THE CRIMINAL BAR ASSOCIATION

www.criminalbar.com

289-293 High Holborn

London WC1V 7HZ

DX 240 LDE

020 7242 1289

REPRESENTIONS TO THE EXTRADITION REVIEW ON BEHALF OF THE CRIMINAL BAR ASSOCIATION

1. These representations are made to the Review being conducted at the request of the Secretary of State for the Home Department the Right Honourable Theresa May MP by Lord Justice Scott-Baker.

2. The Criminal Bar Association and its members represent both requesting states on behalf of the CPS and requested persons as instructed by solicitors.

3. There are 5 areas that the review seeks submissions on:

- breadth of Secretary of State discretion in an extradition case;
- the operation of the European Arrest Warrant, including the way in which those of its safeguards which are optional have been transposed into UK law;
- whether the forum bar to extradition should be commenced;
- whether the US-UK Extradition Treaty is unbalanced;
- whether requesting states should be required to provide prima facie evidence.

The breadth of Secretary of State's Discretion

4. Extradition law is one of the most highly politicised areas of criminal justice. It is the juncture where international diplomacy intersects with criminal justice and political power. The Secretary of State ("SoS") has very limited input into extradition since the advent of the Extradition Act 2003 ("the Act"). However, there are a number of important functions that the role continues to play and a number of areas in which the

SoS should be removed from the equation in order to allow the UK Courts to act more independently.

The Current Role

5. The SoS plays no part in Part 1 European Arrest Warrant ("EAW") cases and her role is currently restricted in Part 2 cases to the certification of the extradition request[1] and then the actual order for extradition[2].

6. The SoS retains the power to prevent extradition on the grounds of national security[3]. Generally the SoS is not involved in the extradition process and that is a desirable course as it should be for the courts to decide.

7. It is submitted that the certification process is flawed in its application, particularly in reference to parallel immigration proceedings and obligations under the Refugee Convention 1951. The SoS has dual functions in removal cases. In immigration matters it is the SoS decision whether to grant asylum. In extradition proceedings the grant of asylum prevents extradition[4] however, the Act does not give proper provision for the consideration of extant or decided asylum claims, nor is there consideration given to those who have been naturalised.

8. The current position is that extradition proceedings will continue even where a person has been granted asylum or has an application pending. The only way in which the proceedings will be stayed is if a person makes an asylum application within the "required period" which is narrowly defined and effectively penalises people who claim asylum at the point of entry to the UK.

9. The SoS has recently taken to the practice of ordering extradition after lengthy litigation but then delaying the actual extradition pending the decision on asylum. The sensible course of action is for the extradition case to be stayed pending any extant asylum application. This situation has recently been addressed by the Court of

[1] Section 70 of the Act
[2] Section 92
[3] Section 208.
[4] Sections 39 and 121 The District Court in Ostraleka v Dytlow and Dytlow [2009] EWHC 1009 (Admin)

Appeal in R (Chichvarkin and ors) v Secretary of State for the Home Department [2011] EWCA Civ 91 (10 February 2011) where it was stated that extradition proceedings should be stayed pending the outcome of asylum proceedings.

10. The current discretion also ignores those who have already been granted asylum. The Secretary of State should refuse to certify requests where asylum has been given on political or human rights grounds.

11. There is also no need for the SoS to decide the matters currently listed in section 92 of the Act, the courts should determine whether there will be a breach of Article 2 of the European Convention on Human Rights ("ECHR") and whether specialty provisions are in place. There is no need for separate consideration by the SoS.

Case Study

The case of Azerbaijan v AM illustrates the situation perfectly. Mr AM was requested by the government of Azerbaijan in 2010 to face a charge of fraud allegedly committed in 1999. Mr AM was arrested in February 2010 and at the outset explained that he had been granted asylum on the basis that he was a member of the Azerbaijani Democratic Party, and a vocal opponent of the incumbent government. He had been granted asylum in 2000 and then naturalised as a UK citizen in 2007. He was unable to avail himself of the protection of the Refugee Convention because he was now a UK citizen. The basis on which the SoS had given him asylum originally was political, but the SoS still decided to certify the request.

The Extradition proceedings meant that he had to reveal to the Azerbaijan government that he had asylum in the UK and was a UK citizen. Thereby giving his oppressors details of not only his location but activities. In December 2011 the Defendant was discharged from the extradition on the grounds that the extradition was made because of his political views rather than to prosecute him for an offence. However, in spite of the grant of asylum and the subsequent naturalisation the burden of proof was on the Defendant.

12. The present position is untenable. Requested persons are penalised for making a proper and prompt asylum claim and there is no recognition of those persons who have been given protection from a requesting state. In light of the above observations it is proposed that sections 39, 121 and 70 be amended to allow the extradition case to be adjourned pending asylum so that the "required period" in section 39 and 121 is extended to include claiming asylum at any time before arrest of the European Arrest

Warrant (section 39); or before certification (section 121). Section 70 should include provisions which require the SoS to examine the person's immigration and nationality status before certifying the Part 2 request and refusing to certify in cases of political asylum or potential breaches of the ECHR.

THE OPERATION OF THE EUROPEAN ARREST WARRENT

13. The operation of the European Arrest Warrant ("EAW") is covered by a number of different organisations' submissions to the review. There are a number of concerns that the CBA has with regards to the operation of the EAW scheme:

    a. Draconian and inflexible time limits
    b. The provision of legal aid
    c. The disproportionate use of the EAW system for minor offences
    d. As above the interaction with asylum law

Time limits

14. The time limit for appealing a decision to order extradition is 7 days including the day on which judgement is given. This means at most there are 5 working days at most for a solicitor (if represented) to file **and** serve an appeal. If the deadline is missed by even a minute then the Administrative court has no jurisdiction. This system was described by Moses LJ as "draconian" in the case of R (Gary Mann) v City of Westminster Magistrates Court [2010] EWHC 48 (Admin). In the case of unrepresented Appellants there is very little chance that they will be able to file and serve from custody. There are numerous cases where the deadline is missed because of the fault of the prison or delay by the court.

15. The Court also has no discretion to vary the time limit in relation to service. This has led to a mass of litigation in the Administrative Court where the Court will hear an appeal but then has to dismiss the appeal for want of jurisdiction. In practical terms and in fairness to the Appellant the Administrative Court still hears the appeal but is powerless to actually decide on any matters in the case except the lack of jurisdiction. It is submitted that in order to make the appeal process fair the Act should be amended to increase the time limit for the filing and service of Appeals in Part 1 cases

to 14 days and that the Court should be specifically allowed to vary the terms and date of service in the interests of justice.

16. In practice this would achieve the Administrative Court having actual and real jurisdiction in all but the most exceptional cases. The filing of the Appeal prevents Extradition at present because the Serious Organised Crime Agency will not surrender a person whilst there is an extant appeal. The varying of the time limit and giving the court actual and proper discretion would prevent miscarriages of justice such as R (Gary Mann) v City of Westminster Magistrates Court [2010] EWHC 48 (Admin) and prevent the continuous litigation in cases including Mucelli v Government of Albania and Mulai v Deputy Prosecutor in Creteil, France [2009] UKHL 2 and Regional Court in Konin, Poland v Pawel Walerianczyk [2010] EWHC 2149 (Admin).

Legal Aid

17. The means testing for legal aid in Extradition cases is exceptionally badly administered by the Legal Service Commission who can take months to grant legal aid to foreign nationals in custody who are unable to prove their income. This counts for a significant number of requested persons. It is submitted that in extradition cases the means test should be removed. It is submitted that this would actually save money as the requested person would be able to get advice from a lawyer quickly and not have to wait months to have their legal aid application considered. The extradition court will often adjourn cases in the interests of fairness and justice whilst legal aid is considered and there is massive delay as a result. This delay would be removed if the means test were removed. Almost all extradition cases qualify for legal aid eventually but the delay is simply unacceptable.

Proportionality

18. The EAW scheme is frequently used to extradite persons for minor crimes. Poland, Lithuania, Czech Republic and Latvia being are particularly susceptible to this criticism. The most prevalent is Poland. The pattern of cases is familiar to those who practice regularly in extradition. Requested persons wanted for extradition years after sentence for minor crimes: many of the sentences being proportionate and

reasonable as they are suspended, then usually between 5 and 10 years later after the individual has left, the sentence is activated, often for no better reason that the court does not know the location of the person. Then ensues the extradition process which for most Defendants the act of leaving their own country means that their life changes and they do not commit further crimes.

19. In the cases where suspended sentences have been activated it is very difficult to resist extradition, however long the period of time because the usual bar of passage of time[5] in unavailable to those who knew of the conviction unless evidence can be provided of permission to leave or inaction by the requesting court. This evidence is very difficult, if not impossible to obtain unless the requested person has kept records. In practice, especially in Polish cases, it is often possible for experienced lawyers to instruct Polish lawyers who will talk to the requesting court who in most cases are reasonable and once they know of the location of a requested person will re-suspend the sentence an withdraw the EAW, saving time, money and expense. If this process were formalised or expedited the extradition case load would significantly drop.

20. There is also the option in order to remove a large number of old and minor cases that the court could discharge on the basis of pure proportionality. Under the extradition Act 1989 the definition of an extradition offence was that it must be punishable by a sentence of 12 months or greater in the UK. The re-introduction of the test would require an amendment of the European Framework Decision. Fair Trials International in their submission make the point in relation to the implementation of Article 4 and 5 of the Framework Decision and we would support their submissions in that respect.

21. Case study: the following case illustrates both the proportionality and time limits point:

Regional Court in Konin, Poland v Pawel Walerianczyk [2010] EWHC 2149 (Admin). Pawel Walerianczyk was requested by the Regional Court in Konin, Poland by a European Arrest Warrant issued on 28 May 2009 and certified by the Serious Organised Crime Agency on 14 November 2009 to serve a sentence of 1 year 8

[5] Section 14

months imposed on 15 November 2002 for an offence of failing to honour a credit hire agreement for a Sony Playstation 2 to the value of 1409PLN (£304).

Mr Walerianczyk had been sentenced in 2002 and had the sentence suspended for 5 years. He had appeared in the Polish court some 5 times after the suspension of the sentence and the sentence was not activated. In 2008 the court in Poland decided to activate the suspended sentence because compensation had not been paid. No communication of the fact that Mr Walerianczyk who had been a teenager when he committed the offence was required to pay compensation had been made. He left Poland before the sentence was activated and had never been in trouble with the Police since.

District Judge Riddle ordered the Appellant's discharge on the grounds of abuse of process because the Polish Court had not acted with any diligence.

The CPS appealed that decision but failed to serve a sealed notice of appeal within the 7 day period. There then ensued legal argument regarding jurisdiction, which Mr Walerianczyk won, but there was no consideration of any merits because of the jurisdiction problem. If it had been the other way round he would have been extradited.

Whether the forum bar to extradition should be commenced

22. Section 19B has already been debated by parliament. It should be enacted. The CBA would disagree with the opinion of the former Attorney General that the implementation of this section would breach international obligations and submit that it should be implemented.

Whether the US-UK Extradition Treaty is unbalanced

23. The CBA have no observations to make in this respect as the US-UK treaty is no more susceptible to abuse or unfairness than any other treaty.

Whether requesting states should be required to provide prima facie evidence

24. It is submitted that requesting Part 2 states (non-EAW) should be required to provide a full prima facie case in most cases.

25. The current focus in the press and the review is the EAW arrangements. Far more worrying is the situation with Part 2 countries. Currently there is a long list of countries that do not have to provide a full prima facie case and they include the acceptable: Australia, New Zealand, Canada, Hong Kong, Norway, Switzerland and the USA to those who are not: Russia, Ukraine, Azerbaijan, and Turkey for example.

26. Russia for example has only successfully extradited one person under the 2003 Act. All the remaining cases have been discharged because of allegations of political corruption. There are a worrying number of states, in particular those states that are former soviet states, that have simply no regard to human rights or the rule of law as understood by western democracies.

27. The states that are required to provide prima facie evidence in Part 2 should be revised and only the bare minimum number of jurisdictions be allowed to have the expedited process. This could be achieved by a simple re-designation of the territories and a diplomatic note to that effect sent to that jurisdiction. This process might make extradition by the UK from some foreign states more difficult however the number of cases that this will impact on is minimal.

Ben Keith
5 St Andrew's Hill
London
On behalf of the Criminal Bar Association