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What an Extradition Hearing is and Why it Matters*

1. Introduction

Extradition is important. It serves vital purposes. Lord Thomas in the Divisional Court 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.[1]

The centrepiece of UK extradition is the hearing. It plays the operative role in the rendition of accused and convicted persons from the UK to third states. In light of the significance of extradition and the centrality of extradition hearings it is not unreasonable to assume that their nature would be settled. This is not the case. Extradition hearings are multifariously understood. This is largely because various existential questions – what they are, what they do, what rules govern them – arise in different contexts and are answered with reference to distinct law. There are three such contexts. They are disputes over the applicable procedural and evidential rules, uncertainty as to their designation for the purposes of appeal and debates concerning the applicability of the right to a fair trial to them. Each of these contexts is framed by a body of rules. These obviously include the Extradition Act 2003 (2003 Act), the core piece of UK extradition law. Also relevant, however, is the law specific to each - procedural and evidential rules, provision governing appeals from the High Court of Justiciary to the Supreme Court and human rights law. Whilst extradition hearings are variously understood across the UK the issue has a particular Scottish resonance. This is due to the unique rules of criminal procedure and evidence and terms of the devolution settlement. Two of the three contexts, therefore, have a distinctly Scottish aspect. This article firstly argues that the variation in conception of extradition hearings is explained by the fact that the same broad question of what extradition hearings are arises in three contexts where distinct law is relied upon to provide the answer. It suggests that an analysis and synthesis of these views leads to a single understanding of extradition hearings as *sui generis* quasi-criminal proceedings affected by international considerations. Secondly, it is argued that the acceptance of this conceptualisation matters. In addition to facilitating comprehension, a single understanding of extradition hearings can be a platform from which the law can develop in a manner based upon clear and agreed foundations. With extradition hearings singly and

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

positively understood, the law governing and affecting them can evolve in a more coherent and defensible way. This article supports the adoption of such a conceptualisation.

2. Dicta and Commentary

The varied understandings of extradition hearings are readily seen in judicial dicta and commentary on the subject. There are two camps into which a number of these views fall, one which considers extradition hearings unique and one which sees them as criminal in nature (albeit not criminal trials).[2] In other instances extradition hearings are conceived in the negative and are described in terms of what they are not, rather than what they are. Dicta and commentary favouring the unique nature of extradition proceedings includes that found in *Goatley v HMA* where Lord Nimmo Smith held, in addressing a possible appeal to the House of Lords, "Although extradition proceedings before the sheriff and before this court under the 2003 Act are best regarded as being *sui generis*, they are nevertheless more akin to criminal than to civil proceedings".[3] In *Mirza v Lord Advocate* Sheriff Crowe, following a request for disclosure, stated "I do not consider that the sheriff is at liberty to alter the nature of his judicial role, even in extradition proceedings, which are *sui generis*".[4] Whilst not terming them *sui generis*, Renton and Brown states that extradition proceedings "… are not criminal".[5] On the other hand, in *Kapri v HMA*, the Lord Justice Clerk stated in the context of a human rights argument that whilst extradition proceedings have been said to be *sui generis* "It is more accurate to say that the rules of criminal evidence and procedure are, in the absence of some special circumstances, normally applicable".[6] A similar view was put forward by Lord Phillips in *R (USA) v Bow Street* Magistrates Court where, in the context of a disclosure request, he said "Extradition proceedings are criminal proceedings, albeit of a very special kind".[7] These statements give an indication of the present position. There is clearly an inconsistency in view. As will be seen, that variation correlates, to an extent, to the context in which the view was expressed.

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[2] It is apparent that there is also no single judicial or legislative conception of what makes a hearing 'criminal'. In the three contexts discussed the answers appear to be the applicability of criminal rules, the proceedings being conducted by a prosecutor and the determination of a criminal charge. It is submitted that a reasonable proposition is that a hearing is criminal if it is a part of a set of proceedings envisaging, or subsequent to, the determination of a criminal charge within the jurisdiction. Academically, a brief discussion of what makes proceedings criminal is found in Williams, G., The Definition of Crime, (1955) 8 Current Legal Problems 107 at 128-130.

[3] 2008 JC 1, at para 36. Whilst accepting that devolution minutes were competent within extradition proceedings the High Court rejected Goatley's argument that the general bar of appeal to the House of Lords (and now Supreme Court) was discriminatory and thus unlawful.

[4] [2015] SC Edin 32, at para 15.

[5] Gordon, G.H., and Gane, C.H.W., *Renton and Brown's Criminal Procedure*, 6th Edition, W. Green, Edinburgh, 2017, Vol. 1, Chp. 1, at para 1-42.

[6] [2014] HCJAC 33, at para 125. This case is discussed below.

[7] [2007] 1 WLR 1157 at para 76.

3. Courts and Powers of the Judge

The courts in which extradition hearings take place and the powers of the judge within them are of considerable relevance to the conclusions drawn on their nature. If, say, the courts and powers are exclusively criminal the case for extradition hearings being properly deemed such is considerably strengthened. On the other hand if there are a number departures and exceptions the case is weakened. The courts in which hearings take place and the powers of judges within them are provided for by the 2003 Act. As regards the former, ss 67 and 130 stipulate that extradition hearings in Scotland must take place in front of the Sheriff of Lothian and Borders. In England and Wales hearings take place in Westminster Magistrates' Court. Appeals in Scotland are to the High Court of Justiciary, and in England the Divisional Court. The Supreme Court may hear extradition appeals from both. These facts shed some light on the nature of extradition hearings – particularly that the High Court hears appeals and that the Supreme Court has competence to hear certain appeals from it. The former fact indicates that extradition hearings are criminal, whilst the latter that they may be in some sense unorthodox.

The powers of the judge at an extradition hearing in Scotland, governed by s 9(2) of the 2003 Act, are both reflective of, and partly responsible for, the variation in understanding. It provides that an extradition judge has the same powers (as nearly as may be) as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by the person in respect of whom the Part 1 warrant was issued.[8] The 'as nearly as may be' qualification is significant. It is reflective of the fact that extradition hearings are related to criminal matters, yet apart from them. It is necessary to except the powers that are ill-suited to extradition. The section is responsible for causing opacity simply because extradition hearings are not criminal trials. *Slovak Republic v Havrilova*[9] is an example. Here the High Court held that the sheriff had been incorrect to hold that the ordinary 40 day time limit for remand in custody under s 147(1) of the Criminal Procedure (Scotland) Act 1995 (1995 Act) had been incorporated into extradition by s 9(2) of the 2003 Act. The Lord Advocate successfully argued that in extradition cases there is no complaint or trial – terms conditioning the application of s 147 – therefore it did not apply. Commenting upon *Slovak Republic v Havrilova* Sheriff Brown notes that "Extradition procedure is not, and never has been, equivalent to trial of the offence; committal has always been the better analogy".[10] This comparison

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[8] There is similar provision throughout the UK, with s 9(1) pertaining to England and Wales and 9(3) to Northern Ireland. Part 1 warrants follow requests under the European Arrest Warrant. Section 77(2) of the 2003 Act applies somewhat similarly to cases arising under Part 2 of the Act where requests originate from outwith the EU.

[9] [2011] HCJAC 113. The case is discussed further below.

[10] Brown, A., et al, *Renton and Brown's Criminal Procedure Legislation*, W. Green, Edinburgh, 2017, para A146- 003. Extradition proceedings are somewhat similar to the now abolished committal for trial procedure in England in that they entailed, in certain circumstances, a determination by a Magistrate whether there was a *prima facie* against a defendant. See

is not inapt, supporting, as it may be understood to be, the quasi-criminal nature of extradition hearings.

4. Rules of Procedure and Evidence

One of the three contexts in which courts have addressed the nature of extradition hearings is the determination of applicable rules of procedure and evidence. This context evinces the greatest variation in conclusion, with certain cases holding that extradition hearings are criminal and others that they are *sui generis*. Determinative in these cases is, of course, the germane law. The starting point here is the 2003 Act itself, containing several extradition-specific rules of procedure and evidence. Of particular relevance is s 206. It provides that questions arising at extradition hearings must be decided by applying any enactment or rule of law that would apply if the proceedings were proceedings for an offence, the requested person was charged with an offence and the requesting state was the prosecution. As with the powers of the judge, therefore, the starting points for the burden and standard of proof are those pertaining in criminal trials. There are exceptions to this, however. One is found in s 7(3), which provides that the determination of the identity of the individual subject to an arrest warrant is on the balance of probabilities. In Scotland, the requirement of corroboration is dispensed with for this determination as well, under s 7(7)(b). These exceptions cover Part 1 cases, with similar provisions applying as regards Part 2. Corroboration is also not required where a *prima facie* case against the requested person must be made out under s 84(1) of the 2003 Act – applying to non-EU states not exempted from that requirement. Under the 2003 Act, then, the position is that the criminal rules apply, with exceptions.

Supplementing the statutory provisions within the 2003 Act is, in Scotland, Chapter 34 of the Criminal Procedure Rules 1996.[11] It is relatively scant, providing for interpretation, arrest under provisional warrant, a procedural hearing, leave to appeal, the hearing of appeals, time limits and extensions, consent to extradition and Part 3 warrants (which cover extradition to the UK). In England and Wales, in contrast, Part 50 of the Criminal Procedure Rules is comprised of 32 separate rules covering such matters as adjournment, case management, preliminary hearing and, to an extent, evidence.[12] This difference in detail is of note because the relative dearth of rules in Scotland leads to a greater degree of uncertainty as regards the nature of extradition hearings – a thorough iteration of criminally-related

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https://www.gov.uk/government/news/faster-justice-as-unneccessary-committal-hearings-are-abolished, and Bell, B., and Dadomo, C., Magistrates' Courts and the Reforms of the Criminal Justice System, (2006) 14 Eur J. Crime Crim L Just 339.

[11] The Criminal Procedure Rules are found in schedule 2 to the Act of Adjournal (Criminal Procedure Rules) 1996/513.

[12] Cited at https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-50.pdf. Of note is s 174 of the Anti-Social Behaviour, Crime and Policing Act 2014 which subjected appeals to the High Court in extradition cases in England to the Criminal Procedure Rules. The Civil Procedure Rules applied previously.

rules would, of course, favour that classification. The relatively skeletal nature of the rules in Scotland has contributed to the emergence of a body of jurisprudence that addresses hitherto unanswered questions. That jurisprudence in turn is responsible for contributing to the multifarious understanding of extradition hearings.

4.1 Procedural and Evidential Jurisprudence

Scottish cases explicitly or implicitly addressing the nature of extradition hearings in the context of procedure and evidence include *Kapri v HMA*[13], *Lord Advocate v Shapovalov*[14], *Slovak Republic v Havrilova*[15] and *Lord Advocate v Mirza.*[16] These authorities demonstrate the discordance between certain rules of criminal procedure and evidence and extradition law and practice. The jurisprudence also, arguably, evinces the origins of the acceptance of a hybrid code of extradition procedure and evidence. In *Kapri v HMA* the High Court had to decide whether systemic corruption in Albania was such to give rise to a real risk of a flagrant denial of justice were the requested person returned.[17] The Lord Justice Clerk raised the question of which code of evidence was to be applied in the case: criminal (with the prohibition on hearsay) or civil.[18] Kapri's counsel argued that everything which his witness had spoken to or included in his report ought to be taken into account by the court. Whilst proceedings were to take the form of a summary trial, he argued, nothing in the 2003 Act demonstrated that parties were tied to any particular evidential rules. The respondent averred that the summary rules of criminal procedure and evidence applied. This was clear, he argued, on the basis of judicial dicta – mentioned below – and provisions within the 2003 Act. Of particular relevance was s 202, providing that documents authenticated in Category 1 and 2 territories may be received in evidence and, importantly, that this does not mean that a document that is not duly authenticated cannot be received. The respondent concluded that whatever the technical rules it was possible for the court to look at reports from reputable human rights bodies, whether they were subject to an admission or presented through the perspective of an expert witness.[19] The parties agreed in this regard.

In addressing the evidential rules the Lord Justice Clerk held that under the 2003 Act the rules of evidence must be those applicable to criminal cases, referring to s 77(2)(b) and 206(1) and (2) of the 2003 Act. As noted, he stated it was more accurate to say that the rules of criminal procedure and evidence are in the absence of some special circumstances normally

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[13] Supra note 6.
[14] [2017] SC Edin 83.
[15] Supra note 9.
[16] Supra note 4.
[17] The case had been remitted from the Supreme Court, Kapri v Lord Advocate [2013] UKSC 48 at para 33. See Arnell, P., Extradition and Systemic Corruption in Albania, (2014) 17 Scots Law Times 74.
[18] Supra note 6 at para 12.
[19] Ibid at para 99.

applicable, rather than extradition proceedings are *sui generis*.[20] The lack of a hybrid code of evidence applicable to extradition cases was noted by the Lord Justice Clerk. The law permitted many official documents to be relied upon in evidence without having been spoken to, and s 202 of the 2003 Act provided specifically for this in regard to documents from requesting states. However, the Lord Justice Clerk held, "… there is no general provision which allows the court to hold as proof as fact, merely by their production, the content of reports or other papers emanating from foreign governments, international governmental or non-governmental bodies, or academic or research institutions".[21] The Court decided that it would proceed, with grave reservations about the evidential base, on its understanding of what the witnesses themselves said about the nature and extent of corruption in Albania. *Kapri v HMA*, then, supports the normal applicability of rules of criminal evidence, and as such the criminal nature of extradition hearings. It also illustrates the tensions that can arise where unorthodox evidence is put forward.[22]

Lord Advocate v Shapovalov, as *Kapri v HMA*, lends support to the criminal nature of extradition hearings. It also brings to the fore the terminological incongruence that can arise where rules of criminal procedure and evidence are applied within extradition hearings. At issue in the case was the possible applicability of statements of uncontroversial evidence (SUEs) under s 258 of the 1995 Act. SUEs allow a party to criminal proceedings to identify facts which are unlikely to be disputed and to serve them on the other party. Section 258 also creates a scheme whereby SUEs can be challenged. Here the requested person lodged two SUEs *inter alia* stating that he would be detained in non-article 3 compliant conditions in Russia if extradited. The Lord Advocate challenged the competency of s 258 in extradition and the facts specified within them. In doing so he referred to *Kapri v HMA* and stated "The clear thrust of Kapri is that the default position is that the rules of criminal evidence are applicable. The exception is where there are special circumstances".[23] There were special circumstances, he argued, that led to the inapplicability of SUEs. These took the form of s 77(2) of the 2003 Act (which referred to powers of the judge not a party to serve notice) and s 258 of the 1995 Act (alluding to a preliminary hearing, intermediate diet and trial diet). In response the sheriff held that as SUEs are part of the "'normal rules' of summary criminal proceedings… unless they conflict or are irreconcilable with the provisions of sec 77, they form part of extradition procedure".[24] He also rejected the argument based on the timetable in s 258 because, in his view, it took an "unduly narrow approach to found on

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[20] Ibid at para 125.

[21] Ibid at para 127. The Lord Justice Clerk later noted that members of the court were familiar with certain of such reports through immigration cases where "… the rules (or rather the absence of rules) applicable to civil administrative proceedings prevail", at para 128. The affinity between extradition and deportation is mentioned below.

[22] Significantly, in Kurtev v Lord Advocate, [2018] HCJAC 31 the Lord Justice Clerk disagreed with the suggestion that *Kapri v HMA* gave rise to a perception that the criminal rules of evidence apply in their full rigour, at para 9.

[23] Supra note 14 at para 13.

[24] Ibid at para 19.

the specific terminology, and such an approach runs contrary to the inclusive language of the authorities relied upon".[25] 'Special circumstances', the sheriff held, referred to "… surrounding facts. Drafting or terminology issues are not 'circumstances'".[26] The sheriff held that s 258 applied to extradition hearings, but rejected Shapovalov's application to disregard the challenge to them. *Lord Advocate v Shapovalov* lends somewhat strained support to the criminal nature of extradition hearings. It emphasises the presumptive applicability of summary cause rules, save where there are special circumstances. SUEs were held to apply within extradition in spite of the terms governing them ill-according with the specifics of extradition procedure.

Supporting the *sui generis* nature of extradition hearings, and contrasting with *Kapri v HMA* and *Lord Advocate v Shapovalov*, are *Lord Advocate v Mirza* and *Slovak Republic v Havrilova*. The two cases suggest that a distinct approach to the applicable rules of procedure and evidence in extradition is developing. In *Lord Advocate v Mirza* a requested person sought disclosure or recovery of documents. The sheriff held that the rules of disclosure had no place in extradition hearings. The duty of disclosure applied to the prosecution in order that information is provided to an accused. Since an extradition is not prosecution, an application for disclosure was incompetent. The application for recovery of documents was also rejected by the sheriff. He noted that the procedure to be followed in summary criminal proceedings under s 301A of the 1995 Act was not clear, and the Criminal Procedure Rules provided no guidance – in regard to criminal proceedings let alone extradition hearings. He held that it was incompetent to make an oral application for recovery or production of documents at the bar of the court in an extradition hearing (as counsel for the requested person had done). He made this decision, he said, on the basis of expediency, basic fairness and want of due notice considerations.[27] The sheriff disposed of the case by holding that the appropriate remedy for the requested person was to seek to recover the documents in the Court of Session in the proceeds of crime proceedings against him. By pronouncing upon the incompetence of disclosure *Lord Advocate v Mirza* exposes a basic difference between extradition and criminal proceedings. It does so by simply noting the fact an extradition hearing does not entail or envisage, within this jurisdiction, a prosecution – Mirza was not, in Scotland, an accused. The rules of disclosure and recovery, therefore, did not extend to extradition.

An important authority favouring a *sui generis* conception of extradition hearings is *Slovak Republic v Havrilova*. Whilst the case was relied upon by the Lord Justice Clerk in *Kapri v HMA* in support of their criminal nature that view is open to question. Properly interpreted, it is submitted, *Slovak*

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[25] Ibid at para 25. A similar approach to the wording of s 258 was used to reject the Lord Advocate's argument that the SUEs were incompetent on account of being submitted late under s 258(2ZA). The sheriff held that the "… application of summary procedure should not be defeated by artificially cleaving to terminology", at para 34.

[26] Ibid.

[27] Ibid at para 7.

Republic v Havrilova lends weight to the view that extradition hearings are unique with extradition-specific rules taking precedence over summary cause rules. Put another way, the case suggests that the rules of criminal procedure apply in a supplementary or secondary sense, rather than being *prima facie* applicable. In *Slovak Republic v Havrilova* the High Court held that s 9(2) of the 2003 Act did not engage by virtue of its wording the provisions of s 147(1) of the 1995 Act. Significantly, the High Court described the relationship between the rules of procedure and evidence and extradition-related rules differently than it had been in *Kapri v HMA*. It stated "It is plain that s 9(2) is intended to bring into play in extradition proceedings, *whenever circumstances allow*, the rules of summary cause procedure and evidence... The person in extradition proceedings in respect of whom extradition is sought has not been charged with a summary offence under the 1995 Act".[28] The court here referred to the dictum of Lord Phillips in *R (USA) v Bow Street Magistrates Court*, quoted in part above. The extended passage cited in *Slovak Republic v Havrilova* included "The judge should apply the normal rules of criminal evidence and procedure to the extent that the[s]e are appropriate having regard to the specifics of the statutory schemes in Part 1 and Part 2".[29] The point being made here is that the courts in these cases have accepted that the rules of criminal procedure are, in a sense, apart from extradition. Extradition-specific rules are *prima facie* applicable and criminal rules will come into play only where appropriate – most obviously where there are lacunae in extradition-specific rules. Admittedly, the distinction between these two approaches is a relatively fine one. The result in any specific case may well be the same regardless of which tact is taken. It is relevant, however, to the conceptualisation of extradition hearings. The existence of a separate body of extradition-specific legislative (and jurisprudential) rules applying in the first instance and taking precedence over rules of criminal procedure is significant in their designation as *sui generis*.

The interpretation of *Slovak Republic v Havrilova* suggested above is supported by the English case of *R. (on the application of B) v Westminster Magistrates' Court*. Here, before the Supreme Court, the parties agreed that as a matter of established practice the normal rules of evidence are relaxed in extradition hearings on issues arising under the heads of extraneous considerations, human rights and abuse of process.[30] The Supreme Court did not challenge this agreement. Indeed, it stated "… under the current legislation, the better analysis may be not that the ordinary rules of evidence are suspended in the areas to which the practice is agreed to apply, but that a broad approach is taken to the nature and basis of the

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[28] Ibid at para 13, emphasis added.

[29] Ibid at para 9, citing *R (USA) v Bow Street Magistrates Court,* supra note 7 at para 76.

[30] [2014] UKSC 59 at para 21. Extraneous considerations are where a requested person is sought or would be prejudiced at his trial or punished for reasons of race, religion, nationality, gender, sexual orientation or political opinions. The relaxation is of considerable pedigree, dating from 1964, see Schtraks v Government of Israel [1964] AC 556, as noted in Hilali v Spain [2006] EWHC 1239 (Admin) at para 63.

expert evidence that is admissible".[31] This case is a persuasive Supreme Court authority that explicitly provides that the approach to evidence in extradition hearings is apart from that taken in criminal proceedings. This approach should be explicitly adopted in Scotland. It would build upon *Slovak Republic v Havrilova*. This is desirable not only because it would represent a move towards a single coherent understanding of extradition hearings in Scotland, but also because it would enhance the similarity of position across the UK. As to the latter "… it is clearly desirable that there should be uniformity of construction and application of the relevant statutory provisions in the various jurisdictions of the United Kingdom".[32] Overall, the law and jurisprudence governing and interpreting the rules of procedure and evidence in extradition hearings in Scotland fails to evince a consistent position. The relationship between the applicable criminal and extradition-specific rules is not settled. This is not ideal. What is clear, however, is that there are a number of extradition-specific rules as well as exceptions in, and limitations to, the operation of the rules of criminal procedure and evidence. This situation creates opacity and lies behind the varied designations of extradition hearings. As will be discussed below, these differing understandings lend support to a broad conceptualisation of extradition hearings as *sui generis* and quasi-criminal.

5. Appeals from the High Court to the Supreme Court

A second context in which the nature of extradition hearings has arisen is an appeal from the High Court of Justiciary to the Supreme Court.[33] In this context what turned on the particular understanding was not which procedural or evidential rules applied but rather, *inter alia*, the powers of disposal the Supreme Court holds in such cases. In contrast to the mixed procedural and evidential authority the position here is unequivocal. It is that extradition hearings are not criminal proceedings. The basis for this view was the germane law, namely that found in the Scotland Act 1998 (1998 Act), the 1995 Act and the 2003 Act. Creating the need for a pronouncement on the issue were the amendments to the former two Acts by the Scotland Act 2012 (2012 Act). Those amendments changed the Supreme Court's jurisdiction as regards certain cases emanating from Scotland. In essence, the 2012 Act excluded some matters which had previously been 'devolution issues' from being so. Those issues became 'compatibility issues'. The 2012 Act defines compatibility issues, in s 288ZA(2) of the 1995 Act, as questions arising in criminal proceedings as to whether a public authority has acted (or proposes to act) in a way which

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[31] Ibid at para 23.

[32] Campbell v HMA, 2008 JC 265 at para 32 per Lord Nimmo Smith. Of course an equally strong case can be made that the rest of the UK follow Scotland's lead as vice versa. There are, of course, extant divergences in extradition law within the UK, including the non-application of the forum bar and lack of abuse of process jurisdiction in Scotland. For the latter see Lord Advocate v Mirza, supra note 5 at p 13.

[33] Appeals to the Supreme Court from the High Court are, of course, exceptional. In criminal cases, and extradition cases, the final court of appeal is the High Court – save in the especial circumstances mentioned presently.

is made unlawful by section 6(1) of the Human Rights Act 1998. The reason for excluding certain subject matter from devolution issues was not to limit the appellate jurisdiction of the Supreme Court. Both devolution issues and compatibility issues are within this jurisdiction.[34] The reason appears to have been to deprive the Supreme Court of the power to quash convictions in light of a successful appeal from the High Court.[35] The relevant consequence of the amendments for our purposes was that they gave rise to the question of whether extradition proceedings were criminal proceedings or not. If they were then a human rights point arising in them would take the form of a compatibility issue on appeal to the Supreme Court. If not that question would remain a devolution issue.

It was in *Kapri v Lord Advocate* that the question arose of whether extradition hearings were criminal proceedings in the context of an appeal to the Supreme Court. Counsel for the appellant had submitted in his written case, in essence, that extradition hearings were criminal proceedings. He suggested that a human rights question in an extradition case had become a compatibility issue. He had done so because, in his view, the focus of the case would widen from whether the act of a member of the Scottish Government was compatible with human rights – that member being the Lord Advocate in conducting the extradition proceedings and/or the Scottish Minister ordering his extradition to Albania.[36] It would come to include the more general question of whether the determination of the compatibility issue was correct. The High Court is a public authority, so its acts can be scrutinised under the new system if they raise a compatibility issue, Kapri's counsel argued. Also relevant, Lord Hope noted, was the fact that the powers of the Supreme Court turn upon the type of issue before it. Whilst there are no restrictions upon its powers following determination of a devolution issue, s 288AA(2) of the 1995 Act provides that the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue. Once, determined, it must remit the case to the High Court of Justiciary, as per s 288AA(3).

At the Supreme Court the Lord Advocate averred that extradition hearings were not criminal proceedings under the 1995 Act. This was because they did not involve the determination of a criminal charge.[37] Importantly, the Lord Advocate highlighted the fact that he performs his extradition-related duties under s 191 of the 2003 Act as a member of the Scottish Government, not in his capacity as public prosecutor. That section provides that the Lord Advocate must conduct extradition proceedings in Scotland. As it turned out, before the Supreme Court, counsel for the appellant conceded that a human rights issue arising in an extradition case remained

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[34] Under paragraph 13 of Schedule 6 to the 1998 Act as regards devolution issues (as held by Lord Hope in BH v Lord Advocate [2012] UKSC 24 at para 34) and s 288AA(1) of the 1995 Act for compatibility issues.

[35] Shead, C.M., Devolution in Extradition Cases, (2013) Scottish Criminal Law 987, at p 988.

[36] As Albania is a Category 2 territory the final decision is made by the Scottish Ministers.

[37] Supra note 17 at para 18.

a devolution issue. Lord Hope, however, noting the importance of the point, felt it worthwhile to comment upon the position. He agreed that extradition hearings were not criminal proceedings in this context.[38] Lord Hope held that the Lord Advocate had properly conceded in *Goatley v HMA*[39] and *La Torre v HMA*[40] that devolution minutes were competent in proceedings under the 2003 Act on the basis that he was performing functions under that Act as a member of the then Scottish Executive. That position remained unchanged by the 2012 Act. Lord Hope noted that the ECtHR and Commission have repeatedly held that extradition hearings do not determine a criminal charge – something that will be discussed below. Emphasising the distinction between the criminal law and extradition, Lord Hope said that the view that extradition hearings were not criminal is reinforced on account of extradition being a reserved matter under the 1998 Act and Scots criminal law being a devolved matter unless relating to a reserved matter. The roles given the Lord Advocate, Scottish Ministers and High Court under the 2003 Act are separate from the 1995 Act. Those roles, he noted "… are not made part of, but are provided for separately from, those that they are required to perform under the 1995 Act".[41] A final point made by Lord Hope in regard to the nature of extradition hearings is that there is explicit provision in the 2003 Act which generally excludes appeal to the Supreme Court (ss 114(13) and 32(13)). He suggested that the enactment of these provisions, in spite of the existence of s 124(2) of the 1995 Act providing that an interlocutor from the High Court is final, evidences the distinction between extradition and general criminal procedure.

The Supreme Court's decision in *Kapri v Lord Advocate* provides that extradition hearings are not criminal proceedings for the purposes of appeals to it. That description stands in stark contrast to certain of the views expressed above including, interestingly, the subsequent decision of the High Court in the same case.[42] The difference between views is the consequence of distinct law being relied upon to answer the question of what are extradition hearings. Instead of procedural and evidential rules, the law detailing the roles of the Lord Advocate and High Court in extradition and affecting the devolution settlement more generally was considered. It was noted that the Lord Advocate played a unique role within them – as a member of the Scottish Government representing the requesting state and not as a public prosecutor. It was relevant that that role, and that of the High Court in extradition, were governed by provisions within the 2003 Act and not the 1995 Act. The reserved nature of extradition under Schedule 5 to the 1998 Act was also relevant. That fact marked a further distinction between extradition and the criminal law. Finally, the jurisprudence of the ECtHR was referred to. That extradition hearings did not determine a criminal charge, weighed in favour of them not being criminal proceedings. In sum, in *Kapri v Lord Advocate* the Supreme Court addressed the nature of extradition hearings in a different context and with reference to distinct

[38] The High Court has held similarly in PB v HMA [2013] HCJAC 138, at para 8.
[39] Supra note 3.
[40] [2006] HCJAC 56.
[41] Supra note 17 at para 20.
[42] That being Kapri v HMA, supra note 6

law than that of the courts which considered the issue in light of procedural and evidential matters. In doing so it adduced factors that shed new light upon the hearings. Those factors provide material support for the *sui generis* nature of extradition hearings.

6. The Right to a Fair Trial

Human rights litigation addressing the applicability of the right to a fair trial in extradition hearings is a third context in which the nature of the hearings has arisen. This jurisprudence follows arguments by requested persons that their extradition hearing should benefit from protection under article 6. In sum, the ECtHR has held that extradition hearings do not determine one's civil rights or a criminal charge. It has also been held by the Supreme Court, however, that they determine a civil right of UK nationals.[43] In this third context, then, there is again a contrasting understanding of extradition hearings. Determinative of the conclusions reached by these courts was, as above, the particular law relied upon. The ECtHR naturally considered the ECHR itself and its previous jurisprudence and that of the Commission. The Supreme Court relied upon those sources as well as public international law and the common law in coming to its conclusion. More precisely, largely determinative of the ECtHR's jurisprudence were the terms of article 6, with the specific question being whether an extradition hearing entails the determination of a civil right or obligation, a criminal charge or neither of these. Article 6(1) begins "In the determination of his civil rights and obligations or of any criminal charge against him…". It goes on to guarantee the right to a fair trial in a reasonable time by an independent and impartial tribunal established by law.[44] It is the initial phrase of article 6(1) that is critical. This is because proceedings which do not determine one's civil rights and obligations or a criminal charge are excluded from its protection. In other words, the nature of extradition hearings is vital in their being protected, or not, by article 6(1).

The ECtHR, and European Commission of Human Rights, have held that extradition hearings do not determine one's civil rights or obligations or a criminal charge. In *Raf v Spain* 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".[45] As regards the meaning of criminal charge the Commission in *Farmakopoulos v Belgium*

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[43] [2012] UKSC 20. Whilst the case arose in England it is authoritative in Scotland.

[44] In contrast to article 6(1) articles 6(2) and 6(3) apply subsequent to one being criminally charged. Accordingly proceedings not following a criminal charge are similarly excluded from the protections found within them. Article 6(2) guarantees the presumption of innocence and article 6(3) inter alia the right to a lawyer and the right to examine witnesses against the accused.

[45] 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.

stated "… that the words 'determination of any criminal charge' concern the process of examining whether an individual is guilty or innocent in respect of a criminal charge against him and do not refer to the proceedings in which the judicial authorities of a State decide whether the individual should be extradited to another country".[46] It is settled, then, that under the jurisprudence of the ECtHR, extradition hearings are not criminal in the sense of determining a criminal charge because they do not examine whether a person is guilty or innocent.

In a similar vein to its conclusion on criminal charge, the ECtHR has held that extradition does not concern a dispute over a civil right. In *Mamatkulov and Askarov v Turkey*, in a case about the fairness of Turkish extradition proceedings (as well as a future trial abroad), the ECtHR held that decisions regarding the entry, stay and deportation of aliens do not concern the determination of his civil rights or obligations within the meaning of article 6(1).[47] 'Civil' in this context was equated with private law rights. As extradition law falls into the public sphere, the 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".[48] In *Agee v UK* the Commission stated:

> … 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 particular his reputation, the State is not required in such cases to grant a hearing conforming to the requirements of Art. 6(1).[49]

Whilst *Agee v UK* was concerned with deportation, a similar view pertains to extradition. According to the ECtHR, then, article 6(1) does not apply to extradition hearings because they do not determine one's civil rights or obligations or a criminal charge. This conclusion of the ECtHR is negative. That of the Supreme Court in *Kapri v HMA* was similarly negative. Those courts decided what extradition hearings did not do and were not. Whilst of some use in coming to an understanding of extradition hearings what is preferable, of course, is a positive statement upon what they are and what

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[46] 8 February 1990, App No 11683/85, cited at http://hudoc.echr.coe.int/eng?i=001-82161, at p 69. It has been held, however, that a requested person has been charged with a criminal offence for the purposes of article 6(2), see *P., R.H. and L.L. v Austria* (5 Dec. 1989) App No. 15776/89. This case also confirms that article 6(3) does not apply to extradition hearings.

[47] (2005) 41 EHRR 494, at para 82.

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

[49] 17 Dec. 1976, application 7729/76, cited at http://hudoc.echr.coe.int/eng?i=001-74884, at para 28.

they do. It was the Supreme Court in *Pomiechowski v Poland* that took a rare step and did just that, pronouncing, in a sense, upon what extradition hearings actually do.

Pomiechowski v Poland broke new ground in the application of article 6 to extradition hearings and, in the process, in the understanding of extradition hearings themselves. It 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.[50] British citizen Halligen had failed to comply with the 14 day time limit for the filing and service of notice of appeal to the Crown Prosecution Service applying to US extraditions. The High Court had held that his appeal was time-barred. Before the Supreme Court Halligen *inter alia* invoked article 6(1). 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.[51] He also referred to the rights given to aliens subject to expulsion under article 1 of Protocol 7 to the Convention.[52] 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. He noted that British nationals possess an entitlement to remain within the UK under both international law and at common law.[53] The presence of that entitlement, deemed a 'civil right' by the Supreme Court, paved the way for the application of article 6(1) in the case.[54] It was held that extradition proceedings of a British citizen involved 'the determination' of that civil right, and since the enjoyment of one's common law right to remain within the UK was suspended a requested national was entitled to a fair hearing. This case is an important addition to the body of jurisprudence related to the understanding of extradition hearings. It adds a new dimension to it. It is that extradition hearings are, in some sense at least, a civil proceeding. As with the two contexts discussed above, distinct law was relied upon to justify this particular understanding. The Supreme Court relied upon not only article 6 and ECtHR jurisprudence but also English common law[55] and public international law. Both the particular decision in *Pomiechowski v*

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[50] The inflexibility has since been addressed by s 160 of the Anti-social Behaviour, Crime and Policing Act 2014.

[51] Supra note 43 at para 31.

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

[53] 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.

[54] Whilst concurring, reluctantly, with the majority Lady Hale thought it perhaps questionable whether the right of citizens to enter and remain their countries counts as a 'civil right' for the purpose of the right to a fair hearing under article 6(1), at para 49.

[55] The civil right that the Supreme Court identified was *inter alia* based in English common law. The question of whether Scottish common law similarly provides is perhaps moot. Whilst Lord Mance employed the term 'British' when providing that that category of persons had a common law right to come and remain within the jurisdiction he referred to Blackstone's Commentaries on the Laws of England in support 15th ed. (1809) Vol 1 at p 137.

Poland and the law used to come to that conclusion support a broad understanding of extradition hearings, and which encompasses their *sui generis* nature and affectation by international considerations.

7. Extradition Hearings Understood

Extradition hearings are clearly understood in a variety of ways. There is no single or over-arching conceptualisation. The differences in understanding generally turn on the context in which consideration of them has arisen. As seen, though, in the context of procedure and evidence there is discrepancy in view. In reaching decisions in each of the contexts, courts have referred to different law. This, of course, is entirely sensible. In deciding upon matters of procedure and evidence, appeal or human rights, courts rightfully relied upon the rules that have been enacted or concluded in those areas and the related jurisprudence. Conflating the various understandings that emerged within each of the three contexts and conceptualising them in light of the purpose, nature and influences upon extradition it is submitted that it is appropriate to designate extradition hearings as *sui generis* quasi-criminal proceedings affected by international considerations. Each element of this understanding will be justified in turn. Firstly, though, it is useful to state why it is desirable to alight on a single conception.

7.1 Why a Single Understanding is Desirable

There are several reasons why it is desirable to come to a single understanding of extradition hearings – why it matters. Some of these are abstract and some applied. Firstly, greater understanding and appreciation would follow if what is after all a single thing – an extradition hearing – is conceived in a unitary way. It is a single entity because it is governed by only one set of rules and it exists for only one purpose in fact. The 2003 Act, rules of procedure and evidence and body of case law that regulate and affect extradition hearings are, by and large, settled. As are the rules tangential to extradition hearings. The rules governing appeal to the Supreme Court and human rights law are good examples of the latter. Together these rules comprise a single set norms, there are no alternatives. What hearings do in fact is also fixed. This is simply that they consider the possible rendition of accused and convicted persons from the UK to a requesting third state. They do nothing else. They have only one role. If the rules governing extradition hearings were fluid, or if the hearings had more than one purpose in fact, then it would not be unreasonable if they were multifariously conceived. As the opposite is the case there is considerable weight in favour of a single understanding. Such a position would bring consistency as between the differing lines of jurisprudence – procedure and evidence, appeal and human rights. The particular context in which a question arises in an extradition case would cease to be relevant to the understanding of hearings themselves. Rather, that conception would be unitary yet wide enough to accommodate the distinct issues that arise within them. Further, a single understanding of extradition hearings can more readily entail a positive conception of them. It is preferable that extradition hearings are conceived in a positive light as well as a negative one. In other words, they should be understood in terms of what they are and do as well as what they are not and do not do. A single positive

understanding would bring consistency, aid coherence and reflect reality – simply, they have to be something and that should be a single thing.

An applied justification for a single positive conceptualisation of extradition hearings is that it would provide a platform from which the law could further develop. As seen, extradition-specific rules are found in the 2003 Act and the Criminal Procedure Rules. Adding to these has been a distinct body of rules developed by the courts. These include the recognition that SUEs apply, the partial operation of article 6 and the relaxation of certain rules of evidence. Arising from these developments is, debatably, an emerging view that discrete extradition-specific rules take precedence, or at least *prima facie* apply, over rules of criminal procedure and evidence. This can be seen as an emerging hybrid procedural and evidential code. Were extradition hearings generally understood in a single positive way Scottish and UK courts would be able to explicitly recognise and contribute to what has been emerging. Courts would no longer feel compelled to cleave to views that fail to adequately reflect reality, and extradition law could develop unhindered by the jurisprudential attachment to their criminal nature. Finally, a single positive understanding of extradition hearings would facilitate comparative understanding by bringing the UK in line with a number of its extradition partners. In most civil law states, for example, extradition is viewed as "… a measure of international judicial assistance in restoring a fugitive to a jurisdiction with the best claim to try him… ".[56] They are not criminal, but considered procedural. In the US the Department of Justice Attorneys' Manual provides that "Extraditions are their own category of case: they are neither criminal nor civil cases, although many concepts from criminal law apply in extradition proceedings".[57] These conceptions accurately describe UK extradition hearings in fact. A single understanding of extradition hearings matters for all these reasons.

7.2 Sui generis

Extradition hearings are *sui generis*. The simple and literal justification for this designation is that they are unlike any other type of judicial proceeding. They are undoubtedly related to criminal matters, yet are apart from them. They do not envisage a Scottish or UK criminal prosecution at all, nor are they subsequent to one. They are, however, governed as nearly as may be by criminal rules and the appellate hierarchy is criminal. Extradition hearings are also clearly not orthodox civil proceedings. They do not consider private law rights and obligations and they necessarily involve the state exercising a sovereign function. They do affect the civil rights of UK nationals, however. The hearings with the closest affinity to extradition are deportation proceedings. They are similar in that they entail the removal of an individual from the UK and that they can give rise to human rights

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[56] Shearer, I., *Extradition in International Law*, Manchester University Press, Manchester, 1971 at p 157.

[57] Criminal Resource Manual section 614, cited at https://www.justice.gov/usam/criminal-resource-manual-614-procedure-district-court. Canada takes a roughly similar approach to the US, with evidence at extradition hearings governed by ss 32-37 of the Extradition Act 1999.

concerns in certain circumstances.[58] The similarity only goes so far, however. Deportation proceedings differ in origins, purpose and governing law. Deportation proceedings originate in a UK decision to expel the person from its territory, the origins of an extradition are found in a request from a third territory. The purpose of deportation is to remove an 'undesirable' person from the country.[59] The purpose of extradition is the facilitation of a prosecution or imposition of a sentence in a third state. The law governing deportation is largely found in the Immigration Acts[60], with the power to deport being found in section 5 of the Immigration Act 1971. Extradition law is largely found in the 2003 Act. Extradition hearings are, therefore, unlike deportation proceedings in important ways. Indeed, whilst sharing commonalities with other forms of proceedings, criminal being the pre-eminent example, extradition hearings have unique features and characteristics. These include their quasi-criminal nature and affinity to international considerations.

7.3 Quasi-criminal

Extradition hearings are quasi-criminal.[61] They are designed to facilitate a criminal prosecution or the imposition of a sentence following a criminal conviction in a third country. In other words, they exist for criminal and punitive purposes. Extradition clearly acts to address international and transnational crime. Lord Thomas' quote from *Polish Judicial Authorities v Celinski* at the outset of this article[62] emphasises the criminal purposes of extradition, *inter alia* stating that those accused of crimes should be brought to trial and those convicted of crimes should serve their sentences. Extradition hearings resemble criminal proceedings. They are largely governed by the rules of criminal procedure and evidence. The resemblance flows from s 206 of the 2003 Act which *inter alia* provides that questions arising at extradition hearings are to be decided by applying the law that would apply if the proceedings were proceedings for an offence. In Scotland an appeal of a decision by the Sheriff of Lothian and the Borders is heard by the High Court, not the Court of Session. In certain cases evidence is

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[58] In Balodis-Klocko v Latvia, [2014] EWHC 2661 (Admin) it was held that there is no distinction between the immigration line of authority and that of extradition as regards human rights arguments.

[59] A further difference is that UK nationals cannot be deported.

[60] 'Immigration Acts' is defined by section 61 of the Borders Act 2007, and includes ten different statutes commencing with the Immigration Act 1971. The difference in rules of evidence between extradition and deportation was noted above. A further mode of expelling an alien from the UK is administrative removal, governed by section 10 of the Immigration and Asylum Act 1999.

[61] For the present purposes 'quasi-criminal' is taken to denote something that relates to and resembles criminal proceedings but is apart from them. The term has been applied in a range of circumstances from regulatory and environmental offences to Terrorism Prevention and Investigation Measures and gang-related injunctions. See, for example, Jones v Birmingham City Council. [2018] EWCA Civ 1189 as regards gang-related injunctions and Adshead, J., Doing Justice to the Environment, (2013) 77(3) Journal of Criminal Law 215 in regard to environmental law.

[62] Supra note 1.

heard against the requested person. Further weighing towards the criminal nature of extradition hearings is that requested persons can be detained pending their hearing, under ss 9(4) and 77(4) of the 2003 Act, or they can be granted bail. Clearly, then, extradition hearings have a close proximity to criminal proceedings and the criminal law.

The affinity between criminal proceedings and extradition hearings only goes so far – there are material differences between them. The most obvious point is, of course, that extradition hearings do not lead to or follow a criminal prosecution within Scotland.[63] There are consistent statements by the ECtHR and UK courts that extradition hearings do not entail the determination of a criminal charge for the purposes of article 6.[64] They are not criminal in this sense. There are also definite limitations in the application of rules of criminal procedure and evidence. Both in general terminology and in the details of certain specific rules, criminal procedure and evidence fails to align with extradition law. From the basic fact that there are no preliminary or intermediate diets and trials in extradition, to the point that the time limits in criminal procedure are inapt on account of there being no complaint (let alone the fact that the 2003 Act itself governs the schedule of extradition). The relaxation of the rules of evidence also differentiates extradition from criminal proceedings. The distinct role played by the Lord Advocate is also relevant. So too is the fact that international and common law rules entitling nationals to remain within the country can be affected through extradition alone, as seen in *Pomiechowski v Poland*. Overall, it is reasonable to conclude that whilst extradition hearings resemble criminal proceedings they are apart from them. They are accurately described as quasi-criminal.

7.4 Affected by International Considerations

Extradition hearings are affected by international considerations. It is important to include this fact within the understanding because international law and policy concerns are a *sin qua non* of extradition itself. Simply, extradition is an inherently international exercise based upon bilateral or multilateral agreements. Recognising this is the House of Lords Select Committee on Extradition Law, which has noted that "Extradition is a discrete legal process but it operates within the context of other legal, political and international considerations".[65] The Framework Decision on the European Arrest Warrant, the European Convention on Extradition 1957 and a network of bilateral extradition treaties form the basis of the UK's

[63] There have been cases where extradition requests have spawned attempts to force the commencement of a domestic criminal investigation and possible prosecution, see for example R. (on the application of Bermingham) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin).
[64] Such as in *Raf v Spain*, supra note 45, in the ECtHR and R (Al Fawwaz) v Governor of Brixton Prison [2001] UKHL 69 at para 87.
[65] Supra note 1 at p 9.

extradition relations.[66] Diplomatic assurances also have come to play an increasingly important role in extradition.[67] These treaties and instruments have had a material impact upon UK extradition law and practice. A number of the central features of the 2003 Act give effect to the UK's international legal obligations. Describing the origins of the 2003 Act are its Explanatory Notes which *inter alia* provide "Crime, particularly serious crime, is becoming increasingly international in nature and criminals can flee justice by crossing borders with increasing ease. Improved judicial co-operation between nations is needed to tackle this development. The reform of the United Kingdom's extradition law is designed to contribute to that process".[68] As noted, Part 1 of the 2003 Act specifically provides for the terms of the European Arrest Warrant.[69] In a different vein, the international dimension of extradition has been held to affect the interpretation of the 2003 Act. As Lord Nimmo Smith in *Campbell v HMA* stated "It seems to me to be inappropriate to approach the construction and application of sec 14 solely or mainly from the standpoint of our domestic law. The international dimension is inherent in extradition law…".[70]

Affecting UK extradition hearings are international policy concerns. These manifest themselves in the UK's position towards comity in extradition jurisprudence and practice. Demonstrating this is *Caddoux v Bow Street Magistrates' Court* where it was stated that "… once the request for extradition was received… there were powerful reasons of comity for giving it priority…".[71] More generally, there are a considerable number of extradition cases where the decision turns on the public policy interest in adhering to international agreements and acting to combat international and transnational criminality. An example from the Supreme Court is *Norris v US*, where Lord Collins noted "The public interest in the prevention and suppression of crime, which includes the public interest in the United Kingdom's compliance with extradition arrangements, is not outweighed by the mutual dependency and the ill-health, both physical and mental, of Mr and Mrs Norris".[72] Two further factors illustrate the international nature of extradition and extradition hearings. The first is the significant role of the ECHR and increasingly EU law. From the seminal case of *Soering v UK*[73] in

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[66] Bilateral treaties from the basis of the UK's relationship with Category 2 territories, a list of them is found here: https://www.gov.uk/guidance/extradition-processes-and-review.

[67] See Grozdanova, R., The United Kingdom and Diplomatic Assurances: A Minimalist Approach towards the Anti-Torture Norm, (2015) International Criminal Law Review 369.

[68] Cited at http://www.legislation.gov.uk/ukpga/2003/41/notes/division/3, at para 6.

[69] The Explanatory Notes also provide "This Act includes provisions implementing the following European Community Legislation: the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)", ibid, at para 12.

[70] Supra note 32 at para 32.

[71] [2004] EWHC 642 (Admin), at para 11.

[72] Supra note 1 at para 131.

[73] (1989) 11 EHRR 439.

1989 to the present time, European human rights jurisprudence has had an impact upon UK extradition law. EU law, including the Framework Decision and the decisions of the CJEU have also come to exert an impact.[74] Second, the law has developed so as to require extradition hearings to increasingly consider extraterritorial circumstances and law. Death row in the US, prison conditions in Taiwan and medical facilities in Poland, for example, have come within the purview of Scottish and UK courts.[75] The forum bar to extradition found in ss 19B and 83A of the 2003 Act can require consideration of foreign circumstances by English and Northern Irish courts. Finally, the double criminality requirement can act to require the examination of a third state's criminal law. Overall, the impact of international law and policy upon extradition hearings is such that it is not unreasonable to state that they have existential relevance. It is therefore appropriate, indeed necessary, to acknowledge the effect that international considerations have within and upon extradition hearings.

8. Conclusion

Extradition hearings are understood in varying ways. These conceptualisations arise from their nature being considered in differing contexts and with reference to distinct law. Their essential features can be identified across those contexts. Conflating the various understandings of extradition hearings – criminal and *sui generis* in the context of procedure and evidence, not criminal proceedings for the purposes of appeals to the Supreme Court and determinative of a civil right for UK nationals in the context of a right to a fair trial – leads to the overall conclusion that they are *sui generis* quasi-criminal proceedings affected by international considerations. This designation, whilst operative across the UK, is particularly apt in a Scottish context. The unsettled nature of Scottish case law, the relative dearth of Scottish procedural and evidential extradition rules and the particular provisions governing appeals from the High Court to the Supreme Court support this contention. A single accurate positive conceptualisation of extradition hearings – it is submitted the designation just given – matters. Important decisions in distinct areas turn on how they are understood. Consistency across those areas and conceptual clarity and realism are the benefits. It is time to recognise extradition hearings for what they actually are and in light of the various areas where that matters.

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[74] See, for example, Case C-396/11, Radu, 29 January 2013, Grand Chamber, Court of Justice, available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0396:EN:HTML, discussed in Arnell, P., The European Human Rights Influence upon UK Extradition – Myth Debunked, (2013) 21 European Journal of Crime, Criminal Law and Criminal Justice 317.

[75] *Soering v UK*, Lord Advocate v Dean [2017] UKSC 44 and Jantos v Lord Advocate [2015] HCJAC 32 considered death row in Virginia, prison conditions in Taipei and medical facilities and the availability of drugs in Poland respectively.