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

On 25 March 2020, the UK Supreme Court (SC) delivered judgment in the case of *Elgizouli (Appellant) v Secretary of State for the Home Department (Respondent)* [[2020] UKSC 10]. 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 Home Secretary's decision to provide evidentiary mutual legal assistance (MLA) to the US without securing assurances 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 murder of several British, American and other foreign nationals in Syria and are currently held in American custody, after being captured in early 2018. The UK has deprived Kotey and El Sheikh of their British citizenship and has maintained it does not have enough evidence to prosecute them. In June 2015, the US requested the UK to provide material including 600 witness statements taken by the Metropolitan Police for the purpose of prosecuting the pair [see SC § 61. See also the bilateral Treaty on Mutual Legal Assistance in Criminal Matters]. It is not contested that if the suspects are convicted in the US, they may face the death penalty [SC § 2, 25, 60]. In line with standard practice, the UK initially sought assurances from the US that the death penalty would not be carried out or commuted, but in June 2018, the Home Secretary dropped this requirement and gave the evidence to the US without requiring any assurances.

Learning about this from the media, El Sheikh's mother brought a claim for judicial review. She argued that although her son should face trial, the decision to give MLA was inconsistent with the UK's opposition to the death penalty in all circumstances. The death penalty is an inhuman punishment, and it cannot be lawful or rational to facilitate or substantially contribute to (the risk of) such a punishment. Second, 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 [[2019] EWHC 60 (Admin)]. On appeal before the SC, the case turned on 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. 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, with a focus on the non-facilitation argument.

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 (Directive EU 2016 /680). Part 3, Chapter 5 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 based on the common law. Lord Carnwath concluded that 'there is as yet no established principle (under the common law, the European Convention or any other recognised system of law), which prohibits the sharing of information relevant to a criminal prosecution in a non-abolitionist country merely because it carries a risk of leading to the death penalty in that country.' [SC § 191]. According to Lord Carnwath, the death penalty as such had never attracted the attention of the common law, the main developments having come from Parliament and the European Convention of Human Rights (ECHR or Convention), not from domestic jurisprudence [SC § 194]. Lord Carnwath pointed to the recent provision in s. 16 of the Crime (Overseas Production Orders) Act 2019, which requires the Home Secretary to seek 'written assurances, relating to the non-use of information obtained by virtue of the agreement in connection with proceedings for a death penalty offence in the country or territory', but does not expressly prohibit such an exchange where assurances were *sought*, but not *received* [SC § 195]. He further held that the power of the Home Secretary to deport or extradite a person was *not* subject to 'an absolute prohibition on removal by reference to the possible consequences in the receiving state' [SC § 198. See also § 197, with reference to the dissent in *Chahal v UK*]. Lord Carnwath was also unpersuaded that the common law recognised a *general* principle prohibiting assistance, based on the fact that the material cited by the appellant pertained to cases of extradition and expulsion exclusively [SC §199-205].

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. This principle of non-facilitation 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.' [SC §142]. Lord Kerr identified six factors that would – taken together – demonstrate the existence of 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, namely the UK Bill of Rights (more specifically the prohibition of 'cruel and unusual punishments'), British contemporary values, ECHR jurisprudence, EU jurisprudence, the Judicial Committee of the Privy Council jurisprudence, and 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. As for the respondent's argument relating to s. 16 of the Crime Act 2019, Lord Kerr rightly pointed out that this provision does not say anything about the legality of *transferring specific information* without a death penalty assurance. The arguments based on the (i) Strasbourg jurisprudence and (ii) the 'fundamental illogicality' merit closer attention.

(i) the ECtHR's jurisprudence

Lord Kerr found that the ECHR case law and Protocol 13 illustrate the 'practically unanimous opposition to the death penalty in any circumstances whatever', which in turn can influence the development of the common law [SC § 113]. Citing *Al-Saadoon v United Kingdom*, where Protocol 13 – which abolishes the death penalty in all circumstances – was considered for the first time by the European Court of Human Rights (ECtHR), Lord Kerr concluded that attitudes towards the death penalty had evolved; 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]. Lord Kerr concluded that the common law principle of non-facilitation should only *not* be applied if MLA is absolutely necessary as a matter of urgency in order to save lives or to protect the nation's security interests, adding that these 'momentous considerations' did not apply in the present case [SC § 164. See also recital (73) of the EU Directive]. This suggested exception resembles the argument the UK government made in *Saadi v Italy*, namely that the 'real risk' test for article 3 should be balanced against the dangerousness of the individual. However, the ECtHR vehemently rejected this, stating the protection against the treatment prohibited by article 3 is absolute [*Saadi* § 138-139]. If the right not to be subjected to the death penalty does indeed rank alongside article 2 and 3 ECHR, such an exception should arguably not be accepted.

It is important to note that Lord Kerr did not find the ECtHR's jurisprudence *directly* applicable in this case as the Convention obligations only apply to individuals that find themselves within the jurisdiction of a member state (see article 1 ECHR), and did not suggest that the ECtHR had recognised an extra-territorial dimension to the obligation not to facilitate the death penalty. The government submitted that there was no support in the ECHR or international law for an obligation not to provide MLA in the context of a death penalty case; the obligation not to facilitate had not expanded beyond the physical transfer of an individual from that state's (territorial) jurisdiction, meaning the state could not be held responsible. Lord Kerr underlined that he did not find it 'an appropriate exercise to seek to identify gaps in ECHR law and then consider whether those should be filled by the development of the common law' [SC § 124]. The gap is evident, however, and has been illustrated by legal practitioners and academics. The question whether the Convention prohibits facilitation is separate from the question of jurisdiction, but to find a state responsible for extra- or non-territorial human rights violations, the jurisdictional threshold of article 1 ECHR would first have to be met. Scholars have argued that the notion of jurisdiction can be interpreted in such a way as to include individuals outside of state borders, namely in cases where a state has control over the fate of those individuals (see Antonios Tzanakopoulos's blog post [Just Security, 2018] on precisely this issue in the context of the present case, with reference to Miles Jackson's article *Freeing Soering* [EJIL, 2016]).

(ii) the 'fundamental illogicality'

This brings us to the following point. While Lord Kerr was careful not to pronounce on any gap in the ECHR regime, he concluded 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 ruled 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 (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 [UN Doc A/70/304, 7 August 2015, § 102]. According to UN Special Rapporteur Professor Heyns, who also intervened in *Elgizouli*, 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, UN Doc CCPR/C/78/D/829/1998, § 10.6]. The issue of causal contribution to the imposition of the death penalty is highly relevant here.

'Causal contribution' – evidence vs extradition

The appellant argued that although the ECtHR case law on the non-facilitation principle, i.e., the *Soering* principle, has not yet been expressly extended beyond cases involving extradition or expulsion to cases of MLA, it should be as a matter of logic. In both instances, the facilitation would likely contribute causally to the imposition of the death penalty in the receiving state. 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, and of course the location of the suspect is different. 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 prosecution of El Sheikh in the US *depends critically* on the evidence obtained by the UK and that the US is *reliant* on the British evidence [SC § 33 and 173. See also 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 [SC § 120]. It was argued that sending (inculpatory) information with the knowledge that 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 specific point), 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 customary 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 the processing of 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 other actors – 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 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, UN Special Rapporteur Professor Heyns 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]. Barat Malkani has concluded in an article on this very topic that '[w]hile States must be able to assist each other in the fight against crime, the prohibition and opposition of the death penalty is not something that can be set aside for the sake of convenience. Abolitionist States do not set aside opposition to the death penalty when crimes that shock the public occur in a domestic setting, despite calls to do so, and it follows that such States must not be complicit in the administration of the death penalty elsewhere for expedient's sake, even if the actual or threatened crime has an impact in the abolitionist State.' [ICLQ, 2013]. *Elgizouli* leaves us with a 'fundamental illogicality', but, in this case, the DPA has fixed it.

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Update 25 August 2021: on 18 August 2020, US Attorney General William Barr sent a letter to UK Home Secretary Priti Patel providing the assurance that the US would not seek the death penalty in any prosecutions against Kotey or El Sheikh, and if imposed, the death penalty would not be carried out. On 7 October 2020, the US DOJ announced Kotey and El Sheikh had been charged with hostage-taking of American, British and Japanese citizens in Syria, including their deaths.