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PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's written evidence to the Select
Committee on Extradition Law**

September 2014

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
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Executive Summary

Liberty is pleased that the House of Lords has decided to give post-legislative scrutiny to the Extradition Act 2003. When the Act was passed we warned that it removed too many justice safeguards and would encourage and allow unfair and oppressive extraditions. In our view, this has been borne out in practice and the legislation and accompanying Treaties are in urgent need of modification. We make the following recommendations for reform –

1. The ‘forum’ safeguard should be re-drafted to provide full judicial discretion to bar extradition on grounds of forum taking into account all the circumstances of a case. The new forum test should be formulated as a presumption against extradition, capable of rebuttal by the requesting State. Judges should not be required to exclude forum considerations in cases where the CPS has decided not to prosecute.
2. The prima facie evidence requirement should be re-inserted for all our extradition partners. The removal of the requirement has allowed individuals to be extradited from the UK on the basis of flimsy information in circumstances where there is arguably no case to answer. The Secretary of State’s power to exempt additional countries from the evidence requirement, by Order, must be urgently repealed.
3. A judicial obligation to bar disproportionate extraditions should be added to Part 2 of the Act. British judges should have the ability to bar extradition requests which are disproportionate taking into account the facts of the case.
4. Legal aid in extradition cases should no longer be means tested.
5. The automatic right of appeal in extradition cases should be re-instated by repealing the recently inserted leave requirement.

Introduction

1. Liberty welcomes the House of Lords post-legislative scrutiny of the *Extradition Act 2003* (EA). This legislation was passed with much controversy at the height of the War on Terror and has continued to generate profound concern and public protest over its ten years of operation. Liberty fully recognises the importance of ensuring that suspected offenders, principally fugitives, face trial. But we believe that this objective must, and may, be reconciled with a system that retains sufficient discretion to protect people against unnecessary extradition.

2. Extradition permits the forcible removal to a foreign country of a person resident in the UK who may have no connection with the foreign jurisdiction. It has a profound and often irreversible effect on all aspects of a person's life, including their mental and physical health. Once extradited, a requested person is separated from friends, family and their emotional support network, considered a fugitive from justice and a flight risk so generally imprisoned on arrival and potentially held in custody for full pre-trial period. Detention conditions can vary greatly from those in the UK and in some jurisdictions can mean solitary confinement. The costs and challenges of mounting a defence overseas can also be crippling. For those extradited to the USA, the lengthy potential sentences faced make the pressure to plea bargain considerable. Even where an individual is later exonerated, extradition requires that a person's life is put on hold, often for a number of years

3. Regardless of the outcome, extradition is a punishment in and of itself. For that reason it is imperative that individuals are not extradited from the UK unless strictly necessary to serve the interests of justice. To ensure this is the case, domestic law requires safeguards to allow unnecessary, disproportionate and oppressive extraditions to be barred. In our view the 2003 Act prioritises speed and efficiency over safeguards and justice to the detriment of British residents. In this response we examine the loopholes that currently exist and make recommendations for reform.

Background

4. The formal surrender of a person from one country's territory to another to allow a prosecution to take place has traditionally been undertaken pursuant to treaty arrangements between the two countries. Thus the UK has a number of treaties with various countries setting out the terms under which a person can be extradited. This

system was first recognised in our domestic legal system by the *Extradition Act 1870*. The laws were consolidated by the *Extradition Act 1989*, and then underwent a major overhaul in the *Extradition Act 2003* (EA).

5. The EA was the result of an extensive review of extradition law which began in 1997. The review took place against the highly charged political and legal background of the Chilean request to extradite General Pinochet from the UK. Indeed the review was halted while the litigation was continuing and proposals for consultation were ultimately published in March 2001.¹ The Home Office explained at the beginning of its paper that of particular significance was the way this case “*threw into high relief many of the problems of UK extradition law, most notably the lengthy delays which can occur in complex, contested extradition cases*”.² The consultation also considered how to implement the Framework Decision of the European Council, which was to become effective on 1 January 2004.³ The Framework Decision applies to all European Union Member States and replaced the traditional extradition scheme between those States.⁴ The 2003 Act sets out three different processes by which extradition will operate:

- (1) in relation to EU countries that are subject to the EAW (category 1 territories, governed by Part 1 of the EA);
- (2) non-EU countries (category 2 territories, governed by Part 2 of the EA); and
- (3) non-EU countries designated by order that therefore aren’t required to prove a prima facie case (category 2 territories excepted by order, also governed by Part 2 of the EA).

6. The 2003 Act much reduced the discretion of the judiciary and the Executive to block extradition requests. In particular it removed ‘forum’ as a ground on which extradition could be barred, much eroded the applicability of the prima facie evidence requirement and repealed the Secretary of State’s discretion to block extradition in the interests of justice. It also gave effect to fast track extradition within the EU whereby an arrest warrant issued in one Member State can be recognised and enforced in all other Member States so allowing for faster and simpler surrender

¹ Home Office, *The Law on Extradition: A Review* (March 2001)

² *Ibid.*, at para 8.

³ *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States* (2002/584/JHA), (‘European Framework Decision’) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF>.

⁴ See the recital to the Framework Decision, *ibid.*

procedures and removing Executive and judicial discretion to closely examine the request.

7. In the first six years of the Act's operation, broad public and parliamentary agreement emerged to the effect that UK extradition law lacked vital safeguards, unduly tied the hands of the British judiciary, and gave rise to unfair and perverse outcomes for British residents. Ahead of the last General Election, the former Home Secretary, David Blunkett, responsible both for the Act's passage and the negotiation and signing of the US-UK Extradition Treaty, conceded that too much had been given away. The Home Affairs Select Committee (HAC) and Joint Committee on Human Rights (JCHR) both investigated the operation of the Act and called for fundamental reforms. Both political parties now in the Coalition Government pledged reform if elected.

8. Since then public and parliamentary concern has continued. In 2012, 253 684 people signed a petition protesting the requested US extradition of Sheffield Hallam student, Richard O'Dwyer. In the same year, 141 000 people signed a petition protesting the requested extradition of British national, Babar Ahmad, to the USA. However, public disquiet and political rhetoric has not been matched by reform. Recently, some modest changes have been made to Part 1 of the EA in response to the injustice caused by the most glaring problems with fast track extradition under the European Arrest Warrant (EAW). But more widely, the Coalition Government has passed legislation that has further removed crucial safeguards – including removing the *automatic* right of appeal against an extradition order and repealing the Home Secretary's residual power to bar extradition to Part 2 countries on human rights grounds.

9. The process of reform has also been found wanting. The Government appointed Sir Scott Baker – a former Judge in the Court of Appeal - to conduct a review of the law in 2010 and following the publication of his Report in 2011 proceeded to cherry pick the conclusions it wished to accept or ignore, with next to no explanation.⁵ Having outsourced policy development in this area, the Coalition then introduced a number of legislative changes via late-stage Government

⁵ *A Review of the United Kingdom's Extradition Arrangements*, 30 September 2011, is available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf. The Government Response to the 477 page review was published in October 2012 and stretches only to four substantive pages - (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228566/8458.pdf).

amendments to Bills leaving minimal opportunity for parliamentary scrutiny. These reforms have been confused and contradictory. Despite acknowledging the unfairness of the system the Government has legislated to downgrade extradition appeal rights. And despite announcing that that it would bar the extradition of Gary McKinnon to the US on the grounds that it would give rise to such a high risk of him ending his life that it would breach his human rights, the Government simultaneously legislated to remove the power of the Secretary of State to block future extraditions to the US and other Part 2 countries on human rights grounds.

10. In Liberty's view, while the Baker Review of extradition law was thorough, its analysis failed to take account of the human cost of unnecessary extradition and was in some areas deeply one-sided. Much of the Report's narrative and conclusions heavily deferred to concerns around diplomacy, cost and delay. Statutory bars to extradition will inevitably cause delay to some extradition requests but, as the last decade has shown, oppressive and unfair extraditions will always be challenged and delayed for a period. What the Review failed to acknowledge is that instead of delaying justice, greater procedural safeguards combined with sensible prosecutorial co-operation could increase efficiency, by ensuring that unnecessary extraditions are quickly barred and that, where appropriate, domestic prosecutions are undertaken instead.

Forum Bar

11. The forum safeguard ensures that where an alleged offence or act is conducted partly or wholly within the State from which extradition is sought, the State in question can reject the extradition request on that basis. A forum safeguard is common in extradition treaties. This is unsurprising given that the overriding objective of extradition of individuals between nation states is to prevent individuals from escaping justice i.e. committing an offence in one territory and then seeking immunity in another.

12. The forum safeguard has a long lineage. The 1957 European Convention on Extradition provides that "*The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.*"⁶ Under the Extradition Act 1989 the Secretary of State had a general discretion to block

⁶ Article 7, European Convention on Extradition 1957, available at - <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>.

extradition and, as confirmed by the House of Lords in a 2001 case, forum could form one of the grounds on which that discretion was exercised.

13. A generous forum bar is also included in the current EU Framework Decision on the EAW which states that a judge may refuse to execute a EAW that relates to offences which “*are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such*”.⁷

14. Despite this history and the specific provision made in the Framework Decision, a forum bar was not included in the list of factors for which extradition could be barred under the EA, for Part 1 countries. Forum as a bar to extradition was similarly not included in the list of bars under Part 2 of the 2003 Act. This meant that from 2004 until autumn 2013⁸ the only way in which a defendant could make arguments as to forum was under the human rights bar, specifically the right to respect for family life found in Article 8 ECHR. In reality the success of such arguments was hampered by understandable judicial deference to the Executive’s extradition agreements in a politically charged area of law and policy.

15. Why is the forum bar so badly needed? The need for an effective forum bar to extradition requests has becoming increasingly apparent in recent years. This is due in part to the wide jurisdiction claimed by the USA, a designated country under Part 2 of the EA, and in part the advent of the internet and its central role in the everyday lives of millions of Britons. Traditionally, common law countries have exercised jurisdiction on the basis that conduct amounting to a criminal offence occurred within their territory. In cases where activity takes place in more than one country, the general rule was that jurisdiction would only be sought if a substantial measure of activity occurred there. However, the US now interprets its legal jurisdiction much more widely. It asserts exorbitant jurisdiction for alleged criminal activity involving – no matter how tangentially - communications systems based in the US. It also pursues extraditions in cases where potential victims are in the US, in circumstances where there is no other US link (including for example in circumstances where alleged activity took place in the UK and on UK based computer systems). This approach to jurisdiction, combined with the ubiquity of the internet in daily life, means

⁷ Article 4.7(a) of the EU Framework Decision on the EAW, 13 June 2002, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0584>.

⁸ A new forum bar, introduced in the Crime & Courts Act 2013, and now contained in sections 19B-19F and 83A-83E of the EA came into force in September 2013.

that it is now relatively easy for someone to be considered criminally liable in the US without the offender stepping outside their living room let alone crossing international borders.

16. Of course, online activity can result in serious criminal liability and we do not suggest that if the activity is sufficiently serious it should not be suitably punished. But the question is, in these so-called cross-border cases, what is the appropriate process for determining the appropriate forum for prosecution? We believe that where a significant part of the alleged activity takes place in the UK, the presumption should be that extradition is not granted and the CPS instead considers prosecution in the UK. There are a number of important reasons for this. First, as explained at paragraph 2, extradition is a punishment and trauma in and of itself. Where a British resident has allegedly committed offences on UK soil, it is right to expect that prosecution takes place in the UK. As well as the lengthy trauma of extradition, extradition will inevitably result in difficulties in defending a case given that witnesses and other defence evidence will be in the UK. Issuing a subpoena to a UK-based witness from another jurisdiction may well prove difficult (or impossible) and seriously affect a defendant's ability to mount a proper defence. This can be contrasted with the increased access to evidence and co-operation of prosecuting agencies.

17. The absence of a forum bar has led to a number of cases of clear injustice over the past decade. In the earliest such case, three British men, David Bermingham, Giles Darby & Gary Mulgrew (commonly referred to as the NatWest 3) were indicted by the US authorities in June 2002 and their extradition was requested in February 2004. It was alleged that they had conspired with two members of Enron to defraud the Natwest Bank in London although the alleged victim, NatWest Bank had never made a complaint against them. The NW3 appealed their extradition orders and argued that since they were three British citizens, living and working in the UK, accused of defrauding a British bank in the UK, they should face trial in the UK. In particular, they argued that all of the available evidence and defence witnesses were in the UK, and that if extradited they would have no access to either. Counsel for the Attorney General argued that the desirability of honouring the UK's international treaty obligations should outweigh a person's Article 8 rights in all but the most extreme cases. The High Court and House of Lords rejected their appeals and the men were consequently extradited to Houston, Texas, in July 2006. As they had predicted, the NW3 were unable, once in the US, to secure disclosure of documents or subpoena witnesses from the UK. They had had no sight of the

prosecution documents until setting foot in the US, and in the absence of any UK proceedings, they had been unable to access any materials prior to extradition. In November 2007, the NW3 agreed to plead guilty to one count of 'wire fraud', and were sentenced in February 2008 to 37 months' imprisonment. They were transferred back to the UK in November 2008 to serve the remainder of their sentences.

18. Another glaring example of the disproportionality and injustice that can arise without an effective forum bar is the case of computer science student, Richard O'Dwyer. While studying at Sheffield Hallam, O'Dwyer set up TVShack – a web search engine that contained links to copyrighted films and TV programmes located elsewhere on the internet. The website contained no copyrighted content, and the website servers and users were not based in the US. Nonetheless, in 2011 the US Customs and Immigration Agency sought to prosecute O'Dwyer with conspiracy to commit copyright infringement and criminal infringement of copyright and extradite him to the US. There was public outcry over his proposed extradition. In addition to the hundreds of thousands of signatures to an online petition, a YouGov poll found that 43% of the public thought he shouldn't be prosecuted at all and only 9% thought he should be extradited to the US.⁹ However, his efforts to resist extradition on the grounds that the alleged activity took place in the UK, failed. He was ultimately spared extradition by reaching a deferred prosecution agreement with US prosecutors and paying a £20 000 fine.

19. The cases of Babar Ahmad and Talha Ahsan further demonstrate the perverse results that arise where discretion to block extraditions on forum grounds is absent. These two Britons were sought by the US for providing material support for terrorism on the basis of their involvement with a website between 1997-2000. The only connection with the US was that the website server was located in Connecticut for five of the months in question. The Metropolitan Police was initially involved in evidence gathering but handed the evidence over to the US and the CPS decided not to bring a prosecution in the UK. Ahmad and Ahsan were ultimately extradited to the US in 2012 and sentenced, following a plea bargains, earlier this year.

⁹ "Richard O'Dwyer's two year extradition ordeal ends in New York" *The Guardian*, 7 December 2012 available at - <http://www.theguardian.com/uk/2012/dec/06/richard-o-dwyer-avoids-us-extradition>.

20. In response to growing public concern about the absence of a forum safeguard, in 2006, the House of Lords proposed a forum amendment to the EA. After huge resistance from the then Government, an amended version of the forum amendment was successfully passed, but never brought into force. It would have allowed 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 for the offence in the requesting territory.*”¹⁰ Having supported it in Opposition, the Coalition Government opted not to bring this forum bar into force on the basis that it “*would have been cumbersome in practice*”.¹¹ Instead the Coalition introduced a new ‘forum bar’ via the Crime and Courts Act 2013 saying it was “*designed to minimise delays, while providing greater safeguards for those who are subject to extradition proceedings*”.¹² Despite its being in force for almost one year, there have been no defence successes under the new forum bar. This is unsurprising as it sets an impossibly high threshold for requested persons to meet.

21. Under the new test an extradition can be barred by a judge “*by reason of forum if the extradition would not be in the interests of justice.*”¹³ However this will only be the case where “*the judge decides that a substantial measure of D’s relevant activity was performed in the UK*” and having regard to an exhaustive list of “*specified matters*” the judge decides that the extradition “*should not take place*”. The first defect of the new test is that the exhaustive list of factors is heavily skewed in favour of extradition and excludes important matters from consideration. A genuinely discretionary interests of justice test would allow the judiciary to consider and accord due weight to *all* relevant factors. If a list of factors is to be provided then it should be genuinely balanced (including for example the ability of the requested person to mount a defence from the requesting State) and include reference to “*any other factors which appear to the judge to be relevant*”.

22. However, the greatest flaw in the forum bar is the requirement that a judge “*must decide that the extradition is not barred by reason of forum if...the judge*

¹⁰ Police & Justice Act 2006, Schedule 13.

¹¹ 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.

¹² *Ibid.*

¹³ New sections 19B(1) and (2) and 83A(1) and (2) of the EA.

*receives a prosecutor's certificate relating the extradition.*¹⁴ A prosecutor's certificate can be given by a prosecutor in circumstances where (a) the prosecutor has considered the offences for which the requested person could be prosecuted in the UK; (b) decided that there are corresponding offences in the UK; and (c) decided not to prosecute due to his/her belief there would be insufficient admissible evidence or prosecution would not be in the public interest or (c) believes that the requested person should not be prosecuted because there are concerns about the disclosure of sensitive material.¹⁵ A certificate not to prosecute is binding in terms of a forum decision and can only be judicially reviewed on appeal against an extradition order. The chances of successfully judicially reviewing such a decision are very slim. This new forum test unacceptably fetters judicial discretion undermining the proper function of the court in blocking unnecessary extraditions.

23. Decisions on forum in so-called cross-border cases are currently made by the two respective prosecuting agencies in negotiations behind closed doors. In the string of cases highlighted above, as well the high profile case of Gary McKinnon, UK prosecutions have not been pursued against the requested persons. This despite *all* the alleged activity taking place in the UK. This has given rise to understandable concern over the dynamic in the relationship between the two prosecuting agencies and the comparative power and control exercised by the US. As drafted, the new forum bar entrenches and increases the supremacy of these private negotiations. While the new forum bar was apparently enacted in response to public concern over requested extraditions of British residents for activity undertaken here, the bar as enacted would not even have been considered by the judiciary in these cases due to CPS decisions not to prosecute.

24. Further the DPP veto will arguably lead to perverse outcomes given that extradition will more likely occur in those cases where (despite generous provision for information and evidence sharing between prosecutors) a UK prosecutor has concluded that there is insufficient evidence for prosecution or prosecution is not in the public interest, perhaps because it is too trivial.

25. Liberty urges the Committee to recommend that the CPS veto be removed and the forum bar re-drafted in a manner that affords proper judicial discretion. A new forum bar should create a presumption – capable of rebuttal by a requesting State –

¹⁴ New sections 19C and 83B EA.

¹⁵ New sections 19D and 83C EA.

that an extradition will not proceed if the alleged activity for which extradition is sought took place in part in the UK. To this end, Liberty supports the test proposed by Alun Jones QC during the passage of the Crime and Courts Bill 2013 which is almost identical to the test originally proposed by the Liberal Democrats and Conservatives during the passage of the Police & Justice Bill in 2006 -

“If the conduct disclosed by the extradition request was partly committed, or intended to be committed in whole or in part, in the United Kingdom, the judge shall not order the extradition of the person unless it appears, in the light of all the circumstances, that it would be in the interests of justice that the person should be tried in the category [1 or 2] territory.”

26. This formulation is preferable to the current legislative forum test and the test eventually added in 2006 which reverses the presumption and requires the requested person to discharge the burden. As drafted above, the forum bar would be consistent with the principle of territoriality and the notion that extradition is principally an exercise in returning fugitives to territories from which they have fled. The test set out above is also likely to lead to early and sensible co-operation between prosecutors (as overseas prosecutors realise they have a burden to discharge) rather than the routine seizure of jurisdiction by, in the case of the US, a better resourced and more politically powerful prosecuting agency. Lastly, such a presumption would encourage transparency, as prosecutors would be required to persuade the judge to extradite and therefore disclose the factors that they believe weigh in favour of extradition in open court.

Prima Facie case

27. Historically all extradition requests to the UK had to satisfy a prima facie evidence requirement. This requirement does not require a full criminal trial, but rather an examination of the evidence to determine whether there is a case to answer.¹⁶ The judge must determine whether the prosecution evidence, taken at its highest, is such that a properly directed jury could convict upon it, but the courts have

¹⁶ R (Harkins) v Secretary of State for the Home Department [2007] EWHC 639.

been clear that “*District judges should be wary before embarking on the trappings of a trial, in particular testing the credibility of complainants by reference to alleged inconsistencies in their accounts...*”¹⁷ In applying this test a judge can reject evidence considered worthless and consider the evidence as a whole, including that introduced by a defendant.

28. The requirement acted as a standard for the quality of extradition request that the UK is prepared to accept, filtering out unmeritorious and speculative requests for extradition. As a Government Working Party on extradition observed as far back as 1970 “*the requirement of prima facie evidence remains the only real safeguard against the trumped up case, and we venture to this that it must serve to deter some applications for extradition where a warrant for arrest has been issued in a foreign State on largely unsupported suspicion of guilt.*”¹⁸

29. The prima facie case requirement has now been excluded for extradition to Part 1 countries within Europe and for those countries designated by statutory order under Part 2 of the Act.¹⁹ In addition to the USA, Canada and Australia, all non-EU Council of Europe countries have been designated, as well as a number of countries with highly dubious democratic and human rights records such as Azerbaijan, Georgia, Moldova, the Russian Federation and Turkey.²⁰ Nothing in the Act prohibits the designation of further countries under section 71(4). The effect of designation means that the requesting country need only provide ‘information’ rather than ‘evidence’ to satisfy the test for the issuing of an arrest warrant²¹ and a judge need not require sufficient evidence to be produced before ordering the extradition of a person.²²

30. Liberty believes that prima facie evidence should be required of all requesting states, including the US, and we urge the Committee to recommend the repeal of

¹⁷ *Fernandez and others v Governor of Her Majesty’s Prison Brixton* [2004] EWHC 2207 (Admin).

¹⁸ Report of the Working Party on the Extradition Act 1970.

¹⁹ See the *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003*, and sections 71(4), 73(5), 84(7) and 86(7) of the *Extradition Act 2003* available at - <http://www.legislation.gov.uk/ukdsi/2003/0110483146?view=plain>.

²⁰ The Home Office has said that Council of Europe members have been designated because the prima facie case requirement was removed by the *European Convention on Extradition* which came into force in the UK on 14th May 1991.

²¹ See sections 71(4) and 73(5) of the EA.

²² See sections 84(1) and 86(1) of the EA.

sections 71(4) and 73(5), of the EA which allow the Executive to designate Part 2 countries by Order.

31. The extradition request for Lofti Raissi, which took place before the 2003 Act was in force, and a number of extradition requests since, demonstrate aptly the importance of the prima facie case requirement. Lofti Raissi, an Algerian born UK resident and American trained pilot, was arrested under the *Terrorism Act 2000* shortly after 9/11 following an allegation that he had trained four of the men who hijacked the planes involved in the terrorist attack. He was detained by the UK police, and then released, without charge, seven days later. Immediately after his release, however, he was re-arrested and imprisoned after an extradition request was issued by the US. The charge on which the extradition request was based was a minor one, alleging that Mr Raissi had fraudulently completed a pilot's licence form by failing to reveal he had had knee surgery; the court was told that these were 'holding charges' and that charges of conspiracy to murder and terrorism were being considered by the US authorities. Mr Raissi was then detained for just under five months in Belmarsh high-security prison, without ever being charged with an offence by UK or US authorities.²³ It is important to note that this case was decided before the US-UK extradition treaty was in force; accordingly the prima facie case safeguard was applied by the judge. On 24 April 2002, Senior District Judge Workman discharged Mr Raissi in relation to all the extradition charges, on the basis that a prima facie case had not been made out. Senior District Judge Workman noted that although a number of allegations of terrorism were made, no evidence was ever received by the court to support the allegation.²⁴ Mr Raissi has since been completely exonerated.²⁵

32. The Baker Review dismissively addressed the Raissi case by saying that the extradition judge who dealt with the case "*expressed the hope that the human rights protections in the 2003 Act would operate to provide a safeguard if a similar case were to arise now that the USA has been designated.*"²⁶ Given the strict interpretation of the human rights bar and the limitations of the abuse of process jurisdiction, Liberty does not share such optimism. Instead, we retain grave concerns over the

²³ The facts of Mr Raissi's case are set out by Lord Justice Hooper in relation to Mr Raissi's compensation for wrongful imprisonment claim: *R (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72.

²⁴ *R (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72 per Lord Justice Hooper at para 2.

²⁵ *Ibid*, at para 154.

²⁶ Baker Review, para 8.73.

lack of evidence required for extradition to the US and elsewhere and the aggressive approach this has encouraged in US federal and state prosecutors.

33. In Richard O'Dwyer's case it was far from clear that the index links contained on his website amounted to copyright infringement under US law. Further the CPS decision not to prosecute in his case is widely believed to be based on the fact that domestic judicial interpretation of the relevant section 107(2.A) of the UK Copyright, Designs and Patents Act 1988 mitigated against prosecution.²⁷ The lack of a prima facie evidence requirement, however, meant that extradition was ordered. The agreement reached between O'Dwyer and US prosecutors has effectively prevented their case ever being tested.

34. The zealous approach of US prosecutors was again highlighted recently following the comments of US federal judge, Janet Hall, during the sentencing of extradited Britons Babar Ahmad and Talha Ahsan. Following their plea bargain for providing material support to the Taliban, Judge Hall rejected huge swathes of the Government's evidence and pushed back on prosecutorial claims that the pair helped Al Qaida, pointing out that in earlier hearings the Government's main co-operating witness had denied that defendants had helped Al Qaida: "*Your own witness doesn't support that. Fighting against US forces doesn't necessarily equate to support of al Qaida*".²⁸ The 150 month sentence arrived at for Ahmad was substantially less severe than the 25 years sought by US prosecutors.

35. The absence of the prima facie case requirement for extraditions within Europe has also given rise to serious injustice. In June 2008, Greece issued a European Arrest Warrant for Andrew Symeou, a 20 year old British national, to face charges equivalent to manslaughter arising out of an assault in a nightclub in July 2007. The UK courts, acting under Part 1 of the EA, ordered his extradition in 2008. Our courts were unable to consider whether or not he had a case to answer, even though all evidence strongly indicated that he did not. This despite the fact that two witness statements that implicated Symeou were immediately withdrawn after the witnesses were released from police custody, citing beatings and intimidation. No statement was taken from Symeou and other available evidence suggested he was not in the nightclub at the time the victim was assaulted. The High Court held that it is

²⁷ R v Rock and Overton, Gloucester Crown Court, (6th February 2010) held that links as opposed to content, do not amount to copyright infringement.

²⁸ "Briton Babar Ahmad given 12 year US prison term for aiding Taliban" *The Guardian*, 16 July 2014.

for the Greek courts to assess the quality and validity of the evidence. In holding that the requested extradition could not be barred the court noted: “*The absence of even an investigation before extradition into what has been shown by the Appellant here may seem uncomfortable; the consequences of the Framework Decision may be a matter for legitimate debate and concern.*”²⁹

36. The Baker Review concluded that the prima facie evidential test should not be re-introduced for designated category 2 countries nor for extraditions within Europe under Part 1. The Panel was principally concerned with the importance of upholding existing treaty obligations and worried that introducing this safeguard would add to the length and complexity of the extradition process. They also felt that under existing 2003 Act provisions, such as the abuse of process jurisdiction, the courts are able to subject requests to sufficient scrutiny to identify injustice or oppression. In relation to category 2 designated territories under Part 2 of the Act, the Panel did accept that there are valid concerns about the human rights records of a number of these states and accordingly recommended that there ought to be periodic review of those designations.

37. As the cases above illustrate, our extradition partners request extraditions in circumstances where there is no case to answer and the abuse of process jurisdiction has proved an insufficient substitute for a prima facie evidence requirement. Further, in our view, arguments about saving time and money should not outweigh the rights of requested persons to have a preliminary review of the evidence by a local judge before their lives are uprooted. One need only look to specific case examples, such as the four year ordeal suffered by Andrew Symeou, to realise the implications of dispensing with the prima facie safeguard. The abuse of process jurisdiction did not prevent Symeou’s extradition on the basis of flimsy and highly contested evidence. Symeou was found innocent of his crimes in 2011; but not before enduring maximum security prison and years of uncertainty.

38. Experience over the past ten years has also shown that in the absence of a prima facie case and forum safeguard, delays are still incurred as requested persons seek to resist unnecessary and unfair extradition on human rights or other grounds. Re-legislating for these safeguards would not necessarily add significant delay and may instead ensure that oppressive extradition requests are disposed with in a timely

²⁹ *Symeou v Public Prosecutor’s Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin) at paragraph 39.

manner. We still require prima facie evidence from a large number of countries that we have extradition arrangements with and this doesn't cause inordinate delays and complication.

Human Rights Bar and Assurances

39. Before ordering extradition under Part 1 or sending the case to the Secretary of State under Part 2 a judge is required to determine whether the proposed extradition will be compliant with the human rights of the person subject to the proceedings as protected by the *Human Rights Act 1998*.³⁰ The Committee has asked whether the human rights bar is sufficient to protect requested people's human rights. Liberty doesn't believe it is, nor is it a substitute for the procedural safeguards discussed above.

40. Whilst the human rights bar is a crucially important backstop, there is understandable judicial reluctance to block extraditions on human rights grounds to countries with which the UK Government has opted to establish an extradition relationship. Further, judicial adjudication of the human rights bar is a complex undertaking, involving risk assessments and decisions concerning the justice system of a foreign jurisdiction. It is invariably more complex than adjudications on domestic procedural bars to extradition and places judges in an invidious position as they seek to show respect for the justice systems of requesting states. Since the removal of a number of historic procedural protections in the 2003 Act, huge pressure has been put on the human rights bar by those seeking to prevent their unjust or unnecessary extradition. The result has been that the judicial threshold now set for extraditions to be blocked on account of human rights (for example due to a requested person's illness, or prison conditions in a requesting State) is high.

41. At the outset the courts took a highly restrictive approach and held that reliance on human rights to prevent extradition "*demands presentation of a very strong case*".³¹ Indeed, the High Court held, in relation to Article 8, that "*there is a strong public interest in 'honouring extradition treaties made with other states'*" and where extradition is legally requested "*a wholly exceptional case would in my judgment have to be shown to justify a finding that the extradition would be on the*

³⁰ Under section 21 in Part 1; and section 87 in Part 2.

³¹ See *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, per Lord Bingham at para 24.

particular facts be disproportionate to its legitimate aim".³² More recently the Supreme Court has held that it is not right to apply an exceptionality test and that the question in Article 8 cases is instead whether the interference with private and family life is outweighed by the public interest in extradition. This balancing exercise will consider the nature and seriousness of the crimes involved but because great weight will always be accorded to honouring extradition agreements "*only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves*".³³ The focus on honouring extradition treaties means that Article 8 will rarely be successful as a bar to extradition, save perhaps in circumstances where the crime concerned is of no great gravity and the requested person has a large number of dependent children whose lives would be severely disrupted.³⁴

42. Given the mutual recognition principle at the heart of the European Framework, UK courts have at times appeared even more reluctant to find that another signatory state to the ECHR will breach basic rights. This despite abundant evidence that some Member States are regularly found to be in breach of the Convention with regard to criminal justice standards. Despite the fact that the EAW was negotiated over a decade ago, the standardisation of procedural safeguards for defendants are only now being negotiated at European level and are years away from reaching completion. Reforms made via the Crime and Courts Act 2013 to the operation of the EAW to deal with its use for trivial offences and lengthy pre-trial detention of British residents were welcome but do not adequately address remaining vulnerabilities such as routine ECHR breaches in the requesting State and the lack of a prima facie case evidence requirement.

43. As regards extradition to the US, the European Court of Human Rights gave judgment in the test case of *Babar Ahmad and Others v UK*³⁵ in 2012 and ruled on

³² See *R (Birmingham) v Director of the Serious Fraud Office; Government of United States of America* [2006] EWHC 200 (Admin), [2007] QB 727, per Laws LJ at para 118. Note that the European Commission itself has said that: "*it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life*". *Lauder v United Kingdom* (1997) 25 EHRR CD 67 at page 74.

³³ *Norris v United States of America* [2010] UKSC 9, at para 82.

³⁴ *HH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); PH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); FK (FC) (Appellant) v Polish Judicial Authority (Respondent)* [2012] UKSC 25.

³⁵ *Babar Ahmad and Others v UK* (Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), 10 April 2012 available at -

the application of Article 3 of the Convention to US supermax prison conditions and sentencing policy. With regard to the restrictive conditions of US supermax prisons, the Court has set a high bar for an Article 3 violation. The restriction of inmates that are not physically dangerous to their cells for the vast majority of time will not amount to an Article 3 violation. In reaching this conclusion the Court took into account that at ADX Florence “a great deal of in cell stimulation is provided through television and radio channels” and that “while inmates are in their cells talking to other inmates is possible, admittedly only through the ventilation system”.³⁶ The Court held that it was only if an applicant faced a real risk of indefinite detention in such conditions that Article 3 may be breached. In respect of sentencing, the Court again invoked the exceptionality principle and held only “in a sufficiently exceptional case”³⁷ if the applicant faced “grossly disproportionate sentence in the receiving State” would an extradition breach Article 3 of the ECHR.

44. The highly restrictive application of the ECHR in the extradition context means that it is an insufficient safeguard against oppressive extradition. Further, whilst it is essential that the judiciary grapple with human rights considerations before extraditions are granted, weighing up whether the projected treatment of a particular person in a foreign justice system meets ECHR requirements is an inherently complex and uncertain process and should not be regarded as a watertight safety net.

45. In the absence of procedural safeguards over the past decade, increased pressure has been placed on the human rights bar as the catch-all for extradition injustice. For example, while solitary confinement and disproportionate sentencing were clearly of valid concern in the Ahmad and Ahsan cases, the greater source of perceived injustice was the issue of forum and the lack of evidence required for their extradition. In some cases, judges have had to consider questions of procedural injustice through the lens of the human rights bar leading to contorted results. By restoring proper procedural discretion to the judiciary in extradition cases, these outcomes can be avoided.

UK/US Extradition

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267#{\"itemid\":\[\"001-110267\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267#{\).

³⁶ Ibid, para 222.

³⁷ Ibid, para 238.

46. One of the central flashpoints in public concern about the UK's extradition arrangements has been the volume and circumstances of extraditions requested by the USA. Much focus on the US-UK extradition relationship has been on the respective standards of information/evidence that each prosecuting agency has to produce before an extradition is sought. Under the terms of the treaty, the UK is required to submit sufficient evidence to satisfy the "probable cause" test in the Fourth Amendment to the US Constitution³⁸ whereas the US is required only to provide information that satisfies the reasonable suspicion test. Liberty maintains that the two standards differ. Probable cause is a logical belief which finds its basis in known facts and circumstances. Reasonable suspicion is a lower standard requiring only the basis for suspicion to be objectively justified. We do not wish to dwell on the varying standards here, save to stay that neither standard should trigger extradition proceedings, which should instead be triggered when sufficient evidence has been sought and gathered to justify committal to trial (i.e. a realistic prospect of conviction and therefore a prima facie case).

47. The focus on the different standards in the treaty has come at the expense of examination of other factors that make the extradition relationship between the US and UK imbalanced. Statistics demonstrate this imbalance. According to Home Office figures published in March 2014, between 2004-2013, the US made 106 extradition requests to England, Wales and Northern Ireland³⁹, compared with 48 made in the other direction. When set against the respective population sizes of each State, the scale of the imbalance is clear. The population of England, Wales & Northern Ireland was estimated to be 58.8 million in mid-2013 and the estimated population of the USA was 316.1 million at the time. The US therefore made over double the number of extradition requests to a population less than five times its own size. If the US was predominantly seeking to extradite US national fugitives, the statistics may better reflect the size of each country but information released following an FOI request in 2010 shows that roughly half of the people that had been extradited to the US from the UK since 2004 were UK nationals or people with dual citizenship.

³⁸ "The Fourth Amendment guarantees "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched , and the person or things to be searched."

³⁹ Scotland's population figure is excluded because the extradition statistics referenced do not include requests between the US and Scotland.

48. The balance of nationalities of those extradited in both directions also demonstrates the imbalance. It appears that many more UK citizens are extradited to the US, than US citizens extradited to the UK. Between 2004 and June 2010, of the 33 people extradited from the US to the UK, 3 were known to be US nationals or to have dual citizenship. In the same period of the 62 people extradited to the US from the UK, 28 are known to be UK nationals or to have dual citizenship.

49. There may be many factors which drive the unusually high traffic of extraditions the US seeks from the UK. As noted previously, the US takes a much wider approach to jurisdiction and it also appears that US federal as well State prosecutors may seek to prosecute and extradite in circumstances where UK prosecutors would not consider that the public interest test had been satisfied. It is certainly no secret that the US has a much tougher criminal justice culture than we do in the UK. As of 2008, the US had the highest prison population rate in the world, and imprisoned almost half of the 9.8 million people imprisoned worldwide.⁴⁰ It is also clear from statistics and factual circumstances in individual cases, that US extradition is no longer predominantly concerned with the most serious offences. Of the US extradition requests received between 2004-2013, 9 related to murder, while 75 concerned fraud related and money laundering offences.⁴¹ These imbalances and the jurisdictional overreach of US prosecutors, make the need for further judicial safeguards all the more urgent.

Other bars to extradition

50. Other limited statutory bars to extradition, including passage of time, extraneous conditions (prosecution on account of race, religion etc) etc are found in sections 11 and 79 of the EA. Liberty believes that in addition to these existing bars, the Committee should consider recommending that a proportionality or general public interest bar be added for extraditions to Part 2 countries. This could reflect the proportionality bar recently added to the EA in respect of Part 1 territories. New section 21A inserted by way of section 157 of the Anti-Social Behaviour, Crime & Policing Act 2014 allows a judge to bar disproportionate extraditions requested under the EAW system. There are no reasons of principle why British judges should now be able to block disproportionate extradition requests from EU Member States but not

⁴⁰ King's College London, International Centre for Prison Studies, World Prison Population List (eighth edition) Roy Walmsley.

⁴¹ Extradition Requests 2004 – 2013, published by the Home Office, 25 March 2014.

disproportionate extradition requests received from Part 2 requesting states. The sheer volume of disproportionate extradition requests under the EAW gave rise to the enactment of the new bar. While there may be fewer extradition requests under Part 2 than Part 1, this does not justify fewer protections for those requested under Part 2.

51. The cases of Richard O'Dwyer (discussed above) and Liberty client, Eileen Clark, demonstrate the need for a proportionality/public interest bar in respect of Part 2 countries. Eileen Clark left her husband in 1995. In 1998 she travelled to the UK with her 3 young children where they were granted leave to remain. She is a person of impeccable character – she spent her life here as a homemaker, doing occasional voluntary work. In 2010 she was informed that she was wanted on a warrant in a US Court for having removed the children unlawfully. Apparently she had initially been wanted on a charge of 'parental interference' which the US Prosecutor had discovered was not an extraditable offence. So the offence was effectively upgraded to one of international parental kidnapping. She was arrested 15 years after her marriage ended.

52. When Liberty took over the case we discovered significant evidence suggesting that Eileen Clark had been a victim of domestic abuse and violence. A great many people who had known her before she left her husband attested to the fact that she had disclosed living in fear of him. We located an old police report from before she left him in which she had reported domestic violence. We located a lawyer from whom she had sought advice who recalled that she had asked about the Family Violence Act and had been fearful of her husband. Clark was assessed by 2 experts – one a psychiatrist and one a psychologist – both of whom diagnosed PTSD consequent to domestic violence. Clark's GP shared this view. Clark was extradited to the USA in June 2014. By the time the proceedings were resolved in the UK she had been held on an electronic tag and curfew for well over 2 years and her mental state had deteriorated to the point that she could barely leave her house. Her children, now adults living in the UK, had resumed contact with their father and were opposed to her extradition.

53. This background, coupled with the passage of time meant, in our view, it was grossly disproportionate to extradite her. The highest sentence she could be given is three years in prison for this offence and she had already been on a tag for over 2 years. Yet there was no provision in law that enabled us to argue that it was not in the public interest to extradite her. Our proportionality arguments were confined to

her right to family life which, when set against the overwhelming desire of the US Prosecutor to secure her extradition, proved fruitless. Because the criminal solicitors had not raised the domestic violence issue at the outset, it was extremely hard to get the court to accept the evidence.

54. Had there been a general provision within the EA enabling the judge to look at the case in the round and decide whether in all the circumstances extradition was proportionate and/or in the public interest, we believe Eileen Clark would have received a much fairer hearing and justice would have been done. The reach of US jurisdiction, the type of offences that they are prepared to pursue and the absence of other effective safeguards, make an urgent case for a proportionality bar.

Legal Aid

55. Legal aid for legal assistance and interpreters in extradition cases is now means-tested. In practice this has been shown to produce unacceptable delay, and unfairness. In *Stopyra v District Court of Lubin [2012]*⁴² the High Court attacked the means test on these grounds and noted the conflict it caused with the strict time requirements under the EAW.⁴³ The Baker Review further recommended that the MOJ urgently consider removing the means test in extradition cases yet the Government rejected this recommendation out of hand, saying “*the Ministry of Justice has carefully considered the position but does not consider that the business case to reintroduce non-means tested legal aid for extradition proceedings has been made out.*”⁴⁴

56. It is unacceptable that requested persons are routinely left languishing (sometimes in custody) without legal representation for weeks or even months while they are means tested. Even more absurd is that this situation persists despite the considerable cost savings that could be made across the system if pressure on custody, court time resources including adjournments applications, were reduced. The extradition judges that gave evidence to the Baker Review were of the view that there would be a considerable net saving of public money in granting free legal aid to

⁴² EWHC 1787 (Admin)

⁴³ Article 17 of the European Framework Decision provides that decisions on whether or not to execute an EAW should be made within 60 days.

⁴⁴ The Government Response to Sir Scott Baker’s Review of the UK’s Extradition Arrangements, October 2012, page 6.

requested persons.⁴⁵ The costings that the MoJ provided to the Baker Review were inconclusive and based on untested assumptions. We urge the Committee to recommend that the means test is removed in the interests of justice and pragmatism.

Right to appeal against extradition orders

57. Section 160 of the *Anti-Social Behaviour, Crime & Policing Act 2014* (ASBCPA) (not yet in force) amended the 2003 Act to repeal the automatic right to appeal an extradition order from the Magistrates Court. Under the reform, extradition appeals on law or fact will in future only be granted with leave of the High Court. Currently, if a judge orders an individual's extradition under the EA, he or she has the right to appeal that decision to the High Court which will be able to consider whether the decision was right in fact and law. This backstop appeal mechanism is one of the last remaining - and critical - safeguards against wrongful extradition allowing individuals to raise new evidence which was not available at the time of the extradition hearing.

58. Large numbers of people subject to extradition requests cannot afford a lawyer and so are represented by one of hundreds of duty solicitors signed up to the extradition rota at Westminster Magistrates' Court. However, the majority of individual solicitors have never conducted an extradition case before. As the Committee is no doubt aware, the 2003 Act is immensely complex and has generated a vast amount of case law. At present where a mistake is made, the requested person is protected by an automatic appeal right to be exercised within 7 days of the extradition order. Given the pressures on duty solicitors and the minimal time allocated before an initial extradition hearing, this is a vital safety net.

59. A leave requirement will mean that an arguable case will need to be made before the High Court within the allotted period. Many requested persons are unrepresented during this period and will only be able to provide a brief argument/outline in their appeal notice before seeking expert legal representation once the appeal is lodged. Unrepresented or badly advised individuals will be unable to meet the arguable case threshold and it is possible that a person who is wrongly advised in the Magistrates' court will be extradited before having the opportunity to

⁴⁵ Baker Review page 312, para 10.31.

have that decision reviewed. The oppressive nature of this reform is made worse by the inequality of arms inherent in circumstances where the extraditing State is automatically granted representation by specialist CPS lawyers.

60. In arguing for removal of automatic appeal rights the Government cited the high number of appeals. Given the implications of extradition for an individual it is unsurprising that many appeal. However judges routinely dispose of weak arguments quickly and a greater number of extradition bars on the statute book will reduce the number of unmeritorious appeals and the corresponding pressure on the High Court. The reform is at odds with growing public awareness that the system already lacks vital checks and balances. At the very least an automatic appeal mechanism is essential to maintaining a credible extradition system and Liberty urges the Committee to recommend the repeal of section 160 of the ASBCPA.

Conclusion

61. In a desire to appease international partners, successive Governments have forgone extradition safeguards that traditionally operated to protect British residents. This has coincided with an increased desire among some extradition partners to extradite in a disproportionate way or in circumstances where insufficient evidence exists or where jurisdiction to prosecute is tenuous. Liberty believes that a core and modest bundle of safeguards must be added to the EA, and certain international agreements, to prevent further unjust and arbitrary extraditions. The Government frequently reminds us that its first duty is to protect those than live within its borders. In this sphere however, protection is badly lacking. Liberty believes the Select Committee on Extradition has a truly unique opportunity to make important recommendations for reform. In undertaking this task, we urge Committee members to reflect on the policy analysis, evidence and recommendations herein.

Isabella Sankey