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Extradition – A View from Europe – Portugal

London, June 7, 2017

Firstly I would like to thank the DELF Committee for organizing this event and inviting me to speak and of course to thank everyone attending. Lastly I would like to thank Prof. Giannoulopoulos and the colleagues from other EU MS who are also speaking tonight.

Trying to stick to my time – a maximum of 10 minutes that equals 3 pages as my mentor taught me a long time ago – I will very succinctly address 3 topics of my extradition practice in Portugal, which I hope are of your interest. Nevertheless I will be available to answer questions about other topics too, therefore please feel free to ask. Other topics, which will not be addressed in my talk, and could be of interest, would be: proportionality in issuing EAW; application of *Aranyosi* and other human rights refusals; guarantees; oral hearings (or the their absence) in EAW cases.

1)

The first issue I would like to address is that of *trials in absentia* and the system of service of documents used in Portugal.

When is this issue relevant for you?

If you are defending a person subject to an European Arrest Warrant issued in Portugal, that person might well be in a situation where:

a) she has not been present at her trial

b) she has had a suspended sentence revoked and did not know about it

Why does this happen?

Every person who is a suspect in a criminal case in Portugal must give a Statement of Identity and Residence (SIR) (*termo de identidade e residência*). Once a person has signed a SIR, service of documents concerning the criminal case will be effectuated at the address stated, unless she informs the court by means of an

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application delivered in person, or by registered mail that she moved to a new address.

Service at the address stated on a SIR is made by postal delivery without acknowledgment of receipt. The postman or postwoman will deposit the letter in the post-box and fill in a "post-card" in which she states the date on which she deposit the letter on the said address.

Service of all papers, including the indictment and of the "order setting up the trial date" is made using this procedure.

The order setting up the trial date is crucial for the defence in a criminal case, since it is the order by whereby the presiding judge will among others set up the date for trial. Moreover the deadline for lodging the defence statement, submit document evidence and enrol witnesses or experts or request the production of further evidence starts counting from the service of said order.

So, what is the problem of using such a procedure to serve the defendant in a criminal case on the date and place of her trial?

The problem is that **this means of service clearly does not prove that the defendant has received the letter and is unequivocally aware of the date of her trial**. It is a mere legal fiction that the person has become aware of her trial, since the postman deposited the letter in her post-box at the address given on the SIR.

I find, therefore, that **this means of service does not meet the test established by the CJEU for Article 4a(1)(a)(i) in *Dworzecki***, unless it is shown in the case files by other evidence that the person was aware of her trial date.

However when Portugal acts as Issuing State, its courts will typically mark field d) 3.1.a in the EAW form, indicating that the person has been summoned in person on a given date (which will be the fifth day counting from the day that the letter was deposited in the post-box by the postman – against a presumption).

When facing such an EAW from Portugal, defence extradition lawyers should ask their court to clarify the circumstances of service and whether it was conducted through letter without acknowledgment of receipt.

They should also contact a lawyer in the Issuing State. This lawyer will be able to consult the case files and report on the circumstances of service of the order setting up a trial date.

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Often a defendant will have a publicly appointed lawyer (who frequently has no contact to the client), will have made no applications whatsoever to the court and will not have been present at the hearing. Even in that case the person may be – according to Portuguese law, validly – tried in her absence. In fact, when signing a SIR the person is also informed that, as long as she has been duly served, she may be tried in her absence and represented by her lawyer. And as long as the person has not informed the authorities of a new residence and the postman has deposited the letter, then the person may be tried in her absence.

This is quite problematic if we take into account that criminal proceedings in Portugal take years. It is normal that an investigation is not closed until after 1 year of having been opened (in a simple case). But this can even take longer (and often does). It can take years. Therefore demanding that a person keeps informing the authorities on changes of residence subject to being tried in her absence seems disproportionate.

Additionally the SIR is frequently signed without a lawyer being present. Whether the person properly understood the consequences of the SIR is never established unequivocally – even highly literate people have difficulties in understanding the legal jargon and the consequences – i.e., the prejudice for their defence – of being tried in their absence. If the person cannot speak Portuguese, she must be mandatorily assisted by a lawyer when making a SIR (it is mostly not the case and it can help to reverse negative situations). Ask this from your client and have the Portuguese lawyer checking the case files for that.

Finally, in most striking cases in the past, some courts have considered that the defendant had been served despite factual information to the contrary in the case files (for instance, when the letter had been returned to the sender or when there was information that the person no longer lives at the given address). There is some case law stating that if the court knows that the defendant could not have received the letter, then the presumption of service "in person" is rebutted and trial may not be conducted *in absentia*. A trial conducted notwithstanding would be null, but the nullity has to be invoked until the case becomes final, otherwise the trial *in absentia* is validated.

Defendants tried *in absentia* must be served of the final judgment in person: i.e. by the police or judicial authorities, or their equivalent, of by a letter with

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acknowledgment of receipt where they undersign confirming receipt and where the person delivering confirms to have checked that person's ID to make sure that it is the person at stake. From the day they are served, they have a 30-day deadline for lodging an appeal against the decision.

On the other hand **defence extradition lawyers should be aware that there is no right to a re-trial under Portuguese Law**, **or to right to lodge an appeal** on questions of fact which would allow for a fresh determination of the merits of the case**, alongside the possibility** to present a defence at this procedural stage and **to request and produce new evidence.**

The existing legal remedy (if the decision has not become final, case in which there are only very limited extraordinary remedies) **is an appeal which does not allow for the presentation of new evidence** and is strictly limited to a review of the decision of the court of first instance and of the errors of fact and law that this latter might have made. **There is no new instance before which the entirety of the evidence is adduced *ex novo*, or which at least admits the submission of new evidence submitted by the defence**.

Please note also that defendants are not served on second and third instance judgments – Portuguese-speaking defendants aren't. Non-native aren't either (only exceptionally) but their lawyers may (and should) request for a translation of such decisions and the deadline for appealing would only start counting from the date they are provided with a translation (or they can ask for an interpreter for their conversations with the client and having him do an oral translation).

The other situation where the SIR is relevant is during the period in which a suspended sentence is "being executed". Currently – since 2013 – the SIR remains valid throughout the proceedings, until the sentence has been declared extinct. This means that a suspended sentence may be revoked if the Court tried to find out about why the defendant has not fulfilled certain obligations (very often in young offenders reporting to social services) by serving him on the SIR address and received no reply, she might revoke the suspension and order the prison sentence to be executed. This decision will also be served to the defendant at his SIR address. Therefore it is quite possible that your client is sought on the basis of an EAW for execution of a sentence although not knowing that the suspension had been revoked.

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In such situations, I believe the validity of proceedings may still be put into question (there is minority case law in that sense), but the case is more difficult. Do contact a Portuguese lawyer as soon as possible in such a case.

2) Prison conditions in Portugal (just a brief reference)

As you know there as a dramatic financial crisis in Portugal. There were tremendous budget cuts and of course Prisons are on of those areas, which were affected by the budgetary constraints.

Some prisons are not too bad; others clearly have issues and might not meet the standards of the ECHR and the Charter – especially EPL (Lisbon Central Prison) and EPPJ. Typically prisoners extradited to Portugal are flown to Lisbon and therefore put in EPL (sometime ago I received the information from the prison services that that were the "proceedings"). They might then be transferred onwards, but that might take some time (months). The Dutch Courts are now refusing the execution of Portuguese EAWs on this basis – as Thom reported in the DELF Newsletter:

Also, the Amsterdam District Court has ruled on 8 May that there is insufficient information that prison conditions in Lisbon prison have improved. Referring to information it was familiar with ex officio *from other Portuguese EAW cases, it held that any detainee arriving from abroad is initially placed in Lisbon Prison. The detainee will be held there for a minimum of 8-15 days and - since a guarantee was given in this specific case by the* Direção-Geral de Reinserção e Serviços Prisonais *(DGRSP) - for a maximum of 21 days. The Court did not accept the Prosecution's argument that, now that there was a guarantee that the stay in Lisbon prison would be limited to a maximum of 21 days, there is no longer a real risk of treatment in contravention of the EU Charter. It therefore once again postponed a definitive ruling on the validity of the Portuguese EAW pending more information about the prison conditions during the 21 days in Lisbon prison.*

The two decisions are available via:

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2017:3042
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2017:3043

I would also draw your attention to the following ECtHR cases:

1) Butuc v. Portugal, application no. 2582/16 (communication: http://hudoc.echr.coe.int/eng?i=001-168255) – concerning EPPJ - friendly settlement 6.500,00€ http://hudoc.echr.coe.int/eng?i=001-173546

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2) Patenaude v. Portugal, application no. 26986/16 (communication: http://hudoc.echr.coe.int/eng?i=001-168255) –EPPJ, EPL and Silves – friendly settlement 11.500,00€ - http://hudoc.echr.coe.int/eng?i=001-173548

3) Dumitru v. Portugal, application no. 28794/16 – referring to EPL, still pending http://hudoc.echr.coe.int/eng?i=001-168255

4) Bokor v Portugal, application no. 52909/15, Mr Eugen Catalin Bokor – EPL – friendly settlement 14.500,00€ - http://hudoc.echr.coe.int/eng?i=001-173538

5) Dragan v. Portugal, application no. 56503/15 – EPPJ – friendly settlement 10.000,00€ http://hudoc.echr.coe.int/eng?i=001-174798

The Portuguese Ombudsman (NPM) has visited EPL and has described it as inhumane – I don't have an English translation of the report, I am afraid.

3) Execution of Interpol Red Notices in PT

I chose this topic just to make you aware that in Portugal red notices are executed directly, without any prior oversight by a judicial authority.

People may be detained (and will generally speaking be kept in detention if they do not have residence in PT) for a relevant amount of time (maximum of 18 days extendable to 40 days without presentation of extradition request; 65 days since detention until CoA decision and possibly up to 90 days; another 80 days after CoA and until SCJ; plus 3 months after SCJ and pending CC) even though no official extradition request has been received and even if there is not extradition treaty between Portugal and the issuing country (there have been red notices by Qatar, for example).

Portugal may extradite in the absence of a treaty, as reciprocity may be granted on a case-by-case basis. And multilateral treaties are considered a sufficient basis of reciprocity for extradition. Of course if the person is a Portuguese national, it will be very difficult to obtain extradition. So far no Portuguese citizen has been extradited from Portugal. The first cases where this might happen are ongoing and concern Brazil / Lava Jato.

If a person has a red notice against her there is little which can be done at national level. NCB Portugal does not reply to any requests from lawyers represented

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persons. Requests to our Data Protection authority (or the CCF) are as we know usually not efficient.

So, if someone is in Portugal and know that there is a red notice against her, she might be detained.

Is there a possibility to avoid it? For instance, if we know that there is a red notice against the client and we have a good defence against extradition, or if there is no treaty?

The only possibility might be to try to get a decision from an administrative court prohibiting the police of executing a red notice. But I have never seen such a decision or case and also there would be a dispute about which courts have jurisdiction – since jurisdiction over extradition belongs to the criminal courts and detention upon a red notice is only a preliminary step to extradition. I would certainly be willing to try this out, should we find an adequate case!

So... since when I came to the end of this text the 3 pages were long gone, I had to cut out some parts. But do not hesitate to ask now or at a later moment, should you have any inquiries!

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