HOME OFFICE - EXTRADITION REVIEW

SUBMISSIONS ON BEHALF OF THE CROWN SOLICITOR FOR NORTHERN IRELAND

1. Introduction

1.1 Set out in this document are the views of the Crown Solicitor's Office ("CSO") on the five areas which the Extradition Review Panel has indicated will be the main focus of its work.

1.2 These areas are:

(i) the breadth of the Secretary of State's discretion in an extradition case;

(ii) 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;

(iii) whether the forum bar to extradition should be commenced;

(iv) whether the US-UK Extradition Treaty is unbalanced;

(v) whether requesting states should be required to provide prima facie evidence.

1.3 The CSO views/comments are based on our experience of the working of the extradition arrangements in Northern Ireland.

2. Background

2.1 In Northern Ireland the CSO is the authority responsible for all of the extradition proceedings. This has been the position since 1986 when the then Attorney General for Northern Ireland made a statement in House of Commons to the effect that "... the Crown Solicitor for Northern Ireland will undertake the responsibility for advising the Royal Ulster Constabulary [now Police Service of Northern Ireland] on the accuracy of warrants, including all warrants now outstanding, upon which it is sought to obtain the extradition of persons from the Republic of Ireland for terrorist offences". Whilst initially described as a role limited to terrorist offences the actual position since then has been that the CSO acts in relation to the return of all fugitives to Northern Ireland (terrorist and non-terrorist).

2.2 Extradition has not been devolved to the Northern Ireland Executive thus the policy, legislation and practice is UK wide and the Secretary of State involved in Northern Ireland cases is the Home Secretary. It had, until approximately 4 years ago, been the Secretary of State for Northern Ireland.

2.3 CSO also acts on behalf of foreign issuing judicial authorities in proceedings under Part 1 of the Extradition Act 2003 ("the 2003 Act") and for foreign states under Part 2. This is provided for by Section 192 of the 2003 Act which amends, by the insertion of a new Section 31A, the Prosecution of Offences (Northern Ireland) Order 1972.

2.4 It has only been since the commencement of the 2003 Act - that is since 1 January 2004 - that the CSO has acted for foreign states

(ie other than the Republic of Ireland under the Backing of Warrants legislation) seeking fugitives in Northern Ireland as prior to that any fugitives found in Northern Ireland were arrested and taken to Bow Street Magistrates' Court and dealt with there.

2.5 The main bulk of cases before January 2004 involved the extradition of fugitives from Northern Ireland to the Republic of Ireland under the Backing of Warrants (Republic of Ireland) Act 1965.

2.6 As with the other parts of the UK, CSO has witnessed a substantial increase in the number of extradition cases.

3. The role of the Secretary of State

3.1 As stated, given the somewhat recent involvement of CSO in extradition cases involving foreign states, other than the Republic of Ireland, we have had very little experience of cases involving the Secretary of State. Accordingly CSO has no practical reason(s) to seek any change to the statutory role and functions of the Secretary of State under the 2003 Act. So far as we have had engagement or involvement in matters involving the Secretary of State these have progressed satisfactorily. It appears to be appropriate that the courts have most of the engagement in extradition cases and that the limited role of the Secretary of State is appropriately drawn.

4. Operation of the EAW Scheme

4.1 The 2003 Act represents the acceptance of the surrender scheme in the Framework Decision (13 June 2002) of the Council of the European

Union, and also affords protection to requested persons within the jurisdiction of the United Kingdom.

4.2 The Framework Decision makes provision for the "European Arrest Warrant" ("the EAW"). This is described in the sixth recital as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial co-operation".

4.3 The eighth recital focuses on the judicial authority of the requested Member State in these terms:

> "Decisions on the execution of the European Arrest Warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender."

Thus the judicial process is a central element of the scheme established for the surrender of persons by one Member State to another.

4.4 The Framework Decision has to be considered in conjunction with the 2003 Act, which is the domestic measure of transposition and comprehensively reformed the law relating to extradition. The adoption of the Framework Decision, is widely acknowledged as creating "fast track" extradition arrangements amongst the EU Member States.

4.5 The themes of simplified procedures and expedition recur throughout the 2003 Act: for example, sections 4-6. Sections 8-19B contains an array of provisions arranged under the general heading "Bars to Extradition". These include matters such as the rule against double jeopardy, so-called "extraneous considerations" and the passage of time. The judge must decide whether the extradition of the requested person is precluded by any of the specified prohibitions. Further, by virtue of Section 21, the court is obliged to consider whether the extradition of the requested person would be compatible with the Convention rights given effect by the Human Rights Act 1998.

4.6 In Northern Ireland, before the 2003 Act, we had most experience of the backing of warrants system which operated between the Republic of Ireland and the UK. Leaving aside the difficult years involving terrorist offences and the political offence defence which troubled both jurisdictions, the backing of warrants system did work very well for other non-terrorist, non-political cases. In essence, the warrants issued in either jurisdiction were recognised in the other jurisdiction and were endorsed on the back to facilitate execution of the warrant in the respective jurisdiction. In Northern Ireland we received warrants from the Republic of Ireland, made application before the appropriate Justices of the Peace to have them backed for execution, nothing else being required before the fugitive was arrested and brought before the Magistrates' Courts. In the Republic of Ireland, they initially started from this position of warrant acceptance but, over the years, for various reasons, they added to the requirements and eventually we had to send our warrants together with statements of fact and law which were sent to the Irish Attorney General's Office together with a certificate stating that if the person were returned they would be prosecuted for the

offences set out in the warrants. These were incremental add ons to the backing of warrants system.

4.7 Thus, in a simplified way, the EAW idea had, through the backing of warrants, been operative and effective. It was, for example, common for someone to be arrested in Northern Ireland in an early morning arrest, brought before the court later that day and, if, as they often did, they consented to extradition they could be before the court in the Republic of Ireland later the same day or certainly the next day. Also in cases where they did not consent the extradition hearing would have taken place on the same day as the arrest and if extradition was granted the person concerned was extradited following the statutory 15 day period.

4.8 Within the EAW scheme the warrant recognition concept was widened in that the EAW became the warrant recognised throughout the Member States and because it is in a format and contains common information it is easily accepted and acted upon and in our view the scheme is in theory (and practice) effective and represents a large measure of cross-border co-operation amongst the signatories.

4.9 Our experience of the EAW scheme so far has been a positive one. The matters we highlight below do not all arise from the working of the EAW scheme but sometimes have more to do with how the cases in Northern Ireland proceed. We would highlight:

(a) the nature and seriousness of the offences in respect of which EAWs have been issued from other jurisdictions and sent to the UK for execution. It is usually the case that the police, Public

Prosecution Service for Northern Ireland (PPSNI) and CSO would tend to use the extradition arrangements for the more serious types of offences. This represents a recognition of the resources involved in the cases and the need for these to be marshalled in connection with the most serious offences. However, other Member States do not appear to exercise the same considerations. We sometimes receive EAWs for what appear to be minor types of offences, such as, minor thefts. How this is addressed would obviously require careful handling as Member States are entitled to make use of the EAW for whatever offences they regard meet the threshold but some measure of re-assessment on this appears necessary especially when resources are limited and are likely to become even more so.

(b) although possibly confined to Northern Ireland (and now becoming less of an issue) is the question of prison conditions and criminal justice regimes in other Member States. There was for some years after 2004 a tendency on the part of our executing judicial authorities to entertain lengthy fact finding research in other Member States. Also the Legal Services Commission appeared to have authorised the expenditure of legal aid to the requested person's legal team and expert witnesses to visit various Member States to assess and gather evidence about aspects of their legal systems and, in particular, their prisons and prison systems. This had the effect of extending the proceedings for many months (and in some cases years), putting a heavy drain on legal aid resources and, arguably, not giving sufficient recognition to the Member States regimes. This has now changed somewhat as the same countries systems tend to come up for scrutiny and

our executing judicial authorities would appear to now have a fairly settled view on various regimes. Also there have now been a series of decisions from Divisional Courts in England and Wales where prison conditions have been the subject of discussion and unless the requested person can make a particular case as to how conditions will likely affect him personally prison conditions would appear to be less of an issue.

(c) the conduct of proceedings in Northern Ireland have been, generally, dealt with by one nominated judge who had no previous expertise in extradition matters and who has tended to deal with extradition cases around his normally very heavy County Court/Crown Court list. Hence there are reviews listed at various times of the day which are frequently outside normal court business and hearings have to be time-tabled around other court cases. The result of all this is that proceedings tend to take a long time and certainly well beyond the time periods envisaged in the Framework Decision. This may be an issue only for this part of the UK as we, in Northern Ireland, note the expedition with which cases appear to be dealt with in England and Wales.

(d) also there was, until the Divisional Court in Northern Ireland (on two occasions) stated categorically that there should not be, a tendency to present the defence to the extradition one bar at a time instead of presenting the whole case dealing with all the possible bars to extradition. This one bar at a time approach, which appeared to be being favoured by the requested person's legal team and the executing judicial authorities, meant that cases

were extended, appeals were generated and cases were remitted back to the executing judicial authority for further consideration.

(e) the quality of some of the translations of EAWs has given rise to concern and difficulty. In one case, we had sought two translations from Spanish to English and when the case came before a Divisional Court in Northern Ireland it too ordered that the Spanish to English translation be done again, as a member of the court who is fluent in Spanish considered that it was not sufficiently accurate. This proved, in fact, to be the case.

(f) whilst accepting the central idea of mutual recognition of EAWs there appears to be insufficient quality control on some of the EAWs which are sent for execution. The EAW scheme tends to envisage that an EAW should be used to effect a fugitive's arrest no matter how inadequate/flawed it may appear to be and no matter how aware one may be of the prospects of the EAW being successfully challenged before the executing judicial authority. Given the time that the EAW scheme has now operated it would appear appropriate/necessary that there be some system or filter allowed whereby the quality of the EAW can be properly assessed so that arrests are not effected and time and resources expended on what, from the outset would appear to be, flawed/deficient EAWs.

5. <u>Whether the forum bar to extradition should be commenced</u>

5.1 To a limited extent and in a fairly confined area we in Northern Ireland have had with the Republic of Ireland a sort of forum arrangement

through the Criminal Jurisdiction Act 1975 whereby, for certain offences, a person may be tried in either Northern Ireland or the Republic of Ireland at his/her election. This has been rarely used but when it has, for example, if the person is in the Republic of Ireland and elects to be tried in Northern Ireland the PPSNI has to obtain the book of evidence/committal papers and take a view on the charges that the evidence might sustain in this jurisdiction. Thus, in practice, one is here dealing with neighbouring jurisdictions, both having a common law system and whose criminal law has a particular similarity. But even then the system is not without difficulty and we think it is fair to say it has not been favoured. To expand that concept to embrace a large number of Member States/Foreign States whose legal systems and regimes differ greatly tends to magnify the issues and difficulties that could arise. We would therefore urge that the impact and implications of commencing the forum bar be very carefully considered.

6. Whether the US.UK Extradition Treaty is unbalanced

6.1 In Northern Ireland we have had very few (one in fact attempted) extraditions to the US from Northern Ireland hence it is difficult for us to comment on the content of such requests. However, we have had reasonable experience of a number of requests sent from Northern Ireland to the US and the extensive work that was required to set out a probable cause case to meet their requirements. It would appear that there is an imbalance in terms of effort and content and it is perhaps difficult, we consider, to understand why that should be. It would appear more equitable, and preferable, that the UK and the US mirror the requirements sought by each. However, we fully recognise the

government to government issues which have to be considered here and would not seek to put our views any stronger than set out above.

7. Should requesting states be required to provide prima facie evidence?

7.1 If such a requirement were to be introduced to Part 1 EAW countries then the centre piece of the Framework Decision would be removed - that is mutual recognition - and the whole scheme would be or would have to be revised, if not transformed beyond recognition.

7.2 As regards Part 2 countries we do not proffer a view in that the Central UK Government is best placed to take a view based on its dealings with the countries involved and through the Treaty arrangements which exist between them.

8. Conclusion

8.1 We have in the views expressed herein attempted to provide, from our practical experience, a flavour of issues and matters that the Panel may wish to be aware of. We have not, and do not seek, to express views or present positions that only the UK Government can properly present as it is the government which is equipped to assess the political, diplomatic and sovereign state issues that extradition tends to highlight.

Crown Solicitor's Office

26 January 2011