AUTHOR(S): ARNELL, P.

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THE CONTRASTING EVOLUTION OF THE RIGHT TO A FAIR TRIAL IN UK EXTRADITION LAW

INTRODUCTION

Extradition is a process whereby accused and convicted persons are lawfully transferred across borders from one territory to another.[1] It is unquestionably important. It serves material public purposes. Lord Thomas in *Polish Judicial Authorities v Celinski* stated that there is:

> … a constant and weighty public interest in extradition that those accused of crimes should be brought to trial; that those convicted of crimes should serve their sentences; that the UK should honour its international obligations and the UK should not become a safe haven.[2]

Balanced against these interests are factors including the human rights of requested persons. The challenge facing extradition law is to reasonably accommodate the conflicting interests at play. That process takes place in the context of UK law and public international law and is conditioned by public policy concerns. The accommodation has worked reasonably well. Cases that have engendered notable criticisms have been relatively rare.[3] A particular challenge for the law, though, has been posed by article 6 of the European Convention on Human Rights 1950 (ECHR), protecting the right to a fair trial. Article 6 stands apart from those ECHR rights that play a meaningful role in UK extradition law and practice. Its role is partial and limited in law and fact. It is also one that has experienced contrasting fortunes. Whilst the right has come to have a degree of applicability within the UK in extradition hearings its extraterritorial operation has been restricted. This article analyses the limited role of the right to a fair trial in extradition and highlights the contrasting evolution between UK extradition hearings and trials abroad.[4]

LAW AND CONTEXT

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[1] There is a large body of writing in the area. Of particular note are the House of Lords Select Committee on Extradition Law, *Extradition: UK Law and Practice*, 10 March 2015, cited at https://publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/126.pdf and *A Review of Extradition*, published in September 2011 (the Baker Review), cited at https://www.gov.uk/government/uploads/.../extradition-review.pdf.

[2] [2015] EWHC 1274 (Admin) at para 6, referring to the judgement of Lady Hale in *Norris v Government of the United States (No. 2)* [2010] UKSC 9 at para 8.

[3] Addressing certain of those criticisms is P Arnell, The European Human Rights Influence upon United Kingdom Extradition – Myth Debunked, (2013) 21 European Journal of Crime, Criminal Law and Criminal Justice 317.

[4] It builds upon P Arnell, Extradition and the Right to a Fair Trial, (2013) 36 Scots Law Times 247.

Extradition necessarily involves two States or territories.[5] It is generally governed internationally by bilateral treaties[6] and within the UK by the Extradition Act 2003 (2003 Act). International agreements regulating the transfer of accused and convicted persons are of considerable pedigree. The Treaty of Amity, Commerce and Navigation (Jay's Treaty) 1794-1795[7] between Great Britain and the United States is a notable early example. The most contentious treaty in recent times, from a UK perspective, is the UK-US Extradition Treaty 2003. In UK law the development of extradition law and procedure is reflected in 6 & 7 Vict. C. 75 and 6 & 7 Vict. C.76 enacted in 1843, the Extradition Act 1870, and the Extradition Act 1989. These statutes governed extradition to territories apart from those comprising Her Majesty's Dominions.[8] Pursuant to an international extradition agreement one territory may request another to deliver an accused or convicted person present within it. That request can, and often does, give rise to judicial proceedings in both the requested and requesting territories. Where the UK is the requested territory an extradition hearing can take place where, *inter alia*, a court considers whether the formalities of the process are being adhered to – long standing examples here include the requirement of a *prima facie* case being made out, and those arising from the principles of double criminality and speciality. Within the requesting territory there may be a criminal trial, where the requested person is tried for the offence underpinning the request. These basic facts are relevant because they highlight that there appears to be, in some cases at least, two occasions where the right to a fair trial could apply to offer some protection to the individual subject to the request.

The 2003 Act contains three distinct sets of rules governing export extradition - where the UK has received a request from a third territory. Each set pertains to specific type of extradition relationship between the UK and third territories. They are those governed by the European Arrest Warrant (known as Category 1 extraditions under the 2003 Act), those governed by a bilateral extradition treaty (Category 2) and all others. Category 1 extraditions take place under the EAW scheme of surrender of accused and convicted persons

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[5] 'Territory' is often preferred to 'State' because non-State actors may exceptionally be party to an extradition agreement, for example Gibraltar.

[6] Of course the pre-eminent exception is the European Arrest Warrant. The Council Framework Decision on the European arrest warrant and the surrender procedures between Member States 2002/584, as amended, governs surrender as between EU Member States.

[7] https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=129.

[8] For a general history of UK extradition law see *A Review of Extradition*, supra note 1 at pp 26-72.

between the 28 EU Member States and Gibraltar. It is a streamlined system that differs from historical and orthodox UK extradition practice. Extradition to Category 2 territories, and all other territories, reflects the traditional form of UK extradition. The main differences between the two are that a requesting EU territory need not establish a *prima facie* against the requested person, that surrenders within the EU are wholly judicial, and that the traditional double criminality requirement is substituted with a Framework List of offences under the EAW.[9] Territories not a party to a bilateral extradition treaty with the UK nor a EU Member State must rely on *ad hoc* arrangements or existing international criminal conventions making provision for extradition.

Where an extradition request is made to the UK the law provides that a hearing must take place where the requested person may consent to being extradited or not, regardless of the particular arrangements governing that case. Where the individual does not consent a court will consider the request and any arguments put forward in opposition to extradition. The 2003 Act provides that a number of arguments, or bars, can be put forward. If successful the extradition does not proceed. Bars include human rights, double jeopardy, the absence of a prosecution decision in the requesting territory, the passage of time, age, speciality and forum.[10] Further discussion of UK extradition hearings will take place below, presently, though, it should be noted that extradition from the UK entails a hearing that may consider evidence against a requested person, possible human rights violations, the proper forum for the trial and the proportionality of the extradition. All of these decisions are taken with a view to whether the individual should be forcibly transferred from the UK to a third territory.

Extradition requests can be made for both accused and convicted persons. Accused persons are sought to stand trial in the requesting State, and convicted persons in order to serve a sentence subsequent to conviction. This point is relevant in that it may affect the fact that there are two instances where the right to a fair trial may be considered in an extradition – within the UK at the extradition hearing and outside the UK at the trial following the individual's transfer. In a conviction case it *prima facie* appears that the right to

[9] Notably, the Framework Decision itself does not refer to human rights as a possible bar to extradition. In *Criminal Proceedings Against Aranyosi* (C-404/15) EU:C2016:198, however, the CJEU Grand Chamber held that the EAW scheme does not have the effect of modifying the obligation to respect fundamental rights as enshrined in, *inter alia*, the EU's Charter of Fundamental Rights. EU law will be mentioned further below.

[10] A number of the bars are found in ss 11 and 79 of the 2003 Act for Category 1 and Category 2 territories respectively. The human rights bar is found in ss 21A and 87.

a fair trial has no possible extraterritorial application – the individual has already been tried, convicted and sentenced. Whilst this may indeed be the case there are circumstances where it does apply in this way. This arises through the rules governing trials *in absentia* in the 2003 Act. They provide that where an individual was convicted *in absentia* the judge at the hearing must consider whether the requested person deliberately absented himself from the trial, and if not, whether he would be entitled to a retrial or a review amounting to a retrial.[11] If the requested person is not entitled to a retrial or review in the circumstances he is to be discharged. Generally, then, the point that needs to be made is that there are in many cases two separate hearings which might be conditioned with fair trial protection, one within the UK and one abroad. The question being addressed presently is whether, and if so how, UK law acts in that manner. Firstly, though, it is useful to trace the origins and basis of the application of human rights to extradition and to iterate the reasons why that application is generally desirable.

HUMAN RIGHTS AND EXTRADITION

The subjection of extradition to human rights protection within the Council of Europe dates from 1989.[12] Its origins are found in the jurisprudence of the European Court of Human Rights (ECtHR) and in particular the seminal case of *Soering v UK*.[13] Here, in a well-known passage, the ECtHR stated that it:

> … would hardly be compatible with the underlying values of the Convention… were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture… Extradition in such circumstances… would plainly be contrary to the spirit and intendment of the Article (art 3)….[14]

In *Soering* the death row phenomenon was measured against the protection provided by article 3, guaranteeing freedom from torture

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[11] By section 20 for Category 1 extraditions and section 85 for Category 2. Cases arising here include Lord Advocate v Harrison [2015] EDIN 55; 2015 WL 4635391, and Balaeiharis v Greece [2015] EWHC 3702 (Admin).

[12] Academic authorities include J Dugard and C Van den Wyngaert, Reconciling Extradition with Human Rights, (1998) 92(2) AJIL 187 and C Van den Wyngaert, Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?, (1990) 39(4) ICLQ 797.

[13] (1989) 11 EHRR 439. There are several authorities relating to extradition and human rights pre-dating *Soering*, including Agee v UK, 17 Dec. 1976, Application No. 7729/76, cited at http://hudoc.echr.coe.int/eng?i=001-74884. As noted above, various protections were afforded requested persons prior to the introduction of human rights to the process including those found in European Convention on Extradition 1957.

[14] Ibid at para 88.

and inhuman and degrading treatment and punishment.[15] The US had sought Soering from the UK for a murder in West Virginia. His case was 'foreign' in that the putative human rights violation would take place outside the UK. Such cases are distinguished from 'domestic' cases, where the circumstances giving rise to the human rights violation take place within the country.[16] The acceptance that in an extradition human rights violations can be both 'domestic' and 'foreign' underlines the point that there may be two opportunities for the right to a fair trial to apply within an extradition - the judicial proceedings before and after the rendition. This position follows the enactment of the Human Rights Act 1998 and the incorporation of the ECHR into UK law, as well as the germane provision within the 2003 Act. Also of relevance is section 2 of the Human Rights Act 1998 which obliges UK court to take into account decisions of the ECtHR in so far as they are relevant to the case in question.[17]

The reasons why it is considered appropriate to condition extradition with human rights protection are not difficult to find. The rationale is centred upon the importance of extradition to the individuals subjected to it, entailing, as it does, their forcible removal from a country. For UK nationals it is the only process under which they can be removed from their country.[18] Extradition necessarily deprives persons of the prerequisite for the full enjoyment of human rights under UK law – their physical presence within the country. The rights to be free from torture and to private and family life, for example, are deprived of full and immediate effect upon one's transfer from the UK.[19] A person who has been extradited cannot

[15] Soering also argued, unsuccessfully, on the basis of article 6. See further below. A deportation case shedding light on the test to be applied where the putative human rights violation occurs outside the UK is *EM (Lebanon) v Secretary of State* [2008] UKHL 64.

[16] This designation was coined by Lord Bingham in *Regina Ex Parte Ullah (FC) v Special Adjudicator* [2004] UKHL 26 at para 9.

[17] The precise nature of the obligation upon UK courts under section 2 of the Human Rights Act 1998 is the subject of debate, centring upon whether courts must mirror ECtHR jurisprudence, can offer greater human rights protection or indeed may interpret Convention rights more restrictively. See Klug, F., and Wildbore, H., Follow or Lead? The Human Rights Act and the European Court of Human Rights, (2010) 6 European Human Rights Law Review 621, and Malkani, B., A Rights-specific Approach to Section 2 of the Human Rights Act, (2012) 5 European Human Rights Law Review 516. As will be seen below, in 'domestic' cases in the context of extradition and article 6 the Supreme Court has gone beyond the position of the ECtHR and in 'foreign' cases UK courts have arguably taken a more restrictive approach.

[18] UK nationals cannot be deported.

[19] Diplomatic assurances putatively act to prevent human rights violations upon extradition and deportation. They do not, however, negate the fact that protection under UK law is lost upon rendition. See R Grozdanova, The United Kingdom and

directly and immediately engage the UK legal system's institutions in an attempt to defend and vindicate her rights. Relatedly, the Human Rights Act 1998 generally applies on a territorial basis. Whilst article 1 of the ECHR refers to 'jurisdiction', not 'territory', the extraterritorial application of human rights under the ECHR and the Human Rights Act 1998 is rare.[20] Indeed *Soering* is authority for the fact that human rights will apply abroad only in especial circumstances. In that case the UK could have been indirectly responsible for a violation of article 3 were Soering extradited.[21] This brings to the fore a significant factor in favour of the application of human rights to extradition – that the process can indirectly lead to an infringement abroad. Further, as noted, an extradition may give rise to a human rights violation within the UK. 'Domestic' cases, for example, commonly argue that an extradition would violate one's right to private and family life under article 8. A leading case here is *Norris v Government of the US (No 2)*, where the Supreme Court rejected an argument that the extradition of Norris would disproportionately interfere with his family life in light of his age, ill health and the circumstances of his wife. An extradition, therefore, affects the degree of UK human rights protection available to a requested person and may in itself cause or lead to an immediate or future human rights violation.

The rationale in favour of subjecting extradition to human rights protection generally is relatively straightforward. So too is the argument that the right to a fair trial be included as one of those entitlements, *prima facie* at least. Article 6 *inter alia* provides 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The protection offered under article 6 is of indubitable importance. The ECtHR has noted the '… prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention'.[22] The right centres upon procedural propriety which '… lie[s] at the heart of any legal system grounded in

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Diplomatic Assurances: A Minimalist Approach towards the Anti-Torture Norm, (2015) 15 International Criminal Law Review 369.

[20] Article 1 provides 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. There is a considerable body of case law and accompanying academic literature on the subject. This includes Al-Skeini and others v UK,(2011) 53 EHRR 18 and P Arnell, *Law Across Borders – The Extraterritorial Application of United Kingdom Law*, Routledge, London 2012.

[21] In other circumstances the UK, and other ECHR state parties, can be directly responsible for extraterritorial human rights violations, for example through the actions of their diplomatic and consular agents. See Ocalan v Turkey (2005) 41 EHRR 45. The exceptional nature of the extraterritorial application of human rights underpins the discussion below of the applicability of article 6 to trials abroad.

[22] *De Cubber v Belgium*, Application 9186/80, at para 30.

the rule of law'.[23] Relatedly, the ECtHR in *Salabiaku v France* stated '… the object and purpose of Article 6… by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law'.[24] In light of the importance of the right to a fair trial, and the applicability of human rights protection to extradition generally, it is not unreasonable to assume that article 6 plays a prominent and material role in extradition. This is not the case. Indeed, the effect of the right to a fair trial in extradition has been almost negligible. Article 6 has historically not applied to UK extradition hearings at all.[25] Whilst it has had limited applicability to trials abroad for some time, successful cases have been very rare indeed. From this partial and restrictive position the law has evolved in contrasting ways. On the one hand there has been judicial acceptance that the right to a fair trial applies to UK hearings to a certain extent whilst on the other the right's extraterritorial applicability has been increasingly narrowed. This position is based in a body of jurisprudence reflecting varied considerations including the wording of article 6, international law and comity and the purposes of extradition.

ARTICLE 6 AND UK EXTRADITION HEARINGS

The first opportunity for article 6 to apply to an extradition is the hearing within the UK following a request. As noted, the 2003 Act provides that a requested person must be brought before a judge and, if he does not consent to being extradited or transferred, a hearing is to take place. The application of article 6 to such a hearing turns on the terms of the article itself, as interpreted by the ECtHR and UK courts. Article 6(1) begins 'In the determination of his civil rights and obligations or of any criminal charge against him…'. The core question, therefore, is whether an extradition hearing determines one's civil rights or a criminal charge. The ECtHR has held that extradition hearings do neither, with the meaning of 'criminal charge' and 'civil rights and obligations' under the ECHR being autonomous from the law of State parties.[26] Authority for the ECtHR's

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[23] R Reed and J Murdoch, *Human Rights Law in Scotland*, Third Edition, Bloomsbury Professional, 2011, at p 517.

[24] (1989) 13 EHRR 379 at para 28.

[25] See in the context of the ECtHR and the UN Human Rights Committee G Mathisen, On the Fairness of Proceedings for Extradition and Surrender, [2010] European Human Rights Law Review 486 and in relation to a leading ECtHR case on the issue, mentioned below, B Poynor, Mamatkulov and Askurov v Turkey: the Relevance of Article 6 to Extradition Proceedings, [2005] European Human Rights Law Review 409.

[26] *Maaouia v France* (2001) 33 EHRR 42 at para 34. See also *Parlanti v Germany* (App. No. 45097/04), unreported, 26 May 2005 at para 5.

position is found in *Raf v Spain*.[27] Here an applicant *inter alia* argued that article 6(1) had been infringed on account of the length of time the extradition proceedings had taken. The ECtHR held on the point that '… extradition proceedings do not concern a dispute (contestation) over an applicant's civil rights and obligations or the determination of a criminal charge against him or her within the meaning of Article 6 of the Convention'.

A case that addressed the point that extradition hearings can be akin to a criminal trial in that they may entail an examination of evidence against a requested person, is *Kirkwood v UK*.[28] Here Kirkwood challenged his extradition on the basis of article 6(3)(d) because he was not able to cross examine witnesses against him at the committal hearing. That provision *inter alia* provides that everyone charged with a criminal offence has the right to examine or have examined witnesses against him. Kirkwood argued in particular that the hearing entailed an assessment of evidence to determine whether there was a *prima facie* case against him, and that unlike in 'normal trial proceedings' where any mistakes at the committal stage could be rectified during the trial itself this was not possible in extradition hearings. The European Commission of Human Rights (the Commission) accepted that extradition hearings involve a 'certain, limited, examination of the issues which would be decisive in the applicant's ultimate trial', however it held that the committal proceedings did not form part of, or constitute, the determination of a criminal charge within the meaning of article 6.[29]

Whilst extradition hearings do not determine a criminal charge, a requested person has been held to be charged with a criminal offence for the purposes of article 6(2) – unlike article 6(3). That provides that everyone charged with a criminal offence shall be presumed innocent. In *P., R.H. and L.L. v Austria*[30], the applicants had allegedly committed drug offences under both US and Austrian law. They argued that the Austrian court had assumed a conviction in the US would follow the rendition with the result that the Austrian charges assumed lesser importance. The Commission held that while extradition proceedings do not come within the scope of articles 6(1) and 6(3), requested persons are to be considered as charged with a

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[27] 21 Dec. 2000, Application no. 53652/00, at http://hudoc.echr.coe.int/eng?i=001-22200. The Court also noted that the applicant did not have a right not to be extradited. An American authority in a similar vein is *US ex rel. Oppenheim v Hecht* (1927) 16 F. 2d 955 where it is stated 'Extradition proceedings are not in their nature criminal, extradition is not punishment for crime, though such punishment may follow extradition…', at p 956.

[28] (1984) 6 EHRR 373.

[29] Ibid at p 386.

[30] (5 Dec. 1989) App No. 15776/89. See also *Ismoilov v Russia* (2009) 49 EHRR 42.

criminal offence within the meaning of art 6(2). On the facts the Commission held that the Austrian court did not judge the prospects of the criminal proceedings in the US and so there was no appearance of a violation of article 6(2). Overall, then, Convention jurisprudence is clear that an extradition hearing does not determine a criminal charge for the purposes of article 6(1) or 6(3) and so the fair trial protection afforded by those provisions are not applicable on that basis. This is in spite of articles 6(1) and 6(3) being conditioned differently, namely to circumstances where there is a determination of a civil right or criminal charge and where one is charged with a criminal offence respectively.

With an extradition hearing not determining a criminal charge the only way that article 6 could apply is through it determining an individual's civil rights and obligations. As with a criminal charge, though, both the Commission and the ECtHR have decided that they do no such thing.[31] This position turns on a traditional interpretation that equates 'civil' with private law rights.[32] As extradition law falls into the public sphere, this view holds, extradition hearings do not entail the determination of one's civil rights and obligations. As Lester *et al* note the '… early jurisprudence of the ECtHR established that the use of the word "civil" in art 6(1) incorporated the distinction between private and public law, with civil rights and obligations being rights and obligations in private law'.[33] Such a case is *Agee v UK*.[34] The Commission stated therein that:

> … the right of an alien to reside in a particular country is a matter governed by public law. It considers that where the public authorities of a State decide to deport an alien on grounds of security, this constitutes an act of state falling within the public sphere and that it does not constitute a determination of his civil rights or obligations within the meaning of Art. 6. Accordingly, even though the decision to deport the applicant may have consequences in relation to his civil rights, in

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[31] In *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494 the ECtHR stated, in a case about the fairness of Turkish extradition proceedings (as well as a future trial abroad), "… decisions regarding the entry, stay and deportation of aliens do not concern the determination of an Applicant's civil rights or obligations or of a criminal charge against him, within the meaning of art 6(1) of the Convention', at para 82. This case will be mentioned further below.

[32] A broadening of the scope of 'civil rights and obligations' is apparent in Commission and ECtHR jurisprudence. The inclusion within the meaning of certain administrative proceedings and public law questions has taken place. See further R Reed and J Murdoch, supra note 23 at p 511.

[33] A Lester, D Pannick and J Herberg (eds.), *Human Rights Law and Practice*, (Third Edition), LexisNexis 2009 at p 283.

[34] 17 Dec. 1976, application 7729/76, cited at http://hudoc.echr.coe.int/eng?i=001-74884.

particular his reputation, the State is not required in such cases to grant a hearing conforming to the requirements of Art. 6(1).[35]

Whilst *Agee v UK* was concerned with deportation, a similar view pertains to extradition. The rigidity of the equipartition of 'civil rights' with 'private law' rights has been weakened, as is evidenced in a dissenting opinion in *Maaouia v France*.

Commission and ECtHR jurisprudence are both clear that article 6 does not apply to extradition hearings. However, in the first ECtHR case to consider the question, *Maaouia v France* (the Commission had done so previously), is found an opinion that in effect presages an important Supreme Court decision, discussed below. Whilst the majority of the ECtHR followed the Commission's position, the dissenting opinion of Judge Loucaides – joined by Judge Traja – held that article 6(1) did apply to expulsion hearings. They did so on account of their particular interpretation of 'civil'. Judge Loucaides stated:

> What gives rise to a problem of interpretation in this case is the use of the word 'civil' in describing the 'rights and obligations' covered by the guarantees of Article 6(1). It was assumed that by the use of that word the drafters of the Article intended to confine the rights and obligations in question only to those falling within the domain of private law. I do not agree with this approach….[36]

He continued:

> I believe that the word 'civil' when examined in the context in which it appears, has the meaning of 'non-criminal'… It would be absurd to accept that the judicial safeguards were intended only for certain rights, particularly those between individuals, and not to any legal rights and obligations including those vis-à-vis the administration where an independent judicial control is especially required for the protection of the individuals against the powerful authorities of the State. In other words, it is inconceivable… to provide for a fair administration of justice only in respect of certain legal rights and obligations, but not in respect of rights concerning relations between the individual and Government.[37]

This reasoning has considerable merit. It accords – to an extent – with that in *Pomiechowski v Poland*.[38]

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[35] Ibid at para 28.

[36] Supra note 26 at para O-IV4.

[37] Ibid at para O-IV5 -para O-IV7 – footnotes omitted. An important factor in the decision of the majority was that article 1 of Protocol 7 to the Convention provided aliens with certain rights upon their expulsion.

[38] [2012] UKSC 20. Whilst the focus of this article is upon extradition hearings, it should be noted that within the UK the non-application of article 6 extends to a variety of hearings. Also excluded are challenges to asset freezing directions, *R (on*

Pomiechowski v Poland arose out of the short and inflexible time limits then applying under the 2003 Act to the rights of appeal of requested persons and requesting authorities. The relevant aspect of the case for our purposes was the appeal by a British citizen, Halligen. The Secretary of State had ordered his extradition and he had failed to comply with the 14 day time limit for the filing and service of notice of appeal to the Crown Prosecution Service. The High Court held it had no jurisdiction to hear the appeal in that it was time-barred. Before the Supreme Court Halligen *inter alia* invoked article 6(1).[39] The Secretary of State contested its relevance to decisions to extradite. In coming to its decision the Supreme Court focused upon the distinction between aliens and citizens. Lord Mance, giving the leading opinion, noted that all the authorities cited to the court concerned the extradition or expulsion of non-nationals.[40] He also referred the rights given to aliens subject to expulsion under article 1 of Protocol 7 to the Convention.[41] What this indicated, he held, was that State parties understood that expulsion proceedings of aliens were excluded from the scope of article 6(1). The exclusion of nationals did not necessarily follow. Here, British nationals possess an entitlement to remain within the UK under both international law and at common law.[42] The presence of that entitlement or 'civil right' paved the way for the application of article 6(1) in the case.[43] The Supreme Court held that extradition proceedings of a British citizen involved 'the determination' of that civil right. Since the enjoyment

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the application of Bhutta) v HM Treasury [2011] EWHC 1789 (Admin) and deportation decisions by a *Special Immigration Appeals Commission, W (Algeria) v Secretary of State for the Home Department*, [2010] EWCA Civ 898. In regard to the latter Hoffman and Rowe state that "Some decisions may fall outside Article 6… not because they are in some sense internal and not general, but because they are not in any real sense judicial, which is to say made by an independent tribunal which is constituted to find facts and apply the law", D Hoffman and J Rowe, *Human Rights in the UK*, Fourth Edition, Pearson, London, 2013, at p 235. Discussion of tribunals and hearings apart from extradition is beyond the scope of this article.

[39] He had also based his arguments upon the right to liberty, in particular article 5(4) allowing persons deprived of their liberty to challenge the lawfulness of their detention. This argument was rejected by the Supreme Court.

[40] Supra note 38 at para 31.

[41] The UK has not signed nor ratified Protocol 7.

[42] Amongst the authorities cited was Van Duyn v Home Office, [1975] Ch 358 where the European Court of Justice stated that international law provides that a state is precluded from refusing to let its nationals enter or reside within it, at para 22.

[43] Lord Mance equates the common law right with a civil law right without explanation. Whilst concurring, reluctantly, with the majority Lady Hale noted that it is perhaps questionable whether the right of citizens to enter and remain the countries of which they are nationals counts as a 'civil right' for the purpose of the right to a fair hearing in article 6(1), at para 49, highlighting the view that as originally conceived article 6(1) did not apply to the rights enforceable only in public law.

of one's common law right to remain within the UK was suspended, a requested national was entitled to a fair hearing.

Applying article 6 to the facts of Halligen's case the Supreme Court held that the statutory right of appeal must be free of any limitations that impair the very essence of the right and pursue a legitimate aim. There also must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[44] The particular provisions governing appeals, the Court held, did not meet this standard because the essence of the right of appeal may be impaired in individual cases due to the short and rigid time limits for appeals. Having made that decision, the Supreme Court chose to interpret the relevant provisions compatibly with article 6. This meant giving the High Court a discretion in exceptional circumstances to extend time for filing and service of notice of appeal.[45] Notably, Lord Mance commented upon the anomalous position of non-nationals resulting from the decision, saying that their cases '… appear to deserve attention'.[46] Confirmation of this view was not long in coming. It is found in Agardi v Budapest, a decision which styled itself as a test case.[47]

Agardi v Budapest confirms the limits of the law set out in *Pomiechowski*. Here, Hungary sought one of its own nationals under a conviction EAW. The question arose whether or not the High Court could extend the time limit for a non-British citizen to make an appeal. The answer was no. Agardi put forward arguments based on non-discrimination under article 14 of the ECHR in conjunction with articles 6 and 3 and under EU law. In regard to the article 14 arguments the High Court held extradition proceedings against British citizens fell within the scope of article 6 is because they entail the determination of an extant civil right – non-nationals do not have such a civil right. Therefore there was nothing to which article 6(1)

[44] The Court here referred to *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442.

[45] Supra note 38 at para 39. The 2003 Act has since been amended by the Anti-Social Behaviour, Crime and Policing Act 2014 s 160 to permit appeals after the time period has ended where the person did everything reasonably possible to ensure notice of appeal was given as soon as it could be, by sections 26(5), 103(10) and 108(7A) (not extending to Scotland), in force 15 April 2015. The Criminal Procedure Rules now reflect the decision in *Pomiechowski*: '17B.8 Where it is not possible for the High Court to begin to hear the appeal in accordance with time limits contained in Crim PR 17.23(1) and (2), the Court may extend the time limit if it believes it to be in the interests of justice to do so and may do so even after the time limit has expired'.

[46] Ibid at para 40.

[47] [2014] EWHC 3433 (Admin), at para 2.

could attach and there was no article 14 discrimination.[48] Agardi's EU law arguments were similarly dismissed. They were founded upon on article 18 TFEU prohibiting discrimination on the grounds of nationality and article 47 of the Charter protecting the right to a remedy and a fair trial. The High Court firstly noted that the Framework Decision does not require that a State provide for a right of appeal against an extradition order, nor does it set any procedural parameters if an appeal process is created by national law.[49] This was critical because articles 18 and 47 turn on whether the discrimination and putative human rights violation occur 'within the scope of the treaties' and 'when implementing EU law' respectively.[50] As section 26(4) governing the time limits was not based upon or implementing EU law those provisions did not apply to it. Accordingly, the arguments based upon EU law were dismissed.[51] The distinction between UK nationals and all others continues.[52] In spite of this it is clear that the law has evolved. It now admits the application of article 6 to the extradition hearings of UK nationals. It does so because extradition interferes with the common law and international legal entitlement of UK nationals to remain in their country. In contrast to this expansion in the applicability of article 6 has been the development of the law as it relates to trials abroad. The law as established in *Soering* has not broadened in its application. Instead the opposite has happened. The narrow and restrictive origins of the law have been further limited.

ARTICLE 6 AND TRIALS ABROAD

The genesis of the application of article 6 to trials abroad is *Soering v UK.* It established the principle that a requested State must not extradite an individual where there is a real risk of a human rights

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[48] The UK has neither signed nor ratified Protocol 12 to the ECHR which prohibits discrimination without reference to the enjoyment of the rights and freedoms set out within the Convention as found in article 14.

[49] Supra note 47 at para 27.

[50] The former phrase prefaces article 18, and the latter is found in article 51 of the Charter.

[51] A point in the case that appears moot today is that the Court held that article 47 did not have direct effect within the UK. Notably, there have been decisions since *Agardi* to the opposite effect, including that of the Court of Appeal in *Benkharbouche v Sudan* [2015] EWCA Civ 33.

[52] Seemingly in support of the discrimination between UK and all others including EU nationals is the Grand Chamber case of *Criminal Proceedings Against Petruhhin* (C-182/15) EU:C:2016:630, [2017] QB 299. Here it was held, in essence, that discrimination between nationals and other EU nationals in the context of extradition can be justified if it was based upon objective considerations and proportionate to the aim of the rule. See further A Klip, Europeans first! Petruhhin, an Unexpected Revolution in Extradition Law, (2017) 25(3) Eur. J. Crime Cr. L. Cr. J. 195.

violation occurring within the requesting territory. On the basis of this principle the ECtHR and UK courts have accepted that a number of human rights under the ECHR have possible extraterritorial applicability.[53] Whilst *Soering* rejected an argument based upon the right to a fair trial it importantly admitted it could form the basis of an argument. The ECtHR stated:

> The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.[54]

In *Mamatkulov and Askarov v Turkey* the ECtHR developed the law from the point of accepting that an extraterritorial argument was not excluded to it being accepted and considered. In the circumstances, however, the ECtHR held the argument failed as the facts Turkey knew or should have known at the point of extradition were not such to constitute a flagrant denial of justice.[55] Following *Soering* and *Mamatkulov and Askarov v Turkey* the position within the UK is that an argument against extradition on the basis of a real risk of a past or future flagrant denial of justice within the requesting State is tenable. From the outset however, as the ECtHR explicitly stated, the circumstances where a relevant issue could be raised were exceptional. That has proven to be the case. Notably, though, that exceptionality has increased. The narrow and restrictive origins of the law on this point have tightened. Judicial developments in both the UK and the ECtHR have effected a retrenchment in the law. The operation of the 'living instrument' doctrine in this respect can be seen to reflect a narrow, state-centered interpretation in light of present day conditions.[56] These conditions being an enhanced governmental and societal willingness and desire to address

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[53] Lord Bingham considered the breadth of applicable rights in *Regina Ex Parte Ullah (FC) v Special Adjudicator* and concluded that articles 2, 3, 4, 5, 6, 8 and 9 could apply in such a way. The criteria upon which extraterritorial applicability is accepted, as far as they can be ascertained, are somewhat vague. For example the right to life applies in such a matter on account of the 'special importance' attached to it by international human rights law, and the right to be free from slavery and forced labour because it would be incompatible with the 'humanitarian principles underpinning the Convention' if it were not, at paras 15 and 16. As noted presently, the right to a fair trial applies on an extraterritorial basis because of its 'prominent place in a democratic society'.

[54] Supra note at para 113. This position is followed in somewhat similar terms by *inter alia* by section 7(1) of the UN Model Law on Extradition, https://www.unodc.org/pdf/model_law_extradition.pdf, and article 6(3) of the Hong Kong–United States Agreement for the Surrender of Fugitive Offenders 1996, (1997) 36 ILM 842.

[55] Supra note 31 at para 91.

[56] The origins of the doctrine are found in *Tyrer v UK* (1978) 2 EHRR 1.

transnational criminality and defer to the judicial systems of third states. Accordingly, the evolution of the test conditioning the application of article 6 to trials abroad stands in direct contrast to that pertaining to UK extradition hearings.

Originally the jurisprudence following *Soering* reiterated the formulation found within that case and highlighted the exceptional circumstances in which an article 6 argument will successfully prevent an extradition. In the well-known deportation decision of *Regina Ex Parte Ullah (FC) v Special Adjudicator* Lord Bingham surveyed the law up to that point and concluded that the ECtHR "… has not excluded the possibility of relying on article 6, and even article 5, while fully recognising the great difficulty of doing so and the exceptional nature of such cases".[57] Not long after *Ullah* was the case of *Bermingham and Others v United States*[58] where an argument against extradition by the so-called NatWest Three was founded upon article 6.[59] The Divisional Court held that the District Judge had correctly directed himself to the appropriate question, which was whether the requested persons faced a clear risk of suffering a flagrant denial of a fair trial in Texas.[60] The requested persons had *inter alia* averred that their trials would be in breach of article 6 because they would be denied bail, the conditions in which they would be held would be inimical to their ability to prepare their defence and there would be a long delay before trial. Further, they argued that there would be difficulties in obtaining full and timely disclosure of documents from the prosecution, the Houston jury would be prejudiced against them and an application to change venue was likely to be unsuccessful.[61] The article 6 argument was summarily dismissed, in part with reference to the US Constitutional protection afforded to the right to a fair trial, the Sixth Amendment. The court stated that that provision's '… content is strikingly similar to that of ECHR Article 6. It would be frankly grotesque for this court to hold, on the strength of testimony which the District Judge concluded was *parti pris*, that this fundamental constitutional right would be more honoured in the breach than the observance at any

[57] Supra note 16 at para 21. In the case Lord Bingham highlighted the difficulty of applicants meeting the requisite test, which for the right at issue, the qualified right of thought, conscience and religion in article 9, was correctly said to be that "… the right will be completely denied or nullified in the destination country; that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state", at para 24, citing *Devaseelan v Secretary of State for the Home Department*, [2002] UKIAT 702 at para 111.

[58] [2006] EWHC 200 (Admin).

[59] See P Arnell, Scots Extradited, (2008) 4 Juridical Review 241.

[60] Supra note 58 at para 111.

[61] Ibid at para 106.

trial of the defendants in Houston'.[62] *Bermingham* confirms the exceptionality of successful article 6 arguments. It also sheds light on a basis for that position – judicial deference to the law and judiciary in the requesting territory.

A case of considerable importance in the future development of the law is the House of Lords decision in *RB (Algeria) and another v Secretary of State for the Home Department*.[63] The relevant part of the case for our purposes is an appeal by the Secretary of State against a decision of the Court of Appeal allowing Omar Othman's appeal against his deportation to Jordon on the basis of article 6.[64] As will be discussed below, the ECtHR subsequently disagreed with the conclusion of the House of Lords on whether Othman risked suffering a flagrant denial of justice. The importance of RB (Algeria), however, is found in the discussion of the meaning of flagrant breach. Lord Phillips firstly noted that because there is no reported foreign case where article 6 had been successfully invoked there was a lack of authoritative guidance on its meaning. He stated that the approach to that meaning was not so easy because article 6 was a procedural right, not a substantive one.[65] A minority opinion in *Mamatkulov and Askarov v Turkey*[66] was referred to by Lord Phillips because it had formulated the test in somewhat greater detail. He quoted a passage from the opinion including:

> What constituted a 'flagrant' denial of justice has not been fully explained in the court's jurisprudence but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards… [w]hat the word 'flagrant' is intended to convey is a breach of the principles of fair trail guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article.[67]

This formulation was adopted by the ECtHR in its unanimous decision in *Othman v UK*[68], discussed below.

Significantly, though, Lord Phillips introduces a further element into the test. After noting that the test remained one that was neither easy or adequate he stated 'The focus must be simply not on the

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[62] Ibid at para 110.
[63] [2009] UKHL 10.
[64] The Court of Appeal had allowed Othman's appeal from the Special Immigration Appeals Commission, in *Othman (Jordan) v Secretary of State* [2008] EWCA Civ 290 which was in turn overturned in *RB (Algeria)*.
[65] Supra note 63 at para 133.
[66] Supra note 31 at para O-III 14.
[67] Ibid. Cited in *RB (Algeria)* at para 133.
[68](2012) 55 EHRR 1.

unfairness of the trial process but on its potential consequences. An unfair trial is likely to lead to the violation of substantive human rights and the extent of that prospective violation must plainly be an important factor in deciding whether deportation is precluded'.[69] Lord Phillips then goes on to suggest that such a substantive violation includes those of the right to life, and perhaps the right to liberty, under articles 2 and 5 respectively. This novel development in the law heightens the bar in article 6 arguments. Affected individuals not only have to show that there are substantial grounds for believing that there is a real risk of a flagrant denial of justice but also that that denial will have the consequence of a serious violation of a substantive right or rights. That detention following a flagrantly unfair trial may amount to a violation of article 5(1)a, as Lord Phillips notes, might mean that this new formulation does not in fact affect the essence of the test. However, it is also true that it adds to the subject matter that must be established by the individual making the argument. The effect of *RB (Algeria) per se* in regard to extradition is limited because it is restricted to deportation.[70] Lord Phillips stated 'If there is a real risk that the trial will be flagrantly unfair, that is likely to be enough of itself to prevent extradition regardless of the likely consequences of the unfair trial'. [71] Whilst this exclusion of extradition was accepted by Lord Brown in the case, it was done so only reluctantly. He noted that '… it should be recognized too, and countervailingly, that there may be compelling reasons in favour of extradition rather than that the suspect should enjoy an undeserved safe haven from prosecution'.[72] Lord Brown's view prefaces the acceptance of this new facet of the test in extradition proceedings in *Rwanda v Brown and others*[73], discussed below.[74]

The leading ECtHR case on article 6 and trials abroad is *Othman v United Kingdom*. It followed *RB (Algeria)* and confirmed – to an extent – the law as stated in that case. The case is also notable because in it the ECtHR held for the first time that a deportation[75]

[69] Supra note 63 at para 137.
[70] Ibid at para 139.
[71] Ibid.
[72] Ibid at para 259.
[73] [2017] EWHC 1912 (Admin).
[74] Following *RB (Algeria)* Elliott stated that '… the the protection afforded by the flagrant denial of justice test is largely if not wholly illusory', M Elliott, Torture, Deportation and Extrajudicial Detention: Instruments of the 'War on Terror', (2009) Cambridge Law Journal 245 at p 248.
[75] In *Ahmad v UK* (2013) 56 EHRR 1 the ECtHR held that there should be no distinction between extradition and other forms of expulsion when considering the question whether there is a real risk of treatment contrary to article 3 in another State, at para 168.

would violate article 6.[76] In coming to its decision the ECtHR reiterated the applicable test and set out a list of circumstances which could amount to a violation of article 6. It noted that a flagrant denial of justice is a stringent test of unfairness that has been held to be synonymous with a trial which is manifestly contrary to the provisions of article 6 or the principles embodied therein.[77] Circumstances which could amount to a flagrant denial of justice, it held, included a conviction *in absentia* with no possibility of a fresh determination of the charge, a trial which is summary in nature with a total disregard for the rights of the defence and where there is a deliberate and systematic refusal of access to a lawyer.[78] Having noted that in the then 22 years following the *Soering* the ECtHR had never held that an expulsion would be in contravention of article 6 it confirmed a restrictive interpretation of the applicable test. It held that what is required is a breach of the principles of article 6 so fundamental as to amount to a nullification, or destruction of the very essence of the right.[79] It further held that the burden of proof falls on the applicant to adduce evidence that there are substantial grounds for believing that if removed he would be exposed to a real risk of being subjected to a flagrant denial of justice. The ECtHR held that it was not necessary in the present case to consider whether a flagrant denial of justice only arises when the trial would have serious consequences for the person concerned.[80] This was because Othman had been tried and convicted in his absence and a substantial term of imprisonment had been imposed.

The specific question relating to the article 6 argument in *Othman* was whether the admission at his retrial of evidence obtained by the torture of third persons amounted to a flagrant denial of justice. The ECtHR held that both Convention jurisprudence and rules of international law more generally provided that the admission of torture evidence is manifestly contrary to both the provisions of

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[76] Notably, article 6 has been successfully relied upon in the extradition cases of R (Ramda) v Secretary of State [2002] EWHC 1278 (Admin), Brown v Rwanda [2009] EHWC 770 (Admin), and *Rwanda v Brown and others*. In the first case the High Court quashed a decision of the Secretary of State to order Ramda's extradition to France *inter alia* on the basis that there was a real risk of his being denied a fair trial there, the case was decided under the Extradition Act 1989.

[77] Supra note 68 at paras 259-260. See generally J Middleton, Taking Rights Seriously in Expulsion Cases: a Case Study, (2013) 5 European Human Rights Law Review 520.

[78] Ibid, referring to, respectively, *Stoichkov v Bulgaria* (2007) 44 EHRR 14 at para 56, *Bader v Sweden* (2008) 46 EHRR 13 at para 47, and *Al-Moayad v Germany* (2007) 44 EHRR SE22 at para 101.

[79] Supra note 68 at para 260. As seen, the origins of this phraseology are found in the dissenting opinion in *Mamatkulov and Askarov v Turkey*.

[80] Ibid at para 262.

article 6 and the basic international standards of a fair trial.[81] Lending weight to the importance of the right to a fair trial the court stated that the trial process is 'a cornerstone of the rule of law'.[82] Applying the law as it set out to the facts of Othman's case the ECtHR firstly held that Othman had discharged the burden upon him to establish that the evidence against him was obtained by torture. It rejected a contention that a balance of probabilities test was appropriately imposed on that burden.[83] Substantively it held the test was met. It agreed with the Court of Appeal that there was a real risk that Othman's retrial would entail a flagrant denial of justice. Othman's case was '… a sustained and well-founded attack on a State Security Court system that will try him in breach of one of the most fundamental norms of international criminal justice…'.[84] The Court found that Othman's deportation to Jordan would be in violation of article 6.[85]

Five years after *Othman* the English High Court decided *Rwanda v Brown and others*. The case, arising from the genocide in Rwanda in 1994, held that the narrowing of the article 6 test put forward in *RB (Algeria)* as applying to deportation also applied to extradition. Specifically, *Rwanda v Brown and others* was an appeal of the decision of Senior District Judge Arbuthnot in 2015 declining to permit the extradition of five men because there was a real risk that they might suffer a flagrant breach of their rights to a fair trial if extradited.[86] The court had to decide if the judge in the Magistrates' Court should have decided the case differently. It began by discussing the legal test to be applied in some depth, referring to a number of the leading ECtHR and UK decisions, including *Soering*, *Mamatkulov*

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[81] Ibid at para 267.
[82] Ibid at para 264.
[83] Ibid at para 274.
[84] Ibid at para 285.
[85] Interestingly the ECtHR discussed the fact that its conclusion differed from that of the Grand Chamber in *Mamatkulov and Askarov v Turkey*. It did so, in part, on account of the complaint there being of a 'general and unspecific nature' averring that the complainants had no prospect of receiving a fair trial in Uzbekistan. *Mamatkulov and Askarov v Turkey* in this sense mirrors the decision of the High Court of Justiciary in *Kapri v Lord Advocate* [2014] HCJAC 33.
[86] This reasoning pertained to four of the five requested persons. The extradition of a fifth was also barred also under section 80 of the 2003 Act prohibiting double jeopardy. This was the second attempt by Rwanda to secure four of the five individuals. The first was unsuccessful on appeal also on the basis of article 6, *Brown v Rwanda* [2009] EWHC 770 (Admin). That case is discussed in M A Drumbl, Prosecution of Genocide v. the Fair Trial Principle, (2010) 8 Journal of International Criminal Justice 289. Drumbl notes that this decision reportedly '… is the first instance where an English court has denied an extradition request from a foreign government on the basis of the prospect of a violation of ECHR fair trial rights…', at page 299. However, see footnote 76 above and the case of *R (Ramda) v Secretary of State* [2002] EWHC 1278 (Admin).

and Askarov v Turkey, *R (Ullah) v Special Adjudicator*, *Othman* and *Kapri*. As in *Othman*, the Court concluded that where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state with 'flagrant' conveying '… a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article'.[87]

The High Court in *Rwanda v Brown and others* entered into novel territory after reiterating the article 6 as laid out in *Othman*. It noted the difficulty in approaching the meaning of flagrant breach because of the procedural nature of article 6. It concluded on the point 'The consideration of the risk of denial of justice must go beyond the procedural…. The Court should be giving consideration to the outcome of a breach, if it eventuates'.[88] In other words, the Court affirmed the necessity of looking at the potential consequences of a conviction. Accordingly, a lack of judicial independence or impartiality however serious appear not to be sufficient *per se* to establish a flagrant denial of justice. Deciding on the potential consequence of a conviction is, of course, very difficult in prospective cases. As the Court stated '… a retrospective examination of whether there was in fact a "flagrant denial of justice" in a completed case where the facts are known, may be significantly different from considering whether there is a real risk of a flagrant denial of justice in the future'.[89] Having adopted this extension to the test, the Court concluded its opinion on the law by noting that the rarity of cases where article 6 has been successfully invoked emphasises how significant the denial of justice must be and further that the risk of flagrant denial must be a '… risk of real substance, a risk of a truly serious denial of justice'.[90] Altogether, then, the District Court narrowed an already exceptional test by incorporating into it, in extradition cases, the necessity of the flagrant denial of justice having a 'significant adverse outcome, in terms of the nature of conviction and sentence'.[91] It did not, however, explicitly require that outcome or consequence to amount to a violation of a distinct substantive right, as was suggested by Lord Phillips in *RB (Algeria).*

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[87] Supra note 73 at para 68, citing *Mamatkulov and Askarov v Turkey*, supra note 29 at para O-III 14.
[88] Ibid at para 94.
[89] Ibid at para 87.
[90] Ibid at paras 93 and 98. In *Brown v Rwanda 2009* the High Court stated that the word 'flagrant' is included 'because in such a case the ECHR rights apply exceptionally and by extension, to protect the individual from being consigned by a State Party to the ECHR to another territory where he might suffer ill-treatment in violation of the Convention standards', at para 24.
[91] Ibid at para 94.

After considerable and detailed examination of the evidence – the judgment runs to 106 pages – the Divisional Court applied the law to the facts and gave its conclusions on the fair trial debate. The Court refused the appeal by the Government of Rwanda against the decision of the Magistrates' Court. In doing so it firstly held that ideally those accused of genocide should be tried where the criminal acts took place.[92] The high-bar set by the law reflected that point. However, Rwanda had become more illiberal and authoritarian since the 2009 decision. There is a risk, it held, of interference and pressure in these cases unless clear conditions of guarantee are established. The importance of an effective defence emphasised in the Magistrates' Court was also at the heart of the Divisional Court's decision. It was '… the vital element, the capstone of the case'. [93] Whilst in the UK safeguards such as unbiased prosecution, witness protection, and judicial independence can act to compensate somewhat inadequate defence representation, these were in question in Rwanda. The problems identified were sufficient to establish a real risk of a truly serious or flagrant denial of justice that the result of which '… might be likely to lead to serious miscarriages of justice'.[94] *Rwanda v Brown and others*, therefore, is one of the exceptional cases where an argument of the basis of article 6 against extradition was upheld. Ironically, through narrowing an already restrictive test the case also appears set to make successful arguments more difficult in the future.

CONCLUSION

Article 6 and extradition are undoubtedly uneasy bedfellows. The terms of article 6, the desire to address international criminality and adhere to international legal obligations in light of the universally accepted importance of the right to a fair trial lay at the root of the conflict. The law has struggled to accommodate article 6 ever since *Soering* was decided in 1989. After nearly thirty years, and the enactment of the 2003 Act and the Human Rights Act 1998, the struggle persists. As demonstrated however, the law has moved in contrasting directions. Within the UK, the Supreme Court has opened the door to the application of article 6 to the extradition hearings of

[92] Drumbl notes the paradox that 'Influential states that failed to prevent or mitigate genocide in Rwanda now act, out of apparent concern for human rights, to circumscribe Rwanda's ability to prosecute suspects against whom there are *prima facie* cases of genocide', supra note 86 at page 302. He states that the result is preposterous.

[93] Ibid at para 377.

[94] Ibid at para 379. Notably, the Court gave the Government a final opportunity to seek to assure it that '… credible and verifiable conditions will be in place, to overcome the legal bar to extradition…', at para 382. It appears that these assurances were not forthcoming.

UK nationals. This is positive, yet limited. Extradition deprives all those subject to it from the prerequisite to the full enjoyment of one's human rights under the Human Rights Act 1998. As such all extradition hearings should be conditioned with fair trial protection. The position within the UK, therefore, is discriminatory and, arguably, unlawful. It is discriminatory because the protection afforded turns on the nationality of the requested person. It is arguably unlawful because discrimination in the application of Convention rights on the basis of nationality is prohibited under article 14. Further, human rights protection applies within the UK not on the basis of nationality, but rather on being within its jurisdiction. Whilst the particular rule that gave rise to the dispute in *Pomiechowski* has been amended, there are further features of the process that could similarly give rise article 6 arguments. Such a case could only be brought by a UK national. A decision of the ECtHR on the unequal operation of the law is called for.

Extraterritorially, the door to the applicability of article 6 opened ever so slightly by *Soering* has been creeping shut. The interpretation of flagrant denial of justice to mean a nullification or destruction of the very essence of the right was a step in that direction. More recently, the law's emphasis upon the consequences of an unfair trial adds a new and further restrictive element to the test. Whilst the Divisional Court in *Rwanda v Brown and others* upheld the decision of the Magistrates' Court, successful extraterritorial arguments on the basis of article 6 appear set to remain wholly exceptional. This is regrettable but understandable. Be it in the context of systemic judicial corruption in Albania or highly questionable pre-trial practices in Jordan, the extradition of an individual in the knowledge that that treatment would likely not only breach article 6 within the UK but also would fall a considerable way beneath minimum required here is morally questionable and appear to conflict with fair trial protections under public international law. Of course the UK cannot export the standards applied within it *in toto* abroad. Variations in criminal justice systems and standards are inevitable, but that does not mean test needs to be so restrictive. The law as interpreted by the judiciary however supports the test's exceptionality.[95] The law is understood from the point of view of international extradition agreements, the comity of nations and the

[95] A further illustration is found in Section 50.2 of the English Criminal Procedure Rules. It *inter alia* provides 'When exercising a power to which this Part applies … the court must have regard to the importance of (a) mutual confidence and recognition between judicial authorities in the United Kingdom and in requesting territories; and (b) the conduct of extradition proceedings in accordance with international obligations, including obligations to deal swiftly with extradition requests', cited at https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-50.pdf.

desire to combat transnational criminality. As La Forest, J., said in the Canadian Supreme Court in 1987:

> The assumption that the requesting state will give the fugitive a fair trial according to its laws underlies the whole theory and practice of extradition and our courts have over many years made it abundantly clear that an extradition judge should not give effect to any suggestion that the proceedings are oppressive or that the fugitive will not be given a fair trial … the assumption by an extradition judge that delay or other defences would not be given appropriate consideration by the foreign court… amounts to a serious adverse reflection not only on a foreign government to whom Canada has a treaty obligation but on its judicial authorities concerning matters that are exclusively within their competence.[96]

The application of article 6 to UK extradition hearings and trials abroad is travelling in opposite directions. This has been a jurisprudential development, and one where UK courts have played a material role. As is well known, UK courts are obliged to act compatibly with human rights and to take decisions of the ECtHR into account. To this end they must generally follow the jurisprudence of the ECtHR. As seen, the exclusion of article 6 to domestic hearings and its extension to trials abroad are features of ECtHR jurisprudence. UK courts therefore have followed the ECtHR's lead. They have also, however, gone further in extending a degree of protection to UK nationals subjected to extradition and in interpreting the article 6 test in a manner which is more restrictive than that developed by the ECtHR itself. Clearly the courts are faced with conflicting considerations. In attempting to reconcile the irreconcilable they have created a position where article 6 has come to apply to UK extradition hearings and trials abroad in contrasting directions.

[96] In *Argentina v. Mellino*, [1987] 1 S.C.R. 536, 554-555, cited in Dugard and Wyngaert, supra note 12 at p 189-190.