Extradition review – submission by the extradition team[1] of Kingsley Napley solicitors

Please find below our response to the extradition review.

If clarification or expansion on any of the points set out below is required, please do not hesitate to contact [redacted]

1. Whether the US-UK Extradition Treaty is unbalanced

Probable cause

If the US is seeking an extradition from the UK, in an accusation case, it is required to provide information setting out, broadly, the circumstances of the extraditable conduct. It is not required to provide an evidential basis for the request. In contrast, we are all aware that if the UK is seeking to extradite a person from the US in similar circumstances, then there is the additional requirement to show under Article 3 (c) of the United Kingdom – United States Extradition Treaty 2003 ('the Treaty') 'such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested', a test which is more commonly described as 'probable cause' that the individual committed offence in question. The only explanation for this additional requirement placed on the UK, is the level of protection from extradition which is afforded to US citizens by the US Constitution. However, what is not often examined is what the 'probable cause' requirement means in practice and whether the test is equivalent to the requirement for 'information' in support of a person's extradition from the UK to the US. Similarly scant attention is paid to the challenges against extradition available to the individual in US proceedings when compared to the extradition hearing in the UK.

We would submit that the question as to whether the Treaty is unbalanced depends not on the wording of the treaty alone, but requires a comparison of the manner in which extradition hearings are carried out in the US as compared to the UK.

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We invite those undertaking the extradition review to seek an understanding from experienced US extradition practitioners as to how US extradition case law has developed over the years and the practical effect of the 'probable cause' test. For example, it appears that in the US system, the rule of 'non contradiction' (see below) has been relaxed in extradition proceedings and the person whose extradition is sought may, in some circumstances call evidence and challenge the basis of the extradition request on an evidential basis. See for example, the introduction to the article by Roberto Iaroloa[2],

It is well established that, at a foreign extradition hearing, a fugitive "may only introduce evidence to explain rather than contradict the evidence presented by the Government, and the court shall exclude evidence that is proffered to contradict testimony, challenge the credibility of witnesses, or establish a defense to the crimes alleged." In applying this principle, referred to by some courts and commentators as the "Rule of Non-Contradiction," courts consistently have recognized that evidence of defenses such as alibi, insanity, duress, and self-defense, to name a few, is not admissible at the hearing. In a similar vein, evidence offered by fugitives at such hearings challenging the voluntariness of statements by witnesses or accomplices inculpating them, or relating to the recantation of statements by those witnesses, generally has been excluded because it falls within the category of contradictory proof. As the developing case law makes clear, however, at times, the line between evidence offered by a fugitive that seeks to explain what has been presented by the government in support of the extradition request, as opposed to contradict it, "is a murky one."

The practical effects of the blurring of this line appear to be that the person whose extradition is sought is not limited in the US in the same way that he is in the UK to challenging the request on human rights grounds or substantiating, evidentially, that the request is made for improper motives (so called 'extraneous considerations') or fair trial in the requesting state would not be possible, but it is open to him to challenge the evidence itself. We believe that this comparison of the practical application of the law in extradition hearings in the US, contrasting it with the UK, is an important exercise. Its outcome may lead to the view that if there is an unbalance in practice, the Treaty should be amended to increase the requirement placed on requesting states in UK proceedings

2 Roberto Iaroloa Article: Contradictions, Explanations and the Probable Cause Determination at a Foreign Extradition Hearing 2009 60 Syracuse L. Rev. 95.

from 'information' to 'evidence' or a test equivalent to the probable cause test as applied in US courts.

We accept that where the US government is requesting the extradition of an individual who faces trial for a serious offence, an indictment must be produced. Before an indictment can be issued, a grand jury must be convinced that there is a "strong suspicion that an offence was committed". As set out in the case of Norris at [ ],

'Ms McClain, in para 6 of her affidavit, explained how that is determined in the United States:
'Under the federal law of the United States, a criminal prosecution is commenced when a grand jury files an indictment... The purpose of the grand jury is to review the evidence of crimes presented to it by the United States law enforcement authorities. After independently reviewing this evidence, each member of the grand jury must determine whether there is probable cause to believe that a crime has been committed and that a particular person committed that crime. If at least 12 jurors find that the evidence they have reviewed provides probable cause to believe that a particular person committed the crime, the grand jury may return an indictment. An indictment is a formal written accusation that charges the particular person, now a defendant, with a crime, identifies the specific laws that the defendant is accused of violating and specifies the date and place where the charged crime occurred.'

However we do not accept that the fact that most US requests are generally supported by a Grand Jury examination of the evidence in support of the indictment is an adequate safeguard. Presentation and consideration of evidence is by the very nature of Grand Jury proceedings one-sided. For example, in the cases of sealed indictments, the person whose extradition is sought is not entitled to representation, cross examination of witnesses or a review or presentation of any evidence which undermines the prosecution's case. This is in contrast to what appears to be in practice a more open testing of the evidence afforded to those whose extradition is sought from the US.

Pressure from the US

In addition to the question set out above, it is also important to examine the practical effects of a request from the US for extradition – and in this, there will be some overlap with the question in relation to the forum bar below. Examining the question of

whether there is an imbalance with the US should not be limited to the wording of the treaty. There needs to be an examination of the pressure which is brought to bear on individuals and companies within the UK where the US is seeking to claim jurisdiction in relation to conduct which may have taken place wholly or mainly in the UK but which has had an economic impact on US citizens. There needs to be proper discussion and understanding between the relevant UK and US prosecutors as to where the matter should be dealt with –followed by a mutual respect of the outcome of that investigation or trial.

The current position is that if the UK fails in a prosecution (even if the jury verdict is directed by the Trial Judge) in which the US has an interest, the US may seek to prosecute the same defendants, using the same evidence. This is currently the case following the collapse of a recent trial in which we were involved. In that case, no conduct took place in the US, although there was a potential economic impact on US customers. Despite the direction of The Trial Judge to the jury to acquit the defendants, the US Department of Justice has expressed its interest in prosecuting the case and has invited the representatives of the defendants to make representations in relation to this position. Throughout the proceedings, there was also the threat of the US issuing a red notice against the defendants, despite the fact that the UK prosecutor and the DoJ had agreed that the UK investigation and prosecution should take precedence. This is in our view wholly inappropriate. It undermines mutual recognition of legal systems and the approach envisaged in the Attorney General's Guidance for handling criminal cases with concurrent jurisdiction between the UK and USA. It also means that a UK citizen may not be free to travel even after an acquittal in the UK, for fear of having a red notice issued on Interpol by the US. Moreover, the Guidance referred to above does not afford individuals the right to make representations on this point.

We invite the Panel to give some consideration as to whether the definition of 'acquittal' as set out in Article 5(1) of the Treaty should include a ruling by a Trial Judge that a prosecution should not proceed. This would encompass outcomes such as a successful abuse of process argument and half time submissions. Consideration should also be given to amending Article 5(3) of the Treaty so that the Article 5(3(b)) (which states that where criminal proceedings have been instituted and discontinued, this should not preclude extradition) is removed.

In our submission, there is an imbalance in the exercise of jurisdictional power as evidenced by the US seeking jurisdiction wherever it can and in instances when other countries would not seek to do so. This imbalance is heightened by the very fact of the pressure put on potential defendants in the US system to enter into plea arrangements and to give evidence on behalf of the State. We look at this issue further below, in the section relating to forum bar.

The role of the Secretary of State in US / UK proceedings

In addition, we invite the Panel to examine the breadth of the US Secretary of State's discretion to halt extradition proceedings. We understand that this discretion is not limited in the same way as in the UK. Here, the discretion is limited to the considerations set out in the 2003 Act. In the US, the person whose extradition is sought has the right to make representations to the US Secretary of State urging him not to extradite him. In addition, we understand that the US Secretary of State has unfettered discretion to impose conditions on the extradition, which may be based on foreign policy considerations or considerations based upon the individual[3].

This difference is also important to bear in mind when considering our response to question 2, below.

Specialty

We would invite the Panel to remove Article 18(4) of the Treaty so that specialty protection is afforded to those individuals who consent to their extradition under Article 17 of the Treaty.

3 See Lopez-Smith v Hood and the work of Bassiouni

2. Breadth of the Secretary of States' discretion in an extradition case

Part 1 cases

We are concerned by the near absence of the Secretary of State's involvement in all Part 1 cases. We believe that there should be an opportunity to make submissions to the Secretary of State in Part 1 cases if a person's extradition is ordered. We believe that this was an important safeguard under the 1989 Act. We accept that the topics for such submissions may need to be strictly defined. Issues upon which we would invite the Secretary of State to accept submissions include arguments under Article 8 of the ECHR, jurisdiction and triviality. We would also invite the Secretary of State to be more robust in monitoring whether specialty is breached by the requesting State once a person has been returned.

Part 2 cases

We submit that the Act should not seek to limit the Secretary of State's involvement in extradition cases to a small number of strictly defined areas and that a person whose extradition is sought should be entitled to make representations to the Secretary of State which are *relevant and / or in the interests of justice* or a test should be devised akin to that set out in the 1989 Act where the Secretary of State had to determine (on request) whether it was *'wrong, unjust or oppressive'* to extradite.

Observations in relation to the Secretary of State's existing discretion

The Secretary of State should ensure that he makes use of his existing discretion.
It could be said that the existing discretion of the Secretary of State under section 70 of the Act is broader than it appears on the face of the statute. Although the wording of section 70 is that the 'Secretary of State must issue a certificate....if he receives a valid request', it is our submission that the question as to whether a request is valid and therefore the power to issue a certificate is subject to a number of general principles.

First, where Parliament has granted a power to the Executive, it is incumbent on the Executive to exercise that power only for legitimate purposes. This could be interpreted

as including a duty upon the Secretary of State to satisfy himself that the request is issued in good faith and is not abusive.

Secondly, as a public authority, the Secretary of State must satisfy himself that the decision to issue a certificate would be compatible with the Human Rights Act, in particular section 6 (arbitrary detention). To date, the Secretary of State has been reluctant to make use of this broader interpretation of the bases upon which a certificate can be refused. We would invite those reviewing the Act to consider making these broader duties explicit in the Act, emphasising the fact that there are existing duties and responsibilities upon the Secretary of State to use his discretion in a way that is compatible with the principles of administrative law.

3 – The operation of the EAW, including the way in which those of its safeguards which are optional have been transposed into UK law

Legal Aid

One of our biggest concerns is the removal of non means-tested legal aid for extradition proceedings. This has led to an inequality of arms between the CPS and legally aided defendants. This inequality is heightened in Part 1 extradition proceedings by the very fact of the strict timetables laid down in the Act. The delays in processing legal aid, the difficulty with the legal aid forms, the likelihood that a person without representation at their first hearing following arrest is very unlikely to be granted bail and the number of ineffective hearings through funding problems all contribute to the situation where the main focus of a person whose extradition is sought is his funding situation and trying to access his papers and proper advice whilst in custody - not focusing on the extradition proceedings themselves. In addition, in circumstances where the UK funds the costs of the extradition proceedings on behalf of the requesting State, this highlights the inequality of arms. In our submission, the UK should provide non means tested legal aid for all defendants. If an order for extradition is made, it is of course open to the Court to order that a contribution to costs is made by the person whose extradition is sought where the Court assesses that the person whose extradition is sought is of adequate means to do so.

Volume

There has been a significant increase in the number of EAWs coming through the UK in recent years. There has been a 51% rise in the execution of EAWs in the UK within the last 12 months up to August 2010.[4] According to the Serious Organised Crime Agency, 3,526 requests were received in the year 2008/2009 evidencing a two fold increase from the previous year. In total 1,032 people were extradited from the UK between April 2009 and April 2010, up from 683 in 2008-09. The Home Office expects a further 70 per cent rise next year.[5]

[4] Reported in the Sunday Telegraph, 28 August 2010
[5] Reported in the Telegraph, 21 August 2010

In our view, the reasons for this increase include the accelerated process of extraditing individuals under an EAW, the ease with which Member States can make requests to the UK, the removal of a number of bars to extradition and the lack of safeguards in place for defendants contesting EAW requests. We submit that specific consideration must be given to Member States from where extradition requests are common. Scotland Yard's extradition unit estimates that Poland for example currently makes up approximately 40% of extradition requests going through the City of Westminster Magistrates Court. Measures should be introduced to regulate these numbers and particular attention should be given to cost and proportionality of the cases for which requests are being made (see below).

Cost

The introduction of the EAW was based upon the principle of 'mutual recognition' in the EU; requesting states do not contribute to costs of the UK extradition proceedings and similarly the UK does not contribute towards costs of outgoing requests to a foreign state. This is an important principle but at present the system does not operate in a proportionate way. According to the European Commission a total of 9413 EAWs were issued by 18 Member States in 2007,[6] and Germany, France and Poland issued the most number of requests (1785, 1028 and 3473 respectively). The UK and Finland had the highest percentage (over 50%) of persons surrendered following their requests whereas Spain and Poland only obtained the surrender of approximately 10% of the persons they sought. Currently across the EU approximately **14,000** EAW's are issued each year. Poland issues approximately 5,000 of those requests, roughly 50 times more than the UK.[7]

We recognise that the costs of such requests needs to be balanced against the principle of mutual recognition and that the introduction of a cost contribution should not discourage genuine EAW requests from being made. However, in cases where the request is politically motivated, where a warrant is incomplete or where the Court has found there to have been an abuse of process, there should in our submission, be a mechanism in place to award costs against the requesting state with the option of those affected states to implement reciprocal arrangements with the UK.

[6] Responses were received by the Council of Europe from only 18 Member States
[7] BBC Radio 4, The Report, 2 September 2010

The cost of an extradition case is significant. At present this cost is borne by the UK tax payer (save for defence representation ending in extradition in the event that the defendant does not qualify for means tested legal aid). Requesting states are not required to provide any financial contribution towards the UK extradition process irrespective of whether the request is successful. Although we accept that the UK is subject to its treaty obligations in terms of funding the extradition proceedings, it is our view that consideration should be given towards a requirement for the requesting state to contribute towards the cost of processing their request. This could perhaps be limited to requests where a certain number have already been made by that country in a certain period. This may help to combat issues such as triviality (see below) and may also redistribute funds allowing non means tested legal aid to be re-introduced.

Triviality

In our view one of the greatest concerns in the operation of EAWs in the UK is the vast number of cases when individuals are extradited for offences of a trivial nature. Of particular note is Poland from where requests are frequently made for offences which in the UK may not pass either the evidential or public interest test to proceed to a prosecution. These cases are funded by the UK and cause a drain on police, prison and court resources.

Furthermore the abolition of dual criminality in relation to the Framework Decision list and the resulting fact that individuals could be extradited for offences which are not recognised as criminal offences in the UK gives rise to concern. It is our view that the current minimum sentence safeguards under the Framework Decision and sections 63 and 64 of the Act are insufficient.

We submit that safeguards should be put in place to allow the UK to consider requests and reject at an early stage those that are so trivial that they do not warrant extradition. Such safeguards are optional in the EU and some Member States have introduced their own protections. In Belgium for example an 'opt-out' has been imposed so that an EAW allege abortion as an offence for which an individual could be extradited (abortion exists as a criminal offence in a number of EU states including Malta, Ireland and Poland). Germany has a self imposed 'proportionality rule' which states that only those accused of 'serious crimes' can be seized under a warrant. France refuses to extradite its own

nationals, instead preferring a system where offences can be investigated and tried in France even when the criminal act has been committed in another jurisdiction.

Under the EAW scheme there is no mechanism for the Courts in the UK to test the strength of the evidence or whether there even a *prima facie* case. It is very easy for Member States to make requests. It is our submission that an administrative 'triviality test' should be implemented on the receipt of an EAW request to exclude matters of a trivial nature. We invite discussion on whether the test should be administered by the CPS or the Court.

Bail

The operation of EAWs has been expanded across 28 Member States in the EU and there are real risks that fundamental rights of an accused person are being undermined by the regime. We have doubts over the safeguards that exist in some States which operate under the EAW scheme in relation to the trial process, detention, sentencing and bail. There is a clear disparity among member states in terms of the length of time an accused individual can be detained before they must be brought to trial, and other EU countries do not share the UK's presumption in favour of bail. In France for example there is a presumption against bail in criminal cases, and many Eastern European countries refuse to introduce a residency condition meaning that many suspects remain in custody awaiting trial. In Italy over 42% of those awaiting trial are in custody (not including those in youth remand centres), in Belgium it is 35%, and in England and Wales approximately 15%.[8] Many individuals extradited from the UK to another member state spend a significant amount of time detained, sometimes in poor conditions. We are not aware of the percentage of individuals in prison as compared to those on bail in the UK pending extradition proceedings, but we would estimate that it is in the region of 75% and would invite those conducting this review to establish this figure.

The concept of 'Eurobail' would allow bail to be granted to a suspect on the basis that conditions be monitored in their home country. Eurobail reflects the presumption of liberty in the EU and addresses the current discrimination against non-national suspects/defendants within the state where the criminal process is taking place. The Eurobail project addresses the lack of uniformity in national laws regarding bail and we submit that it should be reinstated with the UK taking the lead in its implementation.

[8] As at 31.7.2010, reported by the International Centre for Prison Studies, Kings College London.

Eurobail may in turn lead to more individuals facing trial in Part I cases consenting to their extradition, on the basis that they are more likely to be granted bail in the resulting proceedings in the Requesting State

Specialty

We submit that specialty protections should be afforded in Part I cases where a person consents to his extradition.

Role of the CPS

We submit that an inherent part of the review of the operation of extradition proceedings should include a review of the CPS's role. The danger is that following instructions from the Requesting State on a pure agency basis can mean that the CPS will press on with cases even if its view is that the proceedings will (and should) ultimately fail. That this is possible is illustrated by the case of Ejup Ganic, which was heard at City of Westminster Magistrates Court last year following an extradition request by Serbia.

Dr Ganic was arrested on a visit to the UK. It was alleged that, while Acting President of Bosnia and Herzgovenia during the siege of Sarajevo in 1992, he personally commanded an attack on a military hospital and on a column of medical vehicles.

The allegation was baseless. It had been thoroughly investigated previously by two independent international bodies, neither of which had found any evidence to suggest that Dr Ganic was culpable of any crime. Furthermore, there was ample evidence to suggest that the proceedings launched here were an abuse of process of the English courts. As District Judge Workman eventually found, Serbia withheld from the court evidence showing that Dr Ganic was not responsible for any crime and it presented a deliberately misleading case to the judge. Clear evidence that the case was politically motivated also emerged.

If the CPS had not considered that it was bound to act on instructions, it is reasonable to suppose that it would not have persisted with presenting the Ganic case even as the case was collapsing around it. The CPS has always maintained that in extradition proceedings it acts as agent for the foreign state requesting the extradition. Until 2003 this probably was the state of the law, following a High Court decision a decade earlier

which endorsed the CPS' approach. However, in 2003 the Prosecution of Offences Act 1985 (the statute governing the activities of the CPS) was amended by the Extradition Act. The amendment gave the CPS new powers "to have the conduct of any extradition proceedings" and to advise in relation to such proceedings.

This change was significant for two reasons. First, unlike a private solicitor, the CPS no longer took its authority to conduct the proceedings from the fact that it had been instructed by a client. Its authority now derives directly from its statutory powers. This seems clear from the case of Goodridge v Chief Constable of Hampshire Constabulary, decided by the High Court in 1999, which found that in general there is no solicitor client relationship between the Director of Public Prosecutions and the police. Instead the police and the DPP both exercise public duties regulated by statute, carrying out their functions on behalf of the state.

Secondly, the language in the 1985 Act to describe the CPS' new function in extradition proceedings is the same as for domestic proceedings. In both types, the CPS is given the "conduct" of the proceedings. The CPS is clear that in the conduct of domestic proceedings it acts in its own right, not on behalf of the police. How then, can the CPS sensibly maintain that when it conducts extradition proceedings its role is different and that it has no independent responsibility to satisfy itself that the case is proper to proceed?

Our public bodies must act responsibly, independently, and for the public good. They should not be used to advance on behalf of another State a case which has no merit. The courts have not considered in depth the relationship between the CPS and foreign states in extradition cases since 2003 and we would invite the Panel to consider it.

4. Whether the forum bar to extradition should be commenced

We have commented on this point above in the section relating to the US / UK Treaty and would invite the Panel to consider the points we set out in that section. In short, we submit that the forum bar should be implemented, as envisaged in the Police and Justice Act 2006. We also believe that the Attorney General should oversee these issues in a more pro-active manner. The groundwork has been laid out by the Attorney General's protocol in issues of concurrent jurisdiction[9].

Alternatively, the Attorney General's role on consideration of such submissions should constitute part of the extradition proceedings and the person whose extradition is sought should be entitled to make submissions to, and have them considered by, the Attorney General, who should have the power to either consent to the extradition or order that the investigation and / or prosecution should take place within the UK.

We also submit that the Secretary of State's discretion should be extended to include consideration of submissions on jurisdiction (see above).

In addition, there needs to be a coordinated review of the Interpol and EAW alert systems which currently mean that a person's extradition can be turned down in one country, but the red notice remains against that person's name in Interpol and / or the EAW system. This means that the relevant person will not be able to travel without fear of arrest. Accordingly, without correction any ruling on forum will be without practical effect.

5. Whether requesting states should be required to provide prima facie evidence

Part 1

We accept that our obligations under the EU Treaty mean that the relevant test for extradition under Part 1 is 'information'. However, we would submit that the Requesting State should be asked to certify when providing the 'information' that it does not have additional information in its possession which would undermine the extradition request, or attach such disclosure to the request itself.

[9] Although this is limited to US / UK concurrent proceedings

We would also submit that the requirement of 'information' should be extended to include further details, such as copies of the witness statements of the investigating and forensic officers and lay witnesses, which make out the offence. This should be the minimum requirement where a person is facing extradition proceedings with the likelihood of detention pending those proceedings and many months, if not years, of separation from his family, home and livelihood.

In addition, we believe that the Secretary of State should consider re-designating Part I countries, which have made requests in bad faith, as Part II countries, requiring evidence of a prima facie case to be submitted in support of any future requests.

Part II countries

In our submission, there can be no basis for affording some countries outside the EU the ability to seek extradition of individuals without providing evidence of a prima facie case against them. We therefore submit that all Part II countries should be required to provide prima facie evidence in support of any requests.