

Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- In its decision in *Beghal v United Kingdom* (App. no.4755/16), the Grand Chamber of the European Court of Human Rights found the UK's anti-terrorism regime of stop, examination and detention at ports and borders to be in breach of Article 8 ECHR.
- In its Criminal Law (Extraterritorial Jurisdiction) Act 2019, Ireland has extended the criminal jurisdiction of its courts to a range of violent and sexual offences. While the immediate objective was compliance with the Istanbul Convention on preventing and combating violence against women and domestic violence, the measures go significantly further.
- In its decision in *Konecny v District Court in Brno-Venkov, Czech Republic*, the UK Supreme Court has highlighted the manner in which the UK legislation implementing the European arrest warrant operates harshly against a person who is being extradited to serve a sentence imposed in another EU Member State following an earlier trial in that State in his absence. While Article 8 ECHR has the potential to alleviate some of the hardship, it does not cure the need for a legislative amendment.

UK Port and Border Controls

Facts of the *Beghal* case

In a decision handed down a few weeks ago in *Beghal v United Kingdom* (App. no.4755/16), the Grand Chamber of the European Court of Human Rights (ECtHR) found that the UK's anti-terrorism regime of port and border controls, as they existed in 2011, were in violation of the European Convention on Human Rights (ECHR). The applicant, a French national resident in the UK, was stopped pursuant to these control provisions when returning from a visit to her husband, who was in custody in France in relation to terrorist offences. She was taken to a room where she was searched and questioned, without being formally

detained. She refused to answer questions in the absence of her lawyer who did not arrive until after she had been released. She was subsequently convicted of the offence of failing to comply with her duty under the control provisions. She challenged her treatment as a breach of her rights under Article 5 (right to liberty), Article 6 (right to a fair trial) and Article 8 (right to privacy) of the ECHR. She lost in the High Court and the Supreme Court, before proceeding to the ECtHR.

The controls

The port and border controls were first introduced by the Prevention of Terrorism (Temporary Provisions) Act 1974 in respect of persons travelling either way between Ireland (North and South) and Britain. They were highly controversial for many

decades, as they were considered to be used arbitrarily and oppressively against Irish people. The current controls, which are even broader and more intrusive than the 1974 version, are provided by Schedules 7 and 8 of the Terrorism Act 2000 (as amended). They are equally controversial as it is widely believed that they are applied arbitrarily and disproportionately against people of Asian ethnicity. Although amendments have been effected in 2014 and 2019, the ECtHR in *Beghal* considered the regime as it was at the time of her stop and examination in 2011. Before the decision in *Beghal* was handed down, an amended Code of Practice incorporating the 2019 changes was put out for consultation until 5th April.

Schedule 7 empowers a police officer (among others) to stop, question, search and detain a person passing through a UK port or border for the purpose of determining whether she may be, or has been, concerned in any act of terrorism. Critically, no prior authorisation or suspicion is required. The officer can exercise the powers at random. The person stopped is obliged to answer relevant questions, although she has no right of access to a solicitor unless formally detained (see below). A search of the person (and vehicle where relevant) can extend to goods and articles, including a mobile phone or laptop. Indeed, the downloading of the contents of mobile phones and other digital devices is a regular feature of these searches. Articles and goods can also be retained for examination, and copies made of material in them, in certain circumstances. Legally privileged or journalist materials should not be retained, but materials can be examined to determine whether they come within either of those categories. Articles or materials containing legally privileged or journalist

materials can also be retained and copied to separate out the protected material.

It is an offence, punishable by a custodial sentence, for a person to refuse to cooperate with an examination under these provisions. At the time of the *Beghal* examination, there was no express prohibition on the fruits of the compulsory questioning being used against the person in any subsequent criminal proceedings for a terrorism-related offence. This has since been changed by amendments effected in 2019, so that such answers cannot normally be used against her in respect of offences other than failing to cooperate with the examination.

At the time of the applicant's stop and examination, there was no specified time limits on the duration of the examination; although any follow-on detention could not last longer than nine hours. Pursuant to the 2014 amendments, a person stopped must be formally detained if the examination lasts beyond one hour. The detention regime, as provided for by Schedule 8, stipulates that it can last for up to 6 hours and is subject to periodic review. The detained person can be measured, photographed and otherwise subjected to reasonable steps to ascertain her identity. She can also be fingerprinted, and a DNA sample taken, without her consent. She can be questioned further, but has a qualified right of access to a solicitor. The questioning should not normally commence until after the arrival of the requested solicitor. Prior to the 2019 amendments, a senior police officer could issue a direction to the effect that the consultation with the solicitor in an individual case must be held within the sight and hearing of a police officer of at least the rank of inspector. That has been replaced in the 2019 amendments by a provision empowering a

senior police officer to deny the detained person her personal choice of solicitor.

Article 8 ECHR

Article 8 ECHR protects a person's right to her private and family life, her home and her correspondence. However, it is not an absolute right. It can be restricted by measures which are in accordance with law and are necessary in a democratic society in the interests of national security or for the prevention of crime etc. It was accepted in *Beghal* that the application of the Schedule 7 stop and examination power interferes with the applicant's right to privacy. The key issue was whether it was "in accordance with law".

Obviously, Schedule 7 has the appearance of law insofar as it is enacted as an integral part of the Terrorism Act 2000. That, however, is not sufficient in itself to satisfy the requirement of being "in accordance with law". The firmly established jurisprudence of the ECtHR also requires the substance of the enacted law to be compatible with the rule of law. Accordingly, it must be adequately accessible and foreseeable, and formulated with sufficient precision to enable the individual to regulate her conduct in compliance. Where the legislative provisions in question confer discretion on an executive authority (such as a police officer) to encroach on the fundamental rights of an individual, those provisions must prescribe the scope of that discretion with sufficient clarity. It would be contrary to the rule of law to grant a police officer an unfettered discretion which could be used to subject the individual's rights to arbitrary interference.

The Schedule 7 power of stop and examination raises an acute issue of compliance with the rule of law, as it can

be exercised randomly against any person without the need for a prior suspicion that the person had an association with acts of terrorism. In its previous decision in *Gillan and Quinton v UK* (2010), the Court had identified the absence of a "reasonable suspicion" requirement as a critical factor in finding that the police power to stop and search under section 44 of the Terrorism Act was in breach of Article 8 ECHR. In *Beghal*, by comparison, it acknowledged the importance of the reasonable suspicion standard, but went on to state that its presence is not always essential to avoid arbitrariness in the exercise of the Schedule 7 powers. The Court will look at the scheme as a whole in order to determine whether those powers can be exercised in an arbitrary manner contrary to the rule of law and Article 8.

The ECtHR's jurisprudence affords States a wide margin of appreciation in matters relating to national security. Citing the reports of the UK's independent reviewer of terrorism legislation, the Court noted that the Schedule 7 powers were useful in combating the terrorist threat and they were not being abused. It also took note of the published guidance on the use of the powers. This states, among other things, that they must be used proportionately, without unfair discrimination and in a manner that is informed by reference to terrorist indicators. Nevertheless, the Court found that the scope and intrusive nature of the powers were not sufficiently balanced by appropriate protections for the person affected.

A primary concern for the Court was that a person could be stopped and compulsorily examined without reasonable suspicion, with no access to a lawyer, for up to nine hours (as it was at the time). In particular, the lack of a "reasonable suspicion" requirement made it difficult for a person

affected to seek judicial review of the exercise of the power. This weakness was not offset by the oversight provided by the independent reviewer. While the Court acknowledged the general value of such oversight, it pointed out that the reviewer was not in a position to assess the lawfulness of the purpose of a stop in any individual case. The net effect was that there were insufficient safeguards to protect against the exceptionally broad discretion being used arbitrarily. Accordingly, the Schedule 7 regime was not “in accordance with law” and was in breach of Article 8 ECHR.

Article 6 ECHR

The Court also addressed the Article 6 (right to a fair trial) aspect. Article 6 ECHR states, in part, “[i]n the determination of .. any criminal charge against him, everyone is entitled to a fair and public hearing .. by an independent and impartial tribunal established by law”. It is firmly established in the jurisprudence of the Court that the protections encompassed by the right to a fair trial are not confined to the treatment of a person after he has been charged with a criminal offence. They can extend back to the point where a person is officially notified by a competent authority (such as the police) of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him. So, the Article 6 protections can apply from the point of arrest. Arguably, they can also apply from an entry, search and seizure or even a stop and search which occurred as integral part of preliminary steps leading to a criminal charge and trial.

The applicant argued that by being subjected to the stop and compulsory

examination pursuant to Schedule 7, she was exposed to the risk of her coerced answers being used against her in any possible subsequent prosecution for a terrorism related offence. A key problem, however, is that she was never actually suspected of a criminal offence when stopped and examined pursuant to Schedule 7. The defect that strengthened her case significantly under Article 8 worked against her in claiming the protection of Article 6. In stopping and examining her, the police were merely checking whether she might have been concerned in any acts of terrorism. They had not reached the point at which they were actively investigating her for being so concerned.

The Court did not exclude the possibility that exercise of the Schedule 7 power could trigger the protection of Article 6 in an appropriate case. It concluded, however, that this was not such a case. The applicant had neither been arrested nor charged with any terrorist related offence. The mere fact that she was stopped and examined did not suggest that she was suspected of any such offence. Nor was she questioned specifically about her involvement in any such offence. Accordingly, there was no basis for triggering Article 6 in her case.

Reforms

As noted above, the ECtHR in *Beghal* considered the Schedule 7 regime as it was at the time of the relevant stop and examination in 2011. It is arguable, therefore, that the reforms effected in 2014 and 2019 have cured the defects. Particularly significant in that context is the fact that preliminary questioning can only last up to one hour. Where a person is detained beyond that time, she acquires protections such as the limited right of

access to a solicitor. It is also notable that the number of Schedule 7 port stops have decreased steadily from 60,000 in 2012 to under 12,000 in 2018, while the number of follow-on detentions in that period have increased from about 600 to almost 1,850. This pattern could be interpreted as the result of better targeting, fuelled perhaps by the use of the compulsorily acquired passenger manifest data (in the case of persons travelling by plane or ferry). It remains the case, however, that people of Asian ethnicity are much more likely to be stopped than their white counterparts. In the same period, the proportion of the former has increased while the proportion of the latter has decreased.

A strong argument can be made that the reforms have not gone far enough to satisfy ECHR requirements. A key factor here is that parliament has stopped short of introducing the need for the stop and detention powers to be predicated on a prior suspicion in respect of the person concerned. This is despite the repeated recommendations of the independent reviewer of terrorism legislation (and others) for such a reform. Although the ECtHR appears to have retreated somewhat from the need for a reasonable suspicion requirement in these situations, it has also linked any such departure to the need for compensating safeguards for the persons affected. In particular, it has emphasised the importance of the person being able to challenge the justification for the exercise of the powers in her case. This is severely weakened by the absence of a prior suspicion requirement. Moreover, the Independent Reviewer does not provide an adequate compensating safeguard as he cannot review the lawfulness of the stop in any individual case. It may well be, therefore, that the reforms are still not

sufficient to satisfy the rule of law and Article 8 requirements.

More controls

Finally, it is worth noting that the 2019 Act introduces a parallel regime of examination and detention in respect of travellers at UK ports or borders for the purpose of checking whether they are, or have been, engaged in “hostile activity”. This is largely a response to the ‘Salisbury poisoning’ event. Hostile activity is defined as an act carried out on behalf of (or in the interests of) another State and which threatens national security or the economic well-being of the UK in a manner relevant to national security interests, or which is an act of serious crime. Critically, as with Schedules 7 and 8, the exercise of these powers is not predicated on any prior suspicion against the person stopped or detained.

Irish Extraterritorial Jurisdiction

Ratifying the Istanbul Convention

The Criminal Law (Extraterritorial Jurisdiction) Act 2019 was enacted in Ireland a few weeks ago. The primary purpose of the Act was to introduce the final legislative measures necessary to enable Ireland to ratify the Council of Europe’s Istanbul Convention on preventing and combating violence against women and domestic violence. Most of the legislative measures necessary to ratify the Convention are already contained in the Domestic Violence Act 2018. Significantly, in implementing the outstanding measures, the 2019 Act also extends the extra-territorial jurisdiction of Irish courts to a range of violent offences irrespective of

whether they specifically entail violence against women or domestic violence. This reflects a growing trend towards expanding extra-territorial jurisdiction in criminal matters.

Up until the 2019 Act, extra-territorial jurisdiction in criminal matters has been felt primarily in respect of serious crimes that pose a common threat to States because of their cross-border character. Typical examples concern terrorism, drug-trafficking and certain sexual offences. Arguably, the 2019 Act is different in that it extends extra-territorial jurisdiction to a wider range of offences against the person (see below), some of which (such as assault causing harm) might not be considered to be at the serious end of criminal offending. This, of course, reflects the fact that a primary purpose of the Act is to combat violence against women and domestic violence. In line with the Istanbul Convention, it is concerned to ensure that national borders do not operate as barriers to prosecutions for these offences.

Violent and sexual offences

Much of the Act applies to certain violent offences, namely: assault causing harm; causing serious harm; threats to kill or cause serious harm; coercion; harassment; sexual assault (indecent assault); aggravated sexual assault; rape; and rape under section 4 of the Criminal Law (Rape)(Amendment) Act 1990. Each of these constitutes a “relevant offence” for the purposes of the Act.

Conduct amounting to one of the relevant offences can be prosecuted in Ireland where it occurs outside the State on board an Irish ship or on an Irish registered aircraft. It does not matter whether the accused or the victim is an Irish citizen or resident. The same applies where a person

aids, abets, counsels or procures (secondary participation) another person to engage in conduct on board an Irish ship or registered aircraft, or on the territory of another State party to the Convention. In this event, the conduct must amount to one of the relevant offences if it occurred in Ireland, and the secondary participation must occur in Ireland or on board an Irish ship or Irish registered aircraft.

Such assumption of extra-territorial jurisdiction is not novel in Ireland. There are several statutory provisions asserting criminal jurisdiction over specified conduct that occurs on board an Irish ship or Irish registered aircraft. However, the 2019 Act also confers jurisdiction in respect of conduct that occurs wholly in another Convention State in certain circumstances. This arises where an Irish citizen, or person ordinarily resident in Ireland, engages in conduct in another Convention State, and the conduct in question constitutes an offence in that Convention State and would, if it occurred in Ireland, constitute a relevant offence (listed above) in Ireland. The 2019 Act makes prosecution in Ireland a possibility where these requirements are satisfied. It is worth noting that there does not have to be an identity between the definition of the offence in the other Convention State and the “relevant offence” in Irish law. It will be sufficient that the conduct in question amounts to an offence in the law of the other Convention State, irrespective of how it is defined there.

The Act also confers jurisdiction on an Irish court in respect of aiding, abetting, counselling or procuring (secondary participation) conduct in another Convention State in these circumstances. The secondary participation must occur in the other Convention State and the conduct being assisted or encouraged must concern

conduct in that State. The secondary participation must constitute an offence in the other Convention State, the secondary party must be an Irish citizen or ordinarily resident in Ireland and the conduct being assisted or encouraged must constitute a relevant offence in Ireland if it occurred there.

Murder and manslaughter

The Act makes separate provision for murder and manslaughter. Irish courts already have jurisdiction over murder and manslaughter committed outside the State by an Irish citizen. The 2019 Act extends this further to a person who is ordinarily resident in Ireland. If such a person engages in conduct outside the State and that conduct would, if it occurred in Ireland, constitute murder or manslaughter, he can be prosecuted in Ireland. It is not necessary for the conduct to occur in another Convention State. It can occur anywhere in the world outside Ireland. Moreover, it is not necessary for the conduct to amount to an offence in the place where it occurred.

The Act also extends the jurisdiction of Irish courts to aiding, abetting, counselling or procuring conduct in a place outside Ireland where the conduct in question would, if it occurred in Ireland, amount to murder or manslaughter. This applies where the secondary party is either an Irish citizen or a person ordinarily resident in Ireland, and the secondary participation itself occurred outside Ireland (and not on an Irish ship or Irish registered aircraft).

It is also worth noting that the 2019 Act makes it a specific offence under Irish law for any person (irrespective of nationality or ordinary residence) to aid, abet, counsel or procure murder or manslaughter outside Ireland. The act of secondary participation must occur in Ireland or on board an Irish

ship or Irish registered aircraft. The conduct being assisted or encouraged must be such as to amount to the offence of murder or manslaughter if it occurred in Ireland. However, it need not amount to such an offence under the law of the place where it is intended to occur.

Northern Ireland

Some of the offences covered by the 2019 Act are subject to the extra-territorial jurisdiction provisions of the Criminal Law (Jurisdiction) Act 1976 which relates to Northern Ireland. The primary offences in this context are murder, manslaughter and causing serious harm. Where extra-territorial jurisdiction is being considered in respect of such offences committed in Northern Ireland, it is the 1976 Act (rather than the 2019 Act) that applies.

Court area

Proceedings for an offence under the 2019 Act can be taken in any place in Ireland, and the offence will be treated as having occurred in that place for the purposes of the proceedings. This provision reflects the fact that, under Irish law, the jurisdiction of a court over an offence is closely connected to the court area in which the offence is alleged to have occurred. For an offence that occurs outside Ireland, therefore, it is necessary to have provision treating it as if it occurred in the Irish court area where the proceedings are commenced. A technical complication arises in respect of those offences covered by the Act which are actually committed in Ireland. It is arguable, that the effect of the Act is to permit them to be prosecuted anywhere in Ireland, rather than in the locality where they were actually committed.

Proving citizenship and residency

Since the citizenship or residency status of a person is central to most situations covered by the Act, there is express provision for that to be proved. Evidence of citizenship can be provided by a certificate signed by an officer of the Minister for Foreign Affairs and Trade and stating that a passport was issued to the person concerned on a specified date by that Minister. This, together with a certificate signed by an officer of the Minister stating that to the best of his knowledge and belief the person concerned has not ceased to be an Irish citizen, shall be evidence (unless the contrary is shown) that the person was an Irish citizen on the date that the offence in question was alleged to have been committed.

For the purposes of these provisions, a person is deemed to have been ordinarily resident in Ireland if he has had his principal residence in the State for the period of 12 months immediately preceding the commission of the offence concerned.

Significance in practice

As noted above, the extension of extra-territorial jurisdiction effected by the 2019 Act is not confined to the commission of offences in the context of violence against women or domestic violence. It extends to the specified offences generally, irrespective of the context in which they were committed. Accordingly, the Act can be interpreted as a significant extension of extra-territorial jurisdiction in Irish criminal law. It is also possible, of course, that other parties to the Istanbul Convention will implement these aspects of the Convention in their law in a similar manner. This would mean that their courts would have extra-

territorial jurisdiction over the offences concerned when committed in Ireland by one of their citizens or residents.

Given the nature of the offences covered by the 2019 Act, it might be expected that the need for Ireland to exercise extra-territorial jurisdiction in respect of them will not be a regular occurrence. It is highly likely that murder or manslaughter, or any of the sexual offences or other offences against the person, will be prosecuted in the other Convention State where they occurred. Even if the suspected offender attempted to evade justice there by coming to Ireland, it is likely that he could be prosecuted in the other Convention State in his absence or that he would be returned for trial there pursuant to an extradition request or European Arrest Warrant (where applicable). Presumably, prosecution in Ireland would only be a consideration if, for some reason, the other Convention State concerned refused or failed to prosecute, or the circumstances were such that a prosecution in Ireland would be more appropriate than an extradition. In that event, the provisions of the Criminal Justice (Mutual Assistance) Act 2008 will be available where it is necessary to procure assistance from the other Convention State in respect of evidence or witnesses located there.

Double Jeopardy

It is also important to note that the exercise of extra-territorial jurisdiction pursuant to these provisions is subject to the 'double jeopardy' principle. Accordingly, where a person has been acquitted of an offence in a place outside Ireland, he cannot be prosecuted again in Ireland under the Act for an offence consisting of the alleged conduct constituting the first offence. The same applies where he has been convicted of such an offence outside Ireland.

Status of accused rather than victim

Finally, it is worth noting that the 2019 Act confers extra-territorial jurisdiction by reference to the citizenship or ordinary residence of the alleged offender. The jurisdiction is not triggered by the citizenship or ordinary residence of the victim. It follows that if a person, who is not an Irish citizen or ordinarily resident in Ireland, commits an offence covered by the Act against an Irish citizen (or person ordinarily resident in Ireland) outside Ireland, an Irish court would not have jurisdiction over that offence under the 2019 Act. This focus on the status of the alleged offender, as distinct from the victim, reflects the fact that Irish criminal law approaches extra-territorial jurisdiction on the basis of what is known as the 'active personality principle'; in other words, on the basis of the status of the alleged offender.

Ian Bailey case

Some States exercise jurisdiction on the basis of the status of the victim in certain circumstances. An ongoing, controversial, example of this concerns the French prosecution of English citizen (but Irish resident), Ian Bailey, for the 1996 murder in Ireland (West Cork) of French citizen, Sophie Toscan du Plantier, who was also resident in Ireland at the time. The Irish DPP has decided against prosecution because of the lack of admissible evidence. Despite the fact that the murder occurred in Ireland, the victim was resident in Ireland, the accused is resident in Ireland, the evidence (such as it is) is located in Ireland, and the Irish DPP has decided there is an insufficient basis for prosecution, the French authorities are pursuing a prosecution in France as the murder of a French citizen anywhere in the world is a crime under French law. A prosecution could not

normally be sustained in Ireland for the murder of an Irish citizen in France in comparable circumstances. When enacting the 2019 Act, Ireland decided not to include the status of the victim as a trigger for extra-territorial jurisdiction, as to do so would constitute a major change in Irish law. Any such dramatic change would require much more deliberation than was necessary to satisfy the Istanbul Convention.

European Arrest Warrant

Basic principles

The European arrest warrant (EAW) is an instrument for the surrender of a person from one EU Member to another for the purpose of being prosecuted for a criminal offence, or to serve a sentence already imposed, in the latter. It was introduced by a 2002 EU Framework Decision which was implemented in the UK by the Extradition Act 2003 (as amended). The EAW replaced the more cumbersome Council of Europe extradition arrangements between EU Member States with a streamlined surrender arrangement based exclusively on direct engagement between national judicial (as distinct from political) authorities. Where an EAW issued by a judicial authority in one Member State satisfies the statutory requirements, it must be executed (and the requested person surrendered) by a judicial authority in the other Member State within a specified time frame. While there are provisions in the EU Framework Decision requiring or permitting a refusal to execute an otherwise valid EAW in certain specified circumstances, these do not include an express provision to refuse execution on the grounds of fundamental rights. A core and distinctive feature of the EAW is that it must be

executed on the basis of mutual recognition and trust. Essentially, this means that the executing judicial authority must normally proceed on the basis that the facts stated on the face of the EAW are accurate and that the fundamental rights of the requested person will be respected and protected in the criminal process of the issuing Member State.

Implementation issues

The EAW has proved remarkably successful from a prosecution perspective. Many more defendants are surrendered between Member States much more quickly than was ever the case under the Council of Europe's 1957 Convention on Extradition. In the UK, for example, the number of persons surrendered to other EU States have increased from 19 in 2004 to an average of 1,250 per annum over the past few years, while the numbers surrendered to the UK have increased from 24 in 2004 to an average of 160 in the past few years. It must also be said, however, that the attempt to impose a common, compulsory extradition framework on 28 Member States with criminal procedures which differ, sometimes radically, from each other, has provoked ongoing concerns about fair procedures and the protection of fundamental rights. These concerns are reflected in a steady stream of EAW cases coming before the higher courts in the UK (and in Ireland). They have also resulted in some significant amendments to the UK's implementing legislation in 2013 and 2014, with the result that there is now some divergence between the text of the EU's Framework Decision and the UK's law on important aspects of the EAW.

UK restrictions

Unlike the EU's Framework Decision, the UK's implementing legislation now provides

for an absolute bar on extradition pursuant to an EAW where the proceedings have been affected by delay which would be unjust or oppressive to the person concerned. In this context "unjust" refers primarily to the risk of prejudice to the accused in the conduct of the subsequent trial, while "oppressive" refers to the hardship to the accused resulting from changes in his circumstances which have occurred during the relevant period of delay. The UK legislation also includes an express bar on extradition where executing the EAW would be incompatible with the person's rights under the European Convention on Human Rights (ECHR), as protected by the Human Rights Act 1998. Equally, there is a bar on the execution of an EAW aimed at securing the prosecution of the requested person where the extradition would be disproportionate in the circumstances. These are only some of the additional restrictions that the UK has imposed unilaterally on the execution of an EAW.

Facts of *Konecny*

A few weeks ago, in *Konecny v District Court in Brno-Venkov, Czech Republic* (2019), the Supreme Court handed down its latest decision on the interpretation and application of the EAW provisions. The appellant in *Konecny* had moved from the Czech Republic to the UK in 2007. In 2008 he was convicted and sentenced in this absence to eight years in prison in the Czech Republic for certain fraud offences dating from 2004. An EAW was issued for his surrender in 2013 and it was executed by a District Judge in the Westminster Magistrates' Court in 2017. Significantly, the appellant had not been aware in advance of his trial in the Czech Republic. Accordingly, under Czech law he would have an absolute right to a full re-trial in the event of his surrender. As will be seen

below, this raised the pertinent issue under UK law of whether the Czech EAW should be interpreted as a request for surrender to put him on trial or, as was stated on the face of the EAW, to serve his sentence (subject to him exercising his option of a re-trial).

The appellant challenged the surrender decision unsuccessfully in the High Court, and appealed from there to the Supreme Court. At the heart of his appeal was the familiar argument that the delay between the commission of the alleged offences and the execution of the EAW was such that it breached his rights under the UK's EAW legislation and his right to a private and family life under Article 8 ECHR. In essence, he argued that he had established a settled family life in the UK for such a long period that it would be unjust, oppressive and grossly unfair to himself and his family to rip that asunder by surrendering him to the Czech Republic to serve a long prison sentence or to undergo lengthy criminal proceedings.

An 'accusation' or 'conviction' EAW

The key question that had to be decided by the Supreme Court was whether the appellant was an accused person, in the sense of being wanted for the purposes of prosecuting him for the fraud offences in the Czech Republic (an accusation warrant), or whether he was unlawfully at large, in the sense that he had already been convicted and was wanted to serve the sentence that had been imposed on him for those offences (a conviction warrant). The significance of the distinction relates to the fact that the UK implementing legislation does not treat the two warrants uniformly in the procedure leading to a decision on whether to extradite. So, for example, when assessing whether delay is such that it would be unjust or oppressive to extradite

him, the UK court will measure the delay from the date of the alleged offence in the case of an accusation warrant, but from the date of conviction in the case of a conviction. In the appellant's case, this would have the effect of reducing the period of delay to be considered from 13 years to 9 years.

Another material difference is that the execution of an accusation EAW must be refused if the extradition of the person concerned would be incompatible with his rights under the ECHR, or if it would be disproportionate relative to the seriousness of the penalty likely to be imposed on conviction. By comparison, the execution of a conviction EAW cannot be refused on the ground of disproportionality (although it must be refused if the extradition would be incompatible with the person's rights under the ECHR).

Clearly, it would weigh heavily in the appellant's favour if he was treated as being wanted to be prosecuted again for the offences (an accusation EAW), rather than to serve the sentence already imposed in the trial held in his absence (a conviction EAW). Superficially, of course, it might appear that the appellant is in the latter category as he has already been convicted and sentenced. The reality, however, is the Czech authorities did not make any attempt to notify him in advance of his trial, or to seek his extradition for prosecution before he came openly to the UK. Instead, they seemed content to charge and try him in his absence with a view to seeking his extradition post-conviction, at which point they would afford him the unqualified right to be tried again. In this arrangement, it is at least arguable that the appellant's conviction was not final, and that the trial in his absence was essentially a procedural step that would lead to his trial in person. As such, the

Czech EAW could be viewed substantively as an extradition request to try him in person (essentially an accusation EAW), even though in form it was expressed as an EAW for the extradition of a person who had already been convicted (a conviction EAW).

The Supreme Court concluded that the EAW in question was a conviction EAW. It could find no compelling support in EU law for the proposition that the surrender of a convicted person (a conviction EAW) would be classified as a surrender for the purposes of prosecution (an accusation EAW) simply because the requested person had an unfettered right to a re-trial in the requesting State. If the conviction was final, in the sense of being enforceable, the EAW remained a conviction EAW. The mere fact that the conviction was not necessarily irrevocable did not convert the EAW into an accusation EAW. Insofar as there was domestic UK extradition precedents offering support to the contrary, the Supreme Court considered that these had no application to the EAW regime which was a comprehensive self-contained system.

The Court also considered that it would be inconsistent with the EAW regime and the implementing UK legislation to treat the appellant as an accused person simply because he had a right to a re-trial in respect of the conviction if extradited. In reaching that conclusion, the Court was heavily influenced by the fact that the EAW system was founded on a high level of mutual trust and confidence between the Member States. It acknowledged that the executing judicial authority will normally accept at face value the description of the requested person's status in the national law of the requesting State, as expressed by the issuing judicial authority in the EAW. While that description is not always

conclusive, the executing judicial authority will normally follow it in the absence of evidence to the contrary. In this case the EAW clearly stated that the appellant had been convicted and that the conviction was final and enforceable. No evidence was presented to contest that interpretation of the contents of the EAW under Czech law.

Calculating period of delay

As noted above, the distinction between a conviction EAW and an accusation EAW could have serious adverse implications for a requested person who had been convicted in his absence in circumstances where he had an unfettered right to a re-trial in the requesting State. The immediate effect is that the impact of delay in seeking his extradition would be assessed solely on the basis of the period between the date of his first conviction in the requesting State and the date of the UK extradition. This could be a much shorter period than that between the alleged commission of the offence concerned and the date of the UK extradition, especially if there had been considerable delay in the investigation of the offence concerned. In other words, the requested person could be exposed to severe prejudice in his re-trial as a result of substantial delay by the requesting State in the initial investigation and prosecution, yet that delay (and associated prejudice) could not be taken into account by the UK court in deciding whether his extradition was barred on the basis of delay.

The Supreme Court acknowledged the substantive unfairness of this situation. It attributed that unfairness to a deficiency in the drafting of the UK implementing legislation which, it intimated, required consideration by the legislature at the earliest opportunity. The Court also noted that the High Court, and a Divisional Court, in other cases had resorted to various

devices to circumvent the unfairness, but none were entirely satisfactory. Significantly, the Supreme Court considered that the Article 8 ECHR right to private and family life could provide a vehicle for assessing the effects of the full delay in cases such as the appellant's; at least until the legislation was amended.

Application of Article 8 ECHR

The application of Article 8 would entail a balancing exercise between the public's interest in having the alleged offences prosecuted, and the accused's interest in not being extradited to face delayed proceedings in another State after having established a life for himself and his family over many years in his current State. Not only would this allow the full period of delay from the alleged commission of the offence to be taken into account, but it would also allow the Court to apply a proportionality test that the UK legislation otherwise confines to accusation warrants. Moreover, the Supreme intimated that where delay would present a risk of injustice for the accused at the re-trial, this could be included, and would be highly relevant, in the balancing test under Article 8.

On the facts of the case, the Supreme Court noted that the District Judge had taken the full period of delay into account when conducting the balancing test under Article 8. He took note of the fact that there had been a long period of delay since the commission of the offences, that the appellant had built a new life for himself and his family in the UK since that time, and that he had not been aware of the proceedings or conviction against him in the Czech Republic. However, the District Judge concluded that these were not sufficient to outweigh the public interest in prosecution as the alleged offences were

serious and related to similar offences previously committed by the appellant. The High Court, on appeal, could see no basis for overturning the District Judge's decision, although the High Court judge did express some unease over the length of the delay. The Supreme Court shared that unease, but agreed that there was no clear basis for over-turning the District Judge's decision. Accordingly, the appeal was dismissed.

The decision in *Konecny* clarifies the distinction in UK law between an EAW for the extradition of a person for the purpose of prosecuting him in another Member State, and an EAW rendering him amenable to serve a sentence imposed on him following an earlier trial in his absence in that other State. More broadly, it seems to breathe more life into the Article 8 right to private and family life as a potential basis for resisting the execution of an EAW by a judicial authority in the UK.