FACULTY OF ADVOCATES

RESPONSE

by

FACULTY OF ADVOCATES

to

THE HOME OFFICE

on

REVIEW OF EXTRADITION

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1. The Faculty welcome this review of extradition law and the opportunity to participate in it.

2. In preparing this response, we have assumed that the review is limited to outward extradition except insofar as the comparison with inward extradition from the United States requires.

Breadth of the Secretary of State discretion in an extradition case

3. The Secretary of State does not have a role under Part 1 of the 2003 Act. The role performed by the Secretary of State under Part 2 of the 2003 Act is inScotland

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performed by the Scottish Ministers[1].

4. The Ministers' role in outward extradition accordingly appears to us to be essentially limited to the issues specified in section 93. No provision confers on the Secretary of State a discretion; she is required to exercise a judgment on certain issues but, having reached a view, must then discharge or extradite in line with her decision on the matter at issue.

5. We therefore proceed to deal with this issue on the basis that the Ministers have no significant discretion in outward extradition.

6. We do not favour the introduction of a general discretion on the part of Ministers not to extradite; such a step would add a further stage to proceedings which would lengthen and complicate them in an undesirable fashion.

7. The issue of whether judicial discretion should be introduced is more complex. The judicial introduction of the doctrine of abuse of process, the key elements of which are oppression and unfair prejudice[2] may be indicative of a problem with the Act.

8. The problem may be with the highly prescriptive catechism approach of the

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1 2003 Act section 141(1)

2 R(Government of USA) v Bow St Mags [2007] 1 WLR 1157 para 82

extradition hearing which likewise denies the Court any discretion in cases that do not fit the narrow categories of the obstacles to extradition. It may, alternatively, lie with the narrow way in which these obstacles have been interpreted by the courts on both sides of the border. It may be that the lack of discretion on the part of the Secretary of State/ Ministers has led to an inflexibility in the operation of the system.

9. The introduction of abuse of process presents a number of difficulties for Scotland in particular; it is a term of art in English criminal law applied selectively to extradition. As the term has no technical meaning and is largely unused in Scotland, achieving parity of protection in Scotland is difficult. As a general proposition, the Faculty considers that United Kingdom legislation should not rely on concepts peculiar to only one country of the United Kingdom.

10. Although a statutory enactment of abuse of process would not greatly affect the complexity of extradition hearings if the approach adopted by the Court of Appeal in *R(Government of USA) v Bow St Mags*[3] were adopted, a definition of abuse of

3 [2007] 1 WLR 1157 para 84:
Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may

process would also be required.

The operation of the European Arrest warrant, including the way in which those of its safeguards which are optional have been transposed into UK law.

11. Consideration of the operation of the European Arrest Warrant would cover a very large number of issues. Given the lack of elaboration of the terms of the consultation announcement, we restrict our comments to certain issues in relation to the transposition into UK law of various optional safeguards provided in the Framework Decision.

12. Article 4(6) provides optional grounds for non-execution of a "conviction" EAW where the requested person is staying in or is a national or resident of the executing Member State and that state "undertakes to execute the sentence or detention order in accordance with its domestic law." Article 5(3) provides that an executing Member State may make surrender of a requested person who is a national or resident in an "accusation" EAW case conditional on her being returned, on conviction, to serve any sentence imposed on her. Neither of these provisions has been introduced into UK law. We consider that they should be. We are of the

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have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred.

view that the implementation of these provisions would protect the private and family life of the accused while implementing the law enforcement aims of the Framework Directive. In reaching this view, we have regard to the "exceptionally serious" test which requires to be passed before the Courts will find that extradition will be in breach of respect for family life under Article 8 of the ECHR.

13. Part (h) of the EAW invites information, in the case of offences punishable by life-time custodial sentences or detention orders, as to the provisions in the issuing Member State for review of the sentence imposed or for the application of measures of clemency. This is a reference to the optional safeguard contained in Article 5(2) of the Framework Decision, a safeguard that has not been introduced into UK law. The recent withdrawal of the application to the ECHR in the case of *Wellington v. UK*[4] and the differing opinions in the House of Lords[5] in that case have not clarified the position with regard to relevant Convention rights. We recommend the introduction of this safeguard into both Parts 1 and 2 of the Act.

Whether the forum bar to extradition should be commenced

14. The forum bar is included in the Police and Justice Act 2006 and, if commenced, would add a new section 19B into Part 1 of the 2003 Act (category 1 territories) and

4 Application 60682/08

5 [2008] UKHL 72

a new section 83A into Part 2 (category 2 territories). The two provisions provide that it is a bar to extradition if it appears that (i) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom and (ii) 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. It is expressly stated that the judge must take into account whether the relevant prosecution authorities in the UK have decided not to take proceedings against the person in respect of the conduct in question. The provisions do not apply if the person is alleged to be unlawfully at large after conviction of the extradition offence.

15. The Faculty considers that these provisions allow for more judicial discretion and flexibility in extradition cases. The underlying rationale of the proposed rules is that the case has some connection with the UK, other than the obvious fact that the person who is the subject of the request is present in the UK. It seems to be particularly relevant that the judge can take into account whether the person is to be dealt with by the prosecuting authorities in the UK. Potentially, these provisions could be utilised where UK nationals are subject to extradition requests by states where they have never been for offences which, for the most part, arise from conduct in the UK.

16. The need for the forum bar has perhaps most publicly been illustrated by the cases of *McKinnon* and the *Natwest Three*. In both these cases, the accused committed

acts in the UK which had effects in the USA. Currently however, it is not a bar to extradition even where the whole conduct constituting the alleged crime took place in the UK. The argument for allowing such flexibility is potentially greater when the alleged victim of the conduct is also in the UK. These provisions ensure that there are more rigorous safeguards in place before persons are sent to foreign territories to be prosecuted. Ultimately it is a matter of judicial discretion whether it is in the interests of justice to extradite in such circumstances.

17. The Faculty recognise valid concerns that these provisions may lead to delay in the system while UK authorities decide whether or not they will take proceedings, but on balance it is considered that these provisions will make for a fairer system.

18. The Faculty also note that the forum bar reflects one of the optional safeguards within the Council Framework Decision itself and is consistent with what was anticipated States might wish to incorporate as part of their extradition safeguards.

19. For these reasons, the Faculty is of the view that the commencement of these provisions would lead to a fairer and more flexible system of extradition.

Whether the US-UK Extradition Treaty is unbalanced

20. The US-UK Extradition Treaty imposes a requirement upon the United Kingdom to demonstrate a *prima facie* case when seeking the inward extradition of a person

from the United States. Article 8(3) of the treaty provides that:-

> " a request for extradition of a person who is sought for prosecution shall be supported by:
>
> ...
>
> (c) for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested."

21. As the US-UK Treaty does not impose a similar obligation on the United States, it is unbalanced. As we attach significance to the need to show a *prima facie* case, it follows that we do not consider this imbalance to be immaterial.

Whether requesting states should be required to provide *prima facie* evidence

22. The Extradition Act 2003 does not require a *prima facie* case to be demonstrated in respect of Category 1 countries, *i.e.* members of the European Union who have implemented the Framework Decision. Such a requirement can be imposed for Category 2 countries[6]. Certain countries can be relieved of that requirement by being designated by the Secretary of State. Twenty-three states are designated.

23. We do not believe that a requirement for Category 1 countries to show a *prima*

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6 2003 Act, section 84

facie case would either be consistent with the terms or the *raison d'être* of the Framework Decision. The system of European Arrest Warrants is intended to be a comparatively swift form of extradition that relies upon mutual co-operation, recognition and trust between the systems of criminal justice of member-states.

24. We are of the view that Category 2 countries are in a different position. With these countries, extradition remains a matter regulated by diverse bilateral treaties, between countries with widely divergent systems (and standards) of criminal trial and prosecution. This is also significantly true of the sub-set of Category 2 countries that are designated. Unlike parties to the Framework Decision, we do not share supra-national governmental and legal institutions. In that context, our view is that a requirement for a *prima facie* case is a valuable safeguard which ought to exist across the board. It is a relatively straightforward way of helping to ensure that a request is made in good faith. It prevents the considerable ordeal that extradition entails (especially for U.K. nationals with little connection with the requesting state) where the evidence supporting the allegation is insubstantial.

25. A properly prepared prosecution should not have difficulty meeting the requirement, particularly given the procedural and evidential provisions designed to assist the applications[7].

7 Principally sections 84, 202, 203 and 205.

Other matters

26. The Faculty note the existence of a significant number of European Arrest Warrants for relatively minor offences. In a number of them there is no realistic prospect of the requested person in fact being sent to jail if convicted. A question may be thought to arise as to whether extradition in such circumstances is good use of the resources involved in extradition.

27. Given the tight timetabling of extradition proceedings, and difficulties experienced by those representing potential extraditees in obtaining information from the issuing territory, we draw attention to the need for a proper description of the offences in EAWs. This is important for a number of reasons not least the dual criminality requirement in relation to offences which are not on the Framework list.