

# **Response to the Independent Review of the Human Rights Act 1998**

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## **The Human Rights Act 1998, International Criminal Cooperation and Extradition**

Our submission relates to the impact upon and within the UK's efforts to combat international and transnational criminality, the area of our expertise. Crime, particularly serious crime, is increasingly international in nature and addressing it requires a high level of police and judicial cooperation between States. There is no doubt that the relationship between UK courts and the ECtHR and impact of the HRA on the relationship between the judiciary and the executive (widely construed) are relevant to this cooperation including extradition.

A general preliminary point to make is that the Trade and Cooperation Agreement contains a set of rules replacing the Framework Decision on the European Arrest Warrant. That agreement also provides that the UK will continue to adhere to the ECHR. Particularly, Article LAW.GEN.3 sets out that human rights underpin the entire of Part III which includes the European Convention of Human Rights and "the importance of giving effect to the rights and freedoms in that Convention domestically." Article LAW.OTHER.137 also allows suspension of all or part of Part III in the case of "serious or systemic deficiencies within one Party as regards the protection of fundamental rights or the principle of the rule of law." Amendments to the present system of human rights protection, such as repeal of section 3 of the Human Rights Act 1998, may threaten the system of surrender under the TCA between the UK and the EU27. Prior to Brexit, intra EU surrender by far outnumbered non-EU extradition in scale. It is reasonable to conclude that were the new rules governing UK-EU27 surrender to be suspended and the relationship revert to that under the Council of Europe's Convention on Extradition 1957 the system, at best, would be slower and more cumbersome. This is not to mention the other important elements of UK-EU27 criminal cooperation which would also be affected, such as passenger name record and criminal record information exchange.

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## The relationship between domestic courts and the European Court of Human Rights (ECtHR)

ECtHR jurisprudence contains the origins of human rights in extradition. The seminal case is **Soering v UK** (1989) 11 EHRR 439. The principle that an extraditing country can be responsible for human rights violations subsequent to rendition (in this case the death row phenomenon violating Art 3 ECHR) is now explicit in the Extradition Act 2003. By including human rights in that Act the UK Parliament chose to strengthen the application of human rights in extradition cases by ensuring breaches of the ECHR would bar extradition at the judicial stage of proceedings. Extradition is commonly argued to engage Art 3 (prohibition on torture), Art 6 (right to a fair trial) and Art 8 (right to respect for private and family life).

The ECtHR and UK courts have historically set a high threshold for establishing a breach of human rights in the extradition context. The law operates under a general presumption that a country with which the UK has extradition arrangements will not violate a requested person's human rights. This presumption carries even greater strength when dealing with countries who are signatories to the ECHR. One way a requested person can rebut this presumption is through reference to ECtHR jurisprudence which establishes clear and cogent evidence of the risk of a human rights breach, such as in **Targosinski v Poland** [2011] EWHC 759 (Admin).

Article 8 ECHR has become increasingly relevant to extradition cases and enables the court to consider a wide range of factors when weighing the factors for and against extradition. UK courts apply the test of whether interference with family life of the requested person and their members of his family, such as dependents, is outweighed by public interest in extradition with acceptance that such an interest is weighty and constant and that it will only exceptionally be outweighed.

Note that in the context of extradition, unlike deportation, UK courts (and commentators) have not generally felt obliged to engage with the debate whether they must or should 'mirror' ECtHR jurisprudence or are instead free to depart from (go beyond) it. That debate, on the continuing relevance of Lord Bingham's so-called mirror principle from **R. (on the**

**application of Ullah) v Special Adjudicator** [2004] UKHL 26, is largely absent.

Media reporting and occasional political outcry have given rise to the public perception that human rights, as interpreted by Strasbourg, act to frustrate extradition. This is false. Only rarely do human rights considerations bar an extradition. UK and ECtHR judges place considerable emphasis on the public interest that those accused of crimes should be brought to trial, that convicted persons should serve their sentences, that the UK adheres to its extradition treaties and that it should not become a haven for criminals. As an example, life sentences in so-called super-max US prisons under special administrative measures have not been held by the ECtHR to violate article 3 (**Ahmad and others v UK** (2013) 58 EHRR 1). The point here is that the suggestion that by taking into account decisions of the ECtHR UK courts have been or are obliged to frustrate UK efforts to cooperate with its extradition partners is fallacious.

In fact, an argument can be made that through adherence to the ECHR, including the obligation to take into account decisions of the ECtHR under s 2 of the HRA, the UK is enhancing the effectiveness of its cooperative activities. Complying in good faith with its international obligations as interpreted by a supranational court conditions the UK's efforts with objective legality and legitimacy and strengthens the UK's adherence to the international rule of law in fact and in public consciousness. There is no doubt that in the area of extradition the obligation under section 2 of the HRA to take into account decisions of the ECtHR etc. has not inimically affected the UK's ability to cooperate fully with its extradition partners as it sees fit. Indeed, both the ECtHR and domestic courts have approached the application of Convention rights in extradition proceedings with a wide margin of appreciation.

#### The impact of the HRA on the relationship between the judiciary, the executive and the legislature

The HRA plays an important role in extradition hearings, as noted above. Convention Rights, as incorporated by the HRA, may impact upon the relationship between the executive and the judiciary in the area. Simply, on the relatively rare occasion where an extradition is barred on account of human rights a judicial decision acts to frustrate a proposed action by the

executive. The judiciary here is applying the Extradition Act 2003 as interpreted by both the ECtHR and domestic courts.

There is a developed body of case law applying in that situation. Germane are the tests that are applied in the consideration of whether a proposed extradition would contravene human rights. In the context of article 3, for example, this is whether there are substantial grounds for believing there is a real risk that a violation would follow extradition. In the context of article 6, the test is whether the extradition would result in a flagrant denial of justice in the requesting state. The hurdle that must be overcome to invoke human rights as a bar to extradition is high indeed.

In extradition cases the executive acts on behalf of requesting states. In deciding upon extradition in specific cases the judiciary is necessarily positioned between the requested person and the executive. That noted, the legislature has provided the framework for extradition hearings in the form of the Extradition Act 2003 and the process is, rightly, contested where the requested person does not consent to extradition. Applying human rights law the judiciary decides whether extradition is barred. Barred or not the process has been conditioned by a process instilling legality and legitimacy according to the terms of the ECHR as interpreted. A decision as to whether human rights will be infringed is a judicial decision which should be left to the courts. Executive input into the extradition process has over the years been legislatively curtailed, and rightly so.