



25 March 2020

PRESS SUMMARY

Elgizouli (Appellant) v Secretary of State for the Home Department (Respondent)
[2020] UKSC 10
On appeal from: [2019] EWHC 60 (Admin)

JUSTICES: Lady Hale, Lord Reed, Lord Kerr, Lord Carnwath, Lord Hodge, Lady Black, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

The appellant's son is alleged to have been one of a group of terrorists operating in Syria, involved in the murder of US and British citizens. In June 2015, the US made a mutual legal assistance ('MLA') request to the UK in relation to an investigation into the activities of that group. The Home Secretary requested an assurance that the information would not be used directly or indirectly in a prosecution that could lead to the imposition of the death penalty. The US refused to provide a full death penalty assurance. Ultimately, in June 2018, the Home Secretary agreed to provide the information to the US without requiring any assurance whatever.

The appellant challenged the Home Secretary's decision by way of judicial review. Her claim was dismissed by the Divisional Court, which certified two questions of law of public importance: (i) whether it is unlawful for the Secretary of State to exercise his power to provide MLA so as to supply evidence to a foreign state that will facilitate the imposition of the death penalty in that state on the individual in respect of whom the evidence is sought; and (ii) whether (and if so in what circumstances) it is lawful under Part 3 of the Data Protection Act 2018 ('DPA'), as interpreted in the light of relevant principles of EU data protection law, for law enforcement authorities in the UK to transfer personal data to law enforcement authorities abroad for use in capital criminal proceedings.

JUDGMENT

The Supreme Court allows the appeal. The majority of the Justices (Lord Reed, Lord Carnwath, Lord Hodge, Lady Black and Lord Lloyd-Jones) dismiss the challenge to the decision brought under the common law, but the Court unanimously holds that the decision failed to comply with the DPA. Lord Kerr would have allowed the appeal on *both* grounds. Lady Hale's judgment acts as a short guide to the other judgments.

REASONS FOR THE JUDGMENT

Ground (i): Has the common law evolved to recognise a principle prohibiting the provision of MLA that will facilitate the death penalty?

The majority answer this question "no". The reasons for considering that the common law has not developed so far are explained by Lord Reed and Lord Carnwath.

Lord Carnwath finds that the power of the courts to develop the common law must be exercised with caution [193]. The death penalty as such has never attracted the attention of the common law: the key legal developments have come from Parliament and the ECHR, not from the domestic courts [194]. One recent development is section 16 of the Crime (Overseas Production Orders) Act 2019. This section confirms: (i) that this is an area in which Parliament remains directly involved; and (ii) that, where the Act applies, there is nothing that specifically prohibits the Home Secretary from exchanging material in cases whether they have sought but have not received assurances that the information they

exchange will not be used to facilitate the death penalty. This suggests that the common law has not developed as suggested by Lord Kerr [195].

Lord Carnwath also finds that powers to deport or extradite under domestic law are subject to review on public law grounds, but are not subject to an absolute prohibition on removal by reference to the possible consequences in the receiving state [198]. Finally, it is difficult to reconcile the DPA scheme with the development of an absolute common law prohibition as advanced by Lord Kerr [205].

Lord Reed agrees with Lord Carnwath for the reasons given in his judgment and for additional reasons. He finds that the common law is subject to judicial development, but such development must build incrementally on existing principles. This is necessary to: (i) preserve legal certainty; and (ii) ensure compatibility with the pre-eminent constitutional role of Parliament in making new law [170]. The development of the law proposed by Lord Kerr does not seem to Lord Reed to be an incremental step [171].

Lord Reed adds that judicial recognition of the value of life can have an important influence on adjudication in this context. This is because the courts are required to take a more rigorous approach when reviewing the exercise of discretion where life may be at stake [176-178]. Lord Reed refers to the respondent's submissions that the Home Secretary's decision-making complied with that higher standard of review [179]. He notes that the Home Secretary's decision might have been open to challenge on the ground that it failed to comply with the common law requirement of rationality, but declines to express a view on this [181-182].

Lord Hodge agrees with Lord Reed and Lord Carnwath that the common law does not recognise a right to life which can be used to prevent the Home Secretary from providing information to a foreign country in the context either of MLA or the sharing of intelligence [231-234].

Lord Kerr underlines the steadfast opposition by successive UK governments to the imposition of the death penalty in any circumstances, and the related long-standing policy not to provide MLA unless death penalty assurances are received [26]. He notes that the common law is not immutable but develops over time to reflect the changing values of society [102].

Lord Kerr summarises six factors favouring recognition of the common law principle in question at [141]: (i) the Bill of Rights; (ii) British contemporary values; (iii) European Court of Human Rights ('ECHR') jurisprudence (discussed at [107-124]); (iv) EU jurisprudence (discussed at [125-134]); (v) the fundamental illogicality of refusing to extradite or deport individuals for trial where there is a risk of the imposition of the death penalty, on the one hand, and facilitating precisely such an outcome by the provision of MLA without requiring assurances, on the other; and (vi) Judicial Committee of the Privy Council jurisprudence (discussed at [135-140]).

Lord Kerr concludes that a common law principle should be recognised whereby it is deemed unlawful to facilitate the trial of any individual in a foreign country where, to do so, would put that person in peril of being executed [142]. This principle should be disapplied *only if* MLA is absolutely necessary as a matter of urgency in order to save lives or protect the nation's security [164].

Law must be responsive to society's contemporary needs, standards and values, which are in a state of constant change. That is an essential part of the human condition and experience. The adjustment to the common law proposed reflects the contemporary standards and values of our society [144].

Ground (ii): Is it lawful under Part 3 of the DPA to transfer personal data to law enforcement authorities abroad for use in capital criminal proceedings?

The Court is unanimous in holding that the Home Secretary's decision was unlawful under the DPA. The DPA requires the data controller to address his mind to the specific requirements of the Act and this was not done. The DPA is discussed by Lady Hale at [6-15], Lord Kerr at [152-159] and Lord Carnwath at [207-228].

Lady Hale outlines the basic structure of the DPA at [8-12]. She explains that Part 3 of the DPA makes provision about the processing of personal data by competent authorities for "law enforcement purposes." Sections 73 to 76 set out the general conditions that apply to such transfers. The data controller cannot transfer data unless the three conditions in s. 73(1)(a) are met [8]. Condition 1 is that

the transfer is *necessary* for any of the law enforcement purposes [9]. Condition 2 is that the transfer is (a) based on an adequacy decision of the European Commission; (b) if not based on an adequacy decision, is based on there being appropriate safeguards; *or* (c) if not based on an adequacy decision or appropriate safeguards, is based on special circumstances [10]. She notes that this transfer was not based on an adequacy decision or appropriate safeguards, because there were none [10]. Nor does the transfer meet the special circumstances requirement: a transfer is based on special circumstances only if it is *necessary* for any of the five purposes listed in s. 76(1). This condition is not met [12].

Lord Carnwath agrees that there has been a breach of the DPA. He focuses on the provisions governing transfers of personal data to a third country in ss. 72 to 78 of Part 3. S. 73 deals specifically with transfers of personal data to a third country and prohibits such transfers unless a number of conditions are met. As Lady Hale, he notes that Condition 2 is that the transfer must be based on an adequacy decision, *or* on there being appropriate safeguards, *or* on special circumstances. There was no adequacy decision here, hence the discussion centres upon whether there were appropriate safeguards or special circumstances sanctioning the transfer [209-213]. S. 75 defines the circumstances in which a transfer is based upon there being appropriate safeguards, discussed at [214-219]. Lord Carnwath concludes that the information in question was transferred without any safeguards at all [220]. The lawfulness of the transfer therefore stands or falls on the “special circumstances” condition [221]. The circumstances in which a transfer is based on special circumstances are defined in s. 76, discussed at [221-224]. Lord Carnwath concludes that the Act requires a specific assessment under the section, and that this did not take place [225]. The decision was based on political expediency, rather than consideration of strict necessity under the statutory criteria [227]. It was consequently unlawful under the DPA.

Lady Hale raises a further issue under s. 76(2) DPA, which concerns the special circumstances gateway. S. 76(2) provides that: “subsection (1)(d) and (e) do not apply if the controller determines that fundamental rights and freedoms of the data subject override the public interest in the transfer” [12]. Lady Hale finds that these fundamental rights and freedoms include the rights protected by the European Convention on Human Rights, the most fundamental of which is the right to life [13-14]. This points towards an interpretation of s. 76(2) which would not allow the transfer of personal data to facilitate a prosecution which could result in the death penalty [15].

Lord Carnwath sees the force of Lady Hale’s comments. He concludes that, at least, failure to consider this point is a further reason for holding that the Home Secretary’s decision cannot stand [228]. Lord Hodge also sees the force of Lady Hale’s comments, but as the point was not fully argued, he reserves his position on it [230].

Lord Kerr agrees that there is a breach of the DPA, but for different reasons. He notes that it is common ground that provision of MLA involved the “processing” of personal data falling within Part 3 DPA. Such processing is only lawful where it complies with the data protection principles in section 34 DPA. Unlike the other justices, Lord Kerr held, under ground 1, that the transfer of material to the US authorities without obtaining death penalty assurances was contrary to the common law. He therefore concludes that it follows that the first and second data protection principles in s. 34 – requiring processing that is *lawful* and fair – are not met [152-153].

Lord Kerr goes on to discuss s. 73 DPA [154]. He agrees that there was no adequacy decision and no appropriate safeguards [155]. Transfer on the basis of special circumstances can only occur following an assessment of what is strictly necessary. Such an assessment was not made [158], hence the transfer of data breached s. 73.

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<https://supremecourt.uk/decided-cases/index.html>