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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

We are very pleased to bring you edition 32 of the Defence Extradition Lawyers Forum newsletter. This is a bumper edition including a roundup of all the panels at our annual DELF conference which took place at the end of last year. We also have fascinating updates on the hot topic of witnesses giving evidence via video-link in extradition proceedings, a summary of a recent Indian extradition case and a fantastic overview of the *Popoviciu* case. We bring you our usual updates on on-going activities, CPT reports and social events. Thank you to all our contributors.

A message from the Chair

Welcome to the 32nd edition of the DELF newsletter. This is a packed edition, with lots of fantastic pieces from our DELF community. We also have all of the details for our upcoming educational and social events. We have a lot to look forward to in the coming months. For our first event of the year, we will be assisting our new and junior members by hosting an "Introduction to Defence Challenges in Extradition" seminar, on 28 March 2024. We have had a lot of interest in this event, which is testament to the stellar line up of speakers and excellent organisation by Ben Joyes. Planning is also in full swing for the highlight of the DELF social calendar - the DELF annual dinner on 17 May 2024. It is shaping up to the be the biggest dinner event DELF has ever hosted, and we hope that it will be an enjoyable evening for all. My thanks go to the many committee members who have been working tirelessly behind the scenes to make it happen, but I'd like to give a special mention to Fiona Haddadeen for her outstanding organisational skills.

I hope you enjoy this edition of the newsletter. As ever, DELF is here to represent your interests in whatever way we can and so do not hesitate to contact us with ideas, views and issues.

Catherine Brown
6KBW College Hill

Upcoming Activities

Liaison

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

Upcoming events

Introduction to Defence Challenges in Extradition - 28 March 2024

There are still a few places left at the first in the lecture series entitled "Introduction to Defence Extradition", taking place on Thursday 28 March and tackling Technical Arguments and Tactical Considerations. The lecture is aimed at those who are new to extradition as well as others wishing to update their knowledge. It will take place in person to facilitate the exchange of information as well as networking opportunities.

The lecture will be held at Gray's Inn and will be followed by a drinks reception at 9BR. This event is free for members who will be given priority if the lecture is over-subscribed. The event is also open to non-members at a charge of £10 per ticket. Please email the DELF Administrator if you would like to attend.

"The Supreme Court and the consequences for Section 20" - 23 April 2024

Our second DELF event of the year will be held on 23 April 2024 at Doughty Street Chambers. Junior Counsel instructed in Bertino and Merticariu will discuss the consequences of the Supreme Court decisions handed down on 6 March 2024 on the correct approach to deliberate absence and the right to a retrial. Please email the DELF Administrator if you would like to attend.

DELF Annual Dinner - 17 May 2024

Tables have now sold out for the DELF Annual Dinner which is taking place on 17 May 2024. A limited number of individual tickets went on sale on Monday 18 March 2024 at 10am and there are only a few remaining. Please contact the DELF Administrator as soon as possible if you would like to attend.

John Jones KC Essay Competition 2023/2024

The winners will be announced very soon and the winning essay will feature in the next edition of our newsletter. Watch this space!

DELF Annual Conference – 22 September 2023

The DELF Annual Conference took place on Friday, 22 September 2023 at Savoy Place. Below is a reminder of each of the topics covered by our panels throughout the day:

Panel 1 – EDL, the European Court of Justice's examination of the impact of serious health conditions on extradition. Will the UK follow suit?

The first panel of the day comprised Judge Lars Bay Larsen, Vice President of the CJEU, District Judge Sternberg, and Professor Valsamis Mitsilegas of the University of Liverpool. The panel was chaired by Myles Grandison of Temple Garden Chambers.

The presentation provided a comprehensive background to (C-699/21 18.4.2023) E.D.L. The panel explained that E.D.L is a decision where the Grand Chamber of the Court of Justice of the European Union ("CJEU") provided a provisional ruling in proceedings requested by Italy (the executing judicial authority) concerning the execution of a European Arrest Warrant issued by Croatia (the issuing judicial authority). During proceedings the requested person, E.D.L, relied on an expert's report which highlighted that the RP had a significant risk of suicide in the event of imprisonment and owing to the RP's need to continue therapy RP was an individual who was "unsuitable for prison life".

Italy asked whether in Art.1(3) of the Framework Decision when read with Articles 3, 4, and 35 of the charter must be interpreted as meaning that when a requested person suffers from a serious chronic and potentially irreversible health condition, and surrender could expose that person to suffer serious harm to their health, must the executing

authority request information from the issuing authority which rules out that possibility, and, if that material is not provided within a reasonable period of time, refuse to surrender the requested person?

The CJEU went beyond the original request to state that where there are substantial grounds to believe that the execution of a warrant manifestly risks endangering a requested person's health the executing authority may postpone surrender temporarily. The CJEU continued; when the executing authority concludes that there are substantial and established grounds for believing that the surrender of the RP would expose them to a real risk of a significant reduction in life expectancy or a rapid, significant, and irreversible deterioration in their health, surrender must be postponed and the executing authority must ask the issuing authority to provide all information relating to the conditions under which it intends to prosecute or detain that requested person. If on provision of information to the executing authority it appears that the risk cannot be ruled out within a reasonable period of time, the executing authority must refuse to surrender the requested person to the issuing authority. However, if the risk can be ruled out within a reasonable period of time the executing authority must agree a new surrender date with the issuing authority.

During discussions by the panel, it was observed that the CJEU was principally concerned with the nature of the risk that E.D.L may have been subject to in Croatia and did not assess any generalised nor systemic deficiencies of the issuing authority. In so doing the panel drew attention to the similarity in approach between the CJEU in E.D.L and the opinion of Advocate General Capeta in *Case C-261/22, GN V Procuratore Generale Presso La Corte Di Appello Di Bologna [2023].*

GN is an opinion which sets out that GN was sought by Belgium (the issuing judicial authority) and arrested by the Italian authorities at which point her minor child was placed into care. GN resisted surrender and was remanded into custody. GN was later released to house arrest at which point her child was removed from care and returned to GN. The executing authority submitted a request for further information from the issuing authority, specifically asking about procedures for the execution of a sentence in Belgium for mothers living with minor children, the prison treatment to which GN would be subjected, the measures that would be taken in relation to GN's child, and the possibility of a retrial. No meaningful information was received in reply.

The Italian court refused to surrender GN to Croatia, according to the discharging court, in the absence of a response from Croatia there was no certainty that the issuing authority recognised custody arrangements comparable to those in Italy.

The decision was appealed by the Italian prosecutor to the Supreme Court of Cassation who referred the following questions to the CJEU for a preliminary ruling: 1) must Article 1(2) and (3) and Article, 3 and 4 of the Framework Decision be interpreted as meaning that they do not permit the executing authority to refuse or defer the surrender of a mother who has minor children living with her? 2) if the answer to 1 is positive then are Articles 1(2) and (3) and Articles 3 and 4 compatible with Articles 7 and 24(3) of the charter, also considering the case law of the ECtHR and Article 8 ECHR and member states' constitutional traditions in so far as they require the surrender of the mother thus severing ties with minor children living with her without considering the best interest of the child?

Advocate General Capeta concluded that the CJEU should answer the questions as follows: 1) Article 1(3) of the FD does not in principle prevent the refusal to surrender a mother of small children when that is in the best interests of the child. 2) such a refusal is possible only if, after determining the concrete situation of the child and after using the communication mechanism, the executing authority does not have sufficient information that would allow it to be absolutely certain that the execution of the warrant would not go against the best interests of the child. 3) temporary postponement of surrender is not possible for a person other than RP2 and only when the requested person's life or health is manifestly endangered.

The panel observed that this opinion was not yet the settled position of the CJEU and the final judgment was awaited.

Douglas Wotherspoon
9BR Chambers

Panel 2 – The intersection of asylum and extradition

Our second panel of the day was on the topic of "the intersection of asylum and extradition." Although extradition and asylum are distinct legal processes, our panel gave us a fascinating insight into how they overlap in a number of different ways and how to navigate cases which engages these issues.

Nadejda Atayeva - Founder and President of the Association for Human Rights in Central Asia - shared her first-hand experience of being subject to politically motivated charges brought by the Uzbek authorities. Nadejda had to flee Uzbekistan to France where she was granted refugee status. She described her experiences of trying to fight her case back in Uzbekistan while in France and the difficulties faced by her legal team who were threatened for assisting her. She explained that in many countries in Central Asia, the legal processes are so deeply unfair that the only choice to feel safe for those facing a politically motivated case is to flee the country.

The panel discussed what can happen when asylum and extradition proceedings are progressed in parallel. They explored the tactical considerations of what arguments to run and when they can be deployed. They touched upon the close link between the principle of non-extradition for political offences and asylum, specifically the exclusion clause of Article 1F(b) of the 1951 Refugee Convention. This clause was introduced in part to ensure that persons who flee legitimate prosecution, rather than persecution, should not benefit from international refugee protection They noted the difficulties which can arise when seeking to establish that your client is being persecuted, particularly where the allegation is related to financial crime.

The potential benefits of applying for asylum were discussed, particularly that individuals are afforded confidentiality and anonymity in asylum proceedings. It was explained that the Home Secretary is prevented from disclosing to the requesting state than an individual has made a claim for asylum and the process should be confidential (although it was noted there can be slip ups on this principle in practice, for example if an individual is recognised when they attend their asylum interview). In asylum, there are generally also closed hearings, with no press or requesting state present. This is in contrast to extradition of course, where the requesting state is one of the parties. It was noted that the asylum and extradition processes may go at different speeds, so thought has to be given about what arguments are run first particularly if there are different points which can only be made in closed court.

The panel touched on expert evidence and noted that some experts can be more willing to give evidence in asylum cases as they can do anonymously. It was noted that in extradition there can be a reluctance from Judges to give as much weight to expert evidence when the expert is not named. In many cases, experts will be at risk in the requesting state even if they are acting independently but this again can be hard to prove.

This is a topic which will keep coming up for extradition practitioners – the overlapping issues flagged by our expert panel highlighted the delicate balancing act when considering the best strategy in each case.

Maeve Keenan
Kingsley Napley LLP

Panel 3 - US Sentencing Practices and the ECHR

This panel followed on from the decision in *Sanchez-Sanchez v United Kingdom* (application no. 22854/20), where the Grand Chamber held that Mr Sanchez-Sanchez's extradition to the US would not be in violation of Article 3 ECHR based on the risk of a life sentence without parole.

The panel discussed the case and its impact on the relevant test to be applied, as well as providing valuable insight for practitioners dealing with US extradition cases where there is a context of mandatory minimum sentences, and sentences which are significantly longer after trial.

First, the panel discussed Sanchez-Sanchez ruling, detailing the two limbs of the relevant test as enunciated by the ECHR. First a real risk test, placing burden of proof on the individual to prove a 'real risk' of a life sentence without parole. Second, a review mechanism test, namely that there must be a mechanism in place which allows domestic authorities to consider progress towards rehabilitation, or other progress towards release based on relevant personal circumstances.

As to the second limb, the panel highlighted that there is a lack of clarity in practice, as all cases have been unsuccessful since Sanchez-Sanchez. It seems that it would be "very hard" to say the test is satisfied.

Turning to the US context, the power of prosecutors was highlighted; there is no escape for potential mandatory minimums without cooperation from the state. There remains a lack of 'safety valves' for such sentences, and there is an absence of parole in the federal system. Whilst there is hope that there will be some form of "2nd look"

provisions in the future, given the attention to mass incarceration that there is currently, that system is presently lacking.

Practical guidance was offered on the importance of obtaining quality experts, and that it can be challenging to find evidence which a Court in this jurisdiction will accept and give proper deference to. The participants advised that challenges should be made to the initial papers, the opinions of prosecutors, and assurances: "you can't take anything at face value". It was also suggested that UK practitioners should liaise with public defenders' offices, as they can provide data of sentencing practices and just how likely outcomes are in their area.

American lawyers were highlighted as having a way of expressing themselves which doesn't necessarily carry well in the English judicial context, meaning that their opinions are not always given the weight they deserve. To overcome this evidential hurdle, it was suggested that that academics may be a way to obtain the best evidence. The importance of preparing practitioners for evidence before the Court was emphasised.

Finally, the panel turned to the future. The UK's continued participation in the ECHR very much remains a hot button topic and there are many cases pending before the ECHR dealing with differing factual situations, assurances, and sentencing regimes. Whilst there is no immediate sign of the UK exiting the Convention, close eye will have to be kept on official position of the Government, and any jurisprudence arising from pending cases.

Jonathan Swain
9BR Chambers

Panel 4 - INTERPOL injustices: 100 not out, what next for the organisation?

The final panel, chaired by Ed Grange, was a fascinating discussion with speakers, Bill Browder, Head of Global Magnitsky Justice Campaign and the author of Red Notice and Freezing Order and Sahar Zand: Journalist and presenter of "Dirty Work – The Misuse of Interpol Red Notices" podcast.

This panel brought home the egregious impact Red Notices have on individuals and their families, often politically motivated and on zero evidence.

Bill has been subject to eight Red Notices ever since his lawyer, Sergei Magnitsky, was murdered by the Russian state while assisting him in exposing corruption by Putin and his cronies. Both Bill and Sergei were indicted but Bill had left the Russian Federation. Sergei stayed and suffered horrendous ill treatment and torture, designed to "break him". He refused to sign a "confession" and, instead of receiving medical treatment for his serious medical condition, was beaten for 1.5 hrs and killed. Bill has been campaigning ever since to get justice for Sergei, which has resulted in him being subject to numerous Red Notices himself.

Bill gave the graphic example of being in Madrid in May 2018 (almost 10 years after Sergei's death) at the invitation of the chief anti-corruption prosecutor and subsequently being detained at a police station on a Russian Diffusion request. Fortunately, his tweet for help (sent while in the police car) caused international condemnation and the attention of Chris Bryant MP who secured the help of the then foreign secretary (Johnson) and his release.

Bill graphically described the fear of being detained and potentially subject to removal to a hostile state, but very few of those subject to Interpol Red Notices or Diffusions have such a media profile platform, or resources, as Bill Browder. Sahar Zand talked about the "ordinary people" who have been falsely detained and ill-treated due to Interpol and corrupt or improperly considered/disproportionate requests. These included Brian Glendinning locked up in an Iraqi jail for issues regarding his minor Qatari bank loan. Idris Hasan a Uyghur exile detained in a high security Moroccan prison for 2 years and counting, even though Interpol accepted that the Chinese request to Interpol was politically motivated. Ahmed Jaafer Mohamed Ali who was flown to Bahrain on a private plane from Serbia (with the assistance of Serbian police) although the Courts held the Red Notice was improper and he should not be removed, and now faces indefinite detention and inevitable torture. Marek Zmyslowski, a Polish businessman who had his life turned upside down after he fell out with his well-connected Nigerian business partner and Interpol issued a Red Notice issued by Nigeria.

Sahar has exposed the vested interests and States with almost non-existent Rule of Law who largely fund Interpol. The current President of Interpol is Ahmed Nasser Al-Raisi of the United Arab Emirates who has been implicated in torture. There is little accountability of Interpol, a complete lack of transparency regarding their decision making

and no legal redress. She highlighted, from her own research, how Jurgen Stock, the General Secretary of Interpol who set up the Notices and Diffusions Task Force (NDTF) in 2021, cannot rely on them to adequately scrutinise Red Notice requests. The CCF (an independent body that reviews Red Notices, but is not known for favourable outcomes) concluded that 62% of those requests it examined were non-compliant with Interpol's Constitution, despite having been reviewed by the NDTF. The CCF is over worked, under resourced and any requests to the CCF suffer unacceptable delays.
Bill described Red Notices as "cockroaches under the fridge". You defeat one but many more always appear.

Sahar's case studies illustrate how it is the very existence of a Red Notice or Diffusion that can have such life changing consequences to those subject to them. Removals and detentions still take place. Urgent reform is required and Sahar called for all those involved in this work to keep speaking out and piling on the political and legal pressure and to challenge politically motivated Red Notices wherever possible.

Since the conference, Bill was named as a co-conspirator with Jimmy Lai in a further case in Hong Kong as part of a politically motivated National Security case. See the letter Ben Keith wrote to INTERPOL on his behalf here

Kate Goold
Bindmans

Witnesses giving evidence via video link from abroad in extradition proceedings

Cases where a witness is located abroad can present both a legal and logistical challenge. Legislation is in place to allow witnesses to give their evidence via video link from another jurisdiction in certain circumstances.

Section 51 of the Criminal Justice Act 2003 ('CJA 2003') allows a court to require or permit a person to take part in criminal proceedings via a live link if it is in the interests of justice to do so. Section 206A of the Extradition Act 2003 makes similar provision for extradition proceedings. Amendments have been made to the Criminal Procedure Rules 2020 which will come into effect on 1 April 2024. These will apply the live link provisions in the Criminal Procedure Rules that apply in domestic criminal proceedings to extradition proceedings

The Senior District Judge at Westminster Magistrates' Court has, in the context of hearing witnesses from abroad via video link, referred to *Kadir v R [2022] EWCA Crim 1244*. This was a criminal prosecution in the UK in which an application was made for a defence witness to give evidence from Bangladesh via Whatsapp video call. The request was refused by the trial judge. The defendant was convicted and subsequently appealed partly on the basis that the judge erred in denying the application.

The appeal was dismissed on the basis that the defendant's application was deficient but the court did agree that a Whatsapp video link was capable of falling within the definition of a 'live video link' under s51 CJA 2003 and that the judge would have been able to make an order had the application been properly made and provided that they were satisfied that it would be in the interests of justice to do so. In addition to this, the Court emphasised the need to 'bear in mind the principle that one state should not seek to exercise the powers of its courts within the territory of another state without the permission (on an individual or a general basis) of that other state'.

The Court of Appeal referred to the case of Secretary of State for the *Home Department v Agbabiaka [2022] INLR 304,* in which the Upper Tribunal (Immigration and Asylum Chamber) discussed the 'Nare guidance' to be followed when a live link is considered and, in cases where the witness is abroad, whether a live link would risk damaging international relations so as to be contrary to the public interest. The Nare Guidance is set out in paragraph 3 of the Agbabiaka decision. The Court of Appeal in Kadir applied the same logic used by the Upper Tribunal to criminal proceedings and emphasised the need to comply with the relevant statutory provisions and the Criminal Procedure Rules.

These cases suggest that there are two relevant questions if it is proposed that a witness should give evidence from abroad via video link:

1. Is it in the interests of justice for the person to participate in proceedings in this way?
2. Has the foreign state in which the person is located given their permission for them to participate?

Interests of justice

In criminal proceedings, both parties must be given the chance to make representations, and parties must notify one another and the court in plenty of time if they wish to call a witness via video link from outside the jurisdiction. The court must consider all the circumstances of the case (of which a non-exhaustive list is given in s51 (6) CJA 2003), and the guidance issued by the Lord Chief Justice. That guidance details the risks of live links and the practical considerations in hearing evidence in this way. If the court is satisfied that a live link direction would be in the interests of justice, they will then consider whether the foreign state would be likely to object. Section 206B of the Extradition Act 2003 deals with the requirements for an application in extradition proceedings and as this does not explicitly deal with the interests of justice then it is likely that the court will consider the factors that would be relevant in a criminal case and from 1 April 2024 the court will have to consider these factors.

Permission of foreign state

The Agbabiaka judgment stated that 'There is an understanding among Nation States that one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other State to do so.' The Foreign and Commonwealth Development Office ('FCDO') has set up the Taking of Evidence Unit ('ToE'). However, the FCDO states that they do not deal with taking video evidence in criminal cases, instead referring to the Home Office guidance on Mutual Legal Assistance. The Home Office states in its guidance to law enforcement:

"When arranging a video link with a witness abroad, you must consider the laws of the other jurisdiction. Most jurisdictions require local law enforcement to be informed of any contact with witnesses by foreign authorities. Some jurisdictions may require, or prefer, that video link hearings are arranged using mutual legal assistance (MLA). Where MLA is required, a request must be issued by a court or designated prosecutor in line with section 7 of the Crime (International Cooperation) Act 2003."

This does not draw any distinction between expert witnesses and witnesses of fact and it may be that some countries would consider this to be a relevant distinction in considering whether permission is required. Some assistance may be gained from the ToE unit's response to a freedom of information request, listing the countries which have stated that they have no objection to people present in their jurisdiction giving oral evidence in a United Kingdom Court.

From 1 April 2024, the Court will be required in both extradition and domestic criminal proceedings to consider whether any permission is needed from a court or authority for a person to take part by live link from outside the United Kingdom. Rule 3.35(7) will require the party who wishes to call this evidence to find out whether permission is needed, prepare any formal request needed to obtain that permission and obtain any permission required. This change has been made because the Rule Committee was informed that many lawyers were unaware of these issues.

Anand Doobay
Boutique Law
&
Ross Ludlow
Drystone Chambers

Indian extradition: findings of incompatibility with Article 3 and Article 5

In June 2022, Westminster Magistrates Court discharged all four charges on which our client (the "Requested Person" or "RP") faced a part 2 extradition request issued by the Government of India in relation to terrorism offences. Whilst the District Judge ordered the discharge of all of the charges against the RP under s78 (as to two charges) and s84 (as to the remaining charges) of the Extradition Act 2003, he went on to also rule that the RP's extradition would not have been compatible with their Article 3 or Article 5 Convention rights. The Government of India has not sought to appeal the decision of the District Judge and as such the Court's judgment is final and determinative of the extradition proceedings. Below is a summary of the approach taken by the District Judge in relation to the Article 3 and Article 5 issues.

Grossly disproportionate life sentence incompatible with Article 3 protection against inhuman treatment
All parties agreed the legal test for Article 3 in extradition cases to be that extradition will be prohibited if there are substantial grounds for believing that there is a real risk of treatment which violates Article 3, i.e. treatment which amounts to torture or inhuman or degrading treatment or punishment (Chahal v. United Kingdom (1996) 23 EHRR 413, Soering v. United Kingdom (1989) 11 EHRR 439; R(Ullah) v. Special Adjudicator [2004] 2 AC 323). The issue in relation to the RP's Article 3 Convention rights was that the defence was able to provide uncontroverted expert evidence that the RP faced a real risk of receiving a sentence of life imprisonment that would be in fact and in law irreducible, and such a sentence would be disproportionate to the offending alleged. The District Judge accepted that the central and state executives in India have powers under the Indian constitution to grant pardons, suspend, remit or commute sentences. However, in the case of the RP, the expert evidence was that in order for these powers to be exercised, the central government would have to issue a relevant policy on remission, something it has not done for terrorism offences. The District Judge further noted that the charges faced by the RP had been excluded from previous policies made by the central government. There would thus be no possibility of a review of such a life sentence with a view to its commutation, remission, termination or conditional release.

The District Judge then turned to consider if such an irreducible life sentence would be clearly disproportionate (pursuant to observations in R (wellington) v Secretary of State for the Home Department [2009] 1 AC 335 by Lord Hoffman that an irreducible life sentence would not necessarily infringe Article 3 unless such a sentence was likely to be clearly disproportionate). He considered that whilst the allegations were "clearly very serious," he noted that there was no evidence that anyone was killed as a result of the offending alleged and the prosecution had not sought to submit that an irreducible life sentence would be proportionate. In order to demonstrate why he had concluded that such a sentence would be clearly disproportionate, the District Judge noted the Court of Appeal judgement in R v McCann (AG's Reference No.688 of 2019); R v Sinaga (AG's Reference No.15 of 2020); R v Shah [2021] 4 WLR 3 about those offences for which whole life orders should be reserved in this jurisdiction to demonstrate by analogy why such a sentence in India would be "grossly disproportionate" on the facts of our client's case.

Flagrant breach of Article 5 right to liberty – Indian law incompatible with presumption of innocence
The issue regarding the RP's Article 5 Convention right was that legislation in India would prohibit his release on bail if the court there was satisfied that there were reasonable grounds for believing that the accusation was prima facie true - section 43D (5) of Unlawful Activities (Prevention) Act 1967 ("UAPA"). The District Judge's summary of his evidential findings on Article 5 included:

- Indian Judges are impartial and independent.
- Article 21 of the Indian Constitution guarantees a speedy trial. However, the District Judge accepted the defence evidence that this is "aspirational and does not reflect what happens in practice," the RP's trial "is likely to take years," and that seven years to the conclusion of the trial at first instance was a reasonable time estimate.
- Section 43D (5) of UAPA prohibits the release of a defendant on bail if the court is satisfied that there are reasonable grounds for believing that the accusation is prima facie true.
- Few defendants are granted bail where they face terrorist related charges and those that are often spend years in custody before bail is granted.

In his ruling, the District Judge made clear that the rarity of the grant of bail cannot lead to a conclusion of a breach of Article 5, particularly where the decision is made by an impartial and independent judge. However, the District Judge explained the "distinguishing feature" in the case of the RP, was the "statutory prohibition of the grant of bail where the low test of reasonable grounds for believing that the accusation is prima facie true." The District Judge considered this prohibition to be "inconsistent with the presumption of innocence," preventing the court from examining the individual circumstances of a person before it; in this case characteristics such as the RP's age, lack of previous convictions and health issues. The District Judge found that "a system that prevents the court from considering these factors if the low test is met in my judgement is flagrantly unfair particularly where the defendant faces the real prospect of years in custody awaiting trial." He was thus satisfied that in practice there was a real risk of the flagrant denial of the RP's rights.

Ben Cooper
Doughty Street Chambers
&
Amy Cunningham
Boutique Law

Popoviciu (Respondent) v Curtea De Apel Bucharest (Romania) (Appellant) [2023] UKSC 39

The recent case of Popoviciu clarifies the appropriate standard of proof for conviction extradition cases where the requested person alleges that extradition would violate their Convention rights because their trial was flagrantly unfair.

Factual Background

In 2016, Mr Gabriel Popoviciu was convicted in Romania of bribery and accessory to aggravated abuse of power. In 2017, an EAW was issued by Romania and in 2019, Westminster Magistrates' Court ordered his extradition.

During Mr Popoviciu's appeal to the HC however, new evidence was produced alleging that there had been an improper and corrupt relationship between the judge who had presided over the criminal trial and a key prosecution witness. Based on this evidence, the High Court held that there were substantial grounds for believing that there was a real risk that Mr Popoviciu's trial was flagrantly unfair and thus a violation of his Convention rights.

The Romanian authorities appealed the decision to the Supreme Court. The certified point for the Court was;
"In a conviction extradition case, is it sufficient for the requested person to show substantial grounds for believing that there is a real risk that his trial was so flagrantly unfair as to deprive him of the essence of his article 6 rights, and therefore a real risk that his imprisonment in the requesting state will violate his article 5 rights?"

The Court's finding

On 24 July 2023 the Supreme Court dismissed the appeal because on 13 July 2023, the Court was informed by Romania that the EAW underpinning the proceedings before the Supreme Court had been withdrawn.

The Supreme Court, however, nonetheless handed down its judgement on the certified question. The Supreme Court also addressed the other associated legal arguments made by the Respondents, including in relation to whether there is an available and effective remedy for Mr Popovicu in the Romanian legal system.

On the matter of the standard of proof

The Appellant argued that the High Court was wrong to conclude that there were substantial grounds for believing that there was a real risk that Mr Popoviciu's trial had been flagrantly unfair, stating that this confused the standard of proof. Instead, the Appellant argued that an assessment of a past event must be proved to the civil standard of balance of probabilities as this is consistent with both UK and Strasbourg jurisprudence.

The case of Othman v UK provides the sole exception to this general rule, lowering the standard of proof to 'real risk' in cases of torture under Article 3. The Respondent argued that there was good reason to extend the Othman exception to cases of alleged corruption and bias firstly, due to the gravity of the resulting injustice if such allegations were true and secondly, the similar difficulty of proving corruption and bias.

The Supreme Court ruled in favour of the Appellant on this question, holding that the High Court misdirected itself and applied the wrong standard of proof when it decided the case. When considering burdens of proof concerning past events and prediction of future events, the appropriate standard is the balance of probabilities.

The Court rejected the Respondent's case for extending the Othman exception, noting that torture cases warranted the exceptional relaxation of the standard of proof due to its 'unique wickedness' and its jus cogen status in international law.

On the matter of the right to a remedy

During proceedings in the High Court, the Romanian authorities relied upon evidence stating that even if the undisclosed relationship between the judge and the prosecution witness were proven, it would not constitute a reason to review a final decision under Romanian legislation.

The Respondent argued that that they face a real risk of a prospective flagrant denial of his rights to liberty as protected by Article 5 and to a fair trial under Article 6 arising from the absence of any remedy in the requesting state.

Less than 2 months before the Supreme Court hearing, the Appellant applied for permission to ‘’adduce clarificatory evidence’ explaining that the statement relied on in the High Court had been misunderstood and was not an accurate statement of Romanian Law. The Appellant produced a statement from a Romanian Chief Prosecutor, directing the Court to provisions under the Romanian Criminal Procedure Code, which could provide a remedy for Mr Popoviciu if the conditions for one of the extraordinary appeal procedures were met. As a last resort, the Appellant argued that the Criminal Procedure Code could provide for a retrial in the event of a finding of an ECHR right in Strasbourg.

The Respondent filed evidence expert opinion as not applying to Mr Popoviciu’s circumstances or, in the case of the application to Strasbourg, being too uncertain.

The Supreme Court held that the availability of an application to Strasbourg did not meet the requirements of Article 5 nor did the proceedings before the courts in England and Wales relieve Romania of its obligation to provide such an effective remedy.

But for the withdrawal of the EAW, the Supreme Court held that the matter would have been remitted to the High Court to consider the conflicting evidence regarding the availability of a remedy in Romania.

Julie Davies
Bar Student

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:

- Albania – see article here
- Georgia – see article here
- Portugal – see article here
- San Mario – see article here
- Croatia – see article here

The CPT has announced it has undertaken the following visits:

- France overseas (French Guiana and Guadeloupe) – see article here
- Slovakia – see article here
- Greece – see article here
- Ukraine – see article here

Membership

Membership runs from January to December annually. If you wish to join DELF for the first time since 1 January 2024, 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 2024 are as follows:

£75 – Full membership: Silks/Partners - Open to practising lawyers who are Partners in a law firm or Barristers who have taken Silk, whose practice includes representing requested persons in extradition cases. Full membership is also open to Senior lawyers in equivalent positions practising outside of England and Wales whose practice includes representing requested persons in extradition cases.

£60 - Full Membership: Barristers/Solicitors/Legal Executives/Advocates - Open (subject to approval by the Committee) to any Solicitor, Junior 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

For any queries, please contact enquiries@delf.org.uk

Contacts

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