

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

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

April 2011

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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Introduction

1. In December 2010 the Joint Committee on Human Rights (JCHR) announced an inquiry into the human rights implications of UK extradition policy. Given our long held concerns about the UK's unfair extradition arrangements, Liberty greatly welcomed the JCHR's inquiry alongside the Home Office review being undertaken by Sir Scott Baker.¹ Liberty provided a written submission to the JCHR in January 2011² and also gave oral evidence to the Committee. This briefing is in response to the Committee's request³ for additional information in relation to:

a. whether a judge should be more proactive when considering an extradition request to a requesting state with a poor human rights record as evidenced by case law from the European Court of Human Rights (ECtHR);⁴

b. whether harmonised definitions of criminal offences to which the European Arrest Warrant (EAW) applies would assist in protecting human rights;⁵ and

c. the human rights of persons subject to immigration control who also become subject to extradition proceedings, or vice versa.⁶

Role of the judiciary and human rights

2. Under the *Extradition Act 2003* (EA), before ordering extradition to a Part 1 or Part 2 country a judge must consider whether such an order would be compatible with an individual's human rights under the *Human Rights Act 1998*.⁷ A review of extradition case law reveals that the human rights safeguard has stopped extradition

¹ See Liberty's Response to the Home Office review of extradition, available at <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-submission-to-home-office-extradition-review-december-2010.pdf>.

² Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-submission-to-jchr-extradition-inquiry-january-2011.pdf>.

³ Letter from the Chair of the JCHR, Dr Hywel Francis MP, dated 1 March 2011.

⁴ The Chair of the JCHR in his letter of 1st March 2011 asked: "Should judicial authorities be more proactive when considering a request for surrender from an issuing state with a poor human rights record evidenced by recent caselaw of the European Court of Human Rights?"

⁵ The Chair of the JCHR in his letter of 1st March 2011 asked: "Would harmonised definitions of the criminal offences to which the European Arrest Warrant applies help protect the human rights of those subject to extradition proceedings?"

⁶ The Chair of the JCHR in his letter of 1st March 2011 asked: "The Immigration Law Practitioners' Association's submission to the Committee argued that 'extradition procedures fail to provide protection against breaches of human rights that arise when persons subject to extradition orders are, or become persons subject to, immigration control'. Have you any concerns over possible human rights implications of persons subject to immigration control also becoming subject to extradition proceedings?"

⁷ A judge must consider whether extradition is compliant with the human rights of the person subject to the order under section 21 in relation to Part 1 countries (pursuant to the EAW), and section 87 in Part 2.

in only the most exceptional of circumstances.⁸ Indeed extradition jurisprudence appears to impose a comparatively higher threshold on human rights assessments than in other cases. In a recent decision in the UK Supreme 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”*.⁹ It is without doubt that extradition has an important criminal justice function and solving serious criminal cases is well within the public interest exception. Our concern is that the broader political context of extradition tips the balance in favour of making an order, even where it is evidence that the individual’s human rights will be negatively impacted.

3. With regard to Europe the judicial deployment of the bar to extradition on human rights grounds has remained rare even where there are adverse findings by the ECtHR evidencing a breach of Convention rights by the requesting state, such as the right to a fair trial or the right to be free from inhuman or degrading treatment while in prison. The fact the Framework Decision is based on an assumption of parity of legal systems and a general standard of compliance with the ECHR undoubtedly makes judicial exercise of the human rights bar under the EA difficult. Because of the basis of mutual trust of the Framework Decision, the *“starting point is therefore an assumption that the requesting state is able to, and will, fulfil its obligations under the Human Rights Convention”*.¹⁰ But it has become increasingly clear through ECtHR jurisprudence that there is wide disparity in the treatment of criminal suspects, with the prison conditions and criminal justice processes afforded in various Member States repeatedly falling foul of the Convention. The principle of mutual legal assistance, with the assumption of parity of criminal justice systems which this entails,¹¹ is becoming increasingly unworkable.

4. The way that British judges have framed the question in relation to the EAW is also problematic. Generally a claim that a requesting state will potentially breach an extradited person’s Convention rights has been characterised as a dispute which must be resolved between that State and the extradited individual, not by the UK court undertaking a human rights analysis in consideration of an extradition warrant.

⁸ See para’s 51 to 52 of Liberty’s submission to the JCHR, *ibid*.

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

¹⁰ Per Lord Justice Toulson in *Targosinski v Poland* [2011] EWHC 312 (Admin), at para 5.

¹¹ For example, in the Preamble to the Mutual Legal Assistance Convention adopted in 2000 the signatory states express “their confidence in the structure and functions of their legal systems and in the ability of all Member States to guarantee a fair trial”.

As enunciated recently by Mr Justice Mitting, “*complaints about possible breaches of Convention rights are a matter between the individual and the requesting state*” where that state is a signatory to the Convention, unless there are exceptional circumstances, such as the “*overthrow of the constitutional order of a state*” or clear evidence that the right to reply for relief to the courts of the requesting state or the ECtHR is illusory, which will justify the refusal or quashing of an extradition order under the 2003 Act.¹² Liberty respectfully disagrees with this approach taken by the courts. Given it is the UK Government which is seeking to extradite a person to another Member State, it must be the UK Government which is satisfied that the rights of the person extradited to a Member State – or indeed, any other country under Part 2 of the EA – will not be breached. To state otherwise is to deftly sidestep our obligations under the Convention. We believe that section 21 of the EA mandates any risk to an extradited person’s human rights, whether in the issuing or requesting state, be resolved in a UK court. This is made clear by section 21 of the EA which expressly requires a judge “*to decide whether the person’s extradition would be compatible with the Convention rights*”. We are also concerned about any tendency for a judge to assume that an adverse judgment from the ECtHR will have been rectified by the Member State in question. Some Member States have appalling records on implementation and the Committee will be well aware of a recent example of non/delayed compliance closer to home in respect of the *Hirst* decision.¹³

5. Ultimately we believe that the human rights proportionality assessment must be based solely on the individual set of facts before the UK court, and where there is a risk an individual’s human rights will be breached as a consequence of the extradition then an extradition order ought not be made. However we also recognise that because of the political and diplomatic nature of extradition and the fact that all other members of the Council of Europe are supposed to be bound by the Human Rights Convention, this human rights assessment can be difficult. This difficulty is further exacerbated by the structure of the EA which heavily circumscribes the role of an extradition judge in the first place. As well as minimising judicial discretion and removing a number of safeguards, such as the requirement to present a prima facie case before extradition can be granted, the EA imposes a presumption of fast-track extradition on the courts on the basis of parity of legal systems across all EU states.

¹² *Palczynski v District Court in Zamosc (a Polish Judicial Authority)* [2011] EWHC 445 (Admin), at para 10, see also para 7, 8; following Lord Justice Toulson in *Targosinski v Poland*, *ibid*.

¹³ *Hirst v UK* (No. 2) (application no. 74025/01, 6 October 2005)

This inevitably makes judicial protection under the human rights safeguard more difficult. Judges should always undertake a robust human rights assessment, but the practical reality of doing so in an extradition context must be kept in mind.

Harmonised definitions of criminal offences for the EAW

6. While we are unclear exactly what is meant by the phrase 'harmonised', we assume the Committee Chair is referring to the significant problem which arises from the breadth of extraditable offence categories under the EAW.¹⁴ Liberty would support greater certainty in relation to the offences for which a person could be extradited. Indeed we would go further, and require the re-instigation of the dual criminality safeguard which would prevent any extradition where the alleged conduct is not a criminal offence in the UK.¹⁵

7. Achieving perfect parity, or 'harmonisation', of definitions of extraditable offences across all Member States could involve re-negotiation of the Schedule to the Framework Decision such that each State agrees on those offences for which they will entertain extradition requests. This would inevitably be a long process, given the likely number of criminal offences in each jurisdiction. An alternative approach may be to allow the categories to remain as they are but the EA could be amended to ensure that the UK, as an executing state, would reserve the right whether or not to recognise an extradition warrant on the basis that a warrant will only be issued both where there is a clear offence for which the person is being charged, and that this conduct would also constitute an offence under British law. This would require the requesting state to provide sufficient detail in the description of the alleged offence so that a direct comparison could be made of all the elements. This approach would be preferable, and certainly more practicable, and would ensure any decision about whether parity exists remains within the realm of domestic courts.

Persons subject to immigration control

8. Liberty shares concerns raised in evidence to the Committee by the Immigration Law Practitioners' Association (ILPA)¹⁶ that individuals are being

¹⁴ Set out at Article 2.2 of the Framework Decision and section 215 and Schedule 2 of the EA.

¹⁵ See our primary submission to the JCHR, *ibid*, from para 32.

¹⁶ Available at http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_8.pdf.

extradited from the UK while they are subjected to immigration control. ILPA has provided evidence to the Committee, drawing on the practical experience of their members, which shows the particular problem which arises from the interaction of extradition and immigration law. The Association outlines practical examples of how individuals have been extradited, had their refugee status revoked or indefinite leave to remain cancelled whilst out of the country, and then found themselves unable to return to appeal against the decision. This could also mean the possibility of being separated from family members who may have remained in the UK. Frequently in ILPA's experience the basis for the revocation or cancellation is the alleged conduct in an extradition warrant. In such circumstances Liberty is extremely concerned not only at the possibility of unfair extradition (due to the widely recognised problems with the current arrangements) but also that our obligations under the Refugee Convention may be effectively bypassed where a person's status as a recognised refugee or refugee claimant is reversed while they are out of the country. One can think of very few examples where an individual's vulnerability is more prescient.

9. Again we find the legal root of the problem in the text of the EA. Under the Act an individual who has made an asylum claim cannot be extradited until their claim has been finally determined, unless the Secretary of State is satisfied either that (a) under a standing arrangement the requesting state will take on responsibility for determining the asylum claim and the individual is not a national or citizen of the requesting state, or (b) the individual is not a national or citizen of the requesting state and would not be threatened on the basis of one of the protected Refugee Convention grounds of race, religion, nationality, political or opinion or membership of a particular social group, and that the requesting state will abide by their Convention obligations. This statutory loophole effectively allows the UK government to defer its determination of a refugee claim under the Refugee Convention, and it appears that in practice, as evident in the ILPA submission, that it is a provision of the Act not infrequently used.

10. The situation raises a number of human rights concerns. Asylum seekers and their families are extremely vulnerable and the UK has an obligation to offer protection under the Refugee Convention, and to ensure that particular standards of due process are maintained in making that determination. Referring a decision on a refugee claim to another country in no way guarantees that the individual will receive the same treatment as they would within the UK judicial system. The practice of using this exception in the EA, particularly given the flaws we know to exist in our

extradition arrangements, is deplorable. We would recommend that this loophole be closed such that before a person is extradited their claim for asylum is duly processed. We understand that this may cause delay - however the answer to that concern is to provide expeditious adjudication of an asylum claim, with all requisite due process requirements, rather than riding roughshod over the human rights of a vulnerable individual who risks facing further unjustified trauma.

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