

## ‘Transferring sentenced persons (offenders) to the United Kingdom: Highlighting some of the human rights issues courts have had to deal with’

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**ABSTRACT:** As at 30 September 2013 13 per cent of the prison population in England and Wales were foreign national offenders. Convicted UK nationals are also serving prison sentences in foreign jurisdictions. The UK government has taken measures such as the enactment of domestic legislation and the ratification of bilateral and multilateral agreements with other States for the specific purpose of facilitating the return of its citizens to serve their sentences at home. Many offenders have been transferred to the UK to serve their sentences. This article highlights and examines some of the human rights issues that have exercised UK courts in this endeavour.

### 1. Introduction

The United Kingdom Ministry of Justice reported that as at 30 September 2013 13 per cent of the total prison population in England and Wales comprised of foreign nationals<sup>1</sup> and over 1000 UK nationals were serving prison terms abroad.<sup>2</sup> In order to ensure that foreign national offenders are transferred to serve the last part of their sentences in their home countries and also

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<sup>1</sup> See Ministry of Justice, ‘Offender management statistics (quarterly) – April to June 2013’ published 31 October 2013 at [www.gov.uk/government/publications/offender-management-statistics-quarterly-april-to-june-2013](http://www.gov.uk/government/publications/offender-management-statistics-quarterly-april-to-june-2013) accessed 29 December 2013. For a discussion of how foreign national prisoners are managed in the UK see Laura Dubinsky, Hamish Arnott and Alasdair Mackenzie, *Foreign National Prisoners: Law and Practice* (LAG 2012) 525-537.

<sup>2</sup> See Prisoners Abroad at [www.prisonersabroad.org.uk/](http://www.prisonersabroad.org.uk/) accessed 29 December 2013; see also ‘Over 1,000 Britons are jailed over drugs abroad’ BBC News (London, 3 February 2010) at [http://news.bbc.co.uk/2/hi/uk\\_news/8493551.stm](http://news.bbc.co.uk/2/hi/uk_news/8493551.stm) accessed 29 December 2013. In June 2014 a Private Member’s Bill, Foreign National Offenders (Exclusion from the United Kingdom) Bill, was presented by Mr Phillip Hollobone, to The House of Commons and its broad objective is ‘to make provision to exclude from the United Kingdom foreign nationals found guilty of a criminal offence committed in the United Kingdom.’ The Bill requires the Secretary of State ‘make provision in regulations for any foreign national convicted in any court of law of a qualifying offence to be excluded from the United Kingdom’ (Clause 1(1)). If passed in its current form, it will have far reaching consequences for foreign offenders in the UK as any person who is not a British citizen who is convicted by any court for any offence by which a term of imprisonment may be imposed shall be deprived of any right to remain in the UK. However, the discussion of the Bill falls outside the scope of this article. For a copy of the Bill, see [www.publications.parliament.uk/pa/bills/cbill/2013-2014/0035/14035.pdf](http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0035/14035.pdf) accessed 29 December 2013.

for UK nationals or citizens to be transferred to serve their sentences in the UK,<sup>3</sup> the UK government has signed bilateral prisoner transfer agreements with several African, Asian and Latin American countries<sup>4</sup> and ratified several international agreements, including the Council of Europe's Convention on the Transfer of Sentenced Persons,<sup>5</sup> the Additional Protocol to the Convention on the Transfer of Sentenced Persons,<sup>6</sup> the Scheme for the Transfer of Convicted

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<sup>3</sup> For an offender to be transferred to the UK to serve his or her sentence, most of the agreements provide that he/she has to be a national or citizen of the UK. However, the agreements between the UK and Uganda, Antigua and Barbuda, Barbados, Venezuela, Dominican Republic, Nicaragua, St Lucia, Guyana, Pakistan, Peru, Suriname, Vietnam, Libya and Ghana provide that for an offender to be transferred to the UK, such an offender has to be a British citizen or has to have close ties with the United Kingdom. For these agreements see (n 4 below).

<sup>4</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Uganda on the Transfer of Convicted Persons (2 June 2009); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana concerning the Transfer of Prisoners (17 July 2008); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons (11 February 2010); Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Great Socialist People's Libyan Arab Jamahiriya on the Transfer of Prisoners (17 November 2008); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco on the Transfer of Convicted Offenders (21 February 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Antigua and Barbuda on the Transfer of Prisoners (23 June 2003); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federative Republic of Brazil on the Transfer of Prisoners (20 August 1998) Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Barbados on the Transfer of Sentenced Persons (3 April 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Cuba on the Transfer of Prisoners (13 June 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Nicaragua on the Transfer of Prisoners (6 September 2005); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Dominican Republic on the Transfer of Prisoners (18 February 2003); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Bolivarian Republic of Venezuela on the Transfer of Sentenced Persons (12 June 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India on the Transfer of Convicted Persons (18 February 2005); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of St Lucia on the Transfer of Prisoners (27 April 2006); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Cooperative Republic of Guyana on the Transfer of Prisoners (5 April 2002); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Pakistan on the Transfer of Prisoners (24 August 2007); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Peru on the Transfer of Sentenced Persons (7 March 2003); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka on the Transfer of Prisoners (6 February 2003); Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic on the Transfer of Sentenced Persons (7 May 2009); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Saudi Arabia on the Transfer of Sentenced Persons (2 January 2012); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Suriname on the Transfer of Prisoners (29 June 2002); and Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Socialist Republic of Vietnam on the Transfer of Sentenced Persons (12 September 2008). Copies of these treaties and their official citation are available at <<http://treaties.fco.gov.uk/treaties/treaty.htm>> accessed 29 December 2013. For a detailed discussion of the relevant provisions of these treaties see Jamil D Mujuzi, 'Analysing the Agreements (Treaties) on the Transfer of Sentenced Persons (Offenders/Prisoners) between the United Kingdom and Asian, African and Latin American Countries' (2012) 20 *European Journal of Crime, Criminal Law and Criminal Justice* 377.

<sup>5</sup> Convention on the Transfer of Sentenced Persons (adopted 21 March 1983, entered into force 1 July 1985) CETS No 112.

<sup>6</sup> Additional Protocol to the Convention on the Transfer of Sentenced Persons (adopted 19 December 1997, entered into force 1 June 2000) CETS No 167.

Offenders within the Commonwealth,<sup>7</sup> and Council Framework 2008/909/JHA.<sup>8</sup> It has enacted domestic legislation to give effect to its international obligations on the transfer of offenders.<sup>9</sup>

Literature on the issue of offender transfer between the UK and other countries has dealt with issues such as the possible rehabilitation of offenders on the one hand, and on the other, victims' rights in the convicting State.<sup>10</sup> This article focuses on the role of the courts in the transfer of offenders and in particular, the jurisprudence emanating from UK courts on different issues that have emerged during the transfer of offenders mostly to the UK. The issues that are dealt with in this article include the purpose of the transfers; continued enforcement versus conversion; human rights issues; and the relationship between extradition and the transfer of offenders.

## 2. Purpose of the transfer of a prisoner to the UK

The difficulties that foreign national offenders face in prisons in many parts of the world are well documented.<sup>11</sup> According to the German government, these difficulties are the reason why the question of prisoner transfer is regularly taken up by nationals of other Member States.<sup>12</sup> Some of the treaties that the UK has signed up to on this matter stipulate that the purpose of the transfer is to facilitate the rehabilitation of the offenders,<sup>13</sup> while some refer to facilitating the reintegration of the offender.<sup>14</sup> Other agreements are silent on the question of the purpose of the covered transfers.<sup>15</sup> Courts in the UK have had occasions to make observations on the purpose of the transfer of offenders from other countries to the UK. The House of Lords has held that: '... the primary policy objective of the United Kingdom statute, which is equally reflected in the preamble to the Convention, is the obviously humane and desirable one of enabling persons sentenced for crimes committed abroad to serve out their sentences within their own society.'<sup>16</sup>

<sup>7</sup> Since 27 June 1991, the UK has been a participant to the Commonwealth Scheme for the Transfer of Convicted Offenders. See House of Commons Hansard text of 23 January 2012: Column 92W, available at <[www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120123/index/120123-x.htm](http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120123/index/120123-x.htm)> accessed 29 December 2013.

<sup>8</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

<sup>9</sup> Repatriation of Prisoners Act 1984.

<sup>10</sup> See generally Dirk van Zyl Smit and John R Spencer, 'The European Dimension to the Release of Sentenced Prisoners' in Nicola Padfield, Dirk van Zyl Smit and Frieder Dunkel (eds), *Release from Prison: European Policy and Practice* (Willan 2010) 25-26.

<sup>11</sup> See Michal Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation: A Comparative Study* (Max Planck Institute for Foreign and International Criminal Law 1993) 70-80; Dubinsky, Arnott and Mackenzie (n 1) 523; Anton M van Kalmthout, Femke Hofstee-Van Der Meulen and Frieder Dunkel (eds), *Foreigners in European Prisons* vol 1 (Wolf Legal Publishers 2007); and Denis Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals* (Springer 2012) 509-514.

<sup>12</sup> See Case C/302/02 *Ejffing* [2005] ECR I-553, para 22.

<sup>13</sup> See agreements between the UK and Saudi Arabia (preamble); Antigua and Barbuda (preamble); Barbados (preamble); St Lucia (preamble); Guyana (preamble); Pakistan (preamble); Sri Lanka (preamble); Peru (preamble); Cuba (preamble); Egypt (preamble); Venezuela (preamble); Brazil (preamble); Ghana (preamble); Dominican Republic (preamble); Nicaragua (preamble); Libya (preamble); and India (preamble) (n 4).

<sup>14</sup> Agreement between the UK and Laos (preamble); Thailand (preamble); Hong Kong (preamble); and Morocco (preamble) (n 4).

<sup>15</sup> Agreements between the UK and Rwanda and Uganda (n 4).

<sup>16</sup> *Regina v Secretary of State for the Home Department, Ex parte Read* [1989] AC 1014, 1048 [*Regina*].

In *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* the Court held that: '[t]he only purpose of the PTA is to enable the prisoner to serve the foreign term at home.'<sup>17</sup> It has been observed in the context of prisoner transfer in Europe that:

[W]hile the early Council of Europe instruments in particular were designed to meet humanitarian concerns for offenders who were held in countries other than their own and were thus less likely to be 'socially rehabilitated', the focus has increasingly shifted to the interests of the sentencing states. These states often want troublesome foreign offenders to be returned to their home countries, not because the offenders' interests would be better served by being returned, but because the sentencing states want to be rid of them to reduce the burden they place on overstretched resources for the implementation of sentences.<sup>18</sup>

Whether or not English courts are of the view that the offender's transfer is aimed at his or her rehabilitation is not clear in the light of the fact that courts are yet to expressly state that the aim of the transfers is to rehabilitate offenders. Courts have emphasised the fact the transfer of an offender is done on humanitarian grounds. This could mean many things as case law shows that some British prisoners have requested their transfer from countries such as Laos<sup>19</sup> and Thailand<sup>20</sup> because of the appalling prison conditions under which they were being detained compared to inmates back home. However, once they have been transferred, the question of whether or not they have been rehabilitated while serving their sentence in Britain becomes important in determining whether or not they will be released early.

In *Regina v Secretary of State for the Home Department, Oshin* the court held that: '[t]he sentence remains the sentence of the foreign sentencing court. Under Article 10, all we are doing is continuing it. What happens before transfer happens abroad and is governed by the law of the sentencing court.'<sup>21</sup> The Court added that: '[a]ll we are doing here is enforcing the balance of the sentence and it is to this stage and this stage alone that our law applies as Article 9(3) requires.'<sup>22</sup>

The reasoning in *In re Gilbey*<sup>23</sup> appears to suggest that even after the transfer the offender's imprisonment in the UK could still be aimed at serving retributive or deterrence purposes of punishment.<sup>24</sup> The Court held that: '[j]udging by the information placed before the court during the hearing, retribution and deterrence are important elements in the Thai approach to sentencing, and I can find nothing in the 1993 Act which would prevent me from confirming 10 years as an appropriate punishment part to serve these purposes in this case.'<sup>25</sup> One should recall that before an offender is transferred from Thailand to serve his sentence in the United Kingdom, he or she is required to serve a certain number of years in Thailand.

It probably would have been more appropriate in this case for the court to consider the number of years that the offender had served in Thailand proportionate to the retributive and deterrent aims of punishment and then determine the years to be served in Britain for the purposes of achieving the rehabilitation objective of punishment. This view is supported by the sentencing

<sup>17</sup> *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* [2009] EWHC 1483 (Admin) para 68 [*Willcox v Secretary*].

<sup>18</sup> See van Zyl Smit and Spencer (n 10) 43.

<sup>19</sup> *Samantha Orobator v Governor of HMP Holloway and Secretary of State for Justice* [2010] EWHC 58 (Admin) [*Orobator*].

<sup>20</sup> *Willcox v Secretary* [2009] EWHC 1483 (Admin).

<sup>21</sup> *Regina v Secretary of State for the Home Department, Oshin* [2000] 1 WLR 2311, 2316.

<sup>22</sup> *ibid*

<sup>23</sup> *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249.

<sup>24</sup> For a recent detailed discussion of the purposes of punishment, see Gabriel Hallevy, *The Right to be Punished – Modern Doctrinal Sentencing* (Springer 2013) 16-56.

<sup>25</sup> *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249 para 26.

approach of the UK Court of Appeal (Criminal Division) in *Norman Hull v Regina* where it was stated that: '[i]n the United Kingdom the minimum term is a judicially determined period which the prisoner is required to serve for retribution and deterrence following which the sole issues for determination by the Parole Board are the safety of the public and the reintegration of the prisoner upon his release.'<sup>26</sup> If this is correct then the reasoning in *Regina v Secretary of State for the Home Department, Oshin* that emphasis by the Convention on the Transfer of Sentenced Persons on the social rehabilitation of sentenced persons does not in any way impact on the issues of the release of the transferred offender<sup>27</sup> should not be taken as laying down a general rule. It should be understood as limited to the facts in each particular case or to cases with similar facts. The observation to be made in light of the foregoing discussion is that although many of the treaties between the UK and other countries on the transfer of offenders emphasise rehabilitation as the purpose of the transfer, and some emphasise reintegration of the offender courts are yet to hold expressly that the purpose of transfer is rehabilitation. This is an issue that courts are called upon to address directly. The challenge that the courts are likely to confront is that some treaties in this area point to social rehabilitation of the offender as their objective while others refer to reintegration and others are completely silent on this issue.

Although offender rehabilitation and reintegration go hand-in-hand, in the author's opinion there is a difference between the two, however subtle, namely: that rehabilitation is a means to reintegration. That is, an offender participates in rehabilitation programmes so that on his release he is able to reintegrate into society and reduce the risk of reoffending. The United Nations Office of Drugs and Crime considers both rehabilitation and reintegration to be critical in the fight against recidivism when it states that 'the rehabilitation of offenders and their successful reintegration into the community [are] basic objectives of the criminal justice process.'<sup>28</sup> However, in the same handbook rehabilitation programmes are given as some of the examples of the "social-reintegration programmes."<sup>29</sup> Many scholars distinguish between rehabilitation and reintegration<sup>30</sup> and courts in different countries also draw a distinction between rehabilitation and reintegration.<sup>31</sup>

<sup>26</sup> *Norman Hull v Regina* [2011] EWCA Crim 1261, 2011 WL 1151784, para 28.

<sup>27</sup> *Regina v Secretary of State for the Home Department, Oshin* [2000] 1 W.L.R. 2311, 2316, 2313.

<sup>28</sup> UN Office on Drugs and Crime, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders* (United Nations 2012) 5.

<sup>29</sup> *ibid* 6.

<sup>30</sup> See for example, Andrew Day, Tony Ward and Lyn Shirley, 'Reintegration Services for Long-Term Dangerous Offenders: A Case Study and Discussion' (2011) 50(2) *Journal of Offender Rehabilitation* 66; Harry R Dammer 'Rehabilitation in German Prisons' (1997) 24 (1-2) *Journal of Offender Rehabilitation* 1; and Keren Bachia 'Equine-Facilitated Prison-Based Programs Within the Context of Prison-Based Animal Programs: State of the Science Review' (2013) 52(1) *Journal of Offender Rehabilitation* 46-74.

<sup>31</sup> For example, in *R v Mosili and Others* [2004] LSCA 7 (Judgment of 20 October 2004) [27], the Court of Appeal of Lesotho held that '[O]ne must guard against the imposition of sentences that are so high as ultimately to leave little or no hope for the offender's rehabilitation and reintegration into society.' In *Uganda v Waiswa & Others* [2010] UGHC 276 (Judgment of 1 October 2013) the High Court of Uganda held that the purpose of sentencing is rehabilitation and reintegration of the offender into society. Justice Yacoob of the South African Constitutional Court held in *Centre for Child Law v Minister for Justice and Constitutional Development and Others*; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) [80] that '...the possibilities of the rehabilitation of children and their reintegration into society must always be carefully considered by a sentencing court.' In *Bandisa v S* (A83/2010) [2010] ZAWCHC 430 (28 July 2010) the High Court of South Africa, in sentencing the offender to 10 years' imprisonment and suspending half of the sentence to deter him from reoffending, held that the sentence it imposed will ensure the rehabilitation of the appellant and his reintegration into his community and family. In *V v The United Kingdom* (Application No 24888/94) Grand Chamber (Judgment of 16 December 1999) in his concurring opinion Lord Reed stated that 'On the one hand, the importance attached to safeguarding the well-being and future of young children who have offended, and promoting their rehabilitation and reintegration into society, point towards holding their trials in private.'

### 3. Continued enforcement versus conversion

One of the most hotly debated issues that courts have dealt with is that of whether UK courts have the power to convert the sentences of offenders transferred from other countries. At the time of ratifying the Convention on the Transfer of Sentenced Persons, the UK made a declaration to the effect that it would not convert sentences for offenders transferred to the UK.<sup>32</sup> The Repatriation of Prisoners Act does not provide for the conversion of sentences.<sup>33</sup> The Convention on the Transfer of Sentenced Persons provides for both continued enforcement (under Article 10) and conversion (under Article 11). At the time of ratifying the Convention on the Transfer of Sentenced Persons, some countries indicated that they would only allow transfers to their territory in cases where they would be able to convert the sentence in question.<sup>34</sup> Other States indicated that they would only allow transfer to their territory to ensure enforcement of the remaining sentence,<sup>35</sup> yet others expressly or impliedly allow both conversion and continued enforcement.<sup>36</sup>

State practice shows that some countries are loathe to transfer offenders to destinations where conversion as opposed to continued enforcement of the transferred sentence was practised.<sup>37</sup> In 1988 the House of Lords made it very clear that continued enforcement and conversion are '[t]wo radically different procedures'<sup>38</sup> and that '[t]he nature and duration of any sentence...to be served in the United Kingdom as the administering state by a prisoner transferred here under the Convention is governed by the procedure for continued enforcement...to the exclusion of the procedure for conversion of sentence...'<sup>39</sup> In support of the continued enforcement of transferred sentences, the court in *In re Gilbey*<sup>40</sup> where the applicant had challenged the continued enforcement in Scotland of a life sentence that had been imposed on him in Thailand before his transfer, the Court held that:

[I]t must be remembered that the international arrangements which apply in cases such as the present reflect a commitment to mutual respect and recognition between or

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<sup>32</sup> It is reported that 'Declaration contained in a letter from the Permanent Representative of the United Kingdom, dated 30 April 1985, handed to the Secretary General at the time of deposit of the instrument of ratification, on 30 April 1985 [stated that]: The United Kingdom intends to exclude the application of the procedure provided for in Article 9(1)(b) in cases when the United Kingdom is the administering State.' See List of declarations made with respect to treaty No 112 at [www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=1&DF=&CL=ENG&VL=1](http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=1&DF=&CL=ENG&VL=1) accessed 29 December 2013.

<sup>33</sup> See Repatriation of Prisoners Act 1984, Chapter 47, section 3.

<sup>34</sup> These countries are: Georgia and Russia.

<sup>35</sup> These countries are: France, United Kingdom, Andorra, Bahamas, Belgium, Ireland, Japan, Korea, Luxemburg, Spain, Italy, Malta, Liechtenstein and Switzerland.

<sup>36</sup> For example, Greece and San Marino.

<sup>37</sup> *Plepi v Albania and Greece* (2010) 51 EHRR 3 the applicant was convicted and sentenced to 20 years' imprisonment for, inter alia, drug trafficking. The Greek court found that the applicants should serve their sentence in Albania because 'it considered that the sentences imposed by the Greek court were compatible with Albanian criminal law...' However, later '...the Albanian Ministry of Justice informed its Greek counterparts that there existed the possibility of conditional release for the applicants after serving half of their sentence, provided that they had displayed good behaviour in prison. Consequently... the Greek Ministry of Justice informed the applicants and the Albanian Ministry of Justice of its refusal to transfer the applicants on the ground that the sentences commuted by the Albanian court were inferior to those imposed by the Greek court and thus incompatible with the gravity of their offence and with the short time they had spent in Greek prisons.' See *ibid* 48. See also *Willcox v Secretary* [2009] EWHC 1483 (Admin) para 87 in which the court states that Thailand refused to sign a prisoner transfer agreement with the Netherlands because the latter has insisted on the possibility of being able to convert the sentences of its nationals transferred from Thailand.

<sup>38</sup> *Regina* [1989] AC 1014, 1048.

<sup>39</sup> *ibid* 1049.

<sup>40</sup> *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249.

among the governments and legal systems of participating states. Maintaining such laudable objectives is of practical significance, not merely to the states concerned, but also to those individuals who might benefit from appropriate repatriation arrangements. From their point of view, any state conduct failing to reflect the necessary levels of respect and recognition may carry a serious risk of international cooperation being reduced or even withdrawn, and if any such risk were to materialise prisoners such as Mr Gilbey might be very much worse off than they are now. Against that background I would not, for my part, be prepared to fix a punishment part of a length which might, in Thailand, be regarded as derisory by comparison with the long term ineligibility for parole which characterised the sentence actually imposed.<sup>41</sup>

With the exception of a few cases that will be dealt with shortly, courts in the UK have maintained the position that if an offender is transferred to the UK, the UK will continue to enforce the sentence that has been imposed by the courts of the sentencing State unless such a sentence exceeds the maximum sentence that a UK Court would have imposed in terms of the UK legislation. In such a case, ‘the Secretary of State adapting the sentence under Article 10 of the Convention has power to reduce the sentence to that maximum but no further...’<sup>42</sup> Although that decision has been in place since 1988, there have been cases where courts have converted the transferred sentences.

In *In the Matter of Abdur Rashid Khan*<sup>43</sup> in which the offender was sentenced to life imprisonment by a Canadian court and transferred to serve his sentence in the UK, the court, after discussing the distinction between conversion and continued enforcement in terms of the Convention on the Transfer of Sentenced Persons held that: ‘this country is bound by the legal nature and duration of the original sentence.’<sup>44</sup> The court emphasised that the offender had been sentenced to life imprisonment but held that there were mitigating factors<sup>45</sup> and concluded that the minimum sentence to be served by the appellant was 10 years’ imprisonment.<sup>46</sup>

In *Norman Hull v Regina*,<sup>47</sup> the applicant was convicted of murder and sentenced to life imprisonment in the Republic of Ireland. He was transferred to the UK to serve his sentence. In emphasising the fact that the High Court had erred when it converted the applicant’s sentence,<sup>48</sup> the Court held that he was to be ‘treated as if he had been sentenced to a term of life imprisonment fixed by a court in England and Wales.’<sup>49</sup> The court added that ‘a mandatory life sentence has the same *legal* nature in Ireland and in the United Kingdom only to the extent that each is a sentence of imprisonment.’<sup>50</sup> Most importantly, the Court held that:

[I]t would appear that [the judge *In the Matter of Abdur Rashid Khan*] was [not] informed of the declaration made by the United Kingdom Government at the time of ratification of the transferred prisoners’ Convention ... [and] proceeded upon the mistaken assumption that he was involved in a process of conversion of the sentence.<sup>51</sup>

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<sup>41</sup> *ibid* para 25(xi).

<sup>42</sup> *Regina* [1989] AC 1014, 1053.

<sup>43</sup> *Re Abdur Rashid Khan* [2006] EWHC 2826 (QB).

<sup>44</sup> *ibid* para 15.

<sup>45</sup> *ibid* para 16.

<sup>46</sup> *ibid* para 17.

<sup>47</sup> *Norman Hull v Regina* [2011] EWCA Crim 1261, 2011 WL 1151784.

<sup>48</sup> *ibid* paras 45-46.

<sup>49</sup> *ibid* para 39.

<sup>50</sup> *ibid* para 47.

<sup>51</sup> *ibid* para 41.

As mentioned above, the Court in *Abdur Rashid Khan* was fully aware that the UK was bound by the legal nature and duration of the sentence in question but chose to convert a life sentence to 10 years' imprisonment. Whether or not the Court's decision to convert the sentence was attributable to the fact that it was not aware that the UK had made a declaration at the time of ratification excluding the option of converting transferred sentences is unclear. In all the agreements on the transfer of offenders that the UK has entered with other countries it has excluded the possibility of converting sentences of convicting States.<sup>52</sup> While dealing with the issue of whether UK courts were empowered to convert the sentence of an offender transferred from Thailand, the High Court, in *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* held that: 'it is plain on the wording of the PTA that under it, the United Kingdom, has no power to convert a sentence so as to make it a sentence of the kind the United Kingdom courts might have imposed for the offence (and offender) in question.'<sup>53</sup>

The case of *Samantha Orobator v Governor of HMP Holloway and Secretary of State for Justice*<sup>54</sup> raises an interesting point. The complainant was a "transferred life prisoner" from Laos to the UK.<sup>55</sup> The High Court rejected her argument that her trial in Laos had been a flagrant denial of justice and therefore her continued detention in the UK had violated her right to liberty in terms of Article 5 of the European Convention on Human Rights. However, applying the British law on the release of offenders,<sup>56</sup> the High Court found that there were mitigating circumstances in favour of the applicant<sup>57</sup> and held that the 'appropriate determinate sentence' was 3 years' imprisonment and that in terms of the English law if she 'had been sentenced to a term of 3 years, she would have been released on licence after serving one-half of her sentence.'<sup>58</sup> The Court reduced her sentence to a minimum of 18 months' imprisonment.<sup>59</sup> As the Court observed:

The claimant agreed to be transferred to the UK to serve the remainder of her sentence pursuant to the Treaty between the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic on the Transfer of Sentenced Persons ("the Prisoner Transfer Agreement" or "PTA"). The PTA did not come into force until 25 September 2009. But the UK and Laos signed a Memorandum of Understanding on 28 July 2009 that both states would immediately apply the full provisions of the PTA administratively. She was transferred from Laos to the UK on 7 August 2009 and has been detained in HMP Holloway ever since.<sup>60</sup>

As mentioned earlier, the agreement between Laos and the UK provides for continued enforcement as opposed to conversion.<sup>61</sup> As mentioned earlier, the Repatriation of Prisoners Act does not include conversion and the House of Lords held as early as 1988 that the Repatriation of Prisoners Act provided for continued enforcement at the exclusion of conversion. However, as indicated earlier, in this case the Court converted the sentence from one of life imprisonment to three years' imprisonment.

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<sup>52</sup> See agreements between the UK and Saudi Arabia (art 7); Laos (art 8); St Lucia (art 8); Nicaragua (art 8); Dominican Republic (art 8); Suriname (arts 7 and 8); Guyana (arts 7 and 8); Vietnam (art 9); Pakistan (art 9); India (art 8); Sri Lanka (art 10); Antigua and Barbuda (art 8); Peru (art 8(2)); Cuba (art 9(2)); Venezuela (art 8.2); Barbados (art 8); Brazil (art 7 and 8); Egypt (art 10 and 11); Thailand (art 6); Hong Kong (art 6); Morocco (art 13); Ghana (art 7); Rwanda (art 7); Libya (art 7); and Uganda (art 7) (n 4).

<sup>53</sup> *Willcox v Secretary* [2009] EWHC 1483 (Admin) para 86.

<sup>54</sup> *Orobator* [2010] EWHC 58 (Admin).

<sup>55</sup> *ibid* para 125.

<sup>56</sup> *ibid* paras 125-129.

<sup>57</sup> *ibid* paras 131-137.

<sup>58</sup> *ibid* para 138.

<sup>59</sup> *ibid* paras 138-139.

<sup>60</sup> *ibid* para 3.

<sup>61</sup> Agreement between the UK and Laos art 8.



In refusing to follow the reasoning in *Orobator* the Court *re Gilbey*<sup>62</sup> observed that: ‘the court had apparently proceeded on a straightforward application of domestic legislation, and without any discussion of the regime under the 1984 Act and relative Convention as authoritatively interpreted by the House of Lords in *Read*’ and that the House of Lords decision in *Read* ‘was, however, briefly mentioned for other purposes.’<sup>63</sup> It should be recalled that Ms Orobator had not been transferred on the basis of the Convention on the Transfer of Sentenced Persons. Rather she had been transferred on the basis of the PTA between Laos and the UK. However, the point to be emphasised is the following, namely, that had the court in *Orobator* referred to the House of Lords decision in question and to section 3 of the Repatriation of Prisoners Act in particular when it had dealt with the issue of ‘tariff’, it would probably have come to a different conclusion. Although the court in *Orobator* specifically referred to Article 8 of the PTA between the UK and Laos,<sup>64</sup> it nevertheless came to the conclusion that it could convert the sentence on the basis of UK law. On the basis of the above discussion, one can confidently conclude that the correct position in the UK is that of continued enforcement as opposed to conversion. This is evident from the treaties that the UK has signed with other countries. Moreover, it is also evident from Section 3 of the Repatriation of Prisoners’ Act, in the UK’s reservation to the Convention on the Transfer of Sentenced Persons and in the majority judgements handed down by courts including the House of Lords.

#### 4. Human rights

One of the most important issues in the context of the transfer of sentenced persons is the rights of the offender in question. Before I embark on the discussion of some of the rights that have been dealt with by courts in the UK in the context of prisoner transfer, it is critical to deal with the issue of how courts have dealt with the issue of the offender’s right to be transferred. None of the agreements in the UK and other countries stipulate that an offender has a right to be transferred.<sup>65</sup> Even the Convention on the Transfer of Sentenced Persons does not contain a provision to the effect that an offender has a right to be transferred. Two potentially irreconcilable approaches have been taken by the UK courts on the issue of the offender’s right to be transferred. In the first category one finds cases in which it has been held that the treaty does not provide an individual right to to be transferred. For example, in *McKinnon v Government of the United States of America and another*<sup>66</sup> the House of Lords held that: ‘the Convention [on the Transfer of Sentenced Persons] confers no rights on prisoners: a state is not obliged to comply with a repatriation request nor to provide reasons if it refuses to do so.’<sup>67</sup> Similarly, the European

<sup>62</sup> *Re Gilbey* [2010] HCJ 4, 2010 SCL 1249.

<sup>63</sup> *ibid* para 14. See also *ibid* para 25(x).

<sup>64</sup> *Orobator* paras 17-18.

<sup>65</sup> Although art 8(1) of the agreement between the UK and Uganda states that the offender has a right to ‘express to either the transferring State or the receiving State an interest in being transferred under this Agreement.’ See also common art 8(1) of the agreements between the UK and Rwanda and Saudi Arabia (n 4).

<sup>66</sup> *McKinnon v Government of the United States of America and another* [2008] UKHL 59 [*McKinnon*].

<sup>67</sup> *ibid* para 36. The High Court had observed in *Gary McKinnon v Government of the USA, Secretary of State for the Home Dept* [2007] EWHC 762 (Admin), in which the representatives of the government of the United States of America had issued a veiled threat against the applicant that if he had refused to enter into a plea agreement with the prosecutors they would oppose his application for the transfer to the UK to serve his sentence, that ‘Among other things, the evidence points to some unusual features in the particular proposed Plea Agreement and to the opinion that support from the prosecuting authorities is the single most important factor in deciding applications for repatriation. Where a transfer is refused by the Department of Justice, the decision is unreviewable in the American courts. Moreover the reasons for the refusal are exempt from disclosure.’ See para 52.

Court of Human Rights also held that the offender had no right to be transferred from Greece to serve his sentence in Albania.<sup>68</sup>

In the second category one finds the case of *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice* in which the High Court held that: “ the Convention gives the sentencing State an unqualified discretion to grant or withhold its consent to a transfer. The only constraints on the exercise of the discretion by the Secretary of State are that his decision must not be in breach of the Human Rights Act, or be unreasonable in the *Wednesbury* sense”.<sup>69</sup>

Unlike the House of Lords which held that a state is not obliged to transfer the offender and also to give the reasons for the refusal to transfer, the High Court recognises that the UK still has discretion to refuse to transfer an offender but that such a discretion has to be exercised in line with the relevant laws. Of the two approaches, the current author is of the view that the High Court decision is more progressive than the House of Lords one. This is because in deciding whether or not to transfer an offender, the Secretary of State has to have reasons that form the basis of that decision. In this sense the offender would clearly possess an implied right to access information, especially information that might affect his dignity negatively, thereby imposing upon the Secretary of State a duty to execute his or her duties reasonably. Where the reasons that have been invoked to refuse the offender’s application for a transfer are unreasonable, courts should be able to set aside a decision based on unreasonableness.

In *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice* the applicant was a British national who was domiciled in The Netherlands from where he had committed offences in the UK. He wanted to be transferred to The Netherlands to serve the remainder of his sentence in that country close to his family. The Secretary of State refused to allow his transfer on the ground that he was likely to be released early in The Netherlands and he would have come back to the UK a free man when in fact he should have been in prison had he served his sentence in the UK. The Court held that the refusal to transfer the applicant to The Netherlands was not unreasonable.

It should be noted that although the Convention on the Transfer of Sentenced Persons and indeed most of the treaties that the UK has signed with other countries do not expressly confer rights on prisoners, they include provisions that, if not complied with, could potentially be challenged on purely human rights grounds. For example, Article 4(1) of the Convention on the Transfer of Sentenced Persons states that: ‘[a]ny sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention.’ A provision to the same effect is also found in the agreements that the UK has signed with other countries. In the agreement on the transfer of offenders between the UK and Rwanda, between the UK and Saudi Arabia and between the UK and Uganda, it is clearly stated that one of the rights of the offender is to be informed by the transferring state of the substance of the transfer agreement.<sup>70</sup>

In practice this has happened to all the offenders transferred to the UK.<sup>71</sup> If such an offender were not informed of the substance of the treaty before the transfer, he could argue that his transfer was not based on his consent. This has happened in countries such as Hong Kong

<sup>68</sup> In *Plepi v Albania and Greece* the Court held that 'there is no evidence that Greek law confers on the applicants any right to be transferred to Albania and the applicants did not refer to any relevant legal provisions which would indicate the existence of such a right.' *Plepi v Albania and Greece* (n 37) 53.

<sup>69</sup> *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice* [2008] EWHC 1195 (Admin), para 28 [*Shabeen*]. For the test see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

<sup>70</sup> Agreement between the UK and Rwanda, and agreement between the UK and Saudi Arabia common art 8(2) (n 4).

<sup>71</sup> For example, see *Re Abdur Rashid Khan* [2006] EWHC 2826 (QB) para 9.

where transferred offenders have argued, though unsuccessfully, that the information provided to them before the transfers was misleading and that these transfers took place without their consent.<sup>72</sup> Although what is not clear is whether such an offender could be returned to the sentencing state should courts in the UK reach the conclusion that indeed prior to his transfer he was not informed of the substance of the treaty or properly informed of the substance of the treaty.

There has been a move towards including implied or express human rights provisions in prisoner transfer treaties. For example, some of the treaties that the UK has signed with other countries provide that the transferred offender's right against double jeopardy shall be protected. For example, the treaty between the UK and Antigua and Barbuda provides that: '[a] prisoner who has been transferred under this Agreement shall not be arrested, put on trial or sentenced by the receiving state for the same offence for which he was sentenced in the sentencing state.'<sup>73</sup> The preamble to the treaties between the UK and Uganda and the UK and Rwanda on the transfer of offenders provides that both parties reaffirm 'that sentenced persons shall be treated with respect for their human rights.' Article 9 of the agreement between the UK and Uganda specifically provides that:

Each Party shall treat all sentenced persons transferred under this Agreement in accordance with their applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

A provision to the same effect is also to be found in the treaty between the UK and Rwanda.<sup>74</sup> The agreement between the UK and Rwanda also provides for limited circumstances in which the administering state is allowed to limit the personal freedom of the transferred offender.<sup>75</sup> Framework Decision 2008/909/JHA,<sup>76</sup> which has recently been relied upon by the Supreme Court of the UK,<sup>77</sup> expressly provides that:

This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision should be interpreted as prohibiting refusal to execute a decision when there are objective reasons to believe that the sentence was imposed for the purpose of punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced on any one of those grounds.<sup>78</sup>

Framework Decision 2008/909/JHA also imposes an obligation on EU member states to respect rights such as freedom of movement<sup>79</sup> and other fundamental rights.<sup>80</sup> Once the offender has been transferred to the UK, he or she is protected under UK legislation and in particular the Human Rights Act, 1998 and UK's international human rights obligations. It should be recalled

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<sup>72</sup> See for example *Lai Hin Cheong v Long-Term Prison Sentences Review Board* 2008 WL 4262510 (CFI), [2008] HKEC 1701; and *Ng King Tat Philip v Post Release Supervision Board* 2010 WL 2214275 (CFI), [2010] HKEC 1306.

<sup>73</sup> Art 8(1). See also art 14(1) of agreement with Morocco (n 4).

<sup>74</sup> Agreement between the UK and Rwanda art 9 (n 4).

<sup>75</sup> Art 10(1).

<sup>76</sup> Council Framework Decision (n 8) 27.

<sup>77</sup> *HH v Deputy Prosecutor of the Italian Republic, Genoa*; *PH v Deputy Prosecutor of the Italian Republic, Genoa*; *F-K v Polish Judicial Authority* [2012] UKSC 25, (2012) HRLR 25, para 105.

<sup>78</sup> Preamble para 13.

<sup>79</sup> Preamble para 15.

<sup>80</sup> Art 3(4).

that the Human Rights Act has no extraterritorial application.<sup>81</sup> This means that UK citizens imprisoned abroad are not protected by UK human rights law.

#### 4.1. The right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment

The right to freedom from torture, inhuman and degrading treatment or punishment is provided for in the UK Human Rights Act which transforms the European Convention on Human Rights into national law.<sup>82</sup> Further, the UK is also party to the International Covenant on Civil and Political Rights<sup>83</sup> and to UN Convention against Torture<sup>84</sup> which both guarantee this freedom through relevant provisions. Moreover, *ex parte Pinochet Ugarte No. 3*<sup>85</sup> is clear that the prohibition against torture has achieved the status of *jus cogens*, that is a norm of supreme recognition and importance for the international legal system.

The UK also has an obligation to prevent torture and inhuman and degrading treatment or punishment as a consequence of its recognition of the jurisdiction of UN human rights bodies and the European Court of Human Rights. These entities have developed enormously rich jurisprudence on the recognition, promotion and protection of the right to freedom from torture or inhuman and degrading treatment or punishment, especially in the context of deportation and expulsion of non-nationals.<sup>86</sup> The question of the relationship between the enforcement of a transferred sentence and the right to freedom from inhuman and degrading treatment or punishment has emerged in cases where offenders have been transferred to serve their sentences in the UK.

In *Regina v Secretary of State for the Home Department*<sup>87</sup> the applicant was sentenced to 12 years' imprisonment and one day in Spain for introducing counterfeit currency. The Spanish court, when imposing sentence had stated that it would recommend to the government for the applicant's sentence to be reduced to six years' imprisonment and one day. Before the sentence was reduced the applicant was transferred to the UK to serve his sentence and because the UK did not convert the applicant's sentence, the adopted sentence was 10 years' imprisonment. The applicant argued, and the Court agreed with him, that had he been sentenced in the UK for a similar offence, he would have been sentenced to between four and five years' imprisonment. He argued, *inter alia*, that 'a term of 10 years for the particular offence was wholly disproportionate to the gravity of the offence and constituted a cruel or unusual punishment contrary to the Bill of Rights 1688.'<sup>88</sup> In dismissing the applicant's argument, the Court held that:

[T]his punishment is and remains a punishment imposed by a Spanish court, not subject to the Bill of Rights 1688, and, secondly, the punishment after adaptation comes within

<sup>81</sup> See *R (Smith) v Secretary of State for Defence* [2010] UKSC 29.

<sup>82</sup> David Feldman (ed), *Oxford Principles of English Law: English Public Law* (2nd edition, OUP 2009) 390-97.

<sup>83</sup> See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

<sup>84</sup> See UN Committee Against Torture, 'General Comment No 2' (24 January 2008) CAT/C/GC/2.

<sup>85</sup> *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147.

<sup>86</sup> See David Weissbrodt and Isabel Hörtrreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison With the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 Buffalo Human Rights Law Review 1.

<sup>87</sup> *Regina v Secretary of State For The Home Department* [1988] 2 WLR 236.

<sup>88</sup> *ibid* 241.

the statutory maximum laid down by Parliament in respect of this type of offence, so it cannot in English law be regarded as cruel and unusual.<sup>89</sup>

In the above ruling two points are made by the Court. Firstly, because of the fact that the punishment had been determined and imposed by a Spanish court, it could not thereafter be subjected to the Bill of Rights, 1688. Secondly, because similar punishment is allowed by a piece of legislation passed by the UK Parliament, it cannot be regarded as cruel and unusual. One has to recall that the Bill of Rights of 1688 prohibited the imposition of cruel and unusual punishment.<sup>90</sup> Technically speaking, the punishment in question had been imposed by a Spanish court but there was room for arguing that although the initial punishment had been imposed by a Spanish court, the adopted sentence had been arrived at as a result of an act of the Secretary of State and therefore could be challenged as an unusual punishment. But in the light of the enactment by the UK Parliament in 1998 of the Human Rights Act, the correctness or otherwise of that argument or the Court's reasoning is now moot.

The Court's reasoning that the fact that the sentence in question was consistent with an Act of Parliament meant that it could not be cruel and unusual should also be understood against the background that the decision was handed down 10 years before the Human Rights Act was enacted. However, in the light of the jurisprudence emanating from the European Court of Human Rights and from relevant international human rights treaty bodies such as the Human Rights Committee and the Committee against Torture, specifically on the question that the right not to be subjected to cruel and unusual punishment is an absolute right, such a conclusion cannot be sustained today.

On appeal to the House of Lords in *Regina v Secretary of State for the Home Department, Ex parte Read*<sup>91</sup> the prisoner's lawyer argued, *inter alia*, that:

[A]rticle 10 [of the Convention on the Transfer of Sentenced Persons] must be read in the context of all the relevant provisions of the Convention, including article 9.1 and article 11; the context also includes the other multilateral conventions by which the Council of Europe member states are bound (as paragraph 3 of the explanatory report recognises), and in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms, since plainly the drafters of the Convention did not intend to authorise or require the enforcement of foreign sentences in a manner which would breach article 3 of the European Human Rights Convention (as interpreted by the European Court of Human Rights...<sup>92</sup>

The respondent argued that 'the Bill of Rights is itself a statute with at least equivalent status to any other statute, and the compatibility of any sentence with the law of England has therefore to be judged in the light of the statutory prohibition against cruel and unusual punishments'.<sup>93</sup> The House of Lords held that:

The international arrangement under which the present prisoner's transfer from Spain to the United Kingdom was effected are contained in the Convention on the Transfer of Sentenced Persons 1983 ..., and it is on the provisions of the Convention that the outcome of this appeal turns. But it may be important to bear in mind, in considering the effect of those provisions, that the primary policy objective of the United Kingdom statute, which is equally reflected in the preamble to the Convention, is the obviously

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<sup>89</sup> *ibid* 247.

<sup>90</sup> For the drafting history of the Bill of Rights of 1688 see Feldman (n 82) 41-42.

<sup>91</sup> *Regina* [1989] AC 1014.

<sup>92</sup> *ibid* 1038.

<sup>93</sup> *ibid* 1039.

humane and desirable one of enabling persons sentenced for crimes committed abroad to serve out their sentences within their own society, which, irrespective of the length of sentence, will almost always mitigate the rigour of the punishment inflicted.<sup>94</sup>

There is no doubt that the Convention on the Transfer of Sentenced Persons and the national legislation in the UK indeed aim at ensuring that prisoners are transferred to serve their sentences in the UK and that if such a transfer is successful, they will not face the well-known problems that foreign national offenders face in prisons. However, the House of Lords' ruling above does not directly address the question of whether there could be circumstances in which the offender's transferred sentence might be regarded as cruel and inhumane. It has been argued that '[i]t is a recognised principle of justice that penalties should not be excessive, as acknowledged in the Bill of Rights of 1689.'<sup>95</sup>

The question of whether an excessive transferred sentence violated Article 3 of the European Convention on Human Rights was raised in *The Queen on the Application of: Steven Willcox v Secretary of State for Justice*.<sup>96</sup> The prisoner had been transferred from Thailand where he had been sentenced to 33 years and six months' imprisonment for possessing a small amount of drugs. After his transfer to England his sentence was reduced by the Thai authorities to 29 years and three months' imprisonment. If he had been convicted for a similar offence in England he would have been sentenced to between four and five years. His lawyer argued that 'the Thai sentence here is four to five times as great as that which would be imposed by the UK, and that such a disproportion is so gross as to amount to a breach of Article 3.'<sup>97</sup>

The Court stated that: 'there is no ECtHR decision that a determinate sentence imposed by a contracting or non-contracting state breached Article 3 simply because it was grossly disproportionate by virtue of its length,' and that: 'a sentence imposed by a contracting state could amount to a breach of Article 3, for example where a life sentence was imposed on a juvenile, or a life sentence from which there was no chance of release before death whatever the circumstances'.<sup>98</sup> The Court added that:

The circumstances will be rare...in which the length of a transferred sentence by itself could give rise to a problem of such gross disproportion as to amount to a breach of Article 3, because the UK maximum for the equivalent offence applies to limit the extent of the term to be served whatever the sentence imposed in the transferring country. It does not seem...of any value to consider whether a determinate sentence is or may be so grossly disproportionate as to breach Article 3 simply by virtue of its length. That is because there will always be other factors present to affect the judgment. These will include the nature of the offence, the rationale for the sentencing framework, as well as the specific way in which the offence was committed, and the personal circumstances of the offender.<sup>99</sup>

The Court concluded that:

[T]he question of whether Article 3 creates absolute standards, or whether actions which would breach Article 3 if done by the UK might not do so if done by another state, is a lively one ... The question is always whether the act done by the UK breaches Article 3, rather than whether the act of the foreign state did or would. If the act of the foreign state itself

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<sup>94</sup> *ibid* 1048.

<sup>95</sup> Feldman (n 82) 726, para 16.22.

<sup>96</sup> *Willcox v Secretary* [2009] EWHC 1483 (Admin).

<sup>97</sup> *ibid* para 57.

<sup>98</sup> *ibid* para 59.

<sup>99</sup> *ibid* para 60.

would not breach Article 3, the answer in relation to the UK is of course anyway clear. I take the view that, if the act of the foreign state however did or would breach Article 3 were it a state party to the ECHR, the UK may or may not breach Article 3 in the way its own act relates to it, depending on the nature of and justification for the acts and how the two acts inter-relate. Transferring a prisoner into the UK at his request to serve a term which he would otherwise have to serve abroad, and which would breach Article 3 if imposed here, is not the same nature or quality of act as sentencing someone in that way in the first place nor the same as removing someone to serve a such a sentence abroad. There may be differences depending on what gives rise to the asserted cruelty, inhumanity or degradation. I am prepared again to assume that the UK would breach Article 3 were it to impose the same sentence in the same circumstances. But it would be quite unreal to approach the question of whether continued enforcement on transfer into the UK would breach Article 3 on that basis. That is simply not the context in which the issue arises.<sup>100</sup>

The above ruling shows that courts in the UK are increasingly paying attention to the human rights implications of adopted sentences. This is attributable to the increasing human rights obligations in terms of the Human Rights Act also in terms of the UK's obligations in international law especially in terms of the European Convention on Human Rights. It has been argued that: '[a]t the most fundamental level, sentences created by Parliament or imposed by the courts must not infringe Article 3 of the ECHR...'.<sup>101</sup> It is argued that in the light of the absolute prohibition against inhuman or degrading treatment or punishment in the European Convention on Human Rights (as incorporated by the Human Rights Act), the International Covenant on Civil and Political Rights and the Convention against Torture, courts can invoke a human rights approach to ensure that the Convention on the Transfer of Sentenced Persons is not understood as permitting the enforcement of excessive sentences.

In this author's view, the offender's right not to be subjected to inhuman or degrading treatment or punishment has to be protected in all circumstances irrespective of whether or not s/he is a transferred offender. His/her right not to be subjected to such treatment or punishment is independent of the policy considerations that the executive might want to achieve in ensuring that as many people as possible are transferred to serve their sentences in the UK. Politicians in the UK have also realised that offenders transferred from Thailand serve lengthy prison terms for relatively minor offences and have called upon the UK government to have negotiations with the Thai authorities and have the transfer agreement amended to resolve that issue.<sup>102</sup>

#### 4.2. The right to family life

It should be recalled, as mentioned earlier, that both the House of Lords and the European Court of Human Rights have expressly held that the Convention on the Transfer of Sentenced Persons does not confer any specific rights on the offender. Jurisprudence emanating from courts in the UK shows that one of the issues that have arisen in the context of prisoner transfer

<sup>100</sup> *ibid* para 78.

<sup>101</sup> Feldman (n 82) 1193, para 28.05.

<sup>102</sup> See House of Lords, Hansard text of 23 May 2012: Column WA80 where Lord Avebury asked 'her Majesty's Government what progress they have made in including provision for reduced sentences for prisoners transferred to the United Kingdom in a renegotiated prisoner transfer agreement with Thailand; and whether they will ensure that the new agreement will apply to prisoners already transferred.' The Minister of State, Ministry of Justice Lord McNally, replied that the '[p]roposed amendments to the prisoner transfer agreement with Thailand have been presented to the Thai authorities for their consideration. We have not yet had a response to these proposals. Any changes to the prisoner transfer agreement will require the consent of the Thai authorities. The position of those prisoners already transferred to the UK will be considered in any future negotiations.'

is the right to family life. As Easton observes, '[t]he right to family life has arisen in relation to a range of issues in prison including allocation, temporary releases, visits and the right to marry and have children.'<sup>103</sup> This right is provided for under the European Convention on Human Rights,<sup>104</sup> and also in the International Covenant on Civil and Political Rights.<sup>105</sup> One has to remember that the right to family life has been a contentious right in cases of deportation or expulsion of foreign nationals from the UK.<sup>106</sup> In the context of prisoner transfer, courts have held that the possibility of the offender being transferred back to the UK to serve his sentence could enable him to enjoy his right to family life.<sup>107</sup> A court will not order the UK authorities to transfer an offender to serve his/her sentence in his/her country of domicile simply because his/her continued imprisonment in the UK leads to a violation of his/her right to a family life.

In *The Queen on the Application of Henry Max Shabeen v The Secretary of State for Justice*<sup>108</sup> the applicant, a British citizen, who lived in The Netherlands with his wife and children, was convicted of drug trafficking and sentenced to 16 years' imprisonment in the UK. Before his conviction he had lived in The Netherlands for 15 years. The applicant requested to be transferred to The Netherlands to serve his sentence and the Dutch authorities wrote to the UK authorities 'saying that they were willing to accept the claimant on transfer, and that they intended to convert the sentence under Dutch law upon transfer.'<sup>109</sup>

The Secretary of State refused the applicant's request for the transfer on the ground that he would have his sentence significantly reduced by the Dutch authorities and could not be refused to enter the UK even if he chose to come back at a time when he should have been in prison had he served his sentence in the UK. The Secretary of State stated that: '[i]n reaching his decision to refuse [the applicant's] application [he] gave full consideration to [the applicant's] family and residency links with The Netherlands but concluded that [his] right to return to the UK at any time following his release from custody in The Netherlands outweighed these considerations.'<sup>110</sup>

The applicant's lawyer argued that: 'the maintenance of family contacts is an essential aim of the prison system' and that his imprisonment in the UK meant that he had very limited time to see his wife and children every year when they visited him and that refusing his request to be transferred to The Netherlands meant that 'he will be unable to lead any semblance of normal family life for the next 5–8 years.'<sup>111</sup> The Court held that the Secretary of State was justified in refusing the applicant's request to the transfer because of, *inter alia*, the fact that there was a risk that he could re-offend in the UK. The Court concluded that:

In assessing the proportionality of the decision, I have considered the extent of the interference with the claimant's right to respect for his family life that will result from the

<sup>103</sup> Susan Easton, *Prisoners' Rights: Principles and Practice* (Routledge 2011) 157.

<sup>104</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

<sup>105</sup> ICCPR (n 83) art 23.

<sup>106</sup> See, for example, 'Theresa May criticises judges for 'ignoring' deportation law' (London, 17 February 2013) at <[www.bbc.co.uk/news/uk-21489072](http://www.bbc.co.uk/news/uk-21489072)> accessed 29 December 2013 where it was reported that figures from Home Office suggested that between 2011 and 2012, '177 foreign criminals avoided deportation...after convincing judges of their right to a family life in Britain' prompting the Home Secretary, Mrs May, to accuse some judges 'of making the UK more dangerous by ignoring rules aimed at deporting more foreign criminals.'

<sup>107</sup> *HH v Deputy Prosecutor of the Italian Republic, Genoa*; *PH v Deputy Prosecutor of the Italian Republic, Genoa*; *F-K v Polish Judicial Authority* [2012] UKSC 25, [2012] HRLR 25, para 105; *Glen Howell v Deputy Attorney General Court of Appeal of Douai France* [2012] EWHC 150 (Admin) para 30.

<sup>108</sup> *Shabeen* [2008] EWHC 1195 (Admin).

<sup>109</sup> *ibid* para 5.

<sup>110</sup> *ibid* para 8.

<sup>111</sup> *ibid* para 18.



refusal to consent to the transfer. I fully accept that serving prisoners have Article 8 rights. But their rights to see members of their families are inevitably and seriously curtailed simply by virtue of their being deprived of their liberty. A decision not to transfer a prisoner to a prison where he will be nearer to his family must be viewed in that light. Even if a prisoner is transferred to a prison closer to his family, he will inevitably only have exiguous rights to see them.<sup>112</sup>

The Court rightly concludes that prisoners have a right to family life but that this right is not absolute. One should not lose sight of the fact that the main reason why the Secretary of State refused to transfer the applicant to The Netherlands is that his sentence could be converted by the Dutch authorities resulting in his early release and then possibly, returning to the UK a free man at a time he should have been in prison had he served his sentence in the UK. Had the applicant been a foreign national, like his co-accused, his transfer request would have probably been allowed because of the fact the UK would have barred him from returning to the UK for a certain period of time. This case demonstrates that although the right to a family life is important, it is just one of the factors that have to be considered in determining whether or not a transfer request should be allowed. As the Court rightly observed, ‘neither the Convention nor the 1984 Act gives any guidance as to what the Secretary of State should take into account in determining whether or not to consent to a transfer of a prisoner.’<sup>113</sup>

#### 4.3. The right to a fair trial and continued detention in the UK

The right to a fair trial is guaranteed in Article 6 of the European Convention on Human Rights<sup>114</sup> and in the International Covenant on Civil and Political Rights.<sup>115</sup> In *Drozd and Janousek v France and Spain*,<sup>116</sup> the European Court of Human Rights held that: ‘[t]he Contracting States are... obliged to refuse their co-operation [in enforcing a sentence] if it emerges that the conviction is the result of a flagrant denial of justice.’<sup>117</sup> Although that was a decision of the ECtHR, the impact of the jurisprudence of that court on the UK courts’ human rights jurisprudence has been steadily increasing.<sup>118</sup>

Since the *Drozd and Janousek* decision, many transferred offenders have sought to challenge their continued imprisonment in the UK as a violation of their right to liberty on the basis that the criminal proceedings leading to their convictions were unfair. The transferred offenders have largely not succeeded in convincing courts that indeed their trials amounted to a flagrant denial of justice. In *The Queen on the Application of: Steven Willcox v Secretary of State for Justice* the applicant argued, *inter alia*, that his trial had been a flagrant denial of justice because Thai law created an irrebuttable presumption of guilt with respect to the offence of which the prisoner had been convicted and that the prisoner had not been represented at sentencing. The Court held that:

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<sup>112</sup> *ibid* para 40.

<sup>113</sup> *ibid* para 16.

<sup>114</sup> For detailed and recent discussion of the jurisprudence of the European Court of Human Rights on the right to a fair trial see Pinar Ölçer, ‘The European Court of Human Rights: The Fair Trial Analysis under Article 6 of the European Convention of Human Rights’ in Stephen C Thaman (ed), *Exclusionary Rules in Comparative Law* (Springer 2013) 371-399; Feldman (n 82) 573-591.

<sup>115</sup> ECHR art 14.

<sup>116</sup> *Drozd and Janousek v France and Spain* App No 12747/87 (ECtHR, 26 June 1992).

<sup>117</sup> *ibid* para 110.

<sup>118</sup> See Steven Greer, ‘The Legal and Constitutional Impact of the European Convention on Human Rights in the United Kingdom’ in Rainer Arnold (ed), *The Universalism of Human Rights, Ius Gentium: Comparative Perspectives on Law and Justice* (Springer 2013) 189-207; Jim Murdoch, ‘The Binding Effect of the ECHR in the United Kingdom – Views from Scotland’ in Arnold, *ibid*, 209-221.

[T]here comes a point at which the UK authorities must decline to exercise the power to make a request under the PTA for the transfer of someone who on the face of it falls within its terms, because in reality the sentence is not the sentence of a competent court. The UK could not continue to enforce it in the UK nor, conformably with the ECHR, lawfully hold the individual in detention. It could not dignify the foreign process as a conviction or consequential sentence by a competent court. An example would be a sentence following a show trial, albeit for what on its face could be a conventional criminal offence, but with the result pre-determined by political intervention. It is necessary for the UK as receiving state to ask before transfer whether there was, in substance as well as in form, a conviction before a competent criminal court for the transfer to continued enforcement of sentence to be lawful. I would expect these instances to be obvious and usually to be known to the diplomatic representatives of the UK at the time of trial.<sup>119</sup>

One has to recall that in this case the prisoner had categorically stated that his consent to be transferred to the UK was not voluntary as he had consented in order to avoid the 'terrible' prison conditions in which he was being held.<sup>120</sup> The Court also assumes that the UK representatives abroad are always abreast with all the circumstances under which the trials of UK citizens are conducted. The reality is that some people would rather not refuse their transfer on the ground that their trial was unfair, after having exhausted all the available avenues of appeal or review, and challenge their transfer after they have arrived in the UK in the hope that the UK courts will ensure that justice is done.

As the Court rightly observed, the fact that an offender has consented to be transferred to the UK does not mean that he forfeits his right to challenge his continued imprisonment on the basis that his trial was a flagrant denial of justice.<sup>121</sup> On the question of whether the UK courts could, on the basis on *Drozd* release an offender convicted in a foreign country where there was a flagrant denial of justice, the Court added that:

The solution to this dilemma cannot readily be found either in the short unreasoned obiter sentence of the ECtHR in *Drozd and Janousek*, requiring the receiving state not to co-operate with transfers. It did not have to face the problem arising here. It did not have to deal with the problem that, on the basis of his arguments, this claimant should have remained in custody and in very much worse conditions than those from which he has benefited on transfer. Nor did it have to deal with the problem that the consequence of his success in persuading the UK Government to co-operate with Thailand, to his own advantage and in a way which he now says it should not have done, is that others may well be left to languish in Thailand and elsewhere, after trials and for terms and in conditions which could infringe the very principles his arguments would uphold for him... The application of what the ECtHR said in these circumstances could thus be to achieve the very opposite of what it thought would be achieved in *Drozd and Janousek*. It did not have to deal with the way in which its obiter comment on the obligation to refuse co-operation could require the UK to undermine the intent of its international agreements as the alternative, for what probable short term difference it would make, until the transferring states refused their continued co-operation under the PTA, as they are entitled to do. The ECtHR cannot have envisaged that the obligation not to co-operate should mean that transfers should be agreed on one basis and then given effect on another, in a way which would undermine the good faith of the requesting state.

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<sup>119</sup> *Willcox v Secretary* [2009] EWHC 1483 (Admin) para 32.

<sup>120</sup> *ibid* para 21.

<sup>121</sup> *ibid* para 37.

These very real problems were simply not before it and were therefore understandably not addressed.<sup>122</sup>

The Court seems to put a lot of emphasis on what it considered to be the purpose of the prisoner transfer agreement. It held that: '[t]he only purpose of the PTA is to enable the prisoner to serve the foreign term at home. The PTA is designed not to create an appeal against conviction or sentence after transfer, with UK/ECHR standards applying.'<sup>123</sup> One has to recall that the purpose of the prisoner transfer agreement between the UK and Thailand is not just to return offenders to the UK to serve their sentences. The preamble to the agreement clearly states that the two countries signed that agreement with the desire 'to facilitate the successful reintegration of the offenders into society.' For an offender to be reintegrated into society, s/he has to be rehabilitated first. An offender who thinks that his/her continued imprisonment is unlawful may find it unattractive to take part in rehabilitation programmes. Firstly, s/he thinks that s/he should not be in prison. Related to the above, from a policy point of view, if Thailand gets to know that offenders transferred to the UK end up being released on the ground that their continued detention was a violation of their right to liberty because of the fact that their trial had flagrantly violated standards of fairness, it might end up refusing to consent to the transfer of offenders to the UK.

But that does not mean that 'a one-size fits all' approach should be applicable with regards to all offenders transferred from Thailand. Each case should be examined and decided on its own individual facts and if there should be evidence that indeed the prisoner's trial had flagrantly violated standards of fairness, then it should be presumed that a UK court would have to make that ruling because one person's human rights should not have to be sacrificed for the hope only, of maintaining the prisoner transfer arrangement. A clear message has to be sent out to other countries, including Thailand, that the UK will not just rubberstamp their courts' convictions. Subsequent cases have not cast doubt on the ECtHR decision in *Drozd and Janousek* and have indeed upheld the reasoning in that case.

In *Samantha Oroborator v Governor of HMP Holloway and Secretary of State for Justice*<sup>124</sup> it was held that:

[H]er claim that she has been detained in the UK unlawfully cannot succeed unless it is shown that she suffered a *flagrant* denial of justice in Laos. For the reasons that we have given, she has not been able to satisfy this high test. The test is rightly set very high. That is because it is important not to jeopardise or undermine the treaties for the repatriation of prisoners which the UK now has with many countries, so that those who are convicted abroad can serve their sentences here. If persons who have been convicted and sentenced abroad and have procured their transfer to the UK were easily able to obtain their liberty by challenging the fairness of their convictions, there would be a grave danger that these important treaties would be set at naught. That would be highly regrettable.<sup>125</sup>

UK courts' reluctance to hold that the transferred offender's trial amounted to a flagrant denial of justice that justified termination of continued imprisonment in the UK may be attributed to the fact that the ECtHR *Drozd and Janousek* test that the trial should amount to a flagrant denial of justice has not been met by the applicants. However, that does not mean that there are no examples, though in another context, in which a conclusion has been reached that the offender's trial amounted to or would amount to a flagrant denial of justice.

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<sup>122</sup> *ibid* para 69.

<sup>123</sup> *ibid* para 68.

<sup>124</sup> *Oroborator* [2010] EWHC 58 (Admin).

<sup>125</sup> *ibid* para 140.

In *Stoichkov v Bulgaria*, the European Court of Human Rights held that: ‘criminal proceedings which have been held *in absentia* and whose re-opening has been subsequently refused, without any indication that the accused has waived his or her right to be present during the trial, may fairly be described as “manifestly contrary to the provisions of Article 6 or the principles embodied therein”’.<sup>126</sup>

In *Omar Othman Aka Abu Qatada v Secretary of State for the Home Department*<sup>127</sup> it was held that deporting the applicant to Jordan where ‘there was a real risk’ that evidence obtained by torture would be admitted at his retrial posed ‘a real risk that he would be subject to a flagrant denial of justice.’<sup>128</sup> The above examples show that indeed there could be cases where a trial could be found to have been a flagrant denial of justice and that if a court found that the trial was indeed a flagrant denial of justice, the offender’s continued imprisonment in the UK would be a violation of his right to liberty.

## 5. Extradition and transfer of offenders

Another issue that has come-up in the context of prisoner transfer is the relationship between extraditions on the one hand, and on the other, offender transfers. The issue of extraditing a suspect from one European country to another is less of a problem because of the existence of several instruments regulating extradition.<sup>129</sup> Courts in the UK have emphasised the importance of extradition in fighting crime.<sup>130</sup> Unlike extradition which is always almost used to ensure that suspects are returned to stand trial for the offences they allegedly committed, offender transfer is concerned with repatriating people who have already been convicted of offences and are returned to their countries to serve out the remainder of their sentences. The existence of a transfer of offender treaty or arrangement between the extraditing and the requesting country could be a factor to be considered in deciding whether or not to extradite a suspect or for the suspect to agree to surrender voluntarily to the requesting country to stand trial. This is important in the light of the fact that jurisprudence from the UK courts and the European Court of Human Rights is clear that extradition shall not take place if there are reasons to believe that the offender could be sentenced to a punishment that amounts to cruel or degrading treatment.<sup>131</sup>

The issue of extradition becomes critical in situations where the prison conditions of the administering state are below internationally acceptable standards. This is an issue that has been raised by the Court of Justice of the European Community member states should not return people to countries where there is a real risk of being subjected to conditions of detention that amount to inhuman or degrading treatment.<sup>132</sup>

<sup>126</sup> *Stoichkov v Bulgaria* App No 9808/02 (ECtHR, 24 March 2005), para 56.

<sup>127</sup> *Omar Othman Aka Abu Qatada v Secretary of State for the Home Department* [2013] EWCA Civ 277.

<sup>128</sup> *ibid* para 58.

<sup>129</sup> See generally Ariadna Ripoll Servent, ‘The European Parliament and the Returns Directive: The End of Radical Contestation; The Start of Consensual Constraints’ in Bridget Anderson, Matthew Gibney and Emanuela Paoletti (eds), *The Social, Political and Historical Contours of Deportation: Immigrants and Minorities, Politics and Policy* (Springer 2013) 43-58.

<sup>130</sup> See *Chalitovas v Lithuania* [2006] EWHC 1978 (Admin) and the cases discussed therein.

<sup>131</sup> See Feldman (n 82) 390 para 8.31, and 393 para 8.39.

<sup>132</sup> In *Joined Cases C 411/10 and C 493/10 NS (C 411/10) v Secretary of State for the Home Department and ME (C 493/10) and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011, the Court held that ‘Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the “Member State responsible” ...where they cannot be unaware that systemic deficiencies in...the reception

In *McKinnon v Government of the United States of America and another*<sup>133</sup> the appellant, a British national, was wanted in the United States of America to stand trial for hacking into several government computers. The possibility of his transfer to the UK to serve the remainder of his sentence, if convicted and sentenced in the US, was highlighted as one of the issues he should consider for not opposing his extradition. A representative of the US Department of Justice informed appellant that:

[H]e was authorised to offer the appellant a deal in return for not contesting extradition and for agreeing to plead guilty to two of the counts laid against him...On this basis it was likely that a sentence of 3–4 years (more precisely 37–46 months), probably at the shorter end of that bracket, would be passed and that after serving 6–12 months in the US, the appellant would be repatriated to complete his sentence in the UK. In this event his release date would be determined by reference to the UK’s remission rules namely, in the case of a sentence not exceeding four years, release at the discretion of the parole board after serving half the nominal sentence, release as of right at the two-thirds point. On that basis, he might serve a total of only some eighteen months to two years.<sup>134</sup>

During the plea agreement negotiations, the applicant was informed that if he did not oppose his extradition, then ‘the prosecutor would recommend to the section of the US Department of Justice responsible for administering the Convention on the Transfer of Sentenced Persons that the appellant be transferred and this recommendation too was in practice likely to be accepted.’<sup>135</sup> The applicant understood that statement to mean that if he had opposed his extradition and later extradited, the prosecution would not support his repatriation to the UK to serve his sentence.<sup>136</sup> However, later an official from the US Attorney General’s Office presented an affidavit to the effect that his office would ‘not oppose any prisoner transfer application that may be made by Gary McKinnon (if extradited and convicted) based, in whole or in part, on his refusal to waive or consent to extradition from the United Kingdom’.<sup>137</sup> In the light of the above assurance,<sup>138</sup> the House of Lords held that:

By the same token that a plea of guilty routinely attracts a lesser sentence, understandably it is likely also to attract a more sympathetic response to a repatriation request where, as here, that involves a greatly enhanced prospect of early release. After all, the extent of remission (the critical consideration in a request for repatriation from the US to the UK) affects the length of the prison sentence to be served no less than the nominal term itself.<sup>139</sup>

The above decision shows the importance of the existence of a transfer of offenders agreement or arrangement in extradition cases. The possibility of the offender’s transfer to his/her country to serve his/her sentence could be invoked by the requesting country as a ‘carrot’ if the suspect does not oppose his extradition. In such cases the repatriation guarantee incentive could influence the suspect’s decision to either oppose or not oppose extradition. Courts will also consider the possibility of the person’s transfer as one of the factors in approving their extradition.

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conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.<sup>2</sup>

<sup>133</sup> *McKinnon* [2008] UKHL 59.

<sup>134</sup> *ibid* para 18.

<sup>135</sup> *ibid* para 20.

<sup>136</sup> *ibid* paras 20-21.

<sup>137</sup> *ibid* para 23.

<sup>138</sup> *ibid* para 40.

<sup>139</sup> *ibid* para 36.

In *Kerry Shanks or Howes v Her Majesty's Advocate*<sup>140</sup> the appellant opposed her extradition to the USA on amongst other grounds that in the light of her mental state her extradition would be unjust and oppressive contrary to the Human Rights Act. The Court, in dismissing her application, held, *inter alia*, that in assessing the extent of risk of self-harm if transferred to the United States, 'it is necessary to have regard to the possibility that the appellant may be acquitted, or given a non-custodial sentence or a short sentence of imprisonment, or transferred to Scotland to serve any sentence here.'<sup>141</sup>

In *Glen Howell v Deputy Attorney General Court of Appeal of Douai France*<sup>142</sup> the applicant opposed his extradition to France to serve a custodial sentence that had been imposed by a French court. In dismissing his application that his extradition would violate his right to family life, the Court held, *inter alia*, that: '[t]here is no indication... that the French authorities will refuse to consider'<sup>143</sup> the request by the UK authorities for the offender to be transferred to the UK to serve his sentence and consequently be in close proximity with his family members. Likewise, in *HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority*,<sup>144</sup> in rejecting HH and PH's applications against their extradition on the ground that it would violate their right to family life, the Supreme Court, per Lord Mance, held that:

In reaching my decision relating to HH and PH, I am—though this is not essential to my conclusion—comforted by the hope that it may be possible for both parents to be returned speedily to the UK to serve here the balances of their sentences under Council Framework Decision 2008/909/JHA of November 27, 2008. The Court was informed that this Framework Decision has now been transposed into Italian law. Mr Perry QC's instructions were that, under the previous regime of the Council of Europe Convention on the Transfer of Sentenced Persons of March 21, 1983, repatriation from Italy took 8 to 12 months, although statistics for all repatriations from all Council of Europe countries show a longer average period of around 18 months. Whichever figure is taken, it is to be hoped that much speedier results can be achieved under the Framework Decision, the purpose of which is to limit the rupture of environmental and family links resulting from imprisonment abroad.<sup>145</sup>

Of course courts will not likely allow the extradition of a person to a country to serve his/her sentence if s/he has been detained in a UK prison while awaiting extradition for the time that is equal to the sentence he would have served had s/he been extradited.<sup>146</sup> It should be recalled that the offender does not have the right to be transferred and the European Court of Human Rights in *Plepi v Albania and Greece*<sup>147</sup> has emphasised the fact that the Convention on the Transfer of Sentenced Persons confines itself to 'providing the inter-state procedural framework for the transfer of sentenced persons and do[es] not generate any individual substantive rights *per se*.'<sup>148</sup> The Court concluded that the Convention does not 'contain an obligation on the signatory states to comply with a request for transfer.'<sup>149</sup>

<sup>140</sup> *Kerry Shanks or Howes v Her Majesty's Advocate* [2009] HCJAC 94.

<sup>141</sup> *ibid* para 14.

<sup>142</sup> *Glen Howell v Deputy Attorney General Court of Appeal of Douai France* [2012] EWHC 150 (Admin).

<sup>143</sup> *ibid* para 30.

<sup>144</sup> *HH v Deputy Prosecutor of the Italian Republic, Genoa; PH v Deputy Prosecutor of the Italian Republic, Genoa; F-K v Polish Judicial Authority* [2012] UKSC 25, [2012] HRLR 25.

<sup>145</sup> *ibid* para 105.

<sup>146</sup> *Newman v District Court of Krakow — Poland* [2012] EWHC 2931 (Admin).

<sup>147</sup> *Plepi v Albania and Greece* (n 37).

<sup>148</sup> *ibid* 54.

<sup>149</sup> *ibid*

The Court also reiterated its position that the European Convention on Human Rights ‘does not grant prisoners the right to choose the place of detention.’<sup>150</sup> The above jurisprudence shows the importance that the existence of a prisoner transfer agreement between countries could play in extradition cases. However, it should be recalled that the fact that the offender does not have a right to be transferred, and secondly, that States parties to the transfer treaties cannot be compelled to agree to the offender’s request to the transfer, meaning that even in cases where a person has been extradited on the ground that s/he could be transferred to serve his/her sentence in his/her country of nationality, such a person is not certain that s/he would be transferred.

Plachta gives the example of the Extradition Act of The Netherlands in terms of which a Dutch national could be extradited to stand trial ‘if the Dutch Minister of Justice has good reason to believe that there is a sufficient guarantee that, once sentenced to unconditional custody in the requesting state for the offence for which his extradition has been granted, the offender would be able to serve his sentence in the Netherlands.’<sup>151</sup>

## 6. Conclusion

The UK has signed prisoner transfer agreements with over twenty countries and is a party to multilateral treaties on the transfer of offenders. The author has dealt with the issues that courts in the UK have grappled with regarding the offenders that have been transferred to the UK and those that have been extradited from the UK. The increasing role of human rights in the transfer of offenders has been discussed. Courts are increasingly called upon to deal with issues of offender transfer from a human rights as opposed to a policy perspective. The article shows that most of the agreements on the transfer of offenders between the UK and other countries emphasise rehabilitation as the objective of the transfer but that courts have not expressly stated that indeed that is the purpose of the transfer. The issue of conversion versus continued enforcement of transferred sentences has resulted into conflicting decisions from different UK courts with some converting the sentences and others emphasising that legislation in the UK does not empower courts to convert transferred sentences.

It has been demonstrated in this article that the correct approach is that UK courts do not have the power to convert transferred sentences. It is recommended that where possible that UK should consider entering into agreements that give it the option of converting sentences in question so that clearly excessive sentences are not adopted, and outcomes of unfair trials abroad maintained after transfer. Another issue that some courts have dealt with relates to the policy considerations on the transfer of offenders to the UK on the one hand and the human rights issues on the other hand. The jurisprudence shows that there is yet to be a case in which an offender has been released after his/her transfer to the UK on the ground that his/her trial was a flagrant denial of justice. One gets the impression that courts are more concerned with ensuring that as many British nationals as possible benefit from the transfer programme. In order not to frustrate that programme, courts require that a trial should have been of such a nature that the prisoner did not get justice at all.

However, human rights issues are slowly but surely taking root in the transfer of offender regime. This is evidenced by the fact that many prisoner transfer agreement include implied human rights such as the right not to be subjected to double jeopardy and the right to access information. Some agreements include express human rights such as the right to freedom from

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<sup>150</sup> *ibid*

<sup>151</sup> Plachta (n 11) 190.

torture. There is also emerging human rights jurisprudence on rights such as freedom from torture, family life and one hopes that this jurisprudence will continue to develop and offer better protection to offenders.