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The Law Society
of England and Wales

Law Society Response to the Home Office Extradition Review

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supporting solicitors

Introduction

The Secretary of State's announcement of the Extradition Review ("the Review") identified five core areas: (1) breadth of Secretary of State discretion in an extradition case; (2) the operation of the European Arrest Warrant ("EAW"), including the way in which those of its safeguards which are optional have been transposed into UK law; (3) whether the forum bar to extradition should be commenced; (4) whether the UK-US Extradition Treaty is unbalanced; and (5) whether requesting States should be required to provide prima facie evidence.

Aspects of the five core areas have been considered as part of wider enquiries into the operation of the UK extradition regime by the House of Commons Justice Select Committee as part of its report on *Justice Issues in Europe*,[1] and by the House of Commons Home Affairs Committee in an oral evidence session on 30 November 2010 and follow up session on 18 January 2011. The Joint Committee on Human Rights is currently conducting an inquiry into the human rights implications of UK extradition policy, due to report in mid-April. Evidence heard by these bodies and their findings will be referred to where they have informed the Law Society's response.

It is not clear to what extent the Review will consider other aspects of the UK extradition regime beyond the five core areas (for example, the relationship between extradition and deportation or extraordinary rendition). To the extent that the Review does consider issues beyond the stated remit, the Law Society would urge the Review to pay particular attention to legal aid. Anecdotal evidence suggests that the introduction of means testing in the Magistrates' Courts effectively denies access to legal aid for defendants in extradition proceedings, where the time taken to process applications exceeds the length of those proceedings. However, the Law Society notes with support the authority provided by *Jeziorowski v. Poland* [2010] EWHC 2112 (Admin) for the proposition that there may be reasonable cause to postpone the initial hearing in order to permit the requested person to obtain legal aid and representation.

Scope

The five core areas relate to the operation of the Extradition Act 2003 ("the 2003 Act"), as amended by the Police and Justice Act 2006 and the Policing and Crime Act 2009; informed by the preceding extradition regimes under the Extradition Act 1989 ("the 1989 Act") and the Extradition Act 1870, as amended ("the 1870 Act").

Several of the core areas also relate to international agreements entered into by the UK, including the Council Framework Decision of 13 June 2002 on the European

[1] House of Commons Justice Committee, *Justice Issues in Europe*, Seventh Report of Session 2009-10, 6 April 2010

arrest warrant and surrender procedures between Member States (2002/584/JHA) ("the Framework Decision") creating the EAW scheme and the 2003 Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America ("the UK-US Treaty").

Methodology

The standard by which the operation of existing extradition arrangements is to be assessed is, according to the Coalition's *Programme for Government* (20 May 2010), its 'even-handedness'. The Secretary of State's statement of 8 September 2010, announcing the Review, identified two criteria: 'efficiency' and 'the interests of justice'; but did not define these terms for the purpose.

The range of measures which could potentially be adopted to address 'even-handedness' in the five core areas will be constrained by the need to comply with obligations owed by the UK under international and EU law. Specifically in the area of EU law, any proposed will need to take account of pending EU instruments in the field of Justice and Home Affairs in accordance with the Stockholm Programme.

1 The breadth of the Secretary of State's discretion in an extradition case

The ability of the Secretary of State to exercise discretion provides an obvious safeguard for fugitives. Under the previous extradition regime the Secretary of State exercised a broad general discretion to refuse requests where it would not be just and fair to extradite in the circumstances. This discretion has, however, been curtailed and, under the 2003 Act, the Secretary of State's formal involvement in extradition proceedings is limited to requests from Part 2 territories. Any corresponding involvement by the Secretary of State in Part 1 requests would be contrary to the exclusively *judicial* cooperation scheme established by the Framework Decision.

In relation to Part 2 requests the Secretary of State plays a formal role at two stages; neither of which entails any real exercise of discretion. Firstly, the Secretary of State certifies extradition requests from Part 2 territories. On receipt of a valid request from a category 2 territory, the Secretary of State may issue a certificate under section 70 of the 2003 Act, certifying that the request has been made in the approved way. The Secretary of State may refuse to issue a certificate in the limited circumstances set out in section 70(2) of the 2003 Act. Despite the use of the word 'may' the courts have confirmed that this is not in fact a discretion, where to do so would breach the Human Rights Act (HRA) 1998 (*Poland v Dytlow* [2009] EWHC 1009 (Admin)).

Secondly, for Part 2 requests it is the Secretary of State (rather than the judge, as for Part 1 requests) that orders extradition or discharge. Within two months from the day on which the Secretary of State is sent a case by the extradition judge, the Secretary of State must consider whether any of the grounds set out in section 93-102 of the

2003 Act exist, which prohibits the making of an extradition order (namely, whether the death penalty is available; whether the rule of speciality would be breached; whether there has been an earlier extradition or transfer of the fugitive to the UK from another territory). There is under section 108 of the 2003 Act a right to appeal a decision by the Secretary of State to order extradition or discharge. The Secretary of State's decision is also subject to judicial review.

In the absence of any real discretion on the part of the Secretary of State under the 2003 Act, safeguards for fugitives are limited to those available to the courts. The courts are prevented, under the 2003 Act, from sending Part 1 requests to the Secretary of State for a decision or, for Part 2 requests, from proceeding to consider themselves whether to order extradition, if any of the bars to extradition arise. These are set out, exhaustively, in sections 11-19A and 79-83 of the 2003 Act and consist of the rule against double jeopardy, extraneous considerations, passage of time and hostage-taking considerations; and in the case of Part 1 requests, also the requested person's age, speciality, the requested persons earlier extradition to the UK from another territory or earlier transfer to the UK by the International Criminal Court. Under both Parts 1 and 2 the courts must discharge the person sought, or adjourn the extradition proceedings, if it appears, by reason of the person's physical or mental condition, that it would be unjust or oppressive to extradite them (sections 25 and 91 of the 2003 Act).

In both Part 1 and Part 2 cases the courts must also consider whether extradition would be compatible with the requested person's rights under the European Convention on Human Rights (ECHR) (sections 21 and 87 of the 2003 Act). Even in the absence of an express provision to this effect UK courts are, as public authorities for the purposes of the Human Rights Act 1998, obliged to act compatibly with the ECHR. However, a higher threshold for establishing a breach of rights is applied in extradition proceedings than would otherwise be purely domestic criminal proceedings. UK courts will presume that parties to the ECHR and other international human rights agreements will comply with their obligations; particularly so where the requesting State is an EU Member State (*Symeou v Public Prosecutor's Office at the Court of Appeals Patras, Greece* [2009] EWHC 897 (Admin)). The risk that extradition will result in a violation of absolute rights such as Article 3 ECHR in the requesting State must be conclusively established (*R (Wellington) v Secretary of State for the Home Department* [2009] 1 AC 335; *R (McKinnon) v Secretary of State for Home Affairs* [2009] EWHC 2021 (Admin); *R (Gomes) v Secretary of State for the Home Department* [2010] EWHC 168 (Admin); cf. *Brown v Government of Rwanda* [2009] EWHC 770 (Admin)). The interference of extradition with qualified rights such as Article 8 ECHR must be exceptionally serious or compelling to outweigh the public interest in giving effect to a request for extradition (*Balog v Judicial Authority of the Slovak Republic* [2009] EWHC 2567 (Admin); *Norris v Government of the USA (No 2)* [2010] 2 WLR 572).

In addition to their powers under the 2003 Act the courts exercise an inherent jurisdiction to dismiss extradition proceedings as an abuse of process. The abuse of process jurisdiction operates in parallel to the statutory safeguards under the 2003 Act; for example, if the requested person has been recognised as a refugee (*Poland v Dytlow* [2009] EWHC 1009 (Admin)).

Where the courts are unable to rectify a serious injustice, recourse may instead lie with the relevant diplomatic authorities or with an application for interim measures under rule 39 of the Rules of the Court of the European Court of Human Rights (*R (Mann) v City of Westminster Magistrates' Court* [2010] EWHC 48 (Admin)).

There has been some criticism of the sufficiency of the scope of the court's jurisdiction in extradition cases. Giving evidence to the House of Commons Home Affairs Committee on 30 November 2010 the Chief Executive of Fair Trials International, Jago Russell, suggested that the 2003 Act abolished political discretion to prevent unjust extradition without replacing it with judicial discretion to prevent unjust extradition; so that, at present, there is no power to stop an extradition that is fundamentally unjust. Mr Russell suggested that this discretion should be exercised by the courts (question 59).

Giving evidence before the same Committee on 18 January 2011, Julian Knowles of Matrix Chambers expressed his view that historically the most essential safety net of extradition, removed by the 2003 Act, was the involvement of the Secretary of State at the beginning and at the end of the process; and that this function was not adequately performed by the Convention.

An additional, extra-legal, safeguard against unjust extradition may, however, be the ability of Government ministers to make informal representations to the requesting State in a particular case. Giving evidence before the same Committee, the Rt Hon David Blunkett MP observed, in light of a leaked appeal by the then Prime Minister Gordon Brown to the American ambassador that the Gary McKinnon case be reconsidered, that politicians such as the Secretary of State would inevitably make representations and intervene in high profile cases regardless of the deliberate curtailment of their role under the 2003 Act (response to question 6). The Committee observed that the current Prime Minister had also raised the case with President Obama. Press reports have subsequently confirmed that these efforts have, to date, been unsuccessful.[2]

Recognising that the 2003 Act puts the onus on the courts rather than on the Government to ensure that the extradition process does not operate unjustly, the Law Society urges the courts to be vigilant in applying the statutory bars to extradition under the 2003 Act and to exercise their inherent abuse jurisdiction where appropriate. Extradition lawyers should be equally vigilant in bringing potential injustices to the courts' attention. The Law Society agrees that the judiciary, independent from political influence, are more appropriate than the executive to perform this task; and that the courts have at their disposal the necessary powers for this purpose. The Law Society does not believe that the court's powers need to be strengthened; and notes in this context that the scope of the courts' jurisdiction is, in Part 1 requests, determined by the terms of the Framework Decision.

However, the Law Society recognises that there may be rare cases where reliance on the powers available to the courts alone may be an incomplete guarantee that the

[2] The Telegraph, *WikiLeaks: Gordon Brown's personal plea for hacker Gary McKinnon to serve sentence in Britain rejected by US*, 30 November 2010

extradition process operates in the public interest. To this extent the Law Society hopes that the residual safeguard in the form of ministerial discretion to make representations to appropriate officials in the requesting State will be performed not only responsibly but also transparently.

The Law Society notes that reliance on Government ministers to address perceived injustice in cases where the courts cannot carries with it the risk that deserving cases may not be identified as such; and, conversely, the risk that undeserving cases are championed, for example, as a result of media attention. Furthermore, where such representations are made in private there may be no accountability mechanism to ensure that the discretion is appropriately exercised.

2 The operation of the European Arrest Warrant ("EAW")

Two main issues can be seen to arise in relation to the review of the operation of the EAW scheme: (1) whether the UK should continue to participate in the EAW scheme when the Framework Decision is transformed into a Directive, as the Treaty for the Functioning of the European Union (TFEU) ("the Lisbon Treaty") requires it to be by 2015; and (2) whether the UK should support, and participate in, any amendments to the existing EAW scheme created by the Framework Decision.

The Government in its Response to the Justice Select Committee's Report expressed its confidence that the present Review will provide an effective means of assessing the UK's extradition relations with EU Member States.[3]

UK participation

The UK Government in its Response to the Justice Select Committee's Report on Justice Issues in Europe indicated that it would consider each 'opt-in' decision with a view to maximising the country's security, protecting civil liberties, preserving the integrity of its criminal justice and common law systems and controlling immigration.

In deciding whether to opt in to the EAW Directive the UK Government will also need to consider the legal and practical effects of recently adopted and pending EU instruments in the field of justice and home affairs; which include a predicted 250% rise in EAWs as a result of the UK's connection to the Schengen Information System (SIS) II in April 2011. The Justice Select Committee has expressed the fear that, *"...[a]s the number of EAWs is predicted to rise, there is a real risk that many more citizens will experience the dire consequences of the lack of adequate safeguards afforded to them when they find themselves caught up in cross-European judicial processes*" (paragraph 72).

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[3] Ministry of Justice, *Government Response to the Justice Select Committee's Report: Justice issues in Europe*, 27 October 2010, at paragraph 6.

The UK Government will also need to ensure, if it opts in to the EAW Directive, that any amendments made by it to the EAW scheme are compatible with the UK's obligations as a signatory to the ECHR.

Proportionality

The operation of the EAW scheme created by the Framework Decision has been and continues to be reviewed at both EU and UK levels; not least by the European Commission and by the House of Lords European Union Committee.[4]

There appears to be a broad consensus emerging that a main source of difficulty in the operation of the EAW scheme to date has been the very significant differences between criminal law and even as between the 27 EU Member States. By far the most criticised aspect of the regime is the lack of a mechanism to prevent EAWs being issued for offences perceived as trivial.

There is currently no proportionality requirement in the Framework Decision, whether mandatory or discretionary; nor is there any proportionality requirement imposed under Part 1 of the 2003 Act which implements the Framework Decision in the UK. However, proportionality may still play an indirect role for the purposes of UK extradition proceedings in that the UK courts have suggested that the triviality of an offence can be taken into account in assessing the proportionality of interference with qualified Convention rights as a result of extradition; although triviality cannot of itself provide a valid basis for refusing to execute an EAW (*Sandru v Government of Romania* [2009] EWHC 2879 (Admin); *Hubner v District Court of Prostejov, Czech Republic* [2009] EWHC 2929 (Admin)). The lack of an express proportionality requirement may, therefore, be remedied where extradition is found to be a disproportionate interference with qualified Convention rights.

Furthermore, in accordance with the Framework Decision the 2003 Act provides that conduct will amount to an 'extradition offence' in accusation cases only if it would be punishable by a minimum term of imprisonment or another form of detention; and similarly in conviction cases, only if a sentence of a minimum term has been imposed (sections 64-65). The definition of an 'extradition offence' may, therefore, be seen to provide a measure of protection against EAWs based on 'trivial' offences.

The Law Society has previously called for the EU to introduce a proportionality test as a matter of urgency. In written evidence submitted to the Justice Select Committee the Law Society noted that the absence of a proportionality test discredits

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[4] Commission of the European Communities, *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 23 February 2005, revised 24 January 2006; House of Lords European Union Committee, 30th Report of Session 2005-06, *European Arrest Warrant – Recent Developments*, 4 April 2006.

mutual trust.[5] In response the Justice Select Committee concluded, despite the concerns identified in evidence before it, that the time it would take to review and reform instruments such as the Framework Decision would undermine the mutual trust approach (paragraph 50). On the one hand, the Committee acknowledged that the mutual trust required for mutual recognition to work may be undermined if the threshold for the use of an instrument has been set too low, or interpreted as set too low, given its expense and administrative burden (paragraph 42). In particular, the Committee noted that, *"...[t]he [EAW] has exposed some of the difficulties of adopting common procedures within very different systems and highlighted limitations in taking a mutual recognition approach to legislation in this area."* Nevertheless, the Committee supported the Council's position that it would be prepared to amend the Framework Decision *"...only if it is unavoidable in order to remedy important problems"*.[6] By way of explanation, the Committee observed that:

> *"It is unfortunate that the successful use of the [EAW], and the reduced time taken to process intra-EU extraditions, has been overshadowed by perceived injustices in individual cases (...) ...we believe that the time it takes to review and reform such instruments undermines the mutual trust approach. Legislation should be used only as a last resort to resolving the issues over proportionality and we hope that the current approach bears fruit before the predicted growth in demand for [EAWs] takes place"* (paragraph 50).

In its response to the Committee's report, the Government indicated that it was committed to addressing the issue of proportionality in partnership with other EU Member States and through the European Commission (paragraph 6). Recognising that EAWs have sometimes been issued in relatively trivial cases, the Government endorsed the Committee's recommendation that, if the European Evidence Warrant is revised or replaced, lessons should be learned from the operation of the EAW by incorporating safeguards into the legislation to minimise the potential for disproportionate use; and indicated that it would also be negotiating in connection with the European Investigation Order on this basis (paragraph 8).

Giving evidence to the Home Affairs Committee on 30 November 2010, the Chief Executive of Fair Trials International suggested that proportionality as well as other types of human rights safeguards could be introduced at the domestic rather than the EU level; as had been done in Germany (response to question 50).

Giving evidence before the same Committee on 18 January 2011, Julian Knowles suggested that a filter mechanism could be introduced at the earliest stage of the process by which trivial cases would be identified and refused. This would be coupled with a further safety net in the form of a review at the end of the process, by which either the courts or the Secretary of State would be empowered to prevent wrong, unjust or oppressive requests (responses to questions 113, 123). Finally, there would be an opportunity for a further review by the Secretary of State of any

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[5] *Memorandum submitted by the Law Society of England and Wales*, July 2009, at paragraph 9.1.

[6] Council of the European Union, *Follow-up to the final report on the fourth round of mutual evaluations: the practical application of the European arrest warrant and corresponding surrender procedures between member states*, 7 December 2009.

new material that had not been considered by the court (response to question 123). Mr Knowles further suggested that such a filter mechanism would not breach the UK's obligations under the Framework Decision (response to question 113).

The 2003 Act already contains a ground for refusing to execute a Part 1 request which is not expressly mandated by the Framework Decision; namely compliance with Convention rights. Arguably, however, the Framework Decision is itself subject to this proviso as a matter of EU law. The introduction at UK level of a proportionality test or other measures to address perceived shortcomings in the Framework Decision raises complex legal and practical issues; not least the impact thereof on the principle of mutual trust. A further potential complication arising on this approach, identified in evidence given before the Justice Select Committee, is the inability of the UK courts to refer questions about the operation of the EAW scheme to the European Court of Justice because of the Government's decision not to opt in to its jurisdiction (paragraph 49).

Further amendments to the EAW scheme

Giving evidence to the Home Affairs Committee on 30 November 2010, David Blunkett suggested that another anomaly in the operation of the EAW scheme that had not been foreseen at the time joining is the absence of a time limit on when extradition can be triggered; citing the case of Gary Mann as an example (response to question 22).

A further potential amendment to the EAW scheme debated in evidence before the Home Affairs Committee on 30 November 2010 was the need to address the reliability and effectiveness of EAW alerts on the Schengen Information System. The Chairman of Fair Trials International observed that mistakes in EAW alerts are not picked up until the EAW is acted upon (response to question 52). Furthermore, there is no means for removing an EAW alert, once issued.

The Law Society is hopeful that the protection of defence rights in the operation of the EAW scheme will be further strengthened by the existing and pending instruments adopted in furtherance of the 'Roadmap'. The Law Society has called on the EU to introduce binding minimum procedural rights throughout the EU for suspects and defendants at all stages of the criminal process from investigation onwards;[7] and welcomes the UK Government's decision to opt-in to the first of these instruments.

Amendments to UK implementing legislation

There are clearly shortcomings in the EAW scheme, such as the lack of a proportionality test, which cannot be addressed by UK implementing legislation alone but only by amendments to the EAW scheme itself. Nevertheless, there remain other

[7] *The European Union 2009-2014, Priorities of the Law Society of England & Wales*, July 2009

potential amendments to the way in which the Framework Decision is currently implemented in the UK.

The Framework Decision provides in Article 4 for a number of optional safeguards. The following have sought to be transposed into UK law.

- Double criminality is required for all offences other than those listed in Article 2(2) of the Framework Decision, as reproduced in Schedule 2 of the 2003 Act (Article 4(1) of the Framework Decision). During debates on the Policing and Crime Bill 2009, an amendment to the 2003 Act was proposed which would require the Secretary of State to produce guidance on the definition of the offences in respect of which dual criminality has been abolished.[8] In response the Government's spokesman stated that he did not believe that the proposed amendment was necessary, in the absence of any knowledge of judges seeking guidance on the interpretation of the list offences.

- Precedence must be given to any on-going UK prosecutions in respect of both Part 1 and 2 requests (sections 22 and 88 of the 2003 Act, and Article 4(2) of the Framework Decision). Although not specifically dealt with in the Framework Decision, the 2003 Act now provides that where the person sought is serving a sentence in the UK, the extradition judge has a discretion to adjourn the extradition hearing until the person is released from detention (sections 23 and 89 of the 2003 Act); even if the extradition hearing has not yet begun (sections 8A-B and 76A-B of the 2003 Act; introduced by the Policing and Crime Act 2009).

- Where the person sought has already been finally judged in the UK or in another State in respect of the same acts, double jeopardy operates as a bar to extradition for both Part 1 and 2 requests (section 12 and section 80 of the 2003 Act, and Article 4(3) of the Framework Decision).

The Framework Decision provides a number of further optional safeguards, which have not been provided for in the 2003 Act. In accordance with the remaining provisions of Article 4 of the Framework Decision, the UK would also be entitled to refuse requests on the following grounds:

- The UK has decided either not to prosecute, or to halt proceedings, for the offence on which EAW is based (Article 4(3) of the Framework Decision).

- The criminal prosecution or punishment of the requested person is statute barred according to the law of the UK, and the acts fall within the jurisdiction of the UK under its own criminal law (Article 4(4) of the Framework Decision).

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[8] *House of Lords Hansard*, 20 October 2009, at 602-603.

- The UK undertakes to execute the sentence or detention order imposed in accordance with its domestic law (Article 4(6) of the Framework Decision). However, the 2003 Act does permit extradition to be granted subject to the condition that the person is returned to the UK to serve the remainder of any sentence of imprisonment or other form of detention imposed (sections 59 and 132 of the 2003 Act).

The Law Society supports the UK's continued participation in the EAW scheme and notes the significant achievements made to date in speeding up the extradition process. The difficulties experienced in the operation of the scheme appear to have been 'front loaded' and may, therefore, reduce with time, as EU Member States and their courts become more familiar with each other's respective criminal justice systems. Mutual trust requires the acceptance of differences between Member States, and the inevitability of an imbalance in the number of requests made and received.

Whilst the Law Society continues to call for a proportionality test to be introduced, the UK's continued participation in the EAW scheme should not be jeopardised by proportionality concerns. If the political reality is that the EAW scheme will not be amended when the Framework Decision is transformed into a Directive, there may be other ways to address the absence of a proportionality test and other shortcomings identified in the operation of the regime. To this extent the Law Society would welcome urgent consideration, at both Member State and EU levels, of practical rather than legislative measures that could be adopted to address the problems caused by differing Member State practices in relation to de minimis thresholds for prosecutions and requests; not limited to producing a Handbook of good practice and sharing information on national practices. Specifically in relation to the predicted increase in EAW's as a result of the UK's connection to the SIS II the Law Society urges urgent consideration of the human rights and data protection issues raised by potential errors in alerts, and calls for the introduction of a mechanism for rectifying erroneous alerts.

To the extent that legislative amendments to the EAW scheme are considered necessary, these should, as a matter of principle, be adopted at EU level and not by individual Member States.

In respect of the UK's implementation of the Framework Decision, the Law Society urges the Government to introduce the additional optional safeguards not currently provided for in the 2003 Act. The Law Society further suggests that, as a matter of principle, safeguards for individuals in EU law should not be 'optional'.

3 Whether the forum bar to extradition should be commenced

Some international treaties provide that extradition can be refused on the 'adjudicate or extradite' (*aut dedere aut judicare*) principle; i.e. extradition can be refused on the ground that the requested State undertakes to institute proceedings against the fugitive in respect of the conduct. This ground has, however, been largely confined in

application to international crimes. The 'forum' bar would operate in largely the same way; i.e. extradition could be refused on the ground that the requested State is better placed to institute proceedings in respect of the offence. The difference, of course, is that the basis for the refusal is not contingent on proceedings being instituted in the UK.

There is currently no forum bar to extradition under either Parts 1 or 2 of the 2003 Act; despite the ability of Member States under the Framework Decision to permit the refusal of EAWs relating to offences which are regarded, under the law of that Member State, as having been committed in whole or in part in its territory or in a place treated as such (Article 4(7)(a) of the Framework Decision). The 2003 Act does, however, require both Part 1 and 2 requests to be refused where the offences have been committed outside the territory of the requesting State where UK law would not permit prosecution for the same offence if committed outside its territory (sections 64-65 and 137-138 of the 2003 Act and Article 4(7)(b) of the Framework Decision).

As a result of widespread criticism of the lack of a forum bar following the 'NatWest Three' case (*R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 272), the Police and Justice Act 2006 inserted new sections 19B and 83A into the 2003 Act. Under these new provisions extradition would be barred under both Parts 1 and 2 if a significant part of the conduct alleged to constitute the extradition offence was carried out in the UK and, in light of this, and all the other circumstances, it would not be in the interests of justice for the person sought to be tried for the offence in the requesting territory. The bar would not apply, however, to conviction requests where the person sought is alleged to be unlawfully at large. The bar will only come into force by order of the Secretary of State, following the resolution of each House of Parliament (Schedule 13 of the Police and Justice Act 2006).

During the debates on these provisions, it was recognised that Ireland and a number of other European jurisdictions require forum to be considered (House of Commons Hansard, 29 November 2007 at 728). The provisions were presented as "*...a safeguard against the capricious use of the extradition powers in circumstances where a British court would not convict, or where the British legal authorities would not indict (...) which simply avoids any abuse within the American jurisdiction of the arrangement*" (at 730). The contra-argument was that it was a matter for the prosecuting authorities rather than for the judicial authorities to determine in which jurisdiction there was the best chance of a successful prosecution (at 731).

In the absence of an express forum bar in the 2003 Act, extradition in circumstances in which the forum bar would otherwise have operated may nevertheless be indirectly prevented under the separate human rights bar; most obviously in order to prevent a violation of Article 8 ECHR. However, as has been pointed out above the threshold is a high one; and the extradition judge should not normally have regard to the possibility of a prosecution in the UK (*Norris v Government of the USA (No 2)* [2010] 2 WLR 572). The forum bar would, therefore, provide far stronger protection to the person whose extradition is being sought.

The Law Society calls for the provisions introduced by the Police and Justice Act 2006 to be brought into force.

4 Whether the UK-US Extradition Treaty is unbalanced

The main perceived imbalance in the current UK-US extradition arrangements is the different requirements for UK and US extradition requests, respectively. Historically US requests were required to demonstrate a prima facie case that an extraditable offence had been committed. Under the current UK-US Treaty, US requests in accusation cases only need to identify the person sought, the facts of the offence, the applicable law and provide a copy of the domestic arrest warrant and any charging document. UK courts do not, therefore, assess the strength of the evidence in extradition proceedings relating to US requests. By contrast, UK requests must additionally set out such information as would provide a reasonable basis to believe that the person sought committed the offence (Article 8(3)(c) of the UK-US Treaty).

The most frequently invoked justification for the additional requirement imposed on UK requests is that a US court needs to be satisfied, in any event, that there is 'probable cause' before issuing a domestic arrest warrant. Giving evidence to the Home Affairs Committee on 30 November 2010, David Blunkett suggested that the perceived imbalance, which resulted from the nature of the US judicial system (response to question 9), was not borne out in practice. Indeed, Mr Blunkett could not think of a single case in the seven years since the signing of the treaty where the UK judicial process had not been explored in full. Finally, Mr Blunkett suggested relying on new technology in very specific cases, such as Gary McKinnon's (response to question 27).

A further perceived imbalance in extradition arrangements between the UK and the US is the disparity between the number of extradition requests made by the UK and the US, respectively. The Chair of the Home Affairs Committee on 30 November 2010 noted that just three Americans have been brought to Britain under the Extradition Act since 2004, whereas 28 UK nationals have gone the other way (response to question 25). However, the frequency of requests is not of course governed by the UK-US Treaty.

In other respects the UK-US Treaty appears to be largely balanced. For example, double criminality is required for both UK and US requests in that an offence is only an 'extraditable offence' if the conduct on which it is based is punishable under the laws of both States by deprivation of liberty for at least one year (Article 2). It is not necessary for there to be an exact correspondence between the offence in the requesting State and the offence in the requested State (as confirmed by the House of Lords in *Norris v Government of the United States of America* [2008] 2 WLR 673).

There is, however, little scope at present for UK courts, in considering US extradition requests, to take into account the practical realities of the disparity between the two countries' criminal justice systems over and beyond the definition of substantive offences; i.e. different approaches to the availability of legal aid and to plea bargaining, and different sentencing practices and conditions of imprisonment. To date those differences have not been found to violate the right to a fair trial under

Article 6 ECHR, or to merit a stay of extradition proceedings in the UK as an abuse of process (*McKinnon v Government of United States of America* [2008] 1 WLR 1739).

Some relief to requested persons prejudiced by the nature of UK-US extradition arrangements is provided by prisoner transfer agreements, in accordance with which UK nationals extradited to the US can be returned to serve their sentence in the UK. These arrangements are limited to cases where concurrent jurisdiction arises, and are dependent on consultations between UK and US prosecutors to reach an agreed approach.

Further protection against any potential injustice caused by giving effect to a US request would be provided by bringing the forum bar into force (discussed above), as suggested by Julian Knowles in his evidence to the Home Affairs Committee on 18 January 2011 (response to question 119).

The Law Society cannot see the rationale, as a matter of principle, for limiting this inquiry to the UK-US Treaty, and suggests that a broader review of the UK's extradition arrangements should be conducted to identify other potentially imbalanced treaties. Nevertheless, the Law Society recognises that any treaty arrangement will need to accommodate any discrepancies between the signatories' extradition law and practice. To this extent any perceived 'imbalance' may well be a reflection of the nature of the particular overseas jurisdiction and may perhaps, for this reason, be unavoidable.

With this in mind, the Law Society notes that the perceived injustice in US-UK extradition cases may be less to do with the absence of a reciprocal prima facie evidence requirement and more to do with practical differences between the respective criminal justice systems. Similarly, the ratio of incoming as compared to outgoing requests does not appear to be an appropriate method of evaluating the fairness of a formal extradition arrangement with any State party; given that the frequency of requests is necessarily dictated by practical exigencies.

5 Whether requesting States should be required to provide prima facie evidence

The need to provide prima facie evidence in support of an accusation is dispensed with for a number of requests under the 2003 Act. This position reflects the UK's obligations as a signatory to the European Convention on Extradition 1957 not to require requests to be accompanied by evidence of a prima facie case unless it enters a reservation to this effect.

Part 1 territories are not required to provide evidence beyond a statement of the conduct constituting the offence. It is not for the requested State to inquire into whether the conduct alleged in the EAW gives rise to a case to answer (*R (Hilali) v Governor of Whitemoor Prison* [2008] 2 WLR 299).

Only requests from Part 2 territories must be accompanied by evidence sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him (section 84 of the 2003 Act); unless the territory has been designated by Order of the Secretary of State for this purpose under section 84(7) or 86(7) of the 2003 Act (Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, New Zealand, Norway, Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine and the USA).

The Law Society notes that the existing exceptions to the requirement to provide prima facie evidence diminish its status as a general rule. In cases for which the requirement is dispensed the Law Society considers that the robustness and bona fides of a request may be challenged by the alternative avenues provided for under the 2003 Act.

However, the Law Society suggests that the Government periodically review the list of the Part 2 territories currently designated for this purpose, so as to address any potential changes in those territories (such as, for example, regime changes) that may render their continued designation inappropriate.

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