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DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to Issue 11 of the Defence Extradition Lawyers Forum newsletter. In this edition Giovanna Fiorentino provides a commentary on changes to the Italian legal system following the *Torreggiani* judgment; Patrick Ormerod reports on the recent Lauri Love decision; Peter Caldwell comments on the recent *Georgiev* case; Mark Summers QC and Benjamin Seifert report on the case of *Karel Konecny* and permission to appeal to the Supreme Court on Section 14 of the EA; we update on the recent Administrative Court meeting; and Mary Westcott provides a briefing on the latest DELF education event on 21 March: Ed Fitzgerald in conversation with Sir Andrew Collins. We update you on forthcoming events and our activities over the past month and explain how you could get involved.

Our Recent Activities

DELF activities

On 20 March 2018 DELF held its regular meeting with the Administrative Court. During the meeting the following issues were discussed:

Appeal hearing listing – Currently parties are given two dates to choose from for substantive hearings. DELF asked the court to consider giving three dates to accommodate counsel's diary. The court will look in to this.

Bail appeals from the Magistrates' Court – If no extradition appeal has been lodged and the RP wishes to apply for bail in the High Court then the application must be made on a form N161 which attracts a fee of £240. If an appeal against extradition has been lodged then the bail application will be made on a form EX244 which attracts a fee of £255.

Poland and Art 6 ECHR challenges – The court currently has 8 (and growing daily) cases where Art 6 has been raised. There are currently approximately 90 'live' Polish cases. The lead case of LIS was listed on 14 March 2018 before Davis J. An application was made to amend the grounds following the Irish High Court case of Celmer. The application was granted and the substantive hearing is currently listed before a Divisional Court on 13 June 2018.

Bulgarian prison conditions – The Divisional Court dismissed the Art 3 appeals on 28 February 2018 as it was satisfied by the assurance given by the Bulgarian JA. All cases stayed behind this judgment are being processed.

Hungarian prison conditions – The Divisional Court dismissed the appeals on 21 July 2017 – all stayed cases should have been progressed by now.

French prison conditions – The lead cases of BECHIAN, SHUMBA and HENTA will be heard by a Divisional Court on 24 May 2018

Lithuanian prison conditions – Lead case of GUY will be heard before the Divisional Court on 25 April 2018.

DELF continues to make representations on behalf of its members to the Criminal Procedure Rules Committee. If members have any issues they would like DELF to raise with the Criminal Procedure Rules Committee, then please email Ben Lloyd (ben.lloyd@6kbw.com).

We continue to engage with LAA over various issues. If anyone has anything specific they would like us to raise, please do get in touch with us at enquiries@delf.org.uk

Legal Update

Legislative Intervention following Torreggiani and Others v Italy

Following an application to the Court in Strasbourg by Mr Torreggiani and others on 8 January 2013 the Second Section of the ECtHR found that the Government of Italy had violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedom ("The ECHR").

In the years following, the Italian Parliament has adopted several measures in an attempt to address the core problems contained within these applications: prison overcrowding (three detainees sharing a cell of 9 square metres); the inability to regularly use showers due to the frequent shortage of hot water; and insufficient lighting inside the cells, among other things.

Following the "*Torreggiani* judgment", the Strasbourg Court allowed Italy one year from the date of the final judgment in order to identify suitable measures to tackle the issue of overcrowding and, more generally, the protection of detainees, in line with the guidelines provided by the European Committee. Indeed, Article 27 s.3 of the Italian Constitution forbids any treatment contrary to human dignity guaranteeing a detained person's entitlement to fundamental rights "*Punishment cannot consist in treatment contrary to human dignity and must tend to the re-education of the defendant".*

Overcrowding in Italian prisons has always been a problem. Art. 151 subsection 1 and Article 174 of the Penal Code have been applied on several occasions in order to reduce the number of detainees in prison, either by extinguishing the crime or lifting or commuting the sentence in "exceptional circumstances". The latest legislative amendments in relation to indults were introduced in 2006, Law n. 241 of 31 July 2006, which provided that indult should be granted to all sentences not exceeding three years' imprisonment or a 10,000 Euro fine. This was applicable to all those whose crime had been committed before 2 May 2006. However, this law only applies in relation to certain crimes and the aim of reducing prison overcrowding has not been achieved.

Section 147 of the Penal Code sets out only three instances where the execution of a sentence may be postponed:
1) When a request for pardon has been made and in the absence of an obligatory remittal under s.146;
2) When the sentence constitutes a restriction of personal freedom and the defendant has a serious physical illness; or
3) Where the defendant is a mother with children below three years of age.

However, there is nothing in the provision which enables a detainee to request the deferral of a sentence on the grounds that the conditions of detention are contrary to human dignity.

Following the *Torreggiani* judgment, The Constitutional Court rejected the challenge to Art. 147 of the Penal Code raised by the Enforcement Tribunal. The Court deemed that issues of prison overcrowding fall under the remit of Parliament. Discretionary deferral of a sentence is applicable only to cases where the subjective conditions of the detainee are incompatible with the prison regime. In response to the *Torreggiani* judgment, the Government issued a decree (known as the "empty prisons" law) with the aim of reducing overcrowding in national prisons and created a

system of alternatives to imprisonment. These alternatives included early release, probation, and home imprisonment for sentences of up to 12 months. The following year, a law was introduced ("save prison" law) which focussed on increasing home detention to sentences of up to 18 months.

A wider application of Art. 147 to individuals complaining of dire prison conditions is not permissible and is not the panacea to prison overcrowding.

Some authors criticised the position taken by the Constitutional Court which, had it decided otherwise, would have offered a protection for the detainee. Overcrowding constitutes first and foremost a violation of the Constitution. It is not a political choice but a constitutional obligation affecting not simply the legislator but the state as a whole.

In 2013 and 2014, two legislative decrees were implemented to ameliorate prison conditions, by introducing alternatives to prison and de-criminalising some offences: Decree n.146/2013 (later law n.10/2014) introduced provisions for early release "*liberazione anticipate speciale*" – (special early release) namely a reduction by 75 days for every 6 months spent in prison (compared to the 45 days per 6 months established by Art. 54 law n. 354/1975) applicable two years after the coming into force and to offences for which sentence is imposed as of 1 January 2010. This includes those detainees who have already benefitted from the ordinary early release provisions, and who can benefit from a further reduction of 30 days for each 6 months spent in prison (provided an active participation in any form of rehabilitation).

The same legislative decree introduced a measure where it is possible to benefit from electronic monitoring as an alternative to pre-trial custody or as an alternative sentence to imprisonment. It also made it possible to impose the deportation of a foreign criminal as a punishment in itself.

Prison law (law n.354 of 1975) recognises the fundamental rights of the detainee and goes beyond the protection recognised by the Constitution, now focussing on the dignity of the person detained, rather than just the humanity of the sentence imposed. This principle and the centrality of the detainee are further strengthened by Art.4 of Prison Law 354/1975 which expressly recognises the right to access any judicial remedy in the detainee's own right.

Legislative decree n. 146/2013 has also modified the process for making applications to the Supervising Magistrate – *Magistrato di Sorveglianza* — introducing the possibility of a "generic" as well as "jurisdictional recourse". Articles 35 and 35bis of Prison Law n. 354/1975 created a new body, the Authority for the Guarantee of the Rights of the Detainee, also entitled to receive these applications.

Thus far, there have been no successful applications made under "jurisdictional recourse" despite its necessity being highlighted by the Constitutional Court.

There are two situations when such applications are allowed: in the context of disciplinary sanctions; and in situations when, as a result of "non-compliance by the penitential administration with the provisions contained in this law and its subsequent regulation, the detainee suffered an actual and serious prejudice to the exercise of his rights" (Art. 69, 6 a) and b) Law n. 354/1975).

Any application is examined by the Supervising Magistrate who can direct, if a violation of the law has been established, that the administration adopt remedial measures (which includes the transfer of the detainee to another prison establishment or another cell). Should the administration fail to comply, it is possible to apply to the Supervising Magistrates requesting the issuance of an order forcing the administration to comply. As a result of the *Torreggiani* judgment, Italian legislators have taken serious steps to address the issue of prison overcrowding. It is accepted that with an overcrowding rate of 8% the problem has not been resolved.

Nevertheless, when compared with the situation in 2013, when the overcrowding rate was equal to 40% of capacity, the progress made has been significant.

Roughly a year and a half after *Torreggiani*, Italy was again found to have violated Art. 3 ECHR due to poor prison conditions and the inadequacy of its medical care (*Contrada v Italy* of 11.2.2014).

There have also been serious consequences with regards to the degree of credibility of Italy at international level. In brief, on 5 February 2014 a report from the Commission was made public regarding the carrying out of three different

framework decisions (2008/909/GAI, 2008/947/GAI AND 2009/829/GAI) guaranteeing the mutual recognition of sentences imposing imprisonment and other measures that limit personal liberty, conditional suspension and alternative penalties, and the mutual recognition of alternatives to precautionary detention.

It is quite likely that any future legislative interventions, which will have to offer effective solutions to resolve the problem of Italian prisons, will look at introducing other forms of punishment around reparative justice, in line with the Constitutional principle that any sentence must be applied in respect of human dignity and for the purpose of re-education.

Indeed, amongst the various draft bills particular emphasis has been placed upon the propositions contained in two which foresee a 'waiting list' for detainees: it is expected that each penal institution will indicate the number of bed spaces available and, if there is a shortage of beds in prison, the term of imprisonment be substituted by a home detention. For those convicted of offences involving violence against others, or offences of particular seriousness, it is expected that the sentence should always be executed, and that a criminal institution keep beds available for such cases.

Draft bill C.984 (presented on 17.05.2013) is also of particular interest, as it proposes the introduction of an alternative to detention, namely, 'pact for re-settlement and social security'. The draft bill aims not only to reduce the number of detainees, but also to the accomplishment of the re-educative principle enshrined in Art.27, 3 of the Constitution.

The 'pact' can only apply when at least half of the prison sentence has been completed, provided the remainder is below three years (two, where the detainee is a repeat offender).

Therefore, since 2013 a great deal of effort has been targeted towards avoiding further contrary decisions from the European Court of Human Rights.

The inadequacy of the standards of protection of a detainee's health implies a violation of the Constitutional principles, more specifically Art. 27, 3, read in conjunction with Art. 13 (which protects personal liberty), Arts. 2 and 3 (enshrining the principles of liberty and equality).

Legislative interventions should be such as to represent a real concern for the rights of individuals and their personal liberty. To date, however, various draft bills intending to guarantee an execution of sentence that respects not only the European principles but also the constitutional ones, are still being examined.

The government has been tasked with simplifying the procedure for applications to the Supervising Magistrates - the Judicial authority responsible for the execution of the sentence - facilitating recourse to alternative punishment to detention, eliminating automatic preclusions to the access to prison benefits, in order to encourage reparative justice, to increase internal and external work, to enhance the value of volunteer work, and to assure the efficiency of the re-educative function of the sentence in order to comply with the strict wording of Art. 27.

With regards to alternatives to detention (namely community-based sentence, home detention and the regime of partial liberty) the government should: simplify the procedure for acceding to it; and review the circumstances when alternative punishment can be agreed, both with reference to the subjective character of the individual detainee and the time limit for its application.

The legislator ought to:

1. increase the upper limit of the term of imprisonment currently set as a pre-requisite for an application to alternative sentences from three years to four years;
2. allow the detainee to be present at the hearing when his release on licence is being decided;
3. hold such hearings in public;
4. introduce a scientific observation of the personality of the detainee before his re-settlement into the community; and
5. establish the time, the way, and the body of those tasked with supervising the licence of the detainee and widen the intervention by the UEPE (Office for the execution of external penalty).

The "Orlando" Law, which came into force in August 2017, represents another step forward to a state-of-the-art penitentiary system and a genuinely rehabilitative objective of the sentence. With regards to the latter, the

aforementioned Law delegates to the Government the task of drawing the framework to enable the offender to effectively reintegrate into the community, allowing him also to benefit from work opportunities that facilitate his resocialization, guaranteeing and improving relations between the detainee and his family members, as well as facilitating the integration of foreign detainees into society.

It is understood that the future reform to the prison system, to be carried out in the next few months, will not extend its effects to cases of extreme gravity and danger and, in particular, for sentences involving the Mafia and/or terrorism, as well as international terrorism.

Regardless, it will be interesting to examine the elaborated implementation from the executive power to glean its effects on a merely practical level.

Any judicial system intending to reform the enforcement of its penal sentence ought to place respect for human dignity at its centre.

Avv Benito Capellupo
Translated by Giovanna Fiorentino

Love in the High Court – the forum bar shows its teeth

"Be quiet. This is not a theatre," said the Lord Chief Justice to a "motley mix of hippies and hackers" cheering and chanting as he ruled that Lauri Love's extradition to the USA would not be in the interests of justice. It was no Richard Curtis film – but an extradition appeal hearing in Courtroom 4 at the Royal Courts of Justice on Monday 5 February 2018.

Lauri Love, an Anglo-Finnish man suffering from Asperger's Syndrome, depression and eczema, was indicted in three separate US Federal Districts on fourteen counts of hacking, theft and fraud related offences. However, the High Court ruled (1) that his extradition was barred by reason of forum because it would not be in the interests of justice, pursuant to section 83A of the Extradition Act 2003 ('the EA'), and (2) that it would be oppressive to extradite Love because of his physical and mental condition, pursuant to section 91 of the EA.

This is the first time the 'forum bar' to extradition, a hard fought for and much needed addition to the UK's extradition arrangements, has been used successfully to prevent extradition. This article explores the reasons for the introduction of the forum bar, its operation in practice, and the implications of the judgment in Love for future cases of 'concurrent jurisdiction'.

THE ORIGINS OF THE FORUM BAR

The forum bar was introduced by the Crime and Courts Act 2013 following a number of high-profile extradition cases in which both the UK and USA had jurisdiction to prosecute. These cases generally involved US authorities seeking to extradite British citizens to the USA on the basis of offending alleged to have taken place either wholly or substantially in the UK. In almost all of these cases ('the NatWest Three', Ian Norris, Christopher Tappin, Babar Ahmad, Talha Ahsan) the 'requested persons' were eventually extradited.

The exceptions were Richard O'Dwyer, whose extradition request was withdrawn after he signed a deferred prosecution agreement with the US authorities, and Gary McKinnon, a British man who – like Lauri Love – had Asperger's Syndrome and was accused of hacking into US government computers. His extradition was halted on 16 October 2012 by Theresa May, then Home Secretary, using powers available to her at the time, on the basis that to extradite him to the USA would breach his right under Article 3 of the European Convention on Human Rights ('the ECHR') not to be subjected to torture or to inhuman or degrading treatment or punishment. The decision followed a 10-year campaign by his mother, legal team and supporters (with a bit of help from the Daily Mail and his Tory MP). Curiously, the Home Secretary did not invoke Article 3 10 days earlier to prevent the extradition of Talha Ahsan, a British Muslim who also suffered from Asperger's Syndrome, in similar circumstances. These cases caught the public eye for a number of reasons:

Firstly, it came as a surprise for some that British citizens could be extradited to face prosecution in the USA for conduct which was wholly or substantially alleged to have taken place in the UK. However, this was able to happen because: (i) of the permissive rules of state jurisdiction in international law; (ii) the extraterritorial reach of the US laws concerned; (iii) US authorities have the resources and will to prosecute these cases; (iv) the UK does not– unlike some states – refuse to extradite its own nationals; and (v) there was nothing in the ECHR preventing extradition in these circumstances. Although requested persons did attempt forum-related arguments under Article 8, these did not succeed. In *Norris v USA* [2010] 2 AC 487 at 67, Lord Philips stated, "Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country's treaty obligations".

Secondly, the 2003 US / UK Extradition Treaty ('the Treaty'), swiftly negotiated in the aftermath of the terrorist attacks of 11th September 2001, dispensed with the requirement for a 'prima facie' case to be demonstrated against requested persons, described by the Working Party on the 1870 Extradition Act as "the only real safeguard against the trumped up case". The different legal tests for the evidence necessary for extradition to the USA from the UK and vice versa also created a perception that the Treaty was imbalanced to the detriment of requested persons in the UK.

Thirdly, the consequences of extradition to the USA are stark: extradited persons are often held in extreme prison conditions pre-trial and post-conviction (in some cases solitary confinement is a real risk); US judges' sentencing powers are, generally speaking, far greater than in the UK; defendants are subject to US-style plea-bargaining; and it is far more difficult, and possibly prohibitively expensive, for their friends and family members to visit them. Yet the ECHR offers limited protection in the extradition context, as the European Court of Human Rights ('ECtHR') is reluctant to impose Convention standards on non-contacting states.

Fourthly, it seems that many of these cases could have been prosecuted in the UK and there was little transparency over why they were not. In order to prosecute in the UK, The Code for Crown Prosecutors ('the Code') provides that prosecutors must be satisfied that (i) there is sufficient admissible, reliable and credible evidence to provide a realistic prospect of conviction, and (ii) a prosecution is required in the public interest. Initially, there was little in the public domain explaining how decisions on whether and where to prosecute cases of concurrent jurisdiction were made.

However, in 2007, following the Natwest Three case, 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction' was issued by the Attorney General, Lord Advocate of Scotland, and the US Attorney General, followed in 2013, shortly before the introduction of the forum bar, by the DPP's 'Guidance on the handling of cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas' ('the DPP's guidance'), which embraces principles set out in 2003 guidelines published by Eurojust. The CPS also now has an October 2014 document called "Internal Process for Dealing with Forum Bar Cases", which provides practical guidance to prosecutors in different scenarios where concurrent jurisdiction is an issue.

The DPP's guidance encourages a co-operative approach and 'early sharing of information between prosecutors with an interest in the case' with the aim "to agree a co-ordinated strategy... that respects the independence of the individual jurisdictions but recognises the benefits of co-operation in achieving effective law enforcement". Although one of its main principles is that a prosecution should ordinarily be brought in the jurisdiction where most of the criminality or most of the loss or harm occurred, the thrust of the guidance suggests decisions on forum are taken on a pragmatic basis by prosecutors with a view to obtaining convictions as efficiently as possible, having regard to the respective rules in each jurisdiction on the admissibility of evidence, disclosure obligations, and the desirability of protecting sources.

THE FORUM BAR UNDER SECTIONS 19B AND 83A OF THE EXTRADITION ACT 2003

When announcing her decision to halt McKinnon's extradition, the Home Secretary also announced that a forum bar would be introduced. It was inserted into new sections 19B and 83A of the Extradition Act 2003 ('the EA') for Part 1 European Arrest Warrant ('EAW') cases and Part 2 cases respectively, and came into force on 14th October

2013. Section 83A provides that the extradition of a person is barred by reason of forum if the extradition would not be in the interests of justice. Judges must first decide whether a substantial measure of the requested person's 'relevant activity' (activity which is material to the commission of the extradition offence) was performed in the UK. If not, the forum bar will not succeed. If so, judges must go on to consider an exhaustive list of 'specified matters' relating to the interests of justice. Having regard to these factors only, judges may then decide that extradition should not take place.

To summarise, the specified matters under section 83A(3) are: (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur; (b) the interests of any victims of the extradition offence; (c) any belief of a prosecutor that the UK, or a particular part of the UK, is not the most appropriate jurisdiction in which to prosecute the requested person; (d) whether evidence necessary to prove the offence is or could be made available in the UK; (e) any delay that might result from proceeding in one jurisdiction rather than another; (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to where the witnesses, co-defendants, and suspects are located, and (ii) the practicability of the evidence of such persons being given in the UK or elsewhere; and (g) the requested person's connections with the UK. In addition, in deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 2 territory concerned.

In deference to the principle that prosecutors are best placed to make decisions in respect of where to prosecute, the forum bar scheme provides various opportunities for prosecutors to influence the outcome of forum proceedings. Section 83A(5) provides that if, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which the requested person could be prosecuted in the UK, the judge must make that prosecutor a party to the forum proceedings. As indicated, if a prosecutor expresses a belief that the UK is not the most appropriate jurisdiction in which to prosecute, the judge must take that into consideration as a specified matter relating to the interests of justice under section 83A(c).

Furthermore, under section 83C, a designated prosecutor may issue a 'prosecutor's certificate', the effect of which is that extradition cannot be barred by reason of forum (section 83B), subject only to the possibility, pursuant to section 83D, of questioning the legality of the certificate as part of appeal proceedings in the High Court, which will apply the procedures and principles of judicial review. A prosecutor's certificate certifies that consideration has been given to prosecuting the requested person in the UK, that there are one or more offences for which he could be prosecuted, and either: (i) that a formal decision not to prosecute has been made because of insufficient admissible evidence or because prosecution is not in the public interest, or (ii) the requested person should not be prosecuted because there are concerns about the disclosure of sensitive material (for example, on grounds relating to national security, international relations, or the prevention or detection of crime).

The corresponding provisions in EAW cases are in sections 19B to 19E of the EA.

THE FORUM BAR IN PRACTICE

At the time the forum bar was introduced, commentators questioned whether it would make any difference at all to outcomes in cases where requested persons would try to make use of it. The specified matters that judges must take into consideration tend both for and against extradition. Many believed the opportunities that prosecutors have to influence the outcome of forum proceedings would prevent the forum bar's successful deployment, given that the effect of a prosecutor's certificate is to prevent judges barring extradition by reason of forum, and is subject to challenge on judicial review grounds only, while the belief of a prosecutor that the UK is not the most appropriate jurisdiction in which to prosecute, is a matter that district judges are likely to place considerable weight on.

In practice, prosecutors have so far been reluctant to use the power to issue certificates under section 83C or 19D. There have, however, been several cases in which prosecutors have expressed a belief that the UK is not the most appropriate jurisdiction in which to prosecute. The High Court has held that such a belief, if expressed, is

unlikely to be challengeable except on grounds of bad faith or irrationality *(USA v Shaw* [2014] EWHC 4654 (Admin)). It was also held in Shaw that the absence of the expression of a prosecutor's belief meant that a judge could have no regard to "any belief" as a specified matter.

This was followed in Love at first instance – the District Judge decided that the CPS's silence as to appropriateness of prosecution in the UK was 'neutral' (*United States v Love* [2016] Lloyd's Rep FC 597]. Furthermore, although the District Judge accepted that Love had very strong connections to the UK and that some of the evidence could be made available in this jurisdiction, she found those factors did not outweigh her findings that the harm occurred in the USA, all the victims were in the USA, that their interests would be best served with the case being heard in the USA, and any delay was unknown. Accordingly, the forum argument failed. Indeed, until the High Court's decision on 5th February, there were no reported cases of the forum bar's successful deployment.

LOVE ON APPEAL

The judgment of the High Court in Love was remarkable for a number of reasons. Not only was it the first time the forum bar was used successfully to prevent extradition, the Court also found that Love's extradition to the USA would be oppressive because of his mental and physical health. In doing so, the Court expressed doubts about the District Judge's finding that Love's high risk of suicide if extradited could be prevented, and found the measures in place to prevent suicide in the USA – including segregation, with a watcher inside or outside the cell for company, and limited activities – would be very harmful to Love's mental and physical wellbeing. It also found that given Love's determination, planning and intelligence, he might present himself as no longer suicidal for sufficiently long to be removed from suicide watch, precisely so he could then commit suicide, and that there was no evidence that treatment for Love's combination of severe problems would be available in the sort of prisons to which he would most likely be sent.

In respect of the operation of the forum bar, contrary to previous cases and the decision at first instance, the Court held that the absence of any statement of a prosecutor's belief that the UK was not an appropriate jurisdiction in which to prosecute Love was not neutral. The CPS had not given a certificate under section 83C, it had then decided against expressing any view adverse to the prosecution of Love in the UK. This silence was a factor telling in favour of the forum bar.

In relation to the interests of any victims, the Court held that the real risk that Love's mental health might deteriorate to the extent that he would be unfit to plead or stand trial if extradited and held in custody on remand in the USA was a factor telling against extradition. The risk of no trial taking place would not be in the interests of any victims. The finding that evidence could be made available for Love's prosecution in the UK was of considerable weight as a factor tending against extradition.

Ultimately, in those circumstances, the Court decided the District Judge's overall decision on forum was wrong, primarily because of the nature and strength of Love's connections to the UK. Not only is he a British national, long-term resident, with a girlfriend and engaged in studies – factors which on their own would not have been enough to make the difference – but "there is a particular strength in the connection to his family and home circumstances provided by the nature of his medical conditions and the care and treatment they need. This is not just or even primarily the medical treatment he receives, but the stability and care which his parents provide. That could not be provided abroad. His entire well-being is bound up with the presence of his parents. This may now have been enhanced by the support of his girlfriend. The significance of the breaking of those connections… demonstrates their strength."

WHAT NEXT?

In their concluding remarks, the Lord Chief Justice Burnett and Lord Justice Ouseley emphasised "that it would not be oppressive to prosecute Mr Love in England for the offences alleged against him. Far from it. If the forum bar is to operate as intended, where it prevents extradition, the other side of the coin is that prosecution in this country rather than impunity should then follow… The CPS must now bend its endeavours to his prosecution… If proven, these are serious offences indeed."

The CPS announced on Monday 19th February that the USA would not appeal against the decision of the High Court and was no longer seeking Love's extradition. It remains to be seen whether the CPS will now prosecute Love for equivalent offences in the UK. Counterintuitively, a domestic prosecution may well be the desired outcome for Love. As things stand, there is a risk that should he travel abroad, the USA could attempt to extradite him from a third state, either directly, or after requesting an Interpol Red Notice for his arrest. However, a conviction or acquittal following a UK prosecution would reduce this risk because of rules against 'double jeopardy' in the USA (although these may vary between US states), and/or in the extradition arrangements between the USA and third states.

The future of the forum bar is also uncertain. Love's case was unique and the Court was at pains to make that clear. Cases of concurrent jurisdiction with less favourable facts for requested persons are likely to result in different outcomes. On the other hand, the effect of the judgment may well be that prosecutors err more towards domestic prosecutions in appropriate cases, given the lengthy and unpredictable nature of extradition proceedings. There is some evidence, produced by Love's legal team, that this is already happening in other hacking cases where the victim is abroad and the hacking was carried out in the UK. In any event, where prosecutors consider that prosecution in the UK is not appropriate, they will now be in no doubt as to the importance of expressing that belief to the extradition court.

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Casenote: *Georgiev and others v Bulgarian Judicial Authorities* [2017] EWHC 359 (Admin)

The Divisional Court examined the history of assurances in respect of prison conditions given to UK Courts subsequently breached upon extradition to Bulgaria. It found that in the cases of recently extradited persons the assurances had not been breached and that conditions in Bulgaria had improved permitting a conclusion that there was no real risk that similar assurances would not be honoured.

The lamentable conditions of Bulgaria's prisons have been documented in over 20 years of inspections by the CPT, and ultimately condemned by the ECtHR in its pilot judgment of 1 June 2015, as non-compliant with article 3: *Neshkov v Bulgaria* (Application Nos 3625/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13)).

In the light of that history, the Divisional Court had previously held in *Vasilev v Regional Prosecutor's Office, Silestra, Bulgaria; Nikolev v Regional Prosecutor's Office, Pazadjik, Bulgaria* [2016] EWHC 1401 (Admin) that Bulgaria's prisons were systemically non-compliant with Article 3; that the legal burden had shifted such that it was necessary for the Bulgarian authorities to provide an assurance sufficient to displace the real risk of a breach of Article 3. The court allowed extradition but only on the basis of an assurance as to minimum living space, given in *Vasilev* as 4m².

Regrettably, the assurances given in *Vasilev* were breached. Vasilev himself was held in a variety of multi-occupation cells with space per prisoner of less than 4m² (and, at times, no more than 2.5m²), whilst two other persons surrendered to Bulgaria following the giving of similar assurances, received less than 4m² (and, at times, no more than 1.5m²) of personal space. The details of those breaches were considered in Kirchanov, Petrov and Ivanov v District Prosecutor's Office, Blagoevgrad, Bulgaria and Other Bulgarian Judicial Authorities [2017] EWHC 827 (Admin) ("Kirchanov No 1") and led the Court to seek further assurances from the Bulgarian authorities, with which it was satisfied as a basis for ordering the appellants' extradition.

In *Georgiev*, therefore, the appellants sought to persuade the Court that the assurances given in *Kirchanov No.3* had been breached. Hickinbottom LJ, concluded that, although the Bulgarian authorities had not adhered to the letter the assurances, the *Kirchanov* appellants had not experienced ill-treatment that could be characterised as a breach of Article 3 – or if they had it had been of fairly short duration. Accordingly, and in light of some improvements to the Bulgarian prison estate, (though still finding systemic breach as a matter of generality), the assurances given were sufficient to obviate the Article 3 risk.

Commentary

On one view, this decision is another example of the High Court's belief in second chances; on another, it represents a continuing reappraisal of risk. While it is true that the Court gave substantial emphasis to the degree of trust that should be accorded to a Category 1 territory, the reliability of the assurance was perhaps accorded greater weight (as in *Elashmawy*) by reason of improved conditions. In the absence of another clear (and serious) breach, the Court approached the assessment of risk in the same terms as it had in *Kirchanov No. 3*.

There is, however, more than a hint of the Court according pragmatism as much weight as principle. The treatment of Mr Petrov, who had been held in a cell without adequate sanitation was found to be unfortunate though transient. Under Strasbourg jurisprudence, however, Article 3 is an absolute right, which does not permit ill-treatment of any kind. Since the decision in *Mursic v Croatia* there has been much greater discussion of the cumulative effect of conditions as part of an overall assessment. It would be a very significant departure indeed if such an analysis were to lead the Court to apply a relativist view of where the line on ill-treatment should be drawn.

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Doughty Street

Karel Konecny: permission to appeal to the Supreme Court

On 23rd March 2018 the Supreme Court (Lord Mance, Lord Hughes and Lady Black) granted permission to appeal in the case of Karel Konecny (Konecny v District Court in Brno Venkov, Czech Republic [2017] EWHC 2360 (Admin)).

Mr Konecny had been sentenced to a term of eight years for three offences of fraud which are said to have taken place in 2004 and 2005. He was convicted in his absence on 12th May 2008 and has a right to a retrial in the Czech Republic. He was not considered to be a fugitive from the Czech justice system and there was no evidence that he was aware of any of the proceedings in the requesting state.

District Judge Ashworth found that, as this was a conviction case, any passage of time to be considered was from the date of the conviction in 2008. He did not accept that the time from the alleged commission of the offences should be taken into account when considering oppression and injustice under Section 14 of the Extradition Act 2003.

Sir Wyn Williams, sitting as a High Court Judge, dismissed the appeal on 27th September 2017.

An application was made to the High Court to certify a point of law of general public importance based on the decision of the Court of Justice of the European Union in the case of Tupikas (2017) C-270-17 PPU which found that Article 4a of the Framework Decision is only concerned with "final" convictions and sentences. It is only engaged by decisions which result in final findings of guilt. On this basis, Mr Konecny's conviction is not final and it is submitted on his behalf that he remains "accused" because the Czech conviction and sentence have not be finalised and he has an unfettered right to a new trial.

On 7th November 2017, the court certified the following question of general public importance: "In circumstances where an individual has been convicted, but that conviction is not final because he has an unequivocal right to a retrial after surrender, is he "accused" pursuant to s.14(a) of the Act, or "unlawfully at large" pursuant to s.14(b), for the purposes of considering the "passage of time" bar to surrender?"

The Court refused leave to the Supreme Court.

On Friday 23rd March 2018 the Supreme Court granted permission to appeal the decision of Sir Wyn Williams.

Mark Summers QC and Benjamin Seifert are instructed in the Supreme Court by Deborah Hogg of Freemans Solicitors.

Mark Summers QC, Matrix Chambers
Benjamin Seifert, Temple Gardens Chambers

DELF Educational Event "In Conversation with Sir Andrew Collins" 21 March 2018

Members enjoyed the lively conversation between extradition doyens, Sir Andrew Collins and Edward Fitzgerald QC (DELF President) and unlike in Court, were able to put their own questions to the recently retired judge.

As in his judgments, Sir Andrew provided colourful insights, for example, about his early life growing up in Oxford. His Father was a Dean, opposed to the death penalty and loyal supporter of the ANC, holding meetings at Oriel College Cathedral after dark. When asked if he remained a radical at heart, Sir Andrew answered "perhaps".

The evening covered a massive range of legal, ethical, sartorial (he dislikes the modern robes, so avoided them with "a feeble excuse") and political issues, during which Sir Andrew's humanity and wisdom shone through.

Even if the audience couldn't easily identify with the lofty heights Sir Andrew reached during his career, or his being inspired to join the Bar by childhood walks through the Temple, his reports of shadowing leading juniors at Feltham Magistrates' Court, and witnessing some "awful" tribunals sounded familiar.

Sir Andrew had a mixed practice during his brilliant career at the Bar, but at one stage did almost 90% criminal work. He began to specialise in Judicial Review work, including fighting for prisoners' rights. He was one of the eight members of the very first Treasury Panel and developed his "football practice", as Counsel to both Hillsborough and Bradford Inquiries ("the coroner was an idiot").

Having sat as President of the Immigration Appeal Tribunal and chaired SIAC, Sir Andrew pointed out the significance of the different tests that have developed for human rights breaches domestically (where it is high) and in removal cases (where it is lower). His thoughts on whether the ECHR was ever intended to be extra-territorial, noting the Refugee Convention protections in any event, were fascinating.

Following the batch of post-HH Article 8 High Court success stories, Sir Andrew was asked for "the back story" – was it "proportionality by the back door"? He implied there was a move by Judges "to send a message" to Westminster Magistrates' Court, particularly in cases with trivial, stale offences. Later, Sir Andrew said that the Article 8 cases were some of the most difficult extradition matters he had to decide "where there is going to be a degree of misery whatever one decided".

"As long as there might be something in it" and a case is put responsibly, then representatives are justified in continuing, even if the arguments are weak.

When asked about Brexit, Sir Andrew confirmed suspicions - he was not a fan and replied by asking how the EAW could survive it? "I haven't seen anything that has sensibly dealt with it … it goes both ways, we all want our crooks back." Similarly, geo-political consequences of cases cannot be simply ignored. The rise of the far-right in European politics is another destabilising factor for mutual trust.

On judicial diversity, we were reminded about financial disincentives and about the joint litigation on pension reforms (successful practitioners usually always lose money when moving to the Bench). At the moment there is a straightforward deficit in suitable candidates for the High Court Bench, with only 17 being recruited for 25 posts in the most recent round.

On advocacy, remember few cases have more than two good points, so focus on those and not the whole kitchen sink. Though of course, see the many points above and for those that were present, recall those made on the night, for the exception that proves the rule.

As well as our gratitude to Sir Andrew for his time, our sincere thanks also go to Kingsley Napley for hosting, Edward Fitzgerald QC for chairing with his usual aplomb and Saoirse Townshend for the idea and making it happen.

Mary Westcott, Doughty Street

Forthcoming events

The next DELF educational event "CJEU EAW case law: how to use it until Brexit" will be presented by Mark Summers QC of Matrix Chambers on 23rd April 2018, at Matrix Chambers.

There are limited spaces available. To register, please email: membership@delf.org.uk

This event is free for all members who have paid their annual membership fee for 2018.

The DELF annual dinner will take place at the Crypt of St Etheldreda's Church in Clerkenwell on Friday 11 May 2018. This event is now sold out.

Please save the date in your diaries for 14 September 2018 for the DELF Annual Conference which will be held at the Grange Hotel, St Paul's. Details to follow.

Membership

Membership runs from January to December annually. If you wish to join DELF for the first time from 01 January 2018, please e-mail your name, professional title, firm / chambers / employer, e-mail address and the category of membership that you wish to join DELF under, with "DELF Membership" in the subject heading to the e-mail address membership@delf.org.uk and follow the payment instructions set out below.

If you are simply renewing your existing 2017 membership from 01 January 2018, please follow the payment instructions set out below.

Fees for 2018 will be as follows:

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

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

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

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

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

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