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STATUTES

Alec Samuels*

THE ENGLISH FUGITIVE OFFENDERS ACT, 1967

In England in recent years the *Enahoro* and *Kwesi Armah* cases, and other celebrated cases with all their political repercussions, have emphasized the need for the enactment of a modern statutory code on fugitive offenders within the Commonwealth to replace the Fugitive Offenders Act, 1881. The English Fugitive Offenders Act, 1967, gives effect to the agreement reached by the Commonwealth Law Ministers' conference, April to May 1966, in Marlborough House.[1] The old principles which developed during the time of the unified dependent Empire became inappropriate when the members of the Commonwealth became independent states. Based on anticipated reciprocity, the new legislation gives effect to certain basic tenets. The requesting state must establish a prima facie case that the alleged offender has committed a listed offence, the double criminality and the speciality rules apply, extradition is prohibited for political offences and offences involving the death penalty. Extradition affecting foreign states, as opposed to Commonwealth states, continues to be governed in England by the old Extradition Act, 1870. Any modern system of extradition necessarily calls for a balance between the interests of a state to bring offenders against its laws to justice and to assist friendly states to do the same, and the interests of the individual in particular cases. Those who commit acts that are considered as crimes in the requesting and requested states ought not to escape conviction and sentence, but it is necessary to ensure that there are adequate safeguards to protect the interests of individuals whose extradition is sought.

Political offences

A person shall not be returned under this Act to a designated Commonwealth country, or committed to or kept in custody for the purposes of such return, if it appears to the Secretary of State, to the court of committal or to the High Court . . . on an application for habeas corpus or for review of the order of committal —

(a) that the offence of which that person is accused or was convicted is an offence of a political character;

(b) that the request for his return (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.[2]

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*Barrister-at-Law, Lecturer in Law, the University of Southampton, England. Gratitude is expressed to the editor of the *Solicitors' Journal* for permission to use in this article some material used in an article written for English solicitors and published in that *Journal*, (1967), 111 *S.J.* 956.

1. *Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth*, Cmnd. 3008, May 1966. Cf. the European Convention on Extradition, 1957, European Treaty Series No. 24, H.M.S.O., ratified by Norway, Sweden, Denmark, Eire, Italy, Greece, and Turkey.

2. S.4(1).

The concept of the political offence, though well known under extradition law since the nineteenth century and before, is new in English law for Commonwealth fugitive offenders.[3] The absolute prohibition on the surrender of political offenders follows the European Convention on Extradition, 1957.[4] The concept "an offence of a political character" is not defined, nor could it be. The problem was exhaustively and authoritatively investigated in *Schtraks*,[5] in which it was held that child-stealing and perjury were not offences of a political character even though they were concerned with religious education and aroused great political passions and repercussions in the requesting state. Lord Reid said:

> Many people then [1870] regarded insurgents against continental governments as heroes intolerably provoked by tyranny who ought to have asylum here although they might have destroyed life and property in the course of their struggles. . . . We cannot inquire whether a "fugitive criminal" was engaged in a good or bad cause. A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is as much within the Act as the follower of Garibaldi. But not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge I would not think that that could be called a political offence. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause and quite a different thing to commit the same offence for an ordinary criminal purpose.
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> Moreover, I do not think that the application of the section can be limited to cases of open insurrection. An underground resistance movement may be attempting to overthrow a government and it could hardly be that an offence committed the day before open disturbances broke out would be treated as non-political while a precisely similar offence committed two days later would be of a political character. And I do not see why the section should be limited to attempts to overthrow a government. The use of force, or it may be other means, to compel a sovereign to change his advisers, or to compel a government to change its policy may be just as political in character as the use of force to achieve a revolution. And I do not see why it should be necessary that the refugees' party should have been trying to achieve power in the State. It would be enough if they were trying to make the government concede some measure of freedom but not attempting to supplant it. . . . I feel that if it had been suggested to Mr. Gladstone . . . in 1870 that asylum should be denied to a refugee who had committed an offence, perhaps of a non-violent kind, as part of a campaign to induce or compel an autocratic government to grant a measure of civil or religious liberty, on the ground that there had been no disturbance of public order, he would have indignantly denied any such intention.[6]

There is no doubt that the Home Secretary and the courts can look at the substance of the allegations in order to discover whether behind a request for extradition for an apparently ordinary crime there is really an attempt to extradite for political reasons.

An offence against the life or person of the Head of the Commonwealth is not

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3. The test in English law used to be whether the extradition would be unjust and oppressive: Fugitive Offenders Act, 1881, s.10; *R.* v. *Governor of Brixton Prison, ex parte Kwesi Armah*, [1966] 3 W.L.R. 23, at 33–34 (C.A.), reversed on another point, [1966] 3 W.L.R. 828(H.L.).

4. Art. 3(1): "Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence."

5. [1964] A.C. 556, at 581–84 (Lord Reid), and 587–92 (Lord Radcliffe); 27 *Modern L. R.*, at 27–45 (1965); 2 O'Connell, *International Law*, at 801–802.

6. 583–84. Mindful of the single party state which is unfortunately not unknown in the Commonwealth, and of the possible argument that an offence directed against the government cannot be political in the absence of an opposition, the Australians have specifically provided that an offence may still be regarded as political notwithstanding that there are not competing political parties in the requesting state: Extradition (Commonwealth Countries) Act, 1966, c.10(2).

an offence of a political character because it may be regarded as equally damaging to every member of the Commonwealth. This principle is not extended, however, to other members of the royal family.[7]

An important objection to the absolute mandatory exclusion of political offences is that, in the absence of discretion, the United Kingdom could become a haven for Commonwealth plotters. They may be communists, fascists, racists, or persons who have committed despicable and contemptible crimes. Whereas they could be deported immediately if aliens[8] they cannot be deported if Commonwealth citizens, who may only be deported on court recommendation after committing a deportable offence.[9] The only thing that can be done is for the Home Secretary to make special reciprocal arrangements with each particular Commonwealth country. This difficulty may be the price that has to be paid for the basically sound principle of excluding political offences. It is submitted that a discretion to deport a Commonwealth political fugitive offender would have been practical and desirable, though not to the requesting state because that would amount to disguised extradition. In practice it is often difficult for the fugitive offender to gain admission to the United Kingdom as a political refugee or as a Commonwealth immigrant.[10] The number of extradition requests from foreign countries is declining to a small number because of the difficulty of entry, and the cumbersome procedure. The conflict in principle lies between the desirability of granting political asylum and the undesirability of granting sanctuary to detestable persons. For example, in a Commonwealth country the fugitive offender may have murdered a visiting member of the royal family, for example, Prince Philip at Expo '67, or may have attempted to murder a prime minister, or may have engaged in communist espionage. It may be that in a civilized world murder ought to be excluded from political offences. It is submitted that the Home Secretary certainly should have been empowered to deport Commonwealth citizens if their presence were not conducive to the public good, a power widely exercised in many other Commonwealth countries. Naturally it is readily conceded that proper procedural safeguards, for example, a tribunal of inquiry, should be available to those against whom deportation orders have been made.

In this race-conscious century it is not surprising to see specific mention of racial persecution.[11] The courts may have difficulty in reaching any confident decisions on matters of this kind. Manifestly, any kind of indirect insult to a Commonwealth country will have to be avoided. There are, however, obvious advantages in having these matters carefully considered in public in a judicial manner in an open court. Similarly, the courts may be faced with a delicate task in pronouncing upon allegations that there would not be fair trial in the requesting state[12] because of racial antagonism, for example, allegations of tribal pressure in Nigeria. This was one of the issues facing the Home Secretary in the *Enahoro* case in 1963.[13] It might perhaps have been better to have left an absolute, unfettered discretion in the Home Secretary.

7. S.4(5), the "attentat clause." The European Convention article, 3(3), excludes offences against members of the family of the head of state from the class of political offences.

8. Aliens Order, 1953, S.I. No. 1671. *R.* v. *Governor of Brixton Prison ex parte Soblen*, [1963] 2 Q.B. 243 (C.A.). *Muller* v. *Superintendent, Presidency Jail Calcutta* (1955), Int. L.R. 497; (1955), S.C.J. 1324.

9. Commonwealth Immigrants Act, 1962, ss.6–11.

10. Thornberry, 30 *Modern L.R.* at 197, 200 (1967).

11. European Convention on Extradition, 1957, art.3(2); Irish Republican Extradition Act, 1965.

12. Extradition Act, 1870, s.10.

13. Lord Russell L.C.J. once said that in his opinion the courts could not pronounce on such matters: *Arton*, [1896] 1 Q.B. 108.

Speciality

Under the speciality rule an offender may not be returned until the requesting country has undertaken not to prosecute except for the offence in question, or any corresponding or lesser offence, unless the Home Secretary agrees.[14] If a prosecution is contemplated for any other offence alleged to have taken place before the extradition, the requesting state must first give the offender the opportunity of returning to the United Kingdom.[15] There may be some difficulty where extradition is granted for, say, an embezzlement in which £5,000 is alleged as the sum involved, whereas on return to the requesting state the person finds himself charged with embezzling £500,000, the same legal offence, but a much more serious matter.[16]

Double criminality

The principle of double criminality applies, that is, the offence in question must be an offence under the general law both of the requesting state and of the United Kingdom.[17] A substantial correspondence in the offences is sufficient.[18] It is not quite clear whether the alleged offence must have taken place within the territory or jurisdiction of the requesting state or on a ship flying the flag of the requesting state[19] or whether it is sufficient that the offence would be covered by extra-territorial provisions of the criminal law of the requesting state,[20] but the latter view is submitted to be the better one.

Death penalty

The Home Secretary is entitled to decline to make an order in the case of a person accused or convicted of a returnable offence which in England is not punishable with death if that person could be, or has been, sentenced to death for that offence in the requesting country.[21] The possibility of reprieve is apparently irrelevant. The death penalty still obtains in many part of the Commonwealth, for example, in some of the states in Australia. The application of the rule of double criminality to sentence is modern, and the sentencing policy of other Commonwealth countries would theoretically appear to be an internal domestic matter. If the Home Secretary does exercise his discretion to refuse extradition in such a case the person concerned may simply remain in England free from any criminal process in respect of the offence. A Commonwealth citizen,

14. *Schtraks, supra* note 5, at 581 (Lord Reid) and 587–88 (Lord Radcliffe). *R.* v. *Corrigan*, [1931] 1 K.B. 527, at 532–33. European Convention on Extradition, 1957, art. 14. *R.* v. *Aubrey-Fletcher, ex parte Ross-Munro*, [1968] 1 All E.R. 99; [1968] 2 W.L.R. 23 (D.C.).

15. S.4(3).

16. *Embezzlement (Austria)* case, Ann. Dig. 1935–1937, Case No. 177. 2 O'Connell, *supra* note 5, at 804–806.

17. S.3(1)(c), or any part thereof to take account of the different private law jurisdictions in the United Kingdom, s.3(4). *R.* v. *Governor of Brixton Prison, ex parte Gardner*, [1968] 1 All E.R. 636; [1968] 2 W.L.R. 512.

18. *R.* v. *Metropolitan Police Commissioner ex parte Arkins*, [1966] 1 W.L.R. 1593; [1966] 3 All E.R. 651 (D.C.); *R.* v. *Corrigan*, [1931] 1 K.B. 527.

19. *R.* v. *Governor of Brixton Prison, ex parte Minervini*, [1959] 1 W.B. 155, at 161–64.

20. *R.* v. *Governor of Brixton Prison, ex parte Athanassiadis* (1966), 110 S.J. 769; *The Times*, October 6, 1966, D.C. Glanville Williams, "Venue and Ambit of the Criminal Law," 81 *L.Q.R.* 276, at 277–79 (1965). Tokyo Convention Act, 1967 (aircraft). European Convention on Extradition, 1957, art. 7(2): "When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned."

21. S.9(4); Scheme, para. 17, annex 2.

unlike an alien, cannot be deported, except for a deportable offence.[22] It is of interest to note that quite recently the British Government returned to France one Shielbach charged with a capital offence involving an attempt on the life of President de Gaulle. The principle of the exclusion of capital offences is contained in the European Convention on Extradition, 1957,[23] and in recently negotiated treaties with foreign countries.[24] Accordingly the requesting state will find it necessary to apply for extradition on the basis of a lesser offence not involving the death penalty.

Judiciary and Executive

One of the most interesting juridical problems arising out of the new law is that of the respective roles of the judiciary and of the executive, the courts and the Home Secretary. It is a matter of policy for each state to decide whether the competent authority to determine the issue should be judicial or executive or a combination of both.[25] The arguments in favour of making the decision judicial are that courts proceed in an open, unbiassed manner, free from political tensions and pressures. An impartial judiciary inquiry carried out in accordance with the traditional rules of evidence cannot be said to cast a slur upon any Commonwealth country.[26] The arguments in favour of executive decision by the Home Secretary are that publicity may not be appropriate in what may be essentially a delicate diplomatic matter.[27] The 1967 Act adopts the concurrent or parallel jurisdiction principle.[28] A delicate balance is called for; where the liberty of the individual is in issue as much authority as possible should manifestly be left to the courts.

The procedure to be followed is modelled upon the traditional extradition procedure. Through diplomatic channels the requesting state will approach the Home Secretary who will then, in his discretion, issue an "authority to proceed." In many cases such an approach is likely to be rejected ab initio, especially where the offence is plainly political, thus avoiding unnecessary court proceedings and publicity. After the issue of an authority to proceed a metropolitan magistrate may then issue a warrant and the person will be brought before the court at Bow Street in London. A warrant may also be issued by any magistrate even without prior authority from the home secretary, but notice must immediately be given to the home secretary, who may then cancel the warrant if he wishes. On the appearance at Bow Street the magistrate, if satisfied that there is a prima facie case, must commit in custody to await extradition.[29] The standard of proof required is a "prima facie" case.[30] If the magistrate orders the person to be re-

22. Commonwealth Immigrants Act, 1962, ss.6–11.

23. Art. 11: "If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out."

24. E.g. Israel (Cmnd. 1223, 1960); Sweden (Sweden [Extradition] Order, 1966, S.I. No. 226, Cmnd. 3113, 1966); and Austria.

25. Scheme, para. 9(5), (6). The European Convention on Extradition, 1957, art. 22 simply says that, except where the Convention otherwise provides, the procedure with regard to extradition is to be governed solely by the law of the requested state.

26. Precedents may be found in the Extradition Act, 1870, s.3 and the Fugitive Offenders Act, 1881, ss.7 and 10.

27. United Kingdom, House of Lords, *Hansard*, Vol. 279, col. 690, January 26, 1967, *Kwesi Armah* case.

28. 1870 Act, s.3; 1881 Act, s.7. The Australian Extradition (Commonwealth Countries) Act, 1966, s.11, gives a wide discretion to the attorney general.

29. S.7(5).

30. Previously it was "a strong and probable presumption of guilt": *R.* v. *Governor of Brixton Prison, ex parte Kwesi Armah, supra* note 3; 1870 Act, s.10; *Suidan* v. *Governor*

leased a fresh application may be made, but is unlikely to be successful in the absence of cogent fresh evidence. An order to return must not be executed for at least fifteen days and meanwhile the person may take the matter to the High Court by way of habeas corpus proceedings.[31] The High Court may order a discharge if the offence is trivial, or there has been long delay, or because the accusation is not made in good faith in the interests of justice, so that having regard to all the circumstances it would be unjust or oppressive to return him.[32] The question of good faith may be a delicate matter for the courts. It may arise in the case of an application by one African tribal faction hostile to another. However, the advantage of leaving good faith to be determined by the courts rather than by the executive is that there is a full independent judicial inquiry and political tensions may be lowered. If the offender has already been tried either in England or in the requesting or other state it would be unjust or oppressive not to allow him to plead autrefois convict or autrefois acquit.[33] If habeas corpus proceedings fail, and they may only be brought once, the person must be returned to the requesting state within two months, otherwise he may apply to the High Court for discharge.[34] The Home Secretary still retains an overriding discretion to refuse to order extradition, even in the case of a non-political offender whom the courts have refused to release.[35] Extradition of nationals appears to be possible, for the 1967 Act says that "any person found in the United Kingdom . . . may be . . . returned."[36]

The returnable offences are listed.[37] They cover, in general terms, a wide range of serious offences. Treason and espionage are not included, because they are essentially political offences. The inclusion of bigamy may raise some problems in a multi-racial Commonwealth. The problem of equating offences may not always be very easy. The list may be extended by bilateral agreement with any Commonwealth state.[38] Smuggling per se is not included, as is traditional, except for the smuggling of precious stones, gold, and other precious metals, which is a matter of special interest to a number of Commonwealth countries.

Dependencies

Special provision is made for "dependencies," that is, colonies,[39] protected territories, such as the Persian Gulf states[40] and associated states.[41] There is no

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of Brixton Prison (1966), 116 N.L.J. 978; *The Times*, June 15, 1966.

31. S.8.

32. S.8(3). 1881 Act, s.10; *Arton*, [1896] 1 Q.B. 108, Lord Russell L.C.J.; *R.* v. *Governor of Brixton Prison, ex parte Naranjan Singh*, [1962] 1 Q.B. 211, [1961] 2 W.L.R. 980; *Zacharia* v. *Republic of Cyprus*, [1963] A.C. 634, at 680 (Lord Hodson), and 688 (Lord Devlin).

33. The principle *non bis in idem* is followed in the European Convention on Extradition, 1957, art. 9; 1967, Act. s.4(2).

34. S.10. *R.* v. *Governor of Brixton Prison, ex parte Enahoro*, [1963] 2 Q.B. 455.

35. 1870 Act, s.11, not exercised once since 1870; Anglo-Swedish treaty of extradition; The Nigerian Decree, s.9(2), giving residuary discretion to the attorney general.

36. S.1. The European Convention on Extradition, 1957, art. 6, entitles a requested state to refuse extradition of its nationals but requires that at the request of the requesting state the requested state must submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. In England this would involve submission of the papers to the attorney general and the director of public prosecutions; "Kwesi Armah," *The Times*, June 28, 1967.

37. Schedule 1.

38. S.18.

39. The new Act does not apply to Rhodesia: Southern Rhodesia (Fugitive Offenders Act 1881), Order 1965, Stat. Instr. No. 1958.

40. *R.* v. *Secretary of State for Home Affairs, ex parte Demetrious*, [1966] 2 W.L.R. 1066 (D.C.).

41. West Indies: Antigua, Dominica, St. Lucia, St. Kitts-Nevis, and Anguilla.

list of returnable offences for dependencies, but the double criminality rule applies and the offence for which extradition is requested must carry a possible penalty of at least twelve months, that is, it must be of some seriousness. There is no prohibition against extradition of political offenders, because in a sense the whole of the United Kingdom and its dependencies could be said to represent a single jurisdiction, at least in political terms, but the Home Secretary nevertheless retains a discretion in the matter. Spies are likely to be returned.

Republic of Ireland

The Republic of Ireland, or Eire, occupies a most peculiar status in English and Commonwealth constitutional law. It is not a member of the Commonwealth but it is not treated as a foreign country: it is simply Irish. The exchange of criminals between Great Britain and the Republic of Ireland is governed by the English Backing of Warrants (Republic of Ireland) Act, 1965,[42] and the Irish Extradition Act, 1965.[43] The 1967 Act accordingly only applies to extradition between United Kingdom dependencies and the Republic of Ireland.

Persons returned to United Kingdom

The United Kingdom must observe identical obligations towards persons returned to the United Kingdom from Commonwealth countries. They must be given forty-five days to leave after the conclusion of the trial, if acquitted of the extradition offence, before any further proceedings may be brought against them[44] and if they are acquitted or discharged the Home Secretary may arrange for them to be sent back free of charge with as little delay as possible to the country from which the extradition emanated.[45]

Conclusion

The new Act represents a significant move towards international legal harmonization, but the Commonwealth Law Ministers agreed upon the principles for the Commonwealth alone, and the government of the United Kingdom felt obliged to fall in with this agreement. It is a matter for regret that the systems of extradition for aliens and for Commonwealth citizens were not amalgamated and modernized, instead of leaving the law for aliens unaffected.[46] The recognition of the independence of Commonwealth states in extradition has long been overdue. The parallel role to be played by the judiciary and the executive may be described as a reasonable compromise, although the courts are going to be faced with some awkward and delicate decisions involving political issues, and the Home Secretary is going to be faced with some awkward and delicate decisions if he is obliged to refuse extradition in all political cases, whatever their intrinsic merits or demerits. The idea of a multilateral Commonwealth convention was rejected because it was said to be unnecessary to impose mutual formal legal obligations. Also, some countries were ready to proceed more quickly than others

42. *R.* v. *Metropolitan Police Commissioner, ex parte Arkins*, [1966] 1 W.L.R. 1593; [1966] 3 All E.R. 651 (D.C.).
43. O'Higgins, 15 *Int. and Comp. L.Q.* 369 (1966); 116 *N.L.J.*, at 69–70 (1965).
44. S.14.
45. S.15.
46. The Australians took the legislative opportunity to modernize their law of extradition affecting non-Commonwealth countries: Extradition (Foreign States) Act, 1966.

and efforts to conclude a formal convention might have retarded progress to the pace of the slowest state. The absence of a convention has certainly enabled some countries to get ahead and modernize their law and practice, but the chance of enacting uniform laws to deal with a common problem has unfortunately been lost. Finally, the continuing failure of the international community to harmonize extradition law for all states is to be regretted.

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