Extradition: muddled, unjust, in desperate need of reform

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Geoffrey Bindman [1] 5 December 2012

Britain's extradition law must be reformed. A leading lawyer and chair of the British Institute of Human Rights explains why, and how.

The European Court of Human Rights has been attacked by the Prime Minister and the Home Secretary for frustrating their efforts to deport the terrorist suspect Abu Qatada to Jordan.

Yet David Cameron and Theresa May welcomed the decision of the Court in April not to interfere with the extradition of five other Muslims - Abu Hamza, Babar Ahmed, Talha Ahsan, Khalid Al Awaz, and Abdel Bary – to the United States. And how useful it was for the Home Secretary to have at her disposal Article 3 of the despised European Convention on Human Rights to justify her decision to stop the extradition of Gary McKinnon to the United States on charges of computer hacking.

Immensely popular though the latter decision was, and justifiably so, it is not easily reconciled with the other five cases. It is hard to believe the McKinnon decision was not cynically delayed until after the five Muslims had been safely delivered into the hands of the US authorities, where they are now in custody awaiting trial. The disparity in treatment is too stark to be coincidental.

However, to her credit, the Home Secretary has acknowledged that our extradition law needs reform. The need is urgent in order to bring it into conformity with the overriding demands of justice. Extradition is a severe invasion of freedom that demands powerful justification and safeguards against abuse. English law recognises two important limitations on surrender from its territory: the offence for which extradition is sought must be a crime under English law as well as in the state seeking extradition; and the reason for the request must not be political. And Theresa May's intervention on behalf of Gary McKinnon runs counter to the intention of the Extradition Act 2003 which sought to exclude political involvement in extradition decisions by giving the final say to the courts.

The expansion of measures designed to combat terrorism has added to demands for extradition, especially from the US. UK governments have bent over backwards to co-operate with the US in measures to prevent terrorism and have wished to to do so for extradition, but the vital principle must be observed: no one should be extradited who is not guaranteed a fair trial and fair treatment.

The cases of the five Muslims now in the US awaiting trial are linked only by the fact that the allegations against them relate to terrorism. Abu Hamza is charged in the United States with conspiracy to take hostages in Yemen, and to supply goods and services to the Taliban in Afghanistan. Charges relating directly to the United States concern the alleged establishment of a terrorist training camp in Oregon. Babar Ahmed and Talha Ahsan are charged with providing material support to terrorists through websites, one of whose servers was based in Connecticut. That is the sole US connection in their case. These three men are all UK citizens, living in the UK throughout the period when the offences are claimed to have been committed. Talha Ahsan, like Gary McKinnon, has been diagnosed as autistic. Babar Ahmed is accused of computer misuse while in the United Kingdom.

Abdel Bary, an Egyptian lawyer, is charged with conspiracy to commit violent terrorist crimes; Al Fawaz is charged with several counts of murder.

The delays in bringing these cases to a conclusion have been widely criticised. Their long detention without trial -apart from Abu Hamza who served a prison sentence for other offences - has caused them and their families acute hardship. All were content to stand trial in the UK.

Extradition from and to the United States by the UK is governed by a treaty of 2003. Like the European Extradition Convention and its successor, the European Arrest Warrant, the main purpose of the treaty was to simplify and speed up extradition by reducing the level of evidence required to secure it. The assumption was that all the countries concerned had legal processes which would ensure that similar standards of fairness and thoroughness would prevail. Relying on that assumption, examining the details of the case before extradition is cut to a minimum. In contrast to the previous treaty of 1972, which required the US to provide evidence of a prima facie case, the current treaty merely provides that the US should provide information sufficient to justify the issue of an arrest warrant, i.e., to demonstrate reasonable suspicion. The information is assessed by prosecutors without any judicial finding.

The major concern in these cases is the harshness with which allegations of terrorism are pursued in the US. The main claim in the European Court of Human Rights was that the defendants would, if convicted (and while awaiting trial when bail is routinely refused), be subjected to inhuman and degrading treatment in violation of Article 3 of the Convention. At the forefront of the challenge to extradition was the prospect of incarceration in solitary confinement in the notorious high security prison, ADX Florence in Colorado; the extremely brutal conditions imposed there; and the unreasonable length of the likely sentences. The Court expressed concern that indefinite detention at ADX could amount to a breach of Article 3 but accepted evidence from the US authorities that prisoners have the opportunity of transfer to less harsh regimes. The Court also acknowledged that a real risk of receiving a grossly disproportionate sentence could be a violation, but was not prepared to say that even a discretionary life sentence would be disproportionate in cases involving terrorism.

It has been claimed that the US-UK treaty is unfairly weighted in favour of the US. A test of “probable cause” must be established under US law to justify extradition, a heavier burden than the need to demonstrate “reasonable suspicion” when extradition is sought from the UK. In October 2010 the Home Secretary appointed the retired High Court judge, Sir Scott Baker, to carry out a review. Baker concluded that there was “no significant difference” between the two tests, but this complacent conclusion was questioned by the Home Affairs Committee of the House of Commons in March 2012. The committee report pointed out that the difference in wording gave rise to a widespread impression of unfairness, and more importantly, that there was a real procedural difference in that in the US the finding of probable cause could be challenged before a judge whereas in the UK decisions were made administratively.

The more substantial inequality, however, is that a person extradited to the US on charges linked to terrorism, especially if that person is a Muslim, will fall foul of the excessively harsh and wide-ranging legislation and sentencing practices which have been introduced in pursuit of the “war on terror”. The claim of discrimination whether by the UK or the US against Muslims was apparently not raised before the European Court of Human Rights but the Gary McKinnon decision has made it much more plausible so far as the UK is concerned.

The prosecution and conviction in the US of officials of the Holy Land Foundation for Relief and Development is a disturbing illustration of the vulnerability of Muslims in the US legal system. The foundation is the largest Muslim charity in the US with a long history of support for the needy in Gaza and the West Bank, Officials of the Foundation were accused of the offence of “providing material support” to a terrorist organisation. Funds were distributed through local Zakat (welfare) committees which also receive funds for humanitarian aid from USAID, the United Nations, and various NGOs. It was alleged that these committees were in fact passing this money to Hamas, regarded by the US as a purely terrorist organisation though it is at the same time the elected governing party in Gaza. There was no convincing evidence that the funds were intended to support terrorism and the jury could not reach a verdict. At a re-trial new evidence was given by a so-called expert witness whose identity was concealed, but whom the President of the Centre for Constitutional Rights, Michael Ratner, says was working for Israeli intelligence. On the basis of that evidence the chair of the Foundation and other officials were this time convicted. The chair and one

other were sentenced to 65 years imprisonment and the assets of the organisation were forfeited. On 29 October 2012 the Supreme Court declined to hear an appeal.

The point here is that those faced with a request for extradition from the United States, especially in cases linked to terrorism and especially if they are Muslims, may have a legitimate concern that they will be treated unfairly and in breach of their human rights. The highly competitive and entrepreneurial character of the American legal system has encouraged the desire to expand its jurisdiction wherever possible. Presenting the response to 9/11 as a "war on terror" has encouraged escalation in the range and severity of law enforcement as well as in military action. A kind of institutional paranoia has extended the scope of the law to acts only remotely linked to the risk of terrorist violence. It has made US juries readier to convict and judges to impose Draconian sentences. Baroness Manningham-Buller, former head of MI5, drew attention to such dangers in her recent Reith lectures.

In the cases of Babar Ahmed and Talha Ahsan at least, the conduct complained of took place entirely in the UK. Politicians of all parties have expressed concern that there should be a clear judicial power to refuse extradition where an offence could be more appropriately tried in the UK. Parliament has already addressed the point and has passed an amendment to the Extradition Act (section 83A) barring extradition if:

"(a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and

(b) in view of that and all the other circumstances, it would not be in the interests of justice to be tried for the offence in the requesting territory."

However, this so-called "forum bar" is not yet in force. While it may not solve all the problems of extradition law, the Home Secretary can bring it into force at any time and should do so. She has no good reason to refuse, and cannot refuse if required to implement it by a resolution of both Houses of Parliament.
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