



DELF

DEFENCE EXTRADITION LAWYERS FORUM

NEWS

Welcome to edition 29 of the Defence Extradition Lawyers Forum newsletter. In this edition we have a number of informative case updates from the UK (Hannah Burton), France (Marie Poirot) and Italy (Nicola Canestrini). It also includes a detailed analysis of 'Fugitive Status' in extradition cases provided by Sophia Kerridge and Joe O'Leary. This is alongside our usual updates on on-going activities, CPT reports and recent educational and social events. Many thanks, as always, to all our contributors.

A message from the Chair

This is my last DELF Newsletter, as my year as Chair comes to an end at our AGM next week. It has been a privilege to have led DELF and continue the work of this fantastic organisation, providing fascinating educational events, representing the interests of those defending in extradition and hosting all important social events. Looking back over the year, my highlights have been the series of events we hosted on the Russian invasion of Ukraine, the representations we made to the Government, the creation of the role of International Officer and DELF becoming a collective member of the ECBA. The return of the Annual Dinner was fantastic, and I hope you all enjoyed our Annual Conference the other week and found it as interesting and stimulating as I did. A huge thanks to the DELF Committee for all their support and work throughout the year. Particular thanks go to Danielle Reece-Greenhalgh for being a fantastic Vice-Chair and I have no doubt she will be a superb Chair in the coming year. Finally, Peter Caldwell and Claire Kelly have been on the DELF Committee for many years and are both stepping back. Peter has been an invaluable Policy Officer, putting in a lot of hard work leading our response to consultations, and Claire has been a superb social secretary, we couldn't have hosted the Annual Dinner without her. A huge thank you to them both for their work and contributions to DELF.

I hope you enjoy reading this newsletter, including the case updates on proportionality from both the UK and Italy and an interesting article on the issuance of arrest warrants in France and their test of proportionality. Finally, there is a very helpful reminder of the key cases on fugitive status, and I would draw your attention to our CPT Updates. As always, DELF is here to represent your interests so please do not hesitate to get in touch with the committee with any ideas, views or issues.

James Stansfeld
Matrix Chambers

Recent developments on challenges to French national arrest warrants

In the last couple of years, French case-law on the validity of national arrest warrants has been evolving towards a more intense judicial scrutiny of the use of arrest warrants by Investigating Judges, curbing the tendency of systematic recourse to such an instrument for suspects residing abroad.

These developments are of interest for French practitioners, but also for any extradition practitioners defending clients prosecuted by French authorities against whom a European arrest warrant (hereinafter, “EAW”) or a request for extradition have been issued. The validity of the underlying arrest warrant to an EAW or a request for extradition deserves to be examined closely: challenging the arrest warrant could lead to a decision, rendering not only the arrest warrant, but consequently the EAW or the extradition process void. In some cases, it can also lead to rendering void the concerned individual’s indictment.

The focus of this article will be on arrest warrants issued during criminal proceedings prior to any decision on the merits being rendered.

I. Background: legal basis for issuing an arrest warrant under French law

Under French law, an arrest warrant is issued by a judge or a court. It is an order given to the police to look for a person, and to bring him/her before the judge or the court. Yet whilst waiting to be taken to court, the police can take him/her to the detention facility as indicated in the warrant, where he/she will be detained. Such warrant can be issued during the course of the investigation. Its purpose is to ensure, eventually, that the requested person appears before the court.

An arrest warrant issued in the course of the criminal investigation is requested by the Investigating Judge, whose role is to investigate the facts that the prosecutor has presented to him and decide whether there are sufficient elements against the accused for a trial to take place. During, or at the end of the investigation, if the Investigating Judge wants to indict a person, he must have summoned the suspect to an interrogation called “*Interrogatoire de Première Comparution*” during which the suspect is interrogated, and at the end of which, the Investigating Judge will decide whether or not to place him/her under examination – giving this person a party status in the proceedings. Therefore, to be indicted and judged, one must have been presented to the Investigating Judge. Yet, arrest warrants grant the Investigating Judge a great power, as an individual subject to an arrest warrant can be indicted *in absentia*, without having been previously interrogated.

In which case can the judge issue the arrest warrant?

Due to its coercive nature and its infringement on the freedom of movement, the issuance of an arrest warrant is subject to three cumulative, substantive conditions provided for the French code of criminal procedure (Article 122):

- The existence of serious or concordant evidence suggesting that the person may have participated in acts constituting a criminal offence,
- That this offence is punishable by a sentence of imprisonment, and
- That the requested person is a fugitive or that he/she is residing outside France.

It is the third condition which gives rise to numerous challenges and evolving case-law.

When is a person deemed to be a fugitive?

The notion of “fugitive” is highly influenced by the European Court of Human Rights (hereinafter “ECHR”) case-law. According to the ECHR, this notion must be strictly interpreted in that it must be established on objective factors and inferred from factual circumstances.

Even though there is no substantive definition of a “fugitive”, the ECHR has identified two requirements to differentiate a fugitive from a simple non-appearing individual.

Firstly, the person concerned must be aware of the proceedings instituted against him or her (ECHR, 12 Feb. 1985, *Colozza v. Italy*, no. 9024/80, § 32; 28 Aug. 1991, *F.C.B v. Italy*, no. 12151/86, §§ 27-30; 12 Oct. 1992, *T. v. Italy*, no. 14104/88, §§ 28-29). The Court considers that the mere absence of the applicant from his usual place of residence or his parents' home is not sufficient to consider that the applicant was aware of the proceedings and the trial against him (ECHR, 11 Oct. 2012, *Abdelali c/ France*, n° 43353/07, § 54). The Court pays a particular attention to the authorities' endeavors to find the correct person (ECHR, 12 Oct. 2017, *Cafagna c/ Italie*, n°26073/13, §41).

Secondly, the court should demonstrate that the individual, aware of such proceedings, has expressly sought to evade justice or is deliberately absent from the trial – and therefore waived his right to appear in court. This waiver should be established in an unequivocal manner: it cannot be presumed (ECHR, 12 Feb. 1985, *Colozza v. Italy*, § 28; 28 August 1991, *F.C.B. v. Italy*, § 33; 12 Oct. 1992, *T. v. Italy*, § 27; 14 June 2001, *Medenica v. Switzerland*, no. 20491/92, § 56-59; 16 Oct. 2001, *Eliazer v. Netherlands*, no. 38055/97, § 33; 1 March 2006, *Sejdic v. Italy*, no. 56581/00, §§ 99-101). This may be the case, for example, when the accused succeeds in evading an attempted arrest or when materials are brought to the attention of the authorities which unequivocally show that he/she is aware of the proceedings pending against him/her and of the charges he/she faces.

As these two requirements need to be established, the arrest warrant for a person considered to be a fugitive must be well reasoned, otherwise it risks annulling of the arrest warrant.

Due to the ECHR's strict interpretation of the notion of a fugitive, French judges tended to automatically instigate the use of arrest warrants on the basis of the requested person's residency being abroad where possible.

Notion of "residency abroad"

The French code of criminal procedure (article 131) provides that an arrest warrant can be issued by the investigating judge for a person residing outside the territory of France even if he or she is not a fugitive. The French Supreme Court has specified that a person detained outside France must be considered, within the meaning of article 131, as residing abroad (Cour de Cassation, Chambre criminelle, 11 May 2021, no. 21-81.148 P; 5 Jan. 2022, no. 21-82.484 P).

The possibility to issue an arrest warrant on the sole basis of the place of residence being abroad, gave rise to an increasing number of cases and challenges that is impacting the usual practice of Investigating Judges with regard to arrest warrants.

II. The proportionality test which needs to be fulfilled to issue an arrest warrant based on the requested person's residence

The French code of criminal procedure allows the Investigating Judge to issue an arrest warrant on the sole basis of the place of residence of the requested person when this place of residence is outside the French territory.

The constitutionality of the differential treatment of a person residing in the French territory and a person residing outside that territory has been challenged before the French Constitutional Council in 2015 (Conseil Constitutionnel, Case no. 2014-452 QPC, 27 February 2015). The Council deemed that these two categories of individuals were not in the same situation with regard to the ability of the judicial authorities to order coercive measures against them. Thus, such differentiation in the treatment was necessary to achieve the purpose of this law i.e. the search and prosecution of offenders. The Constitutional Council however set a framework and a limit to this: prior to issuing an arrest warrant based on the individual's foreign residence, the Investigating Judge must, in light of the circumstances of the case, assess the necessity and proportionality of the coercive measure. The Council also recalled that the decision to issue an arrest warrant must be subject to judicial review.

The implementation of this proportionality test has given rise to very interesting case-law in the last couple of years.

In addition, as a consequence of the Constitutional Council's decision, the Court of Cassation imposed on lower courts the requirement to consider the necessity and the proportionality of issuing an arrest warrant when the requested person lives abroad. Failing that, the decision of a court of appeal reviewing the validity of an arrest warrant without undertaking this proportionality test will be quashed by the Court of Cassation (Court of Cassation, Criminal Division, 11 January 2017, 16-80.619).

According to this proportionality test, the judge must assess the necessity and proportionality of the issuance of the arrest warrant i.e. the absence of any alternative measure that would be less intrusive on the fundamental rights of the requested person - in others words, one must look for the “*adequacy between the end and the means*” (Paris Court of Appeal, 28 January 2021, n°2019/03340).

Recent decisions by the Court of Cassation and by the court of appeals have applied the proportionality test when reviewing the validity of the issued arrest warrants and annulling them in the following circumstances:

- When no elements in the file could lead the defendant being considered a fugitive - the court of appeal of Aix-en-Provence noted that the defendant’s address abroad was known to the judge, as well as his lawyers’ and that no summons nor invitation to appear before the judge was served to him. The court therefore ruled that the use of an arrest warrant was not necessary and caused a disproportionate infringement to the defendant’s rights (Court of Appeal of Aix-en-Provence, 6 March 2018, n° 17/01493).
- A similar reasoning was adopted by the Court of Cassation in a 2020 decision, stressing that the defendant “*had an address abroad and that it was appropriate to request that he be summoned there before being able to note, if necessary, that he was a fugitive, and to appreciate the necessity and proportionality of this measure of constraint*”. (Court of Cassation, Criminal Division, 16 December 2020, n°20-85.289),
- When no investigating act was executed to identify the whereabouts of the defendant, nor summons sent to his known addresses in Paris and Dubaï or to his lawyers’ - while the defendant had sent several correspondence to the Investigating Judge through his lawyers establishing his will to participate to the investigation, the court of appeal annulled the arrest warrant on the basis of its absence of necessity and proportionality (Paris Court of Appeal, 28 January 2021, n°2019/03340),
- When no objective factors could establish that the defendant was a fugitive, and no endeavors were made by the French authorities to search and find the address of the defendant abroad in order to summon him before issuing the arrest warrant, the Paris criminal court decided to annul both the arrest warrant and, as a result, the defendant’s indictment (Paris criminal court, 22 April 2022).

To conclude, the French courts have considerably strengthened the scrutiny of validity of arrest warrants issued on the basis of the place of residence of the requested person and the reasoning behind the Investigating Judge’s choice to issue an arrest warrant. The French courts pay particular attention to the authorities’ endeavors to find and summon the person before issuing, at a last resort, an arrest warrant. The courts must therefore assess any alternative possibility to resorting to an arrest warrant, for example through an European Investigation Order or MLAT requests to locate the suspected person, issue summons in order to place him/her under investigation. By doing so, the individual is then offered the possibility to participate and defend him/herself during the course of the investigation, protecting at the same time his/her rights of defense.

The issue of challenging an arrest warrant remains an issue, as the arrest warrant cannot be challenged before its enforcement i.e. before the concerned person is arrested and placed in detention, either in France or abroad. Pending proceedings are currently raising this issue and the compatibility of such a procedural bar to the right of access to a judge.