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Lessons from the Case of Abu Hamza

Dr Paul Arnell on lessons learnt

UK national and resident Abu Hamza was sentenced to life imprisonment in early 2015 by Manhattan Federal Court for various terrorist-related offences. His US sentencing hearing was the most recent in a long-running series of 10 separate cases. One remains – an appeal against his US conviction. Regardless of the outcome, and the chances of his success appear negligible, lessons can and should be drawn from Hamza's story.

At the root of Hamza's case was his involvement in a number of terrorist-related activities. These included inflammatory speeches within and outside Finsbury Park Mosque in London, possession of a terrorist encyclopaedia, support for a hostage-taking in Yemen and the direction of attempts to set up a terrorist training camp in Oregon. All of Hamza's relevant acts took place whilst he was physically present in London. They had an impact in or were connected to a number of countries including the UK, US, Yemen, Afghanistan, Australia, Sweden and Canada. Hamza's case was a complicated and lengthy criminal affair involving extraterritorial jurisdiction, extradition and human rights.

Hamza's subjection to the law began with a US request for his extradition in 2004. A trial at the Old Bailey for separate acts followed in 2006, at which he was convicted and sentenced to six years imprisonment. He unsuccessfully appealed, and lost a human rights challenge at the European Court of Human Rights (ECtHR). He fought his extradition during the course of his UK sentence. This entailed two hearings at the High Court and two at the ECtHR. In the US there were two cases, his trial in a US Federal Court in 2014 and the sentencing hearing earlier this year.

Abu Hamza al-Masri

Expedite

A first lesson to be taken from Hamza's case arises from the inordinate length of time elapsing from his acts to his US sentence – 14 years. This lesson is that action needs to be taken to expedite the process – as far as it is possible to do so without affecting the integrity of the proceedings and the rights of the accused. In this vein, it can be noted that within the discrete proceedings in Hamza's case time limits applied and matters generally progressed relatively rapidly. More generally, there have been a number of attempts to address the issue. These have included reforms to the Extradition Act 2003, introducing the need for leave to appeal in most circumstances. Whilst the length of time taken in Hamza's case was too long, it is also important to appreciate that considerable time is needed to fully and properly address such cases. The reasons behind the length of the case are its multi-jurisdictional nature (entailing international evidence gathering, prosecutorial liaison etcetera) and the UK's membership of the ECHR – not to mention the important point of Hamza's diligence in challenging his English conviction and opposing his extradition to the US. In light of these factors, expeditious proceedings were not reasonably possible. This, in one sense, is a reflection of the UK's adherence to the rule of law and the protection of the human rights of accused and requested persons.

A second lesson arising from Hamza's case is that the perception that human rights law frustrates international

criminal justice is misplaced. Hamza lost his human rights arguments against extradition at the ECtHR. He had argued on the basis of the rights to be free from torture and inhuman and degrading treatment and punishment, and rights to family and private life and a fair trial. Notably, the ECtHR rejected all his arguments in the face of a possible sentence of life imprisonment without parole and prison conditions entailing solitary confinement, other facets of sensory deprivation and restricted access to legal representation. Whilst the process of coming to this decision took some time, the ECtHR eventually held that human rights did not stand in the way of US criminal justice of a type which was more severe than that found in most Council of Europe states.

Reciprocal Extraterritorial Jurisdiction

A third lesson that can be taken from Hamza's case is that transnational criminal cases such as his can give rise to instances of reciprocal extraterritorial jurisdiction. This is something that should be eschewed, especially between kindred countries sharing adherence to the rule of law and human rights protection for accused persons. In Hamza's case extraterritoriality began with his London-based acts of conspiracy and participation in terrorism-related activities being directed at or affecting Yemen, the US and Afghanistan. The US then extended its criminal law to Hamza's UK acts, requested his extradition and gave assurances as to his future treatment. The ECtHR in turn measured US sentencing policy and prison conditions as against the Convention. Finally, Hamza was extradited, tried, convicted and sentenced. Extraterritoriality in his case likely ends there although there is the possibility in law of Hamza being sent back to the UK to serve his US sentence.

The web of reciprocal extraterritoriality in cases such as Hamza's is clearly far from ideal. It is inefficient, expensive and affects the reputation of international and national criminal justice. There are two possible avenues to address it. The first is by the UK paying greater deference to the law and practice of its extradition partners. Extradition treaties are predicated upon the assumption that the state party with which the UK is agreeing is one with which it can, and should, co-operate. In a requesting country where the rule of law and human rights operate it is not unreasonable to forego human rights scrutiny in every case where it is argued – certainly where explicit assurances have been given. A second way in which reciprocal extraterritoriality could be tackled is through the UK being prosecutorially more assertive. For example, a UK prosecution could be undertaken where the acts of the accused and the accused himself have a material connection with it. Hamza's case appears to be a suitable instance – two of the three sets of circumstances for which he was tried in the US were arguably more closely connected to the UK. A further example is the case of the NatWest Three – where a challenge to the DPP's decision not to prosecute was unsuccessfully made *(Bermingham and others v. Director of the Serious Fraud Office* [2006] EWHC 200).

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Manhattan Federal Court New York, where the court began jury selection for the Abu Hamza terrorism trial.

Transnational Criminal Justice

A fourth lesson arising from Hamza's case is that in instances of transnational criminality there are very few legal limits on prosecution authorities. Concurrent criminal jurisdiction between countries is almost common-place and a well-funded and aggressive prosecution service can act to gain custody of an accused with few real safeguards for the individual concerned. The international agreements that exist in the area act to facilitate co-operation and prosecution and do not generally offer protection to accused persons. Whilst UK extradition law does condition rendition with human rights, double criminality and speciality, these do not directly address excessive zeal by foreign prosecution authorities. The UK's forum bar to extradition is a unilateral response to this issue. It remains to be seen whether it will operate in a meaningful way.

Justice was eventually done in Hamza's case. He was involved in activities that could have, and indeed did, result in the death and injury of innocent civilians. His case illustrates the speed and relative ease with which serious and sophisticated transnational crimes can be committed. The legal response to his case, in stark contrast, appears archaic and glacial. Problems in transnational criminal justice unquestionably exist. Solutions however, even as between friendly kindred states, appear to be some way away.

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