Liberty's Committee Stage Briefing on the Policing and Crime Bill in the House of Lords – Part 6 Extradition

June 2009

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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.

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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.

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Introduction

1. The Policing and Crime Bill is broad in its remit and contains several provisions of concern, the majority of which we have detailed in a separate briefing. The Bill also seeks to amend the *Extradition Act 2003* ('2003 Act') to, as the Explanatory Notes put it, "*improve the arrangements for judicial co-operation in relation to extradition and to streamline the process of extradition*". In fact, in 'streamlining' the process of extradition further important safeguards have been eroded. Liberty has long had concerns with the current system of extradition, in particular extradition under the European Arrest Warrant (EAW) framework and the erosion of important safeguards both under this scheme and in relation to current extradition arrangements with several other non-EU states. There have been a number of recent cases in which the current extradition framework has led to unfair outcomes, outcomes we warned against when amendments to the system of extradition were first proposed in 2001. This Bill presents an important opportunity to review the operation of the 2003 Act.

2. 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 those resident in the UK, including UK citizens, who may have no connection with the foreign jurisdiction. This will inevitably have a profound impact on a person's private life and, in particular, that person's ability to carry on relationships with family members. In addition, removal to a foreign jurisdiction may well end employment, interfere with studies, and affect other personal and social ties. Removal of an individual to a foreign jurisdiction therefore necessarily engages Article 8 of the HRA[1] (right to privacy).

3. Over the past few decades there has been a steady increase in bilateral extradition treaties and agreements between countries, incorporated into UK law through domestic legislation. Coupled with this, has been the implementation of the European Framework Decision, which forms the basis of the European Arrest Warrant system. The EAW system is based on the presumption that EU countries all have fair and equal systems of justice which should remove the need for any other

[1] Article 8 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

country to scrutinise the fairness of extradition to another EU country. Liberty believes that this presumption is seriously open to question.

4. Liberty has three main concerns with the current system set up under the 2003 Act:

(a) it removes the requirement to make out a case against a person before they are extradited to a foreign country: this applies in relation to all EU countries and 24 other designated countries;
(b) it removes the requirement that an extraditable offence needs to be one that, if committed in the UK, would also be an offence here: this applies to a list of 32 categories of offences if committed in an EU country;
(c) under the Act as currently in force, a UK court cannot refuse to extradite someone even if the offence, or part of it, took place in the UK and it would be in the interests of justice not to extradite: applies in relation to all extraditions.

The third concern, relating to the most appropriate forum, can be fairly easily addressed as amendments have already been made to the 2003 Act to deal with this. These amendments were included in 2006 and all that remains is to bring those amendments into force.[2] In respect of the first two concerns, amendments could, in theory, be made to the 2003 Act which would immediately effect a change in the UK's law on extradition. This would, however, put the UK in breach of a European Council Framework Decision, a European Convention and a number of bilateral treaties (unless these were re-negotiated). It is clear though that there needs to be a full and proper parliamentary debate on these important issues and we believe this is an opportune moment, which is why we have suggested some proposed amendments to start this debate. In this briefing we intend to set out how the 2003 Act currently operates, the main problems with the Act and how change might best be brought about.

Basic features of extradition

5. The formal surrender of a person from one country's territory to another to allow a prosecution has traditionally been done pursuant to treaty arrangements between

[2] An amendment proposed to bring this into force is included at page 6 of this Briefing.

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 UK law by the *Extradition Act 1870*, and prior to the 2003 Act the laws on extradition were consolidated by the *Extradition Act 1989*. Some of the traditional and 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 which he or she was extradited for (rule of speciality). Other 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

Rule of dual criminality

6. The principle of dual criminality has long been applied by all countries under international law. It requires that the act or omission with which a person has been charged with is criminal in both the requesting and the requested State. 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 principles of state sovereignty).

Political offence exception and rule against speciality

7. 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).[3] 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.[4]

8. The 'speciality' rule 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

[3] See Stanbrook and Stanbrook, *Extradition Law and Practice*, 2000, at pages 65-69.
[4] Note, however, that the EAW scheme does not provide for this.

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.[5]

Prima facie case

9. 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 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 evidence. Given the substantial impact forced removal to a foreign country has on the private life of a person, the requirement to make out a case to answer before extradition is ordered is an essential and important safeguard.

Most appropriate forum

Amendment 1– new clause to force commencement

To move the following clause—

'(1) The Police and Justice Act 2006 (c. 48) is amended as follows.

(2) In paragraph 6 of Schedule 13 for subsections (1) to (3) substitute—

"Paragraphs 4 and 5 come into force on the day on which the Policing and Crime Act 2009 is passed.'.

Clause 116, page 134, line 13, at the end insert—

'(aa) section [new clause amending the *Police and Justice Act 2006*],'.

Effect

This would amend the *Police and Justice Act 2006* to take out reference to the need for a resolution of both Houses of Parliament before the amendments inserting the provisions regarding most appropriate forum could come into effect. Instead it would ensure those provisions come into effect as soon as the Policing and Crime Bill is

[5] Ibid, page 47.

passed. The proposed amendment to clause 116 also ensures that the commencement of this clause in this Bill is not dependent on a commencement order but comes into effect on the day the Bill becomes law. This is a simple way to ensure the *Extradition Act 2003* is amended to allow a Court to bar extradition if the relevant offence was committed in whole or in part in the UK and it is therefore in the interests of justice not to extradite.

Briefing

10. In 2006 amendments were successfully introduced into the 2003 Act,[6] not yet in force, 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. This would require a judge 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 decision about where a person should face trial should be informed by human rights considerations to ensure recognition of the serious impact extradition has on the person to be extradited and their families. In addition, where the conduct that constitutes the alleged offence takes place in 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 the defence's ability to mount a proper defence.

Case Study

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. The Home Office is currently preparing to extradite Mr McKinnon to America where he will stand trial, and potentially face 60 years in an American Supermax high security prison.

Mr McKinnon has been diagnosed with Asperger's syndrome and he submits that because of this, and because the alleged crime was committed on British soil, he should be tried here in the UK. However, the Crown Prosecution Service has decided not to bring charges against Mr McKinnon in the UK and the High Court has

[6] See Schedule 13, paragraphs 4 and 5 of the *Police and Justice Act 2006.*

refused to bar his extradition. If a UK court could consider barring extradition on the grounds set out in the 2006 amendment, it is likely that Mr McKinnon's extradition would be barred as the alleged offence was committed in the UK and, due to Mr McKinnon's diagnosed Asperger's syndrome, 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.

11. We believe that the 2006 amendments to the 2003 Act therefore represent 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 receives the extradition request.[7]

12. However, the amendments introduced in 2006 came with a proviso that the provisions would only come into operation after a resolution by each House of Parliament is passed declaring that they should be brought into force. This is an unusual provision and was clearly included as a means of restricting the coming into force of these provisions. This amendment would amend that Act to ensure the provisions come into force on the passing of this Bill.

Background: The European Arrest Warrant and the *Extradition Act 2003*

13. The EAW system was introduced following the adoption of a Framework Decision by the European Council which became effective on 1 January 2004.[8] This applies to all European Union Member States and replaces the traditional extradition scheme between those countries.[9] The idea behind it is that an arrest warrant issued in one 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.

[7] See article 7.7(a) of the Framework Decision.
[8] *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
[9] See the recital, paragraph 11 of the European Framework Decision.

14. As a result of the European Framework Decision the UK was bound (under EU law) to implement its measures in domestic legislation. As a result, the *Extradition Act 2003* was passed on 20 November 2003 and generally came into effect on 1 January 2004. The 2003 Act is an extremely complex and confusing piece of legislation which basically 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); 2) most non-EU countries (category 2 territories); and 3) non-EU countries designated by order that aren't required to prove a prima facie case (category 2 territories excepted by order). In paragraphs 17 - 23 below we deal with each of these categories in turn.

Category 1 territories (EU countries)

15. Part 1 of the 2003 Act deals with the 27 EU countries that are bound by the European Framework Decision.[10] 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 the person has been charged with an extradition offence and 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[11] (see our comments below in relation to dual criminality). Extradition can be barred in certain limited circumstances,[12] including if the court decides that the person's extradition would not

[10] The countries to which Part 1 of the 2003 ACT 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 2003 ACT and *Extradition Act 2003 (Designation of Part 1 Territories) Order 2003*, SI 2003/3333.

[11] See sections 64 and 65 of the EA. In relation to Category 1 territories, an extradition offence includes an offence that is included 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.

[12] See sections 11 to 19A of the 2003 Act. 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

be compatible with his or her human rights under the *Human Rights Act 1998*.[13] This is a welcome provision, yet the courts have held that reliance on this "*demands presentation of a very strong case*".[14] 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 on the particular facts be disproportionate to its legitimate aim*".[15] In a more recent case 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.[16] In the recent case of Andrew Symeou (referred to below), 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.[17] 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.

<u>*Dual criminality in relation to EU Countries*</u>

16. The EA, in implementing the EAW scheme, effectively abolishes dual criminality for Category 1 countries in respect of 32 categories of offences. This means that for these offences a person sought by an EU country can be extradited even if the

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political opinions; if to 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 (section 20).

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

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

[15] 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 p 74.

[16] See *Jaso, Lopez and Hernandez v Central Criminal Court No 2, Madrid* [2007] EWHC 2983 (Admin) per Dyson LJ.

[17] See *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin), at paragraph 66.

alleged offence is not one recognised by the UK.[18] 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’.[19] 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 (Spain).[20] In fact, there have already been requests for extradition for speech and racism related offences that are not offences under UK law.[21] We 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.*
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> *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.*
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> *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".* [22]

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[18] The only limitation being that the offence is punishable by three years or more imprisonment in the requesting country.
[19] See article 2.2 of the Framework Decision and section 215 and Schedule 2 of the EA.
20 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
[21] See http://www.guardian.co.uk/world/2008/oct/02/secondworldwar.australia
[22] Ibid 20, at paragraphs 23-25.

17. 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 attempted 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 this list applies can be added to every time the law of another country is amended. This is of huge 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. As such Liberty believes it is extremely important to retain the important safeguard of dual criminality in all extradition arrangements.

Prima facie case and EU countries

18. Extradition to an EU country does not require a UK judge to first decide whether there is sufficient evidence to make out a case against a person sought to be extradited. Thus, a UK court 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 limited 'bars to surrender' apply (as referred to above at paragraph 12). The 2003 Act removed the power of a High Court judge and the Secretary of State to scrutinise the merits in an individual case and the risk of injustice was seriously increased as a result. Liberty does not believe that anyone should be removed from the United Kingdom without a domestic court first being satisfied that there is a case to answer.

19. 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 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. However, it has become clear that while the prosecuting agency of some countries do first consider the seriousness of the case and whether one could be made out before issuing an arrest warrant, others do not. For example, in Poland there is no public interest test for determining whether a prosecution should or should not be brought,

effectively meaning that a prosecutor has no choice but to seek to prosecute even where prosecution is not in the public interest. This has meant that of all European arrest warrants received by the UK in 2007/2008, 37% of those were for minor offences from Poland.[23] In one case a person's extradition was successfully sought in relation to an alleged purchase of a stolen mobile phone in Poland worth about £20. In this case the court noted:

"One is becoming used to European extradition cases for less serious offences than used to come before the courts for extradition, but in my reasonable experience of cases under the 2003 Act I have never seen one quite as low down the calendar as this.[24]

There have been a number of other cases in which people have been extradited to EU countries for other extremely minor offences such as 'piglet-rustling', at huge cost to the countries involved in the extradition, not to mention the impact on the extradited person.[25]

Case Study - Andrew Symeou

In June 2008 Greece issued a European Arrest Warrant against 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, have ordered his extradition without considering whether or not he has a case to answer. The available evidence strongly indicates that he has no case to answer. Two witness statements that implicated Andrew were immediately withdrawn after the witnesses were released from police custody, citing 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 has held that it is for the Greek courts to assess the quality and validity of the

[23] See Jodie Blackstock, 'Four Years of the European Arrest Warrant: What lessons are there for the Future?' (2009) vol 6(1) *JUSTICE Journal* (forthcoming), page 29.
[24] Per Maurice Kay LJ in Zak v Regional Court in Bydgoszcz, cited in R Davidson, 'A Sledgehammer to Crack a Nut? Should there be a Bar to Triviality in European Arrest Warrant Cases?' Crim LR 1 [2009] 31, p 31, n1. The comments were made at an adjourned appeal. The ultimate decision in [2008] EWHC 470 upheld the extradition order.
[25] See the article in the *Guardian*, "Door thief, piglet rustler, pudding snatcher: British courts despair at extradition requests" by Afua Hirsch, 20 October 2008: http://www.guardian.co.uk/uk/2008/oct/20/immigration-extradition-poland-lithuania-law

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."[26]

Category 2 territories (non-EU countries)

20. Part 2 of the 2003 Act deals with category 2 countries. Currently 92 countries have been designated as category 2 countries with whom we have extradition arrangements.[27] Part 2 is similar to Part 1 the main difference is that before a Court can order a person's extradition it must decide if there is sufficient evidence to make a case to answer (prima facie case).[28] It also requires dual criminality for all extraditable offences (which would be subject to 12 months or more imprisonment in the UK).[29] 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 Part 1. However, Part 2 still (currently) fails to include important safeguards regarding the most appropriate forum and it still allows for the removal (by secondary legislation) of the prima facie case requirement.

Category 2 territories exempted by order

21. Despite the importance of having a UK court first determine whether a person has a case to answer before being extradited, the government has made a series of Orders that remove this requirement in relation to 24 designated (and non-EU) countries.[30] All Council of Europe countries have been designated, including

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[26] *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin).
[27] See *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003* clause 2.
[28] See sections 84-86 of the EA.
[29] See sections 137-138 of the EA.
[30] See the *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003*, and sections 71(4), 73(5) and 84 (7), 86(7) of the EA. 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,

countries such as Azerbaijan, Georgia, Moldova, the Russian Federation and Turkey.[31] In addition to the Council of Europe countries Australia, Canada, Israel, New Zealand, South Africa and the USA have been designated. 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[32] and a judge need not require sufficient evidence to be produced before ordering the extradition of a person.[33] Thus, the position set out above in relation to prima facie case for EU countries applies equally to these designated non-EU countries. The same concerns as set above therefore apply here, but with greater force given there is no presumption that each of the 24 listed countries have the same robust systems of investigation and prosecutions as EU countries have (however open to question that assumption may be in respect of EU countries).

Avenues to amend the Extradition Act

<u>Amendment 2 - Dual criminality and Designated Orders</u>

Schedule 8, page 198, in column 2, after line 18 insert—
'Section 64(2)(b).
Section 65(2)(b).
Section 142(6)(a) and (7).
Section 215.
Schedule 2.

Section 71(4).
Section 73(5).
Section 74(11)(b).
Section 84(7).
Section 86(7).'.

Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine, and The United States of America.

[31] 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 14 May 1991.

[32] See sections 71(4) and 73(5) of the EA.

[33] See sections 84(1) and 86(1) of the EA.

Effect

This would repeal the above listed sections of the *Extradition Act 2003*. The first group of sections refer to the European Framework List, which removes the need for dual criminality. The second group of sections give power to the Minister to make an order designating a country as one to which the requirement of a prima facie case is not required. If these powers to make designated orders are removed, the Order itself would become null and void (and extradition to all designated countries, which includes Council of Europe states and America among others, would need to provide prima facie evidence before extradition could be ordered).

We are not here suggesting any amendments on the issue of prima facie case in relation to EU countries, as this would require substantial amendments to the structure of the EA which are beyond the capacity of this briefing.

Briefing

22. These amendments are suggested purely as a means of generating debate about the important issue of extradition. We hope that these amendments might be laid to give parliamentarians an opportunity to begin the debate.

23. While the suggested amendments would change UK law, there is also European and international law to consider. The European Framework Decision imposes an obligation on all EU member States to implement the provisions in the Decision. If the UK is to now amend the 2003 Act to achieve these aims, this would place the UK in breach of EU law and the Council of the EU could investigate us and another member State could potentially take a case before the European Court of Justice alleging a breach.[34]

24. The amendments suggested above would remove the list of 32 offences from the EA – yet, as noted, this would leave us open to being in breach of EU law. We understand that the Council of Europe is currently undertaking a review of the list of offences for which a person can be extradited[35] and we therefore urge

[34] See Article 35(7) of the Treaty on *European Union and of the Treaty establishing the European Community*.
[35] 'Justice: Czechs to Rate Effectiveness of European Arrest Warrant', *Europolitics*, 22 January 2009.

parliamentarians to consider the need for representations to be made at the Council of European Union level. Amendments to the list of categories of offences could allow the list to be tightened to ensure that reference is made only to those offences that are recognised by UK law. Now is the time for this debate to begin in the UK Parliament, and the amendments proposed above would be the first step in beginning that debate.

25. In respect of category 2 countries that have been designated by an order so that the prima facie case requirement does not apply, it is possible to repeal the power to make such orders, as suggested above. However, it should be noted that 24 of the designated countries have been so designated because they are parties to the European Convention on Extradition 1990 which essentially provides that there is no need to establish a prima facie case. Thus, removing those countries from the order would put the UK in breach of that Convention. In addition, the UK has bi-lateral treaties with the six other designated countries (including America) which would need to be renegotiated. Again, it is important that this debate begin in Parliament.

26. In proposing changes to the existing system Liberty takes no position on EU integration per se. We are simply concerned with protecting fundamental rights and ensuring that extradition procedure is fair and just. It is now over five years since the 2003 Act came into force and several recent high profile cases have underscored the dangerous lack of safeguards under our current extradition arrangements. In light of this we hope that parliamentarians might take the opportunity presented by this Bill to properly debate these important issues.

27. Not all legal systems are the same and we believe that British citizens and those residing in the UK should not be summarily extradited to a foreign country. While it is important to ensure that those who commit offences do not escape justice it is also essential that any process for dealing with suspects is fair and human rights compliant. Liberty believes that debate is needed at the UK Parliament, the European Parliament and the Council of the European Union level so that the very real impact of these extradition laws on individuals is properly reviewed. Safeguards surrounding extradition have been built up over many decades and should not be dispensed with simply for the sake of speed and efficiency. This issue was never properly debated by the UK Parliament at the time the European Framework Decision was brought in – and it is now time for that debate to occur.

Amendments to the extradition provisions currently in the Policing and Crime Bill

Amendment 3– clause 72 (section 153D)

Clause 72, page 90, lines 3 to 4, leave out 'the Secretary of State is not satisfied that the return is compatible' and insert 'to do so would be incompatible'.

Clause 72, page 90, line 5, leave out '1998.' and insert '1998 or any other international treaty which the United Kingdom is a party to or would be contrary to the interests of justice.'.

Clause 72, page 90, line 6, at the end insert—
'(1A) If subsection (1) applies—
(a) an undertaking to return a person to a territory given under section 153A or 153C is of no effect, and
(b) any power given under section 153A and 153C by reference to the undertaking is of no effect.'.

Effect

28. These amendments are designed to ensure that despite an undertaking being given to return a person to a country, nothing requires this to be done if to do so would breach the ECHR, any other international agreement or would be contrary to the interests of justice. The amendment removes the subjective requirement that the Secretary of State is not satisfied that the return is ECHR compatible, and replaces it with an objective requirement.

29. It would also introduce a new subsection into section 153D to provide that if a person cannot be returned to a territory pursuant to an undertaking (because to do so would breach that person's human rights etc), the undertaking and any powers relating to the undertaking have no legal effect.

Briefing

30. There are a number of international treaties that are relevant to consider before a person can be forcibly sent to another country. The ECHR is an important treaty but it is not the only one. We welcome the Government's last-minute amendment to include the Refugee Convention.[36] This is an important Convention that helps to safeguard the rights of refugees. However, there are also a number of other important international treaties that the United Kingdom is a party to which should be taken into account, The *International Convention on Civil and Political Rights 1966* is one other obvious example, and there are countless others that cannot all be specifically referred to in the Act. We urge parliamentarians to also take these wider obligations into consideration. There are clear and strict rules and obligations that the UK has when sending a person to another jurisdiction. These rules were developed in response to the horrors of the Second World War and the acknowledgment that, in some circumstances, a person cannot forcibly be sent to another country. An undertaking given by the Secretary of State cannot override these important obligations.

31. The Bill also fails to detail what happens if a person cannot be sent back to a country pursuant to an undertaking. These amendments seek to remedy this. A general provision about 'contrary to the interests of justice' should also be included to cover situations relating to a particular individual's circumstances. An example of this may be where the person in question is a British citizen and it would be contrary to the interests of justice to require that citizen to be sent to a country to which they have no connection other than it being the country they were residing in prior to their extradition. It may also be that a person subject to extradition with such an undertaking is only found, once they have arrived in the UK, to have special needs that could not be met in the country to which they are to be sent back to.

32. This amendment is necessary because the Bill does not currently set out what will happen to an undertaking given by a Secretary of State that cannot be complied with because of human rights concerns. More importantly, there is nothing in the Bill that explains what is to happen to a person subject to such an undertaking when they cannot be returned. This amendment seeks to address this to ensure that the powers set out in the Bill that are consequential on the undertaking (i.e. the power to

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[36] Amendment tabled by Jacqui Smith on Tuesday the 12th May 2009.

keep a person in custody until return etc) fall away if the undertaking cannot be complied with.

Amendment 4 – clause 75

Clause 75, page 91 – stand part.

Effect

33. This removes clause 75.

Briefing

34. Currently a person may be arrested under the *Extradition Act 2003* if a constable, a 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.[37] Once a person has been arrested under this power he or she must be brought before a judge within 48 hours and documents setting out the legality of the arrest must be provided to the judge (i.e. the extradition arrest warrant). Clause 75 would amend this to allow a requesting state to apply to a judge to extend the period of 48 hours by which it must produce the relevant documents The judge can grant the extension if he or she decides that the documents could not reasonably be produced within the initial 48 hours. In calculating the period of 48 hours no account is to be taken of weekends or public holidays. This could mean then that a person could be held for an initial period of four days (i.e. the first 48 hours plus the weekend if arrested on a Friday) and up to six days if an extension is granted. In the Public Bill Committee in the House of Commons the Minister said that it would be a "*very rare [case] where there is a need to apply for an extension*". However, there is nothing in clause 75 that suggests this would be limited to exceptional circumstances.

35. This amendment would allow for a person to be detained without charge for upwards of six days. This is a clear interference with the right to liberty[38] and as such must be demonstrated to be necessary and proportionate. The government has not adequately demonstrated this. This appears to be a matter purely of administrative

[37] See section 5 of the *Extradition Act 2003*.
[38] See article 5 of the *European Convention of Human Rights* and incorporated by the *Human Rights Act 1998*.

convenience. A court can be summoned to sit on the weekends or public holidays where necessary. An arrest warrant by a requesting State for extradition can, under section 204 of the *Extradition Act 2003,* be produced electronically. If there is sufficient grounds for believing that a person is subject to extradition an arrest warrant on those grounds should be able to be produced expeditiously. It is incumbent on the government to demonstrate the need for these provisions (e.g. has there been any situation in which a person has had to be released because of a failure to produce the documents on time?). It is incumbent on parliamentarians in considering whether to enact this clause as to whether this clause which can extend the period of which a person is detained without charge, involving as it does a severe deprivation of liberty, is proportionate to that being sought to be achieved. On the basis of the information provided to parliament grounds of convenience does not satisfy this test.

Anita Coles
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