Extradition and the universality of human rights in Scotland.

ARNELL, P.

2022

Extradition and the Universality of Human Rights in Scotland

Dr Paul Arnell

Law School, Robert Gordon University

The debate over the universality of human rights is Sisyphean. Academics, philosophers and others have interminably argued whether human rights protection applies everywhere to everyone. These discussions include the question of whether the protection under article 3 of the European Convention on Human Rights 1950 (ECHR) applies equally within and outwith the jurisdiction of state parties to the treaty. Rarely, if ever, has consideration of the universality of human rights taken place in the High Court of Justiciary. In the recent case of *Amnott v United States* [2020] HCJAC 6 that is exactly what happened.

Amnott v United States is notable for falling squarely in the relativist camp in the universality debate. The scope of protection against inhuman or degrading treatment or punishment under article 3 was held to turn upon the situs of the act or acts giving rise to the contravention. The judgment accords with the position of courts south of the border and one branch of European Court of Human Rights (ECtHR) extradition-related case law. It is at odds with a second strand of European jurisprudence and the wishes of most human rights advocates.

The Rise of Relativity

The leading UK judgment favouring relativity in an extradition context is *R. (on the application of Wellington) v Secretary of State* [2008] UKHL 72. In a unanimous decision, with all five Law Lords giving opinions, it was held that a distinction in the scope of article 3 was essential if extradition was to meet the beneficial purposes for which it exists. A consideration affecting the distinction as regards inhuman and degrading treatment (as opposed to torture) was the desirability of extradition (at para 24 per Lord Hoffmann). Simply, inhuman and degrading treatment or punishment within the territory of the Council of Europe would not necessarily be so in a non-state party to the Convention.

The majority in *R. (on the application of Wellington) v Secretary of State* relied on *Soering v UK* (1989) 11 EHRR 439, which established that a contravention of article 3 arose where a state party proceeded with an extradition in the face of substantial grounds for believing there was a real risk of ill-treatment within the requesting state. In considering the case Lord Hoffmann stated that a relativist approach to the scope of article 3 "seems to me essential if extradition is to function" (at para 27). Lord Carswell explicitly agreed. Notably from a Scottish perspective, Lord Hoffmann referred to *Napier v Scottish Ministers* 2005 1 SC 307 and the possibility that another approach could mean that extradition might not take place to countries poorer than Scotland, where people not in prison often have to make do without flush lavatories (at para 27).

In support of relativity Lord Hoffmann pointed out that human rights other than that guaranteed by article 3 are applied differently in an extradition context. A

violation of the right to a fair trial, for instance, may act as a bar only where extradition might lead to a flagrant denial of justice. Factors which might give rise to a contravention within a contracting party may not in third states. That position is well-known in Scotland on account of the series of cases following Albania's request for Fatjon Kapri in the light of the systemic judicial corruption in that country (Kapri v Lord Advocate [2014] HCJAC 63, Kapri v Lord Advocate [2014] HCJAC 33, Kapri v Lord Advocate [2013] UKSC 48, Kapri v Lord Advocate [2012] HCJAC 84, Kapri v Lord Advocate [2012] HCJAC 17).

Agreeing with Lord Hoffmann, Baroness Hale stated that the right not to be subjected to torture or inhuman or degrading treatment is absolute such that an individual cannot be expelled where there are substantial grounds for believing that he faces a real risk of being subjected to it. However, she also noted that the context of the case affects the assessment of what treatment is to be regarded as inhuman or degrading (at para 50). It is the minimum level of severity, she held, that is relative (at para 51).

Suggesting a different manner of resolving the difficulties arising from the application of article 3 in the extradition context were Lords Brown and Scott. This was through the adoption of a uniformly strict approach to inhuman or degrading treatment or punishment for article 3 purposes (at para 42). This is, of course, at odds with the arguably liberal construction given in *Napier v Scottish Ministers* and a number of other intra-UK and ECtHR cases. In this vein Lord Scott suggested it was of course open for countries to set higher standards but not to rule that a breach of them was an infringement of the absolute nature of the article 3 obligation.

Universalist Authority

Starkly contrasting with relativist extradition authority is *Trabelsi v Belgium* (2015) 60 EHRR 21. At issue in the case was a possible maximum life sentence in the US and the procedures by which it might be reduced. Before the ECtHR Trabelsi argued his extradition was incompatible with article 3 because the possible life sentences he faced were irreducible in fact. The systems of Presidential pardon and sentence commutation were governed by the executive with no judicial supervision nor predefined minimum criteria.

The ECtHR held firstly that a life sentence is not per se incompatible with the Convention. However, an irreducible life sentence may give rise to an issue under article 3 (at para 112). Whilst article 3 does not prevent a life sentence being served in its entirety, it does prohibit life sentences that are irreducible de facto and de jure. The ECtHR noted that in *Vinter v UK* (2016) 63 EHRR 1 it held that irreducibility should be considered in light of the prevention and rehabilitation aims of the penalty. Further, there must be a review where the detention is considered remaining justified on legitimate penological grounds (at para 115). A prisoner is entitled to know when sentenced what he must do be considered for release and when a review would take place or could be sought, it held.

Applying the law governing life sentences in the extradition context the ECtHR confirmed the proposition that protection against the treatment prohibited under article 3 is universal. Bluntly, it said whether the ill-treatment is inflicted by a non-state party to the ECHR was 'beside the point' (at para 116). The obligation not to extradite where there are substantial grounds for believing there is a real risk of treatment contrary to article 3 applies regardless of the source of the request.

The ECtHR held that a discretionary life sentence in Trabelsi's case was not grossly disproportionate. The procedures for sentence commutation and Presidential pardon did not, however, entail decisions based upon objective, pre-established criteria, known to the prisoner at the time of sentencing, on whether he had changed such that his continued detention was no longer justified on legitimate penological grounds (at 137). Trabelsi's extradition violated article 3.

Amnott v United States [2020] HCJAC 6

In the light of the conflicting authorities on universality Edinburgh Sheriff Court and subsequently the Court of Justiciary have considered US extradition requests for Jennifer Amnott, Valerie Hayes and Gary Redburn. The facts are scarcely believable. They centre upon an attempted violent kidnapping and murder in Virginia. In 2018 the three requested persons, with Frank Amnott, attempted to kidnap five children from two families and to murder their parents. The murders were intended to eliminate the witnesses to their crimes. The attempt was foiled. Frank Amnott was arrested. The three others made their way to Scotland. Frank Amnott pleaded guilty to various crimes in 2019. The US extradition request was made that same year.

The charge against the requested persons of particular relevance to the Scottish litigation was conspiracy to kill witnesses with intent to prevent communication to a federal law enforcement officer. This is because it carries a minimum sentence of imprisonment for life, with there being no system of parole within the federal criminal justice system. The courts in Scotland therefore had to consider whether a potential mandatory life sentence without parole for a lesser crime than murder was grossly disproportionate. If it was found not to be, they then had to decide whether it was irreducible. Answering these questions required consideration of *R. (on the application of Wellington) v Secretary of State* and *Trabelsi v Belgium*, amongst other authorities. The crux of the issue was whether the protection afforded by article 3 within Scotland also applied in the US.

At first instance Sheriff Ross found that no bars to rendition were met, that extradition would be compatible with the requested persons' Convention Rights, and that it would not be unjust or oppressive by reason of their mental or physical health to accede to the US request (*US v Hayes* [2021] SC EDIN 50). He found that the mandatory life sentences without parole the requested persons faced were not grossly disproportionate nor were they irreducible. The case was sent to the Scottish Ministers, who in turn ordered their extradition.

The High Court Judgment

The High Court began by noting the case concerned the ECtHR dictum that article 3 does not mean that any form of prospective ill-treatment will bar extradition to a non-state party to the Convention. Set out in *Harkins and Edwards v UK* (2012) 55 EHRR 19 and *Ahmad v UK* (2013) 57 EHRR 1, and followed in two recent English High Court cases *Hafeez v US* [2020] 1 WLR 1296 and *Sanchez v US* [2020] EWHC 508 (Admin), that view conflicted with *Trabelsi v Belgium*.

Lord Carloway, for the High Court, then detailed the authoritative nature of judgments of the House of Lords, Supreme Court and ECtHR. The High Court is, of course, not generally bound by decisions of the House of Lords and Supreme Court. The exception being decisions in Scottish criminal cases complaining of a violation of Convention Rights. As such, *R (Wellington) v Home Secretary* is not binding in Scotland, although it is highly persuasive. The Sheriff had erred on this point. The High Court is also obliged to 'take into account' decisions of the ECtHR, as per s 2(1)(a) of the Human Rights Act 1998, applying its jurisprudence unless there is a sound reason for not doing so.

Substantively, the High Court agreed that given the gravity of the crimes charged a mandatory life sentence without parole was not grossly disproportionate. ECtHR jurisprudence has found such sentences to be Convention compliant where they are reducible. This entails both a prospect of release and the possibility of review. In *Hutchinson v UK* (2017) 43 BHRC 667 the ECtHR held that a review must assess whether there are legitimate penological grounds for the continued imprisonment.

The High Court acknowledged that an irreducible life sentence may raise an issue under article 3 and what required is de jure and de facto reducibility. It noted, from *R. (on the application of Wellington) v Secretary of State*, that the absolute nature of article 3 did not mean that any form of ill-treatment would act as a bar to extradition (at para 31). Further, it cited from *Harkins and Edwards v UK* that "… treatment which might violate art 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of art 3 in an expulsion or extradition case" (at para 31).

The difficulty with this line of reasoning comes from *Trabelsi v Belgium*, which has been followed by the ECtHR in *Lopes Elzora v Spain* (Application No. 30614/15) in 2017.[1] Faced with two conflicting positions, the High Court followed that taken by the courts in England, in part because they had considered an area of law common to the UK (at para 35).

It was held that a high level of ill-treatment would be required, including death or torture, to bar extradition to states with a long history of respect for democracy, human rights and the rule of law (at para 38). The existence of compassionate release and executive clemency in the US met the requirements of article 3, even though it may not be likely that Amnott, Hayes or Redburn would be afforded

[1] Criticising the English jurisprudence in failing to properly consider ECtHR case law is Graham, L., Extradition, Life Sentences and the European Convention, (2020) 25(3) Judicial Review 228.

either. What the High Court attempted to do was apply the central tenets of ECtHR jurisprudence before *Trabelsi v Belgium* (at para 38).

The High Court judgment ends by giving direct support to relativity. It noted that the Grand Chamber of the ECtHR may follow *Trabelsi v Belgium* in the case of *Sanchez-Sanchez v United Kingdom* presently before it. That could have a profound influence on the practical operation of extradition treaties with non-contracting countries, it said. It further noted that the 'mainstream' ECtHR jurisprudence may be thought to be preferable for those countries governed by the rule of law (at para 40). Alluding to the case before it, it said that some obvious and serious ill-treatment should be required to bar an extradition to the US for the crimes of conspiracy to murder parents and to steal their children (at para 40).

The Crux of the Problem

The universality of article 3 protection faces considerable challenges in the extradition context. Central to them is that universality was developed by the ECtHR in the non-extradition context. Universal equates to absolute, meaning that the article admits no exceptions or qualifications and that it is non-derogable *Ireland v UK* 1979-80) 2 EHRR 25 (at para 163). The setting of the ill-treatment is of no account. The ECtHR has stated that even in the "… most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment…" Gafgen v Germany (2011) 52 EHRR 1 (at para 87).

Extradition provided a new facet to universality. *Soering v UK* found it necessitated "… an assessment of conditions in the requesting country against the standards of Article 3 of the Convention" (at para 91). This arguably conflicts with the view that "… the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other states" *Harkins and Edwards v UK* (at para 129). Whilst in the abstract an 'assessment' is not an 'imposition', where it leads to the rejection of an extradition request it can be seen to become tantamount to one.

The universality of article 3 would obviously not be a problem in extradition if there were not material criminal justice policy differences between countries. This is clearly not the case. *In extremis* are those states and jurisdictions retaining capital punishment. The death row phenomenon in Virginia, it will be recalled, led to extradition to a possible capital sentence contravening article 3 in *Soering v UK*. The difficulty arises where penalties in requesting states short of death are notably longer, more inflexible and served in more restrictive and punitive conditions.

There are notable differences between European and Scottish penological policies and those applied federally in the US. Rehabilitation as a purpose of imprisonment, for example, has been recognised by the ECtHR as increasingly important in the Council of Europe (*Dickson v United Kingdom* (2008) 46 EHRR 41 at para 28). It plays a lesser role the federal US criminal justice, certainly as regards its relevance

to decisions on release. Whole of life sentences are not considered appropriate in Scotland. In the present case they were obligatory.

As regards prison conditions, slopping out in certain circumstances has been held to contravene article 3 in Scotland. 'Special administrative measures' are applicable in a minority of federal US cases, which can include 23 hours a day in solitary confinement and facets of sensory deprivation. In some cases at least, there are considerable differences in incarceration in the two jurisdictions.

The Way Forward

There appear to be three ways out of this corner. Two were proffered in *R. (on the application of Wellington) v Secretary of State*. These were to accept relativity as inevitable and necessary, and to raise the bar of the minimum level of severity required to engage article 3 within the Council of Europe. A third is to accept the universality of the present scope of article 3 and act to mitigate the likely consequences.

Accepting a relativist approach, as seen, would mean explicitly countenancing a likelihood of treatment for requested persons that would be inhuman and degrading for persons imprisoned in Scotland. This avenue has been described as an insidious displacement of the absolute protection hitherto afforded by article 3 and the creation of acceptable derogations.[2] It admits differing standards of protection under article 3 and as such is the death knell of universality.

Raising the minimum level of severity necessary to trigger article 3 within the Council of Europe, at the extreme would mean accepting irreducible life sentences and special administrative measures. More realistically, there is likely middle ground where, for example, whole life sentences with clear and defined avenues for commutation are countenanced. Indeed, this appears to be happening, as seen in *Hutchinson v UK*. Generally, however, this approach would be disproportionate. It would amount to a lessening of the scope of article 3 across the Council of Europe in order to satisfy universality in extradition cases involving a relatively small number of individuals every year.

A third solution is to apply the protection under article 3 as understood within requested states to the likely fate of those facing extradition to non-state parties. In other words, to accept universality. A process akin to that following the bar on extradition of persons facing the death penalty could then take place. Diplomatic assurances mitigating the law or procedure giving rise to the possible human rights violation could be sought. These could provide, say, that a particular form of sentence review would be applied according to pre-existing law and procedure. Of course, such assurances may not be forthcoming or acceptable. In such a case Scotland would face the possibility of mounting a prosecution itself, extraditing or

[2] Mavronicola, N., and Messineo, F., Relatively Absolute: The Undermining of Article 3 ECHR in Ahmad v UK, (2013) 76(3) Modern Law Review 589 at p 601.

deporting the individual to an article 3 compliant jurisdiction or setting the requested person free. None of these options are ideal.

There is no doubt that the universality of human rights comes with a considerable cost. The fight against transnational criminality may well be affected by adhering to it. Ultimately, the question is whether the cost of giving to everyone within Scotland equal human rights protection regardless of where a future violation may take place is a price worth paying.