Trinity Term
[2016] UKSC 37
On appeal from: [2013] EWHC 663 (Admin)

JUDGMENT

R (on the application of Ismail) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

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

JUDGMENT GIVEN ON

6 July 2016

Heard on 26 and 27 January 2016

Appellant	*Respondent*
David Perry QC Clair Dobbin (Instructed by The Government Legal Department)	Clare Montgomery QC Ben Watson (Instructed by Peters & Peters Solicitors LLP)

LORD KERR: (with whom Lady Hale, Lord Sumption, Lord Hughes and Lord Toulson agree)

Introduction

1. This appeal concerns the operation of section 1 of the Crime (International Co-operation) Act 2003. That section gives the Secretary of State for the Home Department (who is the appellant in these proceedings) power to serve on a person in the United Kingdom any process or other document at the request of a foreign government or its authorities.

2. Mr Mamdouh Ismail, the respondent, is an Egyptian national. He was chairman of the board of management of the El-Salam Maritime Transportation Company which was based in Egypt. Mr Ismail's son, Amr, was an executive director and vice-chairman. The company operated a ferry. On 3 February 2006 it sank in the Red Sea and more than 1,000 people lost their lives. Mr Ismail and his son were charged with manslaughter. A trial took place before the first instance Safaga Court of Summary Justice. Neither Mr Ismail nor his son was present but they were legally represented. Both were acquitted on 27 July 2008.

3. The prosecution appealed. The respondent and his son were again not present at the appeal hearing but lawyers appeared on their behalf. The respondent's son's acquittal was affirmed but on 11 March 2009 Mr Ismail was found guilty. During the hearing before the Appeal Court a lawyer for the prosecution argued that submissions made on behalf of the respondent and his son should not be taken into account because neither was present. It appears that this argument was based on a rule of Egyptian law which requires a defendant to be present in court during a trial of a misdemeanour punishable by imprisonment. The argument was accepted. The respondent was sentenced to the maximum term of imprisonment: seven years, with hard labour.

4. The respondent and his son had entered the United Kingdom on 26 April 2006. They have remained in this country since then. On 11 October 2010 the Egyptian authorities requested the Secretary of State to serve the judgment of the Appeal Court on Mr Ismail. In July 2011 they confirmed that request. On 3 August 2011 the Secretary of State informed the respondent that she intended to serve the judgment. In a letter before claim dated 18 August 2011, Mr Ismail's solicitors submitted to the appellant that she would be acting unlawfully if she acceded to the request to serve the judgment. Various reasons were given.

5. Further representations were made on Mr Ismail's behalf between August 2011 and January 2012. These prompted an inquiry by the Secretary of State of the Egyptian authorities as to the effect that service of the judgment would have on the respondent. She was informed that the judgment of the Appeal Court, having been given in the respondent's absence, could be appealed by means of an objection and this could be done by a lawyer acting on the respondent's behalf; time for the lodging of objection (ten days) would begin to run when the judgment was served; if the respondent failed to appeal, the judgment would become final but, in that event, it could be appealed to the Court of Cassation; and if the respondent lodged an objection, he would have to attend the hearing of the appeal in person.

6. On 23 May 2012 the Secretary of State informed Mr Ismail's solicitors that she intended to serve the judgment on him. On 20 June 2012 a claim for permission to apply for judicial review of that decision was made. Permission was refused on the papers by Haddon-Cave J on 10 October 2012. A renewed application was made and the matter was listed for a rolled-up hearing before Goldring LJ and Wyn Williams J on 12 February 2013. Permission to apply for judicial review was given during the hearing and on 26 March 2013 the High Court delivered its reserved judgment, allowing the respondent's claim for judicial review. On the Secretary of State's application, the High Court certified two points of law of general public importance:

> "1. What is the extent of the Secretary of State's discretion when serving a foreign judgment under section 1 of the Crime (International Co-operation) Act 2003?
>
> 2. May a person's article 6 rights be engaged on service by the Secretary of State of a foreign judgment under section 1 of the Crime (International Co-operation) Act 2003?"

The judgment of the High Court

7. The High Court considered three grounds advanced on behalf of Mr Ismail. The first of these was that the Secretary of State had been wrong in her analysis of the extent of the obligations imposed on her by article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The second ground was that the Secretary of State adopted an irrational and unlawful approach in exercising her discretion as to whether or not to accede to the request to serve the judgment on Mr Ismail. Finally, it was argued that the Secretary of State, in her consideration of articles 2, 3 and 8 of ECHR, had failed to take into account all relevant circumstances.

8. Goldring LJ (who delivered the judgment of the court) dealt first with the second of these arguments. He held (in para 63) that, in exercising her discretion under section 1 of the 2003 Act, the Secretary of State could not ignore evidence of obvious illegality or bad faith in the proceedings which had led to the request to enforce a foreign judgment. Nor could she fail to have regard to evidence in relation to the manner in which the judgment had been obtained. She was also obliged to take into account the consequences for the person on whom the judgment was to be served.

9. The consequences which the court considered would ensue for the respondent by service of the judgment were summarised in paras 67 and 68:

> "67. Service of the judgment would have serious implications for the claimant both in Egypt and the United Kingdom. It would set time running for finalising the judgment. He would have two options: return to Egypt and begin to serve the prison sentence of seven years with hard labour and appeal or remain in the United Kingdom and suffer the consequences of a final judgment.
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> 68. Remaining in the United Kingdom would have significant consequences for the claimant once the judgment is served. Although there is presently no extradition arrangement between the United Kingdom and Egypt, on any request for extradition, the claimant could not dispute the facts. Egypt would then be seeking the extradition of a man guilty of manslaughter. Of course, the claimant would have the protection rights under Part 2 of the Extradition Act 2003. Further, a final judgment in the United Kingdom might well lead to an Interpol 'red notice'. He could not then leave the United Kingdom for fear of being arrested."

10. On the question of whether the proceedings before the court of appeal in Egypt were tainted by illegality or bad faith, Goldring LJ (in para 72) referred to four factors which, he said, constituted "sufficient evidence for the Secretary of State to have considered whether this was a judgment obviously obtained in flagrant disregard of justice; in other words, in bad faith" (para 73). Those factors were: (i) the background of public pressure after the respondent's acquittal for him to be convicted; (ii) the fact that two of the three judges due to hear the appeal were replaced shortly after their appointment by two men who had worked in the prosecutor's office at the time of the investigation; (iii) in the course of the appeal hearing, the respondent's legal representation was effectively withdrawn; and (iv)

there were grounds to question whether the judgment could be sustained on a proper analysis of the facts.

11. On the first ground advanced on Mr Ismail's behalf (that the Secretary of State had been wrong in her understanding of the duties imposed on her by article 6 of ECHR), Goldring LJ said (in para 100) that it was "very difficult as a matter of principle to distinguish between enforcing a judgment and directly assisting in the enforcement of it" in circumstances such as arose in Mr Ismail's case. He considered, therefore, that there was sufficient evidence for the Secretary of State to consider whether article 6 was engaged. He made the following observation at para 102, however:

> "For article 6 to be engaged the disregard of a person's article 6 rights must be flagrant. The test is a very high one. Some indication of that can be gauged from the fact that over the past 20 years article 6 has not been successfully invoked in an extradition context. Even in a case where defence counsel was appointed by the public prosecutor, the applicants were held incommunicado until trial, the hearing was not public and closed to the defence lawyers and self-incriminating statements were obtained in highly doubtful circumstances, extradition was permitted (see Lord Brown's speech in *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110). That underlines how very exceptional must be the circumstances to result in the application of article 6 in a case such as the present."

12. In light of the court's findings on the first two grounds, Goldring LJ said that it was unnecessary to consider the final ground "to any degree". He reflected that, since the service of the judgment would have an impact on the respondent's family life, the extent and proportionality of any interference with it would have to be assessed. He made an incidental comment on medical evidence that had been submitted on behalf of Mr Ismail. This consisted of three reports from a Professor Kopelman, the last of which suggested that the respondent's poor mental condition would worsen if the judgment was served on him. Goldring LJ said (at para 103) that the Secretary of State's concerns about this - she had said that the claims made about Mr Ismail's health were "unrealistic" - may have been "entirely justifiable".

The appeal before this court

13. For the Secretary of State, Mr Perry QC described the principal question on the appeal as being whether the service of a foreign judgment was capable of

engaging the article 6 rights of the individual who is served with the judgment. He submitted that service of such a judgment could not engage article 6 for two reasons: first, service of a foreign judgment does not have the direct consequence of exposing the individual on whom it is served to a breach of any fair trial guarantee; secondly, the consequences of service are not of a type or nature to warrant the engagement of article 6 rights.

14. Mr Perry claimed that it was beyond dispute that service of the judgment on the respondent would have had no direct effect on his rights in this jurisdiction. The only practical effect of service would have been to start the timetable for further appellate proceedings in Egypt. This would in turn require the respondent to decide whether or not to attend those appeal proceedings. Service of the judgment would make no difference to his ability to remain in the United Kingdom, nor would it have any effect on the conditions in which he lived here. By recognising the possible engagement of article 6, the High Court's judgment had impermissibly extended the reach of ECHR to a category of cases to which it had not previously been applied.

15. On the second issue on which a question had been certified (the extent of the Secretary of State's discretion when serving a foreign judgment under section 1 of the 2003 Act), Mr Perry submitted that it was not incumbent on the Secretary of State to investigate the fairness of proceedings in a foreign state where she is asked to serve or facilitate the service of a foreign judgment. To impose such a duty would run counter to the purpose of the 2003 Act in that such an obligation would impede the ability of the Secretary of State to offer speedy and effective procedural assistance to the competent authorities in other sovereign states.

16. The High Court was wrong, Mr Perry argued, to treat mere service of process as giving rise to similar duties to those which might attend recognition and enforcement of such process. The two were conceptually and, as a matter of practicality, fundamentally different. The recognition and enforcement of a foreign judgment could have the consequence of directly exposing an individual to a possible breach of his article 6 rights, as in the case of extradition. Mere service of process, carrying no such risk (at present there is no extradition treaty between the UK and Egypt) was of a completely different order. The possibility that at some time in the future an extradition treaty might be made between the two countries was remote, Mr Perry said, and, in any event, a person whose extradition was sought would then have the protections provided for in Part 2 of the Extradition Act 2003. These include the prohibition of extradition where that would be incompatible with ECHR rights.

17. Mr Perry also argued that the High Court was wrong to suggest that the issue of a red notice was contingent on the service of the judgment. Article 82 of INTERPOL's Rules on the Processing of Data explains the purpose of red notices.

It stipulates that such notices are published at the request of a National Central Bureau or an international entity with powers of investigation and prosecution in criminal matters in order to seek the location of a wanted person and his or her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action. It did not depend on a final judgment having been passed on the person who was the subject of the notice. In fact, as emerged during the hearing of the appeal before this court, a red notice had been issued in respect of Mr Ismail.

18. For the respondent, Ms Montgomery QC suggested that section 1 of the 2003 Act clearly conferred a discretion on the Secretary of State. The essential question was what the extent of that discretion was and what considerations the Secretary of State had to take into account in deciding whether to accede to a request to serve the foreign judgment. In this case there was a properly arguable case that the Egyptian appeal proceedings were manifestly unfair. They should be characterised in article 6 terms as amounting to a "flagrant denial of justice" - *Othman v UK* (2012) 55 EHRR 1, para 259. To suggest, as did the appellant, that, acceding to the Egyptian government's request to serve the judgment of the appeal court on the respondent would have involved the discharge of a 'mere administrative function' akin to the service of a claim form in a civil/commercial dispute, was unreal. Where material had been placed before the Secretary of State which plausibly suggested that there was inherent and blatant unfairness in the Egyptian trial process, a careful assessment of the respondent's representations was needed.

19. Ms Montgomery accepted that in many cases where service of process was sought, this would have limited or ancillary consequences in foreign proceedings. She suggested, however, that this would not invariably be the case and was not the case here. In this instance, service would have had immediate, profound, and irreversible consequences for the respondent. It was the single step necessary to trigger the start of a short period before Mr Ismail's conviction and the sentence imposed on him became final. Service of the judgment dramatically reduced the options available to him. He would either have to become a fugitive from justice (having declined to return to Egypt, and having lost forever the opportunity to challenge the allegations), or to have surrendered to Egyptian custody and begun serving the custodial sentence while pursuing an appeal before the Egyptian courts.

20. Contrary to the appellant's contention, Ms Montgomery submitted that the service of foreign process was not a purely administrative act; it was, as a matter of principle, an exercise of sovereignty - *Dicey, Morris and Collins on The Conflict of Laws* (15th ed) at 8-049.

21. It was also wrong, Ms Montgomery argued, to suggest that the effects of service would only have been felt abroad. Service would have had foreseeable

effects on Mr Ismail in the UK as well. In this jurisdiction the fact that he had become a fugitive from justice would necessarily have had serious implications for him: it would have potentially affected his immigration status and his ability to travel. Most significantly, Mr Ismail would have lost forever his ability to contest the merits of the criminal case against him and the effects of that would be experienced by him in this jurisdiction. (As it happens, Mr Ismail's immigration status has not been affected. He was granted indefinite leave to remain on 21 August 2015, following the Egyptian authorities' acceptance that the underlying criminal proceedings against him were time barred, and their withdrawal of their request for service of the judgment.)

22. As to the engagement of article 6 of ECHR, Ms Montgomery contended that this case fell within the existing categories of exception to the ordinary territoriality principle under article 1 of the Convention. Relying on *Soering v United Kingdom* (1989) 11 EHRR 439; *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745; *Bankovic v United Kingdom* (2007) 44 EHRR SE5; and *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, she claimed that enforcement of a foreign judgment arising from a flagrantly unfair trial, which would lead to the imposition of punishment in the form of a fine or detention in the UK was capable of engaging the appellant's responsibility under article 6 of ECHR. Although the request for assistance in this instance did not seek the imposition of a fine or detention on the respondent, it involved the appellant directly in the process of enforcing the Egyptian judgment. On a proper analysis, in this case the appellant had been asked to participate in and to facilitate a critical step in criminal proceedings in a foreign state. This was not assistance in relation to a collateral feature of an Egyptian criminal process, or engagement with an ancillary part of it. It was participation in a key act with substantive consequences: it would have converted an arguably flagrantly unfair criminal trial process into a final conviction, accompanied by a lengthy sentence of imprisonment.

23. By way of alternative argument, Ms Montgomery suggested that, if it was considered that the case did not come within the already recognised categories of exception to the territoriality principle, an extension of the existing categories of extraterritorial application of ECHR to cover the respondent's position would be both limited and justified.

The 2003 Act and guidance as to its application

24. The material parts of section 1 of the 2003 Act are these:

> "1. Service of overseas process

> (1) The power conferred by subsection (3) is exercisable where the Secretary of State receives any process or other document to which this section applies from the government of, or other authority in, a country outside the United Kingdom, together with a request for the process or document to be served on a person in the United Kingdom.
>
> (2) …
>
> (3) The Secretary of State may cause the process or document to be served by post or, if the request is for personal service, direct the chief officer of police for the area in which that person appears to be to cause it to be personally served on him."

25. The tenor of the provision, looked at from a purely textual perspective, suggests an administrative procedure. It is contemplated that transmission of the document will be made by post unless personal service has been requested. This is not indicative of a requirement that there should routinely be an examination of the proceedings which prompted the request for service of the judgment in order to investigate whether they were infected by obvious illegality or bad faith. On the contrary, at first blush, the Secretary of State's role might be regarded as that of a cipher, on account of her obviously occupying the position in the executive through which such requests should pass. Such a role might be considered to chime well with the preamble to the 2003 Act which states that the purpose of the legislation is, among other things, to make provision for "furthering co-operation with other countries in respect of criminal proceedings and investigations". It might also be considered to properly reflect the circumstance that there are no express statutory preconditions on the exercise of the Secretary of State's power.

26. As against such considerations, however, is the fact that the Secretary of State is invested with a power, as opposed to an obligation, to effect service of the foreign process. And, clearly, it was contemplated that there would be circumstances in which it would be appropriate not to authorise service.

27. Mutual Legal Assistance Guidelines are issued by the Secretary of State to inform those who wish to make a request under the 2003 Act. The relevant edition of these guidelines, so far as concerns the present case, is the ninth. In the seventh edition, however, in passages omitted from the ninth, it was stated that the central authority (which administered such requests on behalf of the Secretary of State) should ensure that requests for legal assistance conformed with the requirements of law in the relevant part of the UK and the UK's international obligations and that

the execution of particular requests was not inappropriate on public policy grounds. The ninth edition of the guidelines presented a different emphasis. It stated:

> "The UK reserves the right not to serve process or procedural documents where to do so could place a person's safety at risk. (For example: if the procedural documents reveal the address of a key witness in a murder trial). Requesting Authorities should therefore always consider if it is necessary to include details relating to witnesses or victims in such documents."

28. It should be noted that the passages in the seventh edition of the guidelines which required the central authority to ensure that requests for legal assistance conformed with the law of the UK and this country's international obligations and that the execution of the request was not inappropriate on public policy grounds applied to both requests for service of process and legal assistance generally. The appellant has suggested that these sections were directed to the more intrusive forms of assistance which might be provided within the United Kingdom such as the execution of search warrants.

29. The respondent has sought to counter this argument by referring to the fact that when the Bill which became the 2003 Act was passing through the House of Lords, the Parliamentary Under-Secretary of State at the Home Office, Lord Filkin said:

> "… Clause 1(3) [section 1(3) of the enacted legislation] is not an obligatory provision. It contains the word 'may'. It always remains open to the Secretary of State to decline to comply with a request. Clearly, there is a burden of responsibility on him when making an appropriate response to any such request. …"

30. Evidence of this answer was given to the High Court without objection by counsel for the Secretary of State. It is doubtful that it would satisfy the test for admissibility set out in *Pepper v Hart* [1993] AC 593. In any event, I do not consider that the statement made by Lord Filkin advances the respondent's case. It was an answer given to an inquiry as to what might happen if a request for service of process came from countries such as Iraq, North Korea or Zimbabwe. Lord Filkin's statement did no more than point out that clause 1(3) was a permissive provision. That is not in dispute. The answer did not deal with the question at issue here, namely, what steps the Secretary of State must take to ensure that there is a lawful exercise of her power under section 1(3).

31. It appears to me, therefore, that neither Lord Filkin's answer nor the quoted passages from the seventh edition of the guidelines betoken an intention that the Secretary of State should be, in every instance where service of a foreign judgment is requested, obliged to examine the underlying proceedings which prompted the request for their consistency with the UK's standards of fairness in a criminal trial.

The extraterritorial reach of ECHR

32. It is well settled (and not in dispute in the present case) that a person who is physically present in a country which has acceded to ECHR is entitled to the protections enshrined in the Convention. Moreover, such a person may invoke his or her rights where the actions of the member state would expose them to consequences in a non-contracting foreign state which would amount to a violation of Convention rights.

33. Thus in *Soering v United Kingdom* (1989) 11 EHRR 439 the European Court of Human Rights (ECtHR) held that the extradition of the applicant to the United States of America would violate his article 3 rights because he would there be exposed to the risk of the imposition of the death penalty. The violation arose because, as Goldring LJ put it in para 75 of the High Court's judgment, "as a direct consequence of the action of a contracting state an individual will be subject to proscribed ill-treatment in a foreign state …"

34. ECtHR was careful to explain, however, the limited nature of this apparent exception to the territorial reach of the Convention. In para 86 the court described the limits of that reach in these terms:

> "Article 1 of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I,' sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' *('reconnaitre'* in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of states not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other states. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the

> conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention."

35. It was because the actions of the UK authorities, in extraditing the applicant to a country where he faced the possibility of suffering the death penalty, facilitated that outcome that a violation of article 3 was held to be present. In effect, the UK would have been directly instrumental in exposing Soering to the risk of being executed. Properly understood, therefore, this was not an instance of extending the territorial reach of ECHR. It was the decision to extradite, *taken within this jurisdiction*, that constituted the breach of article 3. It is, of course, true that the actual transgression of article 3 would take place outside the *espace juridique* of the Council of Europe but the decision of UK authorities which, it was held, would expose the applicant to the risk of execution was taken within this jurisdiction.

36. Thus understood, *Soering* provides an obvious contrast with Mr Ismail's case. The decision of the Secretary of State to serve the judgment on him did not expose him to the risk of violation of his Convention rights. It is undoubtedly true that service of the judgment would have placed Mr Ismail in something of a dilemma. But it is no part of the Secretary of State's function to take steps to relieve him of the need to confront that dilemma. Avoidance of the consequences of the judgment becoming final lay in Mr Ismail's hands. He could - as he did - simply decide not to return to Egypt. That may not have been a pleasant prospect but it is a very far cry from saying that his having to face it amounted to a possible violation of his article 6 rights.

37. It is important to recognise that ECtHR in *Soering* found that the liability of the UK for a breach of article 3 arose as a *direct consequence* of the actions of UK authorities. At para 91, the court said:

> "In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State *by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment*." (emphasis supplied)

38. Again the contrast with the respondent's position is clear. Service of the Egyptian court's judgment does not have the direct consequence of his becoming exposed to "proscribed ill-treatment". Even if one assumes that his return to Egypt would involve his being vulnerable to treatment that would, if it occurred within one of the contracting states, amount to a violation of a Convention right, this can on no account be said to be the "direct consequence" of the Secretary of State having served the judgment on him. Service of the judgment did not require him to return

to Egypt. It may be said to have reduced his options but this is quite different from its carrying as an inevitable outcome his exposure to violation of his rights. As I have observed, avoidance of that consequence clearly lay within Mr Ismail's control. He may have been faced with an unpalatable choice by the service of the judgment on him but that is quite a different matter from the Secretary of State having taken action which had as a direct consequence the respondent's exposure to a violation of his Convention rights.

39. Breach of an individual's rights within a contracting state can arise from actions taken outside the state by a non-contracting country. As the judgment in *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 illustrates, where a judgment which has been obtained in a non-contracting state is enforced in a member state, notwithstanding the fact that it was obtained in circumstances which would have amounted to breach of a Convention right, it may render its enforcement in a member state a violation of that state's ECHR obligations. This can only occur if the circumstances in which the judgment was obtained amounted to a "flagrant denial of justice" - para 110 and the concurring opinion of Judge Matscher in *Drozd.* That argument can be left aside for the present appeal. The issue is whether the service of a judgment can be regarded as akin to its enforcement.

40. Goldring LJ considered that no practical distinction could be drawn between service of the judgment and its enforcement. At para 70 he said that by serving the judgment the Secretary of State would be directly assisting in the enforcement of this Egyptian conviction. He expanded on that thesis in para 100 where he said that it was "very difficult as a matter of principle to distinguish between enforcing a judgment and directly assisting in the enforcement of it in such circumstances as the present."

41. This finding lies at the heart of the appeal. Is the service of the judgment part and parcel of its enforcement? Certainly, it is a preliminary step which, on the available evidence, is at least prerequisite to enforcing the judgment. But does it give legal force to the judgment or ratify it? Plainly not. On the contrary section 2(2) of the 2003 Act expressly provides that no obligation arises under the law of the UK to comply with the process by virtue of its service. And section 2(3)(a) requires that the process must be accompanied by a notice drawing to the attention of the person on whom it is served the provisions of subsection (2).

42. I consider that a clear distinction can be drawn between serving a judgment and taking steps to ensure that it is enforced. Enforcement of a judgment necessarily alters the legal position of the person against whom it has been obtained. The legal options available to the respondent may have been narrowed by service but his essential legal position remained unchanged. Mr Ismail remained free to stay in the United Kingdom. Any assets that he held in the UK were unaffected. Service of the

judgment on him did not involve any coercive action against him. Moreover, enforcement of the judgment does not flow inexorably from its having been served. It may have been a stage in the process but it did not signify that that process would inevitably continue to its ultimate destination.

43. Indeed, by serving the judgment, the Secretary of State was in no sense committed to authorising its enforcement. Very different considerations would have been in play if she had been asked to take the necessary steps to enforce it - presumably, by agreeing to extradite the respondent. Then, as Mr Perry has pointed out, she would be required to observe the obligations imposed on her by the Extradition Act. These would include the duty to ascertain whether the respondent's extradition to Egypt would be incompatible with any of his Convention rights - precisely the type of exercise contemplated in *Soering* and *Drozd.* In my opinion, there is no reason that this type of consideration should be required to take place at the anterior and quite separate stage of deciding whether to serve the judgment. The Secretary of State was quite plainly aware that service of the judgment alone carried no risk of the respondent being exposed to breach of his Convention rights.

Sovereignty

44. Whether a decision to serve the judgment is to be characterised as a "purely administrative act" or the exercise of sovereignty does not seem to me to greatly matter in the present appeal. As Mr Perry submitted, states and international bodies attach increasing importance to their ability to seek assistance in criminal matters swiftly and through processes which are easily accessible. In both *Drozd* and *Willcox v UK* (2013) 57 EHRR SE16 the need for strengthening international co-operation has been recognised.

45. The European Convention on Mutual Assistance in Criminal Matters 1959 is the primary European instrument providing a framework for mutual legal assistance between EU member states. This is supplemented by the European Convention on Mutual Assistance in Criminal Matters (Council Act of 29 May 2000). It provides for the sending and service of procedural documents. Article 5(1) contemplates service being effected directly by post. It provides that each member state shall send procedural documents intended for persons who are in the territory of another member state to them directly by post. Article 5(2) provides a series of exceptions whereby service may be made via the competent authority of the requested state:

> "5(2) Procedural documents may be sent via the competent authorities of the requested member state only if:

> (a) the address of the person for whom the document is intended is unknown or uncertain; or,
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> (b) the relevant procedural law of the requesting member state requires proof of service of the document on the addressee, other than proof that can be obtained by post; or
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> (c) it has not been possible to serve the document by post; or
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> (d) the requesting member state has justified reasons for considering that dispatch by post will be ineffective or is inappropriate."

46. The fact that within the European Union the essentially formal and administrative nature of the exercise of serving process has been given such prominence is not irrelevant to the approach to the interpretation of section 1(3) of the 2003 Act. It would be inconsistent if service of process emanating from an EU country should be treated differently from that of a country which is outside the EU but which enjoys conventional diplomatic relations with the UK. Quite apart from this, the 2003 Act itself and the guidance issued under it clearly indicate that service of process would normally be achieved directly by post. In my opinion, this highlights the predominantly administrative element of this procedure.

47. If service of a judgment is to be regarded as an essentially formal act (as I believe it should be) the question of whether it involves an act of sovereignty recedes in terms of importance. As the appellant has submitted, the United Kingdom plainly regards the service of foreign process as trespassing only in the most minimal way on its sovereignty. Serving a foreign judgment on a person within the UK does not involve any significant compromise on the sovereignty of this country.

Consequences

48. Service of the judgment by the Secretary of State would not, therefore, have involved an exercise of the UK's sovereignty nor, for the reasons given above, would it engage Mr Ismail's fundamental rights. Indeed, in the particular circumstances of his case, service would have had no material impact on Mr Ismail at all.

49. The High Court considered it to be a significant consequence that he would be exposed to the risk of service of a so-called red notice. This, I am afraid, was plainly wrong. Not only was it the case that a red notice had already been issued in respect of him at the request of the Egyptian authorities, INTERPOL rules do not require service of a judgment on a person before a red notice can be issued.

50. The High Court considered that there were other material consequences for the respondent of the service of the Egyptian court of appeal's judgment on him: (i) he would have two options only; either to return to Egypt and begin to serve the prison sentence which had been imposed on him or to remain in the UK and suffer the consequences of a final judgment; and (ii) in the event of an extradition agreement being concluded between UK and Egypt, he would not be able to dispute the facts on which his conviction of manslaughter was based.

51. For the reasons that I have earlier given, I do not consider that the narrowing of the respondent's options as described in para 50(i) above is sufficient to engage article 6 of ECHR. Nor does the prospect of a future extradition agreement between Egypt and UK, or some other request by Egypt for the respondent's extradition, engage article 6 at this stage. If such a circumstance arises, he will then be entitled to rely on the protections afforded by the Extradition Act, including invoking the entire panoply of his article 6 rights.

52. I am also of the view that the Secretary of State was not, in this case, under any obligation to investigate further the consequences that would accrue to the respondent. These were clear. He was entitled to remain in the UK. Service of the judgment could not affect that situation. His assets in the UK were unaffected by having had the judgment served. There was a distinct difference, in terms of its effect on the respondent, between service of the judgment and seeking to have it enforced.

53. While I have concluded that, in the respondent's case, article 6 was not engaged and that the Secretary of State was not under an obligation to investigate further the respondent's claim, it does not follow that there would not be circumstances in which the service of a judgment would not engage article 6 or call for further investigation of the basis on which the judgment was obtained. It is conceivable that service of a judgment, in circumstances different from those arising in the present appeal, might lead more directly to its enforcement or other material consequences, or that obvious illegality or bad faith (that would affect the person on whom service was made in a way that does not arise for Mr Ismail) would warrant a more probing inquiry. On the issue identified by Mr Perry (para 13, above) I therefore consider that it may well be possible in certain cases for service of a foreign judgment to engage article 6. This is not such a case, however.

Conclusion

54. I would allow the appeal and dismiss the application for judicial review of the Secretary of State's decision.