31 January 2011

www.lccsa.org.uk

Extradition Review Panel
c/o Head of Judicial Co-operation Unit
5th Floor
Fry Building
2 Marsham Street
London
SW1P 4DF

By email: extradition.review@homeoffice.gsi.gov.uk

Dear Sirs,

REVIEW OF EXTRADITION

Please find enclosed the response of the London Criminal Courts Solicitors' Association (LCCSA).

Any questions in relation to this response should be referred to either Malcolm Duxbury or Jonathan Black.

Yours faithfully

LCCSA

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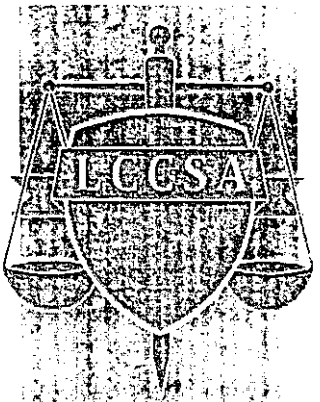

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The London Criminal Courts Solicitors' Association submission to the Extradition Review Panel.

About The London Criminal Courts Solicitors' Association

The LCCSA represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has over 1000 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

Many of our members conduct Extradition cases at City of Westminster Magistrates' Court and in the High Court. A subcommittee has been specifically set up to address matters which affect practitioners on a day to day basis. Drawing from our experience in this field we submit a response, focussing specifically with the questions of:

- Human Rights and the applicability of s.21 Extradition Act 2003
- Whether requesting states should be required to provide a prima facie case in support of their request for extradition.
- Publicly funded legal representation in extradition matters.

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1. Human Rights and the applicability of s.21 Extradition Act 2003

1.1. The LCCSA is concerned that following a line of authorities by Mitting J in the High Court: Dabkowski [2010] EWHC 1712 (Admin); Jan Rot v District Court of Lublin, Poland [2010] EWHC 1820 (Admin) and Klimas v Prosecutors General Office of Lithuania [2010] EWHC 2076 (Admin), the appropriate judge is no longer required to address issues of human rights in extradition cases to Category 1 countries.

1.2. The submissions advanced in both Jan Rot and Klimas were that extradition would be incompatible with Article 3 because of the poor condition of prisons in the requesting state. Mitting J held that in the case of Category 1 states there was an assumption that, as signatories to the convention, they would abide by their obligations:

> *"the district judge need not, save in wholly extraordinary circumstances in which the constitutional order of the requesting state has been upset – for example by a military coup or violent revolution – examine the question at all".*

1.3. By following the above authorities the courts are circumventing s.21 Extradition Act 2003 (The Act) that deals with Human Rights. The LCCSA seek clarification as to the intention of s.21 of the Act given that all Part 1 countries to which it applies are signatories to the European Convention on Human Rights (ECHR).

1.4. Section 21(1) of the Extradition Act 2003 provides that the appropriate judge:

> *".....must decide whether the person's extradition would be compatible with the Convention rights."*

1.5. If the judge decides the above question in the negative he must order the person's discharge in accordance with s.21 (2).

1.6. S.21 of the Act requires the appropriate judge to make some enquiry into the conditions in the requesting state in order to satisfy himself that, if he orders extradition to that state, it would be compatible with the requested person's Convention rights. By not carrying out any such enquiry the courts are derogating their statutory duty.

1.7. The application of the EAW system is based on the principle of 'mutual recognition'. This stems from the fact that all those who operate under the Framework Decision are a signatory to the European Convention on Human Rights and therefore each member state trusts the other in its ability to uphold human rights. One only need look at the cases pending before the European Court of Human Rights and indeed to their judgments to observe that member states routinely breach their obligations under the Convention.

1.8. Section 21 of the Act applies to Category 1 states. All Category 1 states are signatories to the ECHR. It must therefore follow that Parliament expressly intended that, even though such states are all signatories of the ECHR, an enquiry must nevertheless be conducted in the case of each requested person by the appropriate judge as to whether extradition would be compatible with Convention rights. It is submitted that it cannot be an answer to the question posed by s.21 of the Act to simply rely on the requested state being a signatory to the Convention. Each individual case should turn on its own facts.

1.9. It is submitted that not to conduct any enquiry at all into the compatibility of extradition with Convention rights simply on the basis that the requesting state is a Category 1 state is a failure to apply the mandatory obligations of s.21 of the Act.

1.10. The above cited authorities are based on Mitting J's interpretation of KRS v United Kingdom. Interestingly at page 18 of the judgment in KRS, the European Court stated:

> *"The Court recalls... that Greece, as a Contracting State, has undertaken to abide by its Convention obligations.... In the absence of proof to the contrary, it must be presumed that Greece will comply with that obligation...(emphasis added)*

1.11. Applying the above principle, the extradition court may assume that, as a signatory of the ECHR, the requesting state will comply with its Convention obligations. However, that assumption may be rebutted by proof to the contrary. That evidence can only be assessed as part of an enquiry by the appropriate judge based on evidence presented by the requested person. In order to obtain 'proof to the contrary' defence lawyers are left with little time, if any, to prepare arguments on breaches of human rights as this will often involve instructing country experts or other experts that can testify as to the conditions the requesting state offer. The effect of this is that where requested persons raise an issue under s.21, the courts are reluctant to grant applications for adjournments (in light of the authorities) in order to seek to obtain proof to the contrary.

1.12. It is submitted that in order to carry out their statutory duty, the appropriate judge must make his own determination of compatibility with Convention rights by looking ahead to consider whether extradition would be so compatible. Simply deferring a determination to the courts of the Requesting State, after the fact of the breaches complained of, is inconsistent with the court's duty as set out by Parliament in section 21 of the Act.

2. Whether requesting states should be required to provide prima facie evidence in support of their request for extradition?

2.1. The LCCSA recognises that, prior to the Extradition Act 2003, proceedings in extradition cases were often subject to lengthy delays, and that the fast-track procedure that was facilitated by the European Arrest Warrant scheme has significantly reduced those delays in most cases. The requirement to show a prima facie case, however, ensured that there was a basic safeguard which prevented the removal of those persons against whom the evidence was tenuous or weak, or non-existent.

2.2. The LCCSA is concerned that the lack of a requirement to provide prima facie evidence – indeed any evidence at all – carries a significant risk of the fast-track extradition of innocent persons. The LCCSA therefore proposes that prima facie evidence should be provided in those cases which are exempted from the requirement to show dual criminality.[1] The LCCSA recognises that this would require a renegotiation of the Framework Decision in addition to an amendment of the Extradition Act 2003.

2.3. One example of the type of miscarriage that can occur is that of the case of Edmond Arapi, referred to also by Fair Trials International in their submission to the Extradition Review Panel. Mr Arapi's extradition was sought by Italy for the purpose of executing a sentence of 16 years' imprisonment, imposed after he was convicted, in his absence, of murder. Information provided in the warrant and by the Italian prosecuting authorities showed that Mr Arapi was convicted on the basis of an alleged confession and hearsay.

2.4. Mr Arapi was first arrested on 17th June 2009, and the warrant was finally withdrawn on 15th June 2010. The defence were able to provide evidence showing that Mr Arapi was working as a chef at a café in Leek in Staffordshire on the day that the murder was committed in Genoa. However, there was no provision for the defence to contest his extradition on the grounds that he could not have committed the

[1] Participation in a criminal organization; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; laundering of the proceeds of crime; counterfeiting currency, including of the euro; computer-related crime; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorised entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear or radioactive materials; trafficking in stolen vehicles; rape; arson; crimes within the jurisdiction of the International Criminal Court; unlawful seizure of aircraft/ships; sabotage.

offence. Moreover, legal argument on the question of identity was unsuccessful: to extradite Mr Arapi, it was sufficient for the Italian authorities simply to provide evidence showing that Mr Arapi was the person whose extradition was sought. The ground on which his extradition was contested was on the question of whether he would have been entitled to a full re-trial upon his return to Italy: the fact that Mr Arapi was demonstrably innocent was not relevant to the legal argument in this case.

2.5. Following pressure arising from a significant amount of media attention, the Italian authorities finally conceded that Mr Arapi was not the man they were seeking. Had there been a requirement to provide evidence of a prima facie case, this would not only have considerably shortened what became a year-long ordeal for Mr Arapi and his family, but would also have saved a great deal of court time and expense.

2.6. A further example is the case of MB, a Romanian National who was arrested on a European Arrest Warrant issued by the German Government who sought his removal from this jurisdiction to face a murder accusation. He had been named by others accused as a suspect involved in a robbery which resulted in the death. There was no other evidence linking Mr B to the accusation.

2.7. Shortly after his arrest and whilst being detained in the cells at City of Westminster Magistrates' Court, SOCA officers were concerned enough about this case that they took his fingerprints from the cells at court and faxed them from New Scotland Yard to the German authorities in the expectation that they would be able to match the prints with the named suspect. The outcome of this enquiry was that there were as yet no fingerprints.

2.8. Mr B sought to contest his extradition on the basis that there was clear evidence that he was in the UK at the time of the offence. This in itself is not a bar to the extradition. Mr B was granted bail by the court, however given his financial circumstances, he was not eligible for means tested legal aid. He was unable to instruct his solicitors to complete the enquiries in support of his defence because he had not been able to place them in funds until he received his monthly pay. Unfortunately by the time that he paid his solicitors privately, there was insufficient time to complete the enquiries in advance of the final hearing.

2.9. At the final hearing an adjournment was sought for enquires to be concluded. It was argued that the enquiries could demonstrate that the extradition was not for a purpose sanctioned by the 2003 Act, and/or was not made in good faith. However the District Judge refused the adjournment and on the basis that issues of alibi were not a concern under the 2003 Act, ordered Mr B's extradition.

2.10. An appeal by way of Judicial Review was lodged against the decision not to allow an adjournment to enable Mr B to prepare his case. An interim injunction was sought to prevent Mr B's removal which was initially refused on the papers. SOCA took initial steps to arrange for his removal. A renewed application, made orally was successful.

2.11. When the initial application for interim relief was lodged a senior lawyer at The Crown Prosecution Service criticised those acting on behalf of Mr B for taking

this approach as there was in law no basis of appeal, and it was felt that the proper appeal process was being circumvented. It was stated:

> *"I note your claim is in essence for review of the District Judge's decision not to grant an adjournment. That of course is your prerogative, even though the Judge's decision was a wholly reasonable one. However the claim for judicial review is seemingly nothing more than an attempt to circumvent the statutory appeal procedures under the Extradition Act 2003.The ambit of Section 34 of that Act has been considered by the appellate courts, in detail, both in respect of judicial review and habeas corpus.*
> *I do not consider that that there is any prohibition against the removal of the above defendant from the jurisdiction."*

2.12. Eleven days after the successful renewed application, the EAW was withdrawn by The German authorities as a result of further enquiries by the extradition squad, who were able to establish that the DNA found at the scene did not match the applicant.

2.13. This case is cited to illustrate the "straight jacket" within which the EAW framework operates, allowing no discretion to review the evidence, flexibility or time to resist the warrant on the basis of incorrect information.

2.14. To this end, the LCCSA proposes a requirement that for offences for which dual criminality is not required; the requesting state should be required to provide prima facie evidence.[2] It should be noted that, to have reached the stage where a person is either charged or convicted of an offence, the requesting state should of course already be in possession of prima facie evidence and should therefore be able to provide such evidence at a very early stage in proceedings.

2.15. The LCCSA also has particular concerns that the abolition of the requirement to prove a prima facie case now extends beyond the EU to members of the Council of Europe despite evidence that many of these countries (e.g. Albania, Azerbaijan, Georgia, Ukraine) routinely and flagrantly disregard their obligations under the European Convention on Human Rights.

[2] This would also be useful in that it would provide a counterbalance to the risk of injustice that arises from the abolition of dual criminality.

3. Legal Representation in Extradition Matters.

3.1. Prior to introduction of the CDS Financial Eligibility Regulations 2006, legal representation for all matters in the magistrates' court was not means tested.

3.2. The Means testing process requires all those who submit applications for publicly funded representation to complete a lengthy and complex form relating to their means. It requires the signature of the defendant's spouse and the production of documentary evidence.

3.3. A detainee remanded in custody may not be required to produce proof of their means.

3.4. Legal Representation is passported for those on Job Seekers Allowance and other state benefits.

3.5. Many of those that appear before the courts on International Arrest Warrants are in the UK for the purpose of gaining employment. It is well known that many carry our casual employment for cash in hand.

3.6. From the point of arrest on an EAW, often away from their place of abode, many do not have access to their documents and personal affects. Many detainees are vague about their means and many lose their employment as a result of their arrest and detention.

3.7. The rigidity of the means testing scheme is such that if a detained person were to correctly declare his or her income on a CDS 15 (application for legal representation means form) the day after his arrest and be remanded in custody at the first court hearing, he or she may not pass the means test, despite the subsequently losing their source of income as a result of the arrest and detention. A Legal representation certificate will not granted until he or she has sought written confirmation from his or her employers that they have lost their job as a result of their arrest. This requires the individual to contact their employer from custody and obtain formal written confirmation that the employment has ceased. This documentation is also sought in circumstances where the nature of the employment is casual. Solicitors are reluctant to make these enquiries as funding is not available for such work.

3.8. Similar difficulties arise in requiring the detained person to provide proof of their means and spouses signatures.

3.9. Often the detainee is represented by the duty solicitor at the first hearing. There is great pressure for the detainee to be advised to consent to their removal or raise no bars, whilst so represented by the duty solicitor at the first hearing, the court being aware that legal aid may not be in place at subsequent hearings and therefore they would be dealing with an unrepresented defendant against whom the extradition is sought.

3.10. To require the duty solicitor to fully advise all Extradition detainees through to case disposal in one sitting is onerous given the volume of cases being brought

through the court and the time it takes, usually with an interpreter, to deal with each case.

3.11. If a case is adjourned and legal representation is refused on the basis of insufficient information regarding means, the defendant appears unrepresented at a later date and is likely to be further remanded in custody. Had there been the benefit of a legal representation order, then in all likelihood cases would be progressed.

3.12. The consequences of this are the high volume of Extradition detainees in HMP Wandsworth prison, whose cases are not progressing due to lack of representation. On a conservative estimate, there are 6 fresh extradition arrests appearing before City of Westminster on a daily basis. At least 4 of the 6 are remanded in custody. Over 6 days of sitting at least 24 new prisoners are being processed into Wandsworth Prison. Many of those are unrepresented and therefore cases are not processed.

3.13. Of greater concern is the fact that many of those facing extradition are not represented by lawyers. Extradition is a complex area of law and can have severe consequences, not only for the requested person, but also their family.

3.14. In the circumstances the LCCSA submit that consideration ought to be given to abolishing the means testing regime for this discrete area of representation, to enable those whose liberty has not only been deprived in the UK, but is at stake in the requesting jurisdiction, to be adequately advised and represented before any such orders for their removal are finalised.