



## DATA PROTECTION AND CAPITAL PUNISHMENT

### **Case note on the Supreme Court's judgment in *Elgizouli (appellant) v Secretary of State for the Home Department (respondent)* [2020] UKSC 10**

- 1 Two more incongruous concepts in the title of an article or blog can hardly be imagined, and therefore this case is a good example of how far data protection has evolved to permeate into crevices of our lives that might before have been thought to be entirely remote from this legislation. The claimant was a mother whose son who had committed the most dreadful of crimes described as “the beheadings of 27 men ... (in Syria) ... filmed and posted on the internet.” The UK sought to provide information on the claimant’s son to prosecuting authorities in the United States of America.
- 2 Nevertheless a civilised legal system is measured by the appropriate protections it offers to its worst citizens, as with its best citizens, and the issue for the Supreme Court was whether the transfer of data was lawful, given the availability of the death penalty in the United States.
- 3 Lord Kerr gave the main judgment. He found, first, a right to life in the common law that extended to prohibiting the provision of information by the UK to a state for use in a trial in which the death penalty was a competent sentence. This did not find favour with the majority, and therefore is dealt with no further.
- 4 There was unanimous support, however, for the argument that the decision to provide personal data was unlawful in terms of Part 3 of the Data Protection Act, 2018 (“the Act”) –

- 4.1 Part 3 of the Act provides for the processing of personal data by the authorities for the purpose, amongst other things, of law enforcement; but the data controller cannot transfer personal data unless certain conditions are met.
- 4.2 The first condition is that the data transfer be “necessary” for any of the law enforcement purposes that include the prosecution of criminal offences, and this is a strict test of necessity.
- 4.3 The second condition, in the context of the facts, was that there were required to be “appropriate safeguards” or, if not, “special circumstances” to justify the transfer. There were not “appropriate safeguards” because the death penalty had not been excluded by the US authorities. This meant that the lawfulness of the data transfer was dependent on the special circumstances.
- 4.4 But Lord Carnwath held that the UK decision to transfer the data was placed on political expediency, not necessity, and there was no assurance that the US prosecution would take place and therefore the data transfer could not logically be “strictly necessary” for that purpose. The data transfer could thus not be lawful.

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