Key developments in extradition law and practice—top five cases from 2018

05/02/2019

Corporate Crime analysis: Joel Smith, barrister at Furnival Chambers, selects his 'top five' extradition cases from 2018 and explains why they are important for practitioners.

Public Prosecutor's Office of the Appeal Court of Eastern Crete, Greece v Andrew

In *Public Prosecutor's Office of the Appeal Court of Eastern Crete, Greece v Andrew* [2018] EWHC 441 (Admin), [2018] All ER (D) 54 (Mar), the Greek authorities applied to appeal against a decision to discharge a requested person who had been convicted of infanticide on the grounds that those proceedings constituted a disproportionate interference with her rights under Article 8 of the European Convention on Human Rights (ECHR).

The deadline for giving notice of an application for leave to appeal was seven days starting with the date of the decision. The court has a limited discretion to extend the period in the case of a 'person' who has failed to apply within time, provided that 'the person did everything reasonably possible to ensure that the notice was given as soon as it could be given', but no such discretion exists where the applicant is the requesting state.

In this case, the deadline was 23 August 2017. On 22 August 2017, the appellant sent the required documents to the court and the respondent's solicitors by email. However, due to the size of the attachment, the emails were not received by the respondent and indeed did not appear in the inbox until some days later. The court found that, although the emails had been sent within time, because their arrival had been delayed by their size until after the deadline, the appeal was out of time. There was no discretion to extend the period and warned 'if any party fails to obtain acknowledgment of receipt, they face a significant risk of being shut out from proceeding with an appeal to this court'.

The facts of this case provide a stark reminder of the short time periods for giving notice of appeal in extradition proceedings and the potentially draconian consequences of failing to observe them. The appellant had sent the application, and the court had received it, on time. The respondent had not, it would appear, only because of the capacity of their inbox. Nonetheless, the court refused to hear the appeal in a serious matter. Practitioners will need to ensure that applications for leave to appeal are not simply sent to all parties within the permitted period, but also that they have been received. Failure to do so could, as in this case, lead to the dismissal of the appeal regardless of its merit.

Biri v High Court in Miskolc, Hungary

The case of *Biri v High Court in Miskolc, Hungary* [2018] EWHC 50 (Admin), [2018] All ER (D) 89 (Jan) concerned a Hungarian European Arrest Warrant (EAW) describing two 'cases' in which the requested person had been convicted of a total of five offences, relating to a number of incidents. The issue on appeal concerned whether those incidents were set out with sufficient clarity such as to satisfy section 2 of the Extradition Act 2003 (EA 2003) and whether the offending satisfied the 'dual criminality' requirements of EA 2003.

The court considered the issue of sufficiency of particulars and of dual criminality by reference to well established principles. In doing so, however, the court provided guidance to practitioners on the manner in which lawyers should approach the issue of dual criminality. The court noted that under precursor legislation, it was common practice for the requesting state to supply a list of the English offences which it alleged would be constituted by the conduct in the extradition request if it had been committed in England in equivalent circumstances, this taking the form of an English charge is akin to a count on an English indictment, but with an amalgam of the statement of the offence and the particulars of the offence. This practice had fallen out of favour in recent times. The court deprecated this, calling for 'the practice of drafting English charges' to be revived 'except in the most straightforward of cases' and describing it as 'essential for the proper presentation of the prosecution's case' and allowing for 'precision as to the conduct for

which extradition is, or is not, being requested, and produces certainty as to what conduct extradition is being ordered for'.

For prosecutors, this guidance plainly needs to be heeded and the practice of providing a schedule of charges should become standard practice in all but the simplest of cases. For those defending, the guidance may be equally important. In cases where the conduct is presented with a lack of clarity, or the issue of dual criminality is a complicated one, defence practitioners may insist on a schedule of charges to assist in the analysis of the issues, in confirming the manner in which the case is put and the English offences which are said to have been committed.

Government of India v Chawla

In *Government of India v Chawla* [2018] EWHC 1050 Admin, [2018] All ER (D) 28 (May), the Government of India appealed against the discharge of the respondent (who was accused of acting in cricket test match fixing) on the grounds that the conditions in the prison to which he would be extradited were so bad as to breach his rights under Article 3 ECHR. The appellant provided assurances as to the prison the requested person would be detained at and a second assurance which, due to the late hour at which it was served, the district judge refused to admit in evidence.

The appeal court found that the district judge was entitled to refuse to consider the second assurance and to come to the conclusion that there was a real risk of inhuman or degrading treatment. However, applying the ruling of the Court of Justice of the EU (CJEU) *in Criminal Proceedings Against Aranyosi and Caldararu, Re Joined Cases* C-404/15 and C-659/15 PPU (2016) C-404/15, which had previously been applied within the context of intra-European extradition under EA 2003, part 1, the requesting state was given more time to provide further assurances to meet the concerns expressed by the court.

The extradition courts continue to consider large numbers of cases litigating the issue of prison conditions. Regular practitioners have become familiar with the law governing the area, the issue having been raised in a large number of cases in 2018. In EA 2003, part 1 cases, the so-called '*Aranyosi* procedure' is becoming commonplace, whereby a finding that a real risk of breach of Article 3 ECHR exists is followed by a request from the court for further information, within a reasonable time, which might discount the risk. In *Chawla,* the courts have adopted the procedure outside the context of European countries within EA 2003, part 1 and extended the procedure to all other countries with whom the UK has an extradition relationship (EA 2003, part 2 countries).

Practitioners will need to be aware of this and the possible ramifications it will have. Put bluntly, establishing a real risk of breach of Article 3 ECHR is only the first stage of the process. Even if such a risk is found to exist, the requesting state will likely be given a further opportunity to address the matter after judgment is given. This may be the case even where, as in *Chawla*, the requesting state has failed to provide assurances or undertakings in a timely fashion during the proceedings.

M and another v Preliminary Investigation Tribunal of Napoli, Italy

In *M and another v Preliminary Investigation Tribunal of Napoli, Italy* [2018] EWHC 1808 (Admin), [2018] All ER (D) 83 (Jul), the extradition of two Italian nationals, M and B, was sought by Italy. The requested persons had been convicted (but had appeals against those convictions extant) of conduct concerning the trafficking of women for the purposes of prostitution.

The warrants concerning M and B were 'extremely difficult to follow', failed adequately to particularise the number of offences for which extradition was sought and failed to distinguish between the two requested persons by setting out which offences were applicable to each requested person. The court found that the warrants failed properly to comply with the provisions of EA 2003, s 2(4)(c) as they did not set out with the necessary clarity the offences in respect of which each EAW had been issued.

The Italian Government supplied three pieces of further information to the court which clarified the position and sought to rely on the further information to 'correct' the errors in the EAWs, invoking *Alexander v Public Prosecutor's Office, Marseille District Court of First Instance, France; Benedetto v Court of Palermo, Italy* [2017] EWHC 1392 (Admin), [2018] 1 All ER 963 and submitting that the further information was required merely to fill a 'lacuna' and not to correct

a ‘wholesale failure’. The court disagreed and refused to use the material to cure the EAWs, finding the original drafting to be ‘wholly deficient’.

This case, while not establishing a new point of principle, will be interesting to practitioners as it provides guidance on the approach being taken to the ‘curing’ of invalid EAWs through further information. The previously orthodox position—that an EA 2003, part 1 warrant was either valid or invalid ab initio and could not be corrected through the provision of further information—was overturned as a result of the decision of the CJEU in *Bob Dogi*, Case C-241/15, adopted in this country most prominently in *Alexander*. Since *Alexander* it has been unclear the extent to which the courts would allow warrants which failed to satisfy the provisions of statute to be corrected. *M v Itlay* demonstrates that *Alexander* has not provided an open door for the correction of poorly drafted warrants after they have been enforced. Defence practitioners should be well aware of the limits of the *Alexander* ruling and in particular that poorly drafted EAWs can still be challenged—successfully—even after the provision of further information.

GW v Serious Fraud Office

The case of *GW v Serious Fraud Office* [2018] EWCA Crim 1155, [2018] All ER (D) 88 (Jun) concerned an individual who had been extradited from Sweden to the UK, rather than an individual resisting extradition from the UK. GW has been extradited from Sweden and faced trial in the UK on a charge of conspiracy to corrupt between 2002 and 2010. The Swedish court ordered extradition in respect of conduct taking placed after May 2007, as conduct before that date would be time barred under a Swedish statute. At a preliminary hearing, GW sought to argue that his right to specialty enshrined in EA 2003, s 145—protection from prosecution or punishment for offences for which he had not been extradited—meant that the prosecution could not rely on evidence of conduct predating May 2007. The trial judge ordered that the prosecution must confine its indictment to allege conduct occurring between May 2007 and 2010 but that evidence of conduct prior to May 2007 would be admissible to prove the commission of an offence falling within the indictment time period. Both GW and the Serious Fraud Office appealed and both lost—the Court of Appeal endorsed the ruling of the trial judge and noted that the speciality rule was concerned with offences, not evidence.

While this is an ‘incoming’ case, the analysis of the rule of speciality will be of interest, and potential application, in all aspects of extradition law. In particular, where individuals are successful in resisting extradition on a partial basis, they must be advised (as a matter of English law at least) that this would not prevent reliance on evidence of the conduct for which they have not been extradited at future trials in the receiving state.

Joel Smith specialises in crime and extradition. In the field of extradition, Smith has represented foreign governments and individuals at all levels from first instance to the Supreme Court.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.