

# Extradition—Year in Review of 2020—a look forward to 2021

**Corporate Crime analysis: 2020 has undoubtedly been a most unusual year, but in terms of the evolution of extradition caselaw it has been surprisingly still. As in previous years, extradition appeals have been dominated by Article 8 cases and challenges to European prison conditions. However, fewer extraditions than usual have actually taken place, and not for the obvious reasons (although coronavirus (COVID-19) has caused its own delays). Various challenges have led to large numbers of appeals being stayed pending outcomes of lead cases. Sharmistha Michaels and Rebecca Hill, barristers at Five St Andrew’s Hill, discuss the most important extradition judgments of 2020 and what to expect in 2021.**

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## Country-specific caselaw

In respect of Hungary, this was following the certification of a question to the UK Supreme Court concerning breaches of prison conditions assurances given by the Hungarian authorities to the German courts. The lead case of Szalai and Zabolotnyi v Hungary [2019] EWHC 934 (Admin), [2019] All ER (D) 113 (Apr) is due to be heard in February 2021. Many Romanian requests were also stayed while a similar challenge to prison conditions assurances was considered in Adamescu v Bucharest Appeal Court Criminal Division, Romania [2020] EWHC 2709 (Admin), [2020] All ER (D) 89 (Oct) (in the context of more individual concerns raised by the appellant). The Divisional Court determined that there was insufficient evidence of breaches to undermine assurances generally. Polish requests have seen a repeat of the challenges raised in 2017 in respect of independence of the Polish judiciary; a matter going to both the validity of warrants and the Article 6 right to a fair trial (Article 6 of the European Convention on Human Rights (ECHR)). The lead case of Wozniak and Chlabicz [2020] EWHC 1459 (Admin) is to be heard on 3 February 2021 but until then all Polish cases which raise the challenge are also being stayed at the Appellate stage. Following the 17 December 2020 decision of the Court of Justice in cases Openbaar Ministerie v L Case-354/20 PPU and Case-412/20 PPU (which broadly rehearsed the reasoning identified in LM Case-216/18 PPU) it seems likely that this argument will fail.

## Jurisprudential developments

This is not to say that 2020 has been without interesting jurisprudential developments. In Hafeez v US [2020] EWHC 155 (Admin), [2020] All ER (D) 03 (Feb) and Sanchez v US [2020] EWHC 508 (Admin), [2020] All ER (D) 191 (Feb) the Divisional Court considered two separate cases in which extraditees faced whole life sentences if returned to the US. Each argued that to return them in those circumstances would breach their Article 3 rights, by reference to the ECHR decision in Trabelsi v Belgium (App no 140/10) (2014) 38 BHRC 26, which made a finding of incompatibility. In each case the Divisional Court chose to disregard the European jurisprudence which it characterised as having been adopted ‘without any proper reasoning’, and to order extradition on the basis that the sentences are ‘reducible’, consistent with domestic authority. These cases raise questions as to the proper approach where a dichotomy exists between domestic and European jurisprudence. The ECHR has accepted appeals by Hafeez and Sanchez and Strasbourg’s response to the British divergence from its standard will make interesting reading in 2021.

## Interesting decisions—including coronavirus-related circumstances

More esoteric cases of interest included Short v Falkland Islands [2020] EWHC 439 (Admin), [2020] All ER (D) 153 (Feb) in which the High Court discontinued an order imposing reporting restrictions in extradition proceedings imposed to protect the identification of an appellant accused of sexual

offences. It was held that the exceptional circumstances in which reporting restrictions apply to criminal defendants are equally applicable to extradition proceedings.

In *Dragut v Westminster Magistrates Court* [2020] EWHC 3163 (Admin), [2020] All ER (D) 116 (Nov) the court considered the proper interpretation of section 4(3) of the Extradition Act 2003 (EA 2003) and the circumstances in which a requested person should be discharged for failure to produce them at court 'as soon as practicable'. Various administrative failings and errors had led to delays in transporting the applicant for initial hearing but when he was ultimately produced at court for the first time he was refused admittance to the cells due to coronavirus-related restrictions to numbers. Mr Justice Thornton held that the focus should be on what is practical and not what might theoretically have been possible had a different sequence of events taken place. Habeas corpus was refused.

The introduction of travel restrictions because of coronavirus, limiting the number of international flights, has meant that those whose extradition had been ordered were not being removed. The case of *Cosar v Poland* [2020] EWHC 1142 (Admin), [2020] All ER (D) 64 (May) involved two applications for habeas corpus, where it had not been possible to arrange the applicant's extradition to Romania due to restrictions on flights. Two extensions of time for extradition had been granted by the District Judge and the Divisional Court were asked to consider the legality of these extensions. The court held that habeas corpus was not the correct application, as detention had been ordered by the District Judge following the applicant's extradition hearings and they were thus not unlawfully detained. Permission was granted to the first applicant to continue a claim for judicial review regarding the extensions of time. The Administrative Court also held that the extensions of time were in accordance with the Framework Decision, that there was no requirement to notify a requested person of an application to extend the extradition period or for them to participate in the hearing, but that it was a matter of good practice that an individual be notified of any extension of time for their extradition and to be allowed continued access to legal teams and advice.

### **What to expect in 2021—the impact of Brexit and coronavirus**

As anticipated following the Brexit agreement, the UK will lose its connection to the real time database SIS II that shares alerts on wanted people. This can only result in the speed at which the UK gets important data being reduced and inevitably slowing down the extradition process. While there will be co-operation between the UK and EU law enforcement agencies, extradition arrangements will be similar to that between the EU and Iceland/Norway, the main changes being: the remaining EU Member States can refuse to extradite for political offences; refuse to surrender their own nationals or set conditions for surrender; dual criminality can be waived by some states; a proportionality clause is included for surrender requests. European Arrest Warrant (EAWs) already issued will be dealt with under the existing EA 2003, Pt 1 but all new EAWs will fall under the new arrangements. UK practitioners are likely to face challenging and uncertain times ahead. The differences in approach to new requests and old requests under the new regime needs to be carefully scrutinised as it is this inconsistent approach between requests from the same state that has potential for challenge.

The deal has said that where extradition isn't possible, there will still be 'a path to justice in every case'. Potentially representatives may wish to consider whether this could give rise to an abuse of process argument.

Although we can see light at the end of the tunnel with the vaccine, it is highly likely that delays in removing requested persons will continue into the new year, as travel restrictions become even more stringent, giving rise to further unlawful detention claims.

The inevitable uncertainty for those EU nationals extradited as to whether they will be able to return to the UK will remain and despite initial judicial reluctance to address this point fully, it is one that should continue to be made when considering a requested persons Article 8 rights. As it stands, the new deal doesn't seem likely to provide the same level of efficiency and protections as pre-Brexit arrangements.

*Interviewed by Pietra Asprou*

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