**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH**

**[2025] SC EDI 3**

NOTE OF SHERIFF JULIUS KOMOROWSKI

in the

RESPONDENT'S MOTION
FOR AN ORDER UNDER THE EXTRADITION ACT 2003, SECTION 61

*in causa*

THE LORD ADVOCATE

Applicant

against

DAMIAN ZYGMUNT

Respondent

**Applicant: McCulloch, A.D.**
**Respondent: Dunne**

6 February 2024

[1] The respondent was discharged from extradition proceedings under the Extradition Act 2003, Part 1, conducted by the Lord Advocate on behalf of the Polish authorities. The respondent seeks recompense for the fee of £3,000 plus value added tax paid to his solicitor for his defence.

[2] The Lord Advocate submits that an order for payment of expenses should only be made exceptionally, that there are no exceptional circumstances, and accordingly the application should be refused. Alternatively, the Lord Advocate contends that the sum awarded should be less than sought.

**Whether to make any order**

[3] I address first the question of whether any order should be made. As I hold that an order of expenses ought to be made unless it is inappropriate in the circumstances, and as no circumstances have been put forward to make an award inappropriate, I grant the application.

***The legislation***

[4] The Extradition Act 2003, confined to the terms relevant to the matter at hand, and shorn of some surplusage, is as follows:

> "**61—Costs where discharge ordered**
>
> (1) This section applies if … in relation to a person in respect of whom a Part 1 warrant is issued—
>
> (a) an order for the person's discharge is made; …
>
> (2) … an order under subsection (5) in favour of the person may be made …
>
> (5) An order under this subsection … is … for a payment of the appropriate amount … out of money provided by Parliament.
>
> …
>
> (6) The appropriate amount is such amount as [is] … reasonably sufficient to compensate the person … for any expenses properly incurred by him in the proceedings under this Part.
>
> (7) But if … there are circumstances which make it inappropriate that the person … should recover the full amount mentioned in subsection (6), the judge … must—
>
> (a) assess what amount would … be just and reasonable;
>
> (b) specify that … as the appropriate amount."

***The Lord Advocate's submissions***

[5] The Lord Advocate advances several submissions relevant to whether to make any order, which I summarise in the following six propositions:-

1st: The use of "may" in subsection (2) indicates a discretion to make or refuse to make an order.

2nd: There is no presumption in favour of making an order (*Siemlit* v *Westminster Magistrate's Court,* Queen's Bench Division, Administrative Court, 27 November 2012).

3rd: The discretion should be guided by Scottish criminal procedure (Extradition Act 2003, section 9(3), *Kapri* v. *HM Advocate* [2014] HCJAC 33, para. 125).

4th: Awards in summary criminal proceedings are only made exceptionally (*Lawrie and Symington Ltd* v *Houston* [2009] HCJAC 50, 2007 JC 296, para. 13).

5th: It follows that the power should be exercised in extradition proceedings only in exceptional circumstances (*United States of America* v. *Mirza,* 24 February 2020, Sheriff N. Ross, para. 14).

6th: Similar policy considerations as exist with criminal proceedings support such an approach, given that the Lord Advocate acts in the public interest, and where it would be highly prejudicial to requested persons to be at risk of awards of expenses in addition to the usual criminal penalties.

***The correct test***

[6] On one analysis or another, I consider that refusal of an order should entail the application of the same test as involved in making an order for less than the full amount. That is to say, the discretion should not be exercised against the discharged person unless it

is inappropriate in the circumstances to make a full award and it would be just and reasonable to make no award.

***First proposition – use of the word "may"***

[7] My preferred analysis is that subsection (2) does not create a separate discretion to be exercised independent of and before the determination and assessment required by subsection (7), so long as it is understood that any assessment following the application of subsection (7) might result in the sheriff holding that the just and reasonable amount of an award was nil. On this analysis, notionally the sheriff has no discretion not to assess an amount, it is just that the result of the assessment might be zero.

[8] It is no objection to this analysis that the word "may" normally entails a discretion:

> "There are many decisions to the effect that language is in form permissive must nevertheless in certain cases be construed as imperative in effect" (*Whyte* v. *Stewart* 1914 SC 675, Lord Salvesen at p. 685; referring *inter alia* to *Julius* v. *Bishop of Oxford* (1880) 5 App Cas 214).
>
> "[T]he mere fact that mere fact that the word 'may' is used is quite insufficient to lead to an inference that the court is intended to have a discretion. We must read the statute as a whole." (*Lord Advocate* v. *Glasgow Corporation* 1973 SC (HL) 1, Lord Reid at p. 12).

[9] Alternatively, the refusal to award any payment might be properly analysed as an exercise of discretion to make no order under subsection (2) (rather than making an order for a nil amount under subsection (7)). On that analysis "may" in subsection (2) is given its usual meaning of being permissive, not imperative. But just as one must read a phrase or passage in the context of the section as a whole (*R (O)* v *Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, para. 29), one should not apply a subsection in isolation but rather in a manner that is consistent with and coherently operates with the rest the section. Thus, on this alternative analysis, the court can refuse to make any order under

subsection (2), but only ought to refuse where it is inappropriate in the circumstances to make an order for the full amount and it would be just and reasonable to make no order.

***Second proposition – whether there is a presumption to make an order***

[10] There is something in the nature of a presumption that if an order is made it should be for the full amount (though I would prefer to term this a default position or starting point, as the term 'presumption' can have connotations as to the strength of consideration sufficient for rebuttal). That is the effect of subsection (7) providing that there need to be circumstances that make it inappropriate if the appropriate amount is not to be the full amount.

[11] I see no reason why the legislature would impose on the court this starting point for any order being for the full amount, but impose a different starting point that no order ought to be made at all. To make no award is, in substance, the most extreme departure possible from making an award for the full amount. I see no reason why the legislature would have a preference for binary awards, rather than either: (i) tilting the court towards making nil awards and away from making full awards; or alternatively, (*ii)* tilting the court towards making awards for the full amount and away from making nil awards. I conceive of no policy that would support going in different directions.

[12] It was suggested for the Lord Advocate that the circumstances relevant to whether there are exceptional circumstances warranting any order, and the circumstances relevant to making any order for less than the full amount, might be different. I can see in theory how that might be. But it was not suggested, nor can I identify, any scheme or rationale for delineating between what would be relevant to one but not the other. Nor can I see how any delineation invented by the court could be legitimately read into subsections (2) and (7).

Without that, the effect of the Lord Advocate's preferred construction is to have the court being titled in two opposing directions for no apparent purpose.

[13] As for the English Administrative Court's decision in *Siemilet, supra,* stating that there is no presumption in favour of a requested person, there is no judgment available or any account of the judge's reasons beyond the *Westlaw* Case Digest. I am unable to make anything of what the court is said to have held there.

***Third to fifth propositions – summary criminal practice***

[14] As for the Lord Advocate's third to fifth propositions, despite that argument finding favour with the sheriff in *Mirza, supra,* I am unpersuaded by it.

[15] In truth, the Lord Advocate's submission does not entail inviting the sheriff to do as he would in summary criminal proceedings. A sheriff would never make an award of expenses in summary criminal proceedings. There is no explicit statutory power, and it appears there is no implied or inherent power, in summary criminal proceedings at the instance of a public prosecutor for the sheriff court to award expenses (*Lawrie and Symington Ltd* v *Houston* [2009] HCJAC 50, 2007 JC 296, para. 3). The power only exists once there has been an appeal and then is exercised by the appellate court.

[16] Once the extradition legislation entails a radical innovation upon first-instance summary criminal practice, I see no logical basis to guide the exercise of that unusual power by reference to how some other statutory power by another court is exercised on criminal appeal.

[17] To introduce appellate summary criminal practice into the application of subsection (2) also would be anomalous, in that the approach required by subsection (7) indicates that award of the full amount reasonably sufficient to compensate is the norm,

from which circumstances are required for any departure. That is the opposite of the approach in appellate summary criminal proceedings, where the "(almost) invariable practice" is that awards be modified rather than made for the "full expenses" (*Lawrie and Symington Ltd, supra.,* para. 7).

[18] So, to import an exceptionality test into subsection (2) would involve: *(i)* adopting a test from appellate (rather than first instance) procedure; (*ii)* adopting only the part of the appellate court's test relevant to determining whether to make an award rather than the level of award; and, (*iii)* importing a test for part of the statutory power which is of the opposite thrust of the explicit test in another part of that power.

***Sixth proposition – policy***

[19] Policy considerations do not justify importing a test of exceptionality into subsection (2).

[20] The Lord Advocate does not elect to seek extradition on a case-by-case basis depending on the public interest in a manner akin to how she elects to prosecute case-by-case depending on evidential strength and public interest. Rather, she *must* conduct *any* extradition proceeding in Scotland (2003 Act, s. 191(1). In that respect, she acts not as a prosecutor but as lawyer acting on behalf of a foreign client (*R* v *Director of Public Prosecutions* ex parte *Thom,* The Times, 21 December 1994, *per* Glidwell LJ (quoted in *R (Raissi)* v *Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836, para. 136)). So, there can be no fear that awards of expenses might have a deterrent effect on the exercise of her functions in extradition matters.

[21] It might be that the position in criminal proceedings in Scotland also involves an element of *quid pro quo* between prosecution and defence, in that accused persons can never

be liable in expenses (except again exceptionally in appellate summary proceedings). But there is no such symmetry in extradition proceedings. A person whose extradition is ordered can be required to pay the expenses in such sum as is "just and reasonable" (section 60(2)). Unlike with orders in favour of a requested person who has been discharged, there is no equivalent to subsection (7) of section 61, requiring the presence of circumstances that make an award for the full amount inappropriate before payment of some lesser sum is ordered. Parliament has indicated a more generous approach to awarding expenses in a discharged person's favour rather than against a person whose extradition has been ordered.

[22] Of course, the very fact that the Lord Advocate has little scope to refuse to pursue an extradition request could have provided a powerful policy consideration leading the legislature to exclude a power to award expenses, or to explicitly limit when it could be exercised. It might have been a powerful consideration justifying the court reading any power to award expenses in a narrow manner, if section 61 had been expressed in a more open-ended manner like section 60, or like the provisions relevant to summary criminal proceedings on appeal (Criminal Procedure (Scotland) Act 1995, sections 83(9), 188(4)(a)(i)). But section 61 is not drafted in an open-ended manner. Again subsection (7) is important. It provides that any orders for payment should normally be for the full amount. Section 61 is not a fairly blank canvas upon which the court can paint a picture in accordance with its assessment of what policy requires. Rather there is a bold brush stroke already present in the form of subsection (7) in favour of discharged persons. The court ought to fill in the rest of the picture in a manner consistent with this.

**Appropriate amount**

[23] I must now determine what sum would be reasonably sufficient to compensate the requested person, and whether it would be inappropriate in the circumstances for an order to be made for the full amount of that.

***Reasonable sufficiency***

[24] Whilst I am required to determine the amount in accordance with regulations made by the Lord Chancellor (section 61(8)(b)), it appears no such regulations have been made applicable to this jurisdiction.

[25] I cannot call upon the professional judgement of the auditor by remitting the matter to that officer for taxation. Unlike the Sheriff Appeal Court and High Court of Justiciary (Courts of Law Fees (Scotland) Act 1895, section 3), the sheriff has no power to remit in criminal matters nor does the extradition legislation provide for this.

[26] I understood the only objection advanced for the Lord Advocate as to whether the sum sought exceeds that which would reasonably suffice to compensate the requested person was that the sum was paid on a fixed-fee basis, for the work likely anticipated rather than reflecting the work actually done. Essentially the objection concerned the method of arriving at the sum, rather than the apparent reasonableness of the sum arrived at. I reject this objection.

[27] Section 61(6) requires only that the order is for "any expenses properly incurred by him in the proceedings". A requested person who agrees with his solicitor a fixed fee to conduct the entire proceedings, who contracts and pays his solicitor once those proceedings have commenced, has incurred that expense *in the proceedings* and indeed for the proceedings. He does so reasonably by paying a fixed fee in advance, rather than peril his

ongoing representation on his income outstripping the uncertain cost of an indefinite course of work. Given that solicitors are often required to charge the Scottish Legal Aid Board on a block-fee basis, and can submit accounts for expenses in civil proceedings for payment by an opponent on that basis, I see nothing in principle objectionable to a fixed fee being agreed in advance, provided the level of that fee is reasonable having regard to the work typically entailed and the degree of expertise required.

[28] As I have said, the Lord Advocate did not submit that the *level* of fee was apparently unreasonable even though certainly it appears to be a substantial sum. It appears likely to exceed by a large measure the sum that might be paid in respect of someone entitled to legal aid. But I do not think I can safely conclude, in the context of a litigation that imperilled the requested person's liberty and his ability to remain living here, where a limited field of practitioners have the necessary knowledge and useful experience, that the sum is apparently unreasonable. It was paid in advance of the full hearing, so there can be no question of the agreed fee being effectively notional because it might never be paid at that level. It appears to represent what the requested person genuinely thought legal advice, representation and assistance was worth to him.

[29] There might be policy considerations that arguably support the court restricting an award as a general practice to a level lower than the market rate for private clients, so that the typical award should fall short of a full indemnity even where the fees were both reasonable as to work done and *quantum*. I have mentioned that the appellate court almost invariably modifies awards of expenses for criminal proceedings. The court will impose a "generally recognised ceiling" to the sum awarded for first-instance procedure, perhaps at the level of payment made for legal aid cases (*Lawrie and Symington Ltd, supra,* paras. 12, 13). In civil litigation, party-and-party expenses are calculated using rates set at a level

deliberately short of full recovery to ensure some discipline and moderation in how much expense a party incurs (Sheriff Principal J. Taylor. *Review of Expenses and Funding of Litigation in Scotland,* para. 17).

[30] There are practical difficulties in my limiting the award either to what might be paid on legal aid, or to something which echoes the approach in civil litigation, or in some other fashion. I was not addressed on what would be paid by the Scottish Legal Aid Board. There is no table of fees for extradition cases, nor was I addressed on whether a table of fees for some kind of civil proceedings might be used by analogy. I fear that if I was to limit the award I would be driven to the early 19th century practice before the office of court auditor was instituted, where the court made an award "without consideration of the various items of which the account was imposed … [with the] result [that] was most unsatisfactory from every point of view" (Maclaren, *Expenses in the Supreme and Sheriff Courts,* p. 421).

[31] There is also, in my view, a principled obstacle to limiting the award in this way. The reference to what is "reasonably *sufficient* to *compensate*" in subsection (6) and perhaps also the "*full* amount" in subsection (7) are indicative of the sum contemplated being that which will lead to a full recovery. I mean this in the sense that might be used by practitioners in actions for reparation, where the wronged or injured party is entitled to an indemnity except where the expenditures were unreasonable as to kind or *quantum*, with any expenditures that reasonably ought to have been avoided left out of account. Even with an award of expenses on an agent-and-client basis, charges might be disallowed where they are extravagant (*Cabot Financial UK Ltd* v. *Weir,* [2021] CSIH 64, 20222 SC 117, para. 24).

[32] There is provision elsewhere in the 2003 Act for awards in England and Wales to be fixed at rates prescribed by the Lord Chancellor at a level below that reasonably sufficient to compensate (Extradition Act 2003, section 62A(3)(b); applying the Prosecution of Offences

Act 1985, section 20(1A)(d)). I do not think there is any warrant for a court to assume any power, as a general practice, to limit awards in a way that has a similar result by an artificial construction of what is "reasonably sufficient", so that awards might fall routinely and markedly short of something sufficient to compensate the private paying client. A phrase or passage must be read in the context of the section as a whole and the wider context of a relevant group of sections (*R (O) supra*, [2022] UKSC 3, [2023] AC 255, para. 29). *Expressio unius est exclusio alterius.*

***Inappropriateness in the circumstances***

[33] Having determined what sum would be "reasonably sufficient to compensate" the requested person, there remains the question whether it would be inappropriate in the circumstances to award that full amount (s. 61(7)).

[34] No reason was advanced by the Lord Advocate as to why it would be inappropriate, other than perhaps an allusion to considerations of general policy which I have already discussed. I do not think those types of considerations are "circumstances". That word denotes matters that are liable to vary from individual to individual, case to case, or at least from time to time, rather than conditions of a universal and immutable kind. I think the subsection is concerned with matters particular to the case at hand, or at least not with considerations that would apply to all extradition cases. The limited expenses regime in summary criminal proceedings, or the public interest served by the honouring of extradition requests, are not "circumstances" within the meaning of subsection (7).

[35] Accordingly, I will make an order for the full amount.

**Order**

[36] The requested person shall be paid out of moneys provided by Parliament the sum of £3,000 plus value added tax.

**Coda**

[37] The Lord Chancellor might wish to make regulations for Scotland in terms of the Extradition Act 2003, section 61(8)(b), perhaps to provide for a table of fees and a power to remit to the auditor for taxation, to avoid results in future that are "most unsatisfactory from every point of view".