Trinity Term
[2013] UKSC 48
On appeal from: [2012] HCJAC 84

JUDGMENT

Kapri (AP) (Appellant) *v* The Lord Advocate representing The Government of the Republic of Albania (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lady Hale
Lord Kerr
Lord Sumption
Lord Toulson

JUDGMENT GIVEN ON

10 July 2013

Heard on 13 June 2013

Appellant	*Respondent*
John Scott QC	W James Wolffe QC
John Paul Mowberry	Graeme Hawkes
(Instructed by Bridge Litigation UK)	(Instructed by The Appeals Unit, Crown Office)

LORD HOPE (with whom Lady Hale, Lord Kerr, Lord Sumption and Lord Toulson agree)

1. The question in these proceedings is whether it would be compatible with the appellant's Convention rights within the meaning of the Human Rights Act 1998 for the appellant, who is an Albanian national, to be extradited to Albania. On 7 April 2001, while he was in the United Kingdom as an illegal immigrant, another Albanian national named Ylli Pepa, was killed. On the day after this incident the appellant left London and travelled to Glasgow, where he assumed a false Macedonian identity. It was alleged that he had been responsible for Ylli Pepa's murder. But the Metropolitan Police were unable to locate him, and he continued to live in Glasgow for the time being under that false identity.

2. In December 2001 the Crown Prosecution Service delivered all the materials about the case that were in their possession, including witness statements and productions, to the prosecuting authority in Albania. This was done under cover of a letter which referred to the European Convention on Extradition 1957, to which both the United Kingdom and Albania are parties. It invited the Albanian authorities to prosecute the appellant, and they decided to do so. Albania has jurisdiction to prosecute in cases of homicide committed extra-territorially where the deceased and the alleged perpetrator are both Albanian. The law in Albania also provides for the trial in absence of those who are accused of such crimes. As the appellant could not be traced he was not formally notified of the proceedings that were being taken against him. So the trial took place in his absence. But evidence was heard and counsel were appointed to represent his interests.

3. On 23 December 2002 the appellant was convicted in the Judicial Court of Elbasan of premeditated murder under article 78 of the Criminal Code of Albania. He was sentenced to 22 years imprisonment. On 3 January 2003 that decision became final. On 17 February 2003 the office of the District Prosecutor of Elbasan issued an order for the execution of the decision against the appellant. But his whereabouts were still unknown. So no further steps were taken to make the decision effective.

4. In May 2010 the UK police became aware of the fact that the appellant was living in Glasgow. They notified the Albanian authorities. This led to a formal request by the Albanian Ministry of Justice on 22 June 2010 that the appellant be extradited to Albania, which for the purposes of the Extradition Act 2003 ("the 2003 Act") is a category 2 territory. On 24 June 2010 the appellant was arrested in Glasgow under a provisional arrest warrant. On 25 June 2010 he appeared in the

sheriff court at Edinburgh and was remanded in custody. The request for the appellant's extradition was sent to the Home Office on 29 June 2010. On 29 July 2010 the Scottish Ministers issued a certificate under sections 70 and 141 of the 2003 Act that the request for his extradition to Albania on his conviction for the offence of premeditated murder was valid.

The proceedings

5. On 20 January 2011 the sheriff at Edinburgh, having conducted an extradition hearing over a period of three days in December 2010, held that there were no bars to the extradition. So, as he was required to do by sections 87(3) and 141 of the 2003 Act, the sheriff sent the case to the Scottish Ministers for their decision whether the appellant was to be extradited. The appellant was remanded in custody under section 92(4) to await that decision. The Scottish Ministers decided that they were not prohibited from ordering the appellant's extradition, and an order was made under section 101(2) under the hand of a member of the Scottish Government which was served on the appellant on 15 March 2011. He appealed against the order under sections 108 and 216(9) of the 2003 Act to the High Court of Justiciary. He remains in custody.

6. In the course of various procedural hearings which then followed the appellant informed the court that he no longer wished to insist on some of the grounds of appeal which had originally been intimated. On 12 October 2011 he was allowed to lodge a minute of amendment by which various grounds were deleted from the note of appeal and a new ground (v) was introduced. The effect was that the grounds of appeal which remained before the court were as follows:

> "(iv) The sheriff erred in concluding that the appellant would be entitled to a retrial in terms of section 85(5) of the Act. *Separatim.* The sheriff erred in concluding that the rights specified in section 85(8) of the Act would be made available to the appellant.
>
> (v) The learned sheriff erred in concluding that the appellant's extradition would be compatible with his Convention rights in terms of section 87 of the said Act. …
>
> *Separatim.* In seeking the appellant's extradition to Albania the Lord Advocate and the Scottish Ministers are acting in a way which is contrary to the appellant's fundamental rights in terms of the European Convention. In particular, the appellant's extradition to

> Albania would interfere with his right to liberty and the right to fair trial as provided for in articles 5 and 6 of the Convention."

A devolution minute was also lodged in which it was stated that for the Lord Advocate to seek to support the appellant's extradition would be for him to act in a way which would be incompatible with his rights under article 6(1) and 6(3)(c) of the Convention and accordingly ultra vires in terms of section 57(2) of the Scotland Act 1998.

7. The new argument of which notice was given in ground (v) was supported by averments in the minute of amendment in which it was said that the judicial system in Albania was systemically corrupt. They incorporated a number of reports about the judicial system in that country by, among others, the European Commission, the Swedish International Cooperation Agency and the US Department of State, Bureau of Democracy, Human Rights and Labour. Reference was also made to reports prepared by Dr Mirela Bogdani and Ms Miranda Vickers, copies of which were lodged on 10 November 2011. The appellant also sought to rely on a report by an Albanian lawyer named Periand Teta about the circumstances in which a right to a retrial might or might not be available in Albania.

8. The Lord Advocate did not oppose the amendment of the grounds in the note of appeal or the receipt of the devolution minute. But he submitted that the amended ground (v) should not be argued until a preliminary issue about the admissibility of the new evidence relating to it had been determined. He did not oppose the receipt or use of the report by Periand Teta in relation to ground (iv). A further procedural hearing was fixed for determining the preliminary issue as to the admissibility of the new evidence on ground (v).

9. The issue as to admissibility was debated on 11 November and 20 December 2011. Counsel for the Lord Advocate submitted that the reports by Dr Bogdani and Ms Vickers did not satisfy the test for the admission of new evidence in section 104(4)(a) of the 2003 Act, as it was not evidence which did not exist at the time of the extradition hearing before the sheriff or could not have been obtained with reasonable diligence: *Engler v Lord Advocate* [2010] HCJAC 42, 2010 JC 235, para 12. He also submitted that their criticisms of the Albanian judicial system were advanced entirely at the level of generality, and that there was nothing in them which indicated how such criticisms as might be made of the system would affect the appellant's right to a fair trial. So they should not be introduced as new evidence, and the appeal in so far as based on ground (v) should be refused.

10. On 2 February 2012 the Appeal Court (Lady Paton, Lord Turnbull and Lord Marnoch) issued their decision on the preliminary issue: [2012] HCJAC 17. Delivering the opinion of the court Lord Turnbull said in paras 28-30 that an examination of the reports disclosed that counsel for the Lord Advocate's analysis of them was correct. None of the examples of the particular deficiencies in the judicial system impacted on circumstances in which the appellant would find himself if returned to face trial in Albania. The material which they contained was of a wholly general nature, and it contained nothing to suggest that any of the concerns identified would apply to his case.

11. In para 30 Lord Turnbull said:

> "Nothing within either report supports the appellant's contention that 'he' would face an unfair trial on his return to Albania or in any way supports his contention that any retrial would lack the fundamental requirements of article 6. We note also that nothing in either report bears upon the question of whether any such retrial would comply with the particular requirements referred to in section 85(8) of the Act. Accordingly, in our view, the proposed new evidence contained in the reports prepared by Dr Bogdani and Ms Vickers is irrelevant to the ground of appeal in question and ought not to be admitted for this reason."

It was agreed that the additional evidence of Periand Teta should be admitted, and the Lord Advocate was given leave to lead evidence in rebuttal of it, if so advised. The court declined to give effect to the submission that the appeal so far as based on ground (v) should be refused, holding that the appellant could present arguments in support of it based on evidence led before the sheriff and in the Teta report. Counsel for the appellant submitted that an appellant was entitled to rely on new evidence even if it could have been made available at the extradition hearing, as to which there appears to be some uncertainty about the approach that should be taken. That which was adopted in *Engler*, paras 11-12, appears not to be consistent with the more flexible approach indicated by *Trajer v Lord Advocate* [2008] HCJAC 78, 2009 JC 108, paras 28-29. But the Appeal Court found it unnecessary to resolve this issue.

12. A further hearing as to the issues raised by ground (iv) took place in May 2012. On 1 June 2012 the Appeal Court (Lord Justice General Hamilton, Lord Menzies and Lord Wheatley) dismissed the appeal against the sheriff's order of 20 January 2011: [2012] HCJAC 84. In para 3 of his opinion the Lord Justice General observed that the ruling of 2 February 2012 had, in effect, excluded ground (v) of the grounds of appeal. The only subsisting ground was ground (iv), and the court was satisfied that under Albanian law the appellant would, on his return, be

entitled to apply for an extension of the time limit for bringing an appeal against his conviction, that he would be entitled to have that appeal granted and that thereafter he would be entitled to a review amounting to a retrial with the rights referred to in section 85(8) of the 2003 Act: para 22.

13. On 21 June 2012 the appellant asked for and was given leave to appeal the issue raised in his devolution minute to the Supreme Court. That was the issue which had in effect been excluded by the Appeal Court's ruling on 2 February 2012 that the evidence that the appellant wished to lead in support of it was irrelevant.

Jurisdiction

14. The Scotland Act 2012 made a number of important changes to this court's jurisdiction to deal with devolution issues under Schedule 6 to the 1998 Act. They came into effect on 22 April 2013: see *O'Neill and Lauchlan v HM Advocate* [2013] UKSC 36, para 5. Under the previous law, the question whether the exercise of a function by a member of the Scottish government in ordering the appellant's extradition was compatible with the affected person's Convention rights was a devolution issue within the meaning of paragraph 1(d) of Schedule 6 to the Scotland Act 1998, as to which a right of appeal against the determination of a court of two or more judges of the High Court of Justiciary was provided by paragraph 13(a) of the Schedule: *BH v Lord Advocate* [2012] UKSC 24, 2012 SC (UKSC) 308, para 34. The appellant submitted in his written case that, as a consequence of the amendments that were introduced by the 2012 Act, the issue which was identified in his devolution minute had been converted into a compatibility issue. At the hearing his counsel, Mr Scott QC, conceded that this was not so. But the point is of some importance, and it is worth saying something about it.

15. Section 36(4) of the 2012 Act amends the definition of "devolution issue" in paragraph 1 of Schedule 6 to the 1998 Act by adding at the end of that paragraph the words:

> "But a question arising in criminal proceedings in Scotland that would, apart from this paragraph, be a devolution issue is not a devolution issue if (however formulated) it relates to the compatibility with any of the Convention rights or with EU law of –
>
> (a) an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament,

(b) a function,

(c) the purported or proposed exercise of a function,

(d) a failure to act."

Section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995, which was inserted into the 1995 Act by section 34(3) of the 2012 Act, provides that "compatibility issue" means, among other things,

"a question, arising in criminal proceedings, as to –

(a) whether a public authority has acted (or proposes to act) –

(i) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998, or

(ii) in a way which is incompatible with EU law…"

16. The appellant's point was that, if the issue is a compatibility issue, the focus of attention is not limited to the compatibility of an act of a member of the Scottish government. It can extend to the broader question whether the Appeal Court was correct in its determination of the compatibility issue. A court is a public authority. So acts of a court, including those of the Appeal Court itself, can be brought under scrutiny under the new system if they raise a compatibility issue as so defined. This, it is suggested, widens the scope of the appeal.

17. The nature of the issue is relevant too to the powers that the Supreme Court may exercise. There is no restriction on the powers that it may exercise under rule 29(1) of the Supreme Court Rules 2009 (SI 2009/1603) when it is determining a devolution issue. The amendments introduced by the 2012 Act leave those powers unaltered. That is not so if the issue is a compatibility issue. It is open to the Supreme Court to determine a compatibility issue on an appeal to it under section 288AA of the 1995 Act, which was inserted by section 36(6) of the 2012 Act. But section 288AA(2) provides that the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue. Subsection (3) provides that, when it has determined the compatibility issue, the Supreme Court must remit the proceedings to the High Court of Justiciary. Subsection (4) provides

that the expression "compatibility issue" has the same meaning for the purposes of section 288AA as it has in section 288ZA.

18. The Lord Advocate submits that, properly construed, extradition proceedings are not "criminal proceedings" for the purposes of section 288AA(4) of the 1995 Act: see para 15 above, in which the definition of "compatibility issue" for the purpose of that subsection is set out. This is because they do not involve the determination of any criminal charge. The Lord Advocate performs the functions that he is required to carry out in proceedings of this kind under section 191 of the 2003 Act, which states that he must conduct any extradition proceedings in Scotland. He accepts that he is constrained in what he can do by the fact that he is a member of the Scottish Government under section 57(2) of the 1998 Act, which provides that he has no power to act in a way that is incompatible with any of the Convention rights. But his position is that he does not perform these functions in his capacity as the public prosecutor.

19. In *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20, [2012] 1 WLR 1604, para 31 Lord Mance said that an examination of the case law of the Strasbourg court shows that both the commission and the court have stood firm against any suggestion that extradition as such involves the determination of a criminal charge or entitles the person affected to the procedural guarantees provided in the determination of such a charge under article 6(1) or 6(3) of the Convention. In *BH v Lord Advocate*, para 33 it was noted that in *Goatley v HM Advocate* [2006] HCJAC 55, 2008 JC 1 and *La Torre v HM Advocate* [2006] HCJAC 56, 2008 JC 23 the Lord Advocate had conceded that devolution minutes were competent in proceedings under the 2003 Act. It seemed to me that this concession was properly made and that the High Court was right to give the concession its approval. The basis on which it was made was that the Lord Advocate and the Scottish Ministers were performing their functions under the 2003 Act as members of the Scottish Executive within the meaning of section 57(2) of the Scotland Act 1998, and that the Lord Advocate was not acting as head of the system of prosecution in Scotland: see *Goatley*, paras 13-14; *La Torre*, paras 46-47. A challenge to their proposed exercise of those functions by means of a devolution minute was to be seen as a parallel remedy to that afforded by section 87(1) of the 2003 Act.

20. The conclusion that these proceedings are not criminal proceedings for the purposes of section 288AA(4) of the 1995 Act which follows from the analysis in *BH v Lord Advocate* is reinforced by the fact that extradition is a reserved matter under section B11 of Schedule 5 to the Scotland Act 1998. Scots criminal law is devolved, unless it relates to a reserved matter: section 29(4) of that Act. The Lord Advocate and the Scottish Ministers are given a specific role under various provisions of the 2003 Act in relation to extradition proceedings in Scotland, as is

the High Court of Justiciary. These roles are not made part of, but are provided for separately from, those that they are required to perform under the 1995 Act.

21. It is to be noted that there is no right of appeal to this court against a decision of the High Court of Justiciary under Part 2 of the 2003 Act. Section 114(13) provides that the provisions of that section, under which an appeal lies to the Supreme Court from a decision of the High Court on an appeal under Part 2, do not apply to Scotland. That it was thought necessary to make this provision shows that an interlocutor pronounced by the High Court of Justiciary in extradition proceedings is not to be regarded as having been made under Part VIII of the 1995 Act, which has its own provision excluding any further right of appeal. Section 124(2) of that Act provides that an interlocutor under that Part is final and conclusive and not subject to review by any court whatsoever.

22. One can appreciate, in this context, the significance of the Lord Advocate's concession in *Goatley* and *La Torre*. Its effect is that, although there is no right of appeal to this court under the 2003 Act, the person affected is entitled to exercise the right of appeal against a determination of a devolution issue by two or more judges of the High Court of Justiciary which paragraph 13(a) of Schedule 6 to the Scotland Act 1998 provides for: see *BH v Lord Advocate*, para 34. The wording of that paragraph is wide enough to accommodate any issue which falls within the definition of "devolution issue" in paragraph 1 of the Schedule. It includes a question whether a purported or proposed exercise of a function by a member of the Scottish Government is incompatible with any of the Convention rights: paragraph 1(d). That will include the exercise of functions under the 2003 Act.

23. I would hold therefore that it follows from the nature of the statutory provisions under which the Lord Advocate performs his functions in extradition cases, and from the reasoning in *BH v Lord Advocate* which led to the conclusion set out in para 34 of that judgment, that the issue which has given rise to the proceedings under which this appeal is brought is a devolution issue as defined by paragraph 1(d) of Schedule 6 to the Scotland Act 1998. It is not a question arising in criminal proceedings. So it is not excluded from the definition of devolution issues by section 36(4) of the Scotland Act 2012. I should add that I see no disadvantage to the appellant in this conclusion. The protection against the exercise of functions by the Lord Advocate under the 2003 Act in a way that is incompatible with any of the Convention rights that the devolution issues system provides is just as effective as if the new system introduced by the 2012 Act had applied to them.

The substantive issue

24. Mr Scott accepted that, although the situation in Albania about the possibility of a retrial in cases where there has been a conviction in absentia remains complicated, he can no longer rely on ground (iv) alone as the basis for his appeal. In *R (Mucelli) v Secretary of State for the Home Department* [2012] EWHC 95 (Admin), para 55, Cranston J said that in his view the law and practice in Albania was now such that there was no real risk that the applicant in that case would suffer a flagrant denial of justice on his return to Albania, as he was entitled to a retrial on the merits of the case against him. In *Zeqaj v Albania* [2013] EWHC 261 (Admin), para 16, Gloster J concluded that the further evidence which the court heard in that case did not justify departing from the analysis in *Mucelli*. In neither of these cases, however, was extradition resisted on the basis that the judicial system in Albania is systemically corrupt.

25. The appellant's case is that from the time of its foundation in 1991, following the dissolution of the former Socialist Republic, the Republic of Albania has suffered from problems with corruption which it inherited from the former Republic. They were still in evidence when Albania joined the Council of Europe in 1995 and when it ratified the European Convention on Human Rights in 1996. While it has been addressing this problem, it has not been eliminated. The Institute for Development Research and Alternatives Report – Corruption in Albania: Report of Comparisons between the 2005 Judges and National Surveys (revised on 16 May 2006) noted in its executive summary at p 2 that slightly more than half of the judges surveyed agreed that, although bribery was not thought to be a common feature, corruption in the court system was a serious problem in Albania and that lawyers approached them outside of court to influence their decisions. In the 2009 Foreign and Commonwealth Office Annual Report on Human Rights (March 2010) (Cm 7805), at p 70, it was stated that widespread corruption remains a major obstacle to upholding individual rights in Albania. The Home Office UK Border Agency Country of Origin Information Report of 30 March 2012 includes in para 12.01 a quotation from the US State Department 2010 Human Rights Report on Albania (USSD Report 2010) published on 8 April 2011 to the effect that widespread corruption prevents the judiciary from functioning independently and efficiently. There was enough in this material and in the reports of Dr Bogdani and Ms Vickers to give rise to a concern that the Appeal Court did not give proper consideration to the issue when it refused to admit the proposed new evidence contained in their reports on the ground that it was irrelevant.

26. For the Lord Advocate Mr Wolffe QC pointed out that in 2009 Albania applied for membership of the European Union, and that in October 2012 the Commission recommended that Albania should be accepted as a candidate for membership subject to measures for judicial and public service reform. Albania has a modern code of criminal procedure which is not now said to be incompatible

with the Convention and which provides for rights of appeal. But he did not seek to suggest that corruption was not still a problem in that country and he accepted that corruption was an issue about which concern should be expressed. Further work had been done on the Lord Advocate's behalf to obtain information as to the situation as it is now, as it was recognised that it was unsatisfactory for the court to be asked to deal with the issue on a hypothesis. For example, it had been established that it is now possible for Albanian judges to be prosecuted on corruption charges, and it appeared that the judges themselves are committed to addressing the problem. The information that had now been obtained would be put before the Appeal Court if the case were to be remitted to it for a reconsideration of this ground of appeal.

27. But Mr Wolffe's basic point remained that which he made when the issue was debated before the Appeal Court in December 2011. This was that the material in the reports on which the appellant wished to rely was of a wholly general nature. The question was whether, if the appellant were to face a retrial in Albania, he would be the victim of a flagrant denial of justice: *EM (Lebanon) v Secretary of State for the Home Department* [2009] UKHL 64, [2009] AC 1198, paras 34-35, per Lord Bingham of Cornhill. There was nothing in the reports on which the appellant wished to rely which addressed the issue whether judicial corruption would lead to a flagrant denial of justice in his case. He pointed out that a finding that any one accused who was facing extradition and a retrial in Albania would face a flagrant denial of justice because the judicial system was corrupt would be of interest to everyone. He said that there were 17 countries which were regarded as being more corrupt than Albania. The precise figure does not matter, but it appears from the Transparency International Corruption Index for 2012 that there are at least that many countries to which the UK currently has extradition arrangements.

Discussion

28. It is a sad fact that, despite all the many provisions in international human rights instruments which emphasise that everyone has the right to a fair trial before an independent and impartial judge, there are still states where the judiciary as a whole is infected by corruption. It is, of course, hard to get at the true facts. But there is no smoke without fire, and where allegations of corruption are widespread they must be taken seriously. So too must an appreciation of what corruption may lead to when it affects the whole system. It may involve simple bribery of judges and court officials, or it may involve interference with the judicial system for political reasons of a much more insidious kind. Unjust convictions may result, just to keep the system going and keep prices up. Everyone whose case comes before the courts of that country where practices of that kind are widespread is at risk of suffering an injustice. Those who are familiar with the system may know how much they need to pay, or what they have to do, to obtain a favourable

decision but be quite unable to come up with what is needed to achieve that. Those who are not familiar with it will be at an even greater disadvantage.

29. How, then, is the question whether the appellant would suffer a flagrant denial of justice if he were to be extradited to be applied in this case? The Lord Advocate submits that this is a stringent test. It goes beyond mere irregularities or lack of safeguards in the trial process that might give rise to a breach of article 6 if they were to occur within the contracting state itself. In *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, to which Lord Bingham referred when he was describing the test in *EM (Lebanon)*, it was held that this test was not satisfied. The Grand Chamber held that, while there may have been reasons for doubting whether the applicants would receive a fair trial, there was not sufficient information to show that any possible irregularities in the trial were liable to constitute a flagrant denial of justice. In para O-III14 of their joint partly dissenting opinion, to which Judge Rozakis also subscribed, Judges Bratza, Bonello and Hedigan said that in their view the word "flagrant" was intended to convey a breach of the principles of fair trial guaranteed by article 6 which was so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by the article.

30. In *Othman v United Kingdom* (2012) 55 EHRR 1 the applicant's complaint was that his retrial in Jordan would amount to a flagrant denial of justice because of a number of factors including a very real risk that incriminating statements against him had been obtained by torture. The court adopted the meaning to be given to the phrase "flagrant denial of justice" in the partly dissenting opinion in *Mamatkulov*, which it said was a stringent test of unfairness: para 260. It was satisfied that the ill-treatment of the witnesses which was alleged amounted to torture. That meant that the two questions it had to consider were whether a real risk of the admission of that evidence was sufficient and, if so, whether a flagrant denial of justice would arise in the applicant's case: para 271. It was conscious of the fact that the Grand Chamber did not find that the test had been met in *Mamatkulov*: para 283. But the applicant's complaint was not of the general and unspecific kind that was made in that case. It was a sustained and well-founded attack on a State Security Court system that would try him in breach of one of the most fundamental norms of international justice, which was the prohibition on the use of evidence obtained by torture. The court found that his deportation to Jordan would be in violation of article 6.

31. In the most recent case to which we were referred the Strasbourg court has shown no sign of wishing to soften its approach. In *Insanov v Azerbaijan* (Application No 16133/08) unreported, given 14 March 2013, the court found that the criminal proceedings against the applicant did not comply with certain guarantees of article 6. Nevertheless it held in para 184 that the flaws were not of such a nature as to render the entire trial so fundamentally unfair as to amount to a

flagrant denial of justice. It observed that until now the court has found that a flagrant denial of justice has occurred or would occur only in certain very exceptional circumstances.

32. The test itself is not in doubt. As Lord Bingham said in *EM (Lebanon)*, para 35, the point could not have been put more clearly than it was by the Asylum and Immigration Tribunal in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1. The threshold test will require a flagrant breach of the relevant right, such as will completely deny or nullify the right in the destination country. But none of the cases in which the test has been described was concerned with the way it is to be applied where the complaint is of systemic judicial corruption. It is not so obvious that the only way it can be met, as it was in those cases, is by pointing to particular facts or circumstances affecting the case of the particular individual. The stark fact is that systemic corruption in a judicial system affects everyone who is subjected to it. No tribunal that operates within it can be relied upon to be independent and impartial. It is impossible to say that any individual who is returned to such a system will receive that most fundamental of all the rights provided for by article 6 of the Convention, which is the right to a fair trial.

33. For these reasons I would hold that the allegations that the appellant makes are sufficiently serious for it to be necessary to have a closer look at the material in order to determine how systemic or widespread the problem now is. We are not in a position to do that in this court. The reports of Dr Bogdani and Ms Vickers have been lodged, but they are two years out of date and Mr Scott, very properly, did not ask us to examine them as if they were the last word on the subject. There is reason to think that matters have moved on since they did their work. The further evidence which is available to for the Lord Advocate is not before us. The proper course, therefore, is for the case to be returned to the Appeal Court so that it can be provided with up to date information and reach a properly informed decision as to whether or not the threshold test is satisfied. Its task will be greatly eased if, as there is every reason to expect from responsible counsel, the parties exchange and agree as much information as possible with a view to reducing to a minimum the need for any oral evidence.

34. The further delay that will result in the resolution of these proceedings is regrettable. But it is of the highest importance that due process be observed in matters of this kind. It is always tempting to resort to short cuts. But where a person's liberty and his right to a fair trial is at issue that temptation must be resisted. It is plain that the matter must be properly investigated before a decision is taken as to whether the appellant's extradition to Albania should go ahead.

Conclusion

35. I would recall the Appeal Court's interlocutor of 1 June 2012 by which it dismissed the appeal against the sheriff's order of 20 January 2011, and remit the case to the High Court of Justiciary for further consideration. I would set aside the Appeal Court's finding on 2 February 2012 that the proposed new evidence contained in the reports prepared by Dr Bogdani and Ms Vickers was irrelevant to the ground of appeal and ought not to be admitted. The Lord Advocate should be permitted to adduce evidence to rebut any conclusions in the appellant's favour that may be derived from those reports and any other admissible evidence that he may lead. The appellant must remain in custody for the time being.