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Extradition to foreign courts: are our laws fair?

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The coup-de-théâtre of pin-striped executives marching on Whitehall, implying the potentially incongruous warning, *"First they came for the corporate bankers / And I did not speak out…"* was highly effective in drawing negative attention to the current law of extradition in the UK. There is however a countervailing voice to be heard. Criminal enterprise has long ceased to be provincial in scope, it is "*now established on an international scale and the common law must face this new reality*".[1] The globalisation of terrorism and electronic financial crime are distinct examples of this expansion.

Assessing fairness in extradition procedures entails consideration of impartiality, individual rights and the demands of justice. However, fairness also connotes the most productive method of balancing conflicting interests. This essay argues that the Extradition Act 2003 (EA 2003) was a progressive step towards properly integrating the functions of international comity and individual rights, but advocates that further powers should be available to courts in the UK, thereby securing optimum standards of fairness.

The EA 2003 Part 1 provides the statutory basis for the application of the European Arrest Warrant (EAW), a mechanism of surrender without prima facie evidence or strict dual criminality between EU member states. In an extradition request, EA 2003 Part 2 territories must still provide prima facie evidence and to a dual criminal standard. However, Part 2 territories designated by the Home Secretary as category 2

[1] Liangsiriprasert v United States [1991] 1 A.C. 225, Lord Griffiths at 251, quoted in Sambei A. and Jones J, *The Extradition Law Handbook*, OUP, 2005.

territories can request extradition without providing prima facie evidence concerning alleged action that qualifies under the dual criminality principle.[2]

Consequently, an EU member state may request extradition from the UK on the basis of information, without the alleged conduct being a crime in the UK, provided that conduct attracts a minimum sentencing threshold in the requesting state. I submit that this is rationally and morally supportable; it is an incremental step in a democratic process towards judicial co-operation and mutual recognition in criminal cases across Europe.[3] Most importantly, there exists the shared safeguard of mutual respect for the ECHR. Furthermore, there are now augmented bars to extradition on grounds of *inter alia*, extraneous considerations, double jeopardy, passage of time and human rights (ss 11-15 and s.21, EA 2003). These bars are assessed by a UK court, utilising ECHR jurisprudence, thus insuring against the danger of variable standards. The coercive power of the state already unavoidably operates on a man from Glasgow in connection with alleged criminality in Penzance. Is there a significant qualitative distinction when substituting Paris or Pisa for Penzance? A crime punishable by three years imprisonment in an EU member state will be a serious crime; the lack of overt UK prohibition should not obstruct trial in countries with such a close political, social and now judicial connection.[4]

The subject of an extradition request from a category 2 designated state also no longer has the right to test the strength of the case against them in a UK court. I argue that the logic of common shared principles between EAW states extends to these UK

[2] The Extradition Act (Designation of Part 2 Territories) Order 2003, SI 2003/3334.
[3] See Hardy J, *The European Arrest Warrant-surrendering sovereignty?* NLJ 153.7107 (1817) 2003
[4] Cf. where dual criminality is satisfied between the UK and the requesting Part 1 territory, the minimum sentencing threshold is only twelve months, EA 2003 s. 64 (3) (a)-(c).

government-designated democratic nations. Where questions about political and legal standards arise, bars to extradition are again effective (ss 79-87 EA 2003). In addition to the statutory safeguards, supplementary factors militate against the risk of injustice. Crucially, dual criminality and a twelve month sentence threshold mean that the alleged action would have been criminal, to a serious degree, if it had taken place in the UK. Secondly, the law enforcement agency of the requesting state has to persuade its own judicial system of this serious transgression and that there is a proper basis for an extradition request; there is then an appealable judicial assessment of the request and information by a District Judge in the UK, together with disclosure of the information materials to the subject.

It is the US which has attracted the most scrutiny as a designated state. The US has now ratified the UK/US Extradition Treaty 2003, although as a matter of US constitutional law the UK obligation to show "probable cause" remains.[5] However, the evidence threshold and procedural safeguards are the substantive issues here. Respectfully, Uncle Sam's reciprocity is an Aunt Sally that obfuscates the question of which essential protections should apply to an individual. Additionally, an acceptance of the principle of extradition should include acceptance that foreign penal standards are applicable, subject to the right to life and the prohibition on cruel and unusual punishment. To hold otherwise is national exceptionalism.

Justifiable challenges to our extradition laws do exist. Forceful assertion of jurisdiction by a requesting state may mean that action comprehensively "committed" in the UK, nonetheless transgresses a foreign law. Mutual standards in legal systems

[5] United States Constitution, Amendment IV.

and the common classification of criminal behaviour do not wholly safeguard against potentially contentious tactics of foreign law enforcement agencies.[6] In these circumstances, removal to another state, concomitant interference with the right to respect for family life and evidence gathering difficulties, become severe burdens indeed.

This essay advocates the following amendment to the EA 2003; although broadly corresponding proposals were, regrettably, recently unsuccessful in the House of Lords.[7] Firstly, UK courts should be empowered to require steps to be taken by UK agencies with a view to a domestic prosecution when the alleged crime was committed *partly* in the UK. Moreover, where the alleged conduct was *substantially* committed in the UK, and where, after the first step, the UK agencies remain unable to prosecute, courts should also have the power to refuse extradition if prosecution abroad would not be in the interests of justice. The court would determine partial or substantial commission; hopefully inducing superior information from the requesting state in the first instance.

Our current extradition law is not unfair, it is a balanced attempt to reconcile conflicting objectives. Yet legislators must always guard against pure laws being tainted by expediency[8]. A more exacting equilibrium may therefore be achieved by enabling UK courts to assess the interests of national and international justice in individual cases.

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[6] See the case of *Lofti Raissi* and the amendment of the charges in the *Norris* case.
[7] See the proposed amendments to the Police and Justice Bill, *Lords Hansard*, 1st November, 7th November 2006, found at http://www.publications.parliament.uk/pa/ld199697/ ldhansrd/ pdvn/lds06/text/61107-0002.htm and JUSTICE Briefing Note on UK-US Extradition Arrangements 5th May 2006, found at www.**justice**.org.uk/images/pdfs/extraditionbriefingnotetopeersJuly**2**006.pdf
[8] Aeschylus, *The Eumenides*.