What has extradition law done for the law?

This essay considers what extradition law has done for the law with a focus on Article 3 of the European Convention on Human Rights ("Article 3"). The application of Article 3 has evolved from being an issue outside the remit of extradition law, to one very much relevant to extradition practice today. The evolution of extradition law after the ground breaking case of *Soering*, as will be explored, forced signatory states to the ECHR to be held accountable not just for breaches of the convention within their own borders, but also for foreseeable breaches in requesting states, even where that breach is outside of the control of the member state. This essay will show that this responsibility has extended to deportation cases as well as extradition.

Extradition Courts across Europe today regularly resound with the argument that a requested person cannot be extradited to the requesting state, because to do so would amount to or at least would raise a real risk of a breach of their Article 3 Convention Rights. Article 3 dictates that:

> "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"[1]

The Divisional Court of England and Wales, this year alone, has adjudicated on the position of Portugese[2], Hungarian[3] and French[4] prison conditions, finding that the conditions in prisons in Lisbon and Paris are such as to provide a real risk that if extradited, the requested person(s) would face a real risk of inhuman and degrading treatment contrary to Article 3. In these circumstances, the individual cannot be extradited (without safeguards being in place) or else the country expelling that individual is held equally culpable for the Article 3 breach according to the case of *Soering v United Kingdom* (1989) 11 E.H.R.R. 439. This is trite law in extradition proceedings today, but before *Soering* was not so, and this essay seeks to demonstrate that the decision in *Soering* is an example of where extradition law has fundamentally

[1] Article 3 of the European Convention on Human Rights
[2] Mohammed v Portugal [2018] EWHC 225 (Admin)
[3] Fuzesi and Balasz v Hungary, Unreported ; DC; 16 July 2018
[4] Shumba v France [2018] EWHC 1762 (Admin)

changed the landscape of the wider law. Prior to this decision it was not envisioned that a signatory state could be held responsible for the breaches of other states and therefore the question of whether ill-treatment may occur to the requested person after extradition was not a concern of the extradition courts. The consequences of a member state being forced to refuse extradition based on the potential ill treatment that a requesting state may inflict are plainly serious. Signatories to the Convention are unable to expel convicted or accused criminals to meet justice, no matter how serious their crimes, by virtue of their absolute rights under Article 3. The individual has committed no crime in the host state and therefore the individual remains at liberty in the host state.

Jens Soering's extradition was requested by the United States of America to be tried for murder. After unsuccessfully contesting his extradition in the United Kingdom, he petitioned to the European Court of Human Rights and argued, amongst other complaints, that his extradition would amount to a breach of his Article 3 convention rights as he would surely be held in intolerable death row conditions.[5] The United Kingdom, in responding to the complaint, primarily submitted that Article 3 does not bestow a responsibility on a contracting state for acts that fall outside of their jurisdiction. It was argued that this interpretation exceeded the clear remit of Article 3 and would encroach on international extradition treaties, thus interfering with the international judicial process.[6] In the alternative, the United Kingdom argued that if Article 3 did compel member states to refuse extradition for fear of inhuman or degrading treatment in the requesting state, it ought to only apply where the Article 3 breach was "*certain, imminent and serious*."[7] It is noteworthy that even this alternative test would have been a considerable departure from the status quo at the time. The European Court, however, disagreed with the submissions of the United Kingdom, going further than even the alternative "*certain, imminent and serious"* test that had been suggested. They instead found that where there are "*substantial grounds*" for believing that the requested person would face "*a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country*", the convention state's own Article 3 responsibilities are engaged and extradition will not

[5] see *Soering v United Kingdom (1989) 11 E.H.R.R. 439*
[6] Para 83, *Soering*
[7] Ibid

be compatible with their treaty obligations.[8] This invoked a far more onerous responsibility on the United Kingdom and indeed all EU member states to both conduct an assessment of the treatment a requesting person would face once surrendered, and where there is a real risk of ill treatment the member state is forced to refuse extradition, lest they conduct a breach of Article 3 themselves.

This decision was taken nearly 30 years ago and it is perhaps difficult to imagine for most practitioners just how radically this would have changed the practice of not just extradition law at the time but all expulsion cases. Academics at the time observed that the ECHR may have opened a 'pandora's box' by allowing human rights to enter the extradition arena.[9] Indeed the rationale of this decision extended beyond Europe when the UN Committee on Human Rights acknowledged it in several decisions, which explicitly refer to *Soering* and the principles that it raises in other International Extradition decisions.[10]

It would be many years later that the German government sought direction from the Court of Justice of the European Union ("CJEU") as to whether the conditions of detention in the requesting state were within the ambit of Article 3. If so, they would very much be within the concerns of extraditing states by virtue of the responsibility placed on them by *Soering*. In *Aranyosi and Caldararu*[11], the CJEU held that conditions of detention that do not afford human dignity do engage Article 3 of the Convention and guides member states on the correct procedure to adopt where such a risk is identified. This is the procedure that has been successfully engaged in the three instances referred to at the beginning of this essay, which illustrates how critical this challenge is in modern Extradition practice. *Aranyosi* encourages the use of assurances from requesting states to alleviate the responsibility of the extraditing state and to protect the requested person from Article 3 mistreatment. This ought to allow extradition to still effectively operate in the face of problematic prison regimes. However it is noteworthy that an assurance in itself will not admonish the state's

[8] Para 91, *Soering*
[9] Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box? C. Van den Wyngaert, *The International and Comparative Law Quarterly,* Vol. 39 No.4, (October 1990) p.p. 757 – 779
[10] Kindler v. Canada, No. 470/1991, UN Doc. CCPR/C/48/D/470/1991, Ng v. Canada, No. 469/1991, UN Doc. CCPR/C/49/D/469/1991; Cox v. Canada, No. 486/1992, UN Doc. CCPR/C/45/D/486/1992
[11] *Aranyosi and Caldararu* [2016] Q.B. 921

responsibility in the face of evidence that such assurances are not complied with. This was the case in recent Romanian extradition litigation, where evidence came to light that despite assurances from the Romanian state to ensure minimum standards of detention, in practice those extraditees were often still exposed to the inhuman and degrading treatment that the assurance was expected to protect them from[12]. Returning to the dicta in *Soering*, the Convention state contemplating the extradition of a requested person will be responsible for foreseeable breaches of Article 3, even though it falls outside their control. Therefore if the requesting state is shown to be failing to uphold its assurances, this causes real problems for the host state since Article 3 breaches are now foreseeable even when an assurance has been issued. The concern regarding Romanian assurances has been resolved in the United Kingdom by the acceptance of further, individual specific, assurances[13]. One wonders how long one has to wait before there is further evidence of breaches of those assurances and how the English courts will respond to such a breach given their responsibilities and liabilities that are bestowed upon them by *Soering.*

Article 3 breaches, specifically the Article 3 breaches of another state, are not a concern solely for extradition Courts but for all expulsion cases, thus engaging the Immigration Courts. The case of *Chahal v United Kingdom* built on that of *Soering* by finding that even where deportation was sought for reasons of national security by virtue of the Applicant's conduct, they could not be deported if there was a real risk of an Article 3 breach in the proposed receiving state (in this instance India).[14] A very similar situation arose in the matter of *Saadi v Italy*, whose deportation to Tunisia was found to be contrary to the absolute protection afforded to him by Article 3 and upon the application of *Soering*. These decisions were significant – the cases involved allegations of terrorism and conspiracy to murder by the individuals whom the respective states wished to deport. The applicability of an Extradition decision in these circumstances meant that the host states had no choice but to continue accommodating these undesirable individuals. These decisions demonstrate the impact that extradition law has had not just on its own litigation, but also in other areas of law.

[12] *Romania v Zagrean* [2016] EWHC 2786 (Admin)
[13] *Grecu and Bagarea v Romania* [2017] EWHC 1427 (Admin)
[14] *Chahal v. United Kingdom* (23 EHRR 413)

To conclude, within the context of Article 3, Extradition law has radically shaped the way that this right is interpreted and conveys a far more onerous responsibility on member states than that first envisioned by its signatories. Whereas it was previously thought that the observation of Article 3 was strictly a matter for the member state itself, the case of *Soering* meant that signatory states had a responsibility to consider the foreseeable risk of an Article 3 breach by any other state, where it was proposed to extradite or deport an individual to. If the member state was to expel the individual notwithstanding a real risk of an Article 3 breach, they themselves will be in contravention of Article 3. Article 3 has now been more widely interpreted to include prison conditions as being capable of amounting to inhuman and degrading treatment that means that Article 3 is now a regular matter in issue in the Extradition Courts of Europe. The interpretation and applicability of Article 3 was entirely recalibrated by one Extradition case.

Sarah Phillips
Macmillan Williams