle of mutual trust requires authorities of one Member State to accept a final decision issued by another Member State exactly as it has been notified to them. Without such trust, the fundamental principle of mutual trust and recognition as a fundamental principle of EU law would be put at stake. The Court further ruled that bilateral treaties have to be interpreted in a way so as to ensure the protection guaranteed under Art. 54 of the CISA and Art. 50 of the Charter.

While further clarification on the extent of the binding effect is needed, the decision is a further significant step towards a common understanding on the effect of Art. 54 of the CISA and Art. 50 of the Charter in extradition decisions.

This is particularly important since it appears that the courts in EU Member States are treating the relevant questions differently. While only most recently, the Portuguese Supreme Court accepted the binding effect of an extradition decision from 3.08.2022 (file reference nº 157/21.7YRCBR.S1), the Higher Regional Court of Braunschweig (Germany) refused to accept a non-extradition-decision by a Polish Court (Higher Regional Court Braunschweig 1. Senate, Decision from 16.09.2022).

Sören Schomburg
Ufer Knauer

## CPT Updates

The Council of Europe Committee on the prevent of torture and inhuman and degrading treatment or punishment (CPT) has recently published its reports on:

- Belgium – see article

The CPT has announced it has undertaken the following visits:

- Greece – see article
- Moldova – see article
- The United Kingdom – see article

## Membership

Membership runs from January to December annually. If you wish to join DELF for the first time since 01 January 2023, 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.

Fees for 2023 are as follows:

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

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