Extradition to foreign courts: are our laws fair?

With the media frenzy amplifying high profile extraditions to the US, less attention has been paid to the fact that the Extradition Act 2003 also brought into force the European Arrest Warrant (EAW). This fast-track procedure replaces extradition between EU member states with a system of surrender between judicial authorities, in which the executing court does not consider the allegations against the defendant or examine evidence.

Why have the arrangements with the US been subject to such public criticism of 'unfairness' while the EAW has, in this country, emerged relatively unscathed? Could it be the successful employment of the EAW in returning Osman Hussain to Britain for trial for alleged terrorism, contrasted with commercial executives in extradition proceedings with the US?

The UK-US Extradition Treaty was ratified in the UK in 2003 by royal prerogative, circumventing parliamentary debate and scrutiny, its provisions enacted by the Extradition Act 2003. In the US, concerns raised by lobby groups delayed ratification by the Senate until September this year. Critics, enraged at the UK government's acquiescence, argued the UK had removed any incentive for the US to ratify.

More contentious is the questionable reciprocity inherent in the treaty itself. Article 8(3) removes the requirement for the US to show a *prima facie* case when making an extradition request to the UK, but maintains the requirement for the UK to prove "probable cause" in a request to the US. Our government maintains that this achieves "rough parity" of evidential standards, because a US Grand Jury must find probable cause to issue an indictment, and the UK court must be satisfied of sufficient information to justify the issue of a warrant for arrest in this country. But the defendant is not able to challenge this information, or put their side of the case. The value of such a safeguard is illustrated by the case, before the Act, of Algerian pilot Lofti Raissi, whose extradition to the US was refused when the UK court's examination showed the evidence to be woefully inadequate.

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Yet what difference does the constitutional protection afforded to American citizens make to UK citizens? The lack of symmetry certainly provokes an intuitive sense of unfairness, but it does not in absolute terms make a difference to the fate of a given individual. America is but one of 47 designated 'Category 2' territories for which a *prima facie* case is not required for extradition. Albania, Turkey, Romania and Russia have judicial systems far inferior to the US, yet our extradition arrangements with these countries remain broadly unchallenged.

One answer is that these are predominantly Council of Europe member states, signatories to the European Convention on Human Rights accountable to Strasbourg. The US is not bound by a similar international agreement. In the *LaGrand* case, for example, the Solicitor-General took the position that an order of the International Court of Justice "is not binding and does not furnish a basis for judicial relief"[1].

Lord Hope of Craighead said of the EAW:

"a system of mutual recognition of this kind … is ultimately built upon trust … in the ability of the new system to protect those against whom it might be used."[2]

Our government is keen to emphasise that fairness requires criminals to be brought to trial and victims protected. Extradition laws need to be modernised to ensure they are agile to respond to modern types of crime, and that fugitives cannot escape justice behind the barriers of state sovereignty. It is important to balance this agenda with the appreciation that a suspect unjustly extradited is also a victim. Extradition proceedings lead to long term separation from home and family, often with harsh bail and prison conditions, in circumstances making it very difficult to prepare a defence.

The Extradition Act removed the Home Secretary's discretion, and limited the judicial authority of the court to specified legal tests. These provide a valuable safeguard and include Human Rights, health, possible discrimination, and lapse of time. The

[1] *LaGrand Case (Germany v. U.S.)* 2001 I.C.J. 104

[2] Para. 23 [2005] UKHL 67

Natwest Three[3] case showed, however, that Human Rights arguments will only succeed in "exceptional" circumstances.

Thus, the decision whether to extradite lies mainly to the prosecuting authorities. This renders the process vulnerable to the hard-line policies pursued by US authorities. Recent examples highlight the risks to fair treatment this entails.

Dual Criminality

It is a fundamental principle of the Rule of Law that the law must be capable of guiding the behaviour of its subjects. This requires that laws should be clearly understood, and not retroactive. This issue arose for Ian Norris, whose defence was that the offence of price-fixing did not exist at the time of his alleged conduct.

Greatly Differing Sentences

When Gary McKinnon was tracked down by the UK National Hi-Tech Crime Unit in 2002 he was informed that he would face community service if charged. He now potentially faces decades in US prison for charges connected with computer hacking. This raises serious questions about proportionality.

Finality of legal proceedings

In a "difficult and troubling"[4] case, Babar Ahmad was informed by domestic prosecuting authorities of a decision not to pursue charges; only subsequently to be extradited by a foreign jurisdiction.

On 8 November, the Opposition amendment to the Police and Justice Bill was finally defeated in the House of Lords. The "forum clause" amendment would have allowed a judge to decide, in cases triable in more than one jurisdiction, whether it was in the interests of justice to extradite. This clause would have enabled the risks identified above to be taken into consideration, together with issues about the nature and admissibility of witnesses and evidence. A similar provision is provided by Article

[3] *Bermingham and others v Government of the United States of* America [2006] EWHC 200 Admin

[4] Judge Workman, 17.05.05 Bow Street Magistrates Court

4(7) of the EAW Framework Decision[5], and it is hard to see why this should be missing from the Act.

This represents a sad failure of the Legislature to safeguard the liberties of the individual against unfair action by the Executive. We will no doubt see more unfair extraditions as a result.

[5] Brussels, 25.9.2001 COM(2001) 522

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