

## **Noelle Quenivet and Richard Edwards, Euro Rights – Written evidence (EXL0044)**

### **Summary**

We welcome the opportunity to comment on the law of extradition. In our submission detailed below we focus primarily on matters relating to international law and human rights.

First, we believe that the maxim *aut dedere, aut judicare* needs to be interpreted as containing equal alternatives. As a consequence greater consideration should be given to the prosecution of alleged offenders within the UK, where appropriate. Bearing in mind the human rights bar we recommend the UK to review its statutes to ensure that, should it be in a position whereby it cannot extradite the individual, it can assert jurisdiction over offences covered in treaties containing *aut dedere, aut judicare* clauses. Further we would like the UK to be more pro-active in prosecuting individuals rather than wait for an extradition request to examine the acts of the alleged offenders.

Second, we make suggestions for the improvement of the protection of human rights during and after extradition. We believe that the Extradition Act needs to be amended to require courts to consider EU Charter rights as a bar to extradition. We have also formed the view that the human rights bar in the Extradition Act might be supplemented by a schedule detailing the form of human rights abuse likely to give rise to difficulties in the extradition context. Moreover, ideally we would like States listed in Category 2 to be further divided into States with good/poor human rights records. We however understand that this might not be possible for diplomatic reasons and thus make modest suggestions with regard to the interpretation of the law.

Third, we propose the UK to streamline its use of memoranda of understanding and make suggestions as to the content and form of these legal instruments. In particular memoranda of understanding should take the form of treaties and contain sections on the safeguard of human rights, a dedicated post-transfer monitoring mechanism, the reaffirmation of the receiving State's willingness to cooperate with international monitoring mechanisms as well as a dispute settlement clause.

### **General**

**3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?**

1. The Latin maxim *aut dedere, aut judicare* is often used in international law to denote the obligation of a State to extradite as a first resort and then, failing to secure an extradition (because of e.g. possible human rights infringement or the lack of an extradition treaty) or unwilling to extradite the individual, to prosecute the individual (the so-called 'Hague' formula).<sup>1</sup> Treaties which contain such clauses reaffirm the principle of jurisdiction based on territory as the strongest and primary basis of jurisdiction<sup>2</sup> as they give priority to extradition to the State in whose territory the crime is committed. In this context *aut dedere aut judicare* are not equal alternatives as the duty to extradite is viewed as paramount, for the duty to prosecute only arises when the requested State's domestic legislation or international obligations are a bar to extradition.
2. We submit that the prevailing view that extradition as the principal method of bringing fugitive offenders to justice must be revisited in light of the UK's human rights obligations. Indeed, the near automaticity of accepting extradition requests means that individuals who have good grounds to believe that their human rights will be infringed in the State prosecuting them frequently seek to appeal (we note here with concern the removal of the automatic right to appeal (s.160 of the Antisocial Behaviour Crime and Policing Act 2014 Amending s.26 Extradition Act 2003)). Often a long legal battle ensues (e.g. Gary McKinnon, Abu Qatada, etc.) and this provides bad publicity for the Home Office, delay in replying to extradition requests (which could damage bilateral relations with the requesting State), and possible proceedings before the European Court of Human Rights (that may unnecessarily prolong the extradition process with the inevitable interim measures<sup>3</sup>).
3. In *all* extradition requests the UK must carefully examine whether the surrender of the alleged offender complies with its human rights obligations (see below, answer to *Question 9, para 10*).
4. If the individual cannot be extradited then the UK must examine whether it has jurisdiction over the crime. Undoubtedly, the UK must ensure that it fulfils its duty to cooperate in combating impunity as provided through the obligation to extradite or prosecute enshrined in a number of treaties<sup>4</sup> it has ratified. As a result, we recommend that the UK review its statutes to ensure that it has criminalized all relevant offences (those listed in the treaties to which the UK is a party) under

---

<sup>1</sup> See Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. For a full list of treaties, see Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), UN Doc A/68/10, Annex A, Report of the Working Group on the Obligation to Extradite or Prosecute, footnote 28 (hereinafter ILC Report).

<sup>2</sup> *Bankovic and Others v Belgium and 16 Other Contracting States*, Application 52207/99, 12 December 2001, para 59; *Al Skeini and others v UK*, Application No 55741/07, 7 July 2011, para 131; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, para 109.

<sup>3</sup> See e.g. *Khemais v Italy*, Application No 246/07, 24 February 2009, paras 80-83; *Trabelsi v Belgium*, Application No 140/10, 4 September 2014, paras 144-154.

<sup>4</sup> ILC Report, *supra* note 1, para 2.

domestic law and establish/expand its jurisdiction over such offences committed abroad so as to ensure that the individual can be tried in the UK, and that consequently the UK does not breach its legal obligations under the *aut dedere aut judicare* principle. The UK must enable itself to opt for the prosecution alternative. An excellent illustration whereby the UK has satisfied its international legal obligations occurred when the House of Lords upheld the request by Spain to extradite Pinochet to face charges of torture under the Criminal Justice Act 1988 (which implements the UK's duties under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The 1998 Act made it a crime under English law for anyone to commit torture anywhere in the world.<sup>5</sup> More of this is needed. There should be less (ideally, no) cases where individuals who cannot be extradited because of the human rights bar are simply not facing justice. For example, following a judicial decision not to extradite four Rwandans<sup>6</sup> the UK did not start criminal proceedings against them as it did not have jurisdiction (this has been remedied with the Coroners and Justice Act 2009 that amends the International Criminal Court Act 2001) and the individuals were released from custody (to be arrested again in May 2013 following a renewed extradition request by Rwanda).

5. That being said, in some instances, the UK is granted by virtue of international law jurisdiction over some crimes and thus obliged to prosecute the individual irrespective of whether an extradition request has been made. Some treaties contain a *judicare vel dedere* clause that does not make 'this obligation conditional on refusal to honour a prior extradition request'.<sup>7</sup> We believe that here more could be done by the UK to prosecute alleged criminals residing in the UK. Not only is the UK violating international law<sup>8</sup> but it is also putting itself in a position whereby it is 'inviting' extradition requests that will then need to be carefully reviewed .
6. In particular the Geneva Conventions (Articles 49 GC I, 50 GC II, 129 GC III, 146 GC IV) and Additional Protocol I (Article 86) oblige the UK to actively seek individuals who have alleged committed grave breaches. The Commentary to the Geneva Conventions is very clear 'The obligation on the High Contracting Parties to search for persons accused of having committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all despatch. The necessary police action should be

---

<sup>5</sup> *Ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.

<sup>6</sup> *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda and The Secretary of State for the Home Department*, [2009] EWHC 770 (Admin).

<sup>7</sup> International Law Commission, Sixty-first session, Geneva, 4 May-5 June and 6 July-7 August 2009, *The Obligation to Extradite or Prosecute (aut dedere aut judicare)*, *Comments and Information Received from Governments*, UN Doc A/CN.4/612, para 15; ILC Report, *supra* note 1, para 15.

<sup>8</sup> *Questions Relating to the Obligations to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, para 95.

taken spontaneously, therefore, and not merely in pursuance of a request from another State'.<sup>9</sup> With regard to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 the CAT Committee has explained that 'the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition'<sup>10</sup> and the International Court of Justice has come to a similar conclusion.<sup>11</sup>

7. Under such treaties extradition is an option unless the State refuses to prosecute the individual. When faced with an extradition request under such treaties, the UK is obliged to choose between either proceeding with the extradition or submitting the case to its own judicial authorities<sup>12</sup> as extradition and prosecution are alternative ways to fight impunity.<sup>13</sup> That being said, 'national authorities are left to decide whether or not to initiate proceedings in light of the evidence before them and the relevant rules of criminal procedure'<sup>14</sup> as the obligation is actually only a duty to submit the case to the prosecuting authorities.<sup>15</sup> We thus submit that it would be more judicious for the UK to start proceedings against the individual whenever found on the territory of the UK rather than wait to be served with an extradition request.
8. Further, with the establishment of the International Criminal Court and various *ad hoc* international or hybrid criminal tribunals, a State might now have recourse to another alternative, namely to surrender the individual to the competent tribunal although clearly this solution would only work in situations where the tribunal has jurisdiction over the crimes.

## Human Rights Bar and Assurances

### **9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?**

9. We believe that the protection of human rights in the extradition process could be further improved. With respect to Category 1 (European Arrest Warrant) cases there should be a statutory requirement to consider the rights and freedoms protected by the Charter of Fundamental Rights of the European Union. In our opinion the Charter has already legal effect in this context. Although the EAW is governed by a

---

<sup>9</sup> Jean Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949 relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross, 1956), p 621.

<sup>10</sup> Communication No 181/201, *Suleymane Guengueng et al v Senegal*, UN Doc CAT/C/36/D/181/2001, 17 May 2006, para 9.7

<sup>11</sup> *Belgium v Senegal*, *supra* note 8, para 94.

<sup>12</sup> *Suleymane Guengueng*, *supra* note 10, para 9.7.

<sup>13</sup> *Belgium v Senegal*, *supra* note 8, para 50.

<sup>14</sup> *Belgium v Senegal*, *supra* note 8, para 95.

<sup>15</sup> ILC Report, *supra* note 1, para 27.

Framework Decision under the old pillar structure and thus not of direct effect (Article 34 TEU) the Court has in *Pupino*<sup>16</sup> stated that such decisions could have indirect effect, i.e. national courts are required to interpret domestic law in light of the wording and purpose of the framework decision. Accordingly we contend that this is an area governed by EU law, albeit indirectly, and consequently falls within the scope of application of the Charter.<sup>17</sup> Of course, once the existing Framework Decision is replaced or repealed, the new provisions will not enjoy the protection of Protocol No 36 on Transitional Provisions (TEU) and will become justiciable. However we believe that the enhanced protection of human rights in this context requires that the UK take a proactive role in this context before bowing to the inevitable. We believe that Sections 21 and 87 of the Extradition Act should be amended to require courts to consider Charter rights as a bar to extradition in addition to convention ones when dealing with Category 1 cases. In many cases the practical effect of these changes will be limited. However there might be cases where the broader range of rights and freedoms in the Charter could assist the administration of justice.

10. Moreover we have formed the view that the human rights bar in the Extradition Act might usefully be supplemented by a schedule detailing the form of human rights abuse likely to give rise to difficulties in the extradition context. The case-law of the European Court of Human Rights highlights that an individual cannot be extradited if there is a risk that:

- He/she will be arbitrarily deprived of his/her life;<sup>18</sup>
- He/she will be subject to ill-treatment or torture;<sup>19</sup>
- His/her security and liberty will not be safeguarded;<sup>20</sup>
- He/she will not be given a fair trial;<sup>21</sup>
- He/she will be discriminated against on the grounds of social status, race, ethnic origin or religious belief;
- If sentenced, he/she will be given irreducible life without parole.<sup>22</sup>

11. Such a clear elucidation of the human rights grounds would undoubtedly assist in the administration of justice. This should be married to a more liberal approach to evidential matters. A wider range of materials might be judicially taken notice of. The European Court of Human Rights examines 'recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department'<sup>23</sup> as well as materials produced by the international organisations, including the United Nations and its

---

<sup>16</sup> Case C-105/03, *Pupino* [2005] ECR I-5309, para 43.

<sup>17</sup> Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* [2013] ECR (nyr), paras 19-20.

<sup>18</sup> *Bader and Kanbor v Sweden*, Application No 13284/04, 8 November 2005, para 42.

<sup>19</sup> *Soering v UK*, Application No 14038/88, 7 July 1989, para 91.

<sup>20</sup> *Othman v UK*, Application No 8139/09, 17 January 2012, para 231.

<sup>21</sup> *Othman*, *supra* note 20, para 258.

<sup>22</sup> *Trabelsi*, *supra* note 3, para 138.

<sup>23</sup> *Klein v Russia*, Application No 24268/08, 1 April 2010, para 47.

charter- and treaty-bodies (e.g. UN High Commissioner for Human Rights, Human Rights Council, Committee against Torture).<sup>24</sup> Just as there is a strong presumption in the case of some States that they are fulfilling their obligations as contracting States of the Council of Europe and members of the European Union and that evidence from ‘recognisable sources’ with the need to rebut it,<sup>25</sup> the reserve is also true.

12. Ideally, we would recommend that Category 2 be further divided into States with a good 2(1) and a poor 2(2) human rights record respectively. For those States listed in 2(1) the court should apply the law as it is. For those States listed in 2(2) if the individual whose extradition is sought can raise legitimate concerns of a risk of his/her rights to be violated then it should be for the executive to rebut this presumption.
13. The lists of Category 2(1) and 2(2) could be compiled using third party documentation.<sup>26</sup> The UK is no stranger to either such lists or them being used for presumption purposes, for, Asylum Procedure Directive 2005/85/EC (to be replaced by Directive 2013/32/EU on 21 July 2015) recognise that certain States can be designated as generally safe for their nationals. We however would like to stress that the list should only be used as a procedural tool. As said earlier, it does not divest the UK from its obligation to examine whether the surrender of the alleged offender complies with its human rights obligations.
14. We however recognise that for diplomatic reasons it might not be possible to divide Category 2 in further categories and thus in the alternative submit that an individual whose extradition is sought should be able to show that there is *a* risk rather than a *real* risk of being subjected to one of the heads of potential abuse listed above. Indeed, there has been for some time concern expressed that the threshold has been set at too high a level for success in cases where an individual seeks to rely on them as a bar to extradition.<sup>27</sup> While it is of course important to recognise that there are other interests at play in this context (e.g. comity) there is a danger that if the threshold is set too high the rights become theoretical and illusory. On reflection we have come to the conclusion that when requests emanate from Category 2 states with an established good human rights record then the court should apply the law as it is.

## **10. Is the Practice of Accepting Assurances from Requesting States to Offset Human Rights Concerns Sufficiently Robust to Ensure that Requested People’s Rights are Protected?**

---

<sup>24</sup> See the range of materials used by the European Court of Human Rights in *Othman*, *supra* note 20.

<sup>25</sup> *Badre v Ct of Florence Italy* [2014] EWHC 614 (Admin), para 41.

<sup>26</sup> See examples of materials used in *Klein*, *supra* note 23 and *Othman*, *supra* note 20.

<sup>27</sup> Human Rights Joint Committee, *The Human Rights Implications of UK Extradition Policy*, 7 June 2011, para 71.

15. Compared to other Member States of the Council of Europe the UK has made extensive use of diplomatic assurances in extradition cases. Further, in contrast to other Member States that rely on diplomatic assurances given on an *ad hoc* basis, the UK has formalised them via bilateral memoranda of understanding. Nonetheless the European Court of Human Rights has since 1996<sup>28</sup> shown great reluctance to accept diplomatic assurances as such and has stressed that such assurances must be judicially reviewed.<sup>29</sup> We would like to stress that diplomatic assurances are only one of the elements to ascertain whether the State has complied with its Convention obligations. As a result such diplomatic assurances must be examined on a case-by-case basis.
16. Needless to say that the provision of diplomatic assurances does not relieve the UK from its obligation to conduct a *full* assessment of the risks incurred by sending the individual to the requesting State. Recourse to memoranda of understanding should be limited to cases where there is a real risk that the extradition of an individual would violate his/her human rights and because of practical or jurisdictional problems it is impossible to prosecute the individual in the UK (see above, answer to *Question 3, para 4*). In this regard memoranda of understanding enable the UK to fulfil its duty to cooperate with other States in the fight against impunity whilst it complies with its human rights obligations under notably the European Convention on Human Rights but also the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We suggest the UK to streamline its use of memoranda of understandings so as to fulfil its obligations.<sup>30</sup>
17. The European Court of Human Rights has not only cautioned against reliance on diplomatic assurances in States with poor human rights record<sup>31</sup> but also in a number of cases<sup>32</sup> found that even assurances that are well formulated (i.e. safeguarding the rights of the individuals, providing individualised information, etc) they may not constitute a way for the requesting State to fulfil its obligations under the ECHR when the receiving State has a poor human rights record. In other words virtually no diplomatic assurances would offer sufficient protection. In line with Thomas Hammarberg (former Council of Europe Commissioner for Human Rights) we believe that diplomatic assurances “should never be relied on, where torture or ill-treatment is condoned by... Governments and is widely practiced”<sup>33</sup> or if the

---

<sup>28</sup> *Chahal v UK*, Application No 22414/93, 15 November 1996.

<sup>29</sup> *Saadi v Italy*, Application No 37201/06, 28 February 2009, para 148.

<sup>30</sup> See *Othman*, *supra* note 20, para 189.

<sup>31</sup> *Chahal*, *supra* note 28, para 105; *Ismoilov v Russia*, Application No 2947/06, 24 April 2008, para 127; *Saadi v Italy*, Application No 37201/06, 28 February 2009, para 147; *Soldatenko v Ukraine*, Application No 2440/07, 23 October 2008, paras 71, 73.

<sup>32</sup> See e.g. *Gafarov v Russia*, Application No 25404/09, 21 October 2010, para 138; *Sultanov v Russia*, Application No 15303/09, 4 November 2010, para 73.

<sup>33</sup> Memorandum by Commissioner for Human Rights of the Council of Europe, cOMMdh (2008)23, 18 September 2008, paras 92-93.

individual is unfairly tried. If extradition is sought by such a State, it is recommended that the UK acts in substituting prosecution and asks the requesting State to collaborate with the investigation and trial. The requesting State should also be entitled to send observers to the trial, unless security issues justify their non-admittance.

18. In cases where there are doubts that the human rights of the individual extradited will be respected the UK could use a memorandum of understanding, especially with States with which the UK has strong bilateral relations and which have previously complied with diplomatic assurances<sup>34</sup> or with the European Convention on Human Rights (though not EAW States) contracting parties.<sup>35</sup> Although Article 2 of the Vienna Convention on the Law of Treaties acknowledges that treaties can take any form we recommend that the UK makes it clear that the memoranda of understanding are treaties and thus legally binding upon the parties. Whilst the ECtHR has considered both oral<sup>36</sup> and written assurances in various forms the UK would find it easier in a case brought before the ECtHR to demonstrate that it complies with the requirement for the assurances to be legally binding. This would also mean that the UK would fulfil the requirement that the assurances are provided by the relevant authority<sup>37</sup> and binding on all branches of the State (executive, judicial, legislative) and levels of the State (national and local authorities<sup>38</sup>).
19. Bearing in mind the case-law of the ECtHR the UK must ensure that each treaty contains as a minimum the following items:
  - A section on the safeguarded human rights that specifies the relevant international treaties in relation to the rights we listed under *Question 9, para 10*. With regard to the risk of the individual being sentenced to an irreducible life sentence, the State might be amenable to a suggestion that the person serves his/her sentence he/she would benefit from the domestic rules on parole.
  - A dedicated post-transfer monitoring mechanism<sup>39</sup> that is effective,<sup>40</sup> detailed, objective, impartial and sufficiently trustworthy.<sup>41</sup> For example, either UK diplomatic personnel could monitor the applicant<sup>42</sup> or the States would agree that a specific NGO<sup>43</sup> undertakes the monitoring. That being said, we would like to sound a note of caution here as victims of ill-treatment, fearing reprisal, are reluctant to speak about their abuse, or are not believed if they do.

---

<sup>34</sup> *Babar Ahmad and others*, Applications Nos 24027/07, 11949/08 and 36742/08, 6 July 2010, paras 107-108.

<sup>35</sup> *Chentiev and Ibragimov v Slovakia*, Application Nos 21055/08 and 51946/08, 14 September 2010; *Gasayev v Spain*, Application No 48514/06, 7 February 2009.

<sup>36</sup> See e.g. *Shamayev and Others v Georgia and Russia*, Application No 36378/02, 12 April 2005, para 184.

<sup>37</sup> *Khemais*, *supra* note 3, para 59; *Soldatenko*, *supra* note 31, para 73.

<sup>38</sup> *Chahal*, *supra* note 28, paras 105-107.

<sup>39</sup> *Gasayev*, *supra* note 35

<sup>40</sup> *Sellem v Italy*, Application No 12584/08, 5 May 2009, para 42.

<sup>41</sup> See *Pelit v Azerbaijan*, Communication No 281/2005, 29 May 2007.

<sup>42</sup> See e.g. *Gasayev*, *supra* note 35.

<sup>43</sup> See e.g. *Othman*, *supra* note 20.



- A reaffirmation that the receiving State is willing to cooperate with international monitoring mechanisms as well as investigate allegations of torture and punish those responsible.<sup>44</sup>
  - A dispute settlement clause whereby the two States agree to set up a mechanism that will provide for the interpretation and enforcement of the treaty.
20. The individual to be extradited must be able to request judicial review of his detention<sup>45</sup> which, as expressly stated by the European Court of Human Rights,<sup>46</sup> includes a review of the diplomatic assurances. Further the undertakings must be individualised and not enshrined in a formulaic document. For example the UK must take into account that the individual might have been previously ill-treated there.<sup>47</sup>

*12 September 2014*

---

<sup>44</sup> *Soldatenko*, *supra* note 31, para 73; *Koktysh v Ukraine*, Application No 43707/07, 10 December 2009, para 63.

<sup>45</sup> *Ryabikin v Russia*, Application No 8320/04, 19 June 2008, para 137.

<sup>46</sup> *Babar Ahmad and others*, *supra* note 34, para 106.

<sup>47</sup> *Koktysh v Ukraine*, *supra* note 44, para 64.