

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

ADVICE

1. We are asked to advise Liberty in relation to Opposition clauses in the Policing and Crime Bill the effect of which, if enacted, will be to bring into operation the 'Forum' provisions in ss19B and 83A of the Extradition Act 2003, which were inserted by the Police and Justice Act 2006.
2. Sections 19B and 83A give the court hearing the extradition case the power to refuse extradition if the UK would be a more suitable venue for trial than the state requesting extradition. One of the reasons for the introduction of these sections was the case of the NatWest 3 in 2006, which caused controversy in part because their alleged crime had been committed in the UK, and there was only a faint link with the United States, but nevertheless they were extradited there.
3. As explained in Liberty's briefing paper, the Government ensured that ss 19B and 83A would never actually be brought into force by including a 'killing clause' in the 2006 Act. The amendment to the Policing and Crime Bill will remove the killing clause, and ensure that ss 19B and 83A come into force.

The issue

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

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

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

Advice

6. National extradition laws of the UK and foreign states almost invariably contain grounds for refusing extradition which are not found in extradition treaties. It is implicitly recognised as a matter of international law that state parties to extradition treaties may do this in order to give effect in their national laws to the treaty. Extradition treaties are regarded as containing the core matters on which parties to the treaty agree, but they are not regarded as limiting the parties' right to legislate as they see fit, provided, of course that the national legislation does not fundamentally conflict with the treaty.
7. The Extradition Act 2003 already contains a number of grounds for refusal of extradition which are not to be found in extradition treaties, and their inclusion has never been regarded as placing the UK in breach of its international extradition treaty obligations. For example:
 - a. First and most obviously, ss 21 and 87 require the court to refuse extradition where it would breach the defendant's rights under the Human Rights Act 1998. Considering the 2003 UK/US Extradition Treaty by way of example, there is no provision for refusal of extradition on human rights grounds contained in it, but it has never been suggested that ss 21 and 87 are a breach of the UK's international obligations under that or any other extradition treaty.
 - b. The same point can be made in relation to ss 14 and 82 (extradition barred by passage of time); ss 25 and 92 (extradition barred by

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

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

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

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

EDWARD FITZGERALD QC

Doughty Street Chambers
London WC1

JULIAN B. KNOWLES

Matrix Chambers
Gray's Inn

2nd November 2009

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

ADVICE

Liberty