

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty briefing on the Extradition Bill for 2nd Reading and Committee stages in the House of Lords

April 2003

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.

Introduction

1. As a national organisation dealing with the broad remit of civil liberties and human rights, Liberty has always been concerned about extradition. We have always been conscious of the need to ensure that fugitive offenders are, where appropriate, returned to face trial whilst at the same time ensuring that their rights are properly protected.¹
2. The availability of extradition under international criminal conventions to countries with whom the United Kingdom does not have general extradition arrangements, and the gradual expansion of the European Convention on Extradition 1957 to include countries which do not have a track record of protecting human rights, means that there is an increased need for vigilance to ensure that individual rights are protected where extradition is requested.
3. In our response to the Extradition Consultation Paper published in March 2001 we demonstrated the flawed rationale for change put forward by the Home Office. We showed that delays in outgoing extradition from the UK are not markedly worse than in other countries, and we also pointed out that such delays as do occur are the result of lack of court resources. Liberty is therefore extremely concerned that the Extradition Bill removes a number of significant protections for the individual in the interests of speed and economy. We oppose all the proposals in the Bill which would remove these protections. It must be remembered that extradition proceedings are criminal proceedings of a special type,² and the defendant must therefore be given adequate time to arrange his defence to the charges against him.
4. These submissions are by no means affected by the events of 11th September 2001. The Bill applies to all defendants, not just to those accused of terrorist offences.

¹ Liberty's response to the Draft Extradition Bill was prepared by Julian Knowles at Matrix Chambers. We have been assisted in the preparation of this briefing by Clive Nicholls QC of 3 Raymond Buildings with the assistance of Marisa Leaf. We would also like to thank Susie Alegre at Justice for her assistance in preparing our original briefing on the Extradition Bill.

²*R. v. Governor of Brixton Prison ex parte Levin* [1997] A.C. 741.

Ironically, in attempting to ‘streamline’ extradition, the Government has produced a lengthy, cumbersome piece of legislation which will sacrifice a number of individual rights without providing any substantial benefits in return.

5. Liberty accepts that the Bill will become law. However, we urge the Government to take advantage of the transitional provisions allowed for in Article 32 of the European Arrest Warrant (EAW) Framework Decision by making a statement to the effect that it will continue to deal with requests relating to acts committed before a specified date, in accordance with the extradition system applicable before January 2004. There is nothing in the Bill that indicates that it will not be retrospective and would urge the government to incorporate such a statement in the Bill. We understand that similar statements have already been made by France, Italy and Austria.
6. Retrospective application of the Bill may lead to situations where requests are received which apply to people who may have been involved in past conduct which is not criminal in the UK. They may have established strong domestic or professional ties in the knowledge that the UK does not recognise the conduct as being criminal.
7. We have prepared a joint briefing for 2nd reading and Committee stages in the House of Lords. Our suggested amendments for the committee stage are in the second part of this briefing. Before discussion of amendments, it is appropriate to give an explanation of how the extradition process will work under the bill as it now stands.

Category one cases

8. The Extradition Bill essentially introduces a two-tier system of extradition depending on the identity of the requesting state. Category 1 territories are EU and Schengen states (including, upon accession, those candidate countries due to join the EU in 2004); Category 2 territories are all other countries with which the UK has extradition arrangements.
9. In relation to Category 1 territories, the Bill is intended to implement the EU Council

Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States ('European Arrest Warrant' or 'EAW')³. The key features of this aspect of the legislation are:

- a. The removal of executive discretion in extradition to Category 1 territories and
- b. The removal of dual criminality in relation to the offences listed in Article 2(2) of the EAW.

10. The EAW is based upon the presumption that EU countries all have fair and equal systems of justice which should remove the need for any other country to scrutinise the fairness of extradition to such a country. This presumption is seriously open to question. In the 13 years since the Extradition Act 1989 was enacted, UK courts have intervened to refuse extradition following *habeas corpus* or judicial review proceedings in a significant number of EU cases, and the Home Secretary has refused to extradite in a significant number of other cases where extradition would have plainly been wrong and unjust.⁴ The Eurowarrant proposals would seriously increase the risk of injustice in such cases by removing the power of the High Court and Secretary of State to scrutinise the merits in an individual case. Moreover, in *R (Ramda) v. Secretary of State*, 27th June 2002, the High Court said that it was no answer for the Secretary of State to invoke France's status as a signatory to the Convention (and hence that the defendant could always apply to the Strasbourg court) as a complete answer to complaints about the fairness of his trial.

11. Although at present a small number of countries would be involved, there is no guarantee that other countries would not also be added to Category 1 so that extradition without close scrutiny would be possible to countries with under-developed legal systems. The proposed expansion of the EU to include countries

³ OJ L 190, 18/7/2002, p1.

⁴For example, in *Re Barone* (1997), the Divisional Court held that it would not be right to extradite the defendant to Italy because he had been convicted in his absence and would have no right to appeal against his conviction. In *Re Gale* (2001) Portugal persisted with a request for the extradition of a young mother even though it conceded that she could not, legally, be convicted there for the alleged offence. The High Court held that her extradition would be oppressive. These are just two examples of the type of injustice which can occur even with EU partners. We are very concerned that the Bill would not prevent such injustice from occurring.

which formed part of the Soviet Bloc little more than a decade ago demonstrates the potential danger. The European Convention on Extradition provides a good example of the dangers inherent in such an approach. The Convention has been signed by countries with appalling human rights records whose judiciaries in many cases are neither independent nor impartial. Whilst they may also have signed the ECHR, this is no guarantee that in an individual case the accused will receive his Convention rights. A bar on countries which have the death penalty being designated as category 1 was introduced in Committee in the Commons (clause 1(3)). While this is welcome it still does not provide a sufficient safeguard against a breach of Convention rights.

12. Moreover civil law systems place a great deal of power in the hands of judge prosecutors whose decisions (as the *Pinochet* case showed) are very often not subject to executive control. The potential for abuse is obvious. There have been cases where these officials have been motivated by malice or political spite and have not acted in good faith.
13. A further problem with Category 1 is the lack of any explicit control against oppressive extradition requests. However, article 5(4) of the Human Rights Act 1998 (HRA) requires there to be a procedure by which the lawfulness of arrest and detention can be determined by a court. This means that the court must have the power to determine whether detention is 'arbitrary' within the meaning of Strasbourg jurisprudence: *R (Kashamu) v. Bow Street Magistrates Court, Unreported, 23rd November 2002*. It follows that the power of the court of committal must include the power to order discharge if the detention is arbitrary, which will include matters such as whether the warrant has been issued in bad faith. Such arguments could also include that the warrant has been issued other than for the purposes of putting the defendant on trial.
14. To a limited extent, therefore, we welcome the inclusion of a specific duty in Clause 21 on the judge in the extradition hearing to decide whether extradition would be compatible with Convention rights and to discharge the person if it would not be. The inclusion of this duty in Clause 21 does, however, leave some doubt as to the precise scope of applicability of the Human Rights Act 1998 in extradition proceedings. This

is because the use of the words “the extradition” is ambiguous. In light of article 5(4) HRA, the proper interpretation of this clause is that human rights considerations will apply to both the proceedings and the actual return so that article 5(4) procedural rights⁵ would be applied in the extradition hearing and proceedings. We think this should be explicitly spelled out.

15. Clause 10 requires the judge to decide whether or not the offence specified in the Part 1 warrant is an extradition offence. There is no specification of the information needed in the warrant in order for the judge to come to such a decision. While the Framework Decision on the EAW contains an annexe model of the warrant, there is a degree of flexibility as to the information included on the warrant. We do appreciate that the Committee stage in the House of Commons introduced a new clause 2(4)(c) which increased the amount of information that needed to be provided. However, we still do not feel this goes far enough and believe that the information required 2(4)(c) should mirror that included in the model arrest warrant.

16. We would therefore argue that the warrant must contain sufficient information to allow the judge to decide whether the offence (in the light of the alleged conduct) amounts to an extradition offence. In the absence of sufficient information to come to a reasoned decision on this point, it is difficult to see how the judge can ensure that such decisions and subsequent detention do not amount to a breach of article 5 of the ECHR on the grounds of arbitrariness.

17. Clause 11 of the Bill lists the specific bars to extradition to Category 1 territories.

They are:

- a. the rule against double jeopardy;
- b. extraneous considerations
- c. the passage of time

⁵Lodhi v. Governor of HMP Brixton [2001] E.W.H.C. 178.

- d. the person's age
- e. hostage taking considerations
- f. specialty
- g. the person's earlier extradition to the United Kingdom from another Category 1 territory
- h. the person's earlier extradition to the United Kingdom from a non-Category 1 territory.

18. These bars are then further defined in sections 12-19. Many of the bars to extradition are identical for extradition to Category 2 countries. It is therefore appropriate to discuss the nature of Category 2 applications for extradition before considering bars to extradition.

Category 2 cases / *prima facie* case

19. Category 2 countries will include countries which presently have to adduce *prima facie* evidence that the accused committed the crime alleged. Whilst not a pre-requisite for Convention compatibility (the need for European states to prove a *prima facie* case was removed in 1990 under the Extradition Act 1989), this process provides a valuable safeguard against oppressive extradition requests by ensuring that there genuinely is a complaint against the defendant supported by evidence.

20. The Bill envisages removing this protection by Order in Council (see paragraph 83(6)). The question, therefore, is how the Government proposes to decide which countries should have the benefit of not needing to prove a *prima facie* case. There is a concern that removal of this requirement should not remain solely with the executive (namely the Secretary of State) without the need for Parliamentary approval.

Bars to extradition

21. **Extraneous considerations.** These act as a bar to extradition to both category 1 and category 2 countries. Extraneous considerations cover situations where the warrant purports to be for an extradition offence but is in fact issued for the purpose of prosecuting him on account of his race, religion, nationality or political opinions. They are also a bar if his trial may be prejudiced for these reasons. This bar was only a bar to extradition to category 2 countries when the draft bill was published. Concerns were raised by Liberty and others about state persecution of members of a number of political parties within category 1 countries. We are pleased to see the government extended this safeguard against oppressive extradition to all extradition proceedings.
22. **Specialty.** Specialty can be described as the rule prohibiting a person from being prosecuted after his extradition for an offence committed beforehand, unless the offence is the one in respect of which he was extradited. The rule of specialty offers a key safeguard against abuse of the system. When the Bill was published we were extremely concerned by a clause presuming the consent of anyone to be extradited to having other offences dealt with as this would have totally undermined the bar on specialty. We are pleased to see that this was removed during the committee stage in the House of Commons.

Extradition Offences

23. Clause 63 of the bill sets out what constitutes an extradition offence in relation to Category 1 territories. Article 2(2) of the Eurowarrant abolishes dual criminality in relation to a list of 32 types of offence where they are punishable with a maximum sentence of at least three years detention according to the law of the issuing Member State. Dual criminality was the bar on extradition removed by the EAW which prevented extradition if the extradition offence was not an offence in the UK. Whether or not conduct comes within the list is a matter for the judge in the requesting state to decide – the types of offence on the list are not defined and are extremely broad to the point of being meaningless (see e.g. ‘computer related crime’; ‘swindling’) although

there have been some attempts at EU level to harmonise certain of these categories (e.g. the Framework Decision on Racism and Xenophobia).

24. The bill effectively abolishes dual criminality for extradition requests from Category 1 territories for conduct which the issuing judge classifies as within the Article 2.2 list and which carries at least a maximum of 12 months sentence. This provides a significantly lower level of protection than the three-year threshold required by the Eurowarrant. Coupled with the fact that the draft warrant requires little in the way of specification of conduct and that the executing judge may not look behind the issuing judges classification, this is very worrying. Many minor offences carry a prison sentence of 12 months and Liberty believes that ideally to limit the removal of dual criminality to serious offences this should be extended to offences carrying prison sentences of at least seven years. This might appear high but we maintain that extradition should be limited to only those serious cases where it will serve justice to remove someone to an overseas jurisdiction. Unfortunately a seven-year maximum is not possible under the EAW, which stipulates that three years imprisonment is the maximum threshold. As the bill now stands the potential for extradition for trivial offences is greatly increased as any extradition offence carrying a term of imprisonment greater than 12 months can result in removal. Rather than limit the range of offences we would seek to impose the three-year imprisonment tariff stipulated by the EAW to ensure that extradition is limited, as far as permissible, to more serious offences.

Prima facie case

25. With regard to Part 2 cases, many of the points raised above in relation to Part 1 also apply. Clause 83 of the Bill, however, relates to the prima facie case requirement which is only maintained in relation to Category 2 cases. This requirement provides an important safeguard in the case of requests emanating from Category 2 territories, the majority of which are not signatories to the European Convention on Human Rights. The proposal in Clause 83 (3) to allow a summary of evidence to be read is a serious inroad into this protection and should be removed.

Conclusion

26. Liberty appreciates that the EAW has removed the bar on dual criminality. Notwithstanding this we still have grave concerns over the operation of an extradition process that allows persons to be extradited from the UK for offences that are not criminal in the UK. We would urge the government to issue a declaration that the European Arrest Warrant will not be applied retrospectively.
27. We are particularly concerned that there is no need to establish a case against those facing extradition to category 1 countries. We feel that there should at the very least be a statement of facts. While in most extradition cases this would amount to little more than a formality it would help identify those cases where there was a concern about the legitimacy of the extradition. For example, if extradition should be barred on account of political prosecution under the extraneous considerations provisions. The government has introduced a number of safeguards which were not contained in the bill when published which go some way to avoiding oppressive extradition. However, we feel this should go further (please see amendment 2). The Bill is intended to streamline the extradition process and providing this safeguard would not result in any substantive administrative delay.
28. The list of offences which can give rise to extradition to an EU country is extensive and contains such vague offences as 'computer related crime'. Extradition should only take place in clearly defined situations where a serious offence is being alleged. As the bill stands, once the identity of the person is established and the offence is determined to be an extradition offence, unless one of the bars is established, any offence carrying a sentence of over 12 months will result in automatic extradition. Even if the government says this will not be the purpose of extradition it cannot determine what the actions of other category 1 territories will be. If the government wishes to streamline the extradition process it should not be seeking to raise the number of potential extraditions to thousands as will be the case if the bill is passed in its current form. Further protection must be put in place if the offence is not criminal in this country requiring that offences should carry a maximum term of at least three

years imprisonment.

29. While the majority of attention paid to the bill will relate to Part 1 we would not wish the importance of Part 2 to be overlooked. We are particularly concerned by the power contained in Clause 83 for the government of the day to determine that individual states do not need to establish the existence of a case to answer without any parliamentary approval. We propose amendments which require such a determination to be approved by parliament and which will provide some level of safeguard by introducing a new bar to category 2 extraditions on the basis that extradition would lead to injustice and oppression. These amendments are considered in detail at numbers 11-14 and 18 following.

Proposed amendments

Note: For the sake of simplicity our suggested amendments are numbered in sequence with their order in the bill. However, where there is an identical amendment suggested for both parts 1 and 2 of the bill (for example, the ‘balance of probabilities’ test for establishing identity) then they will be considered at the same time.

PART 1

Introduction

Amendment 1

New clause 1(4), page 1, line 12

Insert ‘A territory may only be designated for the purposes of this Part if it is a party to the Framework Decision on the European arrest warrant and the surrender procedures between Member States [Official Journal L 190, 18.07.2002]’.

Justification

Simplification of the extradition procedure and the consequential removal of certain traditional safeguards (such as the double criminality requirement and the executive discretion) have been agreed to by the UK with other EU Member States under the new Eurowarrant scheme in order to implement the principle of mutual recognition. Mutual recognition rests on the presumption that judicial systems are equal across the EU. There is no justification for extending the principle of mutual recognition and relinquishing numerous procedural safeguards in the case of non EU Member States that are not part of the Eurowarrant scheme.

The European Commission has recently published a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings which, once adopted, will further substantiate the mutual trust that underpins such extensive co-operation between EU Member States.

Amendment 2

Clause 2(4)(c) page 2 line 11 delete from ‘including the conduct...’ to ‘committed the offence;’

Insert ‘including a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person, the nature and legal classification of the offence and the applicable statutory provision’

Justification

Liberty has been particularly concerned that there is no need to establish a case against those facing extradition to Category 1 countries. We feel that there should at the very least be a statement of facts that establishes more than simply the identity of the accused and that the offence is an extradition offence. While in most extradition cases this would amount to little more than a formality it would help identify those cases where there was a concern about the legitimacy of the extradition. For example, if extradition should be barred on account of political prosecution under the extraneous considerations provisions. The Committee stage in the Commons introduced a clause 2(4) which requires some level of detail. However, the Framework Decision on the European Arrest Warrant (EAW) contains an annexe model of the warrant. In the interests of legal certainty the Act should explicitly state the details required on the warrant to allow the judge to reach a reasoned decision. In particular, the details of the offence must include sufficient detail of the legal basis of the offence and the specifics of the conduct alleged in order for the judge to establish a reasoned connection between the offence or type of offence and the conduct. This amendment uses the same wording as part (e) of the warrant.

Arrest

Amendment 3

i) Clause 4(2), page 3, line 30

Delete ‘and he asks to be shown the warrant’

ii) Clause 71(2), page 38, line 8

Delete ‘and he asks to be shown the warrant’

Amendment 4

i) Clause 4(2), page 3, line 31

Insert ‘in a language he understands’ before the words ‘as soon as practicable’

Replace ‘request’ with ‘arrest’

ii) Clause 71(2), page 38, line 9

Insert ‘in a language he understands’ before the words ‘as soon as practicable’

Replace ‘request’ with ‘arrest’

Justification

As clause 4(2) and 71(2) presently stand, there is no obligation to show an arrested person the warrant or a copy of it unless he asks to be shown. Nor is there an obligation to inform the person of his right to request to see the warrant or a copy of it. Particularly in the context of extradition, where the arrested person may be unfamiliar with his rights in the UK, it is essential that there be a positive duty to show the warrant or a copy of it to the person in a language he understands as soon as practicable after his arrest where the warrant is not

presented at the time of arrest.

The Initial Hearing

Amendment 5

i) Clause 7(3), page 5, line 9

Delete 'balance of probabilities'

Insert 'beyond reasonable doubt'

ii) Clause 77(5), page 42, line 23

Delete 'balance of probabilities'

Insert 'beyond reasonable doubt'

Justification

Determination of the identity of the person arrested on a balance of probabilities test sets too low and an unacceptable standard. It is in fact difficult to imagine a situation where the fact that a person had been produced on a warrant did not satisfy the test of 'balance of probabilities'. The Bill ought to specify that the appropriate test is one of 'beyond reasonable doubt'. Identification occurs only at the stage when the prisoner is brought before the District Judge. It arises, not as a question whether the accused committed the crime (this cannot be questioned in Category 1 cases) but only whether he is the person referred to in the warrant issued by the requesting state. This question would normally be answered by the production of evidence of a photograph that enabled the District Judge to be satisfied that he was the person before him, or of fingerprints that matched those of the person before him, or in some cases oral evidence of a foreign police officer that the prisoner was the person referred to in the warrant.

Amendment 6

- i) Clause 8(5) page 6, line 6,
Delete ‘are exceptional circumstances’
Insert ‘is good reason’
- ii) Clause 74(3) page 41, line 6
Delete ‘are exceptional circumstances’
Insert ‘is good reason’

Justification

The Bill envisages strict time limits for the hearing of committal proceedings and any High Court proceedings. These time limits may be extended under clause 8(5) (Part 1) and clause 74 (3) (Part 2) if the judge believes there are ‘exceptional circumstances’. The right to adequate time and facilities for the preparation of a defence is inherent in article 5(4) HRA (as it is in article 6 HRA, albeit article 6 does not apply directly to extradition hearings) and it is therefore important that this provision not be construed in such a way as to rob the defendant of his right to defend himself. For example, legal aid often takes time to arrange. Whilst the CPS often appear through counsel, the authorities at Bow Street magistrates court frequently refuse to extend legal aid to cover counsel for the defence, meaning that the application has to be renewed before the district judge. Also, where an appeal to the High Court is necessary, counsel have to write an advice to that effect which needs to be analysed by the Legal Services Commission. The Bill therefore makes no apparent allowance that the legal aid authorities act slowly and often remain unmoved by the fact that hearings are imminent. Secondly, paragraph 21(1) requires the district judge to decide Convention issues. This may require the defence to gather and present evidence (see e.g. *Ramda* where evidence was uncovered in France that a co-defendant had been severely beaten in police custody). We feel that ‘exceptional circumstances’ do not give the judge sufficient leeway to take such factors into account. ‘Good reason’ will allow greater discretion.

The Extradition hearing

Amendment 7

i) Clause 20(2) Page 10 Line 14

After 'to a retrial' insert new line

'when determining whether the ground in part (b) above has been made out the issuing country must establish to the courts satisfaction that the person deliberately absented himself'.

ii) Clause 84(2) page 44 line 37

After 'to a retrial' insert new line

'when determining whether the ground in part (b) above has been made out the issuing country must establish to the courts satisfaction that the person deliberately absented himself'.

Justification

Clauses 20(2) and 84(2) of the bill state that the judge must discharge a person where he was convicted in his absence, not having deliberately absented himself from his trial, and "would not be entitled to a retrial or (on appeal) to a review amounting to a retrial". In order that this provision should provide full protection for the individual, it should be interpreted so that, in order for a person to be deemed to have deliberately absented himself, evidence must be provided that notice was personally served on that person and that he chose not to attend the hearing.

Liberty appreciates that there may be situations where a person may not know about the extradition as they have removed themselves from the country with the intention of avoiding proceedings against them. Conversely, situations could arise where the person was not aware of the proceedings as no particular attempt was made to make them aware. However, this could still be interpreted as 'deliberately absenting themselves'. Because of this the onus of establishing that the person convicted in their absence had intentionally removed themselves from the jurisdiction should be on the state.

Interpretation

Amendment 8

Clause 63(2)(b), page 32, line 14

Insert the words ‘as contained in schedule [2] to the Bill’

Justification

Inclusion of the Article 2(2) list of offences in the Bill will ensure that any extension of the list to further types of offence is subject to parliamentary control. The Article 2 (2) list is only contained in the explanatory notes to the bill. It should be included in a new schedule [2].

Amendment 9

Clause 63(2)(c), page 32, line 17

Delete the words ‘12 months’

Insert the words ‘three years’

Justification

Article 2(2) of the EAW removes the double criminality requirement for 32 offences where these are punishable in the issuing state by a custodial sentence or detention order for a maximum period of at least three years. Clause 63(2)(c) of the Bill reduces this threshold to 12 months. The government has provided no justification for this inroad into the protection offered at EU level. Maintaining the threshold at three years would reduce the risk of warrants being issued other than for the most serious offences in respect of which it has been decided that double criminality is not required.

Amendment 10

Clause 65(3), page 35 line 19

Delete ‘the list of conduct set out in article 2.2 of the European Framework Decision’. Insert ‘set out in schedule [2] to the bill’

Justification

Inclusion of the Article 2(2) list of offences in the Bill will ensure that any extension of the list to further types of offence is subject to parliamentary control. The Article 2 (2) list is only contained in the explanatory notes to the bill. It should be included in a new schedule [2].

PART 2

The extradition hearing

Amendment 11

Delete sub clause 78(1)(c), page 42, line 36

Insert new sub clause 78(1)(c) ‘injustice and oppression’

Amendment 12

Clause 81, page 43, line 20

Delete ‘Passage of time’

Insert ‘Injustice and oppression’

Amendment 13

Clause 81, page 43, line 21

Insert ‘(a)’ before the text on passage of time

Amendment 14

Clause 81, page 43, line 26

Insert a new sub clause (b):

‘a person’s extradition to a category 2 territory is barred if it appears that because the accusation against him is not made in good faith in the interests of justice it would, having regard to all the circumstances, be unjust or oppressive to return him’.

Justification

This second head of injustice and oppression is taken directly from section 11(3) of the Extradition Act 1989 and appeared in all earlier extradition legislation. The Bill has adopted the cause of injustice and oppression arising from the passage of time that appeared in section 11(3)(b) of the 1989 Act. It does not, however, provide for injustice or oppression caused by an “accusation not in good faith in the interests of justice” test that was in section 11(3)(c) of the 1989 Act. It is submitted, as the case of *R (Saifi) v Governor of Brixton Prison, ex parte Union of India* [2001] 1 WLR 1134 paras 64-66 (an Indian request) amply demonstrates, that in the absence of a discretion in the Secretary of State to refuse extradition (i.e. to act as a ‘long stop’ to prevent injustice in exceptional cases), grave injustice may occur which is not avoided by the application of the Human Rights Act 1998. The case of *Re Murat Callis*, 19th November 1993, No. CO-2757-92 (a Turkish request) is a further example where the court discharged the accused on the ground that the accusations were not made in good faith in the interests of justice, they in fact being made as a means of blackmail.

While the principle of mutual recognition falls to be recognised in respect of Category 1 countries that are party to the European Union, it ought not to be accepted or recognised in respect of Category 2 countries. The observations of the Home Minister [Bob Ainsworth in Hansard 25th March, column 188] in opposing the amendment to the effect that the potential miscarriages of justice sought to be remedied by this amendment could be avoided by application of the Human Rights Act were wrong in law and in fact.

There is a further compelling reason why we support this amendment. Clause 83(6) allows any territory to be designated by Order in Council (subject only to the negative resolution procedure) as exempt from the prima facie case requirement. This protection

has already been removed by paragraph 3 of the European Convention on Extradition Order 2001 in respect of State Parties to the European Convention on Extradition 1957 (ECE). However, on 31st March 2003, the Home Secretary announced that the government had signed an extradition treaty with the US which ‘brings the evidential rules for requests from the United States into line with those for European countries and simplifies the procedures for the authentication of documents’. This will effectively remove the prima facie case requirement in respect of the US. Recent requests made by the US to the UK (for Lotfi Raissi) and to South Africa (for Derek Bond) demonstrate that grave injustice would have occurred in those cases but for the application of the prima facie case requirement.

The Raissi case highlights the importance of the prima facie case rule in the face of a precipitate request by the USA where there was, in spite of statements by the USA to the court to the contrary, no evidence against the accused of being involved in acts of terrorism or indeed any criminal act. If the prima facie case requirement had not been in place in respect of the USA, Lotfi Raissi would likely have been surrendered to the USA and would now be detained in Guantanamo Bay.

The case of 72-year-old British pensioner, Derek Bond, arrested in South Africa at the behest of the US provides further illustration of the importance of the prima facie case requirement in Part 2. The FBI issued a warrant pursuant to which the wrong Derek Bond was arrested and detained for almost three weeks. This misidentification could not have been remedied, apart from the exercise of executive discretion, without the application of the prima facie case rule.

The new extradition treaty between the UK and the US, signed in secret and without debate, will exempt the US from the prima facie case rule. Injustices of the kind outlined in the above two cases will therefore only, though not always, be avoided in the case of states exempt from the prima facie case requirement by the proposed amendment to maintain the head of ‘injustice and oppression’ as a bar to extradition.

Amendment 15

Delete Clause 83(3), page 44, line 12

Justification

Clause 83 relates to the prima facie case requirement in Part 2. Sub clause 83(3) allows a summary of evidence to be read. This would allow in documentary hearsay. This is a serious inroad, reducing the prima facie case test to the level required in the case of European Convention states, which is contrary to the purpose of distinguishing between tests for requesting states with different judicial standards. It should be removed.

Secretary of State's Functions

Amendment 16

Clause 93 (3), page 48, line 13. Delete

Justification

Clause 93 relates to the death penalty when considering extradition to a category 2 country. The Secretary of State may not order extradition if the death penalty could be, will be or has been sentenced to death unless that an adequate assurance is received that the death sentence will not be imposed or carried out.

The safeguards in place to ensure that someone who is extradited to a category 2 country is not put to death seem as effective as can be expected. It would not be reasonable to expect someone who has committed a number of capital offences in a country or state that does carry the death penalty to avoid extradition simply on the basis that they could receive the death penalty. If for example, someone was alleged to have committed murder in Texas and had managed to reach the UK, their extradition should not be barred on the basis that Texas has a high incidence of carrying out the death penalty. The fact that the assurance must be considered 'adequate' also allows the Secretary of state some discretion. An assurance from a country with an extremely poor human rights record may never be considered adequate. Similarly, in federal countries it is frequently the federal rather than national authority that

authorises the death penalty and the assurance should come from the appropriate source.

However, subclause (3) removes all safeguards if the person consents to extradition. However unlikely it is that someone would consent in such circumstances Liberty feel that the safeguards against imposition of the death penalty should apply in all cases and can see no justification for Clause 93(3).

General

Amendment 17

Clause 207, page 114, line 21

Insert (a) before the existing text

Insert a new sub clause (b):

‘this Act shall only apply to requests relating to acts committed after 7th August 2002’.

Justification

Article 32 of the European Framework Decision allows Member States to make a declaration to the effect that the Framework Decision will only apply to requests relating to acts committed after a specified date, 7th August 2002 being the latest such date. Removal of double criminality means that the UK is effectively importing the criminal laws of the other Member States for the purposes of extradition in respect of the 32 types of offence listed in Article 2(2). In the absence of such a declaration on transitional provisions and the amendment to the Bill that this would imply, those who have legitimately established homes and businesses in the UK on the basis of the law as it stands may be unfairly liable to extradition for conduct that had not been criminalised in the UK at the time it took place.

Amendment 18

Clause 210, page 115, line 16

Insert a new sub clause 210 (2):

‘An Order in Council under section 83(6) of this Act shall not be made unless both Houses of Parliament have approved the Order by resolution, or, if any modifications are agreed to by both Houses, except as so modified.’

Justification

Clause 210 presently provides for all Orders in Council made under the Extradition Act (with the exception of section 208 which provides for the Act to be extended to the Channel Islands and the Isle of Man by Order in Council) to be made by negative resolution procedure. The proposed amendment would require Orders in Council made under clause 83(6) (removal of the prime facie case requirement) to be subject to affirmative resolution procedure in both Houses of Parliament, reflecting the significance of the blanket removal of this rule in respect of any country.

Amendment 19

Insert new Schedule [2]

‘The relevant conduct is;

- 1) participation in a criminal organisation,
- 2) terrorism,
- 3) trafficking in human beings,
- 4) sexual exploitation of children and child pornography,
- 5) illicit trafficking in narcotic drugs and psychotropic substances,
- 6) illicit trafficking in weapons, munitions and explosives,
- 7) corruption,
- 8) fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26th July 1995 on the protection of the European Communities' financial interests,
- 9) laundering of the proceeds of crime,
- 10) counterfeiting currency, including of the euro,

- 11) computer-related crime,
- 12) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- 13) facilitation of unauthorised entry and residence,
- 14) murder, grievous bodily injury,
- 15) illicit trade in human organs and tissue,
- 16) kidnapping, illegal restraint and hostage-taking,
- 17) racism and xenophobia,
- 18) organised or armed robbery,
- 19) illicit trafficking in cultural goods, including antiques and works of art,
- 20) swindling,
- 21) racketeering and extortion,
- 22) counterfeiting and piracy of products,
- 23) forgery of administrative documents and trafficking therein,
- 24) forgery of means of payment,
- 25) illicit trafficking in hormonal substances and other growth promoters,
- 26) illicit trafficking in nuclear or radioactive materials,
- 27) trafficking in stolen vehicles,
- 28) rape,
- 29) arson,
- 30) crimes within the jurisdiction of the International Criminal Court,
- 31) unlawful seizure of aircraft/ships,
- 32) sabotage.

Justification

This amendment incorporates the list contained in the framework decision into the bill. Inclusion of the Article 2(2) list of offences in the Bill will ensure that any extension of the list to further types of offence is subject to parliamentary control.

Liberty

April 2003

Further Information contact Gareth Crossman 0207 378 3654.