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PROTECTING CIVIL LIBERTIES
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Liberty's submission to the Joint Committee on Human Rights' inquiry into the human rights implications of UK extradition policy

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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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Summary

In this submission to the JCHR Inquiry we set out the background to extradition law and practice in the UK and identify what we consider to be the key flaws in the *Extradition Act 2003* (EA). In order to facilitate an extradition process which is fair, just and which respects fundamental human rights, a number of changes are required.

- **Most appropriate forum bar:** the EA must be amended to ensure that for all extradition requests, a UK judge has the power to bar an extradition where the alleged conduct took place in whole or in substantial part in the UK and where, given the circumstances of the case, extradition would not be in the interests of justice.
- **A prima facie case must be established prior to extradition:** British courts must have the opportunity to determine whether there is sufficient evidence against an individual to warrant their extradition. Before such a significant engagement of a person's human rights it must be determined whether there is a case to answer. To this end the European Framework Decision will need to be renegotiated and Part 1 of the EA amended. Part 2 of the EA will also need to be amended to remove the list of countries currently exempted from having to provide prima facie evidence for extradition requests (following renegotiation of bilateral extradition treaties where necessary). The power for ministerial designation via statutory instrument under Part 2 of the Act should also be removed. The clear injustices which have occurred under the US-UK treaty, as detailed in this submission, show a clear mandate for change.
- **Dual criminality:** the EA must be amended to ensure that only conduct which would be an offence within the UK is an extraditable offence under Part 1. This will put an end to UK residents being subjected to prosecution for acts deemed criminal wholly out of keeping with UK values, and will go some way to ensuring that extradition warrants are executed only in a proportionate manner.
- **Renegotiation of the European Framework Decision:** The European Framework Decision must be renegotiated in order to re-insert the prima facie case safeguard (see above). Renegotiation should also involve re-inserting the dual criminality requirement for extradition within the EU. Further, given

conflicting policies amongst Member States a court must be able to determine whether the ramifications of the alleged crime for which extradition is being sought are disproportionate to the impact on the person who will be affected by their removal to another state and whether it is in the public interest to pursue extradition.

- **Renegotiation, where necessary, of bilateral treaties:** Ensuring that there are adequate safeguards in place for UK residents subject to extradition may require the renegotiation of certain bilateral treaties, and/or the removal of the Part 2 designation order. What will be required will vary from one treaty to the next, but it is vital that safeguards be reinstated even where this requires diplomatic negotiation. All of the arrangements with Part 2 countries must be reviewed – not only that of the US-UK.
- **Provisional Arrest:** The ability to hold a provisionally requested person without charge for 45 days or more without an official warrant is tantamount to holding someone without charge. Not only will this have a devastating impact on the detained person's private life, as well as that of their family, it is a breach of the right not to be imprisoned without lawful charge and conviction.[1] The provisional arrest powers in the Act must be reviewed and the length of time a person is able to be held drastically reduced, with much stronger judicial safeguards.
- **European Investigation Order:** Finally, Liberty is concerned that the EIO Directive, as currently drafted, lacks express safeguards for human rights and procedural fairness which is likely in practice to lead to a similar impact as the operation of the EAW.

[1] As protected by Article 5 of the *European Convention on Human Rights* as incorporated into UK law by the *Human Rights Act 1998*.

Introduction

1. On 10th December 2010 the Joint Committee of Human Rights (JCHR) announced an inquiry into the human rights implications of the UK's extradition policy. The inquiry follows on from the Home Office review of the same, announced on 8th September 2010,[2] to which Liberty submitted a detailed response.[3] Liberty has long held concerns about the UK's extradition arrangements.[4] From a human rights perspective, the legal and international frameworks governing these arrangements are inherently flawed. A review of the experience of practical impact of the EA since it came into force evidences a clear mandate for change.

2. The JCHR inquiry focuses on whether the UK's bilateral extradition treaties, along with the European Arrest Warrant (EAW) system and the European Investigation Order (EIO), comply with the UK's human rights obligations. The inquiry will address a number of issues, including

(a) whether current extradition arrangements provide adequate protection against any unjustifiable infringement under the HRA, and what safeguards should be included to better protect human rights;
(b) whether bilateral extradition treaties override human rights, and whether and what safeguards are required to better protect human rights;
(c) the implementation in the UK of the European Arrest Warrant; and
(d) the human rights implications of the European Investigation Order.

The breadth of issues covered by this inquiry recognises the extent of the problems with the current extradition system. Liberty believes that it is not only the political

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[2] House of Commons *Hansard*, 8 September 2010 at column 15WS. The Home Office review focuses on five areas: (a) the breadth of the Home Secretary's discretion in an extradition case; (b) the operation of the European Arrest Warrant including the way in which its optional safeguards have been transposed into UK law; (c) whether the forum bar to extradition should be commenced; (d) whether the extradition treaty between the UK and UK is unbalanced; and (e) whether requesting states should be required to provide prima facie evidence (that is, that there is sufficient evidence to form a case against the defendant).

[3] *Liberty's response to the Home Office review of extradition legislation* (December 2010), available at http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-submission-to-home-office-extradition-review-december-2010.pdf.

[4] See, for example, *Liberty's Response to the Home Office consultation on The Law of Extradition* (2001) available at http://www.liberty-human-rights.org.uk/pdfs/policy01/jun-extradition.pdf. For more information about Liberty's *Extradition Watch* Campaign see: http://www.liberty-human-rights.org.uk/human-rights/justice/extradition/index.php.

arrangements in place but also the legal implementation of those arrangements under the *Extradition Act 2003* (EA) which need to be reviewed. It is also important that any reform of extradition law goes beyond the arrangements which have received more political and media attention in recent years, such as the UK-US extradition treaty, to consider the arrangements in place with *all* other countries.

3. Liberty's position is that the EA, which implements both European arrangements and international obligations, has removed crucial safeguards and eroded the ability of the judiciary to properly oversee extradition requests. While Liberty has always been conscious of the need to ensure that suspected offenders face trial, we believe that this must, and may, be reconciled with a system which protects people against unfair or unnecessary extradition. Extradition permits the forcible removal to a foreign country of people resident in the UK, including UK citizens, who may have no connection with the foreign jurisdiction. 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. The removal of an individual to a foreign jurisdiction for investigation and possibly prosecution necessarily engages historic rights to fair trial, liberty and the prohibition on inhuman and degrading treatment.

4. Concern about current arrangements has emanated not only from human rights campaigners but from lawyers, judges, journalists and parliamentarians across the political spectrum including at the highest levels of Government. In recent polling commissioned by Liberty, a majority of parliamentarians recognised that there are significant flaws in the current extradition framework. 83% of all MPs surveyed agreed, or agreed strongly, that if a significant part of the alleged crime took place in the UK then it ought to be left to a British court to decide if it is in the interests of justice to extradite the person or have them tried at home.[5] 66% of MPs agreed, or agreed strongly, that extradition should only occur if the country requesting it first provides evidence to a UK court.[6] In relation to the high profile proposed extradition

[5] The survey data was independently collected by ComRes, 2 to 17 September 2010. There were 151 MPs surveyed, with data weighted to reflect the exact composition of the House of Commons in terms of party representation and regional constituency distribution.
[6] Ibid.

of Gary McKinnon, the Prime Minister, while Leader of the Opposition, stated he could *"see no compassion in sending [Gary McKinnon] thousands of miles from his home and loved ones to face trial"* given there is a *"clear argument"* that he could be tried for these offences in a British court, and that the possibility that he would be extradited raised *"serious questions about the workings of the Extradition Act"*.[7] The Deputy Prime Minister stated that the extradition of Mr McKinnon would amount to *"a travesty of justice"*;[8] and the Rt Hon Chris Grayling MP said as Shadow Home Secretary last year that a review of the US/UK extradition treaty was *"vital to maintain the integrity of our extradition system"* given it was facilitating extradition of people who *"are not actually the people we were told, in the first place, it was designed for"*.[9] Even the former Home Secretary, the Rt Hon David Blunkett MP, who negotiated and signed the US-UK treaty, has recently conceded that, with the benefit of hindsight and knowledge of how extradition arrangements are working in practice, both the extradition treaties and EAW should be reviewed and improved.[10]

5. In this evidence to the Committee we set out the basic features of extradition law, and then address key concerns under Part 1 of the EA in relation to the European Arrest Warrant and under the non-EU country arrangements set out at Part 2 of the EA. Liberty recognises that there is an important role for streamlined extradition in the fight against serious crime. However we believe that sacrificing critical safeguards for British residents for the sake of expediency is the wrong approach and leads to grossly unfair and punishing outcomes. This unfairness is compounded by the fact that important safeguards have largely been maintained for the residents of our extraditing partners. Our central submission to the JCHR inquiry is that the EA needs to be urgently amended to include necessary safeguards to stop unjust extradition. In some instances this means that the underlying treaties and frameworks will need renegotiation. In summary, extradition should only take place where there is a prima facie case against the defendant and it will not be contrary to human rights to do so. It should *not* take place where the alleged crime is not a crime in this jurisdiction, where the impact of the extradition is disproportionate to the

[7] http://news.bbc.co.uk/1/hi/uk/8178321.stm
[8] Article written by Nick Clegg in *The Daily Mail*, "If they drag McKinnon to America, he will never come back" (4 August 2009), available at http://www.dailymail.co.uk/debate/article-1203572/NICK-CLEGG-If-drag-McKinnon-America-come-back.html.
[9] "Time to show just how flawed the US-UK extradition treaty is" *The Telegraph* (19 July 2009), available at http://www.telegraph.co.uk/finance/comment/5864977/Time-to-show-just-how-flawed-the-US-UK-extradition-treaty-really-is.html.
[10] Uncorrected evidence given to the Home Affairs Committee, on 30th November 2011, at question 5. Uncorrected evidence available at http://www.publications.parliament.uk/pa/cm201011/cmselect/cmhaff/uc644-i/uc64401.htm.

offence to which the warrant relates, or where the alleged conduct predominantly took place within the UK and it wouldn't be in the interests of justice to extradite. In essence, meaningful oversight powers need to be returned to the courts, while maintaining a finite role for the Secretary of State.

Background to the UK's extradition arrangements

6. 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 once had, and still has in many cases, 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). The EA was the result of an extensive review of extradition law which began in 1997. The review was halted while litigation in relation to the Chilean request to extradite General Pinochet was ongoing, and proposals for consultation were ultimately published in March 2001.[11] Significant amendments to the EA were also later made by the *Policing and Crime Act 2009*.

7. The Home Office consultation in the late 1990s took place against the highly charged political and legal background of the Pinochet extradition. 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".*[12] The consultation also considered how to implement the Framework Decision of the European Council, which was to become effective on 1 January 2004.[13] The Framework Decision applies to all European Union Member States and replaced the traditional extradition scheme between those states.[14] The idea behind it is that 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 procedures and removing the ability of the executive to stop any extradition request. The UK is bound

[11] Home Office, *The Law on Extradition: A Review* (March 2001)
[12] Ibid, at para 8.
[13] *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.
[14] See the recital to the Framework Decision, ibid.

under EU law to implement the Framework in domestic legislation. The 2003 Act was passed on 20 November 2003 and generally came into effect on 1 January 2004.

8. The 2003 Act is an extremely complex and confusing piece of legislation which essentially 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) most non-EU countries (category 2 territories, governed by Part 2 of the EA); and

(3) non-EU countries designated by order that aren't required to prove a prima facie case (category 2 territories excepted by order, also governed by Part 2 of the EA).

Traditional safeguards available in extradition law

9. Before going on to address extradition arrangements in relation to each of these categories, it is important to set out what safeguards have traditionally been part of UK extradition law. During the reworking of the system in the 2003 Act and the later amendments in 2009, some of the safeguards which were previously in place to protect a person subject to an extradition request were removed or whittled down. This has led to an extradition system which leaves UK residents with minimal protection when faced with spurious or speculative prosecution beyond British shores.

10. Some traditional and important safeguards include the requirement for a prima facie case to be made out before extradition is ordered; and the power for extradition to be refused if the requesting state was not the most appropriate forum to try the offence. Other important safeguards include the rule of dual criminality, political offence exceptions, and the requirement that an extradited person cannot be prosecuted for anything other than that for which he or she was extradited (the rule of specialty).

Prima facie case

11. The usual rule is that before a person is extradited to a requesting country, the requested country's courts should first consider whether a prima facie case has been made out against the person. This means that the requesting country has to

demonstrate that there is a case to answer. The courts' ability to scrutinise an extradition request provides an essential safeguard against oppressive extradition requests by ensuring that there is genuinely a complaint against the accused that is supported by at least some evidence. Given the substantial impact forced removal to a foreign country has on a person, the requirement to make out a case to answer before extradition is ordered is an essential safeguard. As regards the UK, this requirement was removed for a number of countries under the EA.

Most Appropriate Forum

12. The forum safeguard ensures that where an offence or act is allegedly conducted partly or wholly within the UK, a judge will be able to consider whether it is in the interests of justice for that person to be extradited. A forum 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 is strangely not included in the EA in the list of factors which can bar an extradition request). In 2006, the House of Lords successfully tabled an amendment to the EA incorporating a forum bar into UK domestic extradition arrangements.[15] This provision, however, has never been brought into force.

Rule of dual criminality

13. The principle of dual criminality was for a long time applied by all countries under international law. It requires that the act or omission with which a person has been charged is criminal in both the requesting and the requested State for an extradition to go ahead. This stems from the principle that there should be no punishment without law – so that a person should not be sent to a country to face prosecution for an offence that is not criminal in the extraditing State (and is also linked to the principles of state sovereignty). The EA, implementing the Framework Decision, has effectively abolished the dual criminality requirement for extradition within the EU by allowing extradition for a broadly defined range of offences which can include numerous offences which are not considered criminal acts in the UK.

[15] Under the *Police and Justice Act 2006*, as outlined below.

Political offence exception and rule against specialty

14. A traditional safeguard which remains in place is the rule that an extradition request may be refused if the requesting State is seeking to extradite the person for political reasons or if the alleged offence was committed for political reasons. The concept of a 'political offence' is related to the idea of political asylum (although the definition has difficulties, especially in relation to terrorism offences).[16] Most international extradition treaties will allow for an exception if there are substantial grounds for believing that the request for extradition has been made for the purpose of punishing someone on the grounds of race, religion, nationality, ethnic origin or political opinion.[17]

15. The 'specialty' rule also remains in force. This requires that a person who has been extradited cannot be prosecuted for any offence other than the offence for which he or she was extradited. This rule safeguards against the risk that a person may be subsequently tried for a political offence and reinforces the rule on dual criminality. It also protects a person from facing a charge for which he or she has not had notice and for which no prima facie case has been proved before the requested country's courts.[18]

Operation of the EA

Part 1 of the EA - The European Arrest Warrant

16. As outlined above, the EA implements the European Arrest Warrant scheme, designed to facilitate streamlined extradition of suspects throughout EU Member States bound by the European Framework Decision. It allows for a fast track system of extradition, whereby people arrested subject to an EAW are swiftly extradited from Britain, often within weeks, for charge, prosecution or imprisonment. The EAW was introduced in the post 9/11 context, sweeping away a number of safeguards previously found in the UK's extradition arrangements. The Home Secretary who was in office at the time the Framework Decision was agreed, the Rt Hon David Blunkett

[16] See Stanbrook and Stanbrook, *Extradition Law and Practice* (2000), at pages 65-69.
[17] Note, however, that the EAW scheme does not provide for this.
[18] Ibid, page 47.

MP, recently said that at the time he signed Britain up to the EAW he was *"insufficiently sensitive to how it might be used".*[19]

17. Part 1 of the 2003 Act deals with the 27 EU countries that are bound by the European Framework Decision.[20] Once a European Arrest Warrant has been issued by a Member State the UK must arrest the person and bring him or her before a judge to consider whether the person is the person specified in the warrant, at which point the judge can detain or bail the person. The judge must (unless the person consents to being extradited) then set a date for the extradition hearing within 21 days. The aim of the hearing is to satisfy the court that (a) the person has been charged with an extradition offence and (b) that none of the legal bars to surrender apply. An extradition offence includes offences punishable by 12 months imprisonment or more and which are offences in the UK, but it also includes offences listed in the European Framework Decision which may not be offences within the UK[21] (see our comments below in relation to dual criminality). Extradition can be barred in certain limited circumstances,[22] including if the court decides that the person's extradition would not be compatible with his or her human rights under the *Human Rights Act 1998.*[23] As outlined in more detail below, this latter ground, whilst a welcome provision, has been interpreted in such a way by UK courts that it will rarely be a successful bar to extradition. The EA fails, however, to implement a key safeguard in the Framework Decision; that is, the opportunity for the executing judicial authority to refuse to execute an EAW where it relates to an offence which

[19] http://www.telegraph.co.uk/news/newstopics/politics/7958202/Surge-in-Britons-exported-for-trial.html.

[20] The countries to which Part 1 of the EA applies are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden: see section 1 of the EA and *Extradition Act 2003 (Designation of Part 1 Territories) Order 2003,* SI 2003/3333.

[21] See sections 64 and 65 of the EA. In relation to Category 1 territories, an extradition offence includes an offence that is on the list of 32 offences set out in the European Framework Decision, punishable by a maximum sentence of at least three years detention in the requesting country (article 2.2). Section 64 also includes other offences that would constitute extraditable offences where the conduct is committed outside of the Category 1 country requesting extradition. Section 65 applies an extradition offence to the situation where a person has been convicted of a relevant offence and sentenced to 12 months imprisonment or more.

[22] See sections 11 to 19A of the EA. Extradition can be barred if it would breach the rule against double jeopardy; if the extradition warrant has been issued to prosecute or punish the person for his or her race, religion, nationality, gender, sexual orientation or political opinions; if too much time has passed; if the person is under the age of criminal responsibility; etc. The courts can also refuse to extradite if the person has already been convicted in the person's deliberate absence and he or she will not be entitled to a retrial: see section 20 of the EA.

[23] Being the rights set out in the *European Convention on Human Rights* and incorporated into UK law by the *Human Rights Act 1998.*

has in whole or in part allegedly been committed in the Member State.[24] The 'forum bar' is completely absent from our legal extradition framework.

Part 2 of the EA

18. Part 2 of the EA applies to over one hundred countries with which the UK has an extradition agreement in place. Under this Part, 'Category 2 territories' include 92 countries with whom extradition arrangements are in place,[25] as well as a number of countries which have been 'exempted by order' to which further provisions apply. There are significant differences between Part 2 and Part 1 (covering the EAW). Before a Court can order a person's extradition to a category 2 country it must decide if there is sufficient evidence to make a case to answer (that is, a prima facie case).[26] It also requires dual criminality for all extraditable offences (which would be subject to 12 months or more imprisonment in the UK).[27] The need to show a prima facie case provides a valuable safeguard against oppressive extradition requests by ensuring that there genuinely is a complaint against the defendant supported by evidence. The requirement for dual criminality ensures that only conduct we consider to be criminal can be prosecuted. With the inclusion of these two important safeguards, Part 2 of the 2003 Act is far preferable to the situation under Part 1 in relation to the EAW, discussed below. Nonetheless Part 2 is dangerously flawed. Not only does it fail to include important safeguards regarding the most appropriate forum, it also allows for the removal (by secondary legislation) of the prima facie case requirement. As we examine below, a number of countries have already been exempted by order under Part 2 allowing them to request extradition of an individual without providing evidence of a prima facie case.

Appropriate forum bar

19. Liberty believes that a decision about where a person should face trial should be informed by most appropriate forum and interest of justice considerations. This will ensure recognition of the serious impact of extradition on a person and their family and allow cases to be prosecuted in the country where most evidence is available. Where the conduct that constitutes the alleged offence takes place in

[24] Article 4(7) of the Framework Decision, ibid.
[25] See *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003*, clause 2.
[26] See sections 84 to 86 of the EA.
[27] See sections 137 to 138 of the EA.

whole or in part in the UK, extradition to a foreign country will inevitably result in difficulties in defending the case given that many witnesses and other 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. With the advent of the internet, it is now the case that online activity in one part of the world can result in 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 minimal judicial protections built into our domestic extradition legislation.

Case study – The Natwest 3, David Bermingham, Giles Darby & Gary Mulgrew

Three British men, (commonly referred to as the NatWest 3) were indicted by the US authorities in June 2002. It was alleged that they had conspired with two members of Enron to defraud the Natwest Bank in London. Their extradition request was, however, delayed until February 2004, one month after the EA came into force.

The NW3 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. The case was remarkable because the alleged victim, NatWest Bank, had never made any complaint against the men.[28]

Their extradition requests were granted by a magistrates' court in October 2004. The Home Secretary ordered their extradition in May 2005. The men appealed and were also granted a judicial review of the refusal of the Serious Fraud Office to investigate the case in the UK. Their appeals were rejected in February 2006.[29] Liberty intervened on their behalf in the High Court, arguing that human rights considerations meant that it was neither necessary nor proportionate to extradite the men because they could so easily be tried in the UK, and indeed *should* be tried here. 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[30] in all but the most extreme cases. The court agreed, but certified the point as being of public interest. The NW3's attempt to have the decision in the Government's favour appealed was refused by the House of Lords. The men were consequently extradited to Houston, Texas, in July 2006.

[28] See http://news.bbc.co.uk/1/hi/business/5163982.stm.
[29] *R (Bermingham, Mulgrew and Darby) v The Director of the Serious Fraud Office* [2005] EWHC 647 (Admin).
[30] The right to privacy and family life, protected by Article 8 of the *European Convention on Human Rights* as incorporated into domestic law by the *Human Rights Act 1998.*

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 sentence. Since their release they have spoken out about the case, outlining that the pressure of their situation in the US lead to their guilty pleas.[31]

Case Study - Gary McKinnon

Gary McKinnon is a British man who has been charged with hacking into the US Pentagon and NASA systems between 1999 and 2002, an offence which was allegedly committed from his computer at home in Scotland. After a US extradition request for Mr McKinnon was issued in 2004, the Home Office began preparing to extradite Mr McKinnon to America for him to stand trial. Mr McKinnon has been diagnosed with Asperger's Syndrome, and his mental health has seriously deteriorated since the legal proceedings against him began. Because of this, and the fact that the crime was committed on British soil, Mr McKinnon has continually argued that he should be tried here in Britain. The Crown Prosecution Service, however, has decided not to bring charges against Mr McKinnon in the UK.[32]

Consequently in a series of decisions made by both the courts and the Secretary of State Mr McKinnon's fate has been deliberated for six years.[33] In May 2010 the Home Secretary announced that she would reconsider the decision of her predecessor, the Rt Hon Alan Johnson MP, in November 2009 that there were no human rights grounds which precluded Mr McKinnon being extradited to the US. Since the first High Court decision in 2007 further evidence has come to light not considered in the early judicial proceedings which indicates that the mental suffering of Mr McKinnon, reflecting not only his Asperger's condition but also now his depression and a significant risk of suicide, is such that to decide to extradite him

[31] http://www.guardian.co.uk/business/2010/aug/15/natwest-three-recant-guilty-pleas/

[32] The Crown Prosecution Service refused to bring charges under the *Computer Misuse Act 1990* against Mr McKinnon in 2003 and later in 2009. Lord Justice Stanley Burnton (with whom Lord Justice Wilkie agreed) noted in his judgment in the most recent judicial review that there were other forums in which Mr McKinnon could be prosecuted: at para 11 in *R (on the application of McKinnon) v Secretary of State for Home Affairs* [2009] EWHC 2021 (Admin).

[33] A decision was first made on 10 May 2006 by District Judge Evans in Bow Street Magistrate's Court to send the case to the Secretary of State, who decided in July 2006 that Mr McKinnon ought to be extradited. Appeals against both District Judge Evans and the Secretary of State were dismissed in 2007: [2007] EWHC 762 (Admin); and finally by the House of Lords in July 2008: [2008] UKHL 59. Following further evidence and a request for the Secretary of State to reconsider, a further decision to extradite Mr McKinnon was decided in 2008, which was reviewed in the Secretary of State's favour by the High Court: [2009] EWHC 2021 (Admin). For a detailed history of the case see the decision of Lord Justice Stanley Burton (with whom Justice Wilkie agreed), *R (on the application of McKinnon) v Secretary of State for Home Affairs* [2009] EWHC 2021 (Admin).

would be disproportionate and a breach of his right to privacy and a family life, and potentially the right to be free from torture or inhuman or degrading treatment.[34]

20. One of the more illogical features of the current UK extradition arrangements is that a key potential safeguard, requiring that a domestic court must consider the most appropriate forum to prosecute the charges in question before granting extradition, sits on the statute book but has not yet been brought into force. In 2006 amendments were successfully tabled to the EA[35] that would allow a UK court to bar extradition if a significant part of the conduct that constituted the alleged offence took part 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.[36] This would require a judge, determining an extradition request under both Parts 1 and 2,[37] to decide on the basis of evidence in each individual case whether it is appropriate to extradite a person in such circumstances. Liberty believes that a forum amendment is long overdue. Any such amendment must, however, ensure that there is not one particular factor which outweighs another in a best interests test, the essence of which allows the judge full discretion to determine the case on the facts in question. We do, accordingly, caution against the inclusion of a specific instruction to take into account one factor (such as whether the UK authorities are prosecuting the alleged offence).

21. In 2009 the Policing and Crime Bill finally presented an opportunity to bring the 2006 forum amendment into force. However following the tabling of the necessary clauses, the then Attorney General wrote to all members of the House of Lords suggesting that enactment of the 2006 forum provisions in the EA would place the UK in breach of its international obligations under the extradition treaties to which it is a party because the treaties did not permit appropriate forum to be a basis for refusal of an extradition request. In response Liberty obtained an opinion from leading extradition experts **(**at **Annex 1)** which states that there was in fact no basis on which it could be asserted that a forum consideration would place the UK in breach of international obligations. If there was a forum amendment in the EA, a

[34] Protected by Articles 8 and 3, respectively, of the *European Convention on Human Rights* as incorporated into domestic law by the *Human Rights Act 1998.*
[35] See Schedule 13, paragraphs 4 and 5 of the *Police and Justice Act 2006*.
[36] These amendments would effect 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.
[37] Paragraph 4(1) of Schedule 13 of the 2006 Act, ibid, would insert a new bar to extradition, 'forum', to section 11, Part 1 of the EA, and insert section 19B; paragraph 4(5) of Schedule 13 would insert the same for extradition requests from Part 2 territories at section 79 and section 83A.

treaty agreement would only need to be renegotiated or amended if the forum provision was in fundamental conflict with the terms of the treaty. Similarly in relation to the EAW, although there is a list of grounds on which extradition may be refused under the EAW, there is no reason an additional ground could not be added, as several EU Member States have already done.

22. Gary McKinnon's ongoing plight shows clearly the type of injustice which could be avoided if extradition could be barred on forum grounds where required in the interests of justice.[38] If a UK court could bar extradition on the basis of forum considerations, it is likely that such a power would be exercised in cases such as Mr McKinnon's as the alleged offence was committed in the UK and, due to Mr McKinnon's diagnosed Asperger's syndrome and deteriorating mental state, it is likely that it would *not* be in the interests of justice for him to be tried in the US and face possible long-term imprisonment. That the current arrangements will lead to an unjust result has been repeatedly recognised by senior Ministers in the Coalition Government. In relation to the case of Mr McKinnon the Prime Minister stated in 2009

> *Gary McKinnon is a vulnerable young man and I see no compassion in sending him thousands of miles away from his home and loved ones to face trial. ...If he has questions to answer, there is a clear argument to be made that he should answer them in a British court. This case raises serious questions about the workings of the Extradition Act...*[39]

23. We believe that a forum amendment, as proposed by both Coalition partners when in opposition, therefore represents the best way of ensuring that where elements of an offence took place in the UK and where the interests of justice require it, a domestic court can decide whether or not extradition should take place. It is important to note that the European Framework Decision itself provides that a European arrest warrant may be refused if it relates to offences which are regarded as having been committed in whole or in part in the territory of the state which

[38] To bring the 'forum amendment' into force an order would need to be laid and approved by both Houses of Parliament which would enact paragraphs 4 and 5 of Schedule 13 to the *Police and Justice Act 2006* bringing those listed provisions into force: as per paragraph 6 of Schedule 13.

[39] As reported in "Don't take my son, mother of computer hacker Gary McKinnon appeals to Obama" *The Times,* Richard Ford (1 August 2009), available at http://www.timesonline.co.uk/tol/news/uk/crime/article6735557.ece.

receives the extradition request.[40] This provision, however, was not included in the finite list of bars to extradition in the EA.[41] A forum amendment, as attempted in 2006 and then 2009 should be immediately brought into force to ensure that this important safeguard can be relied upon in relation to extradition requests from both EU Member States and our bilateral extradition partners.

Prima facie case

24. Extradition requests under Part 1 or from countries designated under Part 2 of the EA require minimal involvement from a UK court. The court simply has to identify that the person arrested and detained is the person named on the warrant and that the requisite information has been provided by the issuing state.[42] A UK court therefore will never consider the substance of the allegations made against the defendant. Instead, the court will simply be required to be satisfied that none of the very limited 'bars to surrender' apply.

25. As regards Part 1 countries, the idea behind removing the requirement for a prima facie case was that each EU country's prosecuting authorities would first consider whether there was sufficient evidence to try a person in that country before requesting extradition. On this reasoning it was felt that there should be no need for another EU country to also check if a case could be made out against that person before ordering their extradition. Unfortunately, the premise for this streamlined reform has not been borne out in the operation of the EAW system. This has resulted in serious injustice, as the case study of Andrew Symeou, set out below, clearly evidences.

Case Study - Andrew Symeou

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. In accordance with the Act our courts were unable to consider whether or not he has a case to answer, even though all evidence strongly indicates that he does not. Two witness statements that implicated Andrew were immediately withdrawn after the witnesses were released from police custody, citing

[40] See article 7.7(a) of the Framework Decision, ibid.
[41] At section 11 of the EA.
[42] See section 2 of the EA for the information required.

beatings and intimidation. No statement has ever been taken from Andrew and witness evidence suggests that Andrew was not in the nightclub at the time the victim was assaulted. The High Court held that it is 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.*[43]

From the date of his extradition to the first appointed date of trial in June 2010 Andrew was kept in prison, for the most part in a maximum security facility, with bail being refused on several occasions on the basis that Andrew was not a Greek national and did not reside in Greece. In late May 2010 the prosecutor successfully applied for the trial date to be adjourned to allow for witnesses to be summonsed for trial. Andrew was at that time released on bail, with a requirement that he remain in Greece. At the time of writing no new trial date had been set; Andrew's punishment continues and his life remains on hold.

26. As regards extradition to non-EU countries, the removal of the prima facie safeguard for a number of Category 2 countries has already taken place. These are countries in relation to which the former Government made a series of Orders removing this requirement – at most recent count, there are 24 designated (non-EU) countries.**[44]** All non-EU Council of Europe countries have been designated, as well as established democracies including Canada and Australia. Also designated are a number of countries with more dubious democratic and human rights records such as Azerbaijan, Georgia, Moldova, the Russian Federation and Turkey.**[45]** Nothing in the Act prohibits the designation of further countries. 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 warrant**[46]** and a judge need not require sufficient evidence to be produced before ordering the extradition of a person.**[47]** The same concerns as set out above for the EAW therefore apply here, but with greater force given there is no presumption that each of the 24 listed countries have the

[43] *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin) at paragraph 39.
[44] 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*. The countries which are currently designated are: Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, New Zealand, Norway, Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine and The United States of America.
[45] 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.
[46] See sections 71(4) and 73(5) of the EA.
[47] See sections 84(1) and 86(1) of the EA.

same robust systems of investigation and prosecution as EU countries have (a presumption that we question in any event).

27. As is the case under the EAW, the practical operation of this part of the Act has unsurprisingly lead to unfair results. Many international agreements are also unbalanced: the terms of the agreements together with the low standards of the EA mean safeguards in place for people the UK wishes to extradite are not in place for our own residents. The problems with this part of the EA have been most clearly demonstrated by the operation of the US-UK extradition treaty, as recognised by the terms of this review. However it must be kept in mind that while it is important to focus on renegotiation with the US,[48] this will have no effect unless the 2003 Act itself is amended to restore the requirements of prima facie case and dual criminality. The focus on the US-UK treaty caused by recent high profile cases should also not obscure all the other bilateral arrangements falling within Part 2 which should all be subject to review.

28. The extradition request for Lofti Raissi, detailed below, which took place before the 2003 Act was in force, demonstrates aptly the importance of the prima facie case requirement.

Case study - Lofti Raissi - pre-*Extradition Act 2003*

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

[48] Article 8 of the US-UK treaty outlines what is required by a requesting state. Under Article 8(2) this includes an accurate description of the person sought; a statement of the facts of the offence; the relevant test of the law describing the essential element of the offence; the prescribed punishment for the offence; a copy of the warrant or order of arrest issued by a judge or other competent authority; and a copy of the charging document. Further information is required if the person sought has been already convicted. Crucially, Article 8(3)(c) provides that UK requests to the US require *"such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested"*.

then detained for just under five months in Belmarsh high-security prison, without ever being charged with an offence by UK or US authorities.[49]

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 able to be 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 was never made out against Mr Raissi. 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.[50] Mr Raissi has since been completely exonerated.[51]

Even though Mr Raissi was never extradited to the United States, his life was irreversibly impacted by the extradition request. While in prison it became known that he was suspected of being involved in the 9/11 attacks and he was subjected to constant racial taunts and threats on his life and he was stabbed twice.[52] He lost his job and has been unable to re-establish his career as a pilot; his wife lost her job with Air France; his brother's wife lost her job at Heathrow airport; and the family has thousands of pounds of debt incurred by Mr Raissi's legal defence.[53]

29. Had the current US-UK Extradition Treaty[54] been in place and the US designation under Part 2 of the EA in force, Lofti Raissi would have been extradited to the US for the purposes of a 9/11 investigation to answer a crime for which the Home Office has since conceded no evidence ever existed to implicate Mr Raissi's involvement.[55] It is likely that he would have been refused bail in the US given the potential seriousness of a terrorist offence. This is because the Treaty as implemented by the 2003 Act removed the prima facie case safeguard hitherto part of UK extradition law.

30. Liberty does not believe that anyone should be removed from the UK without a domestic court first being satisfied that there is a case to be answered, in accordance with rules of criminal justice which UK courts apply to anyone suspected

[49] 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.
[50] *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.
[51] Ibid, at para 154.
[52] http://www.guardian.co.uk/uk/2009/nov/22/lotfi-raissi-algerian-pilot-case.
[53] See a personal account from Mr Raissi at http://www.guardian.co.uk/world/2002/sep/11/september112002.september1147.
[54] *Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America* (Washington, 31 March 2003) CM 5821.
[55] Evidence given to the Home Affairs Committee from Senior District Judge Workman was to the effect that it would have been difficult for him to have done anything other than extradite Mr Raissi had the new extradition arrangements been in place at the time the request came to his court: oral evidence given by Senior District Judge Workman to the Home Affairs Committee, 22 November 2005 at question 28.

of an offence in this country. While it is important to ensure that those committing offences do not escape justice it is also essential that any process for dealing with suspects includes basic safeguards against abuse. Liberty considers that the prima facie safeguard, in relation to both EU and non-EU extradition arrangements, must be urgently reinstated. This would not require a full merits review by a domestic court, with the associated problems of logistics, appeals and delay. It would instead merely require that a domestic court be satisfied that a basic case has been made out before somebody's private life and livelihood is potentially upended.

Other aspects of operation of EAW

31. In addition to concerns over the absence of the forum bar and a prima facie case requirement outlined above, Liberty has a number of further reservations over the current European framework for extradition.

Dual criminality

32. The EA, in implementing the EAW scheme, effectively abolishes dual criminality for Category 1 countries in respect of 32 categories of offences listed in the European Framework. This means that for these offences a person sought by an EU country can be extradited even if the alleged offence is not one recognised in the UK.[56] The listed offences are not defined and are extremely broad to the point of being meaningless. Included are such ill-defined offences as 'computer-related crime'; 'racism and xenophobia'; 'swindling'; 'racketeering and extortion'; 'piracy of products' and 'sabotage'.[57] When the Home Affairs Select Committee, which looked at the Extradition Bill in 2002, asked for examples of what 'racism and xenophobia' means the examples given included disseminating material in support of, or displaying symbols of, banned organisations (Germany); participating in organisations that propagate discrimination (Greece); and disseminating harmful information about a racial or religious group with a reckless disregard for the truth

[56] The only limitation being that the offence is punishable by three years or more imprisonment in the requesting country.
[57] See article 2.2 of the Framework Decision and section 215 and Schedule 2 of the EA.

(Spain).[58] In fact, there have already been requests for extradition for speech and racism related offences that are not offences under UK law.[59]

33. We fully endorse what was said by the Home Affairs Select Committee in 2002 before the 2003 Act was passed in relation to these offences:

> *We have grave* concerns *about the abolition of the dual criminality safeguard. The variety of criminal justice systems and of legislative provisions within the member states of the EU makes it difficult for us to be [confident] that it will be acceptable in all circumstances for a person to be extradited from the UK to face proceedings for conduct that does not constitute a criminal offence in the UK.*
>
> *Our sense of* unease *is heightened when we look at the list of 32 offences specified by article 2.2 of the framework decision. ...It is apparent that these offences are defined in generic terms and are probably better described as "categories of offence". As noted above, the UK Parliament has no power to amend them.*
>
> *We asked the Home Office what information it has about how these offences are defined in other countries. The Home Office responded that it "does not have detailed definitions of offences in the criminal justice systems of other EU member states".*[60]

34. As these offences are not defined, even those offences which on the face of it look to be offences under UK law, may in fact not be. For example, if another country were to define 'murder' as including abortion or assisted suicide, extradition for such a 'crime' could not legitimately be refused under the 2003 Act as the relevant test is whether the conduct is punishable under the law of the category 1 territory - not under the law of the UK. This effectively means that offences to which the list applies can be added every time the law of another country is amended. This is of huge

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[58] See the Home Affairs Select Committee, *First Report, Extradition Bill*, presented to the House on 14 November 2002, Annexure 1, available at http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/138/13802.htm.

[59] For example, the extradition request for Gerald Toben, as discussed in House of Commons Library Note, *The European Arrest Warrant in Practice* (SN/HA/4879) (23 February 2009), available at http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-04979.pdf.

[60] Ibid, at paragraphs 23 to 25.

concern. It means that people resident in the UK could be extradited to another country in the EU to face prosecution for an act which is wholly out of keeping with our values. If parliament has not considered it necessary to criminalise particular conduct, a person present in this country should not be extradited to face prosecution elsewhere for such an offence. Another aberration has resulted from the structure of justice systems in other states. Former Home Secretary, the Rt Hon David Blunkett MP, recently spoke of one of his British constituents who was picked up in Spain for an EAW issued by Luxembourg on civil rather than criminal grounds (resulting from the dual civil and criminal procedural structure in Luxembourg).[61]

Proportionality of Extradition Request

35. It has also become increasingly clear that the operation of the EAW system is both unfair and unworkable. As use of the EAW has evolved it has become evident that while some prosecuting agencies do first consider seriousness, public interest and whether there is a basic case to answer before issuing an arrest warrant, others do not. For example, in Poland there is no public interest test. This means that the prosecutor has no choice but to seek to prosecute even where prosecution (let alone extradition) is evidently not in the public interest. This has resulted in half of the extradition requests being from Poland in 2009, roughly ten times the amount extradited to Ireland even though there are more Irish residents in the UK than Polish.[62] Examples abound of individuals being extradited in circumstances where the impact of their extradition is undoubtedly disproportionate to the alleged offence. Indeed the punishing impact of some extraditions has arguably been worse than any potential sentence that may or may not be received at the end of a successful prosecution.

Examples of EAW requests to the UK

1. 49 year old Briton Patrick Reece-Edwards was extradited to Poland after an EAW was issued alleging that he had forged a car insurance certificate.[63] After spending several weeks in a British prison Mr Reece-Edwards was extradited to Poland, only

[61] Uncorrected evidence given to the Home Affairs Select Committee on 30th November 2010, ibid, at question 5.
[62] Home Office Statistics, as analysed in http://www.economist.com/node/15179470?story_id=15179470
[63] *Reece-Edwards v Suwalki District Court, Poland* [2009] EWHC 3589 (Admin).

for the matter to be resolved by payment of an administrative penalty with no criminal record.[64]

2. Mr Hubner was extradited to the Czech Republic to serve a five month sentence imposed after he drove away from a petrol station without paying, a theft to the value of a little over £20.[65]

3. Valentina Nanarova, a Czech national of Romani descent and resident in the UK, was extradited to serve a sentence for 'endangering the morale of juveniles' on the basis of the absence of her children from school for extended periods. Her appeal against the extradition, one ground of which was that it unfairly impacted on the article 8 rights of herself and her disabled child who was only able to communicate using Czech sign language with his mother, failed.[66]

4. A British national was extradited to Poland after being convicted, but not sentenced, for a driving offence while on holiday with friends. He left Poland voluntarily, but after his return to the UK an EAW was issued by Polish authorities who stated that he would be imprisoned for 14 days, following which he would be released.[67]

36. These cases are just a glimpse of an extradition framework which is becoming increasingly unsustainable. While the facts in many of these cases are strikingly trivial, the impact on the person subject to extradition and their family is not. Neither is the impact that hundreds of arguably unnecessary extradition requests have on the public purse each year. There is huge expense incurred by judicial proceedings, interpreters, etc in dealing with extradition requests. Further, now that the UK is joined up to the Schengen Information System, which allows participating countries to exchange information on wanted and missing persons, the rate of extradition requests is set to rise to an estimated three times the number processed now.[68] During a time of unprecedented cuts to public funding these kinds of extradition requests are an unnecessary drain.

37. The European Commission has, after investigation of how the EAW is operating, concluded that in some Member States there is a need to set up domestic checks on how the EAW is implemented to ensure that extradition requests are

[64] See http://www.telegraph.co.uk/news/newstopics/politics/7958202/Surge-in-Britons-exported-for-trial.html.
[65] *Hubner v Czech Republic* [2009] EWHC 2929 (Admin).
[66] *Nanarova v Czech Republic* [2009] EWHC 2710 (Admin).
[67] *S v A Polish Judicial Authority* [2010] All ER (D) 194 (Mar).
[68] According to the Home Office as reported in *The Economist*: http://www.economist.com/node/15179470?story_id=15179470.

proportionate to the crime suspected.[69] As noted in the case examples above, the flaws of the extradition system have also been highlighted by numerous judges whose role in relation to extradition has, in many cases, been confined to a rubber stamp by the 2003 Act.

Implementation across the EU

38. The Framework Decision, forms a part of a continual widening and consolidation of co-operation between EU Member States in the investigation and prosecution of crime. The preamble to the Framework Decision states that the EAW mechanism *"is based on a high level of confidence between Member States".*[70] But it is clear in the way that Member States have implemented the EAW that there has not been uniform application of the warrant system, nor is there mutual recognition of parity of criminal justice systems. The UK implemented the EAW even before the Framework came into force;[71] the expansive approach adopted at that time by the UK is, as recently conceded by the then Home Office Secretary the Rt Hon David Blunkett MP,[72] regretful.

39. The disparity of implementation across the EU serves to further illustrate the flaws in the Framework Decision and its domestic implementation. Crucially, other Member States have retained legislative safeguards which are not similarly available to UK residents subject to an EAW. This has been done either by taking full advantage of the limited safeguards provided for in the Framework Decision or by failing to implement it in full. Some States have narrowed the very broad offence categories which can form the basis for an extradition warrant. Belgium, for example, has excluded abortion and euthanasia from the extradition category offence of 'murder or grievous bodily harm'.[73] Belgium has also indicated that it will look behind

[69] For background on the European reviews on how the EAW is working practice, see House of Commons Library note, *The European arrest warrant in practice*, SN/HA/4979 (23 February 2009), available at http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-04979.pdf.
[70] Preamble to the *Council Framework Decision*, ibid, at para 10.
[71] The EAW came into force on 1 January 2004; the EA came into force in the UK in 2003.
[72] As noted above and http://www.telegraph.co.uk/news/newstopics/politics/7958202/Surge-in-Britons-exported-for-trial.html.
[73] Report from the European Commission based on Art 34 of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (Revised version), Brussels, 24 January 2006, COM (2006) 8 final: Annexure at page 7.

a warrant issued and determine whether it should be issued with a view to potentially refusing it.[74]

40. The lawfulness of domestic laws that implement the Framework Decision has also been challenged in a number of Member States. In Germany, for example, the Constitutional Court struck down national legislation implementing the Framework Decision as it failed to adequately protect the fundamental rights and procedural requirements of German law in relation to extradition.[75] The court concluded that in implementing the Framework Decision the legislature failed to take into account the protected interests of German citizens and specifically it had *"not exhausted the scope afforded to it by the framework legislation",* for example by not allowing for the opportunity to refuse the extradition of a German resident in circumstances where it related to offences with a *"significant domestic connective factor"*.[76] The legislature was also found to have infringed constitutional protection guaranteeing recourse to a court given there was no possibility under the arrangements of challenging the judicial decision granting extradition.[77]

US and UK Treaty

41. The terms of reference for the current review include specific mention of the workings of the US-UK Extradition Treaty. This Treaty was signed on 31 March 2003, but did not come into force until April 2007 when both parties exchanged instruments of ratification. However due to the earlier enactment and coming into force of the EA, the UK's generous extradition arrangements with the US were already in place. The considerable delay was caused by reluctance on the part of the US Senate, whose approval is required before a Treaty can be ratified in the US under their system of constitutional law. The delay caused a considerable amount of controversy in the

[74] As noted by the now Secretary of State for Energy and Climate Change, the Rt Hon Chris Huhne MP in *The Independent,* 24 October 2008, http://www.independent.co.uk/opinion/commentators/chris-huhne-holocaust-denial-and-a-case-that-shows-flaws-in-the-eu-971404.html.
[75] Judgment of the Second Senate of the Federal Constitutional Court, declaring the European Arrest Warrant Act (*Europäisches Haftbefehlsgesetz*) void: 2 BvR 2236/04. As outlined by the House of Lords European Union Committee, *European Arrest Warrant – Recent Developments* (HL Paper 156) (4 April 2006), at para 157.
[76] See the Bundesverfassungsgericht Press Release no. 64/2005 of 18 July 2005 on the judgment of 18 July 2005, 2 BvR 2236/04, available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg05-064en.html.
[77] Ibid.

UK.[78] Announcing the imminent signing of a new Treaty with the US, Lord Falconer, then Attorney General, stated

> *The United States is one of our key extradition partners and there is a significant volume of extradition business between the two countries. It is therefore important that our bilateral extradition treaty should be as effective as possible. I am pleased that it has been possible to reach agreement on the new treaty and that the Government have the opportunity to affirm their commitment to the closest possible co-operation in the fight against terrorism and other serious crime.*[79]

At the time of the announcement the actual text of the treaty was not published.[80] Indeed the treaty only became available after it had been signed. Given the restrictive nature of the treaty for the UK, it is disappointing, if unsurprising, that no time for parliamentary debate was ever allowed for.

42. The Treaty is intended to allow for a smoother extradition process where the offence for which extradition is sought is punishable under the laws in both states by imprisonment for 12 months or more.[81] One of the sources of controversy over the Treaty is the lack of reciprocity in State parties' obligations. The Treaty does not require the US to present a prima facie case in an extradition request for a UK resident; but for a UK request, however, information is required *"as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested"*.[82] The reason for the lower threshold for US extradition is that the US constitution will not allow for an evidential standard any lower than "probable cause".[83] Given the comparative ease with which the US is able to extradite UK residents, it is unsurprising that there is significant disparity in the numbers sent to and from the UK. Of the 33 people extradited to the UK from the US

[78] In addition to an Early Day Motion demanding that US extradition requests be stayed until ratification signed by 145 Labour House of Commons backbenchers by March 2006, the Conservatives in July 2006 successfully blocked designation under the 2006 Order until the Treaty was formally ratified.
[79] Written Ministerial Statement, House of Lords *Hansard*, 31 March 2003, column W93.
[80] See House of Commons Library Note, *The US/UK Extradition Treaty* (SN/HA/2204) (23 February 2009), available at http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-04980.pdf
[81] Article 2 of the *Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America*.
[82] Article 8(3)(c) of the US-UK Extradition Treaty.
[83] As explained by the then Home Office Minister Baroness Scotland in the debate in the House of Lords on the *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003.*

since the EA came into force on 1 January 2004 only three people were US nationals or had dual citizenship.[84] There have been almost double the number of UK residents extradited to the US (62 people from 1 January 2004 to 30 June 2010), of which 28 were UK nationals or had dual citizenship.[85] These figures are even more disturbing given the relative size of each population.

43. There is provision for extradition from the UK to the US to be refused where the request is for an offence punishable by death unless an assurance is provided that the death penalty will not be imposed, or if it is imposed, will not be carried out.[86] This should provide little comfort in the absence of any prima facie requirement given it still may eventuate in life imprisonment on death row, for example. There is also provision for the Treaty to act retrospectively, which applies to both parties, but is all the more serious for UK residents where evidence of the case would not have to be provided.

44. While concern over the lack of reciprocity in the Treaty is understandable, Liberty's main concern is with the lack of protection for UK residents. We would not therefore support a race to the bottom whereby the protections currently enjoyed by US residents were scaled back to the same level as ours. We should instead be seeking to incorporate the sensible constitutional safeguards that benefit US residents.

Breadth of the Home Secretary's discretion

45. As we have outlined above, Liberty believes that a judge (with a revised, fairer, list of potential bars to extradition available to him or her) is best placed, in the first instance, to properly assess the facts of each case and consider whether an extradition should go ahead. However we also recognise that given the nature of the extradition process, which inevitably involves inter-state diplomacy, that there ought to be a role for the Secretary of State. In particular, that he or she should be able to refuse an extradition request in certain circumstances even where extradition has been approved by a court.

[84] As at 30 June 2010. These figures were provided by the Home Office in response to an FOI request made on 24 March 2010, which the recipient passed on to Liberty.
[85] Ibid.
[86] Article 7 of the US-UK Extradition Treaty.

46. The role of the courts and the Secretary of State in extradition proceedings was greatly whittled down by the EA. This restrictive statute specifies extremely limited bars to extradition which a judge can consider and prevents a judge from taking into account the facts of a particular case. The House of Lords has concluded that even the centuries old writ of habeas corpus has been excluded by the clear and unequivocal wording of the EA.[87] As regards the Executive, in the case of the EAW its role has been rendered defunct by the UK's commitment to the Framework Decision. Indeed under Part 1 of the EA the Executive is entirely cut out of the extradition granting process. A Part 1 arrest warrant is instead received by the Serious Organised Crime Agency which may certify the warrant. Following a certification, the individual named in the warrant is arrested and brought before an appropriate judge. If after an initial hearing and an extradition hearing the judge is satisfied that there are no bars to extradition and that the extradition is compatible with human rights the judge must order the person's extradition.

47. In relation to Part 2 territories, section 93 provides a limited role for the Secretary of State to bar an extradition (on referral from the court) for a limited number of reasons. For example, if the individual concerned will be or has been sentenced to death, if there are no specialty arrangements with the category 2 country etc. Under Part 2 the Secretary of State is also subject to legal obligations under the HRA which require him or her to bar an extradition if it would breach human rights. 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. For these 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.

48. The erosion of the judicial and executive role in barring extraditions has in turn lead to increased pressure on the Secretary of State to reach a diplomatic solution to unjust or unnecessary extradition requests. As this pressure has increased, the problems inherent in finding diplomatic solutions have become clear.

[87] *Re Hilali* [2008] UKHL 3. The House of Lords held in that case that an application for habeas corpus on the ground that there was no case to answer in the requested state must always be rejected as having been excluded by section 34 of the EA.

We now know for example that former and present Prime Ministers have been thwarted in their attempt to persuade their US counterparts to strike a deal for Gary McKinnon, and that it was possibly other political considerations which lead to their refusal, not just the facts of Gary's case.[88] The increasingly political nature of Gary McKinnon's case demonstrates aptly why greater judicial and executive safeguards against unfair extradition are required. The current system has lead in practice to individuals becoming political pawns, their fate dependent on diplomatic negotiations which will be affected by any number of extraneous considerations.

49. Liberty believes that establishing better safeguards and restoring judicial discretion will mean a fairer, less politicised process which will better protect the human rights of each individual. Decision-making should belong primarily with judges and not with the Executive. The judiciary are best suited to examining the facts and circumstances of individual cases, deciding whether necessary legal tests have been satisfied, and determining whether considerations of fairness and justice require extradition to be granted. However it is important for the Secretary of State to retain a residual right to decide that the extradition should not proceed, notwithstanding a previous finding of a court. This discretion should lie alongside the Secretary's legal obligation to protect human rights under the HRA which should be extended to cover all extraditions, including those within Europe. The restoration and imposition of a robust set of legal safeguards will mean any role of the Secretary of State will be limited and narrowly defined. But discretion is important to ensure that any extradition which would be unjust is stopped notwithstanding earlier court findings. This will be necessary, for example, where new information comes to light, or where the Secretary of State is privy to intelligence which may not have been available to the court at the time of the extradition hearing. To this end both parties ought to be able to make final representations where the Secretary of State is considering whether to stop the extradition on human rights grounds or to exercise his or her discretion to prevent unjust extraditions.

Human Rights

50. Before ordering extradition under Part 1 or sending the case to the Secretary of State under Part 2 a judge will be required to determine that the proposed extradition will be compliant with the human rights of the person subject to the

[88] http://www.guardian.co.uk/world/2010/nov/30/wikileaks-cables-gary-mckinnon-gordon-brown

proceedings as protected by the HRA.[89] Whilst these provisions are crucially important, they are not sufficient protection as in practice the sections have provided very little protection to a minimal number of persons, mostly due to judicial reluctance to engage in what is seen as the largely diplomatic and political process which is extradition.

51. The courts have held that reliance on human rights to prevent extradition *"demands presentation of a very strong case".*[90] Indeed, the High Court has held in relation to the right to privacy 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 particular facts be disproportionate to its legitimate aim".*[91] More recently the High Court has held that *"it is not right to apply [an exceptionality test] as a formula for proportionality"* but went on to say that it *"is clear that great weight should be accorded to the legitimate aim of honouring extradition treaties made with other states"* and so *"there will have to be striking and unusual facts"* before a court would say that the extradition would be disproportionate.[92] The focus on honouring extradition treaties and the need for at the very least 'striking and unusual facts' means that this ground will rarely be successful as a bar to extradition. Indeed in the most recent Supreme Court decision the President of the Court Lord Phillips noted that *"only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves"*.[93]

52. As noted above, the European Framework is based on mutual recognition of a perceived parity of criminal justice systems in all of the signatory states. Given this political context, UK courts appear even more reluctant to find that another signatory state to the *European Convention on Human Rights* will breach the rights of the person to be extradited there, even though there is abundant evidence that some

[89] Under section 21 in Part 1; and section 87 in Part 2.
[90] See *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, per Lord Bingham at para 24.
[91] See *R (Bermingham) 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"*: *Launder v United Kingdom* (1997) 25 EHRR CD 67 at page 74.
[92] See *Jaso, Lope and Hernandez v Central Criminal Court No 2, Madrid* [2007] EWHC 2983 (Admin) per Dyson LJ.
[93] *Norris v United States of America* [2010] UKSC 9, at para 82.

Member States are regularly found to be in breach of the Convention with regard to criminal justice standards. In the case of Andrew Symeou, for example, the courts held, in relation to the right to a fair trial, that it is *"to be assumed in the absence of the most cogent contrary evidence"* that a court in an EU country will give a fair trial.[94] Unfortunately, this assumption cannot withstand the numerous findings by the European Court of Human Rights that a territory's criminal justice system or prisons fail to comply with human rights obligations. The assumption also cannot stand where the process by which a person is charged, prosecuted and convicted does not withstand comparison to the standards put in place by the UK courts.

Case study – Gary Mann

Gary Mann is a 52 year-old former fire fighter who was arrested in 2004 in connection with a football riot in Portugal. Under special legislation introduced especially for the event[95] Gary was arrested, charged, tried, convicted and sentenced to two years' imprisonment in under 24 hours. The trial took place with twelve independent defendants, for whom there were two lawyers and one English-speaking interpreter.[96] The usual safeguards present in a British court room, such as ensuring that the defendant is able to understand the case made against him with the aid of an interpreter, has adequate access to a lawyer and is able to put forward a defence in the form of witnesses etc, were not available to Gary. A police officer with over 29 years experience in attendance at the trial with a role of advising Portuguese police officers in relation to English football fans at the tournament described the trial as *"a farce",* and maintained that Gary Mann did not understand most of the trial.[97] Indeed, some years later when a Football Banning Order was sought by the Commissioner of Metropolitan Police in 2005, District Judge Day refused the order on the basis that Mr Mann's conviction was *"obtained in circumstances that are so unfair as to be incompatible with the respondent's right to a fair trial under Article 6"*.[98]

After his conviction in Portugal in 2004, Mr Mann was made subject to an Order for Voluntary Departure, and he left the country two days after his 'trial' in 2004. Four years later, a European Arrest Warrant was issued, and in 2009 Senior District Judge Workman ordered his extradition from the UK. Mr Mann's attempts to have his extradition reviewed were prevented by both procedural failures of his lawyers and the EA, which restricts the right to appeal in extradition decisions.[99] In determining that there was no possibility of final appeal, Lord Justice Moses stated:

[94] See *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin), at paragraph 66.
[95] Under Article 302 of the Portuguese Criminal Code: *R (Gary Mann) v City of Westminster Magistrates' Court & Anor* [2010] EWHC 48 (Admin).
[96] http://www.guardian.co.uk/football/2010/apr/27/gary-mann-extradition-portugal.
[97] *R (Gary Mann)*, ibid at para 1.
[98] *R (Gary Mann)*, ibid at para 5. Note that Senior District Judge Workman, considering the EAW three and a half years after District Judge Day concluded the Portuguese trial had been unfair, disagreed with this finding and considered there had been no such breach (this finding was, however, reached without evidence from either Mr Mann nor his lawyers): see *R (Gary Mann)*, ibid at para 6.
[99] Section 34 of the *Extradition Act 2003* provides that a decision under Part 1 of the EA can only be questioned by an appeal under that part. See *R(Mann)*: at para's 7 to 11.

> *I cannot leave this application without remarking upon the inability of this court to rectify what appears to be a serious injustice to Mr Mann. He is…a 51 year-old man who had previously been a fireman. He had not been in trouble for 29 years, when he received a small fine for a minor offence. Now, after a hearing condemned by a police officer as a "farce" he faces 2 years in prison, over 5 years since his original conviction.*[100]

Following a failed attempt to appeal to the European Court of Human Rights in May 2010, Gary Mann had to leave his family, including two daughters and four step-daughters, and his job to serve a sentence for a crime of which he maintains his innocence and without ever having an opportunity to properly, in accordance with a British standard of criminal justice, challenge the case against him.

53. Another human rights issue which has arisen in the practical application of the EA is the impact on the right to liberty[101]. Those who have been extradited to a foreign jurisdiction are unlikely to be granted bail as they are considered a flight risk. In relation to the EAW, the impact on the right to liberty is exacerbated by the issuance of a warrant by certain Member States in the early stages of an investigation. This stems from the simple fact that different European states have markedly different modes of investigating, charging and prosecuting crime, and is compounded by the tight timeframe within which an EAW must be executed by the receiving state.[102] It means that UK residents can be extradited for the purposes of investigation when there may not be a great deal of evidence against them, and even though the EA allows for extradition for the purposes of prosecution.[103] A recent example illustrating the potential difficulties of the system involved the issue of a Spanish arrest warrant which particularised the offences followed by the words 'diligencias previas' without translation. The court held that there were no grounds to refuse the extradition, even though expert evidence produced by the applicant showed that the words meant 'preliminary inquiry' and that the applicant's case was at the first stage, where a private complaint had been made but no judicial inquiry begun.[104] The EAW is of course designed to assist in the investigation of crime, but the practical effect is that a person may be extradited at a very early stage of a

[100] *R(Mann)*, ibid, at para 15.
[101] Article 5 of the *European Convention on Human Rights*, incorporated into UK domestic law by the *Human Rights Act 1998.*
[102] Article 17 of the Framework Decision, ibid, requires the EAW is executed within 60 days, with an extra 30 days available in exceptional circumstances. See section 35 and 36 of the EA.
[103] Section 2 the EA stipulates what is required in an arrest warrant. Section 2(3)(b) states that the statement with the Part 1 warrant shows it is issued *"with a view to his arrest and extradition to the Category 1 territory for the purpose of being prosecuted for the offence"*.
[104] *Meizoso-Gonzalez v Juzgado le Instruccion Cinco de Palma de Mallorca, Spain* [2010] All ER (D) 227 (Oct).

criminal investigation, with no prospect of bail and held in a prison with standards which fall far short of what would be deemed acceptable in the UK.

54. While any legislative provision directing human rights compliance is undoubtedly welcome, the experience to date shows that it is not, in the context of UK extradition arrangements, proving an effective safeguard against unjust extradition which undoubtedly engages the HRA. When it comes to extradition, the technique of having a generalised bar on human rights grounds is not an adequate substitute for other procedural legislative protections. This is because extradition is capable of being a punishment in and of itself. The extradition process, therefore, needs to be tailored to ensure compliance with basic fairness and due process rights.

Provisional arrest

55. Finally, Liberty also has concerns about the ability to *provisionally* arrest a person in the UK before an extradition request is received or presented before a court. In relation to extradition within Europe under Part 1, under the EA a person may be arrested if a constable, customs officer or a service policeman has reasonable grounds to believe that an arrest warrant for the person's extradition has been or will be issued.[105] Once a person has been arrested under this power he or she must be brought before a court within 48 hours and documents setting out the legality of the arrest must be provided (i.e. the extradition arrest warrant). This initial 48 hour period can be extended by a further 48 hours if a judge or magistrate decides the documents could not reasonably be produced within the initial 48 hour period. Given the calculation of the 48 hour period does not take into account weekends or public holidays, the person could be held for an initial period of four days (i.e. 48 hours plus an intervening weekend) and up to six days in total if an extension is granted.[106] The power to extend provisional arrest was brought in by the *Policing and Crime Act 2009*, resting on Governmental assurances that it would be a *"very rare [case] where there is a need to apply for an extension".*[107] However, there is nothing in the Act that suggests this would be limited to exceptional circumstances.

[105] Section 5 of the EA.
[106] Section 6 of the EA.
[107] Public Bill Committee Debate, House of Commons *Hansard*, 25 February 2009, at column 523.

56. These provisional arrest provisions allow for a person to be detained without evidence of an arrest warrant for upwards of six days. This is a clear interference with the right to liberty[108] and as such should be demonstrated to be necessary and proportionate. At no time did the former Government adequately demonstrate this. Nor have steps been taken which could address this issue, such as requiring a court to be summoned to sit on a weekend or public holidays where necessary. If there are sufficient grounds for believing that a person is subject to an extradition arrest warrant, the warrant should be able to be produced expeditiously. Liberty does not consider that the ground of convenience satisfies the proportionality test when considering the severe deprivation of liberty that speculative arrest potentially entails.

57. The powers for provisional arrest under Part 2 are even worse. Under Part 2 of the EA, a person is able to be arrested under a provisional warrant, issued by a justice of the peace, satisfied on the basis of information provided in writing and on oath, that a person in the UK, or believed to be in the UK, is accused in a category 2 territory of the commission of an extradition offence, or is alleged to be unlawfully at large after conviction of such an offence in a category 2 territory.[109] That person must be brought before a court as soon as practicable, at which time the person must be remanded in custody or released on bail.[110] The judge must order the person's discharge if the extradition request and certificate from the requesting state[111] is not received by the judge within 45 days from the time of arrest or, if it is a category 2 territory designated by order, any longer period permitted by the order.[112] For example, in the US-UK treaty, a person who is provisionally arrested may be discharged from custody 60 days from the date of provisional arrest, pursuant to the Treaty, if the requested state has not received the formal request for extradition and accompanying supporting documents.[113] This means that a justice of the peace is able to authorise the arrest of a person who is then detained for 45 days *or longer* on the basis of sworn information that the person is accused in a category 2 territory but without the arrest warrant being before the court.

European Investigation Order

[108] See article 5 of the *European Convention of Human Rights* incorporated into UK law by the *Human Rights Act 1998.*
[109] Section 73 of the EA.
[110] Section 74 of the EA.
[111] As specified in section 70 of the EA.
[112] Section 74(10) and (11).
[113] Article 12(4) of the US-UK Treaty, ibid.

58. The European Investigation Order (EIO) Initiative,[114] to which the UK has opted in and the terms of which are currently being negotiated, is a proposed cross-border framework for the gathering of evidence based on the principle of mutual recognition.[115] The EIO would allow for an issuing authority to request a particular investigative measure be carried out by the executing authority, which may also include, and is not limited to, the temporary transfer to the issuing state of persons held in custody for the purpose of an investigation;[116] information on banking accounts and transactions and monitoring of transactions;[117] arranging for a hearing by video or telephone conference;[118] and investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time.[119]

59. The EIO, as currently drafted, has a number of flaws, many of which reflect those we have discussed above in relation to the EAW. The EIO will engage the right to a fair trial,[120] the right to privacy and family life,[121] and the right to be free from inhuman and degrading treatment.[122] Given the lack of explicit safeguards for human rights and the lack of comprehensive measures to guarantee procedural fairness, along with the limitation of judicial and administrative discretion in the exercise of an EIO, the proposed Directive presents a number of significant concerns, including:

(a) Limited grounds for non-recognition or non-execution of an EIO.

The draft Directive allows for extremely limited grounds of non-recognition or non-execution of an EIO by an executing state,[123] in order to *"ensure the*

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[114] *Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of regarding the European Investigation Order in criminal matters* (9288/10) (21 May 2010).
[115] See para 6 of the Preamble.
[116] Articles 19 and 20.
[117] Articles 23, 24 and 25.
[118] Articles 21 and 22.
[119] Article 27.
[120] Protected by Article 6 of the *European Convention on Human Rights*, as incorporated into UK domestic law by the *Human Rights Act 1998*.
[121] Protected by Article 8 of the *European Convention on Human Rights*, as incorporated into UK domestic law by the *Human Rights Act 1998*.
[122] Protected by Article 3 of the *European Convention on Human Rights*, as incorporated into UK domestic law by the *Human Rights Act 1998*.
[123] Article 10(1). These grounds include where (a) there is an immunity or privilege under the law of the executing State making it impossible to execute the EIO; (b) in a specific case, execution of the EIO would harm essential national security interest, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; (c) where there is no alternative investigative measure to the one named in the EIO to achieve a similar result; (d) where the EIO has been issued in relation to particular proceedings, including administrative proceedings, and the measure would not be authorised in a similar national case.

effectiveness of judicial co-operation in criminal matters".[124] There is no safeguard provided on the grounds of dual criminality, double jeopardy, most appropriate forum or human rights.

(b) Lack of explicit protection of human rights.

The only mention of human rights in the draft EIO Directive is at Article 1(3), where it states that the Directive *"shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles"* enshrined in the ECHR.[125] This reference is entirely inadequate to be considered effective protection. The principle of mutual recognition on which the EIO is based assumes that there is parity across all Member State criminal justice systems. When it comes to human rights, this assumption does not withstand scrutiny, as evidenced by numerous judgments from the European Court of Human Rights. As discussed in the context of the EAW, even where human rights are an explicit consideration under the EA, British judges have been reluctant to enforce this protection in extradition cases.

(c) No requirement of proportionality.

There is no requirement in the Directive that an EIO only be issued where the investigative measure requested is proportionate to the crime being investigated, or where investigation is only required in the public interest. We have already seen how the operation of the EAW in practice has lead to a proliferation of extradition requests for minor crimes. There is no barrier to a similar impact being imposed by the EIO, with the associated implications for the public purse and individual fairness.

(d) Lack of safeguards in UK mechanisms to obtain and retain data.

Liberty already has serious concerns about the data held by UK authorities, in relation to whose data is recorded, how long it is held for, how it is stored and who has access to it. These concerns are shared by the European Court of Human Rights, which in 2008 ruled that the blanket and indiscriminate retention of fingerprints, cellular samples and DNA profiles of persons suspected but not

[124] Para 12 of the Preamble.

125 Article 1(3) states that the Directive will not effect the principles enshrined in Article 6 of the Treaty on European Union, which states that the EU "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States", and that the EU shall respect fundamental rights as guaranteed in the ECHR.

convicted of offences constituted a disproportionate interference with the right to respect for private life.[126] This decision is yet to be implemented by the UK government. The interference with human rights by UK data retention mechanisms is greatly magnified with the operation of the EIO as currently drafted, which could see data collected in breach of human rights being passed on to all signatory states to the Directive without adequate safeguards for its use.

60. Negotiation of the exact terms of the EIO is, we understand from government officials, in the early stages. Review of the often unintended consequences of the EAW in practice must inform the drafting of the EIO to ensure that there is limited risk of the repetition of the unjust results we have outlined here.

Isabella Sankey
Sophie Farthing

[126] *S and Marper v United Kingdom* (App No. 30566/04) European Court of Human Rights, 4 December 2008.

Annex 1

Legal advice obtained by Liberty (November 2009)

PROPOSED FORUM AMENDMENTS
IN RELATION TO EXTRADITION
IN THE POLICING AND CRIME BILL

ADVICE

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1. We are asked to advise Liberty in relation to Opposition clauses in the Policing and Crime Bill the effect of which, if enacted, will be to bring into operation the 'Forum' provisions in ss19B and 83A of the Extradition Act 2003, which were inserted by the Police and Justice Act 2006.

2. Sections 19B and 83A give the court hearing the extradition case the power to refuse extradition if the UK would be a more suitable venue for trial than the state requesting extradition. One of the reasons for the introduction of these sections was the case of the NatWest 3 in 2006, which caused controversy in part because their alleged crime had been committed in the UK, and there was only a faint link with the United States, but nevertheless they were extradited there.

3. As explained in Liberty's briefing paper, the Government ensured that ss 19B and 83A would never actually be brought into force by including a 'killing clause' in the 2006 Act. The amendment to the Policing and Crime Bill will remove the killing clause, and ensure that ss 19B and 83A come into force.

The issue

4. The specific issue on which our Advice is sought is the assertion by the Attorney General in a letter to members of the House of Lords dated 19th October 2009 that enactment of the Forum provisions in the Extradition Act

2003 would place the UK in breach of its international obligations contained in the extradition treaties to which the UK is party, because these treaties do not permit forum of trial to be a basis for refusal of extradition (see letter at para 27).

5. For the reasons set out below the Attorney General's assertion is, with respect, wrong.

Advice

6. National extradition laws of the UK and foreign states almost invariably contain grounds for refusing extradition which are not found in extradition treaties. It is implicitly recognised as a matter of international law that state parties to extradition treaties may do this in order to give effect in their national laws to the treaty. Extradition treaties are regarded as containing the core matters on which parties to the treaty agree, but they are not regarded as limiting the parties' right to legislate as they see fit, provided, of course that the national legislation does not fundamentally conflict with the treaty.

7. The Extradition Act 2003 already contains a number of grounds for refusal of extradition which are not to be found in extradition treaties, and their inclusion has never been regarded as placing the UK in breach of its international extradition treaty obligations. For example:

a. First and most obviously, ss 21 and 87 require the court to refuse extradition where it would breach the defendant's rights under the Human Rights Act 1998. Considering the 2003 UK/US Extradition Treaty by way of example, there is no provision for refusal of extradition on human rights grounds contained in it, but it has never been suggested that ss 21 and 87 are a breach of the UK's international obligations under that or any other extradition treaty.

b. The same point can be made in relation to ss 14 and 82 (extradition barred by passage of time); ss 25 and 92 (extradition barred by

defendant's physical or mental condition); and s 208 (refusal of extradition on national security grounds).

8. The same is true in relation to the European Arrest Warrant scheme (EAW). Articles 3 and 4 of the EU Framework Decision list the grounds on which states can refuse extradition. Although on one view the Framework Decision in these articles exhaustively lists the grounds on which extradition may be refused under the EAW scheme, many EU member states have enacted in their national laws additional grounds for refusing extradition: see Nicholls, Montgomery and Knowles, *The Law of Extradition and Mutual Assistance* (2nd Edn, Oxford, 2007), paras 15-95 – 15-100. The position is as follows (para 15-95):

> Many countries have introduced grounds for refusing extradition other than those provided for in the EAW Framework Decision. Denmark, Italy, Malta, The Netherlands and the UK have introduced additional reasons for refusal, such as delay political discrimination and national security, while other states have grounds for refusal connected with the merits of the case, eg, its special circumstances or the personal or family situation of the individual in question.

9. There is therefore no basis on which it can be asserted that enactment of the Forum provisions would place in the UK in breach of its international obligations.

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2nd November 2009

PROPOSED FORUM AMENDMENTS IN RELATION TO EXTRADITION IN THE POLICING AND CRIME BILL

ADVICE

Liberty