IHRC’S BRIEFING

TO THE HOUSE OF LORDS

SELECT COMMITTEE ON EXTRADITION LAW

ON THE EXTRADITION ACT 2003

SEPTEMBER 2014

About IHRC

Islamic Human Rights Commission (IHRC) is an independent, not-for-profit, campaign, research and advocacy organisation based in London, UK. IHRC has consultative status with the United Nations Economic and Social Council.

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1. Introduction

1.1 With the Extradition Act 2003 the government of the United Kingdom passed into law a new streamlined framework for extradition procedures as outlined by the European Union. It made provisions for the extradition of nationals from other EU countries (Category 1) and those with whom the UK has bilateral extradition treaties with (Category 2).

1.2 Amendments have been introduced to the Extradition Act 2003 in the Crime and Courts Act 2013 and the Anti-Social, Crime and Policing Act 2014. A review was conducted by Sir Scott Baker in 2011, and separately in a report produced by the Joint Committee on Human Rights in the same year.

1.3 Islamic Human Rights Commission (IHRC) welcomes the creation of the House of Lords Select Committee on Extradition Law, and hopes consideration will be given to serious violations of human rights under the cover of this legislation. IHRC campaigned in particular against the extradition of Babar Ahmad and Talha Ahsan. Our case study and analysis is included below:

‘October 5 [2013] marked the first anniversary of the extradition of the British Muslim duo Talha Ahsan and Babar Ahmad to the United States to face charges relating to their alleged support of “terrorists” in Afghanistan and Chechnya.

The pair are accused of running the Azzam.com website, which carried news and reports from the battlefields of Bosnia, Chechnya and later Afghanistan, as a fundraising and recruiting vehicle for extremists. Both men have pleaded not guilty in the US to the charges against them.

The disturbing circumstances surrounding their arrest, detention and extradition are well-known: Both men were indicted on the basis that one of the servers used by the offending website was located in Connecticut, allowing US prosecutors to claim that an offence had been committed on US soil. Ahmad was violently beaten by police during his arrest and in 2009 won £60,000 in compensation after London’s Metropolitan Police admitted subjecting him to a “serious, gratuitous, and prolonged attack”. Indeed Ahmad, who was held in detention for eight years in the UK, holds the dubious distinction of having been held without trial longer than any other British citizen in modern history.

Less well known perhaps are the political double standards and machinations that compound the men’s ongoing ordeal. Barely two weeks after their extradition the Home Secretary Teresa May blocked the extradition of Gary McKinnon under the same legislation on the grounds that the computer hacker, who wormed his way into the US
military’s computer systems, suffers from Asperger Syndrome, a condition which was likely to place him at high risk of suicide.

In 2009 Talha Ahsan was independently diagnosed to also have Asperger Syndrome as well as depressive illness and consequently judged to be a high suicide risk. He is currently incarcerated in Connecticut “Supermax Prison” in solitary confinement in the same type of isolative detention described by Juan Méndez, the UN Special Rapporteur on Torture, as cruel and inhuman and a violation of the UN’s Universal Declaration of Human Rights.

Gary McKinnon contested his extradition request on administrative bail while Ahmad and Ahsan challenged theirs from behind bars in high security prisons.

The parallels between the pair are glaringly obvious – their fates strikingly different.

Consider also the gravity of their respective indictments. Ahsan and Ahmad allegedly helped recruit and rally Muslims to take up arms against occupying forces using a website that was – only partially – hosted on a US server. McKinnon, on the other hand, is described by US prosecutors as having perpetrated the “biggest military computer hack of all time”.

The compassion extended to non-Muslim victims of the scrofulous, one-sided Extradition Act was again in evidence last week when the British government agreed with its US counterpart to allow British a British businessman to fly back and serve out the remainder of his 33-month sentence in the UK.

Christopher Tappin had admitted knowingly aiding and abetting others in an illegal attempt to export zinc/silver oxide reserve batteries, a special component of the Hawk air defence missile, from the US to Iran via the Netherlands.

If as is expected, Ahsan and Ahmad are convicted in the US, is it even imaginable that they will be afforded the opportunity to serve part of their sentences in their native UK?

Many other Muslims have been whisked off to the US under the Extradition Act. On the same plane as Ahsan and Ahmad were three other co-religionists - Abu Hamza al-Masri, Adel Abdel Bari and Khaled al-Fawwaz who had himself spent 14 years in a British jail without trial awaiting extradition. Abu Hamza had already served a seven-year jail sentence in the UK before he was detained and subsequently extradited. Abdel Bari had been in detention since 1999 awaiting
extradition for alleged involvement in the 1998 US embassy bombings in East Africa.

Cases such as these – the above list is by no means exhaustive - appear to point to the use of the Extradition Act as a tool to remove “undesirable” UK-based Muslim activists to the US where the lax legal framework makes prosecution more likely. Indeed, when it was drafted shortly after the 2001 attacks against the US, observers – myself included - warned that it had been deliberately drafted to allow the easy and speedy removal of “problem Muslims”. For example, one of the particularities of the Extradition Act is that the burden of proof required for those indicted to be sent to the US is substantially lower than would be expected in other jurisdictions. Authorities are only required to show “reasonable suspicion” and not to produce any prima facie evidence that an offence has been committed. Another particularity is that the Act is retrospective in that it can apply to alleged offences carried out years before it came into force.

As a product of the US-led “War on Terror” the Extradition Act was always a weapon, intended to add to a raft of laws brought in to curb threats to western hegemony. Since its purpose is to demonise, blackball or silence those who dare to challenge western foreign policy, in essence to delegitimise their right to dissent and express their beliefs, should we be at all surprised when its victims - Ahsan and Ahmad included - are afforded differential treatment?

2. UK/US Extradition: reconsider the imbalance of threshold requirements & introduction of prima facie evidence

2.1 IHRC has campaigned extensively on what is clearly an imbalance in the UK’s extradition arrangements with the US, disagreeing with Sir Scott Baker’s 2011 Review, which concluded that the evidentiary requirements for both states were broadly the same. While the UK is required to present evidence for ‘probable cause’, the US is not required to present a ‘prima facie’ case. Instead, the US is only required to show ‘reasonable suspicion’.

2.2 As the UK Director of Public Prosecutions himself explained, the use of ‘reasonable suspicion’ as a threshold test is potentially a grave infringement on the liberty of an individual. It is a low threshold in UK law and is not equivalent to ‘probable cause’. Reasonable suspicion is relatively easy to establish as it does not always require specific information or intelligence. Therefore, it is possible for generalisations to be made based on the behaviour of the person.

2.3 ‘Probable cause’ in US law is a higher threshold as it requires some form of evidence. It is a term that features in the Fourth Amendment and can be the standard by which a grand jury establishes a crime has been committed.
2.4 The reason for the lower threshold for extradition from the UK to the US is because the US constitution does not permit an evidential standard lower than ‘probable cause’.iv

2.5 A prime facie case presented by the US with an extradition request would provide an equivalent threshold, as it requires evidence, as per the requirements in the UK’s own unwritten constitution.

2.6 Data collected on the number of individuals extradited from the UK to the US and vice versa reveals the reality of this imbalance. Between 2004 and 2011, 62 people were extradited from the UK to the US, of which 28 were UK citizens or dual-citizens. Only 33 people were extradited from the US to the UK during the same period, and of these, only 3 were US citizens or dual-citizens.v

2.7 Further, the US is a country of particular concern as it has on several occasions argued that its jurisdiction extends to individuals’ online presence. They have been able to assert this on the basis that many web pages are hosted by servers in the US. This is despite the fact that their creation and maintenance occurs in other countries. Richard O’Dwyer, a UK national, was accused of criminal activity online.vi That his crime was alleged to have taken place on websites hosted by servers in the US allowed the White House to exert its right to prosecute him within the US. This was despite the fact that he had not travelled to the US. This was also despite the fact that the offence he was accused of was not a crime in the UK. The internet is a complex and far-reaching entity, and poses many new challenges to legislators. It is therefore necessary to be cautious when one state is in a position to claim jurisdiction over it due to a technicality. The provision in the Extradition Act that allows such a low threshold for extradition to the US puts all internet users in the UK at risk of extradition because a legal activity they are performing in the UK may well be illegal in the US.

3. Political and Policy Implications of Extradition: limit the Secretary of State’s power

3.1 IHRC welcomed the removal of the Home Secretary’s role in certain aspects of the extradition process. This is because many decisions appeared to be political, and therefore compromised the role of justice in the proceedings. Many media outlets reported the Home Secretary declaring that it was ‘great to say goodbye’ to Talha Ahsan and Babar Ahmed on their extradition to the US in 2012. The implication was that the Home Secretary was keen to have these individuals removed from the UK as soon as possible and that the judicial procedure was an unnecessary obstacle. The phrase also implies their guilt. This is despite these men being innocent in the eyes of the law at that point in time (having not yet been tried in a court of law). The Home Secretary’s political position in this matter was at odds with the legal procedure. The legal process should not be politicised in this way as it compromises the principle of separation of powers.

3.2 The Home Secretary’s previous power to block an extradition was exercised in the case of Gary McKinnon.vii While IHRC welcomed this, it presented clear disparities in the law. The
reasons presented for blocking it were in relation to his health. Mr McKinnon has Aspergers’ Syndrome, and his health and wellbeing would be in jeopardy should he be subjected to solitary confinement in the US. As a result, the Home Secretary conceded that allowing his extradition would be in breach of his human rights. However, despite the very same concerns being raised about Talha Ahsan (who also suffers from this condition), no such compassion was exercised in the preservation of his rights. The implication is that Mr Ahsan’s race and religion were deciding factors in the decision to send him to the US. This calls into question the fairness and integrity of the UK government and its political actors.

3.3 It is clear that extradition law is influenced by political motives, and the courts should be acutely aware of this in order to prevent justice from being compromised. Political points should not be won at the expense of the rights of an individual.

4. Forum Bar to Extradition: preferable to prosecute an individual in the UK

4.1 IHRC welcomes the forum bar, which will be brought into force under the Crime and Courts Act 2013. It ensures the process is less disruptive to the individuals in question. Furthermore, it ensures that the country where the most harm and loss is alleged to have occurred is the site of the prosecution. This will ensure a faster judicial process, unlike that of Babar Ahmad, who was detained in the UK for 10 years awaiting extradition to the US. It will also ensure that the financial burden on the individual is not as great, and that legal counsel appointed in this country is equipped to deal with the matters in question, rather than attempting to understand a foreign system.\textsuperscript{viii}

5. Human Rights Bar and Assurances: not rigorous enough

5.1 The working of the human rights bar in the Extradition Act 2003 is not sufficient to protect the rights of individuals. The rights under the European Convention on Human Rights that are most often invoked in extradition cases include Articles 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), and 14 (prohibition of discrimination). These are also qualified rights, which allow for them to be weighed up against what is in the public interest. It has been suggested in a High Court case that honouring an extradition treaty is of such importance that only a ‘wholly exceptional case’ would warrant extradition disproportionate to its legitimate aim.\textsuperscript{ix} From this it is clear that issues of diplomacy have had an impact on considerations of human rights issues in extradition cases, and this ground is a largely unsuccessful bar to extradition. The assumption is that bilateral extradition treaties the UK has with other countries are evidence for those states having the same human rights concerns as the UK. However, this is not necessarily the case, and the legislation should be drafted so as to provide for more rigorous analysis of these countries’ human rights records. With regard to Babar Ahmad and Talha Ahsan, they were extradited in the knowledge that they would be jailed in a ‘Supermax’ prison in the US and kept in solitary confinement for 23 hours a day. This has been described as a system of torture by the UN Special Rapporteur on Torture, and therefore in breach of Article 3 of the European Convention on Human Rights. This is an absolute right, and
certainly should not have been dispensed of in favour of diplomatic relations with the US. Diplomacy and international relations should not obstruct the provision of justice or the protection of an individual’s human rights.

5.2 IHRC is also gravely concerned over the way in which human rights abuses have occurred within the UK when individuals have been awaiting extradition. Returning to the example of Babar Ahmad and Talha Ahsan (both British nationals), they were imprisoned in the UK for 10 and 8 years respectively while awaiting extradition. Adel Abdel Bary, an Egyptian citizen, was held in the UK for 13 years awaiting extradition to the US. In all three instances the men were imprisoned without trial. This evidently infringed on their Article 5, 6 and 8 rights. This calls into question the robustness of the judicial system.

5.3 The examples given above are very serious and extreme, but human rights breaches in the arrest and initial detention of individuals occurs frequently under UK extradition law. The possible detention of an individual for 45 days or longer is in violation of the right to liberty and security. This is possible simply on the basis of an accusation by a Category 2 country.

5.4 Attention should not only be paid to human rights in one section of the Extradition Act 2003, but at every stage of the process and in every part of the legislation.

Summary of key recommendations

- Rectify the imbalance of threshold requirements between the United Kingdom and United States in their extradition agreement, and introduce a requirement for prima facie evidence for Category 2 states.

- The court’s consideration of political commitments should not supersede the individual’s access to qualified rights within the European Convention of Human Rights.

- Limit the Secretary of State’s power due to concerns over the politicisation of the extradition process.

- Provisions to hear evidence in the UK are always preferable. The forum bar is welcome and provisions should be strengthened to ensure this is at the discretion of the courts and not subject to external political considerations.

- Human rights considerations should not simply be restricted to one stage of the extradition process. Consideration should be given to the detrimental effect of extended periods of pre-extradition detention.

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1 http://ihrc.org.uk/news/comment/10767-extradition-a-year-on-the-hypocrisy-that-doesnt-end
4 Home Office Minister Baroness Scotland in the debate in the House of Lords on the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003
6 http://www.theguardian.com/uk/2012/dec/06/richard-o-dwyer-avoids-us-extradition
7 http://www.bbc.co.uk/news/uk-19957138
9 R (Bermingham) v Director of the Serious Fraud Office; Government of United States of America [2006] EWHC 200 (Admin), [2007] QB 727, per Laws LJ at para 118