Death Penalty Assurances and the Data Protection Act – Fixing a Hole? The case of Elgizouli (Appellant) v Secretary of State for the Home Department (Respondent)

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On 25 March 2020, the UK Supreme Court (SC) delivered its judgment in the case of *Elgizouli v Secretary of State for the Home Department*. The case concerns the appeal brought by the mother of one of the members of an Islamic State terror cell (unfortunately referred to as 'The Beatles') against the decision of the Home Secretary to provide information to the US without securing an assurance by the US that the information would not be used directly or indirectly in a prosecution that could lead to the imposition of the death penalty. Two of the four high-profile members of the group, Mr Kotey and Mr El Sheikh, are allegedly responsible for the violent and abhorrent murder of several British and American citizens and are currently held in American custody in Syria or Iraq, after being caught in early 2018. While the UK has deprived Kotey and El Sheikh of their British citizenship and maintained it does not have enough evidence to prosecute them, the US requested the UK to provide evidentiary mutual legal assistance (MLA) pursuant to the bilateral Treaty of Mutual Legal Assistance in Criminal Matters for the purpose of charging and trying the pair in 2015. It is not contested that if the suspects are prosecuted in the US and found guilty, they may face the death penalty [SC § 2, 25, 60]. In line with standard practice, the UK initially sought assurances against the imposition of the death penalty in the US, but the Home Secretary eventually dropped this

request and gave the evidence – consisting of material including 600 witness statements taken by the Metropolitan Police [SC § 61 and Divisional Court 34] – to the US without requiring any assurances in June 2018.

Learning about this from the media, El Sheikh's mother brought a claim for judicial review. She argued, *inter alia*, that the death penalty is a 'cruel and unusual' and 'inhuman' punishment and that it cannot be lawful or rational to facilitate or substantially contribute to (the risk of) such a punishment, that the decision is inconsistent with the UK government's opposition to the death penalty in all circumstances, and that the provision of MLA in the form of witness statements was in breach of the Data Protection Act 2018 (DPA). On 18 January 2019, the Divisional Court rejected the claim against the Home Secretary's decision to deliver MLA to the US without seeking death penalty assurances in its entirety but granted permission to apply for judicial review. On appeal before the SC, the case turned on these two legal questions: (1) whether it is unlawful under the common law for the Secretary of State to exercise his power to provide MLA so as to provide evidence to a foreign state that will facilitate a criminal conviction and subsequently the imposition of the death penalty; and (2) whether (and if so in what circumstances) it is lawful under Part 3 of the DPA for law enforcement authorities in the UK to transfer personal data to law enforcement authorities abroad for use in capital criminal proceedings [SC § 3]. The SC unanimously held that the decision to provide MLA was unlawful based on the second point, more specifically, Part 3, Chapter 5 of the DPA. Lord Kerr also answered the first question in the affirmative, but the other justices found there was no rule prohibiting such facilitation under the common law. This blog post considers both points in turn, with a focus on the notion of complicity.

Unanimous judgment on the ground of the DPA

The MLA provided, or to be provided, to the US involved the 'processing' of information, primarily personal data. Part 3 of the DPA includes rules relating to the processing of personal data by competent authorities for law enforcement purposes and implements the EU's Data Protection Law Enforcement Directive. Chapter 5 of Part 3 of the DPA deals with the transfer of personal data to third countries or international organisations. S. 73-76 provide general conditions for such transfers, with s. 73(1)(a) stating that the competent authority that determines the purposes and means of processing personal data, i.e. the Secretary of State, may not transfer personal data to a third country or to an international organisation unless three conditions are met: first, the transfer must be *necessary* for any of the law enforcement purposes. Second, the transfer must be based either on an *'adequacy decision', 'appropriate safeguards', or 'special circumstances'* (see s. 74-76). In this respect, Lady Hale concluded that '[t]his transfer was not based on an adequacy decision or on there being appropriate safeguards, because there were none.' [SC § 10. cf Divisional Court 200 and 203]. Lady Hale and Lord Carnwath also referred to recital 71 of the EU Directive, which adds that 'the controller should take into account that the personal data will not be used to request, hand down or execute a death penalty or any form of cruel and inhuman treatment.' This meant that, in the words of Lord Carnwath, the lawfulness of the provision of MLA 'stands or falls on the "special circumstances" condition contained in section 73(3)(c).' Together with Lady Hale, he concluded that the DPA requires a specific assessment under this section, which in this case did not take place. The 'decision was based on political expediency, rather than

strict necessity under the statutory criteria.' [SC § 221, 225, 227; see also 11-15. cf Divisional Court 207]. As the first two conditions were not met, the third was not considered. Agreeing with these conclusions [SC § 154-158], Lord Kerr also found that the decision to provide evidentiary MLA was unlawful under the DPA based on another point. As established above, the provision of MLA in the present case means that personal data will be 'processed'. This can only be done lawfully if the processing as such is lawful and fair. As the transfer of material to the US without obtaining death penalty assurances was contrary to law according to Lord Kerr, the condition under s. 34 was not met either [SC § 153].

The legality of facilitating the death penalty abroad by the transfer of information under the common law

The majority of the SC dismissed the challenge brought under the common law. Lord Carnwath concluded that the common law had not evolved to recognise a principle prohibiting the provision of MLA that could facilitate the death penalty. The death penalty as such has never attracted the attention of the common law; the main developments have come from Parliament and the European Convention of Human Rights (ECHR), not from domestic jurisprudence [SC § 194]. Moreover, one recent development in s. 16 of the Crime (Overseas Production Orders) Act 2019 confirms there is nothing that prohibits the Home Secretary from exchanging material in cases where no assurances are *obtained* [SC § 195]. Lord Carnwath was also unpersuaded that the common law recognised a general principle prohibiting assistance (to be discussed below), based on the fact that the material cited by the appellant pertained to cases of extradition and expulsion [SC §199-204]. Other reasons for dismissing the appeal on this ground were the need to exercise caution in developing the common law on the part of the courts and the need to preserve legal certainty and to ensure the separation of powers was respected [SC § 193 and 170]. Contrary to the majority, Lord Kerr held that the transfer of information without securing death penalty assurances was unlawful under the common law, finding that there is indeed a common law principle that prohibits the facilitation of the trial of any individual in a foreign country, if that person faces capital punishment there [SC §142]. This principle would be 'a natural and inevitable extension of the prohibition (in the common law as well as under the [Human Rights Act]) of extradition or deportation without death penalty assurances.' Lord Kerr then concluded that this principle should only *not* be applied if MLA is absolutely necessary as a matter of urgency in order to save lives or protect the nation's security interests [SC §164]. This seems to echo the argument of the UK in *Saadi v Italy* that the 'real risk' test for article 3 should be balanced against the dangerousness of the individual. However, the European Court of Human Rights (ECtHR) vehemently rejected this, stating the protection against the treatment prohibited by article 3 is absolute [*Saadi* § 138-139]. It would not make sense to expand the protective scope of the rule enshrined in article 3 of the ECHR on the one hand, but to simultaneously limit the non-derogability and allow a balancing act on the other.

Lord Kerr identified several factors that would recognise a common law principle to the effect that the death penalty should not be facilitated by providing information to the country conducting the criminal proceedings where the person facing trial is at risk of being executed. Two of these factors are (i) the development of the ECtHR's case law and (ii) the 'fundamental illogicality' of, on the one

hand, refusing to extradite or deport an individual to another state where there is a risk the death penalty will be imposed without assurances to the contrary, and, on the other, facilitating such a trial by other means without demanding assurances.

(i) the development of the Strasbourg case law

It is important to note from the outset that the ECtHR's jurisprudence was not deemed *directly* applicable in this case as the Convention obligations only apply to individuals that find themselves within the jurisdiction of a member state. Several scholars have argued that when a state has control over the fate of that individual, such as in the event it possesses incriminating information that it wishes to transfer to another state, this should place the person in question within the jurisdiction of the Convention state (see e.g. this blog post by Antonios Tzanakopoulos on precisely this issue in the context of the present case). In his judgment, Lord Kerr did not suggest that the ECtHR had recognised an extra- or non-territorial dimension to the obligation not to facilitate the death penalty, but found the ECHR gives rise to a general principle, which in turn can be further developed in the common law [SC § 113]. Lord Kerr first considered the absolute abolition of the death penalty in Europe, and the prohibition of deviating from Protocol 13 under any circumstances. Citing *Al-Saadoon v United Kingdom*, Lord Kerr concluded that the right not to be subjected to the death penalty '*applies in all circumstances* [and] is to be regarded as a fundamental right, ranking alongside article 2 (the right to life) and article 3 (the right not to be subject to torture or inhuman or degrading treatment)' [SC § 111]. The Strasbourg jurisprudence and Protocol 13 illustrate the unequivocal opposition to the death penalty and support the conclusion that there is such an obligation in the common law [see again SC § 113]. The problem posed by the conventional reading of the ECHR has also been demonstrated by Miles Jackson in his article *Freeing Soering* [EJIL, 2016]. In this paper, Jackson addresses the problem that victims of foreign states' acts of torture face when bringing a claim against a Council of Europe member state that may have assisted or otherwise contributed to the torture. If we 're-imagine' *Soering*, instead of extending the obligation of *non-refoulement*, as a preventive complicity rule to extend to other forms of complicity in torture, this 'unprincipled gap' can be overcome. In other words, the *Soering* rule prohibits states from engaging in a very specific form of complicity (i.e. extraditing the individual to the requesting state). Jackson argues there is no good reason to confine this rule to one specific type of complicity.

(ii) the 'fundamental illogicality'

Lord Kerr raised a similar issue in the context of the common law. It would be 'fundamentally illogical' to refuse to extradite someone in light of the real risk of a capital trial without assurances, but to facilitate such a trial by other means, also without assurances. With reference to the Constitutional Court of South Africa in *Mohamed v President of the Republic of South Africa* [2001, ZACC 18, § 59] Lord Kerr concluded that the principle of non-complicity was not confined to the extradition of an individual within the jurisdiction of, in the South African case, the Republic of South Africa, but 'extended to any complicity in the imposition of cruel, inhuman or degrading punishment. If it is objectionable to be complicit in exposing an individual to the risk of execution by

extraditing him, it is surely equally objectionable to be complicit in facilitating that result by providing material which has the same result.' [SC § 141, under 5]. Lord Kerr found further support for the principle of non-complicity in the report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions [2015, UN. Doc. A/70/304, § 102]. According to Special Rapporteur Professor Heyns, the assistance by abolitionist states to a retentionist state in criminal matters 'could amount to complicity in the death penalty', even if the individual facing the death penalty 'may never have been in the jurisdiction of the abolitionist state'. Lord Kerr also agreed with the appellant that 'what matters is whether the state whose actions are impugned has, by its actions, "established the crucial link in the causal chain that would make possible the execution of the author"', as decided by the Human Rights Committee in *Judge v Canada* [2005, § 10.6]. Although Lord Kerr did not discuss the notion of complicity any further, it is clear he frames the situation in terms of complicity, paying special attention to causation.

A sufficient contribution – evidence vs extradition

This leads us to the following question: is the provision of evidence to facilitate a suspect's trial abroad really comparable to the extradition of a suspect to that state? The former is arguably not of the same calibre as the latter, but this need not matter. As Edward Fitzgerald QC, counsel for the appellant, argued during the hearing in July 2019: what applies to extradition and deportation could also apply to other forms of 'instrumental causation' of the death penalty. Crucially, it has been established that the US is *reliant* on the British evidence [SC § 173. See also SC 120 and Divisional Court 28 and 30]. The appellant argued this satisfied the but-for test, and that the provision of MLA made the UK more directly involved. It was argued that sending (inculpatory) information knowing there will be a trial resulting in the death penalty is an even greater contribution than extradition, as extradition does not result in a death sentence per se; the person extradited still enjoys the presumption of innocence, and the trial may have another outcome, for example following a plea deal. Be that as it may (no judgment was pronounced on this specificity), it is clear that the causal link is met. Although not considered by the SC, it is worth noting here that the UN International Law Commission (ILC)'s article 16 of the Articles on State Responsibility – the rule prohibiting assistance to an internationally wrongful act of another – requires the contribution to be *significant*, but not *essential*.

Fixing a hole?

This case has been decided in favour of Ms. Elgizouli – the evidentiary assistance to the US without any assurances was unlawful under the DPA. The director of Reprieve, an intervening NGO in the case, has heralded the judgment as a '*landmark (…), an excellent result for anyone who cares about the rule of law and Britain's long-standing opposition to the death penalty.'* But it is important to consider what would have happened if the case had not concerned personal data, and if the DPA had not been applicable. This is not merely an academic question. There are many more situations in which states can assist others in cases where the death penalty may be imposed, or, more broadly, the administration of criminal justice in violation of the right to be free from torture or from unlawful detention. Even broader still, states can assist others – not always

intentionally – in many other situations where fundamental human rights are at stake. Outside the jurisdictional reach of the ECHR and its member states, victims of grave human rights abuses are generally left without recourse.

Public international law presents us with – for want of a better word – a patchwork of rules preventing one form of assistance or another. From the *Soering* principle in the context of extradition to the EU Anti-Torture Regulation or the prohibition of allowing arms transfers to states where there is a risk of violations of international humanitarian or human rights law in the Arms Trade Treaty; these rules all prohibit specific acts of assistance. Customary international law offers a catch-all rule, reflected in article 16 of the ILC Articles on State Responsibility, prohibiting the assistance to the internationally wrongful act of another with knowledge of the circumstances. But besides the high cognitive standard, there is another limitation, which is illustrated by this case: the imposition of the death penalty is not an internationally wrongful act for the US. This is in fact the 'reverse' situation of article 16 paragraph (b), which requires that the act would be internationally wrongful if committed by that state. Can it be so, under international law and in principle, that the lawfulness of the provision of assistance is wholly dependent on the specific legal regime that applies to the case at hand?

In the context of assistance to the death penalty, the UN Special Rapporteur admitted that it is not unlawful for a state to share information with another state 'concerning a criminal act, which may at some later stage be used as evidence in a judicial proceeding that results in a death sentence' and refers to the need for further 'guidance on what sort of assistance might constitute unlawful complicity in the death penalty' [report § 103 and 106]. For now, it appears that we are indeed left with the 'fundamental illogicality', but, in this case, the DPA has bridged it.

Criminal law | State responsibility | MLA | DPA | death penalty | Mutual legal assistance | Data Protection Act