5 SAH
FIVE ST ANDREW'S HILL
+44 (0) 207 332 5400

Rae v USA | ECHR human rights standards can apply to requests from non-contracting states

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Sian Priory

On 5th December 2022, the Administrative Court handed down judgment in the extradition case of ***Rae v USA*** [2022] EWHC 3095 (Admin), and, in doing so, the court addressed and clarified the long-unanswered question of whether or not ECHR standards can apply to non-contacting states in the affirmative. **Sian Priory** discusses the recent judgment and its implications for extradition practitioners.

What was Rae all about?

Mr Rae, represented by 5SAH's **Rebecca Hill**, challenged his extradition to the US, specifically to the state of Texas, on the basis that the prison conditions he would be kept in would not be compatible with his Article 3 rights, the right not to be subjected to inhuman or degrading treatment.

Ms Hill presented the District Judge with expert evidence demonstrating that Mr Rae would be imprisoned in a cell with insufficient space and subjected to extreme heat, factors often forming the basis of such challenges. The District Judge however found the expert evidence to be lacking in specificity in relation to cell space, and the issue of extreme heat sufficiently addressed by an assurance letter drafted by the US authorities setting out their efforts to improve the issue. As such, extradition was ordered.

The Administrative Court would go on to hear arguments about the applicability of accepted domestic standards, notably determined by the oft-cited ECHR decision *Murši? v Croatia* (2017) 65 EHRR 1, in relation to Article 3 to non-contracting states.

How much cell space is enough?

In *Murši?*, the European Court of Human rights addressed the most common Article 3 issue raised in challenge to extradition, overcrowding. In the judgment the Court determined that each prisoner must be accommodated with a minimum personal space of three meters squared. Any less than this establishes a presumption in favour of there being a breach of Article 3, save for where this is "short, occasional and minor." Of course, as a judgment of the European Court, its authority per se extends only so far as contracting states, however explicit consideration had not been given to how these standards might apply in removal cases, at least until the case of *Sanchez-Sanchez v United Kingdom* (Application No. 22854/20, Judgment 3 November 2022) earlier this year.

In *Sanchez-Sanchez*, the Grand Chamber of the Strasbourg Court on the face of it reinforced the relativist approach to Article 3 such that (in this case the prospect of a sentence of life without parole) a failure to meet European standards would not necessarily prevent extradition to non-contracting states such as the USA. Indeed, the Respondents in *Rae* relied heavily on the authority in their resistance to the application of *Murši?* standards regarding overcrowding.

A relativist approach?

The US authorities, represented by David Perry KC, sought to rely upon Sanchez-Sanchez

(App. No. 20863/21) as well as the dicta of Lord Brown in *Wellington v USA* [2008] UKHL 72

> *“Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account.”*

to contend that a relativist approach should be adopted and that the *Murši?* test is not therefore binding. The example given in support of the approach was "slopping out", a practice that may well offend Article 3 standards in the UK, but not in other countries, since the motivation for any particular treatment, and in particular whether it was intended to humiliate or debase, was important.

In *Rae*, the Administrative Court ultimately found that whilst *Sanchez-Sanchez* represents a genuine development in the Strasbourg Court’s case law:

> *"the development is not as fundamental as Mr Perry suggests… Even in that narrow field, the Strasbourg Court took pains to distinguish between substantive requirements (which were applicable even in extra-territorial cases) and procedural requirements (which were not)"*

Indeed the Court considered that there may be a number of impediments to a non-contracting state complying with ECHR procedural safeguards and so:

> *"the practical consequence of imposing such standards as a precondition for extradition would be to turn the espace juridique of the ECHR into a safe haven for fugitives from the justice system of such states."*

So too does the court acknowledge the need for caution in applying substantive requirements universally but note crucially that

> *"it is important not to allow this point to be stretched further than justified by the policy concerns which animated it." In Rae there is no suggestion by the Respondent that the US, or Texas in particular, lack the resources to provide adequate accommodation and to meet the minimum standard determined in Murši? , in fact the evidence before the court suggested that some 87% of prisoners were housed in Murši?-conforming cells. It follows that, even in applying a relativist approach, there is "no convincing reason of principle why accommodation that falls below Article 3 standards because of inadequate personal space in a contracting state should be held not to breach such standards in a case concerning extradition to the US."*

The implications of Rae

Both the legal and political implications of Sanchez were expected to be significant, and Rae marks the Administrative Court's first chance to consider the position in its wake. Whilst the Judgment respects the findings of the Strasbourg Court, it draws a clear distinction between the approach adopted by the Grand Chamber in Sanchez (where procedural protections are concerned), and the protection of substantive Art 3 rights where a finding of breach involves an assessment which is fact-specific and contextual. The authority will undoubtedly go on to bolster challenges of a similar nature.

Sian Priory practices in all areas of extradition and criminal law and has a growing practice in professional discipline and regulatory law. Sian routinely represents Requested Persons in extradition proceedings, from first appearance through to appeal, and in cases where certificates for counsel are granted owing to the complexity or severity of the issues raised.

Rebecca Hill is a leading practitioner in extradition and international crime who has worked at the forefront of this niche area for more than a decade. Rebecca's significant expertise in human rights and European law complements her public law practice in which she represents individuals in challenges against the State and the Government. She regularly acts in cases of the utmost gravity before all levels of Court including the Divisional and Administrative Court and the European Court of Human Rights. Rebecca is ranked in Chambers and Partners as a band 2 leader in the field of Extradition at the London Bar and is also ranked in tier 2 in The Legal 500.