Extradition and the Polish judiciary.

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In *Circuit Court of Warszawa-Praga v Maciejec* [2019] SC EDIN 37 and *Regional Court in Bielsko-Biala v Charyszyn* [2019] SC EDIN 43 Edinburgh Sheriff Court was tasked with evaluating the Polish judiciary. This is strange but not exceptional. It is strange because the state of judiciaries abroad would normally be of no account to Scots law or courts. It is not exceptional because human rights within extradition have come to have an established role in providing protection to requested persons in this way. Admittedly, though, in most cases it is a third country's prisons or health services that come under scrutiny, not its judiciary.

The two cases are of note for several reasons. Firstly, they were 'test cases' on extradition to Poland in the light of relatively recent political and legislative machinations in that country putatively affecting the independence of the judiciary. The consequence of the cases is poised to affect nearly fifty individuals in Scotland subject to Polish extradition requests. Secondly, the cases are the latest installment in series of judicial and political responses to the events in Poland. These include an EU 'Reasoned Proposal' and a Court of Justice of the EU (CJEU) decision, *Criminal Proceedings against LM*, [2019] 1 WLR 1004. Further European and UK developments are pending. Finally, the case brings to the fore the possible effect upon human rights in extradition of the UK's departure from the EU. In particular, whether this type of case will continue to arise after the UK leaves.

The origin of this extraterritorial facet of extradition law is found in the European Court of Human Rights (ECtHR) case of *Soering v UK* (1989) 11 EHRR 439. It held that the human right to be free from torture and inhuman treatment in effect barred Soering's extradition from the UK in circumstances where he would likely spend a lengthy period on death row in West Virginia if convicted. The case opened the door to the application of further human rights in a similar manner, including that protecting the right to a fair trial under article 6 of the European Convention on Human Rights 1950 (ECHR). A notable instance of which in a Scottish context is found in the litigation concerning Fatjon Kapri, [2012] HCJAC 84, [2013] UKSC 48 and [2014] HCJAC 33. Here Kapri argued, unsuccessfully, that his extradition be barred on account of systemic judicial corruption in Albania.

The cases of *Circuit Court of Warszawa-Praga v Maciejec* and *Regional Court in Bielsko-Biala v Charyszyn* are in a sense similar to the Kapri jurisprudence. Relied on in both was article 6 in the context of supposed general deficiencies within the criminal justice system of a requesting state. The difference between them is that in the test cases it was changes to the terms and circumstances of the Polish judiciary, not judicial corruption, that formed the basis of a possible a violation of article 6. These changes commenced in 2015 following a Polish election and included a new

judicial disciplinary procedure and a reduction in the retirement age of judges. In response to what was an apparent political attack on the independence of the judiciary the European Commission issued a Reasoned Proposal. That unprecedented step challenged the Polish actions in a way that could ultimately lead to a suspension of certain of Poland's voting rights within the EU. That process is continuing.

Poland issued European Arrest Warrants (EAWs) seeking Patryk Maciejec and Kamil Charyszyn on both an accusation and conviction basis. Maciejec was sought for crimes including driving whilst disqualified, housebreaking and theft. Charyszyn was accused of robbery, threatening behavior and theft and had been convicted of opening lockfast places. Both challenged their extradition, in part, on the basis of article 6. The crux of the argument against extradition in both cases was that the evidence indicated that there had been a breakdown in the rule of law in Poland and that to surrender Maciejec and Charyszyn in those circumstances would be contrary to article 6. In Charyszyn's case it was also argued that an 'Assessor' might try him, a judge said to be akin to a Temporary Sheriff in Scotland prior to their abolition in 2000. In support of Maciejec's and Charyszyn's arguments was evidence led from three people with knowledge or experience of the political developments and courts in Poland.

The arguments on behalf of the Lord Advocate were largely the same in both cases. It was accepted that the evidence required the court to assess whether there were substantial grounds for believing that there was a real risk that Maciejec and Charyszyn would be exposed to a flagrant denial of justice were they returned to Poland. This followed *Criminal Proceedings against LM* and, amongst others, the first case in which article 6 was successfully invoked on the basis of the situation in a receiving country at the ECtHR, *Othman v UK* (2012) 55 EHRR 1. As to the position of an Assessor, it was noted that only one of a possible seven judges set to try Charyszyn held such a position. Counsel for the Lord Advocate then put forward what turned out to be the decisive point, this was that whilst systemic problems in Poland had been highlighted the precise issue was whether the requested person, having regard to his personal situation, would run a risk of a flagrant denial of justice if extradited.

Sheriff Crowe held that Maciejec's and Charyszyn's extradition would be compatible with their ECHR rights. He agreed with counsel for the Lord Advocate that what was required was specific information relating to the requested person's particular case – in any event as long as the article 7 TEU Reasoned Proposal procedure was pending. There was no evidence that Assessors had been acting unfairly or that they themselves had been treated in that way. Significantly, the cases of both men were not found to be unusual. They would not attract special attention. There was not a political element to them nor the involvement of a high-ranking person that might affect future judicial proceedings. There were also no specific issues pertaining to the

courts in which they would be tried. Maciejec and Charyszyn were ordered to be extradited.

The decisions in *Circuit Court of Warszawa-Praga v Maciejec* and *Regional Court in Bielsko-Biala v Charyszyn Circuit Court of Warszawa-Praga v Maciejec* open the door for a further 48 outstanding Polish extradition cases to proceed. Arguments on the basis of article 6, unless raising special and specific circumstances pertaining to the requested person, will not succeed. A further EU development as regards article 7 TEU or decisions favourable to requested persons in pending or possibly pending Polish cases before the CJEU and the UK Supreme Court, however, could alter that position. In the meantime, extraditions from Scotland to Poland will not be generally prevented by right to a fair trial arguments.

A matter that is poised to affect Scotland's, and the UK's, extradition relations with Poland and all other EU Member States is Brexit. Exactly how is unclear. The draft Withdrawal Agreement provides that the existing EAW scheme will apply until the end of 2020. Subsequently, there has not been even tentative agreement. The clear desire of the Crown Office, amongst others, is that the existing extradition arrangements continue. The UK Government has proposed a security treaty with the EU that retains the current arrangements, but does not require the UK to accept CJEU jurisdiction. The EU, however, has suggested a relationship based on the European Convention on Extradition 1957. Reliance on that treaty is also something that the UK government has provided for in the case of no deal with the EU. If that were to happen former fellow EU member states would become Category 2 territories under the Extradition Act 2003, and so be treated in a manner akin to those countries with which the UK has bilateral extradition agreements. This scenario, it is widely accepted, would be considerably inferior to the EAW and would likely lead to delays, higher cost and the reintroduction of political input into the process.

As things stand little can be said with certainty. From a human rights perspective however the impact of the change to extradition law and practice in Scotland following Brexit, with or without the retention of a EAW-type scheme, will not be too significant. The clear majority of leading human rights extradition authorities have to-date come from the ECtHR and the UK Supreme Court. The CJEU and the Charter of Fundamental Rights are, however, exerting an increased influence on the law, as seen in *Criminal Proceedings against LM*. If Fundamental Charter jurisprudence develops in a direction apart from the EHCR then, of course, any new protections will be lost to persons in Scotland – assuming that CJEU jurisprudence will not be applicable in the UK in future. That noted, at present it is the ECHR, through the Extradition Act 2003 and Human Rights Act 1998 that provides the basis of almost all human rights arguments put forward in Scottish extradition cases. It is a change to the UK's relationship with the ECHR or the repeal the Human Rights Act 1998, not Brexit, that would radically alter the human rights protections afforded requested persons in Scotland.