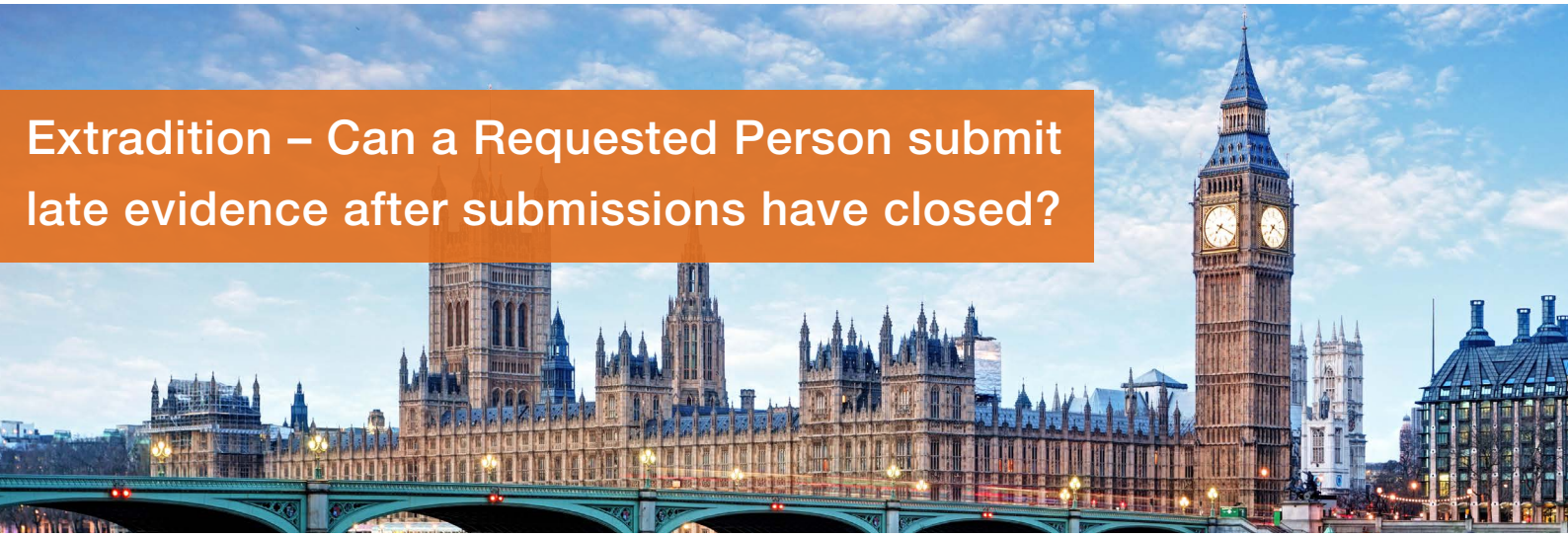
Extradition – Can a Requested Person submit late evidence after submissions have closed?



Background

In May 2021, Mr Peter Weinzierl was arrested at Biggin Hill airport following an extradition request by the United States of America. Mr Weinzierl has been charged with one count of conspiracy to commit money laundering and two counts of international promotional money laundering. Mr Weinzierl is also charged with one count of engaging in a transaction in criminally derived property.

The indictment concerns Mr Weinzierl's time spent on the board of Meinl Bank Aktiengesellschaft (in liquidation) ("MB AG"), an Austrian bank, between 2006 and 2016, and the events surrounding "Operação Lava Jato" (Operation Car Wash). Operation Car Wash was a criminal investigation by the Federal Police of Brazil's Curitiba branch into widespread bribery, corruption and money laundering at the highest echelons of Brazilian society. Estimates of the level of fraud are in excess of USD 10 billion.

The allegations concern MB AG's sale of a small offshore bank in Antigua, Meinl Bank Antigua (in liquidation) ("MBA"), to a group of Brazilian businessmen centrally connected to Operation Car Wash. Upon purchasing MBA the Brazilians used it to funnel money offshore from which to pay bribes to third parties. By using legitimate and substantial national infrastructure projects, in countries such as Antigua, the Brazilians used MBA to onboard offshore clients to the bank who were purported to be professional service companies. Sham invoices were then created in the name of MBA's clients for purported services to the infrastructure projects. The proceeds from the infrastructure projects were used to settle these invoices and the money was then rerouted offshore to create the slush funds from which to pay the bribes.

Proceedings have been ongoing over the last two years, in what has been an incredibly complicated legal and factual defence due to the sheer size and reach of the investigation and the allegations by the US Department of Justice ("DOJ"). The work undertaken covers multiple jurisdictions including England, Brazil, US, Austria, Switzerland, and Antigua. The case is being heard at Westminster Magistrates Court, reserved to Senior DJ Paul Goldspring throughout.

Final submissions by the parties were heard in December 2022 with judgment expected in April 2023. At the December 2022 hearing, the Judge had informed the parties that no further evidence would be allowed unless there were exceptional circumstances.

Following the closing submissions, Mr Weinzierl's defence team came into possession of a Swiss server through the Austrian authorities. On that sever were the files of MBA, including the "Drousys emails", a covert email server which had been in the possession of the DOJ but which, due to the manner in which the extradition legislation is drafted, the DOJ are under no obligation to disclose. Those documents are said to address two key issues advanced by Mr Weinzierl's defence team on abuse of process and passage of time.

Mr Weinzierl's defence team was faced with a crucial balancing act: whether to apply to re-open proceedings at the Magistrates Court before a first instance decision is made or to wait to present the documents in the High Court should extradition be granted and an appeal be lodged. Whilst the former approach is clearly an unattractive one, it was considered that, had this application not been made at this stage and the defence were ultimately unsuccessful in defending the extradition in the Magistrates' Court, any application on appeal to introduce fresh evidence would have been strongly resisted by the prosecution. The High Court would want a full explanation as to why the application had not been made sooner and when the material was in Mr Weinzierl's possession before the court strictly being functus officio.

Upon a preliminary view of the Swiss data, it was considered that the documents had the potential to be decisive and Mr Weinzierl's defence team applied for

permission to allow the Swiss data to be uploaded to an eDisclosure platform, processed and reviewed. The effect would have been to delay judgment and re-open the extradition proceedings for the Judge to consider the new material. In correspondence the Judge had stated he did not wish to see all the new documents prior to making his decision, the documents being voluminous by their very nature.

Legal Consideration

On 20 April 2023, the Chief Magistrate, Senior DJ Paul Goldspring, heard the parties' submissions.

Mr Weinzierl's legal team directed the Judge to his wide case management powers and unfettered discretion to re-open the matter, taking into account the interests of justice. It was submitted that the Judge should consider that the data is material to his decision at this stage. It was put to the Judge that the Swiss data had the potential to be decisive.

The Requesting State opposed the application stating that it is wholly against what the statutory scheme is designed to do i.e., effectively and efficiently dispose of extradition proceedings. The Requesting State argued that the case of *Szombathely City Court v Fenyvesi [2009] 4 All ER 324* states that the new evidence must be at least potentially decisive. In relation to the defence's abuse of process arguments, the prosecution submitted that the principles of *Zakrzewski v Regional Court in Lodz, Poland [2013] 1 WLR 324* apply, such as why the circumstances in Mr Weinzierl's case are exceptional.

Mr Weinzierl's defence directed the Judge to consider that the principles as set out in Fenyvesi only apply where fresh evidence is sought to be adduced on appeal before the High Court and crucially not at this stage of proceedings, as judgment had yet to be handed down.

The Judge also considered the practicalities of conducting an extensive eDisclosure review exercise, which would then require the US to respond to any new submissions and a further hearing before judgment could be handed down. Such an exercise would cause a considerable delay to the proceedings.

Ruling

On 26 April 2023 Senior DJ Paul Goldspring handed down his judgment. The application was denied. A brief oral judgment was given with a full written judgment to follow.

The Judge noted that the parties had accepted that the Judge had unfettered discretion whether to grant the application or not.

In essence the Judge opined that it was a balancing act on competing issues between expediency and not prejudicing Mr Weinzierl's position, and consideration must be given to the **special objective in extradition proceedings under Rule 50.2. of the Criminal Procedure Rules 2020**, which states, *"[w]hen exercising a power to which this Part applies, as well as furthering the overriding objective, in accordance with rule 1.3, the court must have regard to the importance of — (a)mutual confidence and recognition between judicial authorities in the United Kingdom and in requesting territories; and (b)the conduct of extradition proceedings in accordance with international obligations, including obligations to deal swiftly with extradition requests."*

The proceedings had been ongoing for two years and submissions had been extensive by Mr Weinzierl. The Judge was not convinced of the potency of the new material being decisive. The Judge did not consider the new evidence to be exceptional let alone truly exceptional. Without criticism of Mr Weinzierl's legal team, who had only recently come into possession of the material, there needs to be finality to the evidence. The open-ended nature of the eDisclosure exercise puts to risk finality and closure of the proceedings. The Judge stated that on balance it was not in the interest of justice to grant the application.

Judgment to be handed down on 5 June 2023.

Comment

Legal practitioners continue to argue at length about the lopsided nature of the extradition treaty between the UK and US. On 12 February 2020, the Leader of the Opposition stated in Parliament *"this lopsided treaty means the US can request extradition in circumstances that Britain cannot"*. The Prime Minister replied: *"to be frank, I think the right honourable Gentleman has a point in his characterisation of our extradition arrangements with the United States"*.

In Mr Weinzierl's case, the position advanced was that there was evidence that had the potential to be decisive in undermining the extradition request as being an abuse of process and supporting the argument that the delay in bringing charges against Mr Weinzierl prejudiced his ability to mount a defence. Most of this material was accepted by the US to be in its possession, but the US had no duty to provide a copy of this material to Mr Weinzierl during the course of his extradition proceedings. It was fortuitous that the material came into Mr Weinzierl's possession at all, and if the extradition is approved, will afford Mr Weinzierl the opportunity to push for a speedy trial in the US. The material by its very nature will significantly undermine its case.

Unfortunately, this material was not made available before submissions had closed and that will always be the case in complex extradition cases of a cross-border financial nature. Furthermore, the case concerned events that occurred as long ago as 2006, so what prejudice is caused to the US position in allowing Mr Weinzierl time to review the material and why would the US not consent to such if it

had the material and had nothing to fear? It is arguable that to allow the material at this stage in the proceedings would avoid a potential future point of appeal and could have brought proceedings to a close much sooner.

This judgment will add more fuel to the fire that the balance has gone too far in favour of the US and the scales of justice are undermined.

Mr Weinzierl is represented by Mr David Pack (Partner), Leah Kesby and Tommy Evans of Devonshires Solicitors and Mr James Lewis KC, Ben Watson KC and Ciju Puthuppally of Three Raymond Buildings.

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