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**THE MOST PREVALENT ISSUES IN SPANISH EXTRADITION COURTS WITH
SPECIAL FOCUS ON EXTRADITIONS REQUESTED BY THE UKRANIAN
AUTHORITIES**

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The most prevalent issues in Spanish Extradition Courts

1.1.- Trials in absence

- a) **Spanish Constitutional Court Judgment 48/2014**, 7th February (Italy):

Until this Judgment, the Spanish Courts rejected many extraditions to Italy because this country's Criminal Procedure Act allows trials in absence, so we faced a high number of extradition requests regarding defendants who had been convicted to serious prison sentences in absence.

However, the Spanish Constitutional Court changed its criteria in this Judgment and states that even if, under the provisions of Italian procedural law, the defendant was not entitled to request a review of the Judgment, the imposition of a sentence without the appearance of the accused and without the subsequent possibility of remedying his lack of presence in the criminal proceeding followed does not violate the absolute content of the right to a fair trial, when the failure to appear at the trial has been decided voluntarily and unequivocally by a defendant duly summonsed and the defendant has been effectively defended by appointed counsel.

- b) Some months later, **Sections 33 and 49 of Law 23/2014, 20th November**, on the mutual recognition of criminal judgments and decisions within the European Union, incorporated this line of thought. In summary, if the requested person knows the existence of the proceeding, but he or she decides not to attend the trial, or was assisted by counsel of their choice, even in his or her absence, this person must be extradited.

Indeed, these Sections state that the Court *shall reject* the extradition when the requested person has not appeared in the trial, unless one of the following circumstances:

- That, sufficiently in advance, the defendant was duly served with the summons and acknowledged service (the defendant was informed that a judgment could be issued in case of non-appearance).
- That, having knowledge of the date and place for the trial, the accused appointed a lawyer for his defense in the trial and was effectively defended by him there.

In addition to these cases, the Court *may grant* the extradition when the defendant has not appeared in the trial when he or she was not personally notified, if in the extradition request the State confirms that the defendant will be notified promptly after extradition, at which point he will be informed to his or her right to a new trial or to file an appeal, with the possibility that from that new proceeding in which he or she would have the right to appear, a contrary judgment could be possible.

- c) **The end of Section 2 of Law 4/1985**, 21th March, on export extradition (which applies to non EU countries), states that if the request for extradition is based on a judgment after a trial in absence, in which the requested person has been convicted to a penalty that is not allowed in absence according to Spanish law can not, Extradition may be granted *on condition* that the diplomatic representation in Spain of the requesting State, within the term required, provides enough guarantees that the requested person will have a new trial in which he or she must be present and properly defended.

This Section is relevant because according to the Spanish Criminal Procedure Act no trial can be held in absence if the prosecutors seek over two years prison in their provisional accusatory pleadings (Section 786.1).

1.2.- Prison conditions

In relation to the harmful prison conditions that the defendants would suffer if they were extradited, it has been argued on several occasions as a ground for refusing extradition, but for the most part it has been rejected. Moreover, it is not expressly contemplated as a reason for refusal in the current

legislation. It would be closely linked to the right not to suffer inhuman and degrading treatment (indirect violation of fundamental rights).

For example, the Spanish Extradition Court (High National Court), in its Judgment of January 14th 2004 dismissed the defendant's motion arguing that:

"The prison conditions that are said to exist in Argentina, under the aegis of this allegation in what is indicated in the reports of defense and human rights protection agencies, is in itself insufficient to deny an extradition. The statement contained in these reports of poor prison conditions in relation to those maintained in other countries or the best, does not allow in any way the immediate affirmation of the subjection of the inmates in those penitentiaries to a situation of outlaw abuse or inhuman or degrading treatment, but rather a wake-up call to countries to improve the prison conditions in their prisons. In any case, as a Spanish citizen, the defendant may opt for compliance with the sentence imposed on him in Spain, in accordance with the international treaties between Argentina and Spain in this matter".

Despite knowing the existence of the case *Aranyosi and Caldaru* (Court of Justice of the European Union, April 5th 2016) on this subject, at the moment the Spanish Extradition Court has not applied it in any particular case. In my opinion, Spain should start to follow the duty of monitoring principle. For example, the Spanish High Court, in its Judgment of November 17th 2014, accepted the claim of a person extradited to USA because the High National Court imposed as a condition to the extradition that once judged in the USA he was transferred to Spain to serve the sentence. USA failed to comply with this condition, despite having accepted it. The lawsuit was filed against the Spanish Government for its passivity. The Supreme Court considers that the obligation of the government of Spain was to ensure that the condition is complied with.

1.3.- Rights of requested persons upon their return to the requesting State

Precisely in relation to the duty of monitoring principle, although it is assumed that the rights of the requested persons, once extradited to the requesting State, should be the same as those enjoyed in Spain, of course when we faced with countries like Russia, we consider there is a risk that the requested persons will suffer violations of their fundamental rights (physical integrity, life imprisonment, etc.), so we always file a motion to deny the extradition based on documentary evidence. Otherwise, what the High National Court does is condition the extradition to the requesting State to comply with a series of guarantees, which before extradition are usually offered in writing by the latter.

Our Extradition Court usually accepts the assurances as reliable, so we always ask the Court for the duty of monitoring to check whether the requesting State actually complies with the guarantees.

I recently studied a case about a Russian citizen, extradited a few years ago to Russia. The fact is that in the Russian Federation he has been sentenced to life imprisonment, in breach of the guarantees offered to Spain. His lawyer has requested the Court to: i) request the return to Spain to comply with this sentence; or (ii) require the Russian authorities to undertake to respect the guarantees provided that the sentence to be imposed would not exceed 25 years and, where appropriate, that life imprisonment would not be lifelong and reviewed. The Prosecutor has partially agreed to that request, but the Extradition Court dismissed the file. Now the case will be heard by the Constitutional Court.

1.4.- Political reasons

- a) Finance Minister of Ukraine (embezzlement). **Judgment of the High National Court 2/2016**, 15th January, rejected the extradition because the proceedings against the other codefendants were withdrawn in Ukraine (none of them were public positions in the previous government), so the Spanish Court suspected that *“his situation could be aggravated with respect to the other suspects”*.
- b) Russian Journalist (inciting public disorder). **Judgment of the High National Court 8/2013**, 11th February, rejected the extradition because the charges were based only in a police report stating that the requested person organized a demonstration in front of a City Hall that ended in public disorder and damage to the building (which raises the question of the respect to the dual criminality principle in light of the freedom of expression and association) and he was a political refugee in Finland, precisely because of the possible illegitimate political persecution by the Russian authorities.

1.5.- Lack of specification of the participation of the requested person, above all in cases of alleged criminal organization

There is a case of a Ukrainian lady requested to be tried for setting up a criminal organization and companies for illicit purposes (in this case, money laundering) and breach of (fiduciary) duty. **Judgment of the High National Court 21/2018**, 12th March, rejected the extradition because the Ukrainian Prosecutor didn't specify the role of the requested person in the alleged criminal organization. The Court only found in the description of the facts a formal relationship between the RP and some companies and considered that is not sufficient grounds to agree to the extradition to affirm, in general, that the RP *“together with other persons, created a criminal organization to commit offences against social security and property, without specifying what her function or activity was”*.

1.6.- Interesting case from Ukraine that all of you might know (Onyshchenko): Judgment of the High National Court 26/2018, 23rd March

A Ukrainian member of the National Parliament requested by the Ukrainian Prosecutor. According to the National Anticorruption Office he, together with other persons, created a criminal organization to commit serious offences (specially misappropriation of third parties assets). They affirm that this criminal organization caused 57 m. EU loss to a public company that manages natural gas in Ukraine and then they sold the gas to third companies obtaining the profit which actually belonged to the public company.

The RP refused the extradition and claimed political persecution from Mr. Poroshenko.

The High National Court granted the extradition, rejecting all the grounds put forward by the RP's lawyer:

- Political reasons: he reported Poroshenko's government for corruption and claimed that Interpol refused the arrest warrant against the RP and his mother. The High National Court rejected this ground highlighting that two Courts (one in Solomianskyi and the Kiev Court of Appeals) supervised the arrest warrant, so it's not only the Prosecutor's point of view, but also the judiciary considered there is sufficient evidence to issue the warrant. So it's about law, not about politics.
- With regard to risk of torture: the RP claimed that other codefendants in his case suffered torture, even their lawyers and Onyshchenko's lawyer himself. The High National Court rejected this objection, arguing that Ukraine is a member of the European Council, United Nations Human Rights Council and controlled by the ECHR, so, in principle, Spanish Courts trust this country.

1.7.- Dual criminality principle

Judgment of the High National Court 45/2018, 26th July.

In short, my client, a dual national (Spanish-Argentinian) was being requested by the Argentinian authorities for smuggling. I objected that according to the Spanish Smuggling Act, goods must have a value over 150,000 euros for the behavior to be deemed a criminal offence and the goods, in this case, were valued by an

independent expert under this amount. So, in my opinion, the **dual criminality principle** requirement didn't apply.

In the end of the hearing at High National Court the Prosecutor agreed with my position but in extradition cases in Spain Prosecutor's criteria is not binding.

The Court ruled that, although the bilateral treaty between Spain and Argentina provides in Section 4.2 that "extradition cannot be rejected on the grounds that the legislation of the requested State does not impose the same type of taxes or fees or does not contain the same type of regulations in these matters that the legislation of the requesting State", but also states in paragraph 1 that "in the subject of customs duties and taxes and exchange rate extradition will be granted in accordance with the provisions of this Treaty if the facts meet the requirements of article 2", which requires a minimum offence (not only an infraction) and sentence.

1.8.- (Finally) The most recent and well-known case: the situation of Venezuela

Judgment of the Plenary sitting of the High National Court 11/2019, 11th February

The Court explained that the worrying situation in Venezuela is widely known (evident) and declared that there is a lack of authority of the institutions who issued the extradition (e.g., the European Parliament recognized Juan Guaidó as a provisional president the 31st of January).

In the Court's opinion there is sufficient evidence to confirm that the current authorities (who issued the extradition) don't respect human rights of persons who dissent, so in the end the Spanish Court refused the extradition.

In addition to this, the High National Court considered that there is Government interference in the judicial system (in particular, with regard to the appointment of the highest positions) and that there is a high risk of torture if the Court agrees to the extradition. The Court highlights that even the Prosecutor of the International Criminal Court initiated an investigation against Maduro for violations of human rights (tortures and even disappearances).