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PANEL ON EXTRADITION

REVIEW IN THE EXTRADITION PROCEDURE

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Legal framework

There are different grounds for the extradition procedure in Serbia, depending on existence of a mutual legal assistance treaty concerning the requesting (country claiming it has jurisdiction over the case) and requested (country which received the extradition request). The usual applicable international treaties are 1957 CoE Convention with all Protocols and the 2005 UN Convention against Corruption (but also several other UN Conventions depending on the case, as they also address extradition), and numerous bilateral treaties.

In cases when there is no treaty the domestic legislation on mutual legal assistance in criminal matters shall apply. However the courts – even in cases when there is a ratified treaty often give precedence over domestic legislation, leaving the precise scope of application of the treaty subject to case by case determination of a presiding judge.

In any case, the case usually goes to the pre-trial judge and then first and second instance court before it is referred to the Minister of Justice, who has the discretionary power to refuse the extradition.

Refusal

The extradition can be refused for typical extradition grounds i.e. double criminality, *non bis in idem,* statute of limitations, political/military offence, *ordre public* (Article 3 ECHR considerations accordingly - the Constitution states that all ratified treaties i.e ECHR are part of Serbia's legal order and thus *ordre public*).

Article 6 of the ECHR

The courts so far have been reluctant to allow wider application of Article 6 of the ECHR as a ground for the extradition bar.

Similarly, taking into account the constraints posed by the ECtHR case law in *Maaouia v. France*, the extradition procedure sometimes is conducted without reflecting on the fair trial standards, guaranteed by the Article 6 of the ECHR.

No review of findings on essential conditions for extradition

The existence of all conditions are decided by the court, save for the conditions relating to political/military offence and *ordre public*, which are decided by the Minister of Justice of Republic of Serbia, should the court previously find that all other conditions are met.

More precisely - the decision of the court on extradition can be appealed to the next instance higher court, which reviews the findings of the first instance court on the existence of all conditions on extradition, save for the political/military offence and *ordre public* conditions, which are decided subsequently by the Minister by an administrative act.

However, although Minister issues a new decision, assessing grounds/conditions, which were not previously addressed nor assessed by the court (i.e. political/military offence and *ordre public)*, this decision of the Minister cannot not be further effectively reviewed, as explained below.

The decision of the Minister is by its legal nature, a final administrative act – individual legal act, which decides on rights, obligations or legal interests of a particular individual (the person sought for extradition).

In Serbia, where these rights, obligations or legal interests, are violated by an individual decision of authority of some government administrative agency, judicial control of administrative action is exercised in a special form of action – an administrative claim. This is usually done via action for annulment in the administrative dispute, before the administrative court. This is in line with the Recommendation Rec (2004)20 of the Committee of Ministers to member states on judicial review of administrative acts.

According to the Constitution, legality of final individual acts deciding on a right, duty or legally grounded interest (such as deciding whether to extradite a person), must be subject to review before the court in the administrative dispute via action for annulment, if other form of court protection has not been stipulated by the law, such is the case in extradition procedure.

Also, the administrative act brought in the first instance administrative procedure (decision of the Minister on extradition) may become final and as such constitute the subject matter of an administrative dispute if appeal to the second instance administrative body is precluded by law or if the rules or practice of the government body (i.e Ministry of Justice) do not provide for an administrative review, which is precisely the case here, as there is no administrative review or appeal against the decision of Minister on extradition.

The practice of the Ministry of Justice was not to provide the decision on extradition with the instruction to file the administrative claim, as it should be, regardless of the fact that this decision is the final administrative act, as explained above, and should be reviewed via action for annulment (i.e. administrative claim).

Consequently, the only possible recourse should be the judicial review via action for annulment of this final administrative act - the decision of Minister on extradition and this should be done before the administrative court. The claimant (i.e. defendant) could also seek temporary suspension of the decision on extradition until the judgement of the administrative court and the court would have to decide on the suspension within 5 days.

Again, although there is a review by the court of most conditions/grounds for extradition, the grounds relating to political/military offence and *ordre public* are not, however, subject to any review. According to the Constitution, ECHR is part of Serbia's legal order and *ordre public,* meaning there is practically no review of the findings relating to Article 3 of the ECHR.

<u>Therefore, it is crucial to allow the defence to address and contend these conditions/grounds, especially in cases concerning Article 3 of the ECHR, which are quite frequent.</u>

Assurances

Also, in cases where there is Article 3 of the ECHR invoked, usually there is no proper assessment of the criteria set in *Saadi vs Italy and Ismoilov vs Russia*.

This criteria states that guarantees cannot be general, must be precise and concrete and that these are not sufficient to provide the necessary protection from actions contrary to Article 3, if there are reliable sources that the state concerned is not abiding to the Convention, which might often be the case depending on the requesting state in question.

Asylum procedure

It is not rare that these cases also have a political and refugee law dimension which may lead to interplay between asylum and extradition, as seen in recent practice. In these cases, if there is a risk of persecution or flagrant denial of justice in the requesting country, the international law suggests that the requested country should adhere to the principle of *non refoulement* whereby no one should be expelled (deported or extradited) to a country where such a risk exists.

These assertions should also be examined in parallel asylum application and reviewed by a court.

However, the practice so far rarely allowed a full judicial review of an asylum application before deciding on extradition.

Recourse

One of the recourses is via the Constitutional court to challenge the decision of the Minister on extradition and to seek suspension of this decision, as the law states that in exceptional cases the enforcement of the act – subject of the constitutional appeal, can be suspended, providing that the enforcement would cause irreparable damage to the appellant, but if suspension is not contrary to the public interest, and would not cause considerable damage to a third party. However, the Constitutional court does not provide any mechanism to effectively exercise this possibility of suspension, nor there are any guidelines whatsoever on this matter.

So, even though it is possible to seek the suspension of the Minister's decision on extradition, until the decision on the constitutional appeal procedure, it is highly likely that a person would be removed from Republic of Serbia, shortly after the decision of the Minister on extradition. As a corollary, the request to the Constitutional court on suspension would practically be incapable of suspending the extradition.

Generally, the recourse should be taken via request for interim measure before European Court of Human Rights or application before UNHCR (in cases of parallel asylum proceedings), or even CAT. However, once the decision of the Minister is passed it usually takes couple of days to remove the person sought for extradition, so the request for interim measure should be submitted as soon as possible in order to suspend the expulsion (extradition).