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The High Court of Justiciary in Morrow (Sarah Lynn) v HMA [2023] HCJAC 29 has recently added to the body of jurisprudence supporting a conservative interpretation of the application of the European Convention on Human Rights (Convention) in the extradition context. It follows a number of judgments including, in Scotland, Amnott v United States [2022] HCJAC 6, in England, R. (on the application of Wellington) v Secretary of State for the Home Department [2009] 1 AC 335, and arguably in the Grand Chamber of the European Court of Human Rights (ECtHR), Sanchez-Sanchez v United Kingdom (2023) 76 EHRR 16. The gist of this case law from a human rights perspective is that there has been the adoption and entrenchment of a relative understanding of human rights under the Convention in the extradition context. It holds that the nature or level of protection is contingent upon where a prospective violation may take place.

Strongly making the relativity point in Morrow (Sarah Lynn) v HMA was Lord Pentland who wrote "It is emphatically not for contracting states to seek to impose Convention standards on non-contracting states" (at para 30). Accordingly, what could amount to a violation of human rights within a state party to the Convention need not bar an extradition to a non-state party. The meaning of a particular human right in the extradition context, therefore, turns on whether a possible violation of it would occur within or outwith one of the other 45 member states of the Council of Europe. The recent High Court case is relevant not only for confirming the relative approach in no uncertain terms, but also for affirming the compatibility of US sentencing practice with the presumption of innocence under article 6(2) of the Convention. Further, it is usefully contrasted with a recent decision in the Republic of Ireland, where an extradition request from Scotland was refused where concerns had been expressed over Scottish prison conditions.

The Case

Giving rise to Morrow (Sarah Lynn) v HMA [2023] HCJAC 29 was a United States extradition request for crimes related to an alleged fraud committed against Morrow's employer in the state of Missouri. At Edinburgh Sherrif Court she argued that her extradition would be oppressive due to the passage of time under ss 79(1) and 82 of the Extradition Act 2003, contrary to article 3 of the Convention protecting persons from torture and inhuman and degrading treatment and

punishment and article 6(2) of the Convention protecting her presumption of innocence. Success in any one of these arguments would have barred her extradition.

The sheriff's decision began with it being noted that the starting point for consideration of Morrow's arguments was the fundamental assumption that the requesting state was acting in good faith. This was particularly so where, as with the US, there was a long-standing good relationship between the countries and where treaty obligations had been consistently honoured. In considering the argument founded on the passage of time the sheriff noted that the appellant had to meet an extremely high test for the bar to be satisfied. There was no evidence of culpable delay on the part of the US. Whilst the appellant had made a new life for herself since moving to Scotland and her extradition would cause hardship to her, her husband and stepchildren, the indictment libelled serious offences. The argument was rejected.

Morrow's article 3 arguments centred upon facets of her imprisonment in the US. These were the risk that she would be sexually assaulted whilst incarcerated and that she would be held in overcrowded and inappropriate conditions. Here the sheriff began by highlighting the relative application of article 3 in extradition. It was noted that a distinction was to be drawn between extraditions within the Council of Europe and those to non-contracting states (at para 16).

The sheriff then considered the evidence, including a report by the US Senate Permanent Subcommittee on Investigations, a letter from Timothy Rodrigues, Deputy Associate Counsel, Legislative and Correctional Issues for the Federal Bureau of Prisons, and a former prisoner. As regards both sexual assault and overcrowding the sheriff held that the appellant had not established that there were substantial grounds for believing there was a real risk she would be subject to treatment contrary to article 3 if extradited.

The argument based on article 6(2) and the presumption of innocence was founded on the nature of the US sentencing process. That process included consideration of the total financial loss to the appellant's employer of her actions, $165,239.25, even though the indictment against her iterated ten counts that accounted for $8,357.10. The sheriff held that article 6(2) applied only to the particular offence charged, and not to an accused's character or conduct that may

affect the sentencing process. Here, in what can be seen as an instance of relatively, it was noted that the Convention should not be used as a means of imposing the criminal justice values of contracting states on non-contracting countries (at para 18). Overall, the sheriff held that the US trial and sentencing process did not meet the requisite article 6 test, namely that there where substantial grounds for believing that the requested person would be exposed to a real risk of a flagrant denial of justice if extradited (at para 19).

The High Court Judgment

Following the Sheriff Court judgment the High Court was asked to consider leave to appeal. The appellant argued that sheriff erred in reaching decisions on each of the arguments put forward. Firstly, in considering oppression by the reason of the passage of time Morrow argued that the sheriff should have weighed the seriousness of her offences differently. Secondly, she suggested that the sheriff wrongly weighed the evidence as regards the risk of a violation of article 3 by way of a possible sexual assault in the US prison system. Thirdly, it was averred that the sheriff's decision on the article 6(2) argument was simply wrong. The Lord Advocate argued that the sheriff took the correct approaches to the arguments made and accordingly came to the proper decision.

Lord Pentland began by iterating the difference between extraditions within and outwith the Council of Europe. He then noted that it will require strong and cogent evidence of likely mistreatment for a Convention issue to amount to a bar to extradition to countries, like the US, with a long history of respect for democracy, human rights and the rule of law (para 30). He then went on to confirm all facets of the sheriff's judgment. He found the sheriff was entitled to hold, on the basis of the evidence heard, that the appellant had not shown that there was a real risk that she would be subjected to inhuman or degrading treatment.

Similarly as regards the presumption of innocence argument, Lord Pentland held that no aspect of the US sentencing process as described in the evidence amounted to the bringing of a new criminal charge for the purposes of article 6(2) (at para 37). He noted that that article deals only with the proof of guilt, and not the kind or level of punishment. Since article 6(2) was not engaged, he held, it was unnecessary to address whether Morrow's extradition would result in a flagrant denial of justice (at para 41).

Lord Pentland further found that the sheriff had not misdirected himself as to the gravity of the allegations against Morrow in his consideration of oppression on the basis of the passage of time. The sheriff correctly understood, he held, that she caused a total loss to her employer of a sum over $165,000. A fraudulent scheme involving a loss on that scale could not be regarded as anything other than serious (at para 43). The progress of the proceedings against Morrow was not such that there was an unreasonable delay. Accordingly, Lord Pentland held, the sheriff was right to conclude that the appellant did not meet the extremely high test for oppression by reason of the passage of time. Leave to appeal under sections 103 and 108 of the Extradition Act 2003 was refused.

Commentary

Morrow (Sarah Lynn) v HMA is further confirmation that there is a difference between extraditions within and outwith the Council of Europe. The debate on universality or relativity of human rights in extradition, represented in recent times by R. (on the application of Wellington) v Secretary of State for the Home Department in the relativist camp and Trabelsi v Belgium (2015) 60 EHRR 21 in the universalist camp, appears to be over. The sentiment that extradition should not be used as a means of imposing the Convention and the criminal justice values of contracting states on non-contracting countries has held sway. That written, there is no escaping the fact that the Convention has acted and does act in that manner in some circumstances.

Perhaps the clearest example of this are prison conditions cases. The ECtHR has developed standards on what would amount to inhuman and degrading treatment and punishment in a prison context. Notable here is the general standard of the personal space required by an inmate being three square metres, Mursic v Croatia (2017) 65 EHRR 1. In Rae v United States [2022] EWHC 3095 (Admin), the English High Court held that there was no reason why it would be inappropriate to apply the Mursic rule in a case concerning extradition to the US (at para 70). It found "Even applying a contextual approach to the question of whether treatment reaches the minimum level of severity necessary to engage Article 3, there is no convincing reason of principle why accommodation that falls below Article 3 standards because of inadequate personal space in a contracting state should be

held not to breach such standards in a case concerning extradition to the US" (at para 70).

There was no question of a possible differentiation in the application of Convention standards in the recent Irish case considering an extradition request from Scotland. Both jurisdictions are, of course, members of the Council of Europe and bound by the Convention. On 29 June this year Mr Justice Paul McDermott found that there was a real and substantial risk of inhuman or degrading treatment should the Irish High Court extradite Richard Sharples from Ireland to Scotland (case unreported). The judge noted that prison overcrowding was such that Sharples would have to spend 22 hours in a cell daily in conditions where there would be less than three square metres of personal space. The central issue in the case appears to be that the Crown Office had not provided, or had not been able to provide, adequate assurances as to the medical treatment and prison conditions Sharples would receive and experience at Barlinnie or Low Moss prisons in Glasgow.

Conclusion

Ever since the seminal human rights extradition case of Soering v UK (1989) 11 EHRR 439 extradition hearings may, in one way or other, entail consideration of the circumstances facing the requested person in the requesting country. The ECtHR said in that case after noting that a party to the Convention may be responsible where it carries out an extradition in certain circumstances that "The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention" (at para 91). It is not unreasonable to consider such an assessment, with the possible consequence of a refusal of an extradition request, as some form of imposition of the criminal justice standards of contracting states. This is more clearly the case where an assurance is sought such that the requesting state agrees to act or not act in such a way that a particular interpretation of Convention rights is adhered to. There is simply no escaping this fact whilst the process of extradition remains conditioned by human rights protection. There are, of course, forceful and compelling reasons favouring extradition and the accordance of respect to the criminal justice and prison systems within the UK's extradition partners. Accordingly, it appears clear that the linguistic gymnastics around

relativity will continue. Scottish and UK courts will grapple with finding a middle ground between the weighty factors favouring extradition and human rights protection, particularly under article 3. A relative universality will be the consequence.