Res judicata, oppression and abuse of process in Scots extradition law.

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Res judicata, Oppression and Abuse of Process in Scots Extradition Law - Iliev v HMA [2021] HCJAC 26

Governing extradition in Scotland and the rest of the UK is the Extradition Act 2003 (the 2003 Act). It has been in force for 17 years. Whilst it has been subject to a number of amendments, some significant, extradition law and practice has been relatively stable in recent times. This has allowed a sophisticated body of jurisprudence to develop on a range of aspects of the subject from the courts in Scotland, England and Wales, the UK and the European Court of Human Rights ECtHR). Matters considered include the effect of the risk of suicide upon rendition, the introduction of new evidence on appeal and the appropriate approach to analyse the right to respect for private and family life under article 8 in that context. It is somewhat surprising, therefore, that certain seemingly basic questions remain outstanding. Amongst these are whether, and if so how, the principles of *res judicata* and abuse of process apply in Scots extradition law. Both were addressed in the High Court case of Iliev v HMA [2021] HCJAC 26.

The High Court considered an application for leave to appeal under section 26 of the 2003 Act of a decision of Edinburgh Sheriff Court ordering Iliev's extradition to Romania in the case. On the bench were the Lord Justice General, Lord Pentland and Lord Mathews. The Lord Justice General delivered the opinion. The sheriff had ordered Iliev's extradition to Romania on a conviction warrant for driving without a licence. He had been sentenced to one year's imprisonment.

Prior to coming to the UK Iliev had been arrested and detained in Sweden pursuant to a Romanian extradition request. There the Nykopking District Court refused to order his extradition. The Romanian authorities had been asked to provide assurances as to the prison space that would be available to Iliev were he returned. They had only been able to guarantee $2m^2$, not the $3m^2$ required under the jurisprudence of the ECtHR. He was discharged. Iliev subsequently came to the UK and was arrested at Edinburgh airport. The Romanian European Arrest Warrant was still extant.

Following Iliev's extradition hearing the sheriff found that the offence stated in the warrant was an extradition offence, that no bars to extradition were met and that Iliev's extradition was compliant with Convention Rights. Amongst the information considered was a letter from the Prison Chief Superintendent to the Romanian Ministry of Justice stating that when imprisoned Iliev would have a minimum of $3m^2$ of space.

Argued in front of the sheriff was article 8 on the basis that the Scottish extradition hearings were an abuse of process and precluded by the principle of *res judicata* (at para 11). The sheriff held that *res judicata* did not apply to extradition. He carried out a balancing exercise whereby the factors in favour of extradition were weighed against those in opposition. Iliev's extradition was ordered. His case, the sheriff held, could not be described as an abuse of process.

Iliev sought to appeal the sheriff's decision, with leave being required since 2015. In his application Iliev firstly argued that the sheriff's refusal to adjourn the hearing prevented him from obtaining objective evidence of prison conditions in Romania. Had such evidence been collected, it was suggested, the sheriff would have decided the case differently. Secondly, it was averred that since a Swedish court had already considered Iliev's extradition any subsequent decision to extradite was barred by the plea of *res judicata*. Finally, it was argued that if *res judicata* did not apply the abuse of process remedy did (at para 17). This followed the Romanian requests to different jurisdictions for Iliev in relation to the same offence.

In response the Crown Office stated that no arguable grounds of appeal were demonstrated. A Council of Europe report on prison conditions in Romania was available but not advanced before the sheriff. The test in s 27(4)(a) of the 2003 Act was not met, that being that had the new material been considered by the sheriff he would have decided the question differently. Further, it was suggested that the assurances received from Romania were effective, reliable and unequivocal, there was no *res judicata* in extradition hearings and the institution of a second set of extradition proceedings would not necessarily amount to an abuse of process. The exceptional and residual plea of *res judicata* was not satisfied.

Having laid out the arguments the Lord Justice General then described a report on Romanian prison conditions put forward on behalf of Iliev. It provided that it was not possible to have confidence that article 3 would be complied with if Iliev were extradited. The assurances provided, the author said, would be difficult to implement and almost impossible to monitor (at para 24).

The Lord Justice General began his opinion by noting the serious problems in the Romanian prison system and that the ECtHR had adopted its pilot procedure in a 2017 case in regard to them. That entailed the court upholding a violation as well as identifying a systemic problem and indicating remedial measures. In this regard Lord Justice General found the basis of the pilot judgment could have been relied upon by Iliev in front of the sheriff. In any event, he held that there was nothing preventing the sheriff from accepting assurances from Romania. Indeed, the jurisprudence contains a presumption that they will be adhered to, and no specific basis to doubt them had been provided to the sheriff or the High Court. An appeal based on article 3 was bound to fail.

Perhaps more interestingly, and certainly more unusually, the Lord Justice General then moved on to discuss *res judicata*, oppression and abuse of process in Scots extradition law. He firstly noted that the 2003 Act sets out a scheme which the sheriff must apply in an extradition hearing, including consideration of the bars to extradition and Convention Rights. The Lord Justice General then spent some time considering a Divisional Court judgment where *res judicata* and abuse of process were discussed in the context of England and Wales, Auzins v Latvia [2016] EWHC

802 (Admin). He did that in order to determine whether the approach taken south of the border would be adopted in Scotland.

In Auzins v Latvia Burnett LJ held that practical difficulties in ascertaining the precise issues decided in a third jurisdiction and the terms of the Framework Decision and 2003 Act, amongst other things, "… support the conclusion that the principle of res judicata has no application in extradition proceedings, whether viewed through the Framework Decision or the 2003 Act" (at para 34). Considerations which could give rise to such an argument may be applicable, Burnett LJ held, in a 'wider sense' whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings' (at para 20).

The Lord Justice General then looked at the position in Scotland. He stated that *res judicata* has a place in Scots criminal law. Alison explicitly refers to it in his Practice of the Criminal Law, he noted (at para 34). The Lord Justice General held that the principle described by Alison is essentially that of double jeopardy or *ne bis in idem*. It was described as entailing not only a plea in bar of trial but also applying more generally to decisions taken in the course of a criminal process where identical applications are made on the same grounds and relying on the same facts (at para 35).

The term 'abuse of process' is not one in general use in Scots criminal proceedings, the Lord Justice General then held. The appropriate categorisation is 'oppression'. It acts to prohibit proceedings which, in the trial context, amount to an 'affront to justice'. In circumstances which do not entirely accord with those pertaining to *res judicata* it may be that a plea of oppression would be sustained, he stated (at para 36).

Having clarified the position in Scots law of *res judicata* and oppression generally the Lord Justice General then considered their applicability to extradition and Iliev's case in particular. Notably, he held that the aspect of *res judicata* protecting an individual from having to repeatedly defend matters that have been subject to a previous decision is likely to feature as a significant element where article 8 is pled in opposition to extradition (at para 38). Where a request had been refused in the same or another jurisdiction on the same grounds and in the same circumstances it may be regarded as disproportionate in article 8 terms. In that event, the Lord Justice General held, the determination is likely to subsume an extra statutory plea of oppression. Accordingly, if an argument based on article 8 was rejected it would be difficult to envisage a separate point on *res judicata* or oppression succeeding. Even though counsel in the present case expressly disavowed a submission based on article 8, the Lord Justice General noted that the High Court had considered it and found that it would not have succeeded. Leave to appeal was refused.

Analysis

The 2003 Act applies UK-wide, with extradition being a reserved matter under Schedule 5 to the Scotland Act 1998. Scots criminal law and procedure is, of course, not reserved. Extradition hearings fall between the two. They are not civil or strictly criminal. The present case illustrates these facts. Extra statutory remedies were at issue in the context of extradition and the similarities and differences between the law in Scotland and England and Wales was considered.

Res judicata does not apply to hearings at Westminster Magistrates' Court, and abuse of process does. In extradition hearings at Edinburgh Sheriff Court *res judicata* and oppression may apply, with the latter being akin to abuse of process argument south of the border. The question arising is whether the law contains distinct substantive rules north and south of the border or whether through article 8 and different designations being assigned to kindred pleas there is no real difference between the extra-statutory remedies available to requested persons.

Largely eliminating the differences between Scotland and England as regards *res judicata*, oppression and abuse of process are judicial dicta on their application in practice. In England, *res judicata* related factors may fall within an abuse of process plea. In Scotland, those factors may be included within an article 8 proportionality analysis. A leading case in England on that, Poland v Celinski [2015] EWHC 1274 (Admin), has been held to be correct and applicable in Scotland in DV v Lord Advocate [2020] HCJAC 33 at para 34. Further, the remedies of oppression in Scotland and abuse of process in England both act to prohibit affronts to justice. In sum, then, it appears that the differences between Scotland and England as regards *res judicata*, oppression and abuse of process are more apparent than real.

Conclusion

In spite of being relatively settled for coming up to two decades extradition law and practice continues to throw up novel questions. One reason for this is its multi-jurisdictional nature both within the UK and across its borders. The conclusion of the Trade and Cooperation Agreement 2020 following Brexit is likely to be another in coming years (see Arnell, P. and Davies, G., The New UK-EU Extradition Arrangements (2021) 6 SLT 21). Whilst Brexit is unlikely to affect *res judicata* and oppression extradition law and practice more generally is bound to continue to give rise to interesting issues requiring judicial determination.