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**TITLE:** Extradition in the sheriff court.

**YEAR:** 2018

**Publisher citation:** ARNELL, P. 2018. Extradition in the sheriff court. Scots law times [online], 10, pages 33-35. Available from: https://login.westlaw.co.uk/

**OpenAIR citation:** ARNELL, P. 2018. Extradition in the sheriff court. Scots law times, 10, pages 33-35. Held on OpenAIR [online]. Available from: https://openair.rgu.ac.uk

# Extradition – Three Sheriff Court Cases

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A trio of sheriff court extradition cases decided at the end of 2017 illustrate the continuing development of the law and the inherent tensions cases face. The law continues to develop due to novel issues coming to the fore and the relative dearth of extradition-specific rules of procedure and evidence. The tensions simply arise from transnational justice being conditioned by antipathetic factors, including the protection of the human rights of requested persons.

The first of these cases is Lord Advocate v SN, [2017] SC EDIN 69 (23 Oct.). At issue was the question of whether an arrest warrant should be granted following an extradition request where the requested person was suffering from dementia and other health issues. The requested person, the so-called 'tartan terrorist', had previously been extradited from Ireland to Scotland, but was then considered to be unfit to stand trial. Giving rise to the present case was a US request based on the accusation that he was responsible for making more than 40 bomb threats in relation to US targets. The request was certified by a Scottish Minister in January 2016. Following the request an up-to-date report on SN's health had been obtained by his solicitor. It confirmed that he was not fit to travel to the US, nor to stand trial. It also found that those facts were not temporary. The issue facing Sheriff Crowe was whether to exercise discretion and not issue an arrest warrant under s 71(2) of the Extradition Act 2003. That section provides that the judge may issue a warrant for the arrest of requested person if there are reasonable grounds for believing, *inter alia*, that the information provided is information that would justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction. The sheriff held that it was proper to exercise discretion under the statute and at common law and not issue a warrant for the arrest of SN. To grant the warrant, he held, would have been to authorise a charade, paying lip service to the procedural provisions of the 2003 Act, in the absence of SN, well knowing that it would be unjust and oppressive to extradite him (at para 18). SN was discharged from the process.

In coming to his decision the sheriff noted that neither party was able to produce authority dealing with the discretion under section 71(2). Sheriff Crowe himself referred to Edwards v US [2012] EWHC 3771 (Admin), which whilst concerning discretion was not directly on point in that the discretion considered was that of the Secretary of State issuing a certificate, not an extradition judge granting an arrest warrant. As such, *Lord Advocate v SN* appears to deal with a novel point. Section 71(2) allows discretion in issuing a warrant, and in the case it was wholly reasonably exercised. Of note here is the origin of the request being the US, a category 2 country. This is relevant because the issuance of a certificate at the start of the process in such cases is not qualified by a belief by the Scottish Ministers that the extradition is proportionate – as it is for category 1 requests under s 2(7A) of the 2003 Act. Had the request emanated from an EU member state the sheriff may well have not been faced with the case.

The second recent case is Lord Advocate v Shapovalov [2017] SC EDIN 83 (29 Nov.). Here the possible applicability in extradition hearings of statements of uncontroversial evidence (SUEs) under s 258 of the Criminal Procedure (Scotland) Act 1995 was at issue. SUEs allow a party to criminal proceedings to identify facts which are unlikely to be disputed and to serve them on the other party. Section 258 also creates a procedure under which SUEs can be challenged. In *Shapovalov* the requested person lodged two SUEs *inter alia* stating that he would be detained in non-article 3 compliant conditions in Russia if extradited. The Lord Advocate challenged the competency of s 258 in extradition as well as the facts specified within the SUEs. In doing so he referred to Kapri v HMA [2014] HCJAC 33 and stated "The clear thrust of Kapri is that the default position is that the rules of criminal evidence are applicable. The exception is where there are special circumstances" (at para 13). There were special circumstances, he argued, in the form of s 77(2) of the 2003 Act (which referred to powers of the judge not a party to serve notice) and s 258 of the 1995 Act (alluding to a preliminary hearing, intermediate diet and trial diet). In response Sheriff Ross firstly held that as SUEs are part of the "'normal rules' of summary criminal proceedings… unless they conflict or are irreconcilable with the provisions of sec 77, they form part of extradition procedure" (at para 19). Secondly, the sheriff rejected the argument based on the timetable in s 258 because, in his view, it took an "unduly narrow approach to found on the specific terminology, and such an approach runs contrary to the inclusive language of the authorities relied upon" (at para 25). 'Special circumstances', the sheriff held, referred to "… surrounding facts. Drafting or terminology issues are not 'circumstances'" (at para 25). The sheriff held that s 258 did apply to extradition hearings, but rejected Shapovalov's application to disregard the challenge to them.

Interestingly, *Lord Advocate v Shapovalov* was distinguished from HMA v Havrilova [2011] HCJAC 113, where an attempt to incorporate a feature of criminal procedure into extradition proceedings was rejected. In *HMA v Havrilova* the High Court held that it was not possible to accommodate the custody time limits under s 147(1) of the 1995 Act into the structure of the 2003 Act. Sheriff Ross distinguished the case by the fact that in *HMA v Havrilova* the appellant was attempting to invoke rights which only come into existence following being charged with a summary offence. There was also, he noted, express provision on bail in extradition proceedings. Undoubtedly, the acceptance of the competency of SUEs in extradition hearings is novel. The rationale for it was the efficient leading of evidence which was, the sheriff noted, "every bit as central to extradition proceedings as it is to summary, and for that matter all, criminal procedure" (at para 20). Of course it remains to be seen whether and to what extent SUEs are utilised within extradition proceedings.

Lord Advocate v Black, [2017] SC EDIN 77 (17 Nov. 2017), the third recent case, was spawned by a request from the United Arab Emirates. Here Black was sought to serve a 12 month sentence following his conviction for crimes including embezzlement from the bank account of his Dubai-based employer. He had been living and working in Dubai at the relevant time. He was convicted *in absentia*, having returned to Scotland. Two of the four grounds in opposition to

extradition were upheld by Sheriff Welsh. The first followed from Black being convicted *in absentia*. As he had not deliberately absented himself from the UAE proceedings the sheriff was obliged to decide whether he would be entitled to a retrial or (on appeal) a review amounting to a retrial, under s 85(5). An aspect of this requirement includes the provision of legal aid. As the UAE did not have a system of legal aid the condition was not met. Black was discharged for this reason under s 85(7). Although discharged, the sheriff went on to consider the human rights compatibility of Black's extradition. Upon reviewing the oral evidence the sheriff held that there substantial grounds for believing Black would be at real risk of an article 3 violation because of the inadequate medical provision at Bur Dubai Police station. A further factor was that the son-in-law of Black was well-connected in the UAE and he might apply pressure in order to secure the return of his estranged wife to Dubai. Again referring to the lack of legal aid, the sheriff also held that there was a real risk of a violation of article 6 if Black was extradited to Dubai in that he would be tried in Arabic which he could not speak. Black was therefore discharged under both ss 85(5) and 87(2).

As with *Lord Advocate v Shapovalov* evidential questions arose in *Lord Advocate v Black*. Unlike the former, though, the questions were evidentially orthodox – namely the possible admission of a document prepared several years previously for a distinct case and the status of a particular witness as an expert. After considering s 202 of the 2003 Act governing receivable documents and judicial dicta, including *Kapri v HMA*, the sheriff held that the document was inadmissible. He held that it would be unfair to admit it and treat its contents as evidence without the respondent having an opportunity to test it in cross examination. Sheriff Welsh did accept the expert witness put forward by Black. In doing so, however, he noted that her opinion was not sufficient to determine the ultimate issue – which here was whether there were substantial grounds for believing there would be a real risk that Black will be subjected to human rights violations in the UAE.

Each of the three recent sheriff court extradition cases is notable in its own right. Jointly, they demonstrate that extradition law continues to develop and that tensions in the law itself and in its application persist. The development is in the rules of procedure and evidence. The provision in the 2003 Act relating to evidence is limited and the effect of granting an extradition judge the same powers as nearly as may be as if the proceedings were summary proceedings is at times unclear. There is not a hybrid code of extradition procedure and evidence – as noted by the Lord Justice Clerk in *Kapri v HMA* (at para 126). Courts have been obliged to rely on summary cause rules and respond to arguments made and evidence put forward by parties to hearings. This has exposed various tensions. *Lord Advocate v Black* also demonstrates the inherent conflicts within extradition including that between the interests of the requesting state and the human rights of the individual subjected to the process.