http://www.coe.int/tcj

Strasbourg, 5 March 2014
[PC-OC/PC-OCMod/2013/Docs PC-OC Mod 2013/ PC-OC Mod(2013) 06rev2]

PC-OC Mod (2013) 06 rev.2
English only

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

Information received from states on practical problems encountered and good practice as regards the interaction between extradition and asylum procedures

Contents

Introduction

During its 64th meeting (28-30 May 2013), the PC-OC discussed the interaction between extradition and asylum proceedings on the basis of a discussion paper prepared by Mr Erik Verbert (Belgium) and a presentation by Mr Olivier Beer (UNHCR) and decided to:
- take stock of the most important practical problems encountered in this field by inviting experts to send a paper to the Secretariat by 15 September at the latest;
- instruct the PC-OC Mod to reflect on the information gathered and make proposals for possible follow-up.

The PC-OC Mod, during its 16th meeting (9-11 October 2013), had a long and substantial discussion on various aspects of this issue and decided to:
- inform the plenary that it was of the opinion that problems encountered by member states as regards the interaction between extradition and asylum procedures could be diminished by enhancing the exchange of information and communication between the different authorities concerned at a national level but also at an international level;
- underlining that work on this issue falls, to a certain extent, outside the competency of the PC-OC, propose that the plenary suggest the CDPC to address this issue both from the perspective of extradition and asylum and consider the possibility of developing a recommendation for adoption by the Committee of Ministers in order to assist member states in striking the appropriate balance between extradition and asylum proceedings.

During its 65th meeting (26-28 November 2013), The PC-OC considered the practical problems reported by member states in this field as well as the proposal for follow up by the PC-OC-Mod. It was recalled however that the CDPC had discussed this issue during its 58th plenary session in 2009 and had concluded that the question was “of great importance to the Council of Europe” but had noted “the absence of a specialised intergovernmental committee dealing with issues to asylum seekers” [Doc CDPC(2009)22 meeting report]. The PC-OC agreed that the issue was of importance to its work and in need of further discussion and decided to:
- invite all experts to send examples of good practice in this area as well as obstacles encountered to the Secretariat by 15 February 2014;
- instruct the PC-OC Mod to consider this issue further in preparation of the special session on extradition to be held during its 66th meeting.

Armenia

Interaction between extradition and asylum proceedings
Examples of good practice and obstacles encountered

Good experience:

On 4 June 2012 through Interpol National Central Bureau of the Police of the Republic of Armenia, and 11 July 2012 through diplomatic channels, the Ministry of Justice of the Republic of Armenia received a note regarding extradition of B.K. (born on 06/02/1967 in Tekman, Erzurum province) from the Republic of Turkey.

The examination of documents provided to the Ministry of Justice of the Republic of Armenia showed that:

- The Police Department of Avan and Nor Nork found and arrested B.K., who was under search for commitment of offences provided by articles 102/2, 102/3-d, 102/5, 43/1, 109/3-b, 109/4, 109/5, 53/3 of the Code No. 5237 of the Republic of Turkey (Rape and Kidnapping).
- The Court of General Jurisdiction of the Administrative Districts Avan and Nor Nork had satisfied the petition of the Prosecutor's office and determined provisional arrest for 40 days as a measure of restraint against Mr. K. on 27.03.2012.
- A reference provided by the State Migration Service of the Ministry of Territorial Administration of the Republic of Armenia indicated, that B.K. was recognized as a refugee and granted asylum in the territory of the Republic of Armenia by the decision of the State Migration Service dated 23 June 2009 No. B-1/09-A.

While reviewing the question of extradition of the abovementioned person, the Ministry of Justice of the Republic of Armenia took into account the following:

- The Article 22 of the European Convention on Extradition, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party.
- The para. 1 of the Article 478.2 of the Criminal Procedure Code of the Republic of Armenia indicates, that if the extradition request has not been received during the maximum period of provisional arrest within 40 days, the person is subject to release.

Since the official extradition request was not received, B.K. was released from provisional arrest on 4 May, 2012, taking into account the Article 478.2 of the Criminal Procedure Code of the Republic of Armenia.

On 04 June, 2012 the Ministry of Justice of the Republic of Armenia received the official request from the Turkish competent authorities regarding the extradition of B.Karagol, after which the question of his extradition was reviewed by the Ministry. The Ministry took into account the following circumstances:

- The duty to extradite arises from a multilateral extradition agreement to which both the Republic of Armenia and the Republic of Turkey are parties to. On the other hand, the Republic of Armenia, being a requested State, was bound by its non-refoulement obligations under international refugee and human rights law, which preclude the extradition of a refugee or an asylum-seeker to the requesting State under the conditions already examined. The Ministry of Justice received a number of letters from the Representative of the UN High Commission for the Refugees in the Republic of Armenia providing assistance to the refugee B.Karagol.

- In the light of the abovementioned the Ministry of Justice of the Republic of Armenia found appropriate to take into consideration the Guidance Note on Extradition and International Refugee Protection issued in April 2008 by UNHCR. The Guidance Note examined the scope and content of the requested State's non-refoulement obligations under international refugee and human rights law, as well as their operation in the context of requests for the extradition of a refugee or an asylum-seeker. It also explored how protection against refoulement may be given effect in the extradition process of the requested State.

The principle of non-refoulement, which prohibits the forcible removal of refugees to a risk of persecution, is the cornerstone of the international refugee protection regime. Enshrined in Article 33 of

the 1951 Convention, it constitutes a fundamental principle from which no derogation is permitted. The principle of non-refoulement as provided for under Article 33 of the 1951 Convention also forms part of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.

The principle of non-refoulement applies not only with regard to a refugee's country of origin, but also any other country where he or she has reason to fear persecution related to one or more of the grounds set out in Article 1A(2) of the 1951 Convention, or from where he or she could be sent to a country where there is a risk of persecution linked to a Convention ground.

Exceptions to the principle of non-refoulement are permitted under international refugee law only in the circumstances provided for in Article 33(2), which states that: "The benefit of Article 33(1) may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

In accordance with the Criminal Code of the Republic of Armenia B.K. had committed offences stipulated by the Articles 138 (Rape) and 131 (kidnapping). Kidnapping (secret or open) by means of fraud, breach of trust, violence of treats or violence against a person if there are no characteristics of the crime stipulated in Article 218 of the RA Criminal Code, shall be punished for a term of two to five years of imprisonment. Rape, sexual intercourse of a man with a woman against her will, using violence against the latter or some other person, with threat thereof, or taking advantage of the woman's helpless situation, is punished with imprisonment for the term of 3 to 6 years. So, according to the Article 19 of the Criminal Code of RA these are considered grave crimes.

According to the paragraph 21 of the UN Guidance Note, in such situations, bars to the surrender of an individual under international refugee and human rights law prevail over any obligation to extradite.

The Ministry of Justice of the Republic of Armenia took into consideration also the fact, that the principle of non-refoulement, which prohibits the forcible removal of refugees to a risk of persecution, is well grounded also in the case law of the European Court of Human Rights. The Court held, that there would be a violation of the Convention (particularly of the Article 3) if there will be extradition or expulsion to the country of origin. For instance, the case of the ECHR Abdolkhani and Karimnia v. Turkey (n.2) 27.07.2010, A.A. v. Greece 22.07.2010 or the case of I.M. v. France 02/02/2012, where the Court rejected the applicant's complaint under Article 3 because he no longer faced deportation to Sudan and was certain to be able to remain in France since he had been granted refugee status.

Taking into consideration that the extradition of a refugee B.K. had been sought by his country of origin, the Republic of Armenia as a requested State was precluded under Article 33(1) of the 1951 Convention or customary international law from extraditing the wanted person. In such case, the principle of non-refoulement in international refugee law established a mandatory bar to extradition.

Malpractice:

On 11.10.2013 G. Z., under search by the law enforcement authorities of the Republic of Georgia for committment of crimes proscribed by the Article 226 (organizing or taking part in group activities violating public order) voluntarily showed up at the Nor Nork Division of the Police of Republic of Armenia.

The case was sent to the Ministry of Justice of the Republic of Armenia.

The exploration of the facts indicated, that with the court decision of the Republic of Georgia dated 29.12.2006 detention was appointed as a measure of restraint. With the court sentence dated 28.05.2008 G. Z. was found guilty for commitment of crimes prescribed by Article 226 of the Criminal Code of the Republic of Georgia, and was sentenced to 2 years of imprisonment.

On 01.12.2011 G.Z. was found and arrested by the RA Police. On 03.12.2011 the General Prosecutor's Office of the Republic of Armenia filed a motion to the First instance court of general

jurisdiction of Armenia to apply provisional arrest for 40 days in regards of G. Z. The motion was granted and the beginning of detention was counted from 01.12.2011.

On 30.12.2011 the documents regarding G.Z. were forwarded to the Ministry of Justice of the Republic of Armenia, with the information that the General Prosecutor's office of the RA had filed a motion to the competent Court of the Republic of Armenia for the purpose of prolonging the detention of G.Z., however the motion was not granted taking into account the fact that G.Z. had filed an application asking for a political asylum in the Republic of Armenia. G.Z. was released from detention on 10.01.2012.

It was later revealed that political asylum was not granted to G.Z., and on 28.04.2012 the Ministry of Justice of the Republic of Armenia, having recieved the documents from the General Prosecutor's office of RA, sent a request to the RA Police General Department of Criminal Investigation to take measures towards finding and arresting G.Z.

On 20.12.2012 G.Z. was found and arrested, however, the Ministry of Justice of the Republic of Georgia, with the letter dated 14.01.2013, informed the RA Ministry of Justice that the extradition was not considered relevant at that point. G.A. was again released from detention on 19.01.2013.

Later, the Ministry of Justice of the Republic of Armenia received the letter of the Ministry of Justice of the Republic of Georgia, dated 17 Jun 2013 with a request of extradition of G. Z., asking not to take into consideration their previous letter regarding the irrelevance of the extradition. According to the presented documents G. Z. was a citizen of the Republic of Georgia.

The Ministry of Justice of the Republic of Armenia requested the Ministry of Justice of the Republic of Georgia to provide the 21.12.2012 Act of Amnesty of the Republic of Georgia.

It became evident, that according to the Article 16 of the Amnesty Act the sentence regarding G. Z. was reduced by ¼ and had reached 1 year and 6 months of imprisonment.

On 11.10.2013 G. Z. voluntarily showed up at the Nor Nork Division of the Police of RA.

The Ministry of Justice of the Republic of Armenia sent a motion to the First instance court of general jurisdiction of the administrative district Nork Marash with the request to apply two months of extradition detention regarding G. Z..

However, G. Z. objected with the information that he is a citizen of the Republic of Armenia showing the Court a passport of the Republic of Armenia.

Taking into account that the parties have provided different documents regarding Z.'s citizenship, the Court, considering the RA Government 1154-N decree dated 04.10.2007 on "Establishing the rules of gaining information on a person's citizenship", had sent a request to the RA Police passport and visa department to gain a reference on G. Z.'s citizenship. The reference dated 24.10.2013 indicated that G. Z. is a citizen of the Republic of Armenia, and had applied for the citizenship during the period when the Republic of Georgia considered his extradition irrelevant.

During the hearings G. Z. also showed a reference dated 16.10.2013 provided by the RA Police passport and visa department, indicating that with the President's decree dated 11.09.2012 G. Z. received a citizenship of the Republic of Armenia.

Thus, examining the provided materials, taking into account the facts, that:

According to the Article 30.1 of the RA Constitution, a citizen of the Republic of Armenia cannot be extradited to another country, with the exception of cases provided by RA international treaties,

According to Article 5 of the Law on RA Citizenship , a citizen of the Republic of Armenia cannot be extradited to another country, unless otherwise provided by RA international treaties,

According to the Article 488(1)(3) the extradition request from a competent body of a foreign country is subject to refusal, in case the request is in regards of an RA citizen,

In Accordance with the Article 6 of the 1957 Convention on Extradition, a Contracting Party shall have the right to refuse extradition of its nationals,

According to the 1997 bilateral agreement between the Republic of Armenia and the Republic of Georgia, no extradition is granted, when the requested person is a citizen of the Contracting party,

The Court refused the motion of the Ministry of Justice of the Republic of Armenia.

Belgium

The past years, we have had significant issue surrounding the extradition – asylum problem. In a very general fashion and looking back to our discussion with the UNHCR's representative, I am more than ever convinced that asylum and extradition represent two intrinsically worlds that rather function next to each other than together. Our respective legal frameworks, purposes (raisons d'être) and terminologies – including their legal meanings) are very different, even to the extent that there are essentially no bridges between them.
In the end the matter should be addressed at the level of domestic legislation. Bridges – all to avoid conflicts and to "marry" two incompatible "legal systems" in function of the respective conventional obligations – should be built in our domestic legal provisions. In that respect I most welcome the information that was provided by Switzerland. Also Canada has made most interesting changes in the extradition legalization on the one hand and the asylum legislation on the other hand. Only through proper legislation both procedures can be managed in such a way that (1) excessive delays are avoided and (2) an exchange of relevant information can be guaranteed such as that (3) both procedures can take into account all relevant information and take into account the respective obligations under the respective conventional frameworks and corresponding institutions.

Next to that I would like to stress the importance of transnational / international exchange of information between the immigration and / or asylum instances. This is a kind of cooperation that falls outside the scope of our committee since it is to some extent police to police cooperation and / or administrative cooperation. I am more than ever convinced that many asylum requests are made on the basis of incomplete or wrong information. The exact identity of the applicant is often incorrect, in some cases even the nationality of the applicant is not the nationality he or she claims to have. This very preliminary yet essential information may avoid asylum issues in a very early stage of the extradition procedure even long before an extradition request is being made.

I leave it to these quite preliminary remarks, but I will certainly come back to this complicated and sensitive issue. About the latter characterization, I would say that in far more cases than we can imagine, there is no reasonable ground to make the issue 'sensitive'. A reasonable approach based on adequate multi-level cooperation can and will avoid the kind of sensitivities that only complicate cooperation and thus, in the end the proper administration of the law.

Croatia

The Republic of Croatia has specific problems related to extradition and asylum.

A person who is in detention usually submits the request for asylum after the Minister has granted the extradition and that is only delaying execution.

It is purposely obstructing justice.

Czech Republic

In the Czech Republic the asylum and the extradition are two separated proceedings. They are regulated by different laws, from their nature they have different purposes. Asylum procedure falls within the competence of the Ministry of Interior whereas extradition is handled first by the competent courts that decides on admissibility of extradition and then by the Ministry of Justice where the Minister is the one to grant or refuse extradition.

Notwithstanding the fact that they are separate proceedings, asylum cases have impact on extradition cases. The fact that international protection had been granted inevitably means inadmissibility of extradition. Nevertheless, until recently, there was no regulation establishing clearly relation between the two proceedings.

According to a newest opinion of the Constitutional Court of the Czech Republic, asylum procedure takes precedence and Minister of Justice cannot decide on extradition (and obviously the person cannot be extradited) until the final decision in the asylum proceeding is taken (including judicial review of this decision). That becomes a problem where the asylum application has been submitted for no other reason than to delay extradition. There are numerous examples of this. The asylum proceeding usually takes a very long time and can be prolonged by appealing each decision. A person, however, cannot apply for international protection after the decision on extradition had been issued by the Minister of Justice.

Estonia

The longest ever extradition case between Estonia and state X lasted 8 years and 4 month. And from that time to solve asylum procedure took nearly 8 years. The case was so complicated and from other hand so funny and finally after eight and almost half a year we extradited the person from Estonia to state X. If you want, I can tell the “story” during next PC-OC session.

Despite that one case where the extradition and asylum procedures interacted Estonia still does not have any specific laws on this point.

Finland

In response to your query on the interaction between extradition and asylum procedures please be advised of the following.

In Finland these two procedures are regulated by two different sets of rules administered by different branches of government and having no point of convergence whatsoever. Asylum procedures fall within the competence of the Ministry of the Interior whereas extradition is handled by the Ministry of Justice. Communication between these two agencies is haphazard; on general level problems arise when one hand doesn't know what the other is doing.

A specific problem arises when the person whose extradition is being requested applies for asylum or has already previously done so with respect to the requesting country. Naturally, asylum procedures take precedence and extradition is frozen until further notice. Asylum procedures can be prolonged into eternity by appealing each decision all the way up even to the Supreme Administrative Court, appeal in the last instance being however subject to leave of appeal. Now, that becomes a problem where the asylum application is clearly without merit as sometimes is the case. There is no way to shorten the path of justice even when an asylum application has been submitted for no other reason than to delay extradition. What exacerbates this problem is that more and more extraditees become aware of this last resort. I'm sure that this is not exclusively a Finnish problem but probably deserves to be mentioned just as well.

Further information Finland

Finland has an ongoing case to report on the interaction between extradition and asylum procedures.

The US requested extradition of one of their nationals caught in Finland. The case went on as usual until the subject applied for political asylum in Finland. The Ministry of Justice was notified of the application and the case was put on hold pending the outcome of the asylum proceedings. What we were not told was that the Immigration Service was about to deport the individual to Norway where the fate of his asylum application would be determined. Namely, the person in question had entered Europe through Norway and the EU Regulation establishing the criteria for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national provides that Norway, as the first point of entry (Norway is part of the mechanism), would be responsible for handling any and all asylum matters.

Extradition and asylum procedures in Finland are two separate and independent procedures in respect of which the law does not recognize any interaction between the competent authorities at all.

However, to prevent further complicating matters the Ministry of Justice and the Immigration Service came to an informal understanding by which the Immigration Service would avail themselves of the possibility afforded by the Regulation to examine the asylum application themselves so that unnecessary hassle could be avoided and asylum and extradition could be decided in one country. The case is still pending.

Germany

Interaction between extradition and asylum proceedings

According to the current legal situation, decisions in asylum proceedings (asylum and protection against deportation) are expressly not binding for an extradition proceeding (section 6, second sentence Asylum Procedure Act (*Asylverfahrensgesetz* - AsylVG); no. 47 (1) of the Guidelines on Relations with Foreign Countries in Criminal Law Matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten* - RiVASt). The Higher Regional Courts, which are responsible for decisions regarding the admissibility of extradition, therefore must decide independently whether serious grounds exist to believe that the person subject to extradition would be threatened with political persecution in the requesting State, and that his extradition is therefore not admissible pursuant to section 6 (2) of the Act on International Legal Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen* - IRG). It should be taken into account that the IRG, which forms the legal basis for decision on the admissibility and grant of extradition for domestic and non-treaty-based extradition matters, provides in section 6 (2) that a hindrance to extradition exists in cases where there is serious cause to believe that the person sought, if extradited, would be persecuted or punished because of his race, religion, citizenship, association with a certain social group or his political beliefs, or that his situation would be made more difficult for one of these reasons. With this, the provision mentions those characteristics of persecution that form the basis of the principle of non-refoulement in Article 33 (1) of the Geneva Convention relating to the Status of Refugees (*Genfer Flüchtlingskonvention* - GFK) and are therefore determinative for the grant of political asylum. To the extent that extradition treaties exist, these contain rules that are consistent in terms of substantive result with section 6 (2) IRG.

According to consistent past decisions of the Federal Constitutional Court (BVerfGE 52, 391, 407), although these characteristics do not have binding effect, they constitute weighty circumstantial evidence for a positive decision in the asylum proceeding. The result of this is that the files from the asylum proceeding, to the extent that this is legally permissible, are to be submitted to and examined by the Higher Regional Courts. The factual reasons which led to the asylum decision are to be taken into account. As such, no. 47 (2), first and second sentences of RiVASt provide that the public prosecutor at the Higher Regional Court, pursuant to section 8 (2) Asylum Procedure Act, informs the Federal Office for Migration and Refugees that an asylum application has been filed by the person concerned and also requests that office to forward information on the factual situation or evidence which could be relevant for the issue of political persecution.

However, the Higher Regional Courts are not prevented from engaging in independent investigations regarding the issue of whether political persecution exists, and may potentially decide differently. A different decision on the issue of political persecution is to be carefully reasoned. In evaluating the general possibility and reliability of assurances, it is to be differentiated whether the person affected is recognised as a refugee or enjoys only subsidiary protection. In cases of political asylum, assurances will likely have no practical effect, while in cases of subsidiary protection they could well overcome potential hindrances to extradition, such as, e.g., the threatened imposition or execution of the death penalty.

Correspondingly, the theoretical possibility exists that a foreigner, despite a positive decision by the foreigner's authority on his claim for asylum, may be returned by way of extradition for the purpose of criminal prosecution to the country from where he fled due to political persecution which has been recognised by the foreigner's authority.

In practical terms, however, the situation is as follows: if the request for extradition is based upon a political offence and the grant of asylum and/or protection against deportation was made cognizant of that offence, the Higher Regional Courts have uniformly declared the extradition to be inadmissible. In such constellations, the indicative effect of the decision in the asylum proceeding is generally

considered to be a reason to deny extradition. Overall, if political asylum is granted, extradition is very rarely even considered.

Problems arise primarily when the person concerned has been granted asylum by a third State. In such cases, it is often not possible to procure the files from the asylum proceeding by way of a mutual legal assistance request, so that for lack of knowledge of the factual and legal situation, the decision rendered there cannot be considered in the extradition proceeding.

The necessity of a statutory solution to the issue of the relationship between asylum and extradition has been under discussion for quite some time; however, it has not yet been completed because of the lack of unity regarding the concrete and appropriate solution.

Asylum Procedure Act (AsylVfG)

Section 6 – Binding character of decisions under asylum law

The decision on the asylum application shall be binding in all matters in which the recognition as a person entitled to asylum or recognition of refugee status are relevant in law within the meaning of section 1 (1), no. 2. This shall not apply to extradition procedures or to procedures pursuant to section 58a of the Residence Act.

(§ 6 AsylVfG, current as of 28 August 2013)

Guidelines on Relations with Foreign Countries in Criminal Law Matters

No. 47

(1) The decision in the course of recognition proceedings has no binding effect over the extradition proceedings (§ 6 AsylVfG). There is, as a rule, no reason to stay the extradition proceedings until the completion of the recognition proceedings. The issue of the political persecution or its effects on the asylum proceedings shall be examined separately in the extradition proceedings.

(2) Where the prosecuted person has filed a request for asylum, the public prosecution office at the Higher Regional Court informs the Federal Office for Migration and Refugees in accordance with § 8 AsylVfG. It further asks the Federal Office to make available facts or exhibits which could be substantial for the issue of political persecution (§ 6 (2) IRG).

(3) Paragraph 1 shall apply mutatis mutandis to refugees recognised in other States.

Greece

According to article 5 of the Presidential Decree (P.D.) no 114/2010 which refers to the status of refugees “asylum applicants are allowed to remain in the country until the administrative procedure for the examination of their application is concluded and they shall not be removed, in any way”.

When the Minister of Justice, Transparency and Human Rights orders the extradition, the surrender of the person will be postponed for the abovementioned reason.

According to the Hellenic legislation, the person who is under extradition remains in custody for 2.5 years maximum.

Given the fact that the asylum procedures require a significant amount of time, there is a strong possibility that the 2.5-year period expires and as a result the extradited person must be released.

Netherlands

Furthermore I would hereby like to contribute to your question about asylum and extradition. In the Netherlands we have not solved the question about what information can be shared with the Immigration Service. I think it would help to get information about what other countries share in these kind of cases.

The second issue is that the problem that can occur when a person has been accepted in the Netherlands as a refugee. In some cases this person can get the Dutch nationality eventually. If after a few years more becomes clear about the situation in a country for example in a country which was involved in a civil war, the country involved will sometimes request the extradition of the person. In some cases this can be a bottleneck. The extradition will be refused because of the refugee-status a person has. In some cases however, there is more information about the wrong the person has done, and we would like to extradite the person. Based on his Asylum (refugee)-status that is not possible. We would start a new Immigration-procedure, but this can take forever.

Or on the other hand, the problem can rise that we still do not want to extradite a person, but we don't have a formal ground of refusal, because the person has become a Dutch national (after his refugee status), but formally we cannot use this reason to extradite a person. I think Erik Verbert already mentioned this situation in an earlier paper.

If necessary, I can get more information about the way we treat these situations.

Serbia

In the Republic of Serbia, extradition and asylum are two different legal procedures, administered by different branches of government. Asylum procedures fall within the competence of the Ministry of the interior, while extradition procedures fall within the competence of the higher courts and the Ministry of justice and public administration.

When there is an asylum granted (there is no legal obligation for the Ministry of justice and public administration to check that fact, nor the Ministry of interior provide that information ex officio, but in most cases the person whose extradition is being requested will point that out), that person would not be extradited (based on the article 7 of the Law on mutual assistance in criminal matters). In cases when a person whose extradition is being requested applies for asylum or has already previously done so, the Ministry of justice and public administration will postpone its decision until the final decision on asylum is reached. The Ministry of justice signalizes to the Ministry of the interior that the extradition procedure is in place, so that excessive delays are avoided. We must mention that there are no specific legal provisions about this matter and this is the way the Ministry of justice and public administration acts in practice.

Slovak Republic

There are several problems concerning extradition and asylum proceedings.

According to the Slovak Code of Criminal Procedure a person cannot be extradited when he/she has requested for asylum. Asylum proceedings are quite long and persons can request for asylum again and again that means that it is delaying the process of extradition. However there was an amendment to this provision of the Code of Criminal Procedure, due to the serious obstacle in the extradition proceedings, that if a person applies for asylum repeatedly, it is not a reason not to extradite the person.

There are 3 cases of nationals of the Russian Federation who are several years in detention in the Slovak Republic and cannot be extradited not only due to the asylum proceedings but also due to the ECHR decision.

United Kingdom

The UK's extradition legislation includes a significant number of human rights safeguards for those individuals subject to extradition requests from other states. Asylum and related protection issues form a key part of these. A person will not be extradited if he has been recognised as a refugee on account of a well founded fear of persecution in the requesting state (this would also be the case if they had international protection on a basis outside the scope of the Refugee Convention, i.e. under Articles 2/3 of the ECHR). The UK will extradite a refugee to a third country. In such circumstances, the UK may require assurances from the requesting state that the person will not be refouled to the state from which they have protection.

Where a person's asylum application has not been concluded the extradition process will be deferred pending the outcome of the application. Asylum applications can, of necessity, be complex and are subject to appeals. This means that they can take a long time to complete with a knock on effect to extradition matters. There are numerous examples of this. We would be very interested in discussing this further (if possible with examples) at a future plenary.

Further information United Kingdom

IN THE WESTMINSTER MAGISTRATES' COURT

Senior Deputy Public Prosecutor in Bruges, Belgium v Khalid Zazai

1. This is an application by Mr Zazai (the applicant) for his discharge pursuant to section 36(8) of the Extradition Act 2003 (the Act) following the failure of the National Crime Agency (NCA) to remove him to Belgium 'before the end of the required period.'

2. The relevant statutory provisions are:

   36(2) The person must be extradited to the category 1 territory before the end of the required period

   36(3) The required period is –

   (a) 10 days starting with the day on which the decision of the relevant court on the appeal becomes final or proceedings on the appeal are discontinued, or
   (b) If the relevant court and the authority which issued the Part 1 warrant agree a later date, 10 days starting with the later date.

   36(8) If subsection (2) is not complied with and the person applies to the appropriate judge to be discharged the judge must order his discharge, unless reasonable cause is shown for the delay.

3. The applicant is represented by **Mr Philip Newman** and he has provided a 5-page skeleton argument dated 8th January 2014. The NCA are represented by **Mr Ben Keith** and he has been provided a 6-page skeleton argument dated 3rd January 2014. The Belgium Judicial Authority (JA) is represented by **Mr James Stansfeld.**

4. There is no dispute over the relevant chronology. Extradition was ordered by DJ Jeremy Coleman on 14th August 2013. The applicant lost his section 26 appeal, before Collins J, in the Administrative Court on 25th November 2013, see **Zazai v Senior Deputy Public Prosecutor (etc), Belgium [2013] EWHC 4003 (Admin).**

5. All unsuccessful appellants, within 14 days of the dismissal of their appeal, may apply for the certification of any points of law of general public importance. No such application was made in this case which means the appeal decision became final 14 days after the decision was given and he should therefore have been removed within 10 days of that date i.e. within 24 days of the decision date - see section 36 (3) that is by **19th December 2013.** He was not removed by that date (he is still here detained in custody) and he applied by email dated 30th December 2013, pursuant to section 36 (8), to be discharged.

6. It is useful to consider the likely purpose behind the provision in subsection (8) which directs the person must be discharged absent reasonable cause. The Extradition Act 2003 was the legislative vehicle adopted by the UK government to implement the Council Framework Decision (FD) of 1[3th] June 2002 on the European arrest warrant and the surrender procedures between Member States (2002)/584/JHA).

7. The FD identifies the objective of abolishing extradition and replacing it by a (much simpler) system of surrender between judicial authorities (recital 5) and by Article 15.1 directs the executing judicial authority shall decide, within the time-limits and under the conditions defined in the FD, whether the person is to be surrendered. Article 17.1 directs a European arrest warrant shall be dealt with and executed as a matter of urgency. Article 23 imposes time limits for the surrender of the person. Article 23.5 states "Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released."

8. Any submission that is not a requirement for him to be discharged from the proceedings, but merely that those in custody be released on bail, was rejected in **Owens v City of Westminster Magistrates' Court [2009] EWHC 1343 (Admin).** Pill LJ, at paragraph 20, rejected any suggestion that "Article 23.5 of the Framework, which refers only to "release" and not to "discharge", was concerned only with the grant of bail. Given the presence of 23.3 and 23.4, which specify circumstances in which "surrender may be postponed, I regard that construction as impossible."

9. The thrust of these provisions, aimed at urgency and requiring adherence to fairly tight time scales are 'primarily in the interests of the administration of justice in the jurisdiction to which removal is sought' see paragraph 53 in **Owens**. They are not primarily for the requested person's benefit. It would seem parliament felt it necessary for a requested person to be discharged in the event of a failure, without reasonable cause to remove him within the required time, because that was dictated by Article 23.5 of the FD. Clearly, by including such a provision those responsible for effecting removal are made aware of the extremely serious consequences should they fail to adhere to the time requirements.

10. Many people would regard discharge as an unnecessarily generous provision if its purpose is to encourage timely removal. It is not difficult to imagine the public's outrage, if a violent terrorist finally captured after some bombing incident which killed many hundreds, were he to be discharged in circumstances such as these. In such a case the general public would likely think the provision absurd. This court accepts it is required to apply the law as it is.

ASYLUM CLAIM

11. The applicant is an Afghan national. He entered this country clandestinely in May 2008. I refer to paragraph 3 of Collins J's judgment: "He was apprehended in this country following his arrival by clandestine means. He then made an application for asylum. He was granted temporary admission with conditions of reporting. These he failed to keep. He disappeared and he was therefore in breach of the law here and was not traced. Indeed, it was not until 2011 that he was eventually apprehended. He then made another claim for asylum, his original one having lapsed as a result of his disappearance and failure to (report) when required. That claim for asylum has not yet been finally determined in the sense that it has been rejected by the Home Office. He has appealed and his appeal should have been heard this month. Unfortunately the prison failed to produce him when he should have attended the tribunal and so his appeal has been put off until January 2014." I understand the appeal will be heard on 31st January 2014.

12. I have been shown the computer log/ chronology maintained by the NCA in respect of the applicant. Such individual logs are apparently kept for all those subject to extradition. Presumably they are designed, amongst other things, to ensure that mistakes are not made in relation to the statutory obligation of removing persons within the required period. In this case the log reveals the extradition appeal was dismissed on 25.11.13. It was known that the applicant had an outstanding asylum claim so a request for up-to-date information was sought on 26.11.13. On the same date a reply from the asylum caseworker confirmed the asylum appeal had been adjourned to 31.01.14.

13. Mr Keith submits the NCA are unaware, and are prevented from knowing, details of any asylum application, so it would not know from which jurisdiction the applicant was seeking asylum which might have been, or included Belgium.

14. If the NCA did not have access to Collins J's judgment then being told by the asylum caseworker there was an outstanding asylum appeal was enough to provide reasonable cause for not removing the applicant until at least 31st January 2014. The default position must be that when there is an unresolved outstanding asylum claim in existence the person should not be removed unless there is total confidence a lawfully right to remove exists.

15. If one refers to paragraph 4 of Collins J's judgment (where I have emphasised two passages by underlining), he said "However, it is common ground that the existence of the asylum claim, which has not yet been finally determined, is not directly material so far as the extradition appeal is concerned. It may well be that he cannot be physically removed assuming that his (extradition) appeal is dismissed until the asylum claim is finally determined. As Belgium of course is a

safe third country and there would be no risk of refoulment, contrary to the refugee convention, were he decided to be a refugee. If his (asylum) appeal is dismissed then that question will not obviously arise. Nonetheless, if removal cannot take place until his asylum appeal is finally determined that can be dealt with by a court order in due course if the (asylum) appeal is dismissed."

16. Although, perhaps not with pellucid clarity, is not Collins J saying there the applicant should not be removed until his asylum appeal hearing on 31st January 2014 has been determined? Whether the learned judge is right, as a matter of strict law, may be a matter of debate. If, as I suspect, the applicant's asylum claim is limited to a claim that he has a well-founded fear of facing persecution in Afghanistan and that the Afghan state will not protect him from such abuse then, as I understand the position, there is no obligation to await the resolution of any such claim before surrendering him to Belgium.

17. Obviously, where an asylum claim relates to the requesting state then removal must await a resolution of the claim see, for example, paragraph 6 onwards in **Bialek v Poland [2013] EWHC 930 (Admin)** per Collins J. Where, however, asylum is not being claimed against the requesting state there is no obligation to await the final resolution of the asylum claim see, for example, **Dos Santos v Portugal [2010] EWHC 1815 (Admin)**, where Mr Dos Santos was seeking asylum from Angola but his surrender was sought by Portugal and **Ignaoua v Italy [2008] EWHC 2619 (Admin)** where Mr Ignaoua was seeking asylum from Tunisia but his surrender was sought by Italy. In both those cases physical removal following extradition was (as I understand it) effected before their outstanding unresolved asylum claims had been determined.

18. Whether Collins J was strictly correct or not is not a matter of any consequence in determining this application. What he said, if acted on by the NCA, undoubtedly provided a reasonable cause for the delay. Indeed if, in the light of what he said, the NCA had removed the applicant it would likely be taken to task for having done so.

19. I do not consider section 39 of the Act has any relevance here. The asylum claim was not made at any time in the relevant period. It was made on some unspecified date in 2011 which I was told was prior to the issuance of the Part 1 Certificate.

20. Quite apart from anything else, the applicant should be pleased he has an opportunity to attend his asylum appeal where he will be able to contribute and advance submissions. Asylum law is not an area of law with which I claim any expertise; Mr Keith tells me that asylum appeals are dismissed if the person appealing is out of the jurisdiction on the date of the hearing as s/he is deemed to

have abandoned the appeal. He referred me to section 104 (4) of the Nationality, Immigration and Asylum Act 2002 -

> An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant leaves the United Kingdom.

I do not know if an involuntary leaving makes a difference.

21. If the removal of the applicant occurs, as a consequence of this extradition request, before his asylum appeal hearing on 31st January, and as a consequence the appeal is automatically dismissed without any assessment of its merits then that would be very unfortunate, if not unfair. It might make his re-entry into the UK following his extradition difficult. Even if there is no strict legal obligation to await the resolution of this outstanding asylum claim, the court is entitled to take into account (1) the proximity of the date of hearing and (2) the fact that the only reason it was not resolved last year was because of the failure of the prison to produce him before the tribunal. These are compelling reasons to delay surrender until at least the resolution of the asylum appeal hearing on 31st January.

22. Mr Newman submits the applicant has now served more time in custody than he will be required to serve to complete his sentence in Belgium. He says that the applicant, for that reason ought to be discharged. I understand the applicant may be eligible for early release in Belgium having served one third of his sentence. Such eligibility for early release can only be determined by the Belgian authorities.

23. If the applicant gives specific and clear instructions that he does not want to attend his asylum appeal on 31st January (even if that might mean the appeal is dismissed) and wants to be surrendered as soon as possible to Belgium then I suggest an immediate application is made to Collins J who might be persuaded to facilitate such a request.

24. I am satisfied reasonable cause for the delay has been established and I decline to order the applicant's discharge.

Nicholas Evans

Nicholas Evans
District Judge
Westminster Magistrates' Court
14th January 2014.