Helen Nugent

Extradition to foreign courts: are our laws fair?

"The Extradition Act 2003 will deliver swifter justice by removing the unnecessary delays and duplication that afflicted our archaic and costly extradition procedures."[1]

David Blunkett, former Home Secretary

Until 2003 extradition law was governed by what was considered to be an unnecessarily complex piece of legislation, incurring superfluous cost and delay. The Extradition Act 2003 was hailed as the solution to this problem, aimed at facilitating the surrender of fugitive offenders between EU member states and category II designated territories.[2] This essay will argue that, by reason of the simplified provisions of the act, our laws are generally not fair and further that, the appeal mechanisms to challenge a potentially unfair extradition order are of limited use in practice.

The general concept of extradition seems to drive a coach and horses through the old English adage of "innocent until proven guilty" and under the European Arrest Warrant scheme, as with category II designated territories, this situation is worsened. The lack of evidence proving a *prima facie* case means that the courts can order an applicant's removal without even considering the merits of the case against him, thus supposing confidence "in the requesting states' procedures".[3] The justification for this is mounted on the fact that countries to which the EAW applies are simultaneously signatories of the European Convention of Human Rights and therefore deemed to act compatibly with the Convention and its provisions. The main fallacy of this argument is that contracting states may derogate from the Convention and, further, are entitled to make their own interpretation of its provisions. With this in mind, English courts have no guarantee that the requesting state will have equivalent standards, or even keep within the conventional framework.

Similar reasoning has been used in respect to the UK- U.S extradition treaty: the U.S constitutional guarantee of a fair trial is couched in terms analogous to those of

[1] http://press.homeoffice.gov.uk/press-releases/Extradition_Bill_Recieves_Royal_Assent
[2] The new Act is divided into two categories: category (I) territories and category (II) territories, with the latter further divided into designated and non-designated territories.
[3] STONE Richard, *Civil Liberties & Human Rights*, Oxford University Press (Oxford: 2004), p393

Article 6 of ECHR.[4] In a report earlier this year, Andy Burnham, Home Office minister, attempted to further justify the treaty by submitting that the new arrangement redressed the balance of evidential requirements with "mature democracies founded on the rule of law".[5] This may ring true to EAW states whose rules apply equally to English requests, but the absence of reciprocity in the rules set out in the treaty mean that the *evidential balance* simply cannot be redressed.

A further streamline provision is contained in schedule 2 of the Act: a list of 32 extradition offences. It is submitted that this provision facilitates extradition, rendering it easier for requested states to ensure that the double criminality rule has been satisfied. In practice, however, schedule II only serves to complicate matters. Descriptions of extraditable offences such as "xenophobic and racist activity" are vague and have the potential to bring about "uncertainty and injustice within the law".[6] Ultimately the use of such indistinguishable terms gives the court a wide interpretative discretion and in doing so reduces transparency in the law.

Save that these modernising provisions limit potential for delay and are consistent with the applicant's Article 6 rights (the right to be brought to trial within a reasonable time), bars to extradition and the possible routes for successfully challenging an application are significantly reduced. Under previous law *habeas corpus* was expressly recognised as a means of challenging extradition but currently the writ has no place in existing legislation, and the existence of appeal routes within the Act would seem to preclude the use of judicial review. Further, the political offence exception has been expressly excluded from the bars contained in section 11 of the Act. We may ask then, how can an individual successfully challenge an extradition order when his case neither falls within the narrow scope of the bars specified in the act, nor has he been privy to the evidence being used against him?
Notwithstanding the contracted bars to extradition and challenges based on procedural impropriety, the court must be satisfied that an extradition order does not

[4] The sixth amendment provides that individuals shall enjoy the right to a "speedy and public trial, by an impartial jury […] and to have the assistance of Counsel for his defence" (Human Rights Update: Bermingham, http://humanrights.org.uk)
[5]http://news.independent.co.uk/legal/article327390

[6] DAVIES Owen QC, SIKAND Maya, *'Surrender Made Easy?'* New Law Journal, 26th November 2004, pp1802-1803

unnecessarily interfere with the applicant's fundamental rights. Although the courts have recognised to the need to strike a balance between the rights of the individual and the wider interests of the general public, greater weight has undeniably been attributed to the latter. The need to bring an accused to trial in the appropriate state, coupled with the increased threat of terrorism and cross border crime has and always will be the premise on which extradition orders and the consequential interference with human rights have been justified; in tackling such issues, any interference with Convention rights will simply be considered in pursuit of a legitimate aim and, for the most part, proportionate.

In *Bermingham* the court held that the appropriate question to answer in determining whether or not an order was proportionate was whether "the defendants faced a clear risk of suffering a flagrant denial of a fair trial."[7] In this sense then, the courts have set the bar high in maintaining that only the most extraordinary of human rights challenges will succeed, yet it remains unclear what is needed to bring a successful challenge. In *Boudhiba* the court refused a human rights challenge, reasoning that evidence of ill treatment was anecdotal and that there was *no real danger* that the applicant would be subjected to ill treatment, yet the court failed to qualify what may constitute a *real danger* in future cases and in doing so emphasised the concomitant difficulty of raising a successful challenge.

The Extradition Act 2003 has achieved the objective of *removing unnecessary delays and duplication*, but seemingly at the expense of justice. The Act has retained some of the judicial safeguards afforded to applicants, but has unjustifiably placed greater emphasis on making the extradition procedure a quicker and less bureaucratic one. In this sense, then, the extradition procedure seems anything but fair.

[7] R (On the application of Bermingham and Others) v. Director of Serious Fraud Office,[2006] EWHC 200 (Admin)

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