Extradition to Foreign Courts: Are our Laws Fair?

"To call it poodling is an insult to poodles", noted the ever lucid Boris Johnson MP on the Extradition Act 2003. Such rebuke is only partly deserved. Part I of the 2003 Act introduces the European Arrest Warrant (EAW), a system which this essay will contend is, despite its flaws, a fundamentally fair system of extradition. However Mr Johnson's comments, when directed at extradition to the US, are as accurate as his assessment that, "I have as much chance of becoming Prime Minister as of being decapitated by a frisbee or of finding Elvis".

Two competing aims underlie the law of extradition. On the one hand extradition should be swift and efficient. To paraphrase Lord Templeman[1], the airplane allows criminals to quickly flee from country to country; extradition laws should allow for their equally speedy return. On the other, extradition must respect the defendant's rights. It is striking the correct balance between the two that renders extradition law fair.

Does the EAW achieve this balance? Certainly it is efficient. Where the defendant is charged with an offence punishable under the requesting state's law by a minimum sentence of 12 months, the case against the defendant need not be established. This has produced results. Giving evidence to the House of Lords' EU Committee, Andy Burnham MP cited the Hussain Osman case, in which a suspect of the second failed London bombings was swiftly extradited from Italy, as evidence of the "very clear and tangible benefits of the system"[2].

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[1] *Re Evans* [1994] WLR 1006 at 1008C
[2] House of Lords European Union Committee, 30th Report of Session 2005-06, response to Q.8

Safeguards, however, have been compromised. The abolition of many traditional defences to extradition was justified on the basis that all EAW states have the same obligations under the European Convention on Human Rights to protect human rights. Such analysis is however mistaken. First, concerns exist about the level of compliance by member states with the ECHR[3]. Second States differ on their interpretation of key Convention provisions, such as the right to a fair trial and the right to silence, and until a standardized position is established defendants will not be uniformly protected.

Equally concerning is the removal, in relation to 32 offences, of the need to establish that the offence is a crime in Britain as well as in the requesting state. This reform creates a real risk of UK citizens being extradited for conduct they were unaware was criminal. Furthermore many of the "offences" are in truth categories under which member states can fit their own distinct offences. This creates an unacceptable level of uncertainty and opens the system to abuse.

The flaws in the speed/rights balance can and are being rectified. Member states have already recognized the need to rethink and redefine some of the 32 offences. Similar multilateral action in respect of standardizing protection of human rights is vital.

Fundamentally, however, the EAW is constructed on firm ground. National Courts throughout the EU have, since the introduction of the EAW, demonstrated a firm intent to protect their citizens' human rights, refusing extradition requests where a violation was suspected. By firmly adhering to their duty to protect rights UK courts can establish the fair balance between speed and rights left uncertain by the text of Part I Extradition Act 2003.

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[3] Cf. *EU Network of Independent Experts in Fundemental Rights*, Report on the situation of fundamental rights in the European Union and its member states in 2002

By contrast no amount of judicial activism can cure the US-UK extradition provisions.

Like EAW states, the US need no longer establish a case against the defendant before extradition. However unlike EAW states, this level of mutual recognition and trust is not merited. The infamous Lofti Rassi case, in which the US's evidence to support extradition crumbled when examined in Court, the US's claim for extradition against Derek Bond founded on mistaken identity and the Kashamu case in which US authorities consciously decided not to disclose vital evidence all highlight the unfairness in removing a central safeguard of defendant's rights in extradition proceedings to the US.

Equally unjustifiable is the discretion conferred on the Home Secretary to waive speciality. Speciality is the principle that a person may only be prosecuted for the offence for which he was extradited. Waiving the principle allows a defendant to be prosecuted for a crime, perhaps not even an extraditable offence, wholly different from the crime he was extradited for. This is grossly unfair. Not only should defendants not be subject to an executive discretion with such manifestly awesome consequences but no convincing rationale can be adduced for this provision.

Finally, and perhaps most tellingly, recent extraditions, ranging from the Natwest Three to Gary McKinnon, have highlighted the injustice which these provisions create in practice. Extraditions to the US have left defendants facing vast sentences in circumstances when UK authorities had opted not to prosecute at all, with Courts unable to provide even the most minimal protection.

Fundamental reform is needed. To readjust the balance in favour of rights the UK courts should be empowered to consider the appropriateness of extradition to the US. This would resolve several critical issues. First, extradition would normally only be deemed appropriate if a reasonable case against the defendant was established. Second, the effect of current provisions allowing for a defendant to be extradited even if the majority of the offence was committed in the UK would be mitigated. Third, the test would enable the Court to consider whether the UK authorities had opted against prosecution, either on lack of evidence or need, whether the defendant would face a grossly different sentence in the USA and whether in all the circumstances justice would be served by an extradition.

Courts need not be the enemies of efficiency. This test can be applied with varying degrees of intensity depending on the facts of the individual case. Placing more confidence in Courts over rigid, politically agreed procedures will afford the maximum protection of rights with the minimal interference to efficiency.

Striking the correct balance between rights and efficiency in extradition procedures has never been more difficult or more important. That balance has not yet been struck. It can only be hoped that, as Boris Johnson puts it, the Government's current tactic of "…stick(ing) their fingers in their ears and go(ing) la la la"[4] does not persist.

[4] http://www.boris-johnson.com/archives/2006/07/extradition_arrangements.php