Neutral Citation Number: [2019] EWHC 60 (Admin)

Case No: CO/3449/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2019

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES

THE HONOURABLE MR JUSTICE GARNHAM

- -

Between:

The Queen	**Claimant**
(on the application of MAHA EL GIZOULI)	
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Edward Fitzgerald QC, Richard Hermer QC, Joe Middleton and Edward Craven (instructed by **Birnberg Peirce**) for the **Claimant**
Sir James Eadie QC, Hugo Keith QC, Clair Dobbin and Victoria Wakefield (instructed by **Government Legal Department)** for the **Defendant**

Hearing dates: 8 & 9 October 2018

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Approved Judgment

THE LORD BURNETT OF MALDON AND MR JUSTICE GARNHAM

Introduction

1. The issue raised in this claim for judicial review is whether it is lawful for the Home Secretary to authorise mutual legal assistance ("MLA") to a foreign state in support of a criminal investigation which may lead to prosecution for offences which carry the death sentence in that state, without requiring an assurance that the prosecution would not seek the death sentence.

2. The claimant is the mother of Shafee El Sheikh. Mr El Sheikh is believed to be detained by Kurdish forces in northern Syria. Mr El Sheikh, along with Alexanda Kotey, have been accused of involvement in acts of barbaric terrorism in Syria (including the murder of American nationals) and of participating in the conflict there as fighters on behalf of ISIS.

3. The United States authorities wish to secure the surrender of Mr El Sheikh and prosecute him. By a letter to the US Attorney General dated 22 June 2018, the Home Secretary agreed to provide MLA to the US without requiring an assurance that the death penalty would not be imposed. Such assurances are routinely sought in extradition cases to territories which retain the death penalty.

4. The claimant advances five grounds in support of the case that the decision is unlawful:

   (i) the death penalty is a "cruel and unusual" and "inhuman" punishment. It is unlawful for the Secretary of State to exercise his powers under the prerogative to facilitate the imposition of such a penalty or substantially to contribute to the risk of its imposition.

   (ii) the decision is flawed by a series of misdirections of law and fact, and by failure to have regard to relevant considerations.

   (iii) the decision is inconsistent with the UK government's policy of unequivocal opposition to the death penalty "in all circumstances".

   (iv) the decision violates the claimant's own rights under the European Convention on Human Rights ("ECHR") by subjecting her to inhuman treatment in violation of article 3 and in violation of her right to psychological integrity under article 8.

   (v) the provision of MLA without assurances, violates the Data Protection Act 2018 ("the 2018 Act").

The History

5. In June 2015, the US authorities made a request of the UK government for legal assistance in respect of their investigation that the US authorities were conducting into the activities of a group of British terrorists operating in Syria, suspected of being involved in the murder of US citizens in Syria. That request was made pursuant to the 1994 Treaty of Mutual Legal Assistance in Criminal Matters between the US and the UK. The individuals who the US were investigating were part of a group who

became known as "the Beatles" (on account of their British accents) by those they held captive.

6. The nature of the offences of which this group was suspected is described in a witness statement of Mr Graeme Biggar, the Director of National Security in the Home Office. He says:

> "This group of terrorists is associated with some of the most barbaric crimes committed during the conflict in Syria. This includes its suspected involvement in the beheading of 27 individuals, including the murders of US citizens James Foley, Steven Sotloff and Peter Kassig, and British citizens David Haines and Alan Henning. All but one of these beheadings were filmed and posted on the internet. The nature of the deaths suffered by these men (and the ongoing kidnap of others) has brought immense anguish to their families."

7. On 29 October 2015, the United Kingdom Central Authority ("UKCA") sought an assurance that "the death penalty will not be sought or imposed, or if imposed, will not be carried out against anyone found guilty of any criminal offence arising from this investigation" or from assistance provided by the UK.

8. On 21 March 2016, the US Department of Justice provided what is called a "Direct Use" undertaking. That provided that the US would

> "introduce no evidence obtained in response to this request in a proceeding against any person for an offence subject to the death penalty. In the event that the evidence were to be introduced, the United States would take the decision not to seek the death penalty, a decision which in the federal system absolutely precludes the death penalty from being imposed."

As Mr Biggar explains,

> "Such a "direct use" assurance, nevertheless, allows evidence to be indirectly used, for example by being used to inform investigations and inquiries which could lead to the US obtaining its own evidence which it would be free to use."

9. On 10 August 2017, following the change of administration in the US, the Home Office wrote to the Department of Justice referring to their letter of the 21 March 2016, and indicated that:

> "It is our view that the assurance provided in respect of the death penalty falls short of that which was requested…"

10. In January 2018, Mr El Sheikh was apprehended in Syria. According to Mr Biggar, that brought "immediate political reality and urgency" to the question of where Mr El Sheikh should be brought to justice. He says it was the view of the new US Administration that those states from whom foreign terrorist fighters originated ought to try those individuals.

11. In January 2016, the Crown Prosecution Service ("CPS"), in consultation with the Attorney General for England and Wales, concluded that the case against Mr El Sheikh did not meet the evidential threshold for charge. In February 2018, the CPS again assessed that there was insufficient evidence upon which to prosecute Mr El Sheikh in the UK. That being so, there was no question of the UK seeking his extradition. We are told that the claimant does not accept the decision by the CPS but it is not challenged in these proceedings.

12. In February 2018, FBI agents visited the UK to have sight of the evidence gathered by the UK investigators. That had been approved by the then Home Secretary, the Rt Hon. Amber Rudd MP, on the condition that the material could be reviewed on an information-sharing basis only. Between 1 and 2 March 2018, Ms Rudd visited Washington where she had discussions with the then US Attorney General, Jeff Sessions. In the course of those discussions, he expressed the view that all foreign terrorist fighters should be prosecuted in their home countries. He referred to them as "prisoners of war", and to Guantanamo Bay as the appropriate place of detention for prisoners of war.

13. On 16 April 2018, the Office for Security and Counter Terrorism in the Home Office and the UKCA each provided submissions to the Home Secretary and the Security Minister. As Mr Biggar explains, the UKCA recommended that the Home Secretary "maintain her predecessor's decision to accede to the request dated 19 June 2015 but subject to a full death penalty assurance". The following day the Security Minister, the Rt Hon. Ben Wallace MP, indicated that he agreed with the recommendations to accede to the June 2015 request, but disagreed with the recommendation that that should be subject to the provision of a full death penalty assurance.

14. Mr Wallace held talks on this issue with the Department of Justice on 20 April. He was told of opposition of senior members of the US Administration to Mr El Sheikh being tried in federal courts. As Mr Biggar puts it, "if the UK wanted to obtain support for a US prosecution, it would be critical that evidence provided by the UK came with the least amount of restrictions possible". Mr Wallace was also informed that "if the US was left to deal with these individuals, the outcome could not be predicted. There were strong voices arguing for Guantanamo. The more restrictions the UK attached to support, the harder it would be to avoid that outcome."

15. On 25 April 2018, Mr Sessions gave evidence at a Senate panel hearing. He said "I have been disappointed, frankly, that the British…are not willing to try the cases but intend to tell us how to try them…and they have certain evidence we need…" He also indicated that he was supportive of sending Mr El Sheikh and Mr Kotey to Guantanamo.

16. On 30 April 2018, The Rt Hon. Sajid Javid MP became Home Secretary. Four days later, he spoke to Mr Sessions. Mr Sessions indicated that he was concerned that the UK had said it was not interested in prosecuting Mr El Sheikh, that the death penalty should not be an issue for the UK and that he did not want the UK to tie his hands in relation to the use of material.

17. On 15 May 2018, the British Embassy in Washington was asked about the "likely response from the US Administration if the UK were to seek full or partial assurances on the death penalty" and, in particular, whether the request for such assurances

would be critical in Mr Sessions' decision whether or not to prosecute in the US. In answer to the specific question "What if we ask for death penalty assurances?" the Ambassador provided the following response:

> "…parts of the US machinery - notably career DOJ officials - would not be surprised if we asked for death penalty assurances. It is what they expect of us. But that doesn't go for the senior political levels of this administration: Cabinet Secretaries like Sessions, Mattis and Pompeo, and senior political appointees in their departments. Their reaction is likely to be something close to outrage. They already feel that we are dumping on them a problem for which we should take responsibility. They have been signalling to us for weeks now that we are in no position to attach any conditions to this. At best they will think we have tin ears. At worst, they will wind the President up to complain to the PM and, potentially, to hold a grudge. We might argue that the UK position on this is well known and that we were simply behaving in a way consistent with our long-term policy. There might be some understanding of this. But I have to warn that there might also be some damage to the bilateral relationship."

18. The Ambassador considered whether seeking death penalty assurances would prompt the US not to pursue prosecution and said that "our judgement would be that it might. Some US officials have said as much to us. And it would point the way towards transfer to Guantanamo."

19. UKCA provided a submission to ministers on 18 May. Their recommendation was that the Secretary of State should maintain his predecessor's decision to accede to the request for MLA subject to provision of a "full" death penalty assurance. In the course of that submission, UKCA indicated their assessment that "…there is a serious risk (ie. real possibility) that providing assistance might directly or significantly contribute to the death penalty…". They referred to the Foreign and Commonwealth Office recommendation that:

> "…HMG seeks a comprehensive assurance that the suspects will not be subject to the death penalty. This is critical to the consistency with which we apply HMG's policy on Overseas Security and Justice Assistance …Were we not to apply this practice to this case, it could undermine all future efforts to secure effective written death penalty assurances from the US authorities for future UK security and justice assistance. The exception made for the US in this case could also undermine future attempts to secure similar assurances from other countries with which we have a security relationship… particularly if it seems likely that there is litigation which leads to the disclosure of the level of assurance. It could leave HMG open to accusations of western hypocrisy and double standards which would undermine HMG's Death Penalty Policy globally, including in the US."

20. In a Home Office note dated 24 May 2018, Home Office officials considered what assurances should be sought from the US. The Director, Home Office International, noted that:

> "Although it clearly runs the risk of creating a precedent for the future with other countries, taken in the round I am comfortable that proceeding with no assurances is appropriate in securing justice for the families; notwithstanding the fact that we understand the families wish to avoid application of the death penalty".

21. Mr Biggar advised that "…the best chance of achieving our aim of a prosecution (and protecting the US relationship) comes from being prepared to seek no assurances on the death penalty". He went on to observe that:

> "Departing from HMG's normal policy position would clearly be a big step, with legal, policy and presentational risk, but the UKSA's submission provides strong reasons for making an exception and justifying it in court and public, if we need to. We may not need to: we are working with the US DOJ to see if they would be prepared to volunteer… (a 'direct use' rather than full assurance). So I would recommend being prepared to accept no assurances, but test whether they would accept a direct use assurance."

22. The Options Analysis with the note included:

> "It is possible under [overseas security and justice assistance] to proceed without a full DP assurance, where HMG either cannot obtain one or decides not to require one. We could clarify whether the "direct use" DP assurance previously offered is still available and, in the event that it is, notify the US that we accept it and provide the evidence on this basis. Such an assurance does not completely remove the risk of the assistance contributing to the imposition of the death penalty, although proceeding on this basis it would carry less risk."

23. It also noted that "The possibility of them being sent to [Guantanamo Bay] is present in all options, the assumption is the probability decreases marginally compared with option 1 with the Direct Use assurance".

24. On 24 May 2018, the Security Minister notified Home Office officials that his "final position" was to make a "…strong recommendation, in this exceptional case, that HMG does NOT seek assurances (either 'full or direct use') around the death penalty, when sharing evidence for a Federal Prosecution only". The Home Secretary's private secretary confirmed on 29 May that both ministers had concluded that no assurances should be sought from the US.

25. The Home Secretary met Mr Sessions on 30 May. Mr Sessions raised the issue of "the Beatles" and repeated the view that the US should not be left to assume responsibility for other nations' terrorist fighters. Mr Biggar explains that he said that "on the one hand, the UK had evidence which the US could use, but on the other hand, they

objected to Guantanamo and the death penalty which left the US in a difficult position". Mr Sessions said that "if the US were to be willing to try El Sheikh in a civilian court as opposed to a military one, he could not see how the US could do that without the UK evidence or without recourse to the death penalty."

26. Mr Biggar summarises the effect of this meeting, in his witness statement:

> "It became clear to the Home Secretary during the course of that meeting that the position of the US remained unchanged and that there was no prospect of the Attorney General offering any form of undertaking whatsoever. He assessed that, if he asked for assurances (whether full or partial), it was likely to prompt the sort of outrage he'd been advised of, and would damage the prospects of a US criminal prosecution. He judged that the question of assurances was critical as to whether Attorney General Sessions consented in due course to such a prosecution. Into his calculation about pressing the assurances point during the meeting, he also considered the wider UK government interests at stake, including co-operation on security issues and potential damage to the bilateral relationship".

The conclusion was that no request would be made for death penalty assurances, but the Home Secretary made clear that the UK could not provide material to be used in a military court or any process at Guantanamo.

27. In a submission dated 31 May 2018 to the Foreign Secretary, the Foreign Office identified three options. First, to seek a full death penalty assurance. Secondly, to seek a partial death penalty assurance; and thirdly to seek no assurance. The advice to the Foreign Secretary, reflecting long-standing policy, was to urge the Home Secretary to seek a full assurance. Seeking comprehensive assurances was consistent with the general expectations set out in UK policy on overseas security and justice assistance and with all past practice when dealing with US MLA requests. The submission recognised in respect of sharing information without assurances that:

> "…this option provides the greatest chance that the US will pursue a federal prosecution. A successful prosecution will serve as a deterrent to others and give the public confidence in our ability to see justice served. However, there are wider national security risks if the prosecution results in an execution as this could be used by radicalisers in the UK."

28. The Home Secretary wrote to the Foreign Secretary on 11 June. He stated his conclusion that "significant attempts having been made to seek full assurance, it is now right to accede to the MLA request without assurance." The letter went on:

> "I acknowledge that in sharing evidence without any assurance at all, there is a serious risk that the individuals concerned, will if prosecuted and convicted, face execution as a direct result of UK assistance in this matter. In my view, this risk, and the related wider implications for the UK's death penalty policy,

> are outweighed by the risks associated with no prosecution being brought in this case if UK evidence is not shared.
>
> I have acknowledged… that a US prosecution would be reliant on UK held evidence and without the ability to prosecute the two in the US, the US may mitigate the risk to its citizens by moving them to [Guantanamo Bay] thereby removing the possibility of being prosecuted through the federal, criminal, justice system and, as a consequence, opening up the UK to criticism for our inaction.
>
> I consider that it is in the interests of justice…to tackle foreign terrorist fighters…and that the most likely pathway to achieving justice is through a trial in the US..."

29. He continued:

> "I have received advice that key US political appointees may react with outrage at being asked for a death penalty assurance given the UK is not itself able to pursue prosecution. This could precipitate the removal of Kotey and El-Sheikh from detention in Syria to [Guantanamo Bay] which would put them out of reach of a criminal prosecution."

30. The Foreign Secretary replied on 20 June 2018. His reply included the following:

> "…I am a strong advocate for abolishing the death penalty and the UK's role in pursuing this globally. However, as with so much in relation to the fight against Daesh, we find ourselves in an unprecedented and unique position. For the reasons I set out below, I am content you can take a decision to provide assistance in this case for a federal prosecution in the United States without seeking assurances…
>
> The UK has an international obligation to assist in bringing foreign terrorist fighters to justice…Given the nature and seriousness of the possible offences the fact that some of their alleged victims were British citizens, a successful prosecution and commensurate sentences is particularly desirable in order to provide a strong deterrent signal to others and ensure justice for victims' families.
>
> Having considered all available material, it has been determined that a US federal prosecution represents the best opportunity to secure the criminal conviction of these two individuals. We understand that a US federal prosecution would be reliant on UK material for a successful prosecution. In the event that neither the UK nor the US are able to prosecute these two individuals, it is possible they may be released. As well as failing to provide a deterrent, their liberty

> would present a security risk to both the UK and the world and may act as a focal point for further extremist activity."

31. The Foreign Secretary referred to the possibility of the US seeking the transfer of El Sheikh and Kotey to Guantanamo Bay. He explained the UK's long-standing opposition to Guantanamo. He referred to the potential impact on the UK being perceived as failing to co-operate with the US and to the Ambassador's report that this issue has caused strain within the security relationship with the US. He said that "Seeking assurances in this case (which includes confirming the status of the assurances offered in 2015) may additionally adversely impact on a decision by the US to seek to prosecute these two individuals in the federal courts".

32. The letter concludes:

> "Set against all of these factors is the serious risk that providing the assistance would directly or significantly contribute to the imposition of the death penalty…I assess that not seeking assurances presents a risk of damaging our ability to secure adequate assurances from the US and other countries in future…
>
> Furthermore, because of our stance on the death penalty there is a wider reputational and political risk that would arise from executions in these cases following UK assistance. There is also a national security risk whereby there may be reprisals by extremists against British citizens at home and abroad, should the men be executed.
>
> On a balanced assessment of the key risks outlined above, I agree that as this is a unique and unprecedented case, it is in the UK national security interests to accede to an MLA request for a criminal prosecution without death penalty assurances for Kotey and El Sheikh."

33. The Home Secretary set out his decision on this issue in a letter to the US Attorney General on 22 June 2018. He concluded by saying that:

> "We are therefore committed to assisting the US with a federal prosecution of Alexanda Kotey and Shafee El-Sheikh, and after careful consideration I have decided to accede to your current request for mutual legal assistance…All assistance and materials will be provided on the condition that it may only be used for the purpose sought in that request, namely a federal criminal investigation or prosecution. Furthermore, I am of the view that there are strong reasons for not requiring a death penalty assurance in this specific case, so no such assurances will be sought…"

34. A large number of witness statements was then supplied to the US authorities. That does not make this claim for judicial review academic. Further material may yet be provided to the US and an assurance could attach to that. Moreover, the UK could

decline to permit witnesses employed by the state, such as police officers, to travel to the US to give evidence without adequate assurances.

35. On 23 July 2018, the Daily Telegraph published a leaked copy of the Home Secretary's letter to Mr Sessions. The following day, the claimant's solicitor wrote to the Home Secretary notifying him of her intention to issue these proceedings. She also sought an undertaking which was agreed in the following terms:

> "no further material will be provided to the US Government pursuant to any request for mutual legal assistance relating to Mr El Sheik or Mr Kotey until determination of this claim at first instance, or further order of the court, or by agreement between the parties""

Evidence and Argument

36. The claimant provided a witness statement of her own and statements from her neighbour, Dawn Morris, which spoke to the effect of the decision on Ms El Gizouli, and from her solicitor, Ms Gareth Peirce. She adduced a report by Professor Jeffrey Fagan on execution methods in the United States. In addition, we received a witness statement from Harriet McCulloch, the Deputy Director of Casework at Reprieve, an organisation which campaigns for the abolition of the death penalty. We granted permission to Reprieve to intervene by serving this statement.

37. The Defendant relied on the witness statement of Graeme Biggar to which we have already referred.

38. The parties provided lengthy and detailed grounds and skeleton arguments in support of their contentions. We also received speaking notes from the claimant's counsel, Mr Edward Fitzgerald QC, who made submissions in support of Grounds 1-3, and Mr Richard Hermer QC, who dealt with Grounds 4 and 5. Following the hearing, we received a note from the claimant's legal team on the EU Guidelines on the Death Penalty and on events post-dating the hearing, and from the Home Secretary's team on the 2018 Act.

39. We have considered all this material.

Ground 1 – Illegality and breach of the Rule of Law

The competing submissions

40. Mr Fitzgerald submits that the decision to provide MLA to the US without a death penalty assurance is unlawful. He accepts that the Secretary of State has a discretionary power under the prerogative to provide MLA. Relying on *ex parte Simms* [2000] 2 AC 115 and *ex parte Pierson* [1998] AC 539, he submits that the exercise of prerogative powers must accord with the common law and with fundamental principles of justice and the rule of law. He says that that is particularly so where the death penalty is in issue.

41. Mr Fitzgerald argues that to provide assistance to the US without a death penalty assurance is unlawful because it involves the UK government in facilitating, and

substantially contributing to, the imposition of the death penalty. He says the death penalty is a cruel and unusual punishment - both in general, and in its specific manner of application in the United States. To facilitate such an act is to breach fundamental principles of justice and the rule of law, including international law.

42. Sir James Eadie QC, for the Home Secretary, submits that the primary common law right relied upon (a right to prevent the provision of MLA in foreign proceedings which may result in the imposition of the death penalty) does not exist, and that the claimant has not demonstrated how the common law provides her son with any domestically enforceable rights.

43. He argues that, aside from those established categories of case in which a duty of care is imposed, there is no general common law duty on the Home Secretary to take steps to protect an individual's life from the actions of a third party. There is no recognised common law prohibition on the provision of MLA in circumstances in which such assistance might be used in proceedings leading to the death penalty in a foreign state.

44. Sir James submits there is no support, as a matter of international or comparative law or in the jurisprudence of the European Court of Human Rights ("the Strasbourg Court"), for the existence of an obligation not to provide MLA to another state unless there are death penalty assurances in place, still less where the person who may be subject to criminal investigation/charges in the other state is outside the jurisdiction of the providing state. He submits that there is no support for the more general proposition that the imposition of the death penalty (or the imposition of the death penalty in the US) would be a breach of international law.

45. He submits that the limit of the public law duty applicable is the obligation on the Secretary of State, having proper regard to any relevant policy, to consider and make a rational decision whether to provide, without death penalty assurances, the MLA sought; and that he did.

Discussion

46. Mr Fitzgerald acknowledges that there is no precedent for an order of the sort he seeks. To make good his first ground he needs to demonstrate first that the provision of MLA to the US in this case amounts to facilitating the death penalty and second that such "facilitation" is unlawful under English law.

47. The first aspect is common ground. It was accepted both by the Home Secretary in his letter of 11 June 2018 and the Foreign Secretary in his of 20 June that the evidence held by the UK is of importance to a successful prosecution in the US federal courts. Its provision would make possible a prosecution in the US federal courts. It would facilitat the commencement and prosecution of proceedings in the US which could result in the imposition of the death penalty.

48. Mr Fitzgerald seeks to make good the second part of his submission by way of a series of interrelated arguments. He contends, first, that the principle of legality operates to require express statutory authorisation for the exercise of a prerogative in a manner that conflicts with fundamental rights. Secondly, he argues that the common law has adopted and expanded upon the jurisprudence of the Strasbourg Court to the point where it prohibits the provision of MLA in such circumstances.

Thirdly, he says that the use of the death penalty in circumstances such as those that can be envisaged in this case is unlawful under international law and that assisting in the imposition of an internationally wrongful act is itself contrary to customary international law.

49. We address those points in turn. But we deal first with the nature of this challenge.

Challenge in public law

50. Mr Fitzgerald accepts that the Home Secretary was exercising a prerogative power and does not suggest any procedural impropriety or error. The decision was one within the discretion of the Home Secretary, in respect of which he argues that "there are relevant and established principles of law that should *guide the exercise of the discretion.*" Those principles, he submits, include a common law principle that the death penalty is a cruel, inhuman or degrading punishment *per se*, that significant delays in the execution of a sentence of death are cruel, inhuman and degrading, that conditions of detention on death row, and in particular solitary confinement, may also independently render a death sentence cruel, inhuman and degrading. So too if the manner of execution involves infliction of unnecessary suffering that would qualify as cruel and inhuman treatment. Against that background, he contends that it is an unlawful exercise of public power to impose, or knowingly and directly to facilitate, the imposition of a punishment that is cruel, inhuman and degrading.

51. If these are indeed principles which, as Mr Fitzgerald puts it, "guide" the exercise of a discretion, they do not provide a hard-edged rule prohibiting the use of MLA in the case of an individual facing a capital offence in the US. Instead they amount to considerations to which the Secretary of State must have regard in exercising his power. The lawfulness of the decision is determined by whether he did indeed have regard to these matters, and having done so whether the decision is rational in public law terms.

52. MLA is, as Sir James contends, a "classic example" of conduct of foreign affairs by the Executive. The Courts recognise the institutional competence of the Executive in the exercise of foreign affairs. To adopt what was said in *Akarcay v Chief Constable of the West Yorkshire Police, Secretary of State for the Home Department, National Crime Agency* [2017] EWHC 159 (Admin):

> "The conduct of international affairs is a paradigm example of an area in which the courts recognise the institutional competency of the executive."

53. The decision we are concerned with was underpinned by assessments of the UK's relationship with the US and the wider impact of the decision on bilateral relations.

Principle of legality

54. The starting point of the claimant's case in her Statement of Grounds is the principle of legality. She contends that the lawfulness of an exercise of prerogative power must be tested by reference to that principle. The exercise of prerogative powers falls within the ambit of judicial review but the ordinary principle of legality was fashioned for a different purpose. The principle of legality is deployed as a technique of

statutory construction. It depends on there being in existence a relevant fundamental right and operates to require express wording if such rights are to be overridden by statutory provisions.

55. The classic description of the principle of legality is found in the speech of Lord Hoffmann in *ex parte Simms* [2000] 2 AC 115 at 131

> "…I add only a few words of my own about the importance of the principle of legality in a constitution which, like ours, acknowledges the sovereignty of Parliament.
>
> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

56. In *Al-Saadoon* [2017] 2 WLR 219 Lloyd Jones LJ (as he then was) said at [198]:

> "198. (T)he principle of legality is a principle of statutory interpretation. In the absence of express language or necessary implication to the contrary, general words in legislation must be construed compatibly with fundamental human rights because Parliament cannot be taken to have intended by using general words to override such rights. (See, for example, *Ex parte Simms* [2000] 2 AC 115 at [131]; *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 at [111]-[112]; *Axa General Insurance Ltd and others v HM Advocate and others* [2012] 1 AC 86*8*; G*uardian News and Media Ltd v City of Westminster Magistrates' Court* [2013] QB 618 ; *Evans v Attorney General* [2015] AC 1787.) Once again, the judge in the present case expressed the matter with total clarity when he observed (at [269]) that "the principle of legality … is a principle of statutory interpretation, not a broad principle as to how the courts should develop the common law."

57. We respectfully agree with that analysis. Here, the Home Secretary exercised a prerogative, not a statutory, power and, in our judgment, the principle of legality has no application. Under this ground the claimant must, in our view, demonstrate that the decision to provide MLA was made in breach of domestic law, which might include international law that is part of domestic law.

ECHR and the development of the common law

58. Mr Fitzgerald accepts that there is no domestic or Strasbourg authority (or authority in any common law jurisdiction) for the proposition that it is unlawful to provide MLA in circumstances like the present. But he argues that the common law has evolved to the point where it prohibits the Government taking such a step. That evolution, he argues, flows first from a development of the common law which is the parallel of that recognised by the Strasbourg Court and second from a consideration of customary international law.

59. He acknowledges that the claimant's son is presently held in Syria, outside the jurisdiction of this court. He accepts that the ECHR has no direct application to him. The ambit of the Convention is essentially territorial (*Bankovic v Belgium* (2007) 44 EHRR SE5). Mr Fitzgerald accepts that the limited exceptions to the territorial reach of the convention and the Human Rights Act 1998 do not stretch as far as Mr El Sheikh. But he argues that the common law is not bound by the same jurisdictional limits as the ECHR.

60. It is common ground that the ECHR prohibition against subjecting an individual to the death penalty, and against removing an individual where there are substantial grounds for believing that the individual would face a real risk of being sentenced to death and executed, applies only to persons who are within the jurisdiction of the UK (*Soering v UK* (1989) 11 E.H.R.R. 439; *Al-Saadoon v United Kingdom* (2010) 51 E.H.R.R.9). But the claimant suggests that the common law is not so limited. He says that the principle which underlay the Strasbourg Court's decision in *Soering* is that the decision of the UK to deport or remove the applicant to the US would facilitate the objectionable outcome.

61. In that regard, he refers to the decision in *Al-Saadoon* where the Strasbourg Court identified the underlying rationale of the prohibition on extradition or expulsion from a Contracting State to face the death penalty in a non-Contracting State. At [124] the Court endorsed the principle that liability is incurred by a Contracting State "by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment".

62. The Supreme Court considered the issue in *R (Ismail) v Secretary of State for the Home Department* [2016] 1 WLR 2814. At [35] Lord Kerr explained that the outcome in *Soering* was based squarely on the UK's facilitation of inhuman and degrading treatment by the US:

> "It was because the actions of the UK authorities … facilitated that outcome that a violation of article 3 was held to be present. In effect, the UK would have been directly instrumental in exposing Soering to the risk of being executed."

63. Similarly, in *Mohamed v President of the Republic of South Africa* [2001] ZACC 18, the Constitutional Court of South Africa identified a principle of non-complicity as a justification for the refusal to extradite without a death penalty assurance:

> "For the South African Government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he has no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the right to life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment."

64. Mr Fitzgerald suggests that once the underlying principle of non-facilitation is identified as valid, its application need not be limited to cases where the mode of facilitation is dependent on the presence of the individual in the jurisdiction.

65. But we do not accept that the argument is sound. It involves two fundamental expansions of the principles identified in *Soering* and *Al Saadoon.* First, the Strasbourg Court has not extended the "non-facilitation principle" beyond cases involving extradition to face the death penalty in a foreign state. It is entirely consistent with its approach to removals, whether for extradition or immigration law purposes, to a country where the persons concerned face a real risk of torture or inhuman treatment. The claimant's case would require such an extension. It is not, to our minds, a small step but an extension of a large moment which has not been recognised, so far as the researches of the parties have revealed, anywhere.

66. Secondly, the argument involves the extension of the non-facilitation principle to those altogether outside the protection of the ECHR. Through the mechanism of the 1998 Act Parliament legislated to provide the direct protection of the ECHR to those within the jurisdiction for the purposes of article 1 ECHR. It is well-recognised that the courts are careful not to develop the common law in a way that undermines or alters arrangements established by statute: see e.g. *R v Chief Constable of the Royal Ulster Constabulary Ex p. Begley* [1997] 1 W.L.R. 1475 per Lord Browne Wilkinson at p. 1480:

> "It is true that the House has a power to develop the law. But it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament."

67. That principle applies as much to the 1998 Act as to any other statutory provision. The incorporation of the ECHR includes the limitations and qualifications inherent in the Strasbourg jurisprudence. We do not think it appropriate for the courts, under the guise of common law development, to disregard those limitations and qualifications and set the boundaries elsewhere. In particular, the courts have declined to extend ECHR rights, in the context of the imposition of the death penalty, to encompass either British citizens abroad or foreign citizens challenging government action here.

68. In *R (Sandiford) v Foreign Secretary* [2014] 1 WLR 2697 the Supreme Court was concerned with a case in which the appellant had been sentenced to death by a court in Indonesia following her conviction for drug trafficking. She had appealed unsuccessfully to the Indonesian Supreme Court. The only legal options available to her to avoid execution were an application to that Supreme Court to re-open her case, and an application to the President for clemency. She needed legal representation to pursue those options. The UK government declined to pay for such representation, relying on its blanket policy in relation to British nationals facing criminal proceedings abroad.

69. At [23] Lord Carnwath and Lord Mance said:

> "The United Kingdom has no territorial jurisdiction over Mrs Sandiford in prison in Indonesia. But the United Kingdom could, in one way or another, provide her with funds for her legal proceedings in Indonesia. It could on the face of it do so without using any diplomatic or consular agents, by providing funds here which could then be remitted to Indonesia. However, there is no general Convention principle that the United Kingdom should take steps within the jurisdiction to avoid exposing persons, even United Kingdom citizens, to injury to rights which they would have if the Convention applied abroad. The principle recognised in cases like *Soering v United Kingdom* (1989) 11 EHRR 439 only applies where the United Kingdom is proposing a step such as the surrender or removal from the jurisdiction of a person which may lead to infringement of that person's Convention rights abroad."

70. In *R (on the application of Zagorski) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin) the claimants were two US prisoners who had been on death row respectively in Tennessee since 1984, and Kentucky since 1994. Executions in those states were carried out by lethal injection, including sodium thiopental. There was a shortage of sodium thiopental in the US. In the face of information that individual US States might seek to replenish their stock of the drug from the UK, the claimants asked the Secretary of State to impose an export ban under the Export Control Act 2002. They argued that, given the length of time that the claimants had spent under sentence of death, their execution would constitute a breach of their human rights. The Secretary of State refused to make an export control order and the claimants sought judicial review of that decision on grounds, *inter alia*, that it was a breach of the common law protection of fundamental rights and the principle of legality. The Court refused the claimants relief.

71. Lloyd Jones J (as he then was) said this:

> "80. I require no persuading that the common law can act to protect human rights quite independently of the Human Rights Act 1998. However, the extent of such protection and the relationship of the common law to the statutory rights conferred by the Human Rights Act require careful consideration. For example, beyond the established categories of case where a duty of care is imposed, there is no general, common law duty

> on Her Majesty's Government to take positive steps to protect an individual's life from the actions of a third party. The common law has shown a reluctance to remedy apparent lacunae in the ECHR regime."

72. He continued by citing *In Re McKerr* [2004] 1 WLR 807 where the House of Lords held that the adjectival obligation under article 2 ECHR to investigate certain deaths did not apply as a matter of domestic law to deaths occurring before the commencement of the 1998 Act. The claimants had argued that an equivalent and hitherto unrecognised common law obligation, stretching back for decades, should nonetheless be acknowledged. But Lord Nicholls at [32] considered that such a common law right could not sit with the right created by Parliament.

73. Lloyd Jones J concluded at [81] that it was not for the common law to circumvent the limits established by the 1998 Act, whether jurisdictional or temporal.

74. Mr Fitzgerald recognises that *Sandiford* and *Zagorski* present obstacles to the recognition of the common law duty he seeks to establish. But he submits that they are distinguishable because, in each case, the court held that there was no common law duty to take a positive step, respectively the provision of financial assistance for legal expenses and the imposition of an export control order, which might avoid the claimants' execution. By contrast, in the present case we are being asked to hold that the common law imposes a negative duty not to provide MLA.

75. The suggestion that there is a sharp distinction between imposing a duty to take a positive step and a duty to refrain from taking a step, is a superficially attractive one but often difficult to justify in theory and still more apply in practice. The duty in the present case might be characterised as a failure to take a positive step, namely of requiring an undertaking not to permit the death penalty. In fact, that is the burden of the claimant's argument here. She does not say that it is unlawful to provide MLA to the US but that it is unlawful to do so save on conditions. We consider that the analysis in *Zagorski* is applicable; there is no general, common law duty on Her Majesty's Government to take positive steps to protect an individual's life from the actions of a third party and that includes requiring particular undertakings before complying with an MLA request.

76. Accordingly, the argument that the common law has evolved to recognise rights and duties set out in the ECHR and the 1998 Act, but without the limitations expressed therein, does not avail the claimant.

77. We would add that when the courts develop the common law they do so carefully, incrementally and with caution in controversial areas. The argument that the court should recognise a free-standing common law duty on the Government not knowingly to facilitate or contribute to the imposition of an inhuman punishment through the exercise of its formal powers, would create an obligation of potentially wide and uncertain reach. As Sir James points out, attempting to formulate the principle for which Mr Fitzgerald contends prompts numerous questions: what degree of causal connection between the facilitating act and the ill-treatment would be required? What type of ill-treatment would suffice? If provision of evidence pursuant to an MLA request was caught, would intelligence material also be caught? The difficulty in providing precise answers to those rhetorical questions serves to underline the

objection to the development of the sort of broad new principle for which the claimant argues.

Customary International Law

78. Does customary international law require the development of the common law in the manner for which the claimant contends?

79. Mr Fitzgerald acknowledges that international law recognises that the imposition of the death penalty may, at least in certain circumstances, be compatible with the right to life. The right to life is guaranteed by article 2 ECHR, article 6 of the International Covenant on Civil and Political Rights (the "ICCPR") which also recognises the continued use of the death penalty and article 4 of the American Convention on Human Rights. But he submits that whilst the death penalty may not violate the right to life, it does violate the prohibition on cruel or inhuman punishment found in those treaties and elsewhere in international law.

80. He points to the terms of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT"). He relies on article 16 which provides that:

> "1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.
>
> 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion."

81. The claimant relies on the evidence of Professor Fagan. He says that, if convicted and sentenced to death, Mr El Sheikh faces the prospect of lengthy detention, in harsh conditions, on federal death row, where the average period of detention pending execution is 12½ years. He explains that execution will be by lethal injection, which creates a "substantial risk of extraordinary and intolerable pain and suffering", and a "tortuous, gruesome and disfiguring execution". There is a high risk, he says, of a "botched" execution which involves prolonged and excruciating pain. In effect, he argues, the suspects risk being exposed to experimentation by unqualified and unskilled executioners.

82. Mr Fitzgerald argues that the death penalty generally, or at any rate the death penalty regime that applies in the US, constitutes cruel, inhuman and degrading treatment for the purposes of article 16 of UNCAT. To aid or assist another state in committing an internationally wrongful act is prohibited under customary international law.

Therefore, complicity in such serious mistreatment is contrary to customary international law.

83. We cannot accept that argument.

84. There is no warrant for interpreting article 16 of UNCAT as prohibiting the death penalty on the basis that of necessity it amounts in itself to cruel or inhuman punishment. The death penalty remains too widespread around the world to make credible a submission that customary international law treats the death penalty *per se* as a cruel or inhuman punishment. The real issues are first whether the death penalty as enforced in the US can be said to amount to cruel or inhuman punishment, and secondly, whether international law precludes the provision of mutual legal assistance in proceedings in which an individual might face the death penalty.

85. Sir James took us to two US authorities which considered directly the legality of lethal injection as a method of execution, by reference to the constitutional provision which is reflected in article 16 of UNCAT and article 3 ECHR. In *Baze v Rees* 553 U.S.35 (2008) and *Glossip v Gross* 135 S.ct. 2726 (2015), the US Supreme Court ruled that lethal injection does not amount to a violation of the Eighth Amendment which prohibits cruel and unusual punishment. In *Baze v Rees*, it was accepted that, properly carried out, it would be "humane and constitutional". The US Supreme Court noted that the method adopted by Kentucky was believed by it to be the most humane available (a view shared by 35 other States). The risk of maladministration could not remotely be characterized as "objectively intolerable." By contrast, Mr Fitzgerald showed us no international law authority for the proposition that the use of lethal injection is contrary to international norms or is to be regarded as cruel and inhumane.

86. There is undoubtedly support in international jurisprudence for the contention that prolonged delay in carrying out a sentence of death may be unlawful. For example, in *Pratt v AG of Jamaica* [1994] 2 AC 1, the Privy Council held that section 17(2) of the Jamaican Constitution authorised the death penalty but that did not prevent the court investigating the circumstances in which the executive intended to carry out the sentence. It held that execution should take place as soon as reasonably practicable after sentence; to carry out executions after a delay of 14 years would constitute inhuman punishment contrary to section 17 (1) of the Constitution. But that case turned on the construction of the Jamaican Constitution. It did not establish a rule of the common law, either in Jamaica or generally, that particular periods of delay made the enforcement of the death penalty unlawful.

87. In the result, we are unpersuaded that the execution of a death sentence is contrary to customary international law or that the lethal injection method used in the US or other features of its system can be said to violate international law.

88. Does international law have anything to say about providing MLA to states which retain the death penalty? We have been unable to find any support for the assertion that international law precludes the provision of MLA in proceedings in which an individual might face the death penalty. For example, article 11(1) of the *Agreement between the European Union and Japan on mutual legal assistance in criminal matters* ("EU-Japan MLA Agreement") provides that assistance may be refused if the requested State considers that:

> "(b) the execution of a request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests. For the purpose of this subparagraph, the requested State may consider that the execution of a request concerning an offence punishable by death under the laws of the requesting State … could prejudice essential interests of the requested State, unless the requested State and the requesting State agree on the conditions under which the request can be executed;"

89. It is apparent from the terms of that provision that the existence of the death penalty in Japan is treated as a discretionary, rather than a mandatory, ground for the refusal of assistance. We were shown no international instrument that necessarily precluded MLA in such circumstances.

90. In our judgment the claimant's case on customary international law falls at the first hurdle. There is no warrant for concluding that customary international law (a) prohibits the use of the death penalty; (b) renders features of the US regime contrary to international law; or (c) requires a state to decline to provide MLA in the circumstances of this claim. It is unnecessary to explore what the implications for domestic law would be had the conclusion on any of those matters been different. But we note Sir James' arguments that article 16 of UNCAT, to the extent that it is relied upon, is not part of English law. It has never been incorporated. Further, in an environment where the 1998 Act, applying the ECHR, governs the circumstances in of a person's removal to a non-convention country to face trial, it would be wrong for the common law to develop a parallel jurisprudence. He relied upon *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2016] AC 1355 and the observations of Lord Neuberger at [117]-[118]. It is sufficient to note that there is strength in the argument that such a far-reaching development of the common law, even by reference to customary international law, would be a bold step, particularly in an area touching international relations.

91. It follows that the argument that customary international law has shaped the common law in the manner contended for by Mr Fitzgerald must fail.

92. Finally, Mr Fitzgerald submits that the common law has developed domestically to recognise that the imposition of the death penalty is a cruel, inhuman or degrading punishment *per se.* Failing which he submits that significant delays in the execution of a sentence of death, or conditions of detention on death row, or that any manner of execution that involves infliction of unnecessary suffering may render a death sentence cruel, inhuman and degrading.

93. We note that in *Sandiford* Lord Dyson expressed his view that the Government was right to regard the death penalty as "immoral and unacceptable". But that did not lead him to find that the Secretary of State's policy of not providing funding for legal representation to a British national facing capital charges abroad was unlawful. Nor did it lead the court to express any view as to whether the death penalty should be regarded as a cruel or inhuman punishment for the purposes of the common law.

94. The occasion for English common law to do so has never arisen. The death penalty was abolished in Great Britain by the Murder (Abolition of the Death Penalty) Act 1965 and in Northern Ireland by the Northern Ireland (Emergency Provisions) Act

1973. It was by Act of Parliament that the death penalty was abolished, not developments of the common law. Since then the UK has ratified Protocol 13 ECHR abolishing the death penalty which binds us to that position in international law. Given that Parliament legislated to bring the use of the death penalty to an end, there was no room for the common law to develop domestically to achieve a similar end. Nor would it have been appropriate to do so in such a politically contentious area. Although the Privy Council has considered many death penalty cases it has never suggested that the common law applicable in the jurisdictions has developed in the way suggested by the claimant. As we have noted the consideration by the Privy Council of death penalty issues has been in the context of domestic constitutions and laws.

95. Similarly, the common law has never formulated a test for what constitutes cruel and unusual punishment in the means of execution, because Parliament had already made execution in any circumstances unlawful. The development of the law in the context of what amounts to cruel and inhuman treatment has been exclusively through the workings of article 3 ECHR and the 1998 Act. We have no difficulty in accepting that judgments must be made in removal cases of what amounts to treatment serious enough to breach the standards of article 3. But those, if they arise, are adjudicated by the standards of the ECHR, not the common law.

96. For all those reasons, we reject the Claimant's first ground of challenge.

Ground 2 Errors of law disclosed in the Decision letter

The competing submissions

97. Mr Fitzgerald submits that the decision was flawed by four errors in the letter of 20 June 2018.

    i) The Home Secretary irrationally disregarded the previous partial assurance volunteered by the US.

    ii) He failed to have regard to specific features of the death penalty regime in the US.

    iii) The Home Secretary's reliance on avoiding risk of detention in Guantanamo was irrational in the absence of an express assurance to that effect.

    iv) There was insufficient regard to the inconsistency between his decision and the UK's longstanding opposition to the death penalty.

98. In response Sir James argues:

    i) That to assert that the Home Secretary disregarded the previous partial assurance is to mischaracterise his approach to the partial assurance. Instead detailed consideration was given to the potential effect of pursuing any form of assurance.

ii) This part of the assessment requires that consideration be given to the mitigation of risks. That was done under cover of the 18 May 2018 submission (see paragraph 19 above).

iii) The best the Home Secretary could do was to provide the evidence which would make prosecution, as opposed to transfer to Guantanamo, more likely, and to do so on condition that the evidence could not be used, in any event, for the purpose of detention or a military commission in Guantanamo.

iv) The policy permits the provision of assistance absent a death penalty assurance despite the UK's policy of opposing the death penalty.

Discussion

99. There are areas of discretionary judgement in which the Courts tread especially carefully in judicial review proceedings. Decisions under the Royal Prerogative fall within the scope of review but a recognition of the institutional competency of the executive, and due regard to the separation of powers, leads to restraint on the part of the courts. For example, in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p.398, Lord Fraser referred to:

> "many of the most important prerogative powers concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the Law Courts".

100. Challenges to decisions arising out of the conduct of foreign affairs are not now uncommon. The basis of those challenges is often the ECHR. It is common ground that Mr El Sheikh is not within the jurisdiction of the ECHR and cannot pray in aid its direct application. We shall return to whether the claimant can directly rely on the ECHR. But given the fundamental rights in issue, Sir James does not suggest the decision here is not justiciable.

101. Nonetheless, the nature and context of the decision-making under challenge is important. The decision whether or not to offer MLA, and if so on what terms, is a matter of some diplomatic and political significance. It bears on the relationship between the UK and one of its most important strategic allies, with potential significance for national security and future relations between the UK and the US, and elsewhere. The character of the decision is also significant. It involves matters of assessment, prediction and judgement in an environment unfamiliar to judicial decision-making. Absent a hard-edged rule which precludes the provision of MLA in these circumstances, an appeal to broader public law principles faces an uphill struggle.

102. Sir James refers to the judgment of Lord Sumption in *R (Carlile) v Foreign Secretary* [2015] AC 945 at [32] and submits that "even where ECHR rights are engaged, very considerable respect is accorded to judgements and assessments in the foreign relations field, including specifically in relation to the possible reactions of foreign governments". In our view, that is correct.

Partial assurances

103. Partial assurances had been offered by the US in March 2016 but not then accepted. After Mr El Sheikh had been apprehended, the question whether that offer remained open, or should be pressed for, fell to be reconsidered. There was a new US administration with different people, policies and preferences in place. The President had decided to keep open the detention facilities at Guantanamo Bay and to permit additional detainees to be sent there. The US had made clear a strong reluctance to become responsible for foreign fighters detained in Syria or Iraq.

104. Mr Fitzgerald says that the partial assurance was never fully withdrawn by the US and that the Home Secretary was advised that it might still be available. He argues that the inability to obtain a full assurance provides no logical reason to abandon a partial assurance in favour of no assurance at all. A partial assurance would have decreased the likelihood of a death penalty being imposed on Mr El Sheikh. The overseas assistance policy requires the Government to consider "how to mitigate the identified risks" of the death penalty being imposed. It was, he submits, irrational not to discover whether the partial assurance offer was "still on the table".

105. The evidence of the communications between the two governments shows two significant messages were being relayed by the US. First, if the UK wanted the US to prosecute, because a UK prosecution was not viable, then it could not seek to dictate the terms of such a prosecution. Secondly, some in the US administration were reluctant to try Mr El Sheikh within the federal system and would prefer his transfer to Guantanamo, if the UK would not try him.

106. It was in those circumstances that the Home Secretary had to decide whether to invite Mr Sessions to consider the offer of a partial assurance. In doing so, he had to judge his likely reaction. The conversation between the two on 30 May, described by Mr Biggar, led the Home Secretary of conclude that "there was no prospect of the Attorney General offering any form of undertaking" and that to ask would prompt "outrage" of the sort of which he had been warned.

107. The Home Secretary's judgement was underpinned by the assessment of expert officials. The claimant submits that it was unlawful to take into account the possible reaction of the US. The assessment that officials would be outraged should have been critically assessed in the light of the earlier offer of a partial assurance and in the light of the long history of the UK seeking, and being provided with, full assurances in the extradition context. In any event, she submits that "the anticipated emotional reaction of political appointees is not a relevant consideration" because taking it into account "would have the perverse result that the more unreasonable, intemperate or impetuous the reaction of a foreign state to a request for a human rights assurance the more willing the UK will be to provide MLA without seeking an assurance. This outcome is incompatible with the rule of law".

108. The argument that the Home Secretary was not entitled to have regard to the potential reaction of a foreign state which did not share the views of the UK government is one that has been advanced and rejected in other contexts. In *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756, the House of Lords rejected an argument to the effect that it was contrary to the rule of law for a prosecutor to discontinue a criminal investigation in response to threats of a foreign state to suspend intelligence co-operation, even in circumstances where it was judged it was liable to expose the UK to the threat of terrorist attack. Lord Bingham said at [38]:

> "38 The Divisional Court held (para 68) that "No revolutionary principle needs to be created … we can deploy well-settled principles of public law". But in para 99 of its judgment the court did lay down a principle which, if not revolutionary, was novel and unsupported by authority:
>
> "The principle we have identified is that submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker".
>
> … The objection to the principle formulated by the Divisional Court is that it distracts attention from what, applying well-settled principles of public law, was the right question: whether, in deciding that the public interest in pursuing an important investigation into alleged bribery was outweighed by the public interest in protecting the lives of British citizens, the Director made a decision outside the lawful bounds of the discretion entrusted to him by Parliament."

109. That passage was cited with approval by Lord Sumption in *Carlile* (which involved a question whether a person's presence in the UK was conducive to the public good). The Home Secretary had considered the likely reaction of a foreign state, which did not share the values embodied in the ECHR. At paragraph 15, Lord Sumption said:

> "When the question arises whether a person's presence or activities in the United Kingdom is conducive to the public good, it is self-evident that its potential consequences are a relevant consideration. Indeed, they will usually be the only relevant consideration. A threat to British persons or interests is one potential consequence which in an age of widespread international lawlessness, some of it state-sponsored, is unfortunately more common than it used to be. The existence and gravity of the threat is a question of fact. It cannot rationally be regarded as any less relevant to the public good because it emanates from a foreign state as opposed to some other actor, or because that state does not share our values, or because the threat is to do things which would be unlawful by our laws or improper by our standards, or indeed by theirs. The difficulty about the claimants' first submission is that it involves treating as legally irrelevant something which is plainly factually relevant to a question which is ultimately one of fact. Moreover, if the proposition be accepted, it must logically apply however serious the consequences and however likely they are to occur ..."

110. A similar principle applies here. The "anticipated emotional reaction of political appointees" is a consideration which the Secretary of State was entitled to take into account. In conducting relations with foreign states, the Government recognises and responds to the realities of political life in the state concerned, whether or not it likes those realities. It would be very odd indeed to ignore them. Ministers, diplomats and other officials are engaged in a constant process of evaluation, making judgements

about the differences between what is said and what is meant; between what is threatened, explicitly or implicitly, and what is likely to happen; about the impact of action of the UK. That is what was done here. The Home Secretary had the advice of the British Ambassador, set out above at [17] and [18]. The suggestion that he was not entitled to take it into account and rely on that expert assessment when making his own judgement is misconceived.

Failure to have regard to specific features of the death penalty regime

111. The Foreign and Commonwealth Office publish human rights guidance in relation to official security and judicial assistance. The guidance is described in its foreward as the "practical tool officials need to make these difficult decisions in order to ensure our security and justice work defends and promotes human rights". Stage 3 of the guidance deals with mitigating risk. Paragraph 10 provides: "Where the method of death penalty could amount to torture or CIDT (e.g. stoning or excessive periods on death row) the section below on torture and CIDT has been considered". ("CIDT" is an acronym for "cruel, inhuman or degrading treatment".) In paragraph 10 of the Annex B checklist specific to this case an official had written;

> "… I note the information provided at Stage 1 on the method of execution and that there are no serious human rights and/or [international humanitarian law] concerns. The FCO have not raised concerns that the method of execution breaches IHL. Our recommended action is to obtain a full assurance on the DP. Assertions have been made, for example by Reprieve that US executions involve torture/CIDT and failed execution attempts are widely reported for example the Guardian report here.
>
> Providing assistance in the absence of the DP assurance introduces risk."

112. That assessment was provided to the Secretary of State under cover of the 18 May 2018 submission. However, the Home Secretary did not consider separately the method by which the death penalty might be applied nor the death row phenomenon. The central issue on which he was focused was on whether there were strong reasons not to seek assurances.

113. Mr Fitzgerald argues that the Home Secretary failed to have regard to the specific death penalty regime applied in the United States. He refers, in particular, to Prof Fagan's reports, which we have discussed at [81] and [82] above. We concluded that the evidence does not support the proposition that the methods of execution in the US (and lethal injection in particular) would violate article 16 of the ICCPR or, if applicable, article 3 ECHR. The "assertions" about the methods of execution were before the Home Secretary, and formed part of the decision making, albeit that there was no separate discussion of lethal injections or possible delays in execution.

114. The difficult decision in this case, as is clear from the evidence and conflicting views disclosed in it, was whether to provide MLA without an assurance, knowing that the information provided might be sufficient to tip the balance in favour of prosecution. Annex B, referred to in [111] above, identified concerns expressed by Reprieve about

the method of execution were Mr El Sheikh convicted and sentenced to death. Those did not persuade the Home Secretary to refuse MLA. It is unrealistic to suppose that consideration of the method of execution or delays would have made any difference. That is indeed the case. The Home Secretary has confirmed that neither the method of execution in the US nor the death row phenomena would have changed his assessment that the assistance should be offered even in the absence of a death penalty assurance.

115. The question whether a factor is relevant in public law terms, absent a statutory lexicon, is a matter, first, for the decision maker. It is unnecessary to reach a conclusion on whether the broad regard to the US experience of the death penalty, evidenced by the annex referred to in [111] above, rather than the detailed consideration suggested as required on behalf of the claimant, was sufficient in law. We incline to the view that it was. But, given the reality of the position that further consideration would have made no difference to the decision, this part of the argument does not carry the claimant anywhere.

Avoiding risk of detention in Guantanamo

116. The third "key error" identified by Mr Fitzgerald is what he describes as "the irrational reliance" on avoiding the risk of detention in Guantanamo despite the absence of an assurance to that effect. He submits that the Home Secretary placed significant reliance on avoiding the risk of the US deciding to detain Mr El Sheikh (and Mr Kotey) in Guantanamo Bay in reaching his decision. But, he says, it was irrational to rely on this point when the UK did not appear even to have sought an assurance that the suspects would not be detained in Guantanamo, rather than being put on trial.

117. The letter of 29 June 2018 from UKCA to the US Department of Justice, granting the 2015 request for assistance, imposed a condition that the material "may only be used for the purpose sought in your request, a federal criminal investigation or prosecution." Accordingly, the evidence could not be used for the purpose of detention or military commission in Guantanamo.

118. The UK was not in a position to demand any more. As Sir James put it, the UK government had no "leverage in this regard". The UK was keen to see Mr El Sheikh stand trial in a federal court in the US and it was for that purpose that the assistance was provided. The UK could not, consistent with that objective, impose a condition that Mr El Sheikh should not be transferred to Guantanamo. In providing the material for the purposes of a federal prosecution only, the UK was minimising the risk of a transfer to Guantanamo, an outcome the Government wished to avoid.

Inconsistency with long standing absolute opposition

119. The fourth key error identified by Mr Fitzgerald was that insufficient regard was paid to the inconsistency with the UK's long-standing absolute opposition to the death penalty. He submits that the Home Secretary had no regard to the factors that underpin that opposition or to the likely consequences of the decision. He points out that this inconsistency was highlighted by both UKCA and the FCO.

120. The official security and judicial assistance human rights guidance is described as "the practical tool that officials need to make…difficult decisions in order to ensure that our security and justice work defends and promotes human rights". The 2017 edition of the Guidance requires officials to consider whether "the host country retain(s) the death penalty" and whether "the assistance might directly or significantly contribute to…use of the death penalty". Paragraph 9 of Stage 3 of the process there described provides that:

> "(a) Written assurances should be sought before agreeing to the provision of assistance that anyone found guilty would not face the death penalty.
>
> (b) Where no assurances are forthcoming or where there are strong reasons not to seek assurances, the case should automatically be deemed 'High Risk' and FCO Ministers should be consulted to determine whether, given the specific circumstances of the case, we should nevertheless provide assistance."

121. These provisions, on which the claimant relies in support of the existence of the long-standing policy, expressly contemplate the provision of assistance in the absence of such an assurance. The wider implications for the UK death penalty policy were drawn to the Home Secretary's attention and taken into account. In those circumstances it is impossible to say that he was acting irrationally in taking a step expressly permitted by the policy. The obligation was to have regard to the implication of not following the usual course; but that he did.

122. Mr Fitzgerald also points to the fact that some family members of the victims were opposed to Mr El Sheikh being subject to the death penalty. But they also opposed his being transferred to Guantanamo and wanted him brought to justice. Sir James fairly points out that the choice for the Home Secretary was ultimately a stark one: if the UK could not prosecute, then the likely outcome was that Mr El Sheikh would be transferred to Guantanamo Bay or released in Syria to resume his activities. We do not consider that the various views of the many family members of those allegedly murdered by or with the assistance of Mr El Sheikh are legally relevant factors. But the Home Secretary was aware of them and had regard to them when making his decision.

GROUND 3 - The exception to the policy is inconsistent with its rationale.

123. This ground is a variation on the one just considered. Mr Fitzgerald argues that the decision not to seek a death penalty assurance is inconsistent with the UK government's policy of opposition to the death penalty in all circumstances. Moreover, he submits that the grounds for an exception in this case are inconsistent with the rule of law.

124. It is right that in the Foreign Office publication "HMG Strategy for the Abolition of the Death Penalty 2010-2015" the long-standing policy of the UK to oppose the death penalty "in all circumstances as a matter of principle" is stated. The claimant reminds us that the general policy followed by the UK government has been to insist on a death penalty assurance before providing mutual assistance in capital cases.

125. Mr Fitzgerald contends that given the Government's policy, that the death penalty is always wrong in all circumstances, any exception serves to undermine the rationale

on which the policy is based. He says there is no principled basis for the justification of an *ad hoc* exception at the discretion of a minister.

126. To a substantial extent, this ground proceeds on the re-casting of arguments already advanced under Grounds 1 and 2. In so far as there is a discrete point here, it is an argument that the policy should be absolute, as a matter of law. But in our view, it is a matter for the Government whether to adopt policy and to decide whether it should be absolute or qualified. The situation is only otherwise if the policy conflicts with an applicable rule of law.

127. We see nothing unlawful in the Government adopting a policy which permits an exception to seeking assurances and requires a minister to evaluate the conflicting considerations that apply at the time of decision.

128. The evidence shows that the Home Secretary took into account the Foreign Secretary's view of the counter arguments for insisting on a death penalty assurance. He took into account the fact that the previous Home Secretary had earlier taken the view that full assurances should be sought. He took into account the advice of his officials. Having had regard to all of those matters he decided that it would be right to apply the exception for which the policy provides and to proceed without a full assurance.

GROUND 4 - Violation of the Claimant's Convention Rights

129. Mr Hermer argued the fourth and fifth grounds on behalf of the Claimant. In support of Ground 4, he relied primarily on two decisions of the ECtHR in support of the argument that the Home Secretary's decision violated her rights guaranteed by article 3 and 8 ECHR. She is within the jurisdiction for the purposes of article 1 ECHR, unlike her son.

130. In *McGlinchey v UK* [2003] 37 EHRR 41, the Court considered that the standard of medical treatment provided to a deceased prisoner, who was asthmatic and a heroin addict, had been so low as to violate article 3. The Court awarded damages to the deceased's estate and to each of the applicants, namely her children and her mother.

131. There was no finding in that case of a breach of the article 3 (or article 8) rights of the relatives.

132. In *Mayeka and Mitunga v Belgium* [2008] 46 EHRR 23, the applicants, who were mother and daughter, complained that Belgium had acted in breach of articles 3, 5 and 8 of the ECHR. They were both Congolese nationals. The mother had asked her brother, a Dutch national, to take the daughter and care for her in Belgium, pending the mother's arrival from Canada where she had refugee status. However, on arrival in Belgium, the daughter, then aged five, was detained by the Belgian authorities. She was held in a closed detention centre for two months and subsequently deported to the Congo. The mother was not informed of the child's deportation and there were no family members who could care for her in the Congo. Mother and daughter were subsequently re-united in Canada.

133. The Court held that the Belgian authorities had failed to take proper measures to give the daughter the care and protection necessary to fulfil their positive obligations under

article 3. The circumstances in which the child had been detained had caused significant distress to the mother. Furthermore, the circumstances of the deportation had shown a complete lack of humanity to the daughter as a very young, unaccompanied child, and a lack of regard for the mother's concern for her daughter. The Court held that the detention and deportation had represented a disproportionate interference with the rights of mother and child under article 8. At paragraph 61, the Court said:

> "61 The Court reiterates…that the issue whether a parent qualifies as a "victim" of the ill-treatment of his or her child will depend on the existence of special factors which gives the applicant's suffering a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie - in that context, a certain weight will attach to the parent-child bond - the particular circumstances of the relationship and the way in which the authorities responded to the parent's enquiries. The essence of such a violation lies in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of this latter factor that a parent may claim directly to be a victim of the authorities' conduct".

134. This principle has been repeatedly confirmed by the Strasbourg Court. For example, in *Salakhov and Islyamova v. Ukraine* (28005/08) the primary victim suffered numerous article 2 and article 3 breaches, and his mother was forced to observe his slow death "in a state of complete helplessness" [203]. The Court nevertheless repeated its approach:

> "The Court has never questioned in its caselaw the profound psychological impact of a serious human rights' violation on the victim's family members. However, in order for a separate violation of Article 3 of the Convention to be found in respect of victim's relatives, there should be special factors in place giving their suffering a dimension and character distinct from emotional distress inevitably stemming from the aforementioned violation itself." [199]."

135. The Court was considering whether the parent qualified as a victim of the "ill treatment" of her child. Establishing ill-treatment of the child by reference to the ECHR was the starting point. Therefore, unless the claimant can establish that the Home Secretary's provision of MLA without a death penalty assurance constitutes "ill-treatment" of her son, within the scope of the ECHR, this ground cannot succeed. Because he is not within the jurisdiction of the ECHR, this argument fails.

136. Even if the ECHR contemplates a parent's claim based on the treatment of the child outside the jurisdiction of the ECHR, the parent must show the existence of "special factors". Those must give the suffering a dimension and character distinct from the emotional stress which is inevitably caused to relatives of the victim of a serious human rights violation.

137. In our view such factors are absent in this case. First, Mr El Sheikh is an adult, not a child, who had left the family home long before the events in question. Secondly, he chose to leave his home in order to engage in jihad. He chose to put his life at risk in one of the most violent conflicts in recent history. Thirdly, the claimant has had only limited contact with her son since 2012. The circumstances could scarcely be further removed from those in cases like *Mayeka* where the child was five years old and was detained and deported alone by the contracting state.

138. The claim based on article 3 has no foundation.

139. In our view, the case fares no better under article 8. The claimant and her son have been apart since 2012 entirely as a result of his actions. His life has been in peril as a result of his own actions. The claimant argues that because the concept of private life includes both "a person's physical and psychological integrity", her suffering breaches her article 8 rights. The prospect of her son's prosecution, possible conviction and execution in the US causes her psychological suffering.

140. The claimant cannot make good any claim that her son's treatment violates the ECHR. She must rely upon a positive obligation on the state to refrain from taking measures which cause her intense distress. Yet there is no "direct and immediate link" between the measures and the claimant's private and/or family life" (*Botta v Italy* [1998] 26 EHRR 251 at [33]-[35]). As Sir James submits, here there are various causes for the claimant's distress, most noticeably the voluntary actions of her son. We reject the suggestion that the failure to secure assurances, when the alternative would leave Mr El Sheikh with an uncertain future in Syria or propel him to Guantanamo Bay, constitutes such a direct and immediate link for the purposes of article 8.

GROUND 5: Unlawful Transfer of Personal Data in Breach of Domestic and EU Data Protection Law

Introduction

141. The partial transfer to the US authorities of material resulting from the UK police investigation took place in July 2018. As we have noted, the Home Secretary wishes to transfer further material. Most of the Data Protection Act 2018 came into force on 25 May 2018 with the consequence that any processing of personal data by the Home Office which took place in this case was subject to the material provisions of the 2018 Act. Processing by the police and the Crown Prosecution Service was subject to the 2018 Act from that date and to the Data Protection Act 1998 before then. We have not seen the data transmitted to the US authorities but, in general terms, it forms part of the product of a police investigation into alleged criminality. It will necessarily include personal data relating to Mr El Sheikh together with personal data relating to any other suspect, to witnesses and possibly others. There is likely to be much which does not fall within the definition of "personal data". It does not concern any personal data relating to the claimant.

142. In the course of their consideration of the question whether to provide the US authorities with MLA the Home Office, the UKCA and the Foreign Office gave no separate consideration to the requirements of the 2018 Act.

143. Section 1 of the 2018 Act provides an overview which explains that Part 2 of the Act supplements the General Data Protection Regulation (EU) 2016/679 ("the GDPR"). The personal data with which this claim is concerned is not governed by the GDPR. Part 4 makes provision for data processing by the intelligence services which, similarly, has no application to the facts of this claim. It is Part 3 which is in play. It "makes provision about the processing of personal data by competent authorities for law enforcement purposes and implements the Law Enforcement Directive": section 1(4). That is a reference to Directive (EU) 2016/680 on the "protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties" and on the movement of such data ("the LED"). Part 5 makes provision about the Information Commissioner and Part 6 is concerned with the enforcement of data protection legislation.

144. Section 31 defines "law enforcement purposes" as "the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security". Subject to the addition of the final clause of the definition, section 31 thus reproduces the language of the LED. Part 3 regulates the processing of personal data in connection with domestic law enforcement purposes; but it also regulates the transfer of personal data for those purposes between the UK and EU states, and to third countries.

Common ground and areas of dispute

145. Ground 5 concerns alleged breaches of Part 3 of the 2018 Act. It is common ground that Part 3 applies to the transfer of evidence in the present case, to the extent that it contains personal data, because:

(i) The Home Office is a "controller" and a "competent authority" to which Part 3 of the 2018 Act applies (see sections 30, 32 and Schedule 7);
(ii) The evidence which was transferred to the US included "personal data" within the meaning of section 3(2) (namely "any information relating to an identified or identifiable living individual");
(iii) The transfer of the evidence was "processing" within the meaning of section 3(4)(d) (namely "disclosure by transmission, dissemination or otherwise making available") and
(iv) The transfer was for "law enforcement purposes" within the meaning of section 31.

146. The Home Secretary also accepts that he was required to comply with the data protection principles and the restrictions on international transfers of personal data in Part 3 of the 2018 Act.

147. The claimant's case is that the transfer of personal data to the US for potential use in a criminal investigation or proceedings breached the first and second data protection principles (found in sections 35 and 36), together with the rules governing international transfers of personal data for law enforcement purposes contained in sections 73 to 76 and the special processing restrictions in section 80. She submits that Part 3 must be interpreted in accordance with the Charter of Fundamental Rights of the European Union ("the Charter") with the result that it would never be lawful to

process data for use in criminal proceedings which might lead to the imposition of the death penalty.

148. The Home Secretary denies any breach of the data protection principles, disputes that the Charter has any application to the processing in this case and submits that, in any event, the remedies for breach of the 2018 Act provided by the Act itself do not include the relief the claimant seeks in circumstances where she is not the data subject.

The remedies sought by the claimant

149. The remedies sought by the claimant, in summary, are as follows:

i) A declaration that the decision to authorise the transmission of evidence to the US without obtaining an assurance that the death penalty would not be sought was unlawful;

ii) An order prohibiting the transmission of further evidence (or the giving of evidence by a UK official in a trial) in the absence of such an assurance;

iii) An order directing the Home Secretary to use his best endeavours to secure the destruction of the transferred data (or its return);

iv) An order requiring the Home Secretary to secure an explicit assurance relating to Guantanamo Bay.

150. The arguments relying on the 2018 Act recognise that what might be termed technical breaches of the provisions of the Act apply to what has been transmitted in the past but are capable of being avoided in the event of the transmission of further evidence. But to the extent that the claimant argues that it is unlawful under the 2018 Act to transmit personal data which might lead to the death penalty, the underlying illegality is irremediable, absent an appropriate assurance. It is in those circumstances that she submits that an order requiring the Home Secretary to use his best endeavours to secure the destruction of personal data transferred to the US or return of the evidence, and prohibiting him from providing any more, would be appropriate.

The remedies argument in outline

151. In his grounds, the Home Secretary argues that the 2018 Act "prescribes a regime of statutory remedies, which should be used in preference to judicial review". He refers to sections 167 and 169 of the Act. The Home Secretary argues that section 169 provides a remedy and damages for a person, whether or not the data subject, who suffers damage by reason of a breach of the Act; whereas a data subject, and only a data subject, can bring proceedings under section 167 for an order requiring steps to be taken in respect of the data. He argues that the claimant should not be able to circumvent this limitation. In response, Mr Hermer argues that Ground 5 does not involve an attempt to circumvent the remedial provisions in the 2018 Act. He says that this is not a claim for compensation or for the enforcement of private rights. It is instead a public law claim concerned with the lawfulness of the exercise of public law powers. Any breach of the duty set out in the 2018 Act is therefore amenable, Mr Hermer argues, to judicial review in the ordinary way.

152. We do not understand the Home Secretary to be contending that the statutory scheme should be interpreted as excluding the possibility that a data subject might seek through judicial review proceedings to challenge a public law decision on the basis that it fails to comply with data protection legislation. Nor that there may be cases where such a challenge by a third party could be properly brought. But Sir James submits that if the Home Secretary is right on grounds 1 to 4 and correct in his contention that EU Law does not provide a "roadblock" to providing MLA without a death penalty assurance, then it would be wrong to make any order even if there were a technical breach of one or more of the legislative provisions. As a matter of discretion relief should not be granted. Moreover, the claimant should not be able to obtain relief in judicial review proceedings that would not be available to the data subject using the statutory scheme.

Discussion

153. Section 167 provides:

> "167 Compliance orders
>
> (1) This section applies if, on an application by a data subject, a court is satisfied that there has been an infringement of the data subject's rights under the data protection legislation in contravention of that legislation.
>
> (2) A court may make an order for the purposes of securing compliance with the data protection legislation which requires the controller in respect of the processing, or a processor acting on behalf of that controller—
>
> (a) to take steps specified in the order, or
>
> (b) to refrain from taking steps specified in the order.
>
> (3) The order may, in relation to each step, specify the time at which, or the period within which, it must be taken.
>
> (4) In subsection (1)—
>
> (a) the reference to an application by a data subject includes an application made in exercise of the right under Article 79(1) of the GDPR (right to an effective remedy against a controller or processor);
>
> (b) the reference to the data protection legislation does not include Part 4 of this Act or regulations made under that Part.
>
> (5) In relation to a joint controller in respect of the processing of personal data to which Part 3 applies whose responsibilities are determined in an arrangement under section 58, a court may only make an order under this section if the controller is

> responsible for compliance with the provision of the data protection legislation that is contravened."

154. This remedial provision is available to a data subject and to no one else, subject to his appointing certain authorised bodies to act on his behalf (see section 187). The starting point for a court faced with an application under section 167, before considering whether to make a remedial order, is to determine whether there has been "an infringement of the data subject's rights under the data protection legislation in contravention of that legislation". The "data protection legislation" includes Part 3 of the 2018 Act. The rights of the data subject under Part 3 of the 2018 Act are set out between sections 43 and 54. Section 44 imposes general duties on the data controller to make information available to data subjects and section 45 is concerned with the right of access to data. These rights are necessarily circumscribed in the context of law enforcement but have no application to the circumstances of this case. Section 46 concerns data which are inaccurate. If requested by the data subject, but with appropriate safeguards, the data controller must rectify the data. That too has no bearing on this case. Neither do sections 49 and 50 which concern automated decision-making. Section 51 makes provision for the data subject to exercise his rights through the Information Commissioner and sections 52 to 54 are concerned with supplementary matters.

155. Section 43 provides an overview of the rights. Section 44(3) and (4) creates an exclusion that applies to "relevant personal data" which means data in a judicial decision "or in other documents relating to the investigation or proceedings which are created by or on behalf of a court or other judicial authority". It is not suggested that the MLA provided to the US authorities fell within the scope of this definition. But in the international sphere there is much that might do so, particularly when a foreign investigation is being conducted in a civilian jurisdiction under the supervision of a judge, or where a formal request for evidence is made by a foreign court. Section 47 is concerned with the "right to erasure or restriction of processing". It provides:

> "47 Right to erasure or restriction of processing
>
> (1) The controller must erase personal data without undue delay where—
>
> (a) the processing of the personal data would infringe section 35, 36(1) to (3), 37, 38(1), 39(1), 40, 41 or 42, or
>
> (b) the controller has a legal obligation to erase the data.
>
> (2) Where the controller would be required to erase personal data under subsection (1) but the personal data must be maintained for the purposes of evidence, the controller must (instead of erasing the personal data) restrict its processing.
>
> (3) Where a data subject contests the accuracy of personal data (whether in making a request under this section or section 46 or

> in any other way), but it is not possible to ascertain whether it is accurate or not, the controller must restrict its processing.
>
> (4) A data subject may request the controller to erase personal data or to restrict its processing (but the duties of the controller under this section apply whether or not such a request is made)."

This section confers a right on the data subject (whether he makes a request or not) which obliges the data controller to erase data, or restrict its processing, if processing the data would breach any of the data protection principles set out between sections 35 and 40. Section 41 is concerned with safeguards relating to archiving and section 42 is concerned with safeguards for sensitive processing. That is defined by section 35(8) as including personal data revealing "racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership" as well as various medical, genetic or biometric data.

156. There is no suggestion that the evidence relating to the activities of Mr El Sheikh or others implicated in the alleged criminality, strictly that part which contains personal data, should be erased from the systems in the Home Office. The claimant does not argue that they are unlawfully in its hands, that there is any "right to be forgotten" or that any processing of the data necessarily breaches any of the data protection principles. It is processing by transmission to the US without a death penalty assurance which is the primary focus of the complaint. In putting it that way we do not overlook the technical breaches alleged. Were this part of the claim being viewed through the rights conferred upon the data subject by the 2018 Act, in an application brought pursuant to section 167, it would be argued that the Home Secretary was under an obligation in the course of his consideration of whether to provide MLA to restrict the processing of the data. That would be because such processing would breach the first and second data principles together with the safeguards attaching to sensitive processing; and he would be obliged to do so at the data subject's request if the matter had been raised by him. "Restriction of processing" is defined by section 33(6) as meaning "the marking of stored personal data with the aim of limiting its processing for the future". In practical terms that would probably mean marking it with a warning that it was not to be further transferred to the US without a death penalty assurance.

157. It is of note that both the remedies of erasure and of restricting processing are forward looking.

158. Part 3 of the Act does not confer on the data subject any rights arising from the provisions which govern the transfers of personal data to third countries, i.e. section 73 and following, for the purposes of an application under section 167. An alleged breach of those provisions cannot be the subject of an application to the court under section 167. Different mechanisms for enforcement are provided by the 2018 Act. In particular, by section 165(2) the data subject can complain to the Information Commissioner in respect of any infringement of Part 3 of the 2018 Act. That would include matters in respect of which the data subject can bring proceedings pursuant to section 167 as well as those he cannot. The Information Commissioner has power under section 149(2)(a) to issue an enforcement notice for a failure to comply with the data protection principles found in Part 3 and under section 149(2(e)) for a failure to

comply with the provisions relating to international transfers. The notice may require the data controller to take steps, or refrain from taking steps, which the Commissioner considers appropriate for the purpose of remedying the failure. In a case which concerns rectification or erasure, the Information Commissioner can require the data controller, where reasonably practicable, to notify those to whom the data have been disclosed that they have been rectified or erased by the controller (see section 151(6)). She also has power under section 142 to require data controllers to provide information to enable her to discharge her functions. The 2018 Act provides a right of appeal against enforcement notices. Furthermore, the Information Commissioner has power in many circumstances to impose penalties for breaches of the legislation.

159. Section 168 is concerned with compensation for contravention of the GDPR and is not material to these proceedings.

160. Section 169 provides:

> "Compensation for contravention of other data protection legislation"
>
> (1) A person who suffers damage by reason of a contravention of a requirement of the data protection legislation, other than the GDPR, is entitled to compensation for that damage from the controller or the processor, subject to subsections (2) and (3).
>
> (2) Under subsection (1)—
>
> (a) a controller involved in processing of personal data is liable for any damage caused by the processing, and
>
> (b) a processor involved in processing of personal data is liable for damage caused by the processing only if the processor—
>
> (i) has not complied with an obligation under the data protection legislation specifically directed at processors, or
>
> (ii) has acted outside, or contrary to, the controller's lawful instructions.
>
> (3) A controller or processor is not liable as described in subsection (2) if the controller or processor proves that the controller or processor is not in any way responsible for the event giving rise to the damage.
>
> (4) A joint controller in respect of the processing of personal data to which Part 3 or 4 applies whose responsibilities are determined in an arrangement under section 58 or 104 is only liable as described in subsection (2) if the controller is responsible for compliance with the provision of the data protection legislation that is contravened.

> (5) In this section, *"damage"* includes financial loss and damage not involving financial loss, such as distress."

161. There is no claim for damages before us. We express no view about whether any damage has been suffered by anyone so that, if a breach of the 2018 Act were established, a claim for damages could be made.

162. There can be little doubt that if a data subject issued judicial review proceedings when enforcement was available to him either directly under the 2018 Act or via the Information Commissioner, he or she would very likely be met with a successful alternative remedy argument. The remedies available in judicial review proceedings, even if that preliminary obstacle were overcome, would necessarily be fashioned with an eye to those provided in the statutory scheme.

163. The Data Protection Act 2018 is a self-contained statutory scheme, based upon or implementing EU legislation, which imposes duties upon data controllers and processors and confers rights upon data subjects. The two do not necessarily coincide. The rights are enforceable on application by the data subject to the court or by the Information Commissioner using her statutory powers. The duties imposed upon data controllers (whether they be public or private) are enforceable by the Information Commissioner, on her own motion or following complaint by the data subject. An action in damages is provided in the event of either an infringement of a right recognised by the 2018 Act or a failure by a data controller (or processor) to comply with the statutory scheme.

164. Sir James did not go so far as to suggest that there is here an exclusive alternative remedy. The 2018 Act contains no provision equivalent to section 65(2)(a) of the Regulation of Investigatory Powers Act 2000, considered by the Supreme Court in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1, to give exclusive jurisdiction to the Investigatory Powers Tribunal. There is a superficial similarity for analytical purposes to *Barraclough v Brown* [1897] AC 615, where a statute created new rights and provided for a scheme of enforcement in the Magistrates' Court. That was held to preclude recourse to the High Court. The House of Lords held that the "right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other". But this case concerns rights which, although they arise arguably in the context of data protection, are of the most fundamental nature. In consequence, we consider that Sir James was correct not to press an argument to the effect that, under this ground, the claim was inadmissible.

165. Nonetheless, we agree with the essential submission made on behalf of the Home Secretary on this issue. Absent success in the argument that the 2018 Act interpreted in the light of the LED precludes the processing of personal data which would be used in proceedings to secure the death penalty, it would be wrong to grant any substantive relief in respect of any technical breach of the 2018 Act.

The Application of the Charter – the arguments

166. The claimant argued in her Grounds that the LED applied to the transfer of data with the result that the Charter also applied. Therefore, the 2018 Act must be interpreted in

the light of the Charter with the consequence that there has been a breach of the claimant's Charter rights.

167. The Home Secretary disputed that reasoning. He said that the LED has no direct application to the circumstances of this case because the UK opted out of the EU-US MLA Agreement, and instead provides MLA to the US pursuant to a bilateral treaty. Article 6a of Protocol 21 to the Treaty on the European Union ("the TFEU") expressly provides that, in such a case, measures such as the LED will not apply to the transfer of information.

168. Mr Hermer accepted that the Home Secretary's response was correct in the sense that neither the LED nor the Charter bear directly on the claim because of the UK's opt-out.

169. Nonetheless, Mr Hermer argued that Parliament enacted Part 3 of the 2018 Act for the purpose of implementing the entirety of the LED, and with the intention that it would apply to all law enforcement processing, despite the opt-out. In short, despite the UK having agreed the opt-out, critical parts of it have been rendered nugatory by Parliament nonetheless importing its terms into domestic law. It follows, he submits, that the LED is the most authoritative interpretative source as to the meaning and effect of Part 3 of the 2018 Act. The courts should interpret Part 3 consistently with the LED. The next step in the argument is that because the LED is an EU instrument, it falls to be interpreted in the light of the Charter.

170. The importance to the claimant's case of this argument is that, as we shall see, the processing of data for law enforcement purposes must be "lawful" to comply with the data protection principles and otherwise for various purposes satisfy a test of "necessity". She submits that to process data in aid of a potential prosecution which may result in the death penalty is unlawful under the Charter and in EU law and cannot be necessary.

171. Sir James submits that if the LED does not apply, there is no EU law principle of purposive interpretation to give effect to the LED. In any event, he contends that the claimant is outside the scope of the Charter.

Discussion

172. Section 1(4) of the 2018 Act provides that Part 3 "makes provision about the processing of personal data by competent authorities for law enforcement purposes and implements the Law Enforcement Directive". However, as the Explanatory Note accurately explains:

> "The legal basis of the LED is Article 16(2) of the TFEU. Article 16 (is) subject to Article 6a of the UK's…opt-in Protocol No. 21 for measures in Title V of the TFEU (which covers the Area of Freedom, Security and Justice). Article 6a provides that the UK …(is) not bound by rules laid down on the basis of Article 16 of the TFEU …The terms of Article 6a are reflected in recital 99 of the LED. Given this, the LED only applies to the UK in circumstances where data sharing is done under Title V measures in the area of police co-operation or

> judicial co-operation in criminal matters that bind the UK…However, the provisions in Part 3 of the Bill apply to all processing — domestic and trans-national — for law enforcement purposes."

173. Article 6(a) of Protocol 21 to the Treaties provides:

> "The United Kingdom… shall not be bound by the rules laid down on the basis of Article 16 of the Treaty… which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of that Treaty where the United Kingdom (is)…not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 16."

174. The effect of the British and Irish opt-out is that for some purposes involving data processing they will be subject to the LED and for others they will not. The transfer of the data in the present case did not take place pursuant to any EU or police and criminal justice measure. Instead, MLA between the US and the UK is governed by the treaty between the US and the UK. The data were processing was outside the scope of EU law.

175. It is uncontroversial that, because the 2018 Act is intended to implement the LED, that Directive is a legitimate aid to its construction as a matter of domestic law. Recital 46 to the LED provides that any restriction on the rights of a data subject "must comply with the Charter and ECHR, as interpreted in the case law of the Court of Justice and the European Court of Human Rights respectively and in particular, respect the essence of those rights…" On that basis, the claimant submits that the rights in the Charter inform the shape and meaning of the LED, which in turn should determine the meaning of the 2018 Act.

176. The Charter right in play is that found in Article 2.2, "no one shall be condemned to the death penalty or executed."

177. Recital 99 to the LED records, and in effect reproduces, the terms of Article 6(a) of Protocol 21.

178. The question is whether, as a matter of statutory construction, Parliament enacted that any processing of personal data for law enforcement purposes outside the scope of EU law should nonetheless be subject to the Charter. The technique used in the 2018 Act was to "copy out" the LED and elaborate only when necessary. Recital 46 of the LED was not expressly transposed into domestic law. There was no need to do so as regards the ECHR. Similarly, there was no need to do so as regards data processing which falls within the scope of EU law. But, in our judgment, Parliament should not be taken to have legislated in contradiction of the opt-out for cases not governed by EU law. For practical purposes, the distinction between data processing for law enforcement purposes governed by the ECHR and additionally by the Charter will rarely, if ever, make any difference. However, in the event that it does, questions arising under Part 3 of the 2018 Act not governed by EU law should not be analysed

by reference to the Charter. The position is analogous to that identified in *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189.

179. *Hurst* concerned the question whether an investigation compliant with the procedural obligations under article 2 ECHR was required in relation to a death which pre-dated the commencement of the Human Rights Act 1998 in circumstances where the criminal process (there had been a guilty plea to murder) did not explore alleged state failings to protect the deceased. The proceedings followed the decision of the House of Lords in *R (Middleton) v HM Coroner for West Somerset* [2004] 2 AC 182 in which it was held that coronial legislation required to be interpreted differently from the pre-Human Rights Act understanding to comply with article 2 ECHR. One of the arguments advanced in support of a resumed inquest was that the adjusted interpretation of coronial legislation applied for all purposes, and not simply to those deaths which were subject to the procedural obligation. At [52] Lord Brown of Eaton-under-Heywood said:

> "I turn, therefore, to the other limb of this argument, the submission that *Middleton* is now binding authority on the meaning of section 11 in all circumstances, a conclusion, as already explained, plainly contrary to what the House in Middleton intended. The answer to it in my judgment is to be found, as the intervener argues, in the analogous field of European Community law where, pursuant to *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, a similarly strong interpretive obligation is imposed on member states to construe domestic legislation whenever possible so as to produce compatibility with European Community law. The closeness of this analogy has been recognised by the House in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557—see particularly Lord Steyn's opinion at para 45. Where the Marleasing approach applies, the interpretative effect it produces upon domestic legislation is strictly confined to those cases where, on their particular facts, the application of the domestic legislation in its ordinary meaning would produce a result incompatible with the relevant European Community legislation. In cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way. Thus in *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85, Part II of the Merchant Shipping Act 1988 was to be disapplied in those cases where its operation would infringe directly effective European Community rights; but not otherwise. *Similarly in Imperial Chemical Industries plc v Colmer (Inspector of Taxes)(No 2)* [1999] 1 WLR 2035 the House, following a reference to the Court of Justice of the European Communities *(Imperial Chemical Industries plc v Colmer* [1999] 1 WLR 108), held that ICI remained bound by domestic legislation upon its ordinary meaning notwithstanding that in certain circumstances such a construction would be incompatible with European Community rights. This principle was again applied

> by the Court of Appeal in *Gingi v Secretary of State for Work and Pensions* [2002] 1 CMLR 587 where Arden LJ expressly approved the following passage from Bennion, Statutory Interpretation, 4th ed (2002), p1117:
>
> "It is legitimate for the national court, in relation to a particular enactment of the national law, to give it a meaning in cases covered by the Community law which is inconsistent with the meaning it has in cases not covered by the Community law. While it is at first sight odd that the same words should have a different meaning in different cases, we are dealing with a situation which is odd in juristic terms.""

180. Should we be wrong in our conclusion that the Charter has no application to this claim we will consider Mr Hermer's underlying arguments.

181. Mr Hermer submits that "the absolute objection to the death penalty contained in the Charter permeates all aspects of EU decision making at both the political and legislative level". In that context, he refers to the EU guidelines on the death penalty first adopted in 1998, Regulations 1236/2005 and 2016/2134 which concern trading goods to be used for capital punishment. In a post-hearing note, Mr Hermer drew our attention to nine resolutions of the European Parliament maintaining a consistent stance against the death penalty. He also referred to an EU/Council of Europe Joint Declaration to mark the European and World Day against the Death Penalty in October 2016. We accept entirely the unequivocal nature of article 2 of the Charter and the import of the instruments, resolutions and statements referred to. But we are unable to identify such a wide-ranging and all-encompassing principle of EU law when the EU-Japan MLA Agreement provides member states with the discretion to refuse assistance in cases where a Japanese investigation or prosecution could result in application of the death penalty – see [88] above. That agreement, which post-dates the Charter, does not mandate refusal if an assurance is not provided as would have to be the case if the claimant's submissions were right. We would add that article 19 of the Charter expressly prohibits removal to face the risk of the death penalty (i.e. articulates the *Soering* principle) but says nothing about MLA.

182. Both Mr Hermer and Sir James draw attention to Recital 71 to the LED, which is concerned with safeguards relating to the use and security of personal data transferred to a third country. It includes:

> "In addition, the controller should take into account that the personal data will not be used to request, hand down or execute a death penalty or any form of cruel and inhuman treatment. Whilst those conditions could be considered to be appropriate safeguards allowing the transfer of data, the controller should be able to require additional safeguards."

On one reading, advocated by the claimant, this recital could be taken to suggest that in the absence of an assurance as to use, the safeguards will necessarily be inadequate. But, as Sir James submits, if this recital were intended to be a "red-line prohibition" it (a) would be expressed clearly as such; (b) would be expressed in imperative terms

("must" rather than "should" and not merely "take into account"); and (c) would be in an article rather than a recital.

183. The next question, if the 2018 Act must be interpreted in a manner consistent with the LED and the Charter, is whether the claimant is "outside the personal scope of the Charter." Article 52(3) of the Charter provides:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

184. Lloyd Jones J considered that provision at paragraph 73(3) of his judgment in *Zagorski.* He said that article 52:

> "has a vital bearing on the scope *ratione personae* of the rights recognised by the Charter. This provides that in so far as the Charter contains rights that correspond to Convention rights "the meaning and scope of those rights shall be the same as those laid down by the said Convention". To my mind this refers not merely to the content of the rights but also to the scope of their application *ratione personae*. That is the natural meaning of the words."

185. With respect, we agree. Article 52(3) defines the meaning and scope of rights in the Charter and limits their application in the same way as the ECHR limits the equivalent rights. It was held that the claimants in *Zagorski* were outside the scope of the Charter and the same must apply to Mr El Sheikh, in the present case. For that reason too, we conclude that the Charter has no application here.

Breach of the First Data Protection Principle

186. Section 35 of the 2018 Act provides:

> "35 The first data protection principle
>
> (1) The first data protection principle is that the processing of personal data for any of the law enforcement purposes must be lawful and fair.
>
> (2) The processing of personal data for any of the law enforcement purposes is lawful only if and to the extent that it is based on law and either—
>
> (a) the data subject has given consent to the processing for that purpose, or

(b) the processing is necessary for the performance of a task carried out for that purpose by a competent authority.

(3) In addition, where the processing for any of the law enforcement purposes is sensitive processing, the processing is permitted only in the two cases set out in subsections (4) and (5).

(4) The first case is where—

(a) the data subject has given consent to the processing for the law enforcement purpose as mentioned in subsection (2)(a), and

(b) at the time when the processing is carried out, the controller has an appropriate policy document in place (see section 42).

(5) The second case is where—

(a) the processing is strictly necessary for the law enforcement purpose,

(b) the processing meets at least one of the conditions in Schedule 8, and

(c) at the time when the processing is carried out, the controller has an appropriate policy document in place (see section 42).

(6) …

(7) …

(8) In this section, *"sensitive processing"* means—

(a) the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership;

(b) the processing of genetic data, or of biometric data, for the purpose of uniquely identifying an individual;

(c) the processing of data concerning health;

(d) the processing of data concerning an individual's sex life or sexual orientation."

187. Mr Hermer submits that in the light of the LED and the wider body of EU law regarding fundamental rights and the death penalty, provision of information to the US to support capital proceedings cannot be deemed "fair". In our judgment, the Information Commissioner's guidance captures what is meant by fairness in this context: "Fairness generally requires you to be, where appropriate, clear and open with individuals about how you use their information, in keeping with their

reasonable expectations". The Government's policy shows that death penalty assurances are not always needed before sharing information. The practical reality is that the claimant's son cannot expect to be kept apprised of the sharing of his data. In the context of a criminal investigation fairness would rarely, if ever, require the subject of the criminal investigation to be kept abreast of the progress of the investigation, including transfer of information relating to his alleged criminality.

188. As regards lawfulness, Mr Hermer submits that if the claimant succeeds on any of Grounds 1 to 4 then it necessarily follows that the processing was not lawful. We agree. However, we have found against the claimant on all those grounds. In our judgment, the processing here was lawful, in the sense that it was based on the law relating to the exercise of discretionary power under the treaty for MLA.

189. Mr Hermer would have it that any breach of any requirements for record keeping and documentation under the 2018 Act would make the processing unlawful and therefore in breach of the first data protection principle. There was, in fact, record keeping in relation to the decision to provide data to the US authorities and, as Sir James puts it, there is no need under the Act for the production of a "bespoke set of documents". In addition, there is no basis for concluding that a breach of any provision of the 2018 Act itself renders the processing "unlawful" for these purposes. As the Explanatory Notes record at [181], "'Lawful' processing means authorised by either statute, common law or royal prerogative."

190. To be lawful, processing must also be necessary for the performance of a law enforcement purpose (section 35(2)(b)). In our judgment, the transfer was for a law enforcement purpose, namely Mr El Sheikh's prosecution in the US. Furthermore, there was no other way in which that purpose could be performed. Accordingly, it was "necessary".

191. Mr Hermer submits that even stricter requirements apply under section 35(3) to "sensitive processing". The only basis upon which it could be said that this was sensitive processing was because the personal data concerned might reveal the racial or ethnic origin, political opinions, religious or philosophical beliefs of the claimant's son (section 35(8)). We have not seen the material already provided to the US authorities, nor that held back pending the resolution of this claim and thus are not in a position to know whether any such data were transmitted. The high-water mark of the claimant's case evidentially is that "the defendant tacitly acknowledges that some of the material transferred to the US contained information that falls within the definition of "sensitive processing" in section 35(8) (see the Detailed Grounds at [59])". In oral argument Sir James indicated that no such tacit acknowledgment was made and that the transfer did not include sensitive processing.

192. The mischief this provision is aimed at is the disclosure ("revealing") of information which, by its nature, is very personal. Indeed, much of it is of a nature that many people would keep tightly held and discuss with few, if any. Recital 37 to the LED indicates that that such processing merits "specific protection as the context of [the] processing could create significant risks to the fundamental rights and freedoms" of the data subject. Sir James submits, correctly in our view, that the term "religious or philosophical beliefs" could not include extreme religious violence. We would add that a mindset which impels a person to commit criminal acts of violence could not be seen as a "political belief" for these purposes. A paedophile who has an unshakeable

belief that sex with children is in their interests, or any other criminal with a profound belief that his criminality is not wrong, could not rely on their motivation as a political or philosophical belief and thus engage these provisions. No more can a person alleged to use terrorist violence for what he considers to be justifiable political or religious ends, were that motivation referred to in the evidence collected as part of a criminal investigation. In our judgment, the Home Secretary is right to submit that these provisions should not be interpreted to give a heightened degree of protection in respect of terrorist offences which advance "a political, religious, racial or ideological cause" compared with non-ideologically driven crimes.

193. In these circumstances, we reject the submission that there was a breach of the first data protection principle.

Breach of the Second Data Protection Principle

194. Mr Hermer contends that the transfer of personal data to the US breached the second data protection principle which is set out in section 36:

> "(1) The second data protection principle is that—
>
> (a) the law enforcement purpose for which personal data is collected on any occasion must be specified, explicit and legitimate, and
>
> (b) personal data so collected must not be processed in a manner that is incompatible with the purpose for which it was collected.
>
> (2) Paragraph (b) of the second data protection principle is subject to subsections (3) and (4).
>
> (3) Personal data collected for a law enforcement purpose may be processed for any other law enforcement purpose (whether by the controller that collected the data or by another controller) provided that—
>
> (a) the controller is authorised by law to process the data for the other purpose, and
>
> (b) the processing is necessary and proportionate to that other purpose.
>
> (4) Personal data collected for any of the law enforcement purposes may not be processed for a purpose that is not a law enforcement purpose unless the processing is authorised by law."

195. He says that the personal data was collected by the Metropolitan Police Service for the purposes of a possible UK prosecution. Its subsequent provision to the US authorities is therefore "processing for another purpose" and is caught by section 36(1)(b). He also submits that transfer to the US is neither necessary nor proportionate.

196. The police conducted a criminal investigation. The police do not make prosecutorial decisions in this jurisdiction but provide the evidence to the CPS to do so. It is at least likely in this case that the purpose of the investigation always envisaged a foreign prosecution of some sort given that the alleged crimes were committed abroad and other jurisdictions obviously might have an interest in prosecution. That said, there is nothing "incompatible" with the purpose for which data might be processed in an English police investigation, with using it for a prosecution abroad.

197. In our judgment, the transfer of data was necessary for the reasons we have already described. It was a means, in practice the only means, by which Mr El Sheikh could be made to stand trial for his allegedly murderous conduct. Mr Hermer said that it was not proportionate given the absolute prohibition on the death penalty. But, as we have already observed, for a variety of reasons, we do not accept the submission that the transfer of data is subject to an absolute prohibition. The transfer of this data was proportionate to the objective in view, in that there was no other means by which that objective could be achieved.

Breach of section 73 – Transfer of Personal Data to a Third Country

198. Section 73 sets out general principles for transfers of personal data:

> "73 (1) A controller may not transfer personal data to a third country or to an international organisation unless—
>
> (a) the three conditions set out in subsections (2) to (4) are met, and
>
> (b) in a case where the personal data was originally transmitted or otherwise made available to the controller or another competent authority by a member State other than the United Kingdom, that member State, or any person based in that member State which is a competent authority for the purposes of the Law Enforcement Directive, has authorised the transfer in accordance with the law of the member State.
>
> (2) Condition 1 is that the transfer is necessary for any of the law enforcement purposes.
>
> (3) Condition 2 is that the transfer—
>
> (a) is based on an adequacy decision (see section 74),
>
> (b) if not based on an adequacy decision, is based on there being appropriate safeguards (see section 75), or
>
> (c) if not based on an adequacy decision or on there being appropriate safeguards, is based on special circumstances (see section 76).
>
> (4) Condition 3 is that—

> (a) the intended recipient is a relevant authority in a third country or an international organisation that is a relevant international organisation, or
>
> (b) in a case where the controller is a competent authority specified in any of paragraphs 5 to 17 , 21 , 24 to 28 , 34 to 51 , 54 and 56 of Schedule 7—
>
> (i) the intended recipient is a person in a third country other than a relevant authority, and
>
> (ii) the additional conditions in section 77 are met.
>
> (5) Authorisation is not required as mentioned in subsection (1)(b) if—
>
> (a) the transfer is necessary for the prevention of an immediate and serious threat either to the public security of a member State or a third country or to the essential interests of a member State, and
>
> (b) the authorisation cannot be obtained in good time.
>
> (6) Where a transfer is made without the authorisation mentioned in subsection (1)(b), the authority in the member State which would have been responsible for deciding whether to authorise the transfer must be informed without delay.
>
> (7) In this section, *"relevant international organisation"* means an international organisation that carries out functions for any of the law enforcement purposes."

199. We accept Mr Hermer's submission that the expression "a controller may not transfer personal data…unless" underlines the need for strict compliance with the statutory conditions set out in sub-section (2) to (4). For the reason we have already given, Condition 1, that the transfer is necessary for law enforcement purposes, is satisfied. Condition 3 is satisfied in that the intended recipient is a relevant authority in a third country. Condition 2 requires that the transfer is based on an adequacy decision or the existence of appropriate safeguards or on special circumstances.

200. It is common ground that the transfer was not made on the basis of an adequacy decision. That is a reference to a decision of the Commission of the EU relating, in general terms, to a third country or international organisation. There is no such decision relating to the federal jurisdiction of the US.

201. Section 75 deals with appropriate safeguards:

> "(1) A transfer of personal data to a third country or an international organisation is based on there being appropriate safeguards where—

> (a) a legal instrument containing appropriate safeguards for the protection of personal data binds the intended recipient of the data, or
>
> (b) the controller, having assessed all the circumstances surrounding transfers of that type of personal data to the third country or international organisation, concludes that appropriate safeguards exist to protect the data.
>
> (2) The controller must inform the Commissioner about the categories of data transfers that take place in reliance on subsection (1)(b).
>
> (3) Where a transfer of data takes place in reliance on subsection (1)—
>
> (a) the transfer must be documented,
>
> (b) the documentation must be provided to the Commissioner on request, and
>
> (c) the documentation must include, in particular-
>
> (i) the date and time of the transfer,
>
> (ii) the name of and any other pertinent information about the recipient,
>
> (iii) the justification for the transfer, and
>
> (iv) a description of the personal data transferred."

202. We reject Mr Hermer's submission that the use of the expression "based on" requires express consideration of the applicability of the requirements before transfer takes place. What matters is whether, in substance, appropriate safeguards for the protection of the data existed; whether, in other words, the decision proceeded in circumstances where there were appropriate safeguards in place.

203. It is evident that ministers and officials took account of the potential use of the data in respect of the death penalty; in fact, that was central to the assessment. The terms on which the data were transferred to the US authorities were set out in the letter under challenge. Further, in our judgment, the careful consideration by ministers and officials in the Home Office and Foreign Office of the question whether to make the transfer in the absence of death penalty assurance meets the requirement that the Data Controller must assess "all the circumstances surrounding transfer of that type of personal data" to the US as required by section 75(1)(b).

204. The Secretary of State accepts that there was no communication with the Information Commissioner as required by section 75(2) to inform her of the categories of data that take place pursuant to this provision. This provision is not time limited nor does it attach to an individual data subject. On any view, Sir James is correct when he

submits that that failure cannot operate to undermine a transfer which in substance is lawful.

205. No specific document was created which met the section 75(3) documentary requirements. Although it would be convenient for all concerned were that to be done, the statute does not require it. There is no doubt that all the relevant details of the transfer were documented by the UKCA and the justification for the transfer is recorded in the contemporaneous documents.

206. In any event, in our view the defendant is entitled to rely on the existence of "special circumstances" in accordance with section 76 as a means of satisfying Condition 2. Section 76 provides:

> "(1) A transfer of personal data to a third country or international organisation is based on special circumstances where the transfer is necessary—
>
> (a) to protect the vital interests of the data subject or another person,
>
> (b) to safeguard the legitimate interests of the data subject,
>
> (c) for the prevention of an immediate and serious threat to the public security of a member State or a third country,
>
> (d) in individual cases for any of the law enforcement purposes, or
>
> (e) in individual cases for a legal purpose.
>
> (2) But subsection (1)(d) and (e) do not apply if the controller determines that fundamental rights and freedoms of the data subject override the public interest in the transfer.
>
> (3) Where a transfer of data takes place in reliance on subsection (1)—
>
> (a) the transfer must be documented,
>
> (b) the documentation must be provided to the Commissioner on request, and
>
> (c) the documentation must include, in particular—
>
> (i) the date and time of the transfer,
>
> (ii) the name of and any other pertinent information about the recipient,
>
> (iii) the justification for the transfer, and
>
> (iv) a description of the personal data transferred.

> (4) For the purposes of this section, a transfer is necessary for a legal purpose if—
>
> (a) it is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings) relating to any of the law enforcement purposes,
>
> (b) it is necessary for the purpose of obtaining legal advice in relation to any of the law enforcement purposes, or
>
> (c) it is otherwise necessary for the purposes of establishing, exercising or defending legal rights in relation to any of the law enforcement purpose"

207. The transfer here was necessary in an "individual case for any of the law enforcement purposes" (section 76(1)(d)) or, alternatively, in an "individual case for a legal purpose" (section 76(1)(e)). Given the specific nature of the evidence transferred in the present case it cannot be said to fall within the categories of "frequent, massive and structural transfers of person data, or large-scale transfers of data" (which recital 72 suggests would not be permitted under this head).

208. The controller had not determined that the fundamental rights and freedoms of the data subject overrode the public interest in the transfer (section 76(2)). Although no specific document was created to meet the requirements of section 76(3), as we have noted above, the details of the transfer were documented by UKCA and the justification for the transfer is reflected in various contemporaneous documents.

209. Mr Hermer submits that the conditions governing international transfers of personal data must be "applied with regard to the impermissibility of transferring data for its use in imposing the death penalty or any form of cruel or inhuman treatment". But as the defendant points out, if such transfers were "impermissible", then this obligation would prevent transfer irrespective of the DPA, and this complaint adds nothing. For the reason we have explained, they were not impermissible.

210. Mr Hermer also refers to recital 71 of the LED and submits that it refers to a "special circumstances" transfer. That recital is mirrored in [230] of the Explanatory Notes to the 2018 Act. But in our judgment, neither relates to special circumstances transfers. Special circumstances transfers are addressed in recital 72 and explained in [231] of the Explanatory Notes. In addition, we accept the Home Secretary's submission that if a controller was required to "take into account" that data will not be used to "request, hand down or execute" the death penalty when transferring on the basis of special circumstances, the LED would have said so, and it does not.

211. In those circumstances, in our judgment the "gateway" provided by section 75, alternatively section 76, was applicable in the present case and there is no breach of section 73. Had we come to a different conclusion, and having regard to the remedies arguments already discussed, we do not consider that any relief would have been appropriate unless the claimant were able to establish that the 2018 Act prohibits the transfer of data in aid of a prosecution that might lead to a death sentence.

The breach of section 80

212. Mr Hermer contends that the transfer of data in the present case breached a special processing restriction in section 80.

213. Section 80 makes provision for "special processing restrictions":

> "(1) Subsections (3) and (4) apply where, for a law enforcement purpose, a controller transmits or otherwise makes available personal data to an EU recipient or a non-EU recipient.
>
> (2) In this section—
>
> *"EU recipient"* means—
>
> (a) a recipient in a member State other than the United Kingdom, or
>
> (b) an agency, office or body established pursuant to Chapters 4 and 5 of Title V of the Treaty on the Functioning of the European Union;
>
> *"non-EU recipient"* means—
>
> (a) a recipient in a third country, or
>
> (b) an international organisation.
>
> (3) The controller must consider whether, if the personal data had instead been transmitted or otherwise made available within the United Kingdom to another competent authority, processing of the data by the other competent authority would have been subject to any restrictions by virtue of any enactment or rule of law.
>
> (4) Where that would be the case, the controller must inform the EU recipient or non-EU recipient that the data is transmitted or otherwise made available subject to compliance by that person with the same restrictions (which must be set out in the information given to that person).
>
> (5) Except as provided by subsection (4), the controller may not impose restrictions on the processing of personal data transmitted or otherwise made available by the controller to an EU recipient.
>
> (6) Subsection (7) applies where—
>
> (a) a competent authority for the purposes of the Law Enforcement Directive in a member State other than the United Kingdom transmits or otherwise makes available personal data to a controller for a law enforcement purpose, and
>
> (b) the competent authority in the other member State informs the controller, in accordance with any law of that member State which implements Article 9(3) and (4) of the Law Enforcement Directive,

> that the data is transmitted or otherwise made available subject to compliance by the controller with restrictions set out by the competent authority.
>
> (7) The controller must comply with the restrictions."

214. Mr Hermer submits that intra-UK data processing would be subject to a legal restriction not to use those data for an unlawful purpose. That would include using them to assist in a process that could lead to the death penalty in another country. Accordingly, he says, by virtue of section 80(3) and (4) those data could not be transferred lawfully to the US for use in proceedings which might lead to the application of the death penalty there.

215. In our judgment, this submission has no proper application to the present case. Of course, it is right that a UK authority could not lawfully process data in support of an attempt to obtain a sentence in a UK court which is not available in a UK court. But that is not a "restriction on data processing"; that is a function of the substantive law of the UK as to the penalties for murder. Section 80 cannot sensibly be used as a mechanism by which the UK is obliged to impose on foreign states a requirement to adopt particular sentences. As we have observed, were it otherwise, the EU-Japan MLA Agreement could not provide a discretion whether to refuse assistance in cases where the proceedings in Japan may result in the application of the death penalty.

216. In those circumstances, we conclude that section 80 adds nothing to the analysis.

217. For all those reasons, we reject Ground 5 of this challenge.

Conclusion

218. For those reasons we reject each ground of challenge to the decision of the Home Secretary and the subsequent transfer of materials (including personal data) to the US authorities. This matter was referred to a Divisional Court for a rolled-up hearing. We grant permission to apply for judicial review but dismiss the claim.