SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 83

E103/16

NOTE ON INCIDENTAL PROCEDURE

by Sheriff N A Ross

in the application by

THE LORD ADVOCATE ON BEHALF OF THE RUSSIAN FEDERATION

for extradition of

ALEXANDER SHAPOVALOV

Act: Meehan QC on behalf of the Lord Advocate
Alt: Bovey QC

[1] This note relates to incidental procedure in extradition proceedings brought by the Lord Advocate on behalf of the Russian Federation, the state requesting the extradition of Mr Shapovalov, the requested person.

Statements of uncontroversial evidence

[2] In criminal proceedings, sec 258 of the Criminal Procedure (Scotland) Act 1995 (the '1995 Act') allows a party to identify facts which are unlikely to be disputed by the other party, and to serve a statement (commonly referred to as a statement of uncontroversial evidence ('SUE')) on the other party. If the other party fails within a time limit to challenge the facts in the SUE, then those facts are deemed to have been conclusively proved. This allows the true dispute to be focused. The benefits of efficient use of time and resources to the administration of justice are self-evident.

[3] In the present extradition proceedings, senior counsel for both parties made submissions at a preliminary hearing on whether sec 258 procedure is available in

extradition proceedings, whether it has been timeously invoked, and whether the court's power of direction under that section should be used. A number of procedural and evidential issues are of wider relevance, and it was agreed that this note should be issued.

The relevant procedural background

[4] On behalf of Mr Shapovalov agents have lodged two separate SUEs. The Crown has responded by lodging two notes of challenge (1995 Act, sec 258(3)), in which they challenge the statements therein, in effect by a simple denial. In response to those notices to challenge, Mr Shapovalov's agents have lodged a motion to invoke sec 258(4) of the 1995 Act, namely an application to the court for a direction that the Crown's challenge be disregarded, in whole or in part.

[5] In due course at an evidential hearing it will be Mr Shapovalov's position that assurances received from the Russian Federation, about issues such as fair trial and prison conditions, should be rejected as untrue. As such, the honesty and reliability of such assurances are a central focus of the case, and will form the subject of the evidential hearing.

[6] The two statements of uncontroversial evidence (respectively, "SUE1" and "SUE2") are in fairly short scope. Their length, however, belies their potential effect. SUE1 seeks to agree the following statements as uncontroversial:-

> "1. That on 15 December 2014 [date amended at the bar] Professor R. Morgan visited two SIZOs and reported that the prisons were not overcrowded.
>
> 2. The Russian State relied on his report in Court in England in support of extradition requests in relation to a Mr Korolev and, on 24 February 2017, Stanizlav Dzgoev.

3. A couple of days before Professor Morgan's visit to SIZO 5 the prison was suddenly emptied by the decanting of prisoners.

4. When Professor Morgan asked about this he was not told the truth.

5. An explanation for the lie told to Professor Morgan offered on 24 February 2017 by the Russian Federation to the Divisional Court in the case of Dzgoev v Prosecutor General's Office of the Russian Federation [2017] EWHC 735 (Admin) was rejected by that Court."

[7] SUE2 seeks to agree the following statements as uncontroversial:-

"1. Since the Russian Federation ratified the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 1998, the CPT has issued 26 reports on visits to Russian prisons carried out by them.

2. The form of ratification by the Russian Federation requires the consent of that state to the publication of such reports.

3. Of the 26 CPT reports on Russian prison conditions, the Russian Federation has only consented to publication of three reports, the last being a report on a visit in April/May 2011.

4. In the circumstances, no report of a CPT visit to a Russian jail since 2011 has been made public.

5. If admitted to the general prison population in Russia there is a real risk that Dr Shapovalov would be detained in conditions that breach his rights under Article 3 ECHR."

[8] The Crown's response has been to lodge notices of challenge of facts under sec 258(3) which (a) challenge the competency of invoking sec 258 in these proceedings, and (b) challenge all the facts specified in both SUE1 and SUE2.

[9] The issues arising for decision here are (i) whether sec 258 procedure under the 1995 Act applies in these extradition proceedings and, (ii) if so, and this procedure is followed, whether the challenges should be disregarded by order of the court.

The 2003 Act and summary criminal procedure

[10] Sec 77(2) of the Extradition Act 2003 (the '2003 Act') provides:-

> 'In Scotland - (a) at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by the person whose extradition has been requested'.

[11] That section applies to Part 2 (category 2) countries, of which the Russian Federation is one. The equivalent section for category 1 countries (sec 9(2) of the 2003 Act) is substantially in the same terms and was discussed on appeal in *HMA* v *Havrilova* 2012 SCCR 361.

The criteria for the application of section 258 procedure

[12] Extradition procedure has been described as sui generis but more akin to criminal rather than civil proceedings (*Goatley* v *HMA* 2008 JC 1) but:-

> 'It is more accurate to say that the rules of criminal evidence and procedure are, in the absence of special circumstances, normally applicable…There is, after all, no hybrid code of evidence applicable to extradition cases or to those many criminal processes in which a human rights point is raised. If a fact, including a substantial ground, requires to be established, the normal rules must apply…' (*Kapri* v *HMA* 2015 JC 30 per the Lord Justice-Clerk at [125], quoting *Havrilova* at [13]).

[13] The court in *Kapri* had before it and was expressly considering the terms of sec 77(2) when it made those observations. The clear thrust of *Kapri* is that the default position is that the rules of criminal evidence and procedure are applicable. The exception is where there are 'special circumstances'.

[14] The Crown submitted that there are special circumstances in extradition proceedings which prevent sec 258 from applying. These are, first, that sec 77 refers

only to court powers, not the power of a party to serve a notice; second, that sec 258 refers to procedure which does not exist in extradition proceedings.

Special circumstances: the wording of section 77

[15] The Crown relied on the terminology of sec 77, which did not award powers to a party to serve a notice. In my view this point was dealt with in *Havrilova*. The Inner House approved, in principle, the application of summary procedure rules whenever circumstances allowed (discussed further below), but found that *Havrilova* was not such a case. The court noted that sec 77 confers (only) powers on the court, but says nothing about, for example, the rights with which *Havrilova* was concerned (in that case, custody time limits). It accepted that sec 77 did not operate to apply the whole of 1995 Act procedure to extradition proceedings, but only 'whenever circumstances allow'. In *Havrilova* the issue was whether the requested person enjoyed the same time-limits as existed under summary criminal procedure. The court found that it was impossible to fit the custody time limits under the 1995 Act into the structure of the 2003 Act. In *Havrilova* the appellant was not simply using similar procedure, but was attempting to create substantive rights. The court noted that the appellant was attempting to invoke rights which only come into existence following being charged with a summary offence, which he had not been. The right existed in relation to procedure which did not apply. The proposed time limit ignored that the 2003 Act imposes its own time limits. It also did not take into account that bail in extradition proceedings is expressly regulated by sec 24F of the 1995 Act. For these reasons, the Inner House in *Havrilova* found that it was impossible to apply summary time limits to extradition procedure.

[16] The present case invokes sec 258, which was considered in the seven-judge case of *Ashif* v *HMA* 2017 JC 7. The Lord Justice-General conducted a detailed analysis of the provision, in the context of summary criminal proceedings. The section was intended to address the problem of trials being prolonged by the proving of facts which were not capable of being disputed. Early legislative attempts to compel the agreement of uncontroversial evidence were routinely found to be thwarted by a practice of automatic challenge to any attempt to agree evidence. This led to the introduction of sub-section (4A) to that section, which provided powers to the court, on application by a party, to direct that a challenge to evidence may be disregarded. The effect of such a direction is that subsection (3) operates, and the relevant fact will be treated as unchallenged and therefore deemed to have been conclusively proved.

[17] On behalf of the Crown it was submitted that sec 77(2) of the 2003 Act refers only to powers conferred on the court, and not parties' rights or other considerations. A power to make directions under sec 258(4A) only arose if the underlying sec 258 procedure applied. It was submitted that sec 258 procedure was not applied by sec 77(2) as it did not only confer powers on a court. In my view, this issue was addressed and answered by the Inner House in *Havrilova*, who said:

> "It is plain that section 9(2) is intended to bring into play in extradition proceedings, whenever circumstances allow, the rules of summary cause procedure and evidence…that is how those provisions have been understood by the courts to date and that is the correct approach." (at para [13]).

[18] That formulation is inclusive and broad ranging, and covers not only common law procedure but all summary procedure. This approach was approved in Kapri, quoted above:

> "If a fact, including a substantial ground, requires to be established, the normal rules must apply…' at [125], quoting Havrilova at [13]).

[19] There is nothing exotic or new about SUEs. They are an established method of addressing the mischief identified in *Ashif*. They are part of the 'normal rules' of summary criminal proceedings. Accordingly, unless they conflict or are irreconcilable with the provisions of sec 77, they form part of extradition procedure. In *Havrilova*, there clearly were special circumstances, in that the accused was, to borrow the Crown's phrase, attempting to hammer a square peg into a round hole. In that case the proposition rested on procedure which was not integral and was not part of an extradition. In my view, the present case is of a different character. The mechanism in the present case is not impossible to fit into the 2003 Act, unlike in *Havrilova*. This is because the SUEs do not introduce any competing principle or conflicting mechanism to the 2003 Act. It is quite the opposite. The principles behind sec 258 are absolutely compatible with the 2003 Act. The SUEs are a basic procedural tool to focus the preparation and presentation of evidence. The leading of unnecessary evidence and inefficient use of court time:

> 'take up scarce public resources and add to the administrative burdens of the court. The cost of trials of inordinate length is not to be measured solely in terms of time and money. The protracted process of proving a multiplicity of documents causes inconvenience to witnesses and jurors and puts the integrity of the trial at risk' (per L J-G Gill in Ashif at [3]).

[20] There are no 'special circumstances' in extradition proceedings which avoid such issues. These issues are universal, to some extent or another, whatever the nature and level of judicial proceedings. Although sec 77 is phrased in terms of judicial powers, the rules of criminal evidence and procedure are normally applicable (*Kapri*) and circumstances clearly allow the rules of summary cause

procedure to be brought into play (*Havrilova*). The requirement for efficient leading of evidence is every bit as central to extradition proceedings as it is to summary, and for that matter all, criminal procedure. It follows, in my view, that the sec 258 procedure is to be regarded as properly incorporated into extraction proceedings by virtue of sec 77(2) of the 2003 Act. In my view, such procedure is not only part of extradition procedure, but is actively to be encouraged.

[21] Sec 77 awards the judge basic powers to oversee the process, and to make sure that it is not abused, by allowing for a challenge to SUEs. There is nothing incompatible with that procedure.

Special circumstances: wording of sec 258

[22] The Crown submitted that, nonetheless, sec 258 was incompatible with the 2003 Act in that it referred to a procedure and timetable by reference to the "relevant period" (defined in section 258(2ZA) as 14 days) before the "relevant diet". The latter term is defined (section 58(2A)) and:

> "means (a) in the case of proceedings in the High Court, the preliminary hearing; (aa) in summary proceedings in which an intermediate diet is to be held, that diet; (b) in any other case, the trial diet"

[23] The Crown submitted that extradition proceedings did not have either preliminary hearing or intermediate diet, and there was no trial diet, and accordingly that this provision was inoperable, which amounted to "special circumstances" within the meaning of Kapri, and therefore sec 258 as a whole could not form part of extradition procedure.

[24] This proposition has an echo in the situation faced in Havrilova, but in my view is of an entirely different order. *Havrilova* disallowed the attempt to introduce

substantive rights through a procedural mechanism. The present case is not such an attempt. Rather, it is an attempt to regularise procedure by reference to established procedural and evidential mechanisms of Scots criminal law. There is no reason to object in principle to such an attempt.

[25] In my view it is an unduly narrow approach to found on the specific terminology, and such an approach runs contrary to the inclusive language of the authorities relied on. Sec 258 uses specific terminology such as "intermediate diet" and "trial diet" (High Court references being irrelevant, as section 77(2) of the 2003 Act refers only to summary proceedings). In my view, *Kapri* clearly encourages summary procedure to apply unless there is a sound objection in principle. The phrase 'special circumstances' refers to surrounding facts. Drafting or terminology issues are not 'circumstances'. Only if a provision created a fact-critical mechanism which simply did not fit extradition procedure could this be described as in any way special or a 'circumstance'. This is not such a case.

[26] Rather, the use of summary criminal terminology is to identify intermediate and final hearings, akin to extradition proceedings. They are readily understandable and translatable, with no distortion in meaning or effect.

[27] This approach is supported by the inclusive language of Kapri. It is also supported by the leeway introduced by section 77(2), which provides for use of the same powers "as nearly as may be". That phrase must be given content and purpose. It is intended in my view to allow the court and thereby the parties the benefit of powers without artificial strictures arising from terminology. Any other approach would defeat the inclusive approach of the authorities in applying summary procedure.

[28] It follows that there are no special circumstances arising from the wording of sec 258 of the 1995 Act.

Special circumstances: case management in extradition

[29] There remains to be considered whether any other special circumstances exist arising from extradition procedure itself. In my view no such barrier arises. The purpose of sec 258 is entirely consistent with the approach of the courts in virtually every type of procedure, which is to minimise wasted time and resources and to focus on the issues truly requiring judicial decision.

[30] Even if sec 258 procedure was not invoked, the court has an inherent power and duty to regulate extradition proceedings, to achieve an efficient hearing without unnecessary waste of time and resources:

> "It will usually be desirable to hold a case management conference in advance of the extradition hearing to identify any issues that are likely to arise and so that the judge can give directions designed to ensure that these issues can be addressed without causing delay" (Lord Phillips CJ in R(USA), quoted in Havrilova at para [14]).

[31] There is therefore nothing in principle to bar the application of sec 258, and as an efficient case management tool there is much to commend it.

Whether section 258 has been timeously invoked

[32] The Crown submitted that the application should in any event be considered incompetent as it had been submitted late, namely 6 days before the procedural hearing, and not either 14 or 7 days before, depending on which part of section 258(SZA) was engaged. Notably, there is no dispensing procedure, as there is for a

late notice of challenge (section 258(3)) or late application to disregard (section 258(4D).

[33] This submission depends on the definition of "relevant period" from the "relevant date", which latter term means, on the drafting of section 258(2A), the "trial diet" (but not the "intermediate diet", these not being summary proceedings and there being no provision for one). Neither diet exists in extradition procedure which has a single hearing, which is within 2 months of first appearance unless (as has happened here) a later hearing has been fixed on the application of either party (section 75). A practice has grown up to reflect the need in some cases for an extended period of preparation, and this has led to the identification of "preliminary hearings" and "full hearings". These reflect broadly the same purpose, and similar mechanism, as the summary criminal procedure, namely orderly preparation, presentation, and fair notice of points to be taken at any evidential hearing. As noted above, English authority referring to the desirability of holding a case management conference was referred to with approval in *Havrilova* (at paragraph [14]).

[34] In my view, the correct approach is as discussed above, and the application of summary criminal procedure should not be defeated by artificially cleaving to terminology. The purpose of this provision is 14 days' fair notice. The full evidential hearing in this extradition hearing is many months away. There can be no reasonable argument that fair notice has not been given. The Crown did not indicate it required further time to prepare (leaving aside information to be sought, discussed below) and suffers no prejudice on this construction of the legislation. In my view, the terms of section 258(2A)(b) can be applied "as nearly as may be" (sec 77(2)) to the extradition hearing at which the final decision is to be made. That is presently far in

the future, and the 14-day notice period comfortably exceeded. In my view the SUEs have been timeously served.

Whether the court's power of direction should be used

[35] It follows that, as sec 258 has been engaged, then sec 258(4A) is also engaged, and the court has power to make direction, in appropriate circumstances, that a notice of challenge to a statement of uncontroversial evidence is to be disregarded in whole or in part. The Crown submits no such direction should be given.

[36] As a preliminary point, there is a timing issue. Mr Shapovalov's agents have felt obliged, out of caution, to intimate and present SUE1 and SUE2 at an early stage and to argue these at the first opportunity. The Crown has sought instruction and information on the contents of these documents, and has felt obliged in the meantime to intimate notices of challenge. Both parties have acted responsibly, but the result is an unfortunate mismatch of timing. The result of the Crown's enquiries of the Russian Federation and elsewhere is that some (but not all) of these facts may in due course be no longer challenged. For example, the Crown do not yet know whether it is true that the Russian Federation has still not consented to the release of any report about prison conditions since 2011. Their position is appropriate. I would have allowed further time for these facts to be checked, had this been the only issue.

[37] I pause to note that Mr Meehan QC for the Crown was clear and direct in giving assurances to the court about the Crown's proposed conduct. He recognised that there was a duty both on counsel and the Crown not to demand evidence of facts which could not properly be disputed. Such an approach was required, he submitted, quite independently of the terms of the 1995 Act, as part of a general

responsibility to the court. If it transpired, following enquiry, that any of these facts were undisputed, the Crown on behalf of the requesting state would act responsibly and would agree they be treated as proved. I accept those assurances, and agree with that submission. I accept that the Crown are acting properly in accordance with their duties.

[38] Obtaining further instructions will, however, only address some of the outstanding issues. It will not affect the more contentions statements of fact, such as the allegation that the Russian Federation caused witnesses to be lied to, which allegation the Crown challenges. It is therefore necessary to proceed to deal with the question of whether the court should give directions under sec 258(4A).

Whether to direct Crown challenge be disregarded

[39] Sec 258(4A) provides:

> "Where a [SUE] is served under subsection (3) above, the court may, on the application of any party to the proceedings…direct that any challenge in the notice to any fact is to be disregarded…if the court considers the challenge to be unjustified."

[40] The full bench in *Ashif* discussed the genesis of and reasons for sec 258(4A). It was to address the practice of automatic and unthinking challenges to any attempt by the Crown to agree evidence, and the consequent prolonging of proceedings. The onus is on the challenging party to show that the facts stated are 'unlikely to be disputed'. The procedure:

> 'should not be used to concuss the defence into admitting facts of which the defence may reasonably put the Crown to the proof.' (per Lord Justice-General at [41]).

[41] The true interpretation is that:

> 'it seeks to establish, as conclusively proved, facts which the accused cannot reasonably refuse to agree. When a challenge is intimated by the defence, it is not the function of the court to decide on balance whether an alleged fact will be conclusively proved. The court's function is to decide whether a challenge to the statement is 'justified'. In making that decision it must hear the basis of the objection. If the challenge is reasonable, the court must sustain it, even if it may seem to it to be likely that the fact will in the event be proved…I think that there may be few occasions on which a fact that constitutes part of the species facti of the libel can properly be the subject of a disputed sec 258 statement….where the proposal of a fact that is part of the species facti is challenged by the defence, it can rarely be for the prosecutor to move, or the court to hold, that a fact essential to the prosecution case has been conclusively proved." (at para [42]).
>
> "Where a statement of uncontroversial evidence includes a key fact or is based upon the evidence of a key witness, no doubt a challenge to it would inevitably be regarded by the court as justified." (at para 77 per Lord Justice-Clerk)
>
> "I have difficulty in conceiving the circumstances in which a court could properly exercise its powers under sec 258 to override a challenge to a statement of a fact forming part of the species facti…" (at para 82).

[42] Senior counsel for Mr Shapovalov recognised that the test was 'reasonableness' of the challenge, and if that test was met the challenge should not be disregarded. He went on to submit that each of the statements in both SUEs was justified by reason of findings in similar extradition proceedings involving similar facts, and that the challenges were not reasonable. He pointed out that the parties did not have equivalent resources, either financially or in law, in respect that Mr Shapovalov enjoys safeguards that the requesting state does not. He referred to specific findings in *Dzgoev* v *Prosecutor General's Office of the Russian Federation* [2017] EWHC 735 (Admin); *Russian Federation* v *Kononko* (Unreported, 27 May 2015, Westminster Magistrates Court); *Russian Federation* v *Korolev* (unreported, 18 December 2016, Westminster Magistrates Court) and some entries on the Council of

Europe anti-torture Committee ('CPT') website relating to a visit to the Russian Federation. He noted that the magistrate in *Korolev* had been satisfied on evidence that an inspection of the same Russian prison 'had not been told the truth', and that the appeal court in *Dzgoev* had referred to *Korolev* and 'the lie told to Professor Morgan'. *Kononko* had involved a detailed consideration of the same or similar evidence that would be presented for Mr Shapovalov, and the findings mirrored the statements in the SUEs. He submitted that in these circumstances a denial could not be regarded as reasonable, and should be disregarded.

[43] Senior counsel for the Crown founded on two issues. The first of these was timing, which I have discussed above. I accept his assurances that elements of the denial are, in effect, a holding position, and if it transpires following receipt from the Russian Federation of instructions that some of these are properly to be regarded as uncontroversial, he will see that the appropriate admission will be made. That position is entirely responsible, and in accordance with such duties discussed in *Ashif*.

[44] The second was more fundamental, and was that some of these statements form the species facti of the case, and are robustly challenged. Whether or not, for example, the Russian Federation 'lied' to an inspector, or that Dr Shapovalov would be detained in conditions that breach his Article 3 rights, are fundamental to whether either their evidence or their position can be accepted.

[45] In my view the Crown submissions are clearly correct. Some of the statements are fundamental and would form part of the court's findings in due course. *Ashif* does not preclude challenge in such circumstances, but it certainly makes a challenge much more difficult to sustain. As *Ashif* points out, it is not for the court to ascertain

whether they will be proved in evidence, but whether the challenge is itself reasonable.

[46] Here, Mr Shapovalov's case relies on these matters having been considered in other cases. I do not have the underlying material that led to the judgements of fact made in those first instance cases, and the decision in *Dzgoev* was an appeal decision which did not involve the hearing of evidence. While there may be circumstances in which one court should accept the findings of another court as proved, such a position is extremely difficult to take in the light of a challenge by one of the parties to that case. No two sets of court proceedings are identical, and for aught yet seen the Russian Federation may be able to lead more or better evidence in this case than the last. The positions of the parties are not yet finalised, and the Crown is still seeking instructions on the SUEs. I am unable to rule, and unwilling to speculate, on the quality and content of evidence heard in those cases. The SUEs both raise fundamental issues in the case, and *Ashif* is plain that any court should be slow to refuse these probation.

[47] For completeness, I do not regard the argument about inequality of arms, or the relative rights of the parties, as relevant to the test. The issue is whether facts are deemed to be proved, or should be the subject of judicial scrutiny. That cannot be influenced by how difficult either side would find it to lead evidence, or what protections they have against injustice. Proof of fact is entirely separate from issues of fairness or reasonableness.

[48] It follows that I cannot describe the Russian Federation challenge as unreasonable. In my view Mr Shapovalov's applications have, on the face of both SUE1 and SUE2, exceeded the proper purpose of section 258, and therefore I will not

exercise the power under section 258(4A) to direct that the challenges be disregarded. His motion therefore fails at this point.

Disposal

[49] I will therefore refuse Mr Shapovalov's motion to disregard the notice of challenge. I do so in the knowledge that the Crown will make admissions of any matters which properly are to be regarded as uncontroversial. In the event that this further exercise becomes contentious, Mr Shapovalov is able to lodge a further application which will be considered on its merits.

[50] Any issues of expenses can be considered at the next preliminary hearing, which has already been allocated.