

Extradition and mental health: the need for multidisciplinary review and research.

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Title:

Extradition and mental health: the need for multi-disciplinary review and research

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Over one thousand people are forcibly removed from the United Kingdom each year, through the process of extradition, so that they might stand trial or be imprisoned abroad. Over the last ten years, 115,915 extradition requests were made using one such mechanism, the European Arrest Warrant, resulting in 15,243 arrests and 10,689 surrenders.¹ A somewhat similar system has now been agreed post-Brexit. In an increasing number of these cases mental health disorders are put forward in opposition to the process.² This is allowed under the law however a number of questions necessarily arise in the area. Central to these is whether extradition law and practice appropriately and fully takes these disorders into account, given the specific context. The importance of this hardly needs to be emphasised. Subjection to the criminal justice process within the UK itself is a challenging prospect for those with a mental health disorder, indeed for all people.^{3,4} The prospect of facing a criminal trial or incarceration in a foreign country apart from family, support systems, and familiar medical and mental health support networks, is daunting indeed.⁵

The extradition process is one facet of the attempts by countries to address internationally-related criminality. If an order for extradition is made, then the individual is transferred to the requesting country and detained there pending trial. She is then tried in that jurisdiction, and, if found guilty, sentenced to imprisonment there. Although each stage of this process presents challenges for requested persons, it is far from certain that the law acts to address or mitigate these challenges as it ideally would.²

Extradition law attempts to balance two competing interests; the facilitation of international criminal justice and the protection of requested persons.⁶ The process of extradition exists so that persons who have allegedly committed a crime are tried for it. It addresses the circumstances where someone commits a crime and then leaves a country or, more and more commonly, where a person commits a crime in a foreign country remotely. Indeed, remote online criminal allegations are increasingly common and were at the heart of three of the most high-profile instances of mental health and extradition interacting, those of Lauri Love⁷, Gary

McKinnon⁸ and most recently Julian Assange⁹. Countries obviously want to tackle crime, wherever and however it is committed.

Extradition treaties give force to the desire to address international and transnational criminality between countries. The UK is party to a considerable number of such treaties, and a replacement for the European Arrest Warrant (EAW) has now been agreed between the UK and the EU. These agreements provide the framework for international criminal co-operation in this regard.

It is the law within the UK itself, though, that provides the specifics of the process, including the protections available to persons sought by a foreign country. The governing law is found in the Extradition Act 2003. It provides that every person sought by way of extradition is entitled to an extradition hearing. At that hearing arguments against extradition can be put forward. Then, if an argument is accepted by the extradition judge, the individual is discharged and the process comes to an end. In England and Wales, extradition hearings take place at Westminster Magistrates' Court, in Scotland Edinburgh Sheriff Court and in Northern Ireland Belfast Magistrates' Court.

Within the Extradition Act 2003 there are several arguments that can be made by a requested person in opposition to extradition. Of particular relevance to persons suffering from a mental health disorder are one's physical and mental health, human rights and one's attachment to the UK. Most obviously relevant is the argument, or in law, the bar, based on mental health. It provides that an extradition be barred if it is established to the judge that it would unjust or oppressive to extradite the individual on the ground of her mental health. In considering this question, issues regarding the nature of the mental health condition, and the level of any associated risks, including suicide, are relevant.²

Applying along-side the oppression provision is the human rights bar. It provides that an extradition cannot proceed if it would give rise to a violation of the requested person's human rights. The most pertinent rights are those protecting one from inhuman and degrading treatment and punishment and the right to respect to one's private and family life.¹⁰ Finally, the 'forum-bar' may apply in such cases. This can prevent an extradition, in general terms, in cases where the link between the requested person, her crime and the UK is stronger than that between the individual and the foreign country.¹¹

In most reported extradition cases, where an individual suffering from a mental health disorder contested her transfer, more than one of these grounds is put forward. In the Lauri Love case, for example, all three were made with two of the three being accepted as acting to prevent his extradition to the United States.⁷

The overlap of arguments against extradition is one of the problems that can arise in the area of mental health and extradition. There are others. The first and most basic problem arising in the area is that the law arguably fails to adequately recognise that mental health cases engender distinct concerns. This is seen in the fact that both mental and physical health fall under a single bar and are generally

considered similarly. The three different arguments that can be made also illustrates a lack of specific and bespoke consideration in extradition law of mental health disorders.

Further, specific evidential considerations arise in the context of mental health and extradition that may not be sufficiently provided for by the law. This point is magnified by the fact that extradition cases are not uncommonly appealed, and so take some period of time to conclude with a requested person's mental health changing over that period. While there are rules of evidence that will allow new evidence to be heard on an appeal, whether these take proper cognisance of mental health disorders is open to question.

The existence of these problems is not to suggest that the law has not specifically responded to mental health in the context of extradition. It has. An example of which is the judicial development of a body of rules that are to be applied by judges where a requested person is at risk of suicide. This development is positive, although an important question remains whether the bar is set too high. In other words, that the risk of suicide must be as near as possible as a certainly prior to the extradition being stopped. This appears to have been the thinking behind the decision in the Julian Assange District Court case.

Finally, there are the questions surrounding diplomatic assurances in the area.¹² These arise where it is accepted by a court that there are concerns arising in a particular case and promises are sought and then responded to by a requesting country. These can concern details of detention and travel arrangements, particular mental health treatment or drugs afforded requested persons, the procedures to be followed where an individual is unfit to plead, and steps taken to prevent suicide. These can be problematic because they rely on the good will of the requesting country to in fact abide by its promises. Related to this is the issue a lack of formal monitoring of individuals extradited in such circumstances.¹³

There is an undoubted gap in knowledge and understanding where mental health and extradition law and practice intersect. Whilst the law has slowly come to recognise mental health and the issues that can arise it is far from certain whether that recognition appropriately balances the needs and care persons suffering from mental health disorders deserve and the public interest found in the desire of countries to pursue transnational criminal justice. From the perspective of psychiatric assessment and treatment, and the management of risk – including risk of self-harm, suicide and violence towards others – it would now be useful to understand the prevalence of mental health conditions amongst those who are being considered for extradition.

The operation of extradition law and practices require scrutiny from the perspective of both mental health practitioners and lawyers. Multi-disciplinary input into the issue is required. There is an almost complete dearth of academic and clinical literature in the area, be it psychological or legal, and this forms a gap that undoubtedly demands further research.

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