n 23 June 2017, the Divisional Court handed down judgment in Alexander v Public Prosecutor’s Office, Marseille District Court of First Instance, France; Benedetto v Court of Palermo, Italy [2017] EWHC 1392 (Admin), [2017] All ER (D) 76 (Jun). Up until this decision one of the most powerful arguments against any extradition was that the requesting state had failed to properly set out the conduct alleged on the part of the requested person that formed the basis of the extradition request (the s 2 argument). The Alexander decision massively expands any requesting states’ ability to ‘patch-up’ any inadequate extradition warrant with further information. This has arguably removed a very powerful protection of citizens facing extradition within the European Arrest Warrant (EAW) area.

Background
With the advent of the Extradition Act 2003 (EA 2003), for the first time, Parliament provided for extradition from the UK to other countries where no evidence of crime was produced. In other words, EA 2003 scrapped the ancient requirement that foreign states must produce at least ‘a case to answer’ in order to properly apply for extradition. The sole essential requirement of an EAW was that the requesting state prove that the requested person was accused of or had been convicted of an extradition crime (in practice any crime other than speeding etc). The only possible requirement to set out a ‘case to answer’ came in s 2(4)(c) under which the requesting state has to provide: ‘Particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence…’

A ‘case to answer’ requirement by the ‘back-door’?
In testing the new legislation English judges tended to favour a slightly more conservative approach to the lack of a need for the requesting state to produce a ‘case to answer’. The first real test came in the leading Divisional Court case of Palar v Court of First Instance Brussels [2004] All ER (D) 185 (Apr).

In Palar, I successfully argued that s 2(4)(c) of the Act required that, in order to be valid, an EAW must contain a high degree of detail in terms of the allegation that formed the basis of the EAW request.

Palar provided the foundation for a line of authority leading up to the Supreme Court case of Dabas v High Court of Justice, Madrid [2007] 2 AC 31, where Palar was cited with approval and used to enshrine the fundamental principle that a failure of the requesting state to sufficiently particularise the conduct alleged would invalidate the EAW. This principle was further reinforced in Lord Hope’s celebrated speech in the case of King’s Prosecutor, Brussels v Cando Armas [2006] 2 AC 1.

This was thought by practitioners to be settled law and led to the successful challenge of many EAWs on the basis of invalidity flowing from insufficient particularisation (the s 2 arguments). The Palar principle was used through Dabas and Cando Armas and right up to and including the leading case of Assange v Swedish Prosecution Authority [2012] UKSC 22 as support for the proposition that while the requesting state did not have to formally produce evidence of a case to answer, it certainly had to produce a high degree of detail in terms of what the evidence of the alleged conduct was.

In terms of the political dimension, this line of authority served to potentially undermine the entire EAW scheme. The English courts were freely striking out extradition requests on the basis that the allegations were not set out in enough detail.

The dawn of a new era in extradition law?
George Hepburne Scott discusses the death of s 2 arguments & the ‘transient state’ of European Arrest Warrants
The EU fightback
Following Assange, and perhaps facing political pressure from within the EU, on 1 December 2014, the UK opted back into the European Council (EAW) Framework Decision no 2002/584/JHA (the EAW Framework Decision).

Opting back into the EAW Framework Decision was a political decision taken at cabinet level. It created a sea-change in the interpretation of EA 2003, as from then on the English courts were compelled to interpret EA 2003 consistently with the EAW Framework Decision. Therefore, the EAW Framework Decision itself and all the case law from the European Court of Justice (ECJ) regarding it had direct effect on the English courts. Thereafter the s 2 requirements had to be interpreted through Art 8 of the EAW Framework Decision and the ECJ jurisprudence flowing therefrom...

Unsurprisingly, the case law from the ECJ was heavily in favour of speeding up and streamlining the EAW processes. On one view this was a further facet of the development of the European super-state. Using the principles of mutual trust and recognition enshrined in the EU Treaties, the ECJ was and is continually pushing for the creation of one common area where the courts, in executing EAW requests, are treated as one unit serving the EU.

This in turn strongly undermined the English courts’ ability to thwart extradition requests via the ‘interpretive’ s 2 method. Dabas and Cando Armas had been dealt a fatal blow and the number of EAW requests exploded.

The number of EAW requests to the UK’s National Crime Agency (NCA) went up from 5,522 to 12,613 between 2013 and 2015 (source NCA); an increase of over 100%.

The Art 15 procedure
Such was the clamour in EU member states to make extradition requests from the UK that EAWs began to have less and less information contained within them. A practice developed whereby requesting states would issue EAWs with minimal information on the basis that there was mounting pressure on the English courts to ‘rubber-stamp’ the requests and order extradition. In keeping with this practice, requesting states were given an increasing ability to provide further information in the course of proceedings to deal with objections from the defence legal teams. This ability flowed from Art 15 of the EAW Framework Decision.

Essentially EAWs that were invalid due to inadequate particulars were allowed to be ‘validated’ by the provision of further supplemental information by the requesting state under the Art 15 procedure.

The ability of practitioners to mount successful s 2 challenges was becoming frequently curtailed by Art 15 ‘requests for further information. Such requests became the norm’.

The death of Dabas & Cando Armas
However, the difficulty was that the Supreme Court authorities of Dabas and Cando Armas still appeared to be good law and practitioners in the English court continued to mount s 2 arguments to block the ever-increasing number of extradition requests. This apparent contradiction came to a head in the recent Supreme Court case of Goluchowski v District Court in Elblag [2016] 1 WLR 2665, which applied the ECJ case of Bob-Dogi [2016] WLR 4583. Goluchowski and Bob-Dogi in effect recognised the ability of the requesting state to ‘patch-up’ inadequate EAWs with the provision of further information during the course of extradition proceedings.

The judgment of the Supreme Court in Goluchowski effectively overruled the authorities of Dabas and Cando Armas in relation to future s 2 arguments. In other words, any EAW that was apparently invalid by virtue of providing inadequate particulars of conduct was no longer to be deemed invalid under s 2 because it could become valid through the provision of further information by virtue of Art 15. This has led some commentators to describe the validity of the EAW’s as being able to be in a ‘transient state’ in terms of validity.

In fact, Irwin LJ, in Alexander went as far as to state the following: ‘[73] …the previous approach to the requirements of an EAW and the role of further information must be taken to no longer apply. The formality of Lord Hope’s approach in Cando Armas, based on the wording of the Act, has not survived. It is clearly open to a requesting judicial authority to add missing information to a deficient EAW so as to establish the validity of a warrant.

‘[74] …The effect of two recent decisions is, we conclude, that missing required matters may be supplied by way of further information and so provide a lawful basis for extradition.’

Brexit & the future of s 2 arguments
Clearly Brexit throws not just future s 2 arguments but also the entire EAW scheme into question for the UK. It is beyond the scope of this article to hypothesise about our future extradition relationship with the EU following Brexit.

However, it is worth noting that the ever-increasing political and legal integration with the EU, as exemplified by the expanding application of the EAW scheme, may have given more voice to those who favour Brexit.

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