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The Home Office Extradition Review

Submissions by Alun Jones QC

1 I have practised in extradition law since 1982, and have conducted numerous cases, mostly for defendants, under the Extradition Act 2003.

2 It is not thought necessary to cite extensively from authority in these submissions, because they will be well known and accessible to those conducting the Review.

Forum

3 It is serious failing in international legal practice and mutual assistance procedures, and in the law of the United Kingdom, that there is no adequate mechanism for deciding in which jurisdiction cases should be tried which could be tried in two or more states. The cases culminating in *Norris v Government of USA* [2010] UKSC 9, which hold that the conditional right to home and family life guaranteed by Article 8 of the European Convention on Human Rights will very rarely override the public interest inherent in extradition arrangements, mean that it is the more important that effective international and national forum procedures be implemented.

4 The problem is relatively recent, because traditionally most crimes were prosecuted in the territory in which they were committed. There are now two categories of case in which forum questions are likely to arise. The first (which for convenience may be called "transnational crimes") is composed of cases of ordinary crimes where elements of the offences take place in different countries (smuggling, some cases of obtaining by deception, multi-jurisdictional conspiracies, etc), or murder and manslaughter over which the UK has jurisdiction under the Offences against the Person Act 1861 if the defendant is a UK national and alleged to have committed the crime abroad. There are of course other statutory exceptions to the old "All crime is local" approach.

5 The second category is "international crimes", recognised by the international community, normally in UN Conventions, which enshrine the principle of universal jurisdiction in the case of particularly grave offences: torture, genocide, hijacking,

hostage-taking etc. Most developed states have enacted laws obliging them to prosecute or extradite persons accused of those crimes, wherever committed, found within their territories. It is a curiosity of these modern conventions that though they proclaim the principle "aud dedere, aut judicare", they are silent as to the criteria by which it should be determined, in any one case, whether to extradite or to prosecute.

6 Real public concern has arisen in recent years that extradition orders are made against UK nationals who could be tried in this country. Three notorious cases are those of Ian Norris; David Bermingham, Giles Darby and Gary Mulgrew (the "NatWest Three"); and Gary McKinnon. All three could have been prosecuted in the UK. In the first and third of these cases, the alleged crimes were targeted at institutions in the USA, though in the case of Norris, the cartel was said to be international in scale, and in both substantial conduct was committed in the UK.

7 In the NatWest case, the alleged crime was wholly targeted at a bank in London. The US indictment alleged seven counts of "wire fraud". These cross-border "wire" communications, conferring jurisdiction on the US Federal courts for the whole of the alleged criminal conduct, were alleged to be: one fax from Houston to London; five email communications from the UK to Texas; and one transfer of money from Houston to the Cayman Islands. The rest of the conduct took place in London. At no stage did the allegedly defrauded bank in London make any allegation that it had been defrauded.

8 Yet Article 8 did not prevent extradition. Nothing in the Act was relevant to the forum question. In the USA, faced with monstrous legal bills, a judge hostile to requests to invoke mutual assistance provisions for the purpose of obtaining defence evidence from London, and the threat of over ten years' imprisonment without parole if convicted, the defendants pleaded guilty to a lesser allegation and received three years' imprisonment, and a rapid transfer to the UK to serve their sentences.

9 The problem is just as striking in international crimes. One example is the case of Abu Hamza (in which I am involved in an appeal before the ECHR), facing indictments in the USA for three different groups of terrorist crimes committed allegedly between 1997 and 2001. Throughout this period, he was in the United Kingdom, and it was accepted in the extradition proceedings that he could be tried in

the United Kingdom for all the criminal conduct alleged. The most serious group of crimes concerned the taking of western hostages in the Yemen in 1998. This incident finished in a gunfight in which three UK hostages were killed, and two US hostages injured. The US claimed jurisdiction on the basis that these two victims were American nationals. (The other two groups of crimes had a stronger connection with the USA.)

10 The extradition proceedings began in 2004. They were interrupted until 2007 because the defendant was serving a prison term for UK offences. The case should have been tried in the United Kingdom. Had it been prosecuted here in 2004, the proceedings would have been over by 2006. The US evidence could easily have been obtained by invoking mutual legal assistance procedures. Witnesses could have flown to the UK or given evidence via videolink. Documents could have been sent. These arrangements are now routine. Any extradition lawyer, asked to advise on the forum question, would have foreseen in 2004 that the proceedings would probably take place in the United Kingdom years earlier than in the USA, assuming extradition was ordered.

11 In 2007 at the extradition hearing, and in May 2008 at the appeal against the extradition order, I argued that, even then, justice would be better and more expeditiously served if proceedings were instituted here. If they had been, the cases would have been tried before 2010. It was to be foreseen that the defendant would avail himself of every right to challenge extradition, including applications to the ECHR. A person extradited to the USA faces imprisonment in very harsh conditions, and is unlikely to see members of his family ever again, because visas are scarcely issued at all to relatives of terrorist suspects. He would also find it extremely difficult to call witnesses in his defence in the USA, even by videolink.

12 As at January 2011, Abu Hamza's appeal to the ECHR has been held partly admissible, and the appeal may not be concluded this year. It may succeed. If it does not, justice may be irreparably damaged by the delays.

13 There are other suspects whose appeals against extradition orders are currently before the ECHR and who remain in custody in the UK; Ahmad, Aswat and Ahsan, all in prison now, unconvicted, for four, five or six years, and all accused of terrorist-related crimes contrary to US law committed in this country. The only explanation for the

UK failure to prosecute these people in the UK, where they live, and where evidence and defence witnesses is to be found, is deference to a larger jurisdiction.

14 I would also like to draw attention to another little-discussed case. Four Rwandan men were arrested in London in December 2006, their extradition sought by the Government of Rwanda for participation in the 1994 genocide. A special extradition arrangement had been made with Rwanda within the meaning of section 194 of the Extradition Act 2003. My client, Vincent Brown (Bajinya), had come lawfully to this country with his family, and practised as a doctor. He and the other three were remanded in custody until April 2009, when the High Court allowed their appeal on the ground that there was a risk of a flagrant breach of their right to a fair trial if they were extradited (*Brown v Government of Rwanda* [2009] EWHC 70 (Admin)).

15 As in the cases of the "NatWest Three" and Abu Hamza, the defence argued that they should be tried in the UK (in correspondence with the CPS, and in support of an Article 8 challenge to the extradition). So far as there was any detailed response, it was argued that it was debatable whether genocide committed was triable in England. However, at no time was any challenge made to the primary defence proposition that the course of conduct alleged against the defendants necessarily involved the infliction of severe mental and physical pain and suffering. It thus amounted to a conspiracy to carry out a course of conduct involving torture, conferring jurisdiction on the UK courts to try the cases by virtue of the statutory definition of torture in section 134 of the Criminal Justice Act 1988 and section 1 of the Criminal Law Act 1967. This was, of course, the basis on which General Pinochet was extraditable to Spain for the entire course of conduct including torture (subject to a timing point).

16 I believe that the CPS never gave serious consideration to the prospect of a trial in this jurisdiction. Yet, given the obvious human rights violations probable in Rwanda, and the gravity of the offences alleged, such a course was attractive. The outcome was that the men were discharged but not exonerated, Brown's career was destroyed, and from the Rwandan point of view the suspects will probably now not be tried. (It is believed that, the law of genocide now having been changed so as unambiguously to permit trial in England, the CPS is overseeing an investigation with a view to trial of at least one of the suspects in the UK, not Brown, but 17 years have elapsed.)

17 The amendment of the Extradition Act 2003 in 2006 to include at section 83A a "forum" provision should in my view be brought into force, subject to a modification to permit the test to be applied also where the case could be prosecuted in the UK as an international crime, even where none of the conduct had been committed in the UK.

18 There are, it is true, "Guidelines" in force, agreed between the Attorneys General of the USA and UK in January 2007, for deciding at the investigation stage of a prosecution in which of two jurisdictions a case should be tried. There also guidelines published by "Eurojust" in the appendix to its 2003 Report (interestingly drawing attention to a suspect's rights under Article 8 of the ECHR). Neither of these instruments, however, confers powers on a court or rights on a defendant.

19 The Home Office will know why the forum amendments to the 2003 Act have not been brought into force. They are not inconsistent with international agreements. Indeed Article 4.7 of the EU Framework Decision of 2002 permits states to withhold extradition where it regards alleged offences as having been committed in whole or in part on their territories. The Attorney's 2007 Guidelines, referred to above, say that, whatever discussions and consultations have taken place in respect of a criminal investigation:

> "It is of course for the prosecuting authority, having applied the guidance, to decide that a case should properly be prosecuted in its country, where that is in accordance with the law and the public interest" (paragraph 14).

20 It may be, unfortunately, that the Home Office is reluctant to introduce a forum "interests of justice" test into the Extradition Act because (i) evaluation and discretion is inconsistent with the"box-ticking" approach of the statute; and (ii) because the provision would ultimately impose extra expenditure on the CPS and police for investigating and trying additional cases in the UK. Extradition cases are comparatively inexpensive; the CPS does not, except in very exceptional cases, conduct any factual investigation, as it would have to do by reason of its statutory duties and the Code for Crown Prosecutors if the case was to be tried here.

21 However, it is surely important in the public interest, and for the sake of preserving the integrity of our own criminal justice system, that we do not defer unthinkingly, without regard to the convenience and interests of the defence, to a foreign

jurisdiction. In my opinion the Crown Prosecution Service, and Serious Fraud Office, sometimes find it expedient and cheaper to sub-contract cases which should in the public interest be tried here to the better-resourced prosecutors of the US Department of Justice.

Is the UK-US extradition treaty unbalanced?

22 There is no doubt about this imbalance. It is evident in Article 8.3 of the 2003 treaty. Ministers in the former Government defended this provision on the basis that "probable cause" also had to be established in the case of extradition to the USA from the UK, it being necessary to satisfy such a test to obtain an indictment or complaint in the USA in the first place. Thus, ran the argument, at some point in the procedure the evidence had to be assessed equally for extraditions from the USA to the UK and vice versa. The irremediable flaw in the argument is that the US authorities apply the sufficiency test for extradition cases either way. The UK authorities only apply it to their own outward extradition tests. A *qualitative* assessment of evidence in UK requests is made by US authorities; no such test is made by UK authorities in US requests.

23 Notoriously, there was no public discussion of the UK-US treaty before it was signed in March 2003.

Should there be an evidential test in extradition cases

24 It is far too late to insist generally on such a test, because genuinely balanced and mutual international instruments such as the European Convention on Extradition on 1957, which the UK incorporated into our law in the Extradition Act 1989, have made it unnecessary. It is something of a safeguard in Part 2 cases in which territories have not been designated as states which do not need to provide evidence, and should be retained in those cases. If a requesting country has a basis for extradition, it is not asking too much to supply the witness statements, unless a governmental agreement has been made, applying to both states, that it is unnecessary.

Should the Home Office have powers to stop extradition?

25 It is most undesirable that the Home Office should have such powers. There are two reasons for this. The first is that there is no proper mechanism for the Secretary of

State to resolve factual disputes. The Review will be aware of the formidable delays under the Extradition Act 1989 (ten years in the *All-Fawazz* case for example) where evidential submissions were sent backwards and forwards to each party, apparently *ad infinitum*. The second reason is that the Home Secretary has the task of monitoring and enforcing extradition agreements which impose obligations on those states which have ratified and enacted them. These instruments rarely embody discretions found in extradition statutes (See, for example, the passage of time and ill-health bars to extradition in Parts 1 and 2 of the Extradition Act, absent from the Framework Decision and the 2003 UK-US treaty.) The Secretary of State has a conflict of interests if asked to prevent an extradition. All necessary powers should be given to the courts.

The European arrest warrant

26 This scheme suffers from a serious disadvantage in that it requires its members to assume that the standards of justice in Europe are both compliant with the ECHR and also effective in other ways. Thus, it is well-known that there are several European states in which prison conditions are appalling, and where people are detained for years pre-trial with poor possibilities of obtaining bail, but the UK courts have to precede on the footing that the Convention will be complied with.

27 There is little wrong with the draughting of Part 1 of the Act in itself, save that a forum provision should be applied as set out above; a "triviality" exception should be introduced to cope with the minor cases, especially from Poland, which clog up the courts; and District Judges should be given, and should use, the statutory power to make requests for further information for further information which is permitted by Article 17 of the Framework Decision.

28 The problem is that, in my opinion, that the Courts have gone much too far in looking for "purposive" interpretations of the statute in the light of the European Framework Decision. The presumption of compliance with the ECHR is the best example. Section 21 of the Act, forbidding extradition if it would be incompatible with Convention rights, should be repealed. It implies to the lay reader that the Court will measure each extradition case, on request, against the Convention and apply a simple factual test on the evidence, unencumbered by preconceptions. If the presumption of

compliance is strong, there is no need for a provision which is apt to raise hopes and mislead.

29 In reality, of the "bars to surrender" in section 11, extraneous considerations and specialty cannot be successfully invoked in any practical sense, because the court will again make assumptions. In *Hilali v Central Court for Criminal Proceedings No 5 of Madrid* [2007] 1 W.L.R 168, for example, the Divisional Court held that, even in the absence of any evidence of law from the Spanish Court, the UK Court would presume that Spanish law was compliant with the speciality protection in Article 27 of the Framework Decision.

30 Defence extradition practitioners hear much anecdotal evidence that speciality provisions are ignored in several EU states, notably Poland, though it is hard to prove this. The point was particularly striking in Hilali's case, because the entire extradition proceedings against him, alleging participation in the September 11 killings, were inconsistent with findings made by courts in Spain on exactly the facts alleged in the European arrest warrant. (When last I heard, Hilali had been discharged from custody in Spain, as an inevitable consequence of the earlier Spanish court rulings, and was facing, in breach of the speciality provisions, criminal proceedings connected with his original entry into Spain in 2000.)

31 A serious problem is that there is no central body which monitors compliance with the Framework Decision after surrender. No doubt it is considered unnecessary; compliance is assumed.

Time limits

32 Although this is not specifically listed as a subject of the Review, it is my opinion that the absolute 7 day (Part 1, section 26) and 14 day (Part 2, section 103) requirement for lodging and service of notice of appeal, as affirmed in *Mucelli v Albania* [2009] UKHL 2, is fundamentally unjust. There should be a discretion, as in other areas of the law, to extend time to cater for forgetfulness in hard-pressed, poorly-funded, legal aid lawyers.

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