INTERNATIONAL AWARD

"In his foreword to Shaheen Fatima KC's book Using International Law in Domestic Courts (Hart, 2005), Lord Bingham wrote "national courts … are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance." To what extent is that true of the current domestic criminal law of England and Wales?"

Introduction

The extent to which the correct understanding and application of International Law depends largely on the Court and the source of International Law. This is discussed below in relation to the UK's international obligations underpinning the right to a fair trial, freedom from torture and degrading treatment and the right to silence.

On the other hand, legislation which criminalise international crimes, such as the Geneva Convention Act 1957 ("GCA"), The War Crimes Act 1991 ("WCA") and the International Criminal Court Act 2001 ("ICCA"), are hardly used in the Crown Courts. Kathryn Howarth records that, there have only been two cases brought under the WCA and none relating to the ICCA and the GCA[1].

Professor Crawford highlights that customary international law is one of the sources of English law rather than automatically forming part of the Common Law[2].

Fair Trials

Fair trial obligations are extensively reflected in numerous daily applications heard in the Crown Courts; for example, to exclude evidence under s.78 of the Police and Criminal Evidence Act 1984. Criminal Courts hear thousands of bail applications each considering the balance between the right to liberty and the State's responsibility to protect its citizens' rights to life and physical integrity.

[1] Kathryn Howarth, 'A Practical Guide to International Crimes in Proceedings Before the Courts of England and Wales', Law Brief Publishing, 2023
[2] James Crawford, *Brownlie's Principles of Public International Law* (8th Ed. 2012) p.68

Following *R v Manning*[3] and *The King v Ali*[4], Courts are asked to accept adverse developments from the Pandemic and overcrowding in prisons as mitigating circumstances. This is in line with obligations under Art. 3 of the Human Rights Act, 1998 ('HRA').

Freedom from torture and degrading treatment

S.134 of the Criminal Justice Act 1988, was enacted to enable the UK to become party to the UN Convention against Torture. Its application is arguably reflective of Lord Lloyd-Jones' observations: that the gap between international law and domestic law increasingly narrows over time, that the judiciary's understanding of international law is only getting better, and particularly, that "there has been a striking shift in attitude towards judicial examination of the conduct of foreign states and their agents", in both Crown Courts and Extradition Courts[5]. To show such a shift over time, Lord Lloyd-Jones highlights a 1971 case, *R v Governor of Brixton Prison ex parte Kotronis*[6], where the House of Lords rejected the submission that extradition was sought in bad faith for political reasons, rather than to serve an outstanding sentence.

There has been some development in relation to the interpretation of Art.3 HRA rights when comparing the cases of *Harkins and Edwards v. The United Kingdom*[7], and *Vinter & others v United Kingdom* [8] which appeared to be in conflict. In *Harkins,* The High Court held that whether a sentence was Art. 3 compliant, would depend on the determination of whether a prisoner's continued detention performed any "legitimate penological purpose" and that clemency or compassionate release constituted mechanisms for review that rendered the sentence compliant with Art. 3. In *Vinter*, the Court determined that life sentences are incompatible with Art. 3 if they are 'irreducible'. The High Court in *Sanchez-Sanchez v. the United Kingdom*[9] applied the test set out in *Harkins.* There, the requested person ('RP') alleged that there was a real possibility that, if convicted of drug related offences in the US, he faced life imprisonment without parole. The ECtHR held that Mr Sanchez-Sanchez's extradition to the United States would not violate Art. 3 on the basis that an adapted approach had to be applied in cases where the RP had neither been tried nor sentenced.

[3] Crim 592 [2020] EWCA
[4] [2023] EWCA Crim 232
[5] Lord Lloyd-Jones, *International Law Before United Kingdom Courts: A Quiet Revolution,* [ICLQ vol 71, July 2022 pp 503–529], p. 503
[6] [1971] AC250
[7] nos 9146/07 and 3265/07
[8] nos 660/09
[9] (application no. 22854/20)

The ECtHR upheld the principle that extradition should be refused if sentences infringed an applicant's Art. 3 rights. The UK High Court's application was thus not wrong. Simultaneously, the spirit of *Vinter* was not lost. The ECtHR reiterated the principle that a sending State must ascertain that the requesting State would apply a mechanism of sentence which considered a prisoner's progress towards rehabilitation. It was for the RP to show otherwise. Mr Sanchez-Sanchez was unable to properly support his allegation that if convicted, he would face a life sentence without parole and his extradition was deemed lawful.

The right to silence

The ECtHR tolerates adverse inference drawn from silence during police investigations[10] to the extent that silence cannot be the sole basis for conviction[11]. This caveat is applied widely in UK Criminal Courts applying s.34, s.35, s.36 and s.37 of the Criminal Justice and Public Order Act 1994 (CJPOA). In *Webber*[12], the House of Lords held that the word "fact" in s.34 should be interpreted broadly. However, the silence and the circumstances relevant to the charge and crime in question must be directly correlated. In *M*[13], it was held that the Judge had incorrectly allowed the jury to draw an adverse inference from a failure by the appellant to mention relevant facts in interview when there was no basis for drawing one. There, the defendant was asked questions about an alleged rape on the wrong date. The Court held it could not be expected of the defendant to say more.

On the other hand, in family contempt proceedings the Court of Appeal held in *Andreewitch v Moutreuil*[14]

> *"16. The starting point when striking the balance in this case is the duty upon a court hearing committal proceedings to ensure that the accused person is made aware that they are not obliged to give evidence and also warned that adverse consequences or inferences may arise from exercising the right to silence. … [W]hat matters is that the choice of how to proceed belongs to the litigant and not to the other party or to the court."*

This application reflects a far better understanding and application of a defendant's right to silence than is often seen in the Crown Courts. There, juries are often asked to bear in mind that a defendant has the choice of whether to accept or reject legal advice to remain silent, and later decide on whether

[10] Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence; Yvonne Daly, Anna Pivaty, Diletta Marchesi, Peggy ter Vrugt; Human Rights Law Review, Volume 21, Issue 3, September 2021
[11] *John Murray v United* Kingdom Application No 18731/91
[12] [2004] 1 All ER 770
[13] [2012] 1 Cr App R 26
[14] [2020] EWCA Civ 382

the defendant could reasonably have been expected to mention facts on which he relies on at trial. The balance is tipped from a *right* and onto a *choice*, blurring the line between what a defendant could do and ought to do.

Conclusion

The above shows that domestic Criminal Courts certainly aim to apply the UK's international obligations correctly in as far as they can. However, as in caveat to the right to silence, or the need for a RP to support their allegation in extradition proceedings, the threshold to support one's case is high.

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