Review of the Law of Extradition

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Summary of Opinion

- The law of extradition under the Extradition Act 2003 is generally suited-for-purpose
- The reintroduction of political discretion is unnecessary and inappropriate
- The European Arrest Warrant generally operates well, however a proportionality test should be included in its application to address the large numbers of requests for relatively minor crimes
- The 'forum bar' should not be brought into force at present
- The UK US Extradition Treaty 2003 is unbalanced in the evidential requirement demanded, but this does not result in extradition practice inimical to accused persons
- It is not necessary to re-introduce the *prima facie* case requirement as the human rights protections afforded accused persons address the attendant concerns
- The law of extradition is predicated upon the assumption that it is proper to put faith in the criminal justice systems of partner states and strikes a reasonable balance between the necessity to prosecute and prevent international crime and the human rights of accused persons.

Introduction

The Ministerial Statement 8 September announcing the present review stated that it is designed to ensure that the United Kingdom's extradition arrangements are 'efficient' and 'in the interests of justice'. An efficient system is one which timeously and effectively responds to, and makes, extradition requests. It is one based upon the acceptance that the prosecution of crime with a transnational dimension is of great importance. This importance is evidenced, if it need be, by a recent UN report published by the Office on Drugs and Crime which describes in stark terms the dangers posed by crime with an international aspect. The report argues that national responses alone are inadequate, that states must look beyond their borders and that it is essential to strengthen security and the rule of law.[1] The present UK extradition arrangements, governing a generally responsive and facilitative system, adopt this thinking. However the present law is more than a desirable response to transnational criminality; it is largely a product of internationally agreed and binding norms. These norms being the extradition treaties and agreements to which the UK is party, including a number of bilateral

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[1] 'The Globalisation of Crime: A Transnational Organized Crime Threat Assessment', the report is found at http://www.unodc.org/, accessed 8 December 2010.

extradition treaties, the Framework Decision governing the European Arrest Warrant (EAW) and a wide-range of other criminally-related treaties. It is more than desirable that the UK efficiently carry out its obligations in the area of extradition, it is obligatory.

An extradition system 'in the interests of justice' is one that both protects the human rights of those subjected to it and takes into account broader public considerations. The latter include the cost to the state (financial and otherwise), international relations and the victims of crime. Human rights clearly must play a central role in the law of extradition - for legal, moral and political reasons. The UK is obliged to secure to everyone with its jurisdiction human rights under the ECHR, and domestically all public authorities must act compatibly with Convention Rights under the Human Rights Act 1998. There is a very considerable body of ECtHR and domestic jurisprudence in the area of extradition and surrender. From *Soering v UK*, (1989) 11 Eur. Ct. H.R. (ser. A), through *Regina (Ullah) v. Special Adjudicator,* [2004] 2 AC 323 and to *Norris v Government of the US,* [2010] UKSC 9 extradition law has been conditioned by human rights considerations. Morally, it may be argued that regardless of such legal obligations the UK must not be complicit in abuses of those within and under its protection – in part as a concomitant of that protection and a consequence of the duty owed to it by such persons. Politically it is in the interests of the UK to protect the human rights of those subject to its jurisdiction, in part to be justifiably able to comment and criticise those states that do not. Clearly it is imperative for these reasons, amongst others, that the UK protects the human rights of those subjected to extradition.

The interests of justice also require, however, consideration of other factors. In these straitened economic times the financial cost of lengthy multiple extradition hearings must be carefully scrutinised and measured against other demands upon the public purse. The maintenance of good international relations with the UK's political and economic partners is also a not-inconsiderable factor. To the fore here is the crucial point that underlying extradition, and international criminal co-operation more generally, is the trust that the UK has placed in the criminal justice systems of its extradition partners. By entering into numerous international legal relationships (admittedly with protections) the UK has demonstrated that it has decided to assume that the judicial systems of its partners (especially its closest partners) are fair and just. Of course it is open to the UK to revisit those decisions but such an exercise should be open and explicit – not one couched in technical criticisms or human rights-based terminology. Indeed implicit and creeping criticisms may mask national chauvinism. Finally, it is important not to lose sight of the victims of transnationally committed crimes. This is, for obvious reasons, somewhat easy to do – by definition the victims are outwith the UK. And, in recent cases, a number of high profile victims have perhaps engendered little sympathy – including the US Government, a large multinational industrial concern, Enron-related investors and financial institutions. However, the fact that the victims are found in third states and have not been likely to endear themselves to the media, NGOs and other campaigners should not and must not detract from the fact that

they were victims and as such merit satisfaction in the form of the trial of those suspected of committing the crimes from which they suffered.

Discussion of the five areas identified for review[2]

The breadth of political discretion

The first area under review is 'the Home Secretary's powers to stop extradition'. This concerns, in effect, the reintroduction of a formal element of political discretion. It will be recalled that prior to the Extradition Act 2003 there was a degree of discretion built into the extradition process. Both the commencement of judicial proceedings and the final decision to extradite were at the discretion of Scottish Ministers and the Secretary of State under ss 7(1) and 12(1) of the Extradition Act 1989, as amended. Under that Act there were a number of cases, including that of Augusto Pinochet, which lent weight to the arguments in favour of a limitation of discretion. In that case, after a number of separate hearings including three decisions of the House of Lords, political discretion was exercised and Pinochet was released on health grounds and allowed to return to Chile. These cases led the Law of Extradition – A Review, published in March 2001, to consider whether the Secretary of State needs to retain an entirely general discretion. It concluded that such a wide discretion was not appropriate and recommended limiting that discretion to five circumstances; the death penalty, speciality, national security, multiple extradition requests and where the requested person has been tried or is to be tried within the UK. In line with the 2001 review the Extradition Act 2003 removed the general discretion of the Secretary of State and Scottish Ministers in extraditions to both Category 1 and Category 2 states.

In regard to all extraditions, but in particular those to Category 1 states, the reinstitution of political discretion is unnecessary and inappropriate. It is unnecessary as it politicises a process that garners no benefit from political influence. The process of extraditing or surrendering an accused or convicted person presently does not, and should not, stray from the legal. The questions requiring determination are legal and factual, not otherwise. Extradition and surrender in almost all cases take place under and within a legal framework governed by an extradition agreement. This applies to all states designated Category 1 and Category 2, with ss 193 and 194 of the Extradition Act 2003 governing all other cases. The legal framework governing these extraditions, in the form of treaties and the Extradition Act 2003, provides the scheme under which decisions on law and facts are made. It affords accused persons protections based in law upon consideration of the facts. For example ss 79(1)(b) and 81(b) inter alia provide that it is for a judge to decide if an extradition is barred because the person being extradited might be prejudiced at his trial by reason of his race, religion, nationality, gender, sexual orientation or political opinions. This is a decision as to facts and one rightfully made by a judge, not a politician.

[2] Note that these arguments below are similar to those made by the author in Arnell, P., Extradition from Scotland, (2010) 34 Scots Law Times 187.

The reintroduction of political discretion is inappropriate because it is in stark conflict with the premise upon which all extradition agreements are concluded. This is that the UK can rightfully trust the efficacy and fairness of the judicial systems of partner states. This trust, the strong desire to facilitate the prosecution of those suspected of committing transnational crimes and the various protections afforded accused and convicted persons under the Extradition Act 2003 form the basis of the system of extradition. As it will be aware, the UK has historically extradited its own nationals – which is evidence, in part, of the trust place in the criminal justice systems of most third states. This point applies with greater strength to surrenders to Category 1 states EAW system. It is designed to be largely administrative exactly because of the faith thought to be justifiably put in the judicial systems of fellow EAW states. This is seen in Recital 10 of the Preamble to the Framework Decision creating the EAW which states: "The mechanism of the European arrest warrant is based on a high level of confidence between Member States". A further but not less important point is that the reintroduction of political discretion would, of course, impinge upon the legal objectivity of the extradition process – one which today applies impartially and consistently. It is desirable that all extraditions and surrenders are treated equally – the reintroduction of discretion could affect, or be seen to affect, this equal and impartial treatment with sympathetic or high profile cases perhaps attracting support. Finally, the notion that discretion should act as a putative protection for accused or convicted persons is misjudged because, as will be mentioned below, sufficient protections already exist in the form of human rights, speciality and double jeopardy, amongst others, under the Human Rights Act 1998. Overall, the reintroduction of a general political discretion is, to the author's mind, a literal and figurative retrograde step.

The EAW and its optional safeguards

The second subject under review is the EAW and the manner it was brought into UK law. The EAW, created by a Framework Decision of the Council of the European Union on 13 June 2002, is designed to facilitate the largely administrative surrender of accused and convicted persons between EU states. Amongst its most notable innovations are that it removed both the previously applicable requirement upon requesting states to provide *prima facie* evidence and a specific double criminality requirement for the most serious offences. Both of these developments have proved somewhat controversial and have given rise to calls for reform. The principle of double criminality (the *prima facie* requirement will be mentioned below) requires the act with which a person is charged or has been convicted to be an offence in both the requesting and requested states. Under the EAW it was replaced with the necessity that the offence come under one of the 32 crimes in the Framework List of offenses. One of the 'optional safeguards' in article 4 of the Framework Decision is relevant here in that it provides that a state may refuse to execute a EAW where the crime is not found in the Framework List. This is not necessary at present for the UK to apply, however, as it has retained the principle of double criminality alongside the Framework List. Further optional safeguards allow a state to refuse to surrender where the person

is being prosecuted in the requested state for the same act, a decision has been taken not to prosecute and where the requested state's law considers that the acts have been committed in whole or in part in its territory.

In general terms, the EAW has greatly increased the volume of extradition requests to the UK. Statistics released by the Council of the EU on 16 November 2010 provided that 24 of the 27 EU Member States issued 14,789 EAWs in 2009. Further, they provide that the UK issued 220 EAWs and Poland 4844. It is clear that a significant majority of the extradition requests from states such as Poland relate to relatively minor crimes, such as theft and assault. It is also evident that a number of these requests have engendered challenges to surrender on the basis of human rights, largely but not exclusively because of the condition of prisons abroad. It is notable, however, that concerns voiced over the replacement of double criminality with the requirement of inclusion within the Framework List (and its inclusion of the 'crimes' of racism and xenophobia) voiced when the law was enacted have not been realised.

Whilst the terms of the review do not make clear what the particular concern over optional safeguards is, the issue appears to relate to article 4(3), which provides that a state may refuse to surrender a person where it has decided not to prosecute or to halt proceedings. Clearly the introduction of the power to halt proceedings and refuse to surrender on the basis of the relatively minor nature of the crime is not an unreasonable development (the effect of a decision not to prosecute is mentioned below). This is especially the case with the prospect of a considerable increase in the number of requests on the horizon – the majority of which may well relate to relatively minor crimes. This increase will most likely follow the adoption of the Schengen Information II system - the second generation of the EU-wide system collecting immigration, policing and criminal information. It is preferable that a power to halt proceedings on the basis of the crime being relatively minor would entail the application of a proportionality test by the UK court – balancing factors including the disruption to the accused and the cost to the state with the seriousness of the offence. Over time the application of this test would lead to a significant reduction in the number of requests to the UK due to the knowledge that they would not overcome this *de minimus* proportionality test.

<u>The Forum Bar on Extradition in the Police Act 2006</u>

The third subject under review is whether the 'forum bar' found in the Police and Justice Act 2006 should be brought into force. The Call for Submissions describes this subject as whether a crime committed mainly in the UK should be prosecuted here – a distinct but related question. The forum bar will take the form of ss 19B and 83A of the 2003 Act if brought into force. Section 19B provides:

> "(1) A person's extradition to a category 1 territory ("the requesting territory") is barred by reason of forum if (and only if) it appears that-

(a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and
(b) in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.
(2) For the purposes of subsection (1)(b) the judge must take into account whether the relevant prosecution authorities in the United Kingdom have decided not to take proceedings against the person in respect of the conduct in question".

Section 83A provides similarly and relates to Category 2 states. Clearly these sections require judicial consideration of both the territorial connection of the conduct to the UK and the general interests of justice. Decisions on the latter must include consideration of whether there had been a decision not to prosecute. The suggestion underlying this is that extradition is more appropriate, where a crime was committed at least in part within the UK, following a decision not to prosecute. Several points can be made here. Firstly, support for the enactment of the forum bar (and now its entry into force) arose from cases including those of the 'NatWest Three' and Gary McKinnon. In both the accused committed acts within the UK that gave rise to offences under United States law. In the case of the NatWest Three an unsuccessful challenge against the refusal by the Director of Public Prosecutions to instigate an investigation within the UK was made in *Bermingham and others v Director of the Serious Fraud Office* ([2007] QB 727). It should be noted that in both these cases the victims of the acts of the accused were present in some sense at least in the US – even though ultimately the victim in the NatWest Three case was the Royal Bank of Scotland. The point to be emphasised here is that a territorial connection and the appropriateness of prosecution are increasingly unrelated. The relative ease of committing crimes remotely across borders leads to this fact. Whilst a territorial connection should be amongst the factors considered in prosecutorial decisions it is but one, and a relatively small one at that. The putative rational behind the forum bar is the primacy of territory in the application of the criminal law. As noted, this is increasingly marginal – with the *situs* of the victim and the public interest of the jurisdiction in which the crime was concluded or had its effects outweighing that of the country in which the crime was instigated.

A second point that must be made is that ss 19B and 83A in effect extend the double jeopardy rule by the back door. Double jeopardy, the rule which bars extradition where a person has been tried and convicted or acquitted, is found in ss 12 and s 80 of the 2003 Act, and does not cover the situation where an investigation has ended with a decision not to prosecute. Whilst there is some merit in extending the rule (as noted - it forms one of the optional safeguards under the EAW) there are also objections to it. One is that an extension of the rule, if thought necessary, should take the form of a direct and explicit amendment. Indeed the forum bar, as drafted, raises questions about the categorisation of crimes themselves (result and conduct), theories of jurisdiction (initiatory and terminatory) and even criminal jurisdiction generally (the role of territory, nationality and residence as founding it) and as such is not appropriately introduced into the law in the context of extradition and in the form of an

amendment to Extradition Act 2003. Second and more perhaps important is the point that decisions to prosecute within the UK must be taken for reasons including the public interest, available evidence etcetera as found, for example, in the COPFS Prosecution Code for Scotland and the CPS Code for Crown Prosecutors for England and Wales. The putative deficiencies of the criminal justice systems of third countries and the possible treatment given to accused and convicted persons under them should not be a relevant consideration. Finally, such a rule may give rise to the expectation that possible prosecution be considered in all extradition cases. The former Lord Advocate, Lord Boyd, iterated such a concern, saying that the forum bar would lead to an implicit expectation that the Lord Advocate would investigate when an extradition request was received in Scotland, and that this would involve considerable time and resources. He was therefore of the view that the forum bar was ill-conceived (House of Lords Hansard 1 Nov. 2006, col 297 *et seq)*. Lord Boyd's concern is real and remains.

The Balance of the Extradition Treaty with the United States

The fourth issue under review, closely related to the fifth, is the balance of the March 2003 Extradition Treaty between the United Kingdom and United States (the Treaty). This question arises from the fact that the UK and US apply different evidential requirements when extradition requests are made to them. Extradition requests made to the UK traditionally required to be accompanied with *prima facie* evidence that the subject of the request committed the specified offence. For example s 7(2)(b) of the Extradition Act 1989 provided that requests include "... particulars of the offence of which he is accused or was convicted (including evidence... sufficient to justify the issue of a warrant for his arrest under this Act)". This requirement, retained for Category 2 states by s 84(1) of 2003 Act, provides *inter alia* that a judge "... must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him". Crucially, from a balance point of view, this requirement has been set aside for the US under s 84(7) of the 2003 Act and the Extradition Act 2003 (Designation of Part 2 Territories) Order, SI 2003/3334 (as it has been for Albania, Georgia and Russia amongst others). What is required from these states is merely information as to the identity of the individual and the alleged crime committed. This contrasts with the requirement imposed by the US upon the UK and all other states, "probable cause", based on the Fourth Amendment to the US Constitution. It takes the form of "... such information as would provide a reasonable basis to believe that the person sought committed the offense". The UK has explicitly agreed to the US requirement through its inclusion in article 8(3)(c) of the Treaty. There is no equivalent provision stipulating the UK's requirement in the Treaty.

In light of the differential in evidential requirement required by the UK and US the Treaty is clearly unbalanced in its application. It should be noted however, that the *prima facie* requirement is not equivalent to that of probable cause – it is a higher, more onerous standard. Prior to the removal of the *prima facie* requirement therefore, the balance was tilted

in the opposite direction. More significantly, this issue is one of inter-state relations not the extradition of individuals. The vocal criticisms against the treaty on this point appear to conflate the differential in evidential requirement with other criticisms based upon US prosecution policy and prison conditions. Instead the issue is whether the UK rightfully places trust in the criminal justice system of the US, and in particular whether there is a justified concern that baseless and spurious extradition requests are being made to the UK. This is because it is these that such an evidential requirement is designed to address. In this regard there have not been, to the author's knowledge, suggestions that extradition requests from the US have been groundless.

The Provision of Prima Facie Evidence by Requesting States

The final subject under review is the provision of *prima facie* evidence. The first point to make here is that as the law stands this requirement applies to the majority of states with which the UK has an extradition agreement. Only those within the EAW system and those designated under s 84 of the 2003 Act do not have to provide it when making a request. Admittedly, these are the states from which the UK receives the greatest number of, and most controversial, requests. The second point to note is one that has been made above. This is that the basis of the EAW and the decision to not apply the *prima facie* requirement to certain states is that the UK places a high degree of trust in the criminal justice systems of its closest partners, and that they will not make groundless or spurious extradition requests. The UK, by forgoing the requirement, assumes that a request will only be made where a sufficient case exists against an accused, and that that accused will be tried fairly in the requesting state and acquitted if that case is not proven to the requisite standard. The re-introduction of such a requirement is, in the author's view, a retrograde step – as with the re-introduction of political discretion above – and one not required. There have not been, to the author's knowledge, a material number of cases where an accused has been surrendered or extradited and the case against him or her was found to be non-existent. Of course even one such type of case is too many, and organisations such as Fair Trials Abroad (http://www.fairtrials.net/) have detailed the circumstances of several - notably the majority of which concern EAW partners. Generally, however, the way forward is not to revisit the past and re-apply a *prima facie* evidence requirement. Rather it is to realise that all extraditions and surrenders abroad are required to be compatible with human rights. As a result it has to be assumed that all criminal trials following extradition will satisfy article 6 and therefore if the case against an accused fails to satisfy the requisite standard, the presumption of innocence will prevail and the accused will be acquitted.

Conclusion

The Review must distinguish the real issues and concerns from those of less merit yet publicised and supported by media and political sources. It is also crucial to keep in mind the underlying purpose of the system of extradition – to ensure as far as possible that criminal justice is internationally effective. Justice should not be frustrated by the mere fact

of an accused committing a crime remotely or afterwards coming to the UK, nor should the UK become a safe-haven for such persons. On the other hand, the UK cannot and must not be knowingly complicit in violations of human rights or injustice through the rendition of persons abroad. The present system largely achieves an appropriate balance. It aims to efficiently and effectively administer criminal justice internationally whilst protecting the human rights of accused and convicted persons. The system is predicated upon the basic point that it is correct to place trust in the criminal justice system of partner states. This is a long-standing UK belief. If it is now thought that this trust is misplaced, a whole-scale review of criminal jurisdiction as well as extradition is needed to, amongst other things, introduce a system of jurisdiction based upon nationality and residence. It is submitted that this trust is not misplaced. The UK rightfully readily assists its extradition partners in the prosecution of crime, and does so whilst affording accused and convicted persons human rights according to the law found in the Human Rights Act 1998 and the ECHR 1950 as interpreted by UK courts and the European Court of Human Rights.