

# Extradition: the long arm of the law?

*Michael Caplan QC assesses the impact of recent developments in extradition on corporate practice*



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**T**he long arm of American justice has often reached out across the Atlantic to grasp those in this country. Some have argued in vain that if they have committed any offence, given the facts it is more appropriate they should go on trial in the English courts. The Home Secretary announced recently that she is going to introduce a forum bar to enable those in such a situation to be tried here if it is in the 'interests of justice'. But will this mark a drastic change in our relationship with the US and can business executives now rest easier?

Ever since our extradition arrangements with the US were changed so that the US only has to show reasonable suspicion rather than a *prima facie* case, there has been much criticism of the arrangements. Many have complained that it is 'lopsided' as we have to show 'probable cause' when seeking the extradition in the US courts. It has been the subject of much debate; a parliamentary committee report; and also an independent review headed by the retired High Court Judge Sir Scott Baker. The Scott Baker Review concluded that there was no significant difference between what has to be shown by either the US or ourselves. I have long held the view that there is a difference, and that has caused the consternation and unease. What is of greater importance is what happens when someone is extradited from this country to the US. There they are subjected to a 'plea bargaining' system, usually initially refused bail, especially if they have challenged the extradition process, and public comments can be made about them which would not be permitted here. It is a very different system.

## **Conduct**

In the mix have been a number of circumstances where individuals have claimed that virtually all the conduct was committed outside the US — but still the US has been permitted to pursue its extradition request. The dilemma for the courts has been that once an application for extradition is made to the Home Office and a certificate granted, the courts cannot intervene by saying that it is more appropriate that the case should be tried here. Some judges have been outspoken in court, stating that it would be preferable if the matter be brought to a conclusion in the trial process in this country, but they have no power to halt the process. That has caused much disquiet.

## **Legislation**

The concept of a forum bar or forum argument is not new. The Extradition Act 2003 contains a number of bars to extradition, but not a forum bar. This was not known generally in extradition law, and is no doubt a product of the developing process of criminal offences where the product of emails and the internet can be used across multi-national jurisdictions. There also emerged the ability of countries, including the US, who would allege, understandably, that a crime had been committed when the conduct occurred only partially in their jurisdiction, but extended to the UK or other countries.

The Police and Justice 2006 Act contained a section that was ready to be 'dropped in' to the extradition legislation. The new section would allow the court in hearing an extradition request to say in certain circumstances that the offence should

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be tried in this country rather than in the requesting state. It would not include applications for European arrest warrants but would have been available in requests made by other countries such as the US. The effect would have been that, where a significant amount of the conduct giving rise to the alleged offence occurred in the UK and it was not in the interests of justice to extradite to the requesting state, the court could say that the trial should take place here. The court would have to have regard to the view of the prosecutors, both in this country and the requesting state.

Many, including myself, have said that such an argument should be available to the courts in appropriate cases. The legislation could have been introduced by a resolution of both Houses of Parliament. Unfortunately, there seemed little appetite to bring it into force. Its supporters received a further knock-back when the Scott Baker Review said that they could find no reason for bringing in the forum argument. There seemed little

support amongst the judges who heard extradition and nor could they point to cases where they may have acceded to such an argument.

### The McKinnon case

There the debate stood until the Home Secretary used an opportunity to make a statement in Parliament that she

We will of course have to wait for the fine print, but will the new test assuage the critics, and will it allow those facing the prospect of extradition to sleep easier in their beds? It may not be so simple.

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was not going to allow the extradition of Gary McKinnon on human rights grounds to also say that she was going to bring in a forum bar allowing the court to say any trial should take place in the UK if 'it was in the interests of justice'. Many believed that she would implement the earlier legislation as drafted. Not so.

trial taking place here it would be exceedingly difficult to overturn that on appeal. One of the main reasons given for not having introduced the forum bar up to now has been that it will lead to satellite litigation and delays.

For every argument in favour of a trial taking place in this country in appropriate circumstances, there

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is usually a counter-balancing one. Consider the situation where an executive is sitting in an office in London carrying out his functions using modern technology. All of his conduct was at his PC and he didn't move at any time from his desk. The course of action he followed meant that some information went electronically across the Atlantic and, whatever occurred, the US district attorney now says that he committed an offence.

When the executive gets wind of this a shiver goes down his spine. He has read about previous individuals, who have unceremoniously been sent to the US, separated from family, friends and colleagues, initially refused bail and, despite protesting their innocence, found they have to consider a plea bargain agreement to avoid the risk of spending many years in jail. The executive is then told that there will be a powerful argument made before the district judge at the extradition hearing that the forum bar should be implemented; it will be 'in the interests of justice' for any trial to take place in this country.

The first point taken would be that the conduct occurred here and presumably the evidence is secured in the UK. Counsel for the US government tells City of Westminster Magistrates' Court that the evidence that the US complain about and that shows the offence having taken place in the US is in fact there and not here. He further goes on to explain that we are talking in terms predominantly of documentary evidence that could equally be shown to a court in either country.

The next submission is that the witnesses are in the UK. It would be absurd, his advocate says, for the witnesses to have to be transported to the US to give evidence, especially when they will be talking about events that happened in the UK. The US government answer by saying that there are witnesses in the US who would have to give evidence to explain and demonstrate that an offence has been committed. In any event, if it might be inconvenient for witnesses to have to cross the Atlantic, evidence can easily be given by way of video link. Indeed, if the case is predominantly about documentary evidence there may well be little

argument, and thus the tried and tested method of video link evidence can easily be used.

### Future legislation?

At this time we do not know precisely what test will be envisaged by the Home Secretary. If it was similar to that which was contained in the 2006 amended legislation then the advocate for the defendant would have to show that it would not have been in the interests of justice to send his client to the US. If the balance remains the same way it may not be as easy to argue against extradition as may have first been thought.

The point then made is that the executive is, and has always been, in this country, is otherwise a law abiding individual and would willingly stand trial here. The difficulty with that argument is that it could be said for very many of those who face extradition. Furthermore, the US would say that they are looking at offences – serious offences – which have occurred against the US law.

Counsel for the US government then tells the district judge that at an early stage there were discussions between the prosecutors both in the US and here in accordance with the agreed protocol. It was only after the CPS indicated that they had no strong views about prosecuting in the UK that the district attorney, through the state department, made an extradition request. If this scenario played out in the court at the extradition hearing it is by no means certain that the district judge would say that it was in the 'interests of justice' for any trial to take place in the UK.

Furthermore, to suggest that the trial should take place here is directing the Crown Prosecution Service to do so, a task they may in any event be reluctant to do. So, in our hypothetical case, what can the executive do? The Home Secretary, in her statement, also said that she was deeply concerned about the delaying tactics in extradition and would be cutting down the ability to appeal. This was as a direct result of comments made in the Abu Hamza case that too often extradition was being delayed by endless appeals. It is not clear precisely what she will introduce, but I would anticipate there would have to be some form of leave or permission obtained before

appealing from the Magistrates' Court to the High Court. So our executive, having lost his argument 'on interests of justice', now finds that his route to appeal is being curtailed.

### Interests of justice

It would seem, in any event, that if a district judge ruled that the 'interests of justice' argument did not persuade him to order the hearing in this country, an appeal would only succeed in extreme circumstances. It is fair to say that there will clearly be cases where it will be correct and proper 'in the interests of justice' that a request for extradition either by the US or any other countries listed in Part II of the Extradition Act should take place in the UK. However, I do not think that there are likely to be many circumstances where that will be the position. Indeed, the probability is that there will have been discussions, properly, between prosecutors on both sides of the Atlantic to consider the appropriate place for any trial. Remember also that, before we get to the position of any request, the CPS could decide that the code for the Crown prosecuting is satisfied and that someone should be charged with an offence here, thus either preventing or halting any extradition request.

Our special relationship with the US became strained immediately following the Home Secretary's announcement. There was anger from the other side of the Atlantic, but they need not worry too much at the moment. The forum bar is an important development and the arguments are ones that should be properly available to the court at the extradition hearing. We should never forget that we are considering the position of individuals who, if sent to a country, will be thousands of miles away from their family. However, it may not make such a difference to those cases where there is a multi-national aspect as may first have been thought.

Like most amendments to legislation, we will have to consider the fine print and how the arguments develop. One thing is sure, however: I don't think that there will be any downturn in the requests made by the US, and the argument about whether it is 'a lopsided' treaty are sure to continue. ■