

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty's briefing on the Extradition amendments to the Crime and Courts Bill for Ping Pong in the House of Lords

March 2013

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Introduction

1. Liberty has long called for changes to be made to the UK's unfair extradition arrangements. During the passage of the *Extradition Act 2003* (EA) we warned that without amendment and crucial safeguards, the Act would act as a blunt and arbitrary instrument and create injustice. Since then, sadly, our fears have been borne out. But we have been heartened by the growing cross-party parliamentary consensus on the need for extradition reform and in particular the conclusions and recommendations reached by the Home Affairs Select Committee and the Joint Committee on Human Rights in calling for the EA to be amended urgently. Adopting this position does not mean eschewing the importance of extradition in ensuring that cross-border crime is prosecuted. Indeed, Liberty believes that an efficient extradition system is in the best interest of victims, the public and defendants. In pursuing an expedient extradition system above all else, the 2003 Act did not include important safeguards. This has resulted in a number of high profile extradition cases where the orders and proceedings have undoubtedly been unfair, unjust and had catastrophic consequences for those subject to them. Extradition proceedings have a profound and often irreversible effect on all aspects of a person's life, including their mental and physical health and their ability to carry on relationships with family members. Even where an individual is later exonerated, extradition of UK residents has been shown to end employment and ruin careers, destroy marriages, interfere with studies and affect other personal and social ties.

2. It is because extradition is a traumatic punishment in and of itself that a core of minimal due process safeguards is necessary. It is with this in mind that Liberty has called for three main safeguards to be legislated for. These would enable a British court to bar extradition where

- all or a substantial part of the alleged criminal conduct took place here and where it is in the interests of justice for prosecution to take place here;
- a basic case has not been made out against the person wanted for extradition; and
- where the conduct on which the extradition request is made or EAW is issued is not considered to be a crime in this jurisdiction.¹

¹ See *Liberty's evidence to the Joint Committee on Human Rights on the UK's extradition arrangements* (January 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-submission-to-jchr-extradition-inquiry-january-2011.pdf>.

3. After many years of campaigning for fairness in extradition, Liberty welcomed the Home Secretary's announcement in October 2012 that she had decided to introduce a forum bar to extradition.² We are, however, disappointed with the tightly circumscribed test which has now been made part of this this Bill (Commons Amendment 136), which is skewed towards extradition and which heavily fetters judicial discretion. As we outline below, we believe the proposed forum bar falls far short of an adequate safeguard and must be amended by Parliament if it is to provide the procedural fairness sought. We are also disappointed that the Government has rejected the introduction of the "prima facie case" safeguard which would prevent extraditions in circumstances where a basic case has not been made in a British court.

4. Liberty is also concerned with the second proposed change to our extradition arrangements in the Crime and Courts Bill which will remove one of the few safeguards that does exist: the Home Secretary's residual discretion to stop extradition from taking place under the *Human Rights Act 1998*. This change was proposed at the same time the Home Secretary announced her decision to end the 10-year extradition ordeal of Gary McKinnon - using the very power that the Government is now proposing to scrap in this Bill. As set out below, Liberty believes that given the nature of extradition – being in part political, part judicial and part prosecutorial – it is vital that the Home Secretary discretion to consider human rights at the very final stages of an extradition process be retained.

5. We urge Peers to address the shortcomings of the forum bar. The forum bar in Clause 35 and new Schedule 19 to the Bill was inserted so late in Committee proceedings that substantive debate and consideration of any amendments was not possible. When the Bill returned to the Commons for Report stage, as a consequence of the programming motion the newly inserted Schedule and important cross-party amendments were not debated either. This curtailing of parliamentary scrutiny of the extradition amendments is extremely disappointing. This is particularly so given the shortcomings of the test and the widespread commitment in both Houses of Parliament and across the public for there to be workable safeguards to protect against unfair extradition. Similarly the the exclusion of the Home

² Statement of the Home Secretary, Rt Hon Theresa May MP, House of Commons *Hansard*, 16th October 2012 at column 164.

Secretary's current power to stop extradition on the basis of human rights grounds³ has also not been subject to substantive debate. We urge Peers to reject this significant change which will remove a key safeguard against unjust extradition.

Forum bar to extradition

Background to the forum bar

6. Liberty believes a forum bar should enable judges to prevent extradition where an offence or act is allegedly conducted partly or wholly within the UK and where it would be in the interests of justice for the person not to be extradited. The inclusion of this safeguard is common in extradition treaties. The 1957 European Convention on Extradition, for example, provides that an extradition request can be refused where the requested state considers that the alleged offence was committed 'in whole or in part in its territory or in a place treated as its territory'. A similar provision is included in the EU Framework Decision on the EAW (however this bar was not included in the EA in the list of factors which can bar an extradition request). The need for a forum bar to extradition has become increasingly apparent in recent years. With the advent of the internet in particular it is now the case that online activity in one part of the world can result in allegations of criminal liability in another without the offender ever stepping outside their living room, let alone crossing international borders. Coupled with the increasing willingness of countries to assert extra-territorial jurisdiction, the threat of extradition in these circumstances is becoming an increasingly serious problem given the lack of judicial protections built into our domestic extradition legislation.

7. In 2006, an amendment to the 2003 Act was passed by Parliament which would incorporate a forum bar into the UK's extradition arrangements.⁴ This amendment was never brought into force but remains on the statute book. The amendment would allow a UK court to bar extradition if a significant part of the conduct that constituted the alleged offence took place in the UK and in view of that, and all other circumstances, it would not be in the interests of justice for the person to be tried in the other country.⁵ The Government has opted not to bring this forum bar

³ Note that this briefing does not address Part 3 of new Schedule 19 (Devolution issues in Scotland).

⁴ Schedule 13, paragraphs 4 and 5 of the *Police and Justice Act 2006*.

⁵ These amendments would affect forum being a bar to extradition by amending section 79(a) (inserting 'forum' as one of the bars to extradition); and inserting sections 19B and 83A.

test into force on the basis that it “*would have been cumbersome in practice*”.⁶ The newly proposed test, set out below, “*has been designed to minimise delays, while providing greater safeguards for those who are subject to extradition proceedings*”.⁷ Liberty believes that the newly proposed test sets an impossibly high threshold which should be reviewed.

Proposed new forum bar in the Crime and Courts Bill

8. New clause 35 and new Schedule 19 will amend the *Extradition Act 2003* by inserting the ground of ‘forum’ as one of the bars to an extradition request to a Part 1 or Part 2⁸ territory (under sections 11 and 79 of the 2003 Act). Where a Part 1 EAW, or a Part 2 warrant following a non-EU request for extradition, is issued by a judicial authority under sections 2(3) or 70(4) of the Act, extradition will be barred “*by reason of forum if the extradition would not be in the interests of justice*”.⁹ A judge will decide extradition is not “*in the interest of justice*” where of the opinion a substantial measure of the alleged criminal conduct took place in the UK and, having regard to a defined set of “*specified matters relating to the interest of justice*”, extradition should not take place.¹⁰ The exhaustive list of “*specified matters*” to be considered include:¹¹

- a. where most of the loss or harm occurred or was intended to occur;
 - b. the interests of any victims;
 - c. a belief of a prosecutor that the UK is not the appropriate jurisdiction to prosecute;
 - d. were prosecution to take place in the UK for an offence corresponding to the extradition offence, whether evidence necessary for proof is or could be made available here;
 - e. the desirability and practicability of all prosecutions taking place in the one jurisdiction, having regard to where witnesses/co-defendants/other suspects are located, and the practicability of getting evidence from those people in the UK or in an external jurisdiction;
- and

⁶ See written statement of the Minister of State, Jeremy Brown MP, in a letter to the members of the Crime and Courts Public Bill Committee on 5th February 2013, as included in House of Commons Library Note SN/HA/6105 *Extradition and the European Arrest Warrant – Recent Developments* (6th February 2013), at page 20.

⁷ *Ibid.*

⁸ Part 1 of the Extradition Act applies to European Member States under the European Arrest Warrant agreement; Part 2 applies to countries outside the EU.

⁹ New clause 19B(1); new clause 83A(1).

¹⁰ New clause 19B(2); new clause 83A(2).

¹¹ New clause 19B(3); new clause 83A(3).

- f. the defendant's connections with the UK.

A judge should also have regard to “*the desirability*” of not requiring disclosure of material which is subject to restrictions on disclosure in the requesting state.¹²

9. A judge will not be able to consider whether it is in the interests of justice for extradition to be barred on the grounds of forum where a designated prosecutor¹³ has, by certification, decided not to prosecute the defendant in the UK.¹⁴ A prosecutor's certificate can be granted where conditions A and B are met, and C or D are met; that is, the certificate will be granted where:

- a. a responsible prosecutor¹⁵ has considered the offences for which the defendant could be prosecuted in the UK in respect of the conduct constituting an extradition offence;

and

- b. decided that there are one or more offences corresponding to the extradition offence;

AND

- c. the prosecutor has formally decided that the defendant should not be prosecuted for one of the offences on the basis that there would be insufficient admissible evidence for the prosecution, or said prosecution would not be in the public interest;

or

- d. the prosecutor has decided D should not be prosecuted on account of concerns about the disclosure of sensitive material in the prosecution for a corresponding offence or in any other proceedings.

“*Sensitive material*” is that which appears to the prosecutor to be sensitive on national security or international relations grounds, or the prevention or detection of crime grounds (including the identification of witnesses, informants or any other

¹² New clause 19B(4); new clause 83A(4).

¹³ A ‘designated prosecutor’ is one designated for the purposes of this section by Secretary of State order, or is within a description of prosecutors so designated. A ‘prosecutor’ is a person with responsibility for prosecuting offences in any part of the UK (whether or not that person has other responsibilities): new clauses 19F(2), 83E(2).

¹⁴ New clauses 19C(1) and (2), 83C(1) and (2). A judge also must grant any application made by the prosecutor for the proceedings to be adjourned to assist the prosecutor to determine if a certificate should be issued: new clause 19C(3). New clause 19B(5) also requires any application by a prosecutor to be made a party to the extradition proceedings where a prosecutor so applies and where it appears to the judge the prosecutor has considered the extradition offences for which the defendant could be tried in the UK: new clauses 19B(5); 83B(5).

¹⁵ A ‘responsible prosecutor’ for the purposes of a prosecution certificate is a designated prosecutor giving the certificate or another designated prosecutor: new clauses 19F(2), 83E(2).

suppliers of information to the police or another law enforcement agency who may be in danger if their identity is revealed).

10. A certificate not to prosecute will be binding and final in terms of a forum decision. It can only be questioned on appeal against an extradition order.¹⁶ In determining whether to give permission for a certificate to be questioned, and, if permission is granted, determining that question, the High Court must apply principles of judicial review.¹⁷

11. Under the transitional provisions under paragraph 7 of Schedule 1, the forum bar amendments – if passed - will apply where

- a Part 1 warrant or request for a person's extradition has been issued before the amendments come into force, and
- a judge has not yet decided all of the extradition bar questions which currently exist under section 11(1) (for EAW cases)¹⁸ and section 79(1) (in the case of a non-EU request for the person's extradition)¹⁹.

Paragraph 9 of Schedule 19 repeals the changes passed by Parliament in the *Police and Justice Act 2006*.²⁰ These changes, had they been brought into force, would have amended the 2003 Act to insert a forum bar.

Analysis of the proposed forum bar

12. If the intention of Parliament is to introduce a proper judicial safeguard to prevent unjust extradition in cases where most or all the alleged activity took place in the UK then we believe the test as set out in this amendment falls far short of what is needed. The fundamental problem with our extradition framework is that judicial discretion has been all but removed. The proposed forum bar test does nothing to

¹⁶ Under s 26 for Part 1 territories, and ss 103 and 108 for Part 2 territories, of the Extradition Act 2003

¹⁷ New clause 19E(2), 83E(2). If the High Court quashes the certificate, it is to decide the question of whether or not the extradition is barred by reason of forum.

¹⁸ Under section 11(1) the judge must decide whether extradition to a category 1 territory by reason of: the rule against double jeopardy; extraneous considerations; the passage of time; the person's age; hostage-taking considerations; speciality; the person's earlier extradition to the UK from another category 1 territory; the person's earlier extradition to the UK from a non-category 1 territory; and the person's earlier transfer to the UK by the International Criminal Court.

¹⁹ Under section 79(1) a judge is required to bar extradition by reason of: the rule against double jeopardy; extraneous considerations; the passage of time; and hostage-taking considerations.

²⁰ Schedule 13, Part 1, paragraphs 4 to 6.

restore that. An “interests of justice” test is an inherently judicial function, yet the proposed test attempts to predetermine what this will mean in any case. The test sets an extremely high threshold, preventing a judge from considering *all* of the circumstances of a particular case, including elements which might be highly relevant (such as the mental health of a defendant). The exhaustive list of factors is skewed towards extradition; it is difficult to see how the test could have resulted in the prevention of the extradition, for example, of Gary McKinnon – an extradition which ultimately the Home Secretary stopped given she concluded that it “*would give rise to such a high risk of him ending his life that a decision to extradite would be incompatible with Mr McKinnon’s human rights*”.²¹

13. In addition to the highly circumscribed ‘judicial’ test, judicial discretion is also heavily fettered by what is effectively a prosecutorial veto over a court even considering the forum bar. It is clear that in the past decisions about which jurisdiction to conduct a prosecution in have been made behind closed doors in negotiated settlements between UK and external prosecutors.²² While the new requirement for a certificate to be issued when a prosecution is decided against may promote transparency and accountability in relation to prosecutorial decisions, it is entirely inappropriate for this decision to hold sway over the judicial consideration of forum. This is particularly so given the opportunity to review the prosecutorial decision is restricted under the Act. There will inevitably be cases where the CPS determines that it would not be in the public interest to prosecute an offence, such as an offence which the DPP considers to be trivial or of little impact, but which another territory still wishes to pursue. Applying the new test, this means that the judge will not be able to consider whether it is in the interests of justice to extradite and will then be bound by the Act to order the extradition takes place.

14. Given the combination of minimising judicial discretion and a prosecutorial veto it is difficult to think of a recent extradition case – including that of Babar Ahmad, Gary McKinnon or Richard O’Dwyer – where this forum bar would have been effective. We urge Peers to reject the proposed forum bar in Schedule 19 as currently worded and amend the proposed test. We believe that in order to properly

²¹ Home Secretary statement of 16th October 2012, House of Commons *Hansard*, at column 164.

²² See the conclusions of the Home Affairs Select Committee, *The US-UK Extradition Treaty, Twentieth Report of Session 2010-2012* (HC644), at para 32. Report available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/644/644.pdf>.

safeguard against unfair extradition where forum arises there must be amendment to ensure, at minimum:

- that there is a rebuttable presumption against extradition where forum arises;
- that a judge is able to properly exercise his or her judicial discretion in considering all relevant circumstances of the case; and
- that a Prosecutor is not given an effective veto over whether a judge is able to consider whether extradition should be barred on the grounds of forum.

Removing the Home Secretary's discretion to consider human rights

Current role for human rights consideration under the EA

15. Under the *Extradition Act*, before ordering extradition to a Part 1 or Part 2 country a judge must consider whether such an order would be compatible with an individual's human rights under the *Human Rights Act 1998*.²³ Under section 93 of the Act, the Secretary of State currently has a limited role in barring extradition when a case is referred from the High Court for a limited number of reasons (for example, if the individual concerned will be or has been sentenced to death).

16. The Secretary of State also has a residual discretion under the HRA which requires him or her to bar an extradition if it would breach the human rights of the person subject to the order. This is because the final decision as to whether or not extradition should be ordered under Part 2 rests with the Secretary of State and not the courts.²⁴ For Part 2 territories, once a judge has determined that there are no legal bars to extradition and that an extradition would be compatible with human rights the judge must send the case to the Secretary of State for his or her decision as to whether the person is to be extradited. The Secretary of State must refuse an extradition request if in his or her view granting the request would breach human rights. The Home Secretary is a 'public authority' under the HRA²⁵ which means she is required to act compatibly with the HRA in any decision or action she makes.

17. It is this latter exercise of Secretary of State powers under the HRA, rather than the EA, which the amendments below propose to remove entirely.

²³ A judge must consider whether extradition is compliant with the human rights of the person subject to the order under section 21 in relation to Part 1 countries (pursuant to the EAW), and section 87 in Part 2.

²⁴ Section 70 of the EA.

²⁵ Section 6(1)

Changes proposed in Part 2 of Schedule 19

18. Part 2 will affect requests for extradition from Part 2 – or non-EU – territories under the 2003 Act. Part 2 of new Schedule 19 will remove the residual discretion of the Home Secretary to consider, after she has issued a certificate of extradition, whether such issuance would breach the human rights of the person being extradited.²⁶ Instead, human rights appeals will only be able to be made to the High Court. This means that a person who has exhausted the judicial process in relation to their extradition will have no right of final appeal to the Home Secretary before extradition on human rights grounds. The amendment will not impact on the Home Secretary's decision on whether an individual should be extradited in the rare circumstances where a High Court judge considers extradition to breach the human rights of the individual and consequently sends the case to the Secretary of State under section 87 of the 2003 Act.

19. In place of the Home Secretary's exercise of discretion, Part 2 of Schedule 19 proposes to insert a new ground on which a person will be able to appeal on human rights grounds to the High Court. Under section 108 of the 2003 Act a person may appeal, on the basis of law or fact,²⁷ to the High Court if the Home Secretary orders their extradition.²⁸ Paragraph 12 of the Schedule 19 will provide for a specific appeal on human rights grounds, outside of the usual limitation period to lodge an appeal,²⁹ before the person is extradited.³⁰ The High Court, however, can *only* consider the human rights appeal if it appears to the High Court that:

- (a) the appeal is necessary to avoid real injustice, and*
- (b) the circumstances are exceptional and make it appropriate to consider the appeal.*³¹

If permission is granted by the High Court to hear the appeal on human rights grounds and that appeal is refused, the person will be extradited within 28 days of the decision being made.³²

²⁶ Para 11, Part 2, Schedule 19.

²⁷ Section 87(3).

²⁸ Unless the person has consented to their extradition: s 108(2).

²⁹ Currently 14 days under s 108(4).

³⁰ Under s 117 of the 2003 Act: para 12 of Schedule 19, new sub-section (6) to 108.

³¹ New sub-section (7) of s 108 of the 2003 Act: para 12, Schedule 19.

³² Section 118(2); new sub-section (8) to s 108 of the 2003 Act: para 13, Schedule 19.

20. The transitional provisions provide that these new changes will only apply where an extradition certificate has been issued by the Home Secretary and:

- the person to be extradited has not made any human rights representations to the Home Secretary between the time the certificate was issued and these amendments come into force; or
- human rights representations have been made and determined by the Home Secretary in between the certificate issue and the amendments coming into force.³³

Analysis of the changes

21. The Minister of State, Jeremy Browne MP, in his letter to Public Bill Committee, stated that removing the Home Secretary's obligation to consider human rights before executing an extradition order made by a court is necessary given the exercise of the duty under the HRA "*can lead to significant delays while cases are considered, and any decision to uphold the extradition may be challenged in the courts*".³⁴ The Minister pointed to the role the courts currently play in the context of human rights consideration as another justification for the change. However a review of extradition case law reveals that the human rights safeguard has been relied upon by judges to stop extradition in only the most exceptional of circumstances.³⁵ Indeed extradition jurisprudence appears to impose a comparatively higher threshold on human rights assessments than in other cases. The Supreme Court has held that reliance on human rights to prevent extradition "*demand[s] presentation of a very strong case*"³⁶ and that "*only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves*".³⁷ This is perhaps unsurprising given the broader political context of extradition which certainly tips the balance in favour of making an order, even where it is evident that the individual's human rights will be negatively impacted.

³³ Para 14, Schedule 19.

³⁴ See statements of the Minister of State, Rt Hon Jeremy Browne MP, *ibid*, at page 21.

³⁵ See Liberty's additional submission to the Joint Committee on Human Rights' inquiry into the human rights implications of UK extradition policy (April 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-additional-submission-to-the-jchr-extradition-inquiry-april-2011-.pdf>.

³⁶ See *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, per Lord Bingham at para 24.

³⁷ Per Lord Phillips in *Norris v United States of America* [2010] UKSC 9, at para 82.

22. Because of this approach taken by the courts to date, and due to the lack of safeguards in the Act, we believe it is vital that there remains a role for the Secretary of State in extradition proceedings where human rights are in issue. Additionally, by its very nature extradition is not solely a judicial process, given it involves the deliverance of a resident from one state to another state. Extradition under Part 2 is, at the final stages, a political function. Indeed, the Home Secretary may be the only person privy to last minute intelligence or new information regarding the extradition, for example, which was not available to the Court during its deliberations. It is therefore important that the Home Secretary be able to rely on her residual discretion to consider, even and especially at the final hour, human rights concerns.

23. We appreciate that concerns have been raised about delays to the extradition process caused by judicial review of the Home Secretary's decision on human rights grounds. However we believe that returning to a situation where the courts have greater discretion to bar extradition (for example with a satisfactory forum safeguard) would minimise the increasing pressure on the Secretary of State to reach a diplomatic solution to unjust or unnecessary extradition requests. This difficulty has been made clear in the extradition cases involving forum and the United States, including that of Gary McKinnon, Richard O'Dwyer, Babar Ahmad and Talha Ahsan. It is not desirable for any interested party in extradition proceedings for the process to be so politicised. However rather than remove the final human rights safeguard before the Home Secretary executes an extradition order to address delays, we urge the Government to instead focus on restoring judicial discretion and inserting proper safeguards back into our extradition proceedings.

24. Liberty is also concerned that legislation is being introduced which will overturn an important human rights protection already on the statute book. Section 6(1) of the HRA provides that "*It is unlawful for a public authority to act in a way which is incompatible with a Convention right*", unless due to a provision of primary legislation the authority could not have acted differently.³⁸ Removing the residual responsibility to consider human rights from the Home Secretary in the context of human rights is a serious step. Hitherto this function has formed a rarely applied but incredibly important function. Liberty is extremely concerned at this proposal which will undermine a key protection afforded by the HRA and predominantly affect British citizens and residents. We therefore urge Peers to reject this significant step which

³⁸ Section 6(2).

could have a hugely detrimental impact on vulnerable individuals subject to extradition proceedings.

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