AUTHOR(S): ARNELL, P.

TITLE: The wheels of justice in extradition.

YEAR: 2017

Publisher citation: ARNELL, P. 2017. The wheels of justice in extradition. Scots law times [online], 26, pages 143-146. Available from: http://login.westlaw.co.uk

OpenAIR citation: ARNELL, P. 2017. The wheels of justice in extradition. Scots law times, 26, pages 143-146. Held on OpenAIR [online]. Available from: http://openair.rgu.ac.uk

The Wheels of Justice in Extradition

Dr Paul Arnell
Reader in Law, Robert Gordon University

Two recent extradition cases involving Scots lend considerable support to the epithet that the wheels of justice grind slowly but exceedingly fine. These are the Supreme Court judgment dated 28 June 2017, Dean (Zain Taj) v Lord Advocate [2017] UKSC 44; [2017] 1 W.L.R. 2721; 2017 S.L.T. 773, and the European Court of Human Rights decision dated 10 July 2017, Harkins v United Kingdom (application no.71537/14). Both cases also challenge the perception that human rights frustrate the operation of international criminal justice.

Dean (Zain Taj) v Lord Advocate

Dean was an appeal by the Lord Advocate under Sch.6 para.13 to the Scotland Act 1998 against a determination by the High Court of Justiciary. That determination, an appeal under s.103 of the Extradition Act 2003, held by a majority that there were substantial grounds for believing there was a real risk of Dean being subjected to treatment incompatible with ECHR art.3 prohibiting torture or inhuman or degrading treatment or punishment upon his extradition back to Taiwan. That decision was noted by the present author in The continuing tension between human rights and extradition, 2016 S.L.T. (News), pp.211–214. Whilst the High Court refused to give leave to appeal to the Supreme Court, again by a majority, a panel of that court granted the Lord Advocate permission to appeal 21 December 2016.

Factually, Dean was involved in a road accident that caused the death of a Taiwanese delivery man in March 2010. He grew up in Edinburgh and had gone on to live and work in Taiwan. He was convicted by a Taiwanese court of driving under the influence of alcohol, negligent manslaughter and leaving the scene of an accident. He was ultimately sentenced to four years' imprisonment. Pending an appeal to the Taiwanese Supreme Court, in 2012, he absconded from Taiwan using the passport of a friend. Taiwanese authorities have been seeking his extradition October 2013.

The Supreme Court faced two main questions in Dean. These were whether the appeal itself was competent and whether the High Court applied the correct legal test in assessing the harm which Dean might face in Taipei prison. The argument that the Supreme Court lacked competence to hear the appeal was based upon the view that the High Court had not determined a devolution issue and accordingly there was no appeal to the Supreme Court. As the appeal to the High Court was made under s.103 of the Extradition Act 2003, it was suggested an appeal was not competent in that the provision authorising an appeal under that Act did not extend to Scotland.

Lord Hodge, who gave an opinion with which the four other justices agreed, held that this challenge was "misconceived" (at 2017 S.L.T., p.777 para.14). He held that the High Court had in fact determined a devolution issue, that being whether "a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with

any of the Convention rights", as per Sch.6 para.1(d) to the 1998 Act. That Dean chose the option of appealing to the High Court under s.103 instead of raising a devolution issue under the Scotland Act 1998, Lord Hodge held, did not affect the competence of the appeal to the Supreme Court.

The substantive issue facing the Supreme Court concerned the correct legal test to be applied when assessing the risk of harm an individual subject to extradition might face in the requesting state from non-state actors within it. In the introductory comments of his opinion Lord Hodge highlights that the case put before the Supreme Court by the Lord Advocate was different from that put before the High Court. The argument, therefore, entailed "... criticising the judges of the Appeal Court for not giving effect to an argument which they did not hear" (at 2017 S.L.T., p.775, para.3).

The focus upon non-state actors in the Lord Advocate's argument to the Supreme Court is what set it apart from that put forward in the High Court. Non-state actors were relevant because the risk Dean faced in Taipei prison did not come from the prison authorities or by virtue of the conditions*S.L.T. 144 within the prison, rather it came from fellow inmates who might attack him on account of his notoriety and the especial treatment he was afforded. In light of this particular risk the test to be applied was found in R (on the application of Bagdanavicius) v Secretary of State for the Home Department [2005] UKHL 38; [2005] 2 A.C. 668; [2005] 2 W.L.R. 1359. In that case Lord Brown held that harm inflicted by non-state agents will not constitute ECHR art.3 ill treatment unless the state has failed to provide reasonable protection to the individual from that violent treatment (at [2005] 2 A.C., p.677 para.24).

The Supreme Court applied the non-state actors test to the conditions in Taipei prison in light of the assurances Taiwan gave the UK designed to mitigate them and make Dean's incarceration art.3 compliant. In doing so it referred to the criteria laid down by the ECtHR in Othman v United Kingdom (2012) 55 E.H.R.R. 1; 32 B.H.R.C. 62. The court noted that Taiwan was a developed society with a tradition for respect for the rule of law, the assurances were specific and that UK consular staff would have access to Dean and could bring a breach of the assurances to the attention of the prison authorities. In regard to reasonable protection, Lord Hodge held that there was no evidence to support an inference that the Taiwanese authorities would not give Dean reasonable protection against harm at the hands of other prisoners. He noted in particular that the assurances provided Dean could choose to remain in his cell and take outdoors exercise alone.

Having pronounced upon the reasonable protection point, the Supreme Court moved onto whether the particular regime promised Dean, entailing as it did measures to protect him from the wider prison population, would risk a breach of art.3. It held it did not. He would experience 'relative isolation', including sharing his cell with a foreign non-violent prisoner, have access to newspapers etcetera and could be visited. These circumstances were held to not come close to a breach of art.3. The Lord Advocate's appeal was allowed, and the case was remitted to the High Court to consider Dean's

appeal under s.108 (concerning the Secretary of State's decision to order his extradition) and his devolution minute in that appeal.

Harkins v United Kingdom

Harkins was an application to the Grand Chamber of the European Court of Human Rights where the applicant challenged his extradition to the United States on the basis of ECHR arts 3 and 6. The latter, as is well known, guarantees the right to a fair trial. The proceedings up to this decision are of a considerably longer duration than those in Dean. The crime begetting the litigation occurred in 1999, with the original extradition request to the UK being made in in March 2003. The most relevant previous judicial decision is Harkins v the United Kingdom [2012] 6 Costs L.O. 733; (2012) 55 E.H.R.R. 19. This was a decision of a Chamber of the ECtHR over five years previously where Harkins challenged his extradition on similar grounds. The present application argued that the law governing mandatory life sentences had developed under ECtHR jurisprudence and therefore a renewed consideration was merited.

Phillip Harkins, from Greenock, was indicted for first degree murder and attempted robbery with a firearm in Florida in 2000. By a Diplomatic Note the US assured the UK that the death penalty would not be sought or imposed. If convicted of first degree murder, therefore, Harkins faced the sentence of mandatory life imprisonment without parole. In 2012, Harkins challenged that sentence under art.3. The ECtHR held that that sentence would not be grossly disproportionate. Particularly, it held that Harkins had not demonstrated that his incarceration would serve no penological purpose. The ECtHR noted that if his incarceration reached that point it was possible to petition the Governor of Florida and the Board of Executive Clemency seeking the commutation of his sentence.

Subsequent to Harkins' 2012 decision the Grand Chamber pronounced on life sentences in Vinter v United Kingdom (2016) 63 E.H.R.R. 1; 34 B.H.R.C. 605; [2014] Crim. L.R. 81, and two other cases. It held that art.3 requires the reducibility of a life sentence entailing a review which would inter alia involve domestic authorities considering whether the incarceration was no longer justified on legitimate penological grounds. It also held that a whole life prisoner was entitled to know at the outset of his sentence what he must do to be considered for release, under what conditions, and when that review would take place or could be sought. A further decision of the ECtHR,*S.L.T. 145 Trabelsi v Belgium (2015) 60 E.H.R.R. 21; 38 B.H.R.C. 26, held that an extradition to the US violated art.3 because it exposed the individual, Trabelsi, to a risk of a life sentence without parole. Of final relevance to Harkins' present application was a decision of the English High Court on 7 November 2014, R (on the application of Harkins) v Secretary of State for the Home Department [2014] EWHC 3609 (Admin); [2015] 1 W.L.R. 2975; [2015] A.C.D. 33, which took the unusual step of applying a test analogous to that found in the Civil Procedure Rules for reopening appeals. That approach was taken in light of the jurisprudential developments at the ECtHR. The High Court held that there had not been a change in the law such that the human rights of Harkins were fundamentally affected.

Harkins submitted the present application to the ECtHR after the High Court's refusal to reopen proceedings. He argued that following Vinter and Trablesi his extradition would breach art.3 since the sentencing and clemency regimes in Florida did not meet the requirements set out therein. Harkins submitted that his complaint was not substantially the same as that made in 2012. The legal landscape was different and there had been domestic proceedings following Vinter and Trablesi where new arguments were put to the High Court. He further argued, under art.6, that the imposition of life imprisonment without parole would constitute a flagrant denial of justice. In response, the UK Government submitted that Harkins' complaint was based on the same facts, the same charge, the same sentencing regime and the same clemency process. The only change, it said, was the development of the ECtHR's case law which was not "relevant new information". Accordingly, the complaint was not admissible because ECHR art.35(2) required applications not be "… substantially the same as a matter that has already been examined" and that they contained "relevant new information". The UK Government argued that art.35(2) had to be interpreted in light of its purpose, that being the upholding the principle of legal certainty and finality, and that that principle would be undermined were changes in ECtHR jurisprudence deemed "relevant new information".

The Grand Chamber held that whether the domestic proceedings constituted "relevant new information" was "… inextricably linked to the question of whether the development of the ECtHR's case law itself was "relevant new information" (at para.46). Therefore it had to decide whether the development of its case law "… by itself constitutes 'relevant new information' for the purposes of … art.35(2)" (at para.48). In answering this it relied upon the rules of treaty interpretation in the Vienna Convention on the Law or Treaties 1969 which required that words be interpreted according to their ordinary meaning and in their context and in light of the object and purpose of the provision from which they are drawn. In line with the UK Government's view that purpose, the Grand Chamber noted, was to serve the interests of finality and legal certainty by preventing applicants from seeking to appeal against previous judgments or decisions by lodging fresh applications (at para.51). It stated "… legal certainty constitutes one of the fundamental elements of the rule of law which requires, inter alia, that where a court has finally determined an issue, its ruling should not be called into question" (at para.54). In light of the object and purpose of the provision and the obligation to give the words their ordinary meaning the Grand Chamber held "… the Court cannot but conclude that the development in its jurisprudence does not constitute relevant new information" (at para.56). Harkins' complaint under art.3 was rejected as inadmissible.

The Grand Chamber dealt with Harkins' art.6 argument relatively briefly. He had suggested that the imposition of a life sentence without parole in the absence of an opportunity to consider the facts of the individual offence and the offender would constitute a flagrant denial of justice. This argument was held to be manifestly ill-founded. The "flagrant denial of justice" test, the court held, is a stringent one, and one where the applicant must adduce evidence capable of proving there are substantial grounds for believing that,

if removed, he would face a real risk of such a denial. Harkins' submission on art.6 failed to meet that test.

Comment

The extradition proceedings of Zain Dean are not over. He is presently back in Scotland awaiting his Extradition Act 2003 s.108 appeal, with a preliminary hearing scheduled for 19 September. Those of Phillip Harkins are complete. He was extradited to the US on 20 July. He appeared in court in Jacksonville Florida 21 July. Both sets of proceedings have obviously taken some considerable time. The crime at the heart of Dean's*S.L.T. 146 case took place in 2010, with Taiwan's extradition request being made in 2013. The homicide in Harkins' case occurred in 1999, with the US firstly seeking him from the UK in 2003. Critics of the pace of extradition cases thus have ready fodder. The Extradition Act 2003 has clearly failed to expedite the process in all cases. The question arising, of course, is whether the length of time taken is, in all the circumstances, reasonable or not. A different but related question is whether extradition law, and particularly the role of human rights therein, unjustifiably frustrates the operation of transnational criminal justice.

A first point to make about Dean and Harkins is that they are exceptional. The Extradition Act 2003 has shortened and streamlined the extradition process in most cases, and especially within the EU under the European Arrest Warrant. There have also been legislative changes since 2003 that have taken place in furtherance of this aim. The Anti-social Behaviour, Crime and Policing Act 2014, for example, introduced the necessity of leave to appeal extradition decisions. A second point is that extradition cases can entail complex and multifaceted issues concerning not only what can be thought of orthodox extradition subjects such as double criminality and speciality, but also of human rights, treaty interpretation, the scrutiny of a third state's assurances, the comity of nations, differences in approaches to criminal justice and punishment, and the commonly accepted imperative to address transnational criminality. As described above, these considerations can conspire to elongate the extradition process considerably. On balance, though, especially in light of the possibility of there being very serious consequences of an extradition – life imprisonment without parole in Harkins' case – it is not unreasonable that the process takes the time it does.

The cases of Dean and Harkins give a rather emphatic answer to the question of whether human rights within extradition law frustrate transnational criminal justice. That answer is, at the end of the day, no. In both cases human rights arguments have failed to bar extradition. Of course Dean's litigation continues, and so the final position is not yet clear. Human rights in his case have, to date, only delayed matters. In Harkins' case, human rights arguments have failed to bar his extradition where he faces a fate which would not befall someone convicted of the crimes he is accused of within this country. The perception that human rights are ultimately inimical to the operation of transnational criminal justice is fallacious. The issues are complex and the law is evolving. The wheels of justice therefore necessarily grind finely and slowly.