Anti-social Behaviour, Crime and Policing Bill

Briefing for Joint Committee on Human Rights and the Public Bill Committee, House of Commons

Part 11 and Schedule 7 (Part 3) (extradition): Amendments to the Extradition Act 2003

28 June 2013
About Fair Trials International

Fair Trials International (Fair Trials) is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice and provides advice and assistance to people arrested across the globe. Our vision is a world where every person’s right to a fair trial is respected, whatever their nationality, wherever they are accused.

Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our law reform work; and through targeted training and network activities to equip lawyers to defend their clients’ fair trial rights.

Through our expert casework practice, assisting people in cross-border criminal cases, we are uniquely placed to provide evidence on how policy initiatives affect suspects and defendants facing extradition. We provided detailed evidence to the enquiries of Sir Scott Baker (the Sir Scott Baker Review), the Joint Committee on Human Rights (the JCHR) and the Home Affairs Committee (the HAC), highlighting ways in which the UK’s extradition laws could be amended to introduce workable safeguards against abuse and injustice.¹

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¹ The Sir Scott Baker Review reported in October 2011; the Joint Committee on Human Rights reported in June 2011; and the Home Affairs Committee reported in March 2012.
A. Introduction

1. The benefits of a streamlined extradition system are clear. However, insufficient attention has been paid to the heavy toll that extradition takes on individuals and their dependents and families. After debates in Parliament, in-depth enquiries and many high-profile cases, there is a growing consensus that there are flaws in the UK’s current extradition arrangements requiring legislative action. On 5 December 2011, for example, MPs from across the political spectrum voted for reform of the UK’s extradition laws.²

2. On 16 October 2012, the Home Secretary responded to the Sir Scott Baker Review in a statement to the House of Commons.³ Subsequently, in March 2013 a number of amendments to the Extradition Act 2003 (the Extradition Act) came into force, including the introduction of statutory forum bar and the removal of the Home Secretary’s discretion in Part 2 extradition cases. However, a series of further amendments to introduce much needed safeguards into the UK’s extradition laws were tabled but not debated, and the Home Secretary stated in the House of Commons on 18 March 2013 that she would bring forward additional changes to the Extradition Act, both to add further safeguards where they are needed and to improve its effective operation, “as soon as parliamentary time allows”.⁴

3. The Government has now published a series of amendments to the Extradition Act in response to the Sir Scott Baker Review in Part 11 and Schedule 7 Part 3 of the Anti-Social Behaviour, Crime and Policing Bill (the Bill), which was introduced into the House of Commons on 9 May 2013.⁵ Fair Trials was delighted to have the opportunity to give evidence to the Public Bill Committee on 20 June 2013. This briefing relates to Clause 127 of the Bill, which changes the process and deadlines for appeals against extradition from the UK.

4. This briefing also contains further amendments to the UK’s extradition laws which implement many of the additional changes recommended by the Sir Scott Baker Review and the report of the JCHR. The Home Secretary has acknowledged that there are problems in the use of the European Arrest Warrant (EAW) for trivial offences and around lengthy pre-trial detention of British citizens overseas.⁶ Fair Trials is therefore disappointed that the Government did not include reforms to address these issues in the Bill, which are crucial if the UK is to have a fair and effective extradition system. They will also reduce costs and increase efficiency.

² Hansard 5 Dec 2011 : Column 130.
³ Hansard 16 October 2012: Columns 164 to 166.
⁴ Hansard HC Debate, 18 March 2013: Column 753.
⁵ The text of the Bill and accompanying documents are available at http://services.parliament.uk/bills/2013-14/antisocialbehaviourcrimeandpolicingbill.html
⁶ Hansard 15 October 2012: Column 36.
B. Proposed reforms to the Extradition Act 2003 in the Anti-social Behaviour, Crime and Policing Bill

1. Extend the deadline to appeal against extradition in EAW cases

1.1. Fair Trials welcomes the introduction of flexibility to the treatment of appeal deadlines which address, to a certain extent, one of the recommendations of the Sir Scott Baker Review. The current timeframes for filing appeals against extradition decisions in the UK are far too strict. The one week deadline in EAW cases is too short and can result in injustice given the court’s lack of discretion to hear the appeal if the deadline is missed, even where this is not the fault of the individual concerned. The amendments proposed in Clauses 127(1)(c), (2)(c) and (3)(c) recognise that such strict deadlines are not appropriate given the unique difficulties faced by extradition defendants in terms of gathering evidence from abroad or compiling information about the human rights situation in other countries. The Sir Scott Baker Review concluded that the inflexible time limit for the filing of an appeal in EAW cases is operating to cause injustice.7

1.2. This is demonstrated by the case of Garry Mann, who was extradited to Portugal to serve a 2 year prison sentence in May 2010. In 2004 Garry was arrested, tried and convicted within 48 hours for involvement in a riot, in a grossly unfair trial where he had no time to prepare a defence and standards of interpretation were inadequate. Garry accepted voluntary deportation from Portugal on the understanding that he would not have to serve his sentence, but was subsequently astonished to be arrested under an EAW in 2009. Garry’s lawyers then missed the appeal deadline by less than 24 hours through no fault of his own. Lord Justice Moses, sitting in the English High Court, described the case as an “embarrassment” and said that neither Parliament or the courts “can possibly have envisaged one man being deprived of proper legal assistance by two sets of lawyers in two separate jurisdictions on two distinct occasions.” Despite this, he accepted that there were no available legal grounds upon which to refuse Garry’s extradition or allow him an appeal.

1.3. In 2012, the UK Supreme Court also recognised that “the statute will be capable of generating considerable unfairness in individual cases, unless some further relief is available”.8 The UK courts have since decided that there should be some flexibility to extend the appeal deadline in EAW cases where it is in the interests of justice to do so, but this only applies where the requested person is a UK national.9 When something as fundamental as the right to a fair trial is in question, it is wrong to distinguish on the basis of nationality. The amendments introducing flexibility attempt to codify what is already judicial practice in relation to UK nationals, and extend it to all defendants in the UK criminal justice system.

1.4. Whilst welcoming the introduction of flexibility, Fair Trials has concerns regarding the specific formulation proposed in Clause 127 which requires that the High Court must not refuse a “notice of application for leave to appeal after the end of the permitted period [...] if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given”. Fair Trials considers that the threshold is set too high to capture all potential instances of injustice, particularly given the

7 See page 333 of Sir Scott Baker’s Report.
8 See Lord Mance’s leading judgment in Lukaszewski v District Court in Torun, Poland [2012] UKSC 20, paragraphs 37 and 39
inevitable reliance of most requested persons upon third parties – such as prison officials or legal aid lawyers - whose actions they may not be able to influence. As such, a preferable approach would be to follow the suggestion in the Sir Scott Baker Review that flexibility be introduced through the grant of discretion to the court “to extend the time limit in the interests of justice”. 10

1.5. Whilst Fair Trials welcomes the introduction of flexibility in relation to appeal deadlines, we remain concerned that the current drafting may be insufficient to address potential injustices, particularly in light of the proposed removal of the automatic right to appeal. Given the often enormous impact of extradition on individuals, a standard period of 7 days to appeal (or seek leave) is, in our view, too short. This is often exacerbated by the need to obtain evidence from other jurisdictions and can raise enormous challenges when a person decides to change their lawyer after the first instance hearing. Our position on the introduction of the leave requirement is discussed in more detail in section 2 below, but its potential impact on the ability of the person to comply with the appeal deadline must also be taken into consideration. If the leave requirement is introduced and the proposal set out in paragraph 10.14 of the Sir Scott Baker Review is followed, with leave to appeal being sought and granted or refused on paper with a right of appeal against refusal to a judge at an oral hearing, the preparation and drafting needed to produce the leave application could be more onerous, complex and time-consuming than for the current notice of appeal system. Fair Trials therefore suggests that the timeframe flexibility introduced in the amendments to Sections 26(5), 103(10) and 108(5) be retained, but the permitted period in Section 26(4) also be extended to 14 days.

2. Necessity for further details about the process of requesting leave to appeal in extradition cases

2.1. The Bill introduces a new condition requiring the leave of the High Court to appeal against an extradition order. Extradition has an enormous impact on suspects’ lives, and those of their families. Given the problems that we regularly see arising at first instance extradition hearings, Fair Trials has concerns about any measure which limits access to appeal courts. A vast majority of suspects subject to extradition proceedings cannot afford a lawyer and are therefore represented by a duty solicitor. Many of these have little experience of extradition cases and therefore may not be familiar with the complex provisions of the Extradition Act and associated case law. If the legal aid reforms that the Government is proposing, including price competitive tendering, are implemented then this is likely to become a more common problem. This can be contrasted with the position of the requesting state, which is automatically entitled to representation by a specialist unit of CPS lawyers. The complexity of extradition cases also means that there is often inadequate time at a first instance hearing for consideration of all the relevant facts and issues. If suspects lose their automatic right to appeal, then, as long as these problems at first instance remain, there may be cases which result in people being wrongly extradited.

2.2. These problems are demonstrated by the recent case of Krzysztof Juszczak, who in February 2013 successfully appealed against extradition to Poland on the basis that his removal from the UK would constitute a disproportionate interference with his family life under Article 8 of the European Convention on Human Rights. Although Mr. Juszczak is the primary carer for his severely disabled step-daughter, this was

10 See paragraph 10.6 of the Sir Scott Baker Review.
not raised by the duty solicitor before the District Judge – an omission which was criticised as a “failure of [...] duty” by Mr Justice Collins in his appeal judgment.\(^{11}\) As this evidence was only obtained late in the process, there is a clear danger that, under the proposed system, Mr. Juszczak would have been denied leave to appeal.

2.3. We do however recognise the problems raised by the Sir Scott Baker Review in relation to the large number of unmeritorious appeals in the extradition process, and understand the need for a leave process to ensure that appeals with merit are heard and disposed of more quickly.\(^{12}\) It is in the interests of both defendants and the state that the appeal process works to correct genuine errors rather than to delay the judicial process. However, while the current amendments are designed to implement the Sir Scott Baker Review’s recommendations,\(^{13}\) we are concerned that, as drafted, they provide inadequate information to assess whether this objective has been achieved given the absence of any reference to procedure.

2.4. It is vital that suspects are given a full opportunity to put together a case and identify any valid grounds on which their extradition should be refused, and the appeal process should reflect this. Any leave to appeal should, as recommended by the Sir Scott Baker Review, follow the standard required for judicial review, namely that the defendant must show an arguable case in order to be allowed to appeal. The inclusion of any higher standard of proof would be inappropriate, not least because the requirement to demonstrate an arguable case would, as is the case in the judicial review process, suffice to weed out those cases with no merit. Leave should be sought on paper with written reasons provided for the outcome. Defendants must then have a right of appeal against refusal to a judge at an oral hearing. Only the judge at first instance or the High Court judge who would hear the appeal should consider applications for leave to appeal.\(^{14}\) If all of these safeguards are guaranteed, a requirement for leave to appeal may be acceptable. However, the lack of information in the current amendments makes it far from clear that they satisfy the above recommendations of the Sir Scott Baker Review, and people could still have their lives ruined by an unjust extradition.

2.5. The current amendments do not affect the requesting state’s automatic right to appeal if an extradition request is refused. This introduces a further inequality of arms into EAW proceedings, which are already heavily weighted in favour of requesting states who have far greater resources than individuals and benefit from a strict ‘no questions asked’ regime which gives courts very little power to refuse extradition. If leave to appeal is introduced, then this must apply equally to requesting states and requesting persons to ensure protection of the fundamental principle of equality of arms.

\(^{11}\) *Juszczak v Circuit Court Poznan Poland* [2013] EWHC 526 (Admin), paragraph 17.

\(^{12}\) See paragraph 10.15 of the Sir Scott Baker Review.

\(^{13}\) This is stated on page 65 of the Explanatory Notes to the Bill.

\(^{14}\) These recommendations are set out in paragraph 10.14 of the Sir Scott Baker Review.
C. Proposed additional amendments to the Extradition Act 2003

1. No extradition under an EAW until a case is trial ready

Amendment

After section 14 (Passage of time) insert:

“14A Prematurity in accusation cases

1) A person’s extradition to a category 1 territory is barred by prematurity if (and only if)—
   (a) he is accused of committing an extradition offence, and
   (b) it appears that the proceedings against him in respect of that offence are not yet ready for trial.

2) A decision by the judge that a person’s extradition is barred by reason of prematurity does not prevent the subsequent execution of a Part 1 warrant against that person in respect of the same extradition offence.”

In section 11 (Bars to extradition), in subsection (1), after paragraph (c) insert—

“(ca) prematurity;”

Effect

1.1. The proposed amendment would prevent extradition where this is merely to aid an investigation and would enable the court to defer extradition on an accusation warrant (an EAW issued for the purposes of prosecution when a person is accused of committing an offence) where the case is not ready for trial in the requesting state.15

Briefing

1.2. The purpose of extradition is either to enable a person to be prosecuted, or to require them to serve a prison sentence already imposed. However, Fair Trials sees numerous cases where people are extradited under an EAW, long before the state is ready to prosecute. Prior to extradition these people are frequently granted bail and are able to continue their work or studies. Following extradition, however, they have no local address and, as foreign nationals, may be considered a flight risk. This can lead to them being held for months in prison, often in extremely difficult conditions, awaiting trial.

1.3. Approximately 21% of the total EU prison population is in pre-trial detention; over a quarter of those detainees are foreign nationals. In some EU countries, pre-trial detention can last for up to four years. People are often detained in appalling conditions that make trial preparation impossible. Excessive pre-trial detention caused by extradition before a case is trial-ready also has a detrimental effect on a

15 This problem was recognised by both the Sir Scott Baker Review and the JCHR.
suspect's family members, particularly when detention is overseas, as visiting will be more costly and difficult. There is a wider socioeconomic cost as lengthy pre-trial detention will usually result in the suspect losing his or her job, which can have a severe financial impact on other family members.

1.4. This point is illustrated by the case of Andrew Symeou, a British student who was extradited to Greece in July 2009 to face charges in connection with the death of a young man on a Greek island. Andrew was extradited long before the Greek court was ready to try him, and endured almost a year in terrible prison conditions before being granted "local" bail in Greece. Andrew was finally cleared by a Greek court in June 2011, almost four years after the events in question, during which time he had not been able to continue his university studies and his family had their lives turned upside down.

1.5. The Extradition Act should be amended to prevent extradition where this is merely to aid an investigation and to allow for deferred extradition where a case is not trial-ready.\(^\text{16}\)

2. Allow courts to seek further information in an EAW case where there is suspicion of mistaken identity

Amendment

In section 7 (Identity of person arrested) after subsection (4) insert—

"4A) If the judge decides that question in the affirmative he must decide whether the person in respect of whom the warrant was issued is the person who is alleged to have committed, or to have been convicted for, the offence on which the warrant is based.

4B) The judge must decide the question in subsection (4A) on the balance of probabilities, but if he considers there is a reasonable doubt as to that question, he may not decide it in the affirmative unless he has first requested the issuing authority to provide further information within the time specified in the request (which must not be less than a reasonable time in all the circumstances) and the issuing authority has provided him with the information requested within that time.

4C) If the judge decides the question in subsection (4A) in the negative he must order the person’s discharge."

Effect

2.1. This amendment would enable the judge at the extradition hearing to request more information where there is real doubt that the person sought is actually the person suspected or convicted. That would be particularly valuable in cases where there is

\(^{16}\) This problem was recognised by both the Sir Scott Baker Review and the JCHR.
a reasonable belief that the person sought has had his/her identity stolen or where there is a clear case of mistaken identity.

Briefing

2.2. There are currently no grounds in domestic law upon which to refuse extradition where there are serious doubts about whether the person sought is the person who committed the crime or is suspected to have committed the crime.\(^\text{17}\) Such a situation has arisen in several cases where the person subject to the EAW has had their identity stolen by the real perpetrator or where that perpetrator has falsely identified someone else as the person who committed the offence. The inability of courts to ask for this even where there is clear evidence that the person could not have committed the crime can lead to suffering and injustice.

2.3. This is demonstrated by the case of Edmond Arapi. Edmond was tried and convicted in his absence in Italy and given a sentence of 16 years. He had no idea that he was wanted for a crime or that the trial or subsequent appeal had taken place until he was arrested at Gatwick Airport in 2009 on an EAW on his way back from a family holiday. The British courts ordered that Edmond be sent to serve the sentence in Italy despite clear proof he was at work in the UK on the day of the alleged offence. On the day the appeal against his extradition order was to be heard at the High Court, the Italian authorities decided to withdraw the EAW following a campaign by Fair Trials International, admitting that they had sought Edmond in error. Edmond narrowly avoided being separated from his wife and children, including a newborn son, and spending months or years in an Italian prison awaiting a retrial.

2.4. An amendment is needed to give courts greater discretion to request further information where there are reasonable grounds to believe that the person sought under an EAW is the victim of mistaken or stolen identity.\(^\text{18}\)

3. Discretion to refuse extradition where requested person wanted under a “conviction EAW” is a British national or resident

Amendment

After Section 20 (Case where person has been convicted) insert:

“20A. Service of sentence in United Kingdom

3) If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person is a United Kingdom national or a resident of the United Kingdom.

4) If the judge decides the question in subsection (1) in the negative he must proceed under section 21.”

\(^{17}\) Article 15(2) of the EAW Framework Decision contains a general duty on the court in the executing state to seek further information where it considers existing information deficient.

\(^{18}\) The JCHR’s Report recommended this amendment (see page 34). Sir Scott Baker’s report acknowledged that the current legislation could cause a problem in the case of identity theft (see page 158).
5) If the judge decides that question in the affirmative he must decide whether it is possible for the person to serve the sentence in the United Kingdom.

6) If the judge decides the question in subsection (3) in the negative he must proceed under section 21.

7) If the judge decides that question in the affirmative he must decide whether the person consents to serve the sentence for which his extradition is sought in the United Kingdom.

8) If the judge decides the question in subsection (5) in the negative he must proceed under section 21.

9) If the judge decides that question in the affirmative he may refuse extradition provided that he orders the person to serve the sentence (or to complete the service of the sentence) in the United Kingdom.

10) Where the judge makes an order under subsection (7) he shall issue a warrant authorising the person’s detention in the United Kingdom and containing any provisions which the judge considers appropriate for giving effect to the sentence which gave rise to the proceedings (or the portion of the sentence remaining unserved)”.

Consequential amendments are required to Sections 20 and 21 as follows:

In section 20(2) and (4), for “21” substitute “20A”, so “proceed under section 21” reads “proceed under section 20A”

In section 21(1), for “21” substitute “20A” so “by virtue of section 11 or 20” reads “by virtue of section 11 or 20A”.

**Effect**

3.1. This proposed amendment would allow the judge at the extradition hearing to refuse to extradite a person under a conviction EAW (an EAW issued not to require a person to be prosecuted in the requesting country, but to serve a sentence already imposed there) if the person is a British resident or national or lawfully staying in the UK and it is possible for them to serve their sentence in the UK.

**Briefing**

3.2. UK courts have no discretion to refuse to extradite a British national or resident to serve a sentence in another country on the basis that it is more appropriate that he or she serves that sentence in the UK. This means that individuals may be extradited from the UK following a conviction in another jurisdiction only to be transferred back to the UK after the lengthy and bureaucratic prisoner transfer process. This is a waste of time and money. UK courts should be given the option of
allowing the defendant to stay in the UK to serve the sentence. There is, however, no clear legal basis for this to happen at present.

3.3. This issue is illustrated by the cases of Luke Atkinson and Michael Binnington, two young cousins from Essex who were extradited to Cyprus under a conviction EAW to serve a sentence imposed after they were backseat passengers in a car that collided with a moped, killing the driver and seriously wounding the passenger. Their uncle, the driver of the car, had pleaded guilty to manslaughter on the understanding that Michael and Luke would not be prosecuted as passengers. Despite this, both were tried. Although they were initially acquitted, they were later convicted in their absence on appeal by the prosecutor. Eight months after extradition, they were transferred back to the UK to serve their sentences. This extradition was a waste of time and money and caused unnecessary suffering to Luke, Michael and their families.

3.4. Sir Scott Baker recognised that this ground for refusal to execute an EAW “is not only humane it would avoid the expense and inconvenience of resorting to the prisoner transfer process”.19 UK courts should be given the option of allowing the defendant to stay in the UK to serve their sentence. This is expressly allowed for under the EAW Framework Decision.

D. Proposed amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012

1. Abolish means-testing for legal aid in all extradition cases

Amendment

Insert new subsection (1A):

“(1A) But subsection (1) does not apply to services in connection with proceedings for dealing with the individual under the Extradition Act 2003.”

Effect

The suggested amendment would eliminate means-testing from legal aid in cases involving extradition.

Briefing

3.5. Legislation should be introduced to end legal aid means-testing for extradition cases, something that Sir Scott Baker recommended be looked at as a matter of urgency.20 Fair Trials was delighted that means-testing of suspects held in police stations was not included in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This change is equally important in extradition cases where a lack of legal representation can result in unfair extradition with devastating consequences for the individual. Means-testing also results in unnecessary delays and adjournments and in requested persons appearing unrepresented at hearings, wasting resources.

19 See page 154 of Sir Scott Baker’s Report and Article 4(6) of the EAW Framework Decision.
20 See page 335 of the Sir Scott Baker Report.
3.6. Several judges have expressed their concern about the unnecessary injustice and expense caused by the current rules on legal aid in extradition cases. In June 2012, Lord Justice Thomas said in the High Court that “it is clear that the present system for means testing produces unacceptable delays that are unjust. The system is in effect unworkable in practice...and is inconsistent with overarching principles of fairness and justice in timely decision-making in extradition cases.”

3.7. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 already provides for non-means-tested legal aid for suspects held in police stations. By inserting a new subsection (1A), means-testing would be eliminated from determinations of eligibility for both advice assistance and representation in extradition cases. We are of course aware of the ongoing discussions surrounding the reform of legal aid in the UK, but the injustices caused by the means-testing requirement in extradition cases mean that this change is needed immediately.

Fair Trials International
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21 Jakub Stopyra v The District Court of Lublin, Poland 2012] EWHC 1787 (Admin).
22 Section 13 provides for non-means tested legal advice and assistance for persons in custody; Section 15 provides for legal advice and assistance for criminal proceedings; and Section 16 provides for representation for criminal proceedings. Section 14 defines “criminal proceedings” as including proceedings for dealing with an individual under the Extradition Act 2003".