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Rt Hon Theresa May MP
Home Secretary
Home Office
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BY HAND

11th November 2011

Dear Home Secretary,

Review of the United Kingdom's Extradition Arrangements

Having spent many years calling for a fairer extradition system Liberty welcomed your September 2010 announcement of a Review of the UK's extradition arrangements. Following the publication of the Baker Report last month, we now write to raise our concerns about the main conclusions of the Review.

There is, of course, a balance to be struck in any system of extradition between the public interest in expeditious extradition to enable prosecution of crime and the provision of essential safeguards to ensure procedural fairness for the accused. For a number of reasons, we believe that the Extradition Act 2003 secures the former at the dangerous expense of the latter. Liberty believes that as a matter of legal and ethical principle our extradition arrangements should enshrine the fundamental safeguards necessary to protect individuals from injustice. Accordingly, below we offer a critique of the Panel's main conclusions and suggest reasons why they should not be followed.

Forum. As you know, following a Conservative and Liberal Democrat amendment to the *Police and Justice Act 2006*, the Extradition Act now contains a 'forum bar' yet to be brought into force. The Panel concluded that the forum bar provision inserted into the 2003 Act should *not* be brought into force. One of the key justifications for this recommendation is that introduction of the forum bar would create delay and potentially generate satellite litigation which, it is argued, would be costly and all without commensurate benefit. All legal reform of this type can by its nature inspire further litigation. However the possibility of proposed safeguards being used by those who may benefit from them in future cannot be reason enough to preclude changes to ensure fundamental fairness for citizens and residents.

In its analysis the Panel reviews a number of cases in which the issue of forum has been unsuccessfully raised in the context of other legal arguments and concludes

that the 2006 insertion would not have assisted in these cases. Attempting to extrapolate whether the forum bar could have been used successfully in historic cases is an impossible exercise. As the bar is not currently available, it is impossible to second-guess the arguments that appellants would have made in seeking to show that the forum bar test was met. It is also therefore impossible to guess the judgments that would have been reached in individual cases. Further, the examples given by the Panel include cases where the judiciary have concluded that a case is properly triable in the requesting jurisdiction. This is not the same as deciding that the forum bar has not been met. A case can after all be triable in more than one jurisdiction and if, in the examples given, an investigation and/or prosecution was being undertaken in the UK, it is perfectly possible that a forum bar argument would have succeeded. The Panel also completely overlooks the fact that the forum bar may well have been successfully argued (in full and not incidentally) in other cross-jurisdictional cases had it been available. In any event, the Government is not limited to enacting the forum bar that already exists in the 2003 Act. If the 2006 wording of the provision is considered insufficient to safeguard against disproportionate extradition then a more robust forum safeguard could be drafted.

Additionally, the Review concludes the issue of forum is better determined by prosecutors, and the Panel recommends prosecuting authorities should make their determination in accordance with published guidelines. While published guidelines for prosecutors geared toward enhancing co-operation between investigators and fairness for the accused would be welcome, prosecutorial guidelines alone will not deal with the existing problem. Extradition is inherently a part prosecutorial, part political and part judicial process. As such, in addition to prosecutorial guidelines, a legal backstop is required to ensure that the issue of forum is properly examined and adjudicated in cross-jurisdictional cases. Private negotiations between prosecutors – even those made according to guidelines – will not attract sufficient transparency and consistency to command public trust and confidence. The Panel also argues that introducing the forum bar would necessitate judicial scrutiny of a prosecutorial decision. We disagree with this conclusion. Rather than scrutinising the decision, a judge would simply weigh a decision about domestic prosecution into the balance in determining whether the forum bar is activated and justice necessitates against extradition.

The Panel's recommendation on forum diverges with the express will of Parliament (which passed the forum amendment in 2006) including all members of the current Cabinet who were in Parliament at the time. A majority of MPs surveyed by ComRes for Liberty in 2010 supported bringing the forum amendment into force. It was also a key recommendation made in the recent report by the Joint Committee on Human Rights. As a matter of basic principle, where actions take place in whole or substantial part in the UK and where they can be prosecuted here, it is entirely reasonable to suggest that a judge should be able to bar extradition in the interests of justice. This is especially so with the advent of the internet and the increasing assertion of extra-territorial jurisdiction. As the decade-long ordeal of Gary McKinnon has demonstrated, the enactment of a forum bar to enable the judiciary to bar extradition in the interests of justice is long overdue.

Prima facie case. The Review has recommended that the prima facie evidence requirement should *not* be reinstated for either Part 1 or 2 of the 2003 Act. The prima facie safeguard had previously long been a part of UK extradition law. The safeguard requires sufficient evidence to be provided to the court to show that there is a basic case which needs to be answered by the individual suspect. It does not require a full criminal trial but rather a summary trial of the information laid against the individual. The requirement has been dispensed with for the EAW procedure and also for some,

but not all, territories under Part 2 of the Act which have been designated by statutory order. Liberty believes before an individual's life is entirely uprooted by an extradition order a basic case ought to be made out against them in a British court, and the evidence laid before a British judge before removal. The blatant unfairness of sending someone to a foreign jurisdiction to face foreign justice without having an answerable case was not lost on the recent report by the Joint Committee of Human Rights, which recommended that the prima facie requirement be reintroduced into our extradition proceedings.

The Panel concludes that to impose the requirement for Part 1 would require withdrawing from the Framework decision. Liberty recognises the significance of withdrawal from, or renegotiation of, the Framework decision. However it is also clear that the Government would not be alone should it call for the unfair aspects of the EAW to be looked at again. Indeed, serious concerns about how the EAW is operating in practice have been raised from several quarters, including by the Council of Europe. EU-wide instruments have, in many cases, been fundamental to the development of the protection of rights and freedoms within the UK. But in the case of the EAW, there is growing consensus that what began with a laudable objective has unintentionally generated a series of injustices. In part this is because the agreement of the Framework decision nearly a decade ago came ahead of a number of measures, still subject to negotiations and implementation, which aim to guarantee fairness for criminal suspects across Europe.

The Panel is also concerned that introducing this safeguard would add to the length and complexity of the extradition process and it did not consider there was evidence to indicate EAWs are being issued in cases with insufficient evidence. Liberty rejects the reasoning of the Panel and does not believe that an extradition system without sufficient safeguards can be justified for the sake of expediency. Arguments to save time and money cannot stand against the threat to vulnerable criminal suspects whose rights are by no means assured by the 2003 Act. One need only look to specific case examples, such as the four year ordeal suffered by Andrew Symeou extradited to Greece in 2008, to realise the severity of dispensing of the prima facie safeguard for an individual's future. Andrew was extradited under an EAW on the basis of flimsy and highly contested evidence, including withdrawn witness statements, which cast considerable doubt over Andrew's involvement in the alleged offence or even presence near the crime scene. Such was the injustice of Andrew's fast track extradition that the High Court judge presiding over his case commented that the consequences of the Framework Decision are of legitimate concern and a matter for debate. Andrew was found innocent of his crimes earlier this year; but not before enduring maximum security prison and years of uncertainty, which has had a significant impact not only on his own life but those of his family.

In relation to category 2 designated territories under Part 2 of the Act, the Panel did recognise that there are valid concerns about the human rights records of a number of these states and accordingly recommended that there ought to be periodic review of those designations despite the seriousness of removing a designation. Liberty does not consider that the periodic review of Part 2 designations is sufficiently robust to protect the rights of individuals. While much focus has rested on interpretation and operation of our treaty with the US we urge you to keep in mind that in the future it could well be another designated territory, in whose justice system we hold even less confidence, which is requesting the surrender of a British national without having to make out a prima facie case in order to do so. Extradition of a British resident to designated territories, such as the Russian Federation or Azerbaijan, without a basic case to answer, will raise serious concerns. And while the Review favours the importance of our bilateral treaties and tackling transnational crime over

recommendations to make our extradition system fairer, it is worth questioning the extent to which these relationships are indeed reciprocal. During the Prime Minister's recent visit to the Russian Federation it was stated publicly that the two countries had agreed to disagree about the UK's unsuccessful attempt to extradite Andrei Lugovoi. President Medvedev also stated: *'You have to learn to respect our legal framework. I would like to remind you article 65 of the Russian constitution says a Russian citizen can't be extradited for legal proceedings. We should understand it and respect it.'*

Dual criminality. The Review concludes that there should be no reinstatement of the dual criminality safeguard. In its report the Panel states it is unaware of difficulties arising in practice from the controversial abolition of the rule. Liberty is concerned that this conclusion has been reached on the basis of a lack of evidence without any consideration of principle and basic fairness. This is of particular concern given other Framework states have, in legislating to domestically entrench the Framework Decision, expressly excluded extradition for certain offences. Belgium, for example, has excluded 'abortion and euthanasia' from the Framework extradition category of 'murder or grievous bodily harm'. Unless conduct has been deemed an offence by the British Parliament, a British resident ought not to have to face criminal prosecution for that offence in another territory. Broad categorisation of offences will inevitably result in disproportionate extradition requests being executed in the future.

The Panel also concludes that the abolition of the dual criminality safeguard is necessitated by the Framework Decision underpinned by the principle of harmonisation and ever greater cooperation in the fight against crime. While these goals may be laudable, greater co-operation does not require the effective harmonisation of the criminal laws or codes of EU member states. The absence of the dual criminality rule undermines both national and parliamentary sovereignty and there is no reason to believe that this won't, in future, allow for the extradition of British citizens for offences that are entirely out of keeping with British values. Rather than wait for a high profile and unfair case to emerge, we would urge you to look at how this important and principled safeguard can be re-inserted into our extradition framework.

Human Rights. The human rights bar in the 2003 Act is of the utmost importance and we continue to encourage its effective application by the British judiciary. Yet we entirely disagree with the Review's recommendation that the Home Secretary's ability under Part 2 of the 2003 Act to consider the human rights of the person required to be extradited be removed. The Panel justifies this determination on the basis that the ability to appeal to the Secretary of State on human rights grounds causes delay. The Panel concludes that in any event these issues are better determined by the judiciary to ensure a non-political process at the final hour of the extradition process. However this conclusion fails to recognise the inherently political nature of extradition involving the surrender of an individual by one state to another. A Home Secretary is in a unique position in that he or she may be in receipt, at the final hour, of highly pertinent country information or intelligence relevant to the extradition in question after court proceedings have been exhausted but before extradition takes place. This recommendation also inappropriately and unacceptably defers the Secretary of State's functions under the Human Rights Act 1998, which obliges him or her not to act if it would breach an individual's human rights.

Generally, this Review defers to wider EU processes, such as the principle of mutual recognition underpinning the Framework Decision and the Roadmap for criminal procedural rights, as reasons mitigating against reform. Liberty is concerned that in taking this approach the rights of the individual have been subsumed by a broader political and legal framework where due process safeguards are currently

aspirational. While the EAW was negotiated nearly a decade ago, procedural safeguards for defendants are only now being negotiated in successive resolutions by the Council of Europe and are years away from reaching completion. In an ideal world, surrender of an individual to face allegations of crime in another Member State would take place with the assured knowledge that the standards of criminal justice they will face elsewhere will be human rights compliant. This is not, however, the reality. Accordingly the rights of the individual must be able to be considered within the UK by a British court before they are sent off to face an uncertain future in another European Member State or, for that matter, anywhere else in the world. Providing for domestic safeguards when implementing regional or international agreements for one's own residents is not unprecedented. Other states, including Germany and Russia, have interpreted or enacted legislation allowing for specific protections for individuals subject to an extradition request from their territory.

There are some recommendations included in this detailed Review which we do welcome. The recommendation that any future amendment to the Framework Decision include a proportionality assessment as part of the issuing procedure of an extradition warrant is entirely necessary. Encouraging and taking the lead in influencing greater procedural fairness with regard to the Roadmap instruments is similarly vital, as is the recommendation that the Government consider a system of postponed surrender so that an individual is not required to be physically present in the requesting state until the trial commences. Also important is the recommendation that means testing for legal aid be removed to minimise delay and minimise potential injustice and difficulties for both the court and the accused caused by lack of representation.

Many of the Review's conclusions which reject calls for change are based on concerns of cost and delay. As the case of Gary McKinnon demonstrates, unfair extradition will inevitably be frustrated for a period – but rather than undermining the effective dispensation of justice, due process safeguards which put an end to unfair extradition combined with greater prosecutorial co-operation could mean that appropriate domestic prosecutions are untaken more quickly and effectively. The Panel also cite the treaties to which the UK is already a signatory, as a central factor mitigating against reform. While we recognise the challenge involved in the re-negotiation of international agreements, this must not outweigh the obligation on Government to protect the people in its territory. This is especially so where partner States are failing to implement corresponding obligations. As you consider the Review's recommendations we urge you to keep in mind fundamental principles of fairness and ensure that they are permanently enshrined in British extradition arrangements to avoid further injustice.

SHAMI CHAKRABARTI
Director

Copy to:- Deputy Prime Minister, Rt Hon Nick Clegg MP
Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP
Secretary of State for Foreign and Commonwealth Affairs, Rt Hon William Hague MP
Attorney General, Rt Hon Dominic Grieve QC MP