

THE LAW ON EXTRADITION: A REVIEW

Submissions of LIBERTY in response to the Home Office Consultation Document of March 2001

A. INTRODUCTION

1. As the only national organisation dealing with the broad remit of civil liberties and human rights, Liberty has always been concerned about extradition. We have always been conscious of the need to ensure that fugitive offenders are, where appropriate, returned to face trial whilst at the same time ensuring that their rights are properly protected.
2. The availability of extradition under international criminal conventions to countries with whom the United Kingdom does not have general extradition arrangements, and the gradual expansion of the European Convention on Extradition to include countries which do not have a track record of protecting human rights, means that there is an increased need for vigilance to ensure that individual rights are protected where extradition is requested.
3. Liberty is therefore extremely concerned that many of the proposals in the Consultation Paper are designed to remove protections for the individual in the interests of speed and economy. We therefore oppose all the proposals in the paper which would remove any protection currently available to extradition defendants. In our view, as we explain below, no adequate justification has been shown for these changes, many of which would remove features of the extradition system which have been present since extradition began in the early 19th century.
4. We note that the Pinochet case is given as a reason why change is needed. We question whether this is a sound premise. That was a unique case which is not representative of the vast number of extradition cases. The delays which occurred were not the fault of the extradition process per se, but occurred for other reasons which could easily have been avoided, e.g. the involvement of Amnesty International and Lord Hoffmann. The case did emphasise the need to ensure that those charged with international crimes should not escape unpunished, and also that the extradition process should be primarily a judicial one, with only one opportunity for political intervention by the Home Secretary- rather than on up to three occasions as at present- to ensure that defendants are not extradited to unsuitable countries or in inappropriate circumstances". We note that it is only 12 years since the Extradition Act 1989 was enacted. Clearly at that time there was a need for a modernisation of the extradition scheme given that it had been over a century since the 1870 Act came into force. It does not seem to us that a compelling need has been shown for a dramatically re-written Extradition Act.
5. Since 1989, UK courts have intervened to refuse extradition following habeas corpus or judicial review proceedings in a significant number of cases, and the Home Secretary has refused to extradite in a significant number of other cases where extradition would have plainly been wrong and unjust. We believe that the current proposals would seriously increase the risk of injustice in such cases.
6. We recognise the concern about the delays in extradition proceedings, however in our view some delay is both appropriate and necessary. It must be remembered that extradition proceedings are criminal proceedings of a special type, and the defendant must therefore be given adequate time to arrange his defence to the charges against him. In our experience, unnecessary delays are often caused by the CPS's insistence on particular counsel, whose commitments require cases to be listed far in advance. Also, there are often delays in the High Court lists. A wholesale revision of the extradition framework seems to us to be a disproportionate response to what is, essentially, a local administrative problem.

B. SUBMISSIONS

I. Tier One

7. We have particular concerns about Tier One. We believe that a backing of warrants system would be a recipe for injustice. There is an assumption that in respect of our close extradition partners extradition can proceed rapidly because of the presence of adequate safeguards in their legal systems. Experience proves otherwise. Even in the case of signatories to the ECHR there is a real risk of injustice in allowing return simply on the basis of an arrest warrant. For example, in *Gale v. Governor of HMP Holloway* [2001] EWHC Admin 430 the defendant's extradition was requested by Portugal for money laundering offences. It was agreed by all parties that she could not be convicted in Portugal because her husband had been acquitted of the predicate drug trafficking offences. However in Portugal once an arrest warrant has been issued by a public prosecutor there is no power to stop the proceedings going to trial. The extradition request therefore had to be maintained. The High Court discharged the defendant under section 11(3)(b) of the 1989 Act. Laws LJ said at para. 14 of the judgment:

... it seems to me plain beyond any possibility of doubt that it would be unjust and oppressive to return the claimant, having regard to all the facts I have stated springing from the acquittal of her husband in May 2000. As I have said more than once, she cannot now be convicted of these offences.

8. If the Tier One proposals had been in place then Mrs Gale would have faced extradition and a lengthy period of pre-trial detention lasting months or possibly several years, despite the fact that she could not be convicted. This would plainly not be right. Nor is the Gale case unique. Many other cases can be cited where the High Court has discharged fugitives from EU countries because it would not be right to extradite them. For example, in *Re Barone*, Unreported, 7th November 1997, the Divisional Court held that it would not be right to extradite the defendant to Italy because he had been convicted in his absence and would have no right to appeal against his conviction.

9. It therefore seems to us that the justification in para. 59 for the Tier One proposals simply does not stand up to close scrutiny. The fact that a country is a signatory to the ECHR is no guarantee that violations of the Convention will not occur.

10. There is a real risk that removal of the Secretary of State's and High Court's functions (as explained in para. 133) in Tier One cases could potentially lead to this country being in breach of its obligations under the ECHR. For example, the European Court of Human Rights has held that extradition of a person who is physically or mentally ill may violate Article 3 if the illness is sufficiently severe. Moreover, where there is a risk that speciality provisions will not be observed or the defendant subjected to a wholly disproportionate sentence then Article 3 may be violated.

11. We note that none of these factors is mentioned in the Tier One proposals. The Gale case shows that foreign systems of justice do not always contain the necessary discretionary mechanisms which would stop extradition requests being made for those who were, for example, terminally ill. An extradition scheme which does not contain a discretion not to return would not, in our view, be compatible with the ECHR.

12. The paper suggests that because the Home Office refuses to issue an ATP relatively rarely, this step is unnecessary. We think this is a complete non sequitur. The argument can be made that it merely indicates that the Home Office is failing in its duty to carry out its statutory functions under section 7 and is too readily agreeing to give primacy to treaty obligations instead of critically scrutinising whether extradition would really be appropriate. There are numerous cases where it is clear that extradition would not be appropriate but the Home Office has nonetheless allowed extradition hearings to commence. For example, in *Re Sagman*, Unreported, 18th June 2001, the Home Office granted an ATP notwithstanding the fact that (i) the offences had been committed 15 years prior to the request; (ii) the requesting state (an ECE partner) had taken seven years and made five

attempts at producing a sufficient request. It was absolutely apparent from the outset that the High Court would order the defendant's discharge under section 11(3)(b) but the Home Office, obviously wrongly, issued an ATP nonetheless. LIBERTY therefore believes that the Home Office is failing in its duty to carefully scrutinise requests and, as a result, defendants are unnecessarily put through the stress of facing extradition proceedings.

13. We now turn to the specific proposals in Tier One.

14. We could not accept extradition for military offences which are not also part of the general criminal law - and if our EU partners are unlikely to request such extraditions then there can be no objection to including the restriction: circumstances could always change (states of emergency, rise of right-wing extremists etc) which might make this a necessary exception.

15. For the same reason we would be strongly against the removal of the exception for political offences in all tiers. This is probably against the Geneva Refugee Convention, and cases have already arisen of Basques from Spain seeking asylum in Belgium, while the record of Greece on the question of Macedonian cultural nationalism is questionable.

16. We see no objection in principle to extraditing those convicted in absentia provided they have an opportunity of effectively challenging the conviction whether by appeal or otherwise, (with no restrictions on the grounds or evidence that can be brought) on their return.

17. We feel that the dual criminality requirement should continue to exist, and that the minimum punishability requirement should be maintained. Dual criminality has been a feature of extradition since the first extradition treaties with the US and France were concluded in the 1840s. No compelling justification has been shown for its removal.

18. We also consider that the specialty requirement should generally be retained, at least for offences carrying a custodial sentence: it must be wrong for a country seeking extradition for fraud or burglary, for example, suddenly to find that they want to try him for murder or manslaughter - or indeed for a non-extraditable offence. This also applies to consent to the waiver of specialty protection (para 168). Once again, specialty is a long - standing principle of extradition law and so in our view compelling reasons would need to be shown for its removal. In our view there are no such reasons.

Tiers Two and Three

19. We would have no objection to the relaxing of authentication procedures (para 106) provided that the accused and the charge are clearly identifiable, and the requirement of prima facie evidence retained.

20. Our remarks about political offences (above) apply with even stronger motivation to requests from Tier Two and Three countries (para.108(iv)).

21. We agree that the passage of time jurisdiction should be retained (para. 108(v)). However there should be no prescription (or similar exception) for international crimes such as grave breaches of the 1948 Geneva Convention, genocide or torture,

22. We do not understand the potential for 'confusion' referred to in para. 111. The section 11/12 criteria are clear and specific. The Secretary of State, as a public authority, cannot act in breach of the ECHR and is therefore prevented from making an order for return where to do so would breach it. We suggest one of two models:

a. Retention of the present system; or

b. Inclusion of a power of the High Court to order discharge where extradition would breach the ECHR.

23. On balance, we prefer the latter model. It has the advantage that all disputes of fact about conditions in the requesting state could be resolved in an adversarial context in court. At present the Home Office is far too willing to accept at face value what the requesting state says, and the case law indicates that the Secretary of State is entitled to limit the opportunities for the defendant to challenge these assertions: *R. v. Secretary of State ex parte Rose*.

24. We agree that the secretary of state should only intervene once, although there could be occasions for intervention on political grounds, where the judge has not appreciated the gravity of the situation in a country (as perhaps should have been the case in *The Queen v I.A.T. ex parte Acosta* 9 Oct 2000)

25. Turning to the European conventions, we have given our views on the questions of the requirement of prima facie evidence specialty, dual criminality and political offences. With regard to consent to extradition or to waiver of the specialty rule, we have no objection to this becoming irrevocable provided that the suspect has had full independent legal advice, and a reasonable time has elapsed: 10 days is certainly not sufficient, bearing in mind the pressures to which a suspect is subjected, and we would have thought that s/he should have a few days after submitting his consent in which to change his/her mind.

Tier Four

26. We agree that Tier Four cases require the fullest level of protection. Indeed, it is a matter of great concern to us that extradition should even be contemplated merely because the request is made by a country which has signed an international criminal convention. In the case of a country such as the United Arab Emirates, where punishments such as flogging, crucifixion and amputation are imposed, it is not appropriate for this country to cooperate with it as, unfortunately, it has done (*Lodhi v. Government of the United Arab Emirates*, Unreported, 13th March 2001). We should register our disapproval of such legal systems by withholding our cooperation.