



# Home Office

## HOME SECRETARY

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**RECEIVED 19 AUG 2009**

Rt Hon. Tessa Jowell, MP  
House of Commons  
London  
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**17 AUG 2009**

*Dear Tessa,*

Thank you for your letter of 3 August on behalf of a number of your constituents, about a request submitted by the United States for the extradition of Mr Gary McKinnon.

It may be worth setting out first a brief summary of Mr McKinnon's alleged offences. He stands accused in the United States of computer offences allegedly committed between February 2001 and March 2002. These involve the unauthorised access from his home computer in London - or "hacking"- into some ninety-seven US Army, Navy and NASA computers concerned with national defence, security and naval munitions supplies. Mr McKinnon is alleged to have deleted data, including vital operating system files - causing, amongst other things, the shutting down of the US Military District of Washington's entire network of over 2000 computers and the rendering inoperable of certain computer systems at a critical period following 11 September 2001. The United States allege that the conduct was both calculated and intentional; and states the cost of necessary systems repairs as being \$700,000.

During interviews under caution, Mr McKinnon admitted responsibility for some of his alleged actions (although not that he had actually caused damage). He stated that his targets were high level US Army, Navy and Air Force computers and that his ultimate goal was to gain access to the US military classified

information network. He also admitted leaving a note on one army computer reading:

“US foreign policy is akin to government-sponsored terrorism these days . . . It was not a mistake that there was a huge security stand down on September 11 last year . . . I am SOLO. I will continue to disrupt at the highest levels . . .”

This case has been the subject of much public and media interest and we have taken careful heed of all the points which have been urged on Mr McKinnon's behalf. However, there are a number of specific points that I would like to make. First, that in the scheme of the 2003 Extradition Act, the Home Secretary has an important but limited decision-making role. Indeed, the 'Act' provides that the Home Secretary must order extradition unless one of four conditions is met. (None of those conditions, I should say, arises in Mr McKinnon's case). Second, that the United Kingdom has important international obligations towards its many extradition partners. It takes those obligations seriously and, within what the law permits, regards it as its duty to render maximum assistance. We expect no less in return from the United Kingdom's extradition partners – consistent with the principle of reciprocity on which extradition arrangements are founded. Third, that the United States' request for Mr McKinnon's extradition had already been the subject of very rigorous judicial scrutiny before, last August, there was a supervening diagnosis of Asperger's Syndrome – a matter currently before the courts.

Judicial scrutiny of the case to date can be summarised as follows. Mr McKinnon was arrested here for extradition purposes in June 2005. There followed a hearing at the City of Westminster Magistrates' Court where, in an attempt to defeat the United States' request for his extradition, Mr McKinnon and those acting for him sought to raise certain statutory barriers to surrender. (Those are all set out in the Extradition Act 2003). In May 2006, however, the District Judge concluded that none of those safeguards applied and he accordingly sent the case to the Home Secretary for a decision as to surrender.

At that stage, Mr McKinnon had an opportunity to make representations to Ministers directly against his surrender – but, as above, only on certain limited grounds set out in the 'Act'. And where, as in this case, such representations are found not to be applicable or not to be made out, the law requires the Home Secretary to order surrender. That decision was reached in Mr McKinnon's case in July 2006.

As was his right, Mr McKinnon then appealed to the High Court, both against the Judge's decision of May 2006 and that of the Home Secretary in July 2006. The High Court dismissed those appeals in April 2007. Mr McKinnon then took his case to the House of Lords which, in July 2008, also dismissed his appeal. Mr

McKinnon subsequently made an application to the European Court of Human Rights which, in August 2008, rejected the application.

In this way, you will see that the case had withstood the closest possible judicial scrutiny before a supervening diagnosis of Asperger's Syndrome was brought to our attention. Notwithstanding the Home Secretary's limited role in the process and the late stage in the case at which Asperger's Syndrome was diagnosed, you will understand that extradition may not take place if to extradite would be incompatible with a person's rights under the European Convention on Human Rights (ECHR). In these exceptional circumstances, it was therefore agreed to consider fresh representations, including on grounds of Mr McKinnon's diagnosis of Asperger's Syndrome, as to whether the order for Mr McKinnon's surrender to the USA should be upheld.

Notwithstanding what has been reported in some quarters, that is *not* to say that we were able to approach the case with a broad, residual or general discretion: the correct legal consideration was whether to proceed with extradition was compatible with Mr McKinnon's human rights. If extradition was not compatible with Mr McKinnon's human rights, extradition would have to be halted, but if extradition was compatible with the ECHR, there was a legal duty to extradite, and to act in any other way would be unlawful. The decision as to the effect extradition would have on Mr McKinnon's human rights was not a decision to be taken lightly; but, after examining all of the material and evidence relied upon, we concluded in October 2008 that the material and evidence relied upon against Mr McKinnon's extradition to the USA did not engage his rights under the ECHR. Accordingly, there was an *obligation* under the Extradition Act 2003 to give effect to the order for extradition.

As was their entitlement, however, those acting for Mr McKinnon then sought and obtained the permission of the High Court for a judicial review of that further decision.

Separately, during May, Mr McKinnon also lodged a further application for judicial review, this time against a Crown Prosecution Service (CPS) decision in February 2009 not to bring a prosecution against him in the UK.

Following hearings of both matters (which included a careful weighing of all the evidence as to Mr McKinnon's Asperger's Syndrome), the High Court delivered its judgment on 31 July. They found that extradition would *not* contravene his human rights and that, accordingly, there was a statutory duty to proceed with extradition. Contrary to misleading reporting in some quarters of the press, the High Court specifically *rejected* the suggestion that there was any discretion which could be exercised to halt extradition. In view of the High Court's conclusions it would (subject of course to any successful challenge to their decision) be unlawful to seek to halt extradition.

In the other matter, the High Court refused Mr McKinnon permission to mount a judicial review challenge to the decision not to institute criminal proceedings in this country. They considered that the better place for prosecution was the United States and that the challenge to the decision of the Director of Public Prosecutions (DPP) not to institute proceedings in the UK was 'unarguable'. They also expressed the view that the challenge to the DPP's decision was really a collateral challenge to the extradition process and that this was a 'wholly unacceptable state of affairs'.

Mr McKinnon's lawyers have given notice of their intention to seek leave to appeal to the Supreme Court (as the House of Lords is soon to become). I do not therefore propose to say more at this stage about the facts of the particular case – other than to hope that this background may be of some assistance not only in clarifying the Home Secretary's role in the extradition process but also in demonstrating that those acting for Mr McKinnon continue to avail themselves before the courts of every opportunity to contest extradition. In this way, it may clearly be seen that the final outcome of the case and the UK's treaty obligations are being subjected to the closest attention and to the greatest possible procedural fairness.

If Mr McKinnon is extradited and is subsequently found guilty and receives a prison sentence in the United States, it would be open to him to apply to serve that sentence in the United Kingdom. The application would require the consent of both the American and British governments. The British Consulate in the United States would explain to Mr McKinnon, at his request, how to apply for the transfer.

Finally, your constituent's e-mail suggests that the extradition treaty between the UK and the United States favours US citizens. While there is a perception that the UK-US extradition treaty is weighted in favour of the US, this is not the case. The requirements were unequal under the terms of the previous arrangements, which were based on a Treaty negotiated in 1972, in that the UK required more from the US than they asked of us. The US was required to demonstrate a prima facie evidential case in support of extradition requests made to the UK, whereas the UK merely had to demonstrate 'probable cause'.

The information that must be provided in order for a UK extradition request to proceed in the US is in practice the same as for a US request to proceed in the UK. On the one hand, the UK is required to demonstrate "probable cause" in the US courts. In American law this is described as "facts and circumstances which are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime"

The US is required to demonstrate "reasonable suspicion" in UK courts. This has been defined in UK case law in the following terms, "circumstances of the case should be such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence". Every extradition request made by the US to the UK must provide sufficient information that would persuade the District Judge in the UK to issue an arrest warrant if the conduct for which extradition is sought had occurred in this country. This is contained within section 71 of the Extradition Act 2003 ("the 2003 Act").

*Yours aye*

*West of Spithead*

*ll* Alan Johnson