

Hide And Seek: Fugitive Status In Extradition

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Whether a Requested Person (“RP”) is a fugitive is a key consideration at each stage of an extradition case, whether it be in the consideration of bail at the initial hearing, the availability of certain bars to extradition or the consideration of human rights.

This article attempts to provide an overview of the concept of ‘fugitive status’ and the impact it can have at a final hearing.

When is an RP a Fugitive?

There is no statutory definition of a “fugitive” and the caselaw offers examples rather than any strict definition.

Kakis v Government of Cyprus (1978)¹ WLR saw Lord Diplock state:

Delay in the commencement or conduct of extradition proceedings which is brought about by

the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.

Gomes v Government of Trinidad and Tobago [2009] UKHL 21 sets out that someone who “deliberately flees the jurisdiction in which he had been bailed to appear” would count as a fugitive and that “Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice”

Lloyd Jones LJ considers the matter of fugitive status in *Wisniewski v Poland* [2016] EWHC 386 (Admin). In particular, it is noted at paragraph 59 that:

Where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct on his part to support the existence of a statutory bar to extradition. Rather than seeking to provide a comprehensive definition of a fugitive for this purpose, it is likely to be more fruitful to consider the applicability of this principle on a case by case basis.

That rather unhelpful approach was elaborated on slightly in *Pillar-Neumann v Public Prosecutor's Office of Klagenfurt, Austria* [2017] EWHC 3371 (Admin) at para 64, bringing the matter back around to Kakis:

The essential question is ... whether the Requested Person has knowingly placed himself beyond the reach of legal process. Fleeing the country, concealing whereabouts or evading arrest are examples of so doing.

The cases of *Pillar-Neumann* and *Versluis v The Netherlands* [2019] EWHC 764 (Admin) are both particularly relevant to cases where the RP becomes aware that they have proceedings

against them once they are already in the UK. In considering whether the RP was a fugitive, the Court in Pillar-Neuman placed considerable weight on the whether the RP took any “positive” steps to avoid legal proceedings:

She was not was not taking any positive steps to evade or avoid arrest. She was simply carrying on living in her country of residence... Nor was she knowingly placing herself beyond the reach of a legal process. She took no positive steps to place herself anywhere. The Respondent's case is that she was somehow obliged to place herself within the reach of a legal process instituted in another country and to leave and give up her home and lawful residence in the UK in order to do so. Not surprisingly, we have been shown no case in which it has been found, or even suggested, that failing to act in this way makes someone a fugitive. (Pillar-Neumann paragraph 69-70).

3 months later *De Zorzi v France* [2019] EWHC 2062 (Admin) saw the Court grapple with the case where following her arrest in Paris, Ms De Zorzi was subject to “judicial supervision” (bail) and permitted to return to her home town of Amsterdam but was required to respond to court summonses.

Having returned to the French Courts, and despite not being present at the conviction or appeal hearings, she was convicted and sentenced to three years’ imprisonment in June 2001. Her conviction was upheld in 2002.

A request was issued in 2001 seeking her extradition to serve the three year sentence. The request was finally refused by the Dutch Minister of Justice in 2007. An EAW was issued in 2005. Whilst visiting the UK in 2018, Ms De Zorzi was arrested on the EAW.

The issue was whether, Ms De Zorzi was a fugitive by remaining in the Netherlands, and whether her conduct “placed herself beyond the French legal system”. The High Court asked itself: “Is a requested person a “fugitive” if she fails to return to the jurisdiction of the requesting state from the country of which she is a resident in breach of the obligation placed on her by the courts of the requesting state at a time when she was in her home country?”

On the test for fugitive status, Garnham J sets out at paragraph 48 that:

the test for fugitive status is subjective - the requested person must be shown deliberately and knowingly to have placed himself beyond the reach of the relevant legal process.

The High Court concluded that the applicant was not a fugitive and was then successful in raising a bar under s14 and demonstrating that extradition was incompatible with her Art 8 rights.

Makowska v Poland (2020) EWHC 2371 (Admin) saw Fordham J provide a systemic approach to the question of fugitive status, At paragraph 23 he sets out that:

In grappling with the idea of fugitivity, expressed in the authorities which were cited and to which I have referred, I have found it helpful to think in particular about the following three linked themes:

(i) locational dynamism;

(ii) informational deficit; and

(iii) intended consequential elusiveness.

That is not to say that these are elements of a litmus test; nor that all three themes can be expected to be present. A person whose location changes, with a lack of information, becoming elusiveness can be seen as a paradigm case of a fugitive. These themes, or some of them at least, can be seen to be met by each of the following situations: a person who flees the country; a person who conceals their whereabouts; a person who evades arrest; a person whose act of leaving a country knowingly prevents themselves from performing obligations; a person who ceases contact with authorities so as to become a person whose whereabouts are unknown to those authorities and cannot be dealt with by those authorities; a person whose actions are the cause of any delays in their pursuit by the authorities. These themes, as it seems to me, reflect the ordinary and natural meaning of the word 'fugitive'. They link directly

to the underlying idea of extradition delays being consequential upon the individual's own choices, with what are, in effect, penalising consequences for the individual in an analysis of the extradition circumstances, under the law.

In summary of the train of authorities that have each sought to provide clarity to the definition of fugitive status, it appears that the overriding consideration for the court is the mind of the RP, whether it be described as 'consequential elusiveness' or 'evading' arrest, the Court will assess whether an RP is a fugitive on a case by case basis and will consider whether the RP, in moving, has 'knowingly' placed themselves beyond the reach of the requesting authorities.

The Burden and Standard of Proof

It is for the requesting state to prove to the criminal standard that the RP is a fugitive as per section 206 of the Extradition act and set out in *Krzyzowski v Circuit Court in Giliwice, Poland* [2007] EWHC 2754 (Admin) in relation to section 14, and *Mitoi v Romania* [2006] EWHC 1977 in relation to section 20.

Fugitive Status and its Relevance to the Bars to Extradition

Whether a Requested Person (RP) is a fugitive is fundamental where the following bars to Extradition may be engaged:

Section 14 of the Extradition Act 2003

Gomes v Trinidad and Tobago [2009] UKHL 21 is clear, at [26] the House of Lords stated that where an RP

“deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice”

As such, should the Judicial Authority prove, to the criminal standard that the RP in any given case is a fugitive, s14 is not open to him as a bar to his extradition.

Section 20 of the Extradition Act 2003

Whilst not flowing strictly from concept of fugitivity, a convicted RP can only argue that they should have a right to appeal or retry their case following extradition in the event that the Court is satisfied that the RP did not deliberately absent themselves from their trial.

Article 8 of the European Convention on Human Rights

Laws LJ in *La Torre v Italy* [2007] EWHC 1370 at [37] stated that “The extraditee cannot take advantage of delay for which he is himself responsible”.

Norris v Government of United States of America [2010] UKSC 9, considered in *HH and others v Deputy Prosecutor of Genoa Italy and others* [2012] UKSC 25 and *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin) confirm that when weighing up the strength of the article 8 rights against the public interest in extradition, the court may have regard to numerous factors including any delay in the case and who caused it. Lady Hale noted in *HH* that when considering extradition the Courts should notice that:

“[8] ... (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no “safe havens” to which either can flee in the belief that they will not be sent back. (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.”

It was later noted in *De Zorzi* [2019] EWHC 2062 (and considered at length above) where the court found that an RP was not a fugitive that “Under article 8, the balance is changed significantly by a conclusion that she is not a fugitive and it is necessary to conduct the Celinski balancing test afresh” and that where someone is not a fugitive:

“... the public interest in ensuring that, in the words of Lady Hale at [8] in HH, “... the UK is not a safe haven to which those convicted of crimes can flee in the belief that they will not be sent back” is not applicable”

“... the weight to be attached to the public interest (in extradition) diminishes where there has been very significant delay for which the requested person is not responsible”

(see Lady Hale at [8] in HH).

Conclusions

This article has sought to consider, briefly, the impact of fugitive status at a final hearing, however, the lack of fugitive status can be a powerful submission in support of a bail application as a key factor in allaying fears of further failure to surrender.

Whilst the law surrounding fugitivity appears to be based on a subject test of the RP's mind at the time of moving, a finding of no fugitive status will have a key impact on the bars to extradition and will and has the power to significantly diminish the often relied upon public interest in extradition, as such fugitivity of an RP should be in the mind of every extradition practitioner throughout proceedings.

Sophia Kerridge prosecutes and defends in a wide range of criminal cases and is Youth Court qualified. She is gaining a wealth of extradition experience and has been instructed to act on behalf of clients facing extradition to a number of countries. Her experience extends from case preparation and management to final hearings and advising on appeals to the High Court. She has a keen interest in international criminal matters.

Joe O'Leary currently has a busy crime practice and regularly prosecutes and defends in the Crown and Magistrates courts. Joe accepts instructions in extradition matters and has a keen interest in cases involving international jurisdiction and related matters.