***Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10**

On appeal from: [2019] EWHC 60 (admin)

Facts

The appellant's son was a suspected member of a terrorist organisation operating in Syria, whose alleged crimes involved the murder of British and US citizens, the severity and violence of which impacted the sensitivity of the investigation, and this judgment. The US made a Mutual Legal Assistance (MLA) request to the UK in 2015 as part of their investigation into these crimes. Throughout communications, the UK government was clear that it required death penalty assurances as a precondition of assistance. The US refused to provide such an assurance. The Home Secretary ultimately acceded in June 2018, agreeing to share information with the US without any assurance whatsoever.

The issues considered

The appellant brought a challenge by judicial review against this decision, as to the unlawfulness of the waiver of death penalty assurances and the legal consequence of sharing this personal data with a third party. The court divided the submissions accordingly:

1. Was there a common law principle that prohibited the provision of MLA if it were to facilitate the death penalty?
2. Was the decision to provide such information unlawful under Part 3 of Data Protection Act 2018 (DPA)?

In the second instance, the question was not one of facilitation in general, but one of facilitation *by the transfer of data* [205]. The Court looked at the 3 Conditions that the data controller must have met in order to transfer information in accordance with Part 3 of DPA, which detailed the processing of personal data for "law enforcement purposes" and implemented the European Union's Law Enforcement Directive (Directive (EU) 2016/680) ("the LED") (section 1(4)). The data controller could only transfer personal data if all conditions were met.

The first was a *strict test of necessity* and consideration of the *proportionality* for transfer - the balance between the protection of the individual and the protection of public interest. The second was that the transfer must be based on an adequacy decision or there being appropriate safeguards, of which there were none in this case, the Court observed. Recital (71) to the lED contemplated among those safeguards that "*personal data will not be used to request, hand down, or execute a death penalty or any form of cruel or inhuman treatment*".

The permission to transfer in 'special circumstances', according to Condition 3, was not relevant here since the first condition was not met and the second could, arguably, never be met.

The court decision

All but Lord Kerr dismissed the appeal at common law, but unanimously held that the decision under review had not complied with the conditions of the DPA.

The majority position was that the legal developments in regard to the death penalty were not be found at common law, but with Parliament and the ECHR [194]. Further, section 16 of the Crime (Overseas Production Orders) Act 2019 explicitly affirmed that agreements made with non-abolitionist countries was the jurisdiction of Parliament, and although the Secretary of State was required to seek assurances, where no assurance could be obtained there was no specific prohibition - where statute applied - on the exchange of material [195].

The statutory criteria of such a data transfer required a test of *strict necessity*, confirmed in *Guriev v Community Safety Development* (UK) Ltd [2016] EWHC 643 (QB), when considering the proportionality of the fundamental rights and freedoms of the data subject and the public interest of the transfer.

The court found that the decision made by the Home Secretary did not take into account this proportionality; a transfer of data that may have facilitated a prosecution resulting in the imposition of the death penalty was only allowed *if it was urgently necessary to save life or prevent an imminent crime* [para 15].

Section 76(2) required the controller to address his mind to the fundamental rights and freedoms of the data subject, and whether they overrode the public interest in the transfer. Such assessments were not made in the decision of the Home Secretary, and thus the transfer of data was breached.

Significance/comment

Due to the horrific nature of alleged crimes, and the sensitivity of the political story in question, the pursuit of a fair trial was not only complicated by its multi-jurisdictional character.

There was the change in political pressure between 2015 - when the initial MLA was made - and 2018 - when the appellant's son was detained. The new US administration saw it as the responsibility of states where the foreign terrorist fighter had originally come from to try these individuals [para 31-32] but it had been deemed unfeasible to prosecute in the UK. And if the US were to prosecute, there was a secondary concern that this would involve trial in a military court, or transfer to Guantanamo Bay. There were diplomatic concerns voiced by civil servants that a death penalty verdict may incite radicalisers [para 58] and a media maelstrom.

Lord Carnwath saw the decision as one of political expediency, and the Court's decision was arguably one that strictly affirmed the rule of law over pragmatic gerrymandering, where the consequences have such gravity.

Arguably, the fact that the court could not permit recognition of a common law principle was due to different perspectives about the common law itself. Lord Kerr's dissent emphasised that common law was not ''immutable', whereas the rest of the bench affirmed that evolved legal positions on the death penalty had to be made with due reverence to Parliament and the ECHR. There was further discussion required as to whether such processing in these circumstances could *ever* be lawful, and undoubtedly Lord Kerr's will become valuable when that discussion takes place.

Delilah Dumont