



CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Crown Office
25 Chambers Street
Edinburgh

31 January 2011

The Right Honourable Sir Scott Baker
The Extradition Review Panel
Home Office
C/o Head of Judicial Co-Operation Unit
5th Floor
Fry Building
2 Marsham Street
London
SW1P 4DF

Dear Sir Scott,

Review of Extradition

Thank you for your letter of 3 November.

I welcome the opportunity to contribute to the review on behalf of the Crown Office and Procurator Fiscal Service. I understand that the Scottish Government are providing you with a separate submission setting out the Government perspective.

Our International Co-Operation Unit in Crown Office deals with incoming and outgoing extradition requests to and from Scotland and has seen a significant growth in the number of incoming requests to Scotland since the Extradition Act 2003 entered into force on 1 January 2004. During 2004/5, 18 extradition requests were made to Scotland. This has rapidly increased year on year. The projected figure for this current financial year is 174 incoming extradition requests. This represents an almost ten fold increase in incoming extradition business in the last six years.

We have also witnessed an increasing level of extradition requests from Eastern European countries, which currently account for approximately 80% of the requests received.

In Scotland, Part 1 requests are received and dealt with by the International Co-Operation Unit at Crown Office. As the Scottish central authority, legal staff within that Unit certify Part 1 warrants and then appear in Court on behalf of the Lord Advocate who in turn represents the issuing judicial authority in proceedings.

Part 2 requests are received by the Scottish Government before being certified by the Scottish Ministers (in practice the Cabinet Secretary for Justice) and then transmitted to Edinburgh Sheriff Court (the Extradition Court for Scotland) and the International Co-Operation Unit for further procedure. The International Co-operation Unit will seek a warrant to arrest the requested person either in furtherance of a provisional or full request for extradition.

In Scotland, the prosecutor is permitted by law to direct the police in their enquiries and this provides for the swift and effective execution of extradition requests by the police.

Turning to each of the issues for review in turn, I would offer the following observations:-

Breadth of Secretary of State Discretion in an Extradition Case

As you may be aware in Scotland, the Cabinet Secretary for Justice has no power to exercise discretion in Part 1 requests (unless there are National Security issues or competing category 2 claims) but in Part 2 requests, he exercises discretion:

- (a) in the initial stages where he may refuse to certify if he considers that:
- The request either does not meet the fundamental requirements of either the treaty or convention base or has not been issued in the approved way.
 - The request does not disclose that extradition is sought for prosecution or enforcement of an extradition offence, namely a crime known to the Law of Scotland, when the dual criminality test is applied.
 - There is a competing extradition request.
 - Where the requested person has a recognised status within the United Kingdom that prevents extradition on human rights grounds such as would breach his/her Article 2/3 rights or is recognised as having refugee status.

In practice, failure to meet the dual criminality request is the principal ground on which the Cabinet Secretary would exercise his discretion.

We are of the view that his discretion in relation to dual criminality is a valuable safeguard which allows him to supervise the operation and application of the relevant treaty.

- (b) Once the Court has found that there are no bars to extradition; that the category 2 territory has produced sufficient evidence to establish a *prima facie* case to answer; and that extradition is compatible with the requested person's convention rights, then the Cabinet Secretary's discretion is at this stage limited to being satisfied that:-
- The death penalty will not be imposed or if imposed, will not be enforced;
 - any consent from a state from which the requested person has been extradited to the United Kingdom has given consent to onward extradition by the United Kingdom by the Category 2 territory;
 - where the requested party did not consent to extradition, on return, the requested person will only be prosecuted for the offences contained within the extradition request.

It is recognised that the aim of both the EAW Scheme and the four tier approach of the Extradition Act 2003 was to remove and reduce respectively the role of the Minister in the extradition process. This reduction in the role of the Minister with the introduction of the Extradition Act 2003 has permitted judicial decision making in appropriate issues of law and is further enhanced by the appeal structure as provided in the Act. This allows for a consistency of approach.

It should be noted that in Scotland, whilst the final Court of Appeal provided for extradition cases in the Extradition Act is the High Court of Justiciary, where a devolution issue, asserting a Convention rights' issue is raised, the appeal lies to the Supreme Court, which reinforces its role of superintendence of the application of human rights law.



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We consider that the Cabinet Secretary for Justice has sufficient powers in terms of the Extradition Act 2003 to exercise his discretion in connection with extradition requests and any return to the previous unfettered discretionary powers would be undesirable.

The Operation of the European Arrest Warrant including the way in which those of its safeguards which are optional have been transposed into UK law

The introduction and operation of the EAW has undoubtedly led to a far swifter and more efficient system of surrender of fugitives from one EU Member State to another. This has also contributed significantly to an increase in the number of extradition requests received in Scotland. It is considered this flows from the objective detailed in the Framework Decision that the EAW was to provide "the first concrete measure in the field of criminal law implementing the principle of mutual recognition as the cornerstone of judicial co-operation".

This has, in itself, raised some tensions in executing states in terms of concerns regarding proportionality (which have mainly arisen in requests originating in Poland). The impending introduction of the Schengen Information System heightens concerns regarding the increase in extradition requests generally, but also acutely in relation to those which could potentially be considered "trivial" in relative terms. There is a genuine resource challenge for the Crown Office and Procurator Fiscal Service and the Scottish Court Service, as there will be for those involved in dealing with these cases in other jurisdictions, to identify, in the current economic climate, how resources could be reallocated to allow them to cope with the anticipated demand.

Whilst a number of Articles have not been transposed, we consider there may be value, based upon experience, in Article 4(6) and 4 (7) (a) being considered for transposition in any future legislative amendment of the Extradition Act 2003.

Article 4 of the EAW Framework Decision provides grounds for optional non execution of a European Arrest Warrant received from the judicial authorities of another Member State. As these provisions have not been implemented by the Extradition Act 2003, the UK courts currently execute EAWs which, would not be executed in those Member States where the provision has been implemented.

Article 4.6 provides that if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State, the executing Member State may execute the sentence or detention order in accordance with its domestic law. The UK has implemented the Additional Protocol to the Transfer of Sentenced Persons Convention 1983 which provides for Member States to assume execution of a sentence imposed in another Member State. If Article 4.6 was implemented, in the event of a successful challenge to extradition under Article 8 of the European Convention on Human Rights as applied by Extradition Act 2003 s21 or due to the passage of time under s14, the Court could refuse extradition but order the foreign sentence be served in the UK, whereas currently some fugitive avoid serving the sentence imposed abroad

It is submitted that Article 4.6 raises issues in relation to how sentences considered appropriate in foreign courts are translated as "being in accordance" with (the other States) domestic law.

At present, a UK National, who is ordered to serve a sentence abroad, may seek to serve that sentence in the UK where more than six months remains to be served and both States agree to the transfer.

Article 4.7 (a) strikes at offences under the EAW where the offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such. If this provision is transposed then prosecution may take place there. This is contrary to current domestic law approaches within the UK but could ensure effective prosecution of offenders where there is otherwise an absence of criminal jurisdiction.



In relation to Article 4.7 (a) the Supreme Court has taken a robust approach where an EAW has been issued for prosecution in another Member State and considered that even if part of the conduct took place in the United Kingdom, the place where the criminal conduct occurred or had its impact is the appropriate forum for prosecution

As the UK is not party to the Convention on the Transfer of Proceedings 1972, jurisdiction would need to be established in accordance with domestic rules. As you will be aware, the House of Lords European Scrutiny Committee recently rejected a widening of UK jurisdiction when considering the draft Council Framework Decision on the Transfer of Proceedings in criminal matters.

Whether the Forum Bar to Extradition be commenced

It is submitted that if the forum bar was to be introduced, this would require the court to undertake the invidious task of considering the weight of evidence available in each jurisdiction and further, in Scotland, would likely lead to an assessment of the prosecutorial function of the Lord Advocate. This would potentially arise as the Court would require to consider whether the Lord Advocate actively or passively considered prosecution and the appropriateness, proportionality and overall reasonableness of that decision.

While in England, the decision of the Prosecutor to proceed or not may be the subject of judicial review, that has only arisen in limited circumstances in Scotland, to date.

The Courts have been invited to undertake such a task and have rejected it as inappropriate. The accepted reasoning for this approach by the Courts is:-

- That any decision by the Prosecutor to make enquiry or be compelled to make enquiry would undermine the primary function of the treaty based comity or justice, namely to facilitate cross border execution of extradition requests.
- That the decision to proceed or make investigation is a matter for the discretion of the Lord Advocate alone (consistent with the independence of the role of the Lord Advocate as enshrined in the Scotland Act 1998).
- To require the Prosecutor to consider instructing enquiry into criminal conduct brought to the Lord Advocate's attention by an extradition request would lead to delay in proceedings in both jurisdictions which would not be in the interest of justice and would benefit the fugitive.
- The Prosecutor may be open to an accusation of "forum shopping".
- That prosecution is best undertaken in the state where the crime is alleged to have been committed.

The Supreme and Administrative Court in England has addressed this in the context of the EAW and the United States and has rejected the notion that prosecution ought to take place in the United Kingdom when there is a valid extradition request from the requesting state and considered that such prosecution need only be undertaken where the issue is in a "fine balance". In Scotland, the Court has accepted the submission of the Lord Advocate that where the impact of the crime is most keenly felt [and that being the jurisdiction which founds jurisdiction to prosecute by issuing the extradition request] is the best place to prosecute the offence (*Calder v Scottish Ministers* 2006 SCCR 609)

Accordingly, we consider that the forum bar should not be commenced.

Whether the US – UK Extradition Treaty is unbalanced



In relation to requests from the UK to the USA, the treaty of course provides that "such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested" be supplied. This standard is described as "probable cause" and has been defined as "a reasonable belief that a person (has committed, is committing or is about to commit) a crime". This appears to be the equivalent of the recognised evidential standard of proof in Scotland which is required to obtain a search warrant.

We consider that the burden of proof for requests from the UK to the USA is no more onerous therefore than that required under the Extradition Act 2003 for requests from the United States to the United Kingdom.

In relation to requests from the USA to the UK, the Extradition Act 2003 Section 71 provides that the United States provide information that enables the Judge to issue a warrant for the arrest of the person whose extradition is requested and the Judge has reasonable grounds for believing that the offence in respect to which extradition is requested is an extradition offence and there is information within the request that:-

- (a) would justify an issue of a warrant for the arrest of a person accused of the offence within the Judge's jurisdiction, if the person whose extradition is requested is accused of the commission of the offence; or
- (b) would justify the issue of a warrant for the arrest of a person unlawfully at large after conviction of the offence was in the Judge's jurisdiction if the person whose extradition is requested is alleged to be unlawfully at large after conviction of the offence.

The United States need not provide *prima facie* evidence of criminal conduct. To do so would require the United States to provide more evidence than the UK is required to provide to the US.

It is understood that it may be suggested that the United States, in requiring information of probable cause, sets a higher standard for extradition than the UK and in so doing seeks to provide its own nationals with a degree of protection not afforded those whom the US seeks to extradite from the UK.

However we do not have concerns in relation to this matter.

It is submitted that the US, and the UK simply seek to apply the necessary standard and burden of criminal proof of the fugitive's alleged responsibility for the criminal conduct which forms the basis of proceedings in their respective jurisdictions. In issuing a request to the US, the UK Authorities require to produce a warrant granted by the Court as well as a copy of the Indictment. For such to be obtained in Scotland, the Prosecutor needs to be satisfied that there is a sufficiency of credible and reliable corroborated evidence. We consider that the test applied in the US is not radically dissimilar.

Whether requesting States should be required to provide Prima Facie evidence

Whilst any requirement for requesting States to provide *prima facie* evidence would allow the Court and the requested person to be satisfied that there is a sufficiency of evidence against them, the Courts in the UK and at Strasbourg have made it abundantly clear that the Court in the requested State cannot enquire into the nature, extent, validity or weight of evidence in the requesting State and any issues that may arise for the requested person are to be addressed within the trial process in the requesting State.

It is submitted that to require requesting States to provide *prima facie* evidence after several years of operating a system which did not require that, might be viewed as a retrograde step and might cause states to reconsider their willingness to engage effectively in extradition.

Thank you again for the opportunity to contribute to your review. If I can be of further assistance, please do not hesitate to contact me.



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If a detailed discussion with the Crown Office and Procurator Fiscal Service would be helpful then I know that Kate Frame and David Dickson of our International Co-Operation Unit would also be delighted to assist.

Yours sincerely



Catherine Dyer
Crown Agent and Chief Executive



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