The Law Commission and The Scottish Law Commission

(LAW COM. No. 182)
(SCOTTISH LAW COM. No. 119)

EXTRADITION BILL

REPORT ON THE CONSOLIDATION OF LEGISLATION RELATING TO EXTRADITION

Presented to Parliament by the Lord High Chancellor and the Lord Advocate by Command of Her Majesty

June 1989

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THE LAW COMMISSION

AND

THE SCOTTISH LAW COMMISSION

Extradition Bill

Report on the Consolidation of Legislation Relating to Extradition

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain, and the Right Honourable the Lord Fraser of Carmyllie, Q.C., Her Majesty's Advocate

In order to produce a satisfactory consolidation of legislation relating to extradition it is necessary to make the recommendations which are set out in the Appendix to this Report.

The Home Office, the Scottish Office, the Northern Ireland Office and the Foreign and Commonwealth Office have been consulted in connection with the recommendations and agree with them..

ROY BELDAM, *Chairman, Law Commission*

C. K. DAVIDSON, *Chairman, Scottish Law Commission*

15 June 1989

APPENDIX

RECOMMENDATIONS

1. Extradition between the United Kingdom and foreign states is conducted through the appropriate international channels. In our opinion however the legislation governing extradition, as it stands at present, does not spell this out consistently and correctly.

Section 7 of the Extradition Act 1870 provided that a requisition for the surrender of a fugitive criminal to a foreign state should be made "by some person recognised by the Secretary of State as a diplomatic representative of that foreign state". Section 7 of the Extradition Act 1873 clarified this by providing that "a diplomatic representative of a foreign state shall be deemed to include any person recognised by the Secretary of State as a consul-general of that state". Section 4(1) of the Criminal Justice Act 1988 corresponds to section 7 of the 1870 Act, in referring to "some person recognised by the Secretary of State as a diplomatic representative of a foreign state". But there is no equivalent of the explanation of this term provided by the 1873 Act.

Section 17 of the 1870 Act is about fugitive criminals in colonies. There are no diplomatic representatives in colonies. The section therefore provides that the requisition for surrender "may be made to the governor of [the colony] by any person recognised by that governor as a consul-general, consul, or vice-consul". Again there is an explanation in section 7 of the 1873 Act. The officials listed in section 17 of the 1870 Act are "deemed to include any person recognised by the governor . . . as a consular officer of a foreign state".

The Criminal Justice Act 1988 introduces both general extradition arrangements and special extradition arrangements, for particular cases. So far as colonies are concerned, these are dealt with separately, in sections 20 and 21. Section 20(5) speaks of "a consular representative recognised by the Governor". It does not list the various ranks, in the manner adopted in 1870 and 1873. Section 21(2) applies this modification for the purposes also of special extradition arrangements.

In our opinion it should be made clear that an extradition request under the 1988 procedure can be made by a consular representative. We also think that the phrase "consular representative" should be used, for consistency, in the provisions of the Bill deriving from the 1870 Act.

Section 20(5) of the Criminal Justice Act 1988 only substitutes a reference to a consular representative for the reference to a diplomatic representative in section 4(1). But there are similar references in section 18(1)(a)(i) and 4(a) and (b). In our view there is no justification for the omission from section 20(5) of any reference to these provisions. The translation from diplomatic to consular representatives is needed for all the legislation, if it is to operate in colonies. We recommend that this gap should be filled.

Effect is given to this recommendation in Clauses 7(1)(a), 21(1)(a) and 30(4) and paragraphs 4(1) and 16(a) of Schedule 1.

2. As originally enacted, section 5(2) of the Fugitive Offenders Act 1967 required a request for the return of a person to be accompanied by "particulars of the person whose return is requested and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest under section 6 of this Act". Section 6 dealt with arrest for committal. The corresponding provision of the Criminal Justice Act 1988 is section 4(2)(b). This refers to "particulars of the offence of which he is accused or was convicted (including information sufficient to justify the issue of a warrant for his arrest under this Part of this Act)". Paragraph 8(1) of Schedule 1 to the 1988 Act inserted a new subsection (2) in section 5 of the 1967 Act. It corresponds with section 4(2) of the 1988 Act. Both provisions refer to "information" whilst the 1967 Act previously referred to "evidence".

Subsection (3) of section 6 of the 1967 Act is concerned with provisional warrants of arrest. It provides that the authority by whom such a warrant is issued shall transmit to

the Secretary of State "the information and evidence, or certified copies of the information and evidence, upon which it was issued". Section 5(3) of the 1988 Act is identical, except that it leaves out the words "and evidence".

We believe that the two concepts, "information" and "evidence", are both relevant in sections 5 and 6 of the 1967 Act and sections 4 and 5 of the 1988 Act. "Evidence" is an appropriate word to use in referring to material that justifies the issue of a warrant of arrest. But the other material that comes with an extradition request is fairly described as "information". The information relates to the person whose return is requested, the offence of which he is accused or was convicted, etc. We therefore recommend the use of the word "evidence" in the provision of the Bill corresponding to section 5(2) of the 1967 Act and section 4(2) of the 1988 Act and the inclusion of references to evidence, as well as information, in the provision corresponding to section 6(3) of the 1967 Act and section 5(3) of the 1988 Act.

Effect is given to this Recommendation in clauses 7(2), 8(4) and 21(1)(b).

3. Section 26 of the 1870 Act defines the term "warrant", in the case of any foreign state, as including "any judicial document authorizing the arrest of a person accused or convicted of crime". This definition was taken over into section 4(7) of the 1988 Act. But there is no provision in either Act relating to warrants for the arrest of persons convicted of crime. Paragraph (c) of section 4(2) of the 1988 Act requires that there shall be furnished with an extradition request "in the case of a person accused of an offence, a warrant for his arrest issued in the foreign state" making the request. Paragraph (d) requires that there shall be furnished "in the case of a person unlawfully at large after conviction of an offence a certificate of the conviction and sentence".

We believe that the words "or convicted" were superfluous both in 1870 and 1988. We recommend their removal.

Effect is given to this Recommendation in clause 7(6) and paragraph 20 of Schedule 1.

4. Schedule 1 to the Extradition Act 1870 contains a list of "extradition crimes". These are the crimes in respect of which extradition is available under that Act. But under section 1(5) of the Criminal Justice Act 1988 extradition is available for offences punishable with imprisonment for a term of 12 months or more. There is no list of individual offences. The Fugitive Offenders Act 1967 originally had, in Schedule 1, a list of offences similar to the list in the 1870 Act. But it now corresponds with the 1988 system; see the new section 3 inserted in the 1967 Act by paragraph 6 of Schedule 1 to the 1988 Act.

In a case where the extradition of an alleged offender has been requested under the 1870 Act, a magistrate is authorised, by section 8(1), to issue a warrant for his apprehension "on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England". Under section 6(2) of the 1967 Act the question to be considered is whether the evidence would "authorize the issue of a warrant of the arrest of a person accused of committing a corresponding offence or, as the case may be, of a person alleged to be unlawfully at large after conviction of an offence within the jurisdiction" of the person considering the issue of the warrant. This subsection is worded differently from its predecessor in the 1870 Act, but has much the same effect. But section 5(2) of the 1988 Act applies a different test. Under it a person empowered to issue warrants of arrest "may issue such a warrant if he is supplied with such information as would in his opinion authorize the issue of a warrant for the arrest of a person accused of conduct which would constitute an offence punishable under the law of the United Kingdom with imprisonment for a period of not less than 12 months, or as the case may be, of a person alleged to be unlawfully at large after conviction of such an offence within his jurisdiction". The reference to imprisonment for not less than 12 months reflects the new test of whether extradition is available. But that test cannot in our view be applied to questions of arrest. The length of possible sentence is immaterial to such questions, which depend on the available evidence. The possible sentence is material to the question whether the conduct alleged is an extradition crime.

We recommend that a test on the lines of the tests provided in 1870 and 1967 should

appear in the Bill, and that the 1988 test should not be reproduced. We also recommend that it should be made clear that the question whether the conduct alleged would be an extradition crime has to be considered.

Effect is given to this Recommendation in clause 8(3).

5. It is possible that there may be more than one request for the return of the same person. The Secretary of State may thus be faced with the task of deciding between competing requests. Section 9(5) of the Fugitive Offenders Act 1967 and section 9(14) of the Criminal Justice Act 1988 set out principles for him to apply. The 1967 Act expressly contemplated a possible clash between a request under it and a requisition for surrender under the Extradition Act 1870. The 1988 Act did not refer to the Acts of 1870 and 1967. Nor was a reference to the 1988 Act inserted in section 9(5) of the 1967 Act. (The 1870 Act causes no problem. Section 11 authorises surrender. But the matter is left to the discretion of the Secretary of State. He would obviously take account of competing claims under the later legislation.)

We recommend that, in so far as the Bill reproduces the Acts of 1967 and 1988, it should expressly provide for all the possible competing types of extradition request.

Effect is given to this recommendation in clause 12(5).

6. Section 10 of the 1967 Act and section 12 of the 1988 Act both contemplate that a person committed for surrender may be discharged if his return is delayed after the end of the relevant period. The relevant period is defined. The 1988 Act provides a special period for a case where the person whose surrender is in question has instituted proceedings for judicial review. The 1967 Act does not do this, although proceedings for judicial review are just as possible in a case under it as in a case under the 1988 Act.

We recommend that this discrepancy should be removed.

Effect is given to this Recommendation in clause 16(1) to (4).

7. Section 7(5) of the 1967 Act required the court of committal to commit a person whose return was ordered to custody. There is no such requirement in section 6 of the 1988 Act. Paragraph 10(2) of Schedule 1 to that Act brought the 1967 Act into line in this respect. In consequence paragraph 14 of the Schedule removed a reference to custody from subsection (1) of section 10. But there is still a reference in subsection (2). We believe that this is unintentional.

We recommend that this discrepancy also should be removed.

Effecf is given to this Recommendation in clause 16(5).

8. Section 16(2) of the Criminal Justice Act 1988 is as follows–

> "(2) Where any person returned to the United Kingdom in pursuance of general or special extradition arrangements has been convicted before his return of an offence for which his return was not granted, any punishment for that offence shall by operation of this section be remitted; but his conviction for it shall be treated as a conviction for all other purposes."

Section 14 of the Fugitive Offenders Act 1967 is about persons returned to the United Kingdom under that Act from designated Commonwealth countries or colonies. But it contains no provision equivalent to section 16(2) of the 1988 Act. We believe that the failure to insert such a provision in the 1967 Act must be inadvertent. We recommend that the gap should be filled.

Effect is given to this Recommendation in clause 19(4).

9. Section 15 of the Extradition Act 1870 and section 13 of the Criminal Justice Act 1988 are both about the authentication of foreign documents. The 1870 Act requires that such documents shall in all cases be "authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state". Section 13 of the 1988 Act requires certification alone, and not an official seal. It is also more simply worded than the 1870 provision. We believe that there is no

justification for retaining a special provision about the authentication of the foreign documents in the portion of the Bill deriving from the 1870 Act. In our view all that is needed is a single clause concerning the authentication of documents used in extradition proceedings of either type. We recommend that the Bill should include such a clause, following the precedent of the 1988 Act.

Effect is given to this Recommendation in clause 26.

10. Section 13 of the 1967 Act and section 15 of the 1988 Act provide for the form of warrants and orders. The latter allows them to be signed by the Secretary of State, a Minister of State or an Under-Secretary of State. The former does not include a Minister of State as a possible signatory.

The 1870 Act contains no provision corresponding to these sections of the Acts of 1967 and 1988. But sections 7 and 11 require that the documents with which they are concerned shall be under the hand and seal of the Secretary of State. They do not therefore contemplate a junior Minister acting at all. Moreover the requirement of a seal is in our view archaic.

We recommend the adoption of the 1988 precedent throughout.

Effect is given to this Recommendation in clause 28(1) and paragraphs 4(2) and 8(2) of Schedule 1.

11. Paragraph 4 of Schedule 3 to the Parliamentary Commissioner Act 1967 excluded from investigation by the Commissioner "Action taken by the Secretary of State under the Extradition Act 1870 or the Fugitive Offenders Act 1881". The 1881 Act was repealed by the Fugitive Offenders Act 1967. Section 21(4) of that Act provides that the reference to the Fugitive Offenders Act 1881 in the Parliamentary Commissioner Act "shall include a reference to this Act". The Criminal Justice Act 1988 did not amend the Parliamentary Commissioner Act. It follows that, as the law stands at present, the Parliamentary Commissioner cannot investigate action taken under the Acts of 1870, 1881 and 1967, but can investigate action taken under the 1988 Act. We do not believe that this discrepancy is intentional. We recommend that it should be corrected. We also recommend the deletion of the reference to the 1881 Act, since more than 20 years have now passed since that Act was repealed.

Effect is given to this Recommendation in Clause 36(1).

12. The Extradition Act 1895 was passed to permit an extradition case to be heard elsewhere than at Bow Street if the Secretary of State was of opinion that the removal of the person concerned for the purpose of his case being heard at Bow Street would be dangerous to his life or prejudicial to his health. The Act was used once, in 1896. We believe it is of no practical utility. The magistrate can adjourn the extradition proceedings until the fugitive's health improves. The requesting State may be persuaded to withdraw its application, and make another in due course. These powers are quite independent of the 1895 Act.

We recommend that the 1895 Act should be repealed and should not be re-enacted.

Effect is given to this Recommendation in clause 37(2).

13. Section 3 of the 1870 Act provides as follows–

> The following restrictions shall be observed with respect to the surrender of fugitive criminals: .....
>
> (3) A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.

Cases under the 1870 Act are heard in England. But there is an obvious possibility that a person whose extradition is requested may be in prison in any part of the United Kingdom. This is recognised by the provision quoted above. It is equally obvious that a person whose extradition is requested may have been accused of an offence anywhere in

the United Kingdom. We believe that the phrase "within English jurisdiction" must have been meant to cover the jurisdiction of the courts in Scotland and Ireland. Otherwise there is an inexplicable clash with the later reference to the United Kingdom.

We recommend that "United Kingdom" should be substituted for "English".

Effect is given to this Recommendation in paragraph 1(4) of Schedule 1.

14. Section 1(8) of the 1988 Act provides that–

"(8) For the purposes of this Part of this Act–

(a) .....

(b) conduct in a . . . vessel, aircraft or hovercraft of a foreign state, shall be treated as if it were conduct in the territory of that state."

An offence may thus be extraditable if it was committed in a hovercraft.

Section 16 of the 1870 Act makes offences extraditable if "committed on board any vessel on the high seas which comes into any port of the United Kingdom".

Section 1(1)(h) of the Hovercraft Act 1968 (c.59) authorises the extension to hovercraft of "any enactment or instrument relating to ships". In our view it would be possible, by an exercise of this power, to extend the 1870 Act to hovercraft. This would remove what seems to us to be an obvious, small anomaly. We recommend however that it should be removed in the course of consolidation.

Effect is given to this Recommendation in paragraph 13(1) of Schedule 1.

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