Anti-social Behaviour, Crime and Policing Bill

Fact sheet: Extradition (Part 12)

Background

1. The *Coalition Programme for Government* included a commitment to "review the operation of the Extradition Act – and the US/UK extradition treaty – to make sure it is even handed".[1] The Government subsequently commissioned a review by the Rt. Hon. Sir Scott Baker in September 2010.[2] The Home Secretary published the review's report on 18 October 2011[3] and announced the Government's response in an oral statement on 16 October 2012.[4] The review recommended a number of changes to the Extradition Act 2003 ("the 2003 Act"), including changes relating to asylum, time limits for notice of appeal and leave to appeal. In addition, a number of other issues have been identified concerning the operation of the 2003 Act. The provisions in Part 12 are intended to implement certain of the review's recommendations, address these issues and improve the overall effectiveness of the 2003 Act. In particular, it includes changes to the operation of the European Arrest Warrant ("EAW"), which were announced to Parliament on 9 July 2013.[5] These changes have been carefully designed to address the concerns of Parliament, non-governmental organisations and others, by providing better safeguards for those, particularly UK citizens, who are subject to EAWs. These changes will help to ensure that the EAW properly strikes the balance between necessary law enforcement action and civil liberties.

2. In terms of extradition from the UK, the 2003 Act provides for two different processes, depending on the territory that has requested extradition.

3. Part 1 of the 2003 Act deals with the surrender of people from the UK to other EU Member States under an EAW.[6] The process in a Part 1 case is, in summary, as follows:

    - on receipt of an EAW, the National Crime Agency must decide whether to issue a certificate;
    - if a certificate is issued, the person is arrested;
    - the person is brought before a district judge as soon as practicable for an initial hearing. The judge decides whether the person is the person named in the EAW. A date for the extradition hearing is then fixed;

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[1] https://www.gov.uk/government/publications/the-coalition-documentation
[2] House of Commons, Official Report, 8 September 2010 column 18WS.
[3] http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review
[4] House of Commons, Official Report, columns 164 to 180 and House of Lords, Official Report, columns 1373 to 1383.
[5] House of Commons, Official Report, columns 177 to 193.
[6] The provisions in Part 1 give effect to Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), as amended by Council Framework Decision 2009/299/JHA.

- at the extradition hearing, the judge must decide whether the offence is an "extradition offence" and, if so satisfied, must consider whether extradition is barred by any of a number of reasons set out in the 2003 Act;
- if the judge decides that extradition is not barred, the judge must order extradition. The person may appeal this decision;
- if the judge decides that extradition is barred, and discharges the person, the requesting State also has a right to appeal against this decision.

4. Part 2 of the 2003 Act deals with extradition from the UK to territories which are not EU Member States but which are designated by order for the purposes of that Part. The process in a Part 2 case is, briefly, as follows:

- on receipt of a request, the Secretary of State[7] must decide whether to issue a certificate. If the request is valid, the certificate and request are sent to a judge;
- the judge may issue a warrant for the arrest of the person concerned if certain conditions are satisfied;
- the person is arrested and brought before the judge, and the judge fixes a date for the extradition hearing;
- at the hearing, the judge must consider whether the person's extradition is barred for any of the reasons set out in the 2003 Act. If satisfied that no bars apply, the judge must send the case to the Secretary of State for a decision on whether to order extradition;
- provided the Secretary of State is satisfied that the person's extradition is not prohibited, he or she must order the person's extradition, unless certain limited exceptions apply;
- a person may appeal either the decision of the judge or the Secretary of State or both. It is open to the requesting State to appeal a decision to discharge the person.

Date of extradition hearing

5. Under the 2003 Act, a judge must fix a date for the extradition hearing to begin, which must not be later than 21 days after arrest. In practice, there may be circumstances that mean the person's extradition would be deferred, such as if he or she had been charged with a criminal offence in the UK or was serving a custodial sentence. However, the date of the hearing must still be set within 21 days of arrest. Clause 136 of the Bill therefore amends these requirements so that in cases where extradition proceedings have been deferred because the person has been charged with an offence in the UK or is in custody serving a sentence of imprisonment or other form of detention, the obligation to fix a date for the extradition hearing to begin no later than 21 days after arrest does not apply.

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[7] In Scotland, most of the functions which the Secretary of State performs in England, Wales and Northern Ireland are performed by the Scottish Ministers.

Extradition barred if no prosecution decision in requesting territory

6. The Bill (clause 137) ensures that, in cases where a person is wanted to stand trial, extradition can only go ahead where the issuing State is ready to charge and to try the person. Where it appears to the judge that there are reasonable grounds for believing that a decision to charge and a decision to try have not both been taken in the issuing State (and that the person's absence from that State is not the only reason for that), extradition will be barred unless the issuing State can prove that those decisions have been made (or that the person's absence from that State is the only reason for the failure to take the decision(s)). This provision will help prevent people from spending potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence.

Proportionality

7. Proportionality is a fundamental principle in EU law, and therefore underpins the operation of the EAW. However, the use of the EAW for relatively minor offences has long been identified as a problem, and resources that could be directed at dealing with more serious cross-border crime are often being diverted to matters which should be tackled in a different way (for example by way of a fine, or a court summons). The changes made to the 2003 Act by clause 138 will require the courts to consider whether execution of an incoming EAW request would be disproportionate. This is in addition to requiring the judge to be satisfied that extradition would be compatible with the person's Convention rights. In deciding whether extradition would be disproportionate, the judge will have to take into account the following factors (so far as he or she thinks appropriate): the seriousness of the conduct, the likely penalty and the possibility of the issuing State taking less coercive measures than extradition, such as issuing a fine or a court summons.

8. This new proportionality bar will help to ensure that extradition only occurs where the judge considers extradition would be proportionate. In addition, to reduce the potential burden on the criminal justice system, we will take a more pragmatic approach to our administrative processes when an EAW is received, to ensure that the most trivial requests are identified and where appropriate dealt with administratively before ever getting to the Courts. The aim will be to work practically with other States to identify and find alternative solutions for the most trivial requests.

Hostage-taking considerations

9. Clause 139 also includes a provision to bring the UK law fully in line with the EAW Framework Decision by removing the hostage-taking bar from Part 1 of the 2003 Act. At present, in a Part 1 case, a person's extradition is barred if the requesting State is a party to the International Convention against the Taking of Hostages and the limited conditions of sections 16 of the 2003 Act

are met. There is no equivalent ground for refusal in the Framework Decision and its retention could result in infraction proceedings. In practice, the removal of this provision will have a negligible impact on extradition proceedings, given the hostage-taking bar has never been used.

Request for temporary transfer etc

10. Clause 140 of the Bill allows a requested person in EAW cases and the issuing State to contact each other, if they both consent, before extradition takes place. In particular, it will allow for the temporary transfer of the person to the issuing State and also for the person to speak with the authorities in that State whilst he or she remains in the UK (for example, by video link).

11. It is expected that one effect of this change will be that, in a small number of cases, the EAW will be withdrawn; for example, there may be cases where, having spoken with the person, the issuing State decides that he or she is not the person they are seeking, or did not in fact commit the offence in question. In other cases, where extradition is pursued, this provision may mean that some of the processes required ahead of the trial can be completed before extradition takes place, with the result that the person may spend less time in pre-trial detention.

Appeals

12. At present, a person has an automatic right of appeal against extradition decisions.[8] The Baker Review found that the success rate of appeals was extremely low (12.65% in 2010), and that the court system is burdened by unmeritorious appeals.

13. The new provision in clause 141 makes the right of appeal for both the requested person and requesting State subject to the leave of the High Court. This is intended to filter out unarguable appeals to reduce the burden of unmeritorious appeals that currently delay hearings.

14. The new provision also sets out that the High Court must not refuse to entertain an application, by the requested person, for leave to appeal solely because it has been submitted outside the normal time period, if the person did everything reasonably possible to ensure that the notice was given as soon as it could be. (Normally, notice of appeal must be given within seven days of the extradition order being made in Part 1 cases, and within 14 days of the date on which the Secretary of State informs the person of the order in Part 2 cases.) This provision does not apply to appeals raised by the requesting State.

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[8] These appealable decisions are: a judge's decision to order extradition in Part 1 cases (section 26); the decision of a judge to send a case to the Secretary of State in part 2 cases (section 103); and appeal against decision of the Secretary of State to order extradition (section 108).

Judge informed after extradition hearing or order that person charged with offence or serving sentence in the United Kingdom

15. When a person who is to be extradited is charged with an offence in the UK or sentenced for such an offence, and such circumstances come to light before the end of the extradition hearing, the extradition process is deferred while domestic proceedings take place. However, if the judge hears of the domestic case after the end of the extradition hearing, extradition cannot be barred. If, for example, a person is on bail pending their surrender to another country and they commit a crime in the UK, they must still be extradited no matter the seriousness of the offence. After that the UK can seek the person's temporary surrender or wait until the person has served the sentence in the requesting state. The changes made by clause 142 mean that in such cases, the domestic case must be dealt with first. This ensures the primacy of domestic proceedings over extradition.

Asylum etc

16. At present, if a person makes an asylum application after a certificate is issued, he or she cannot be extradited before that application has been finally determined. The new provisions extend this protection to cases where a person has made an asylum claim before the initiation of extradition proceedings.

17. Similarly, at present, the Secretary of State can discharge a person if he or she has been granted one of the following, provided the grant was made before extradition proceedings began: (i) refugee status, or (ii) leave to remain in the UK on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove him or her to the requesting territory. The Bill extends this power so that people who are granted refugee status or leave to remain after the certificate has been issued can also be discharged.

Consent to extradition not to be taken as waiver of specialty rights

18. Clause 144 ensures that a person who consents to his or her extradition does not lose the benefit of any "specialty protection" he or she would otherwise have. Specialty protection ensures that following a person's extradition, in general, he or she can only be prosecuted for the offence or offences listed in the extradition request. At present, the 2003 Act states that a person waives specialty protection when he or she consents to extradition. This leads in practice to very few people consenting to extradition, even where they may otherwise have no objections. Removing this waiver will enable those who wish to be extradited to be surrendered quickly without risking being tried for any other alleged offences. This will apply in all extradition cases except where our bilateral arrangements specifically exclude it. This change will apply to both Parts 1 and 2 of the 2003 Act.

19. The new provision is expected to increase the number of people who consent to extradition at their initial hearing, reducing the costs associated with onward legal challenge.

Definition of "extradition offence"

20. The purpose of the changes made by clause 145 is threefold. First, it makes very clear that in cases where part of the conduct took place in the UK and that conduct is not criminalised here, the judge must refuse extradition for that conduct. This will require "dual criminality" to be present in cases where the offence was committed in whole or in part in the UK, which is consistent with the terms of the EAW Framework Decision. The new provisions ensure that the requirement for dual criminality in such circumstances is clear on the face of the legislation.

21. Second, it simplifies the existing definitions of "extradition offence", which are long and complex.

22. Third, it makes a change to the circumstances in which conduct, that took place outside the issuing State, can be an "extradition offence" in a Part 1 case to ensure the UK is fully compliant with the Framework Decision. At present, the 2003 Act incorrectly transposes the Framework Decision by imposing a requirement that the conduct be punishable in the issuing State and in the UK with a minimum period of 12 months imprisonment. The amendment removes the requirement for the conduct to be so punishable in the UK. However, it will still need to be criminalised here.

23. The changes will ensure that dual criminality is required in all cases where the conduct took place in whole or in part in the UK, to make the definitions of "extradition offence" easier to understand and to ensure the UK is fully compliant with the Framework Decision in this regard.

Proceedings on deferred warrant or request etc

24. If two extradition requests are made in respect of the same person, one is deferred pending the outcome of the other. At present a judge may start the deferred case even if extradition has been ordered in the other case. This is an anomaly that needs to be closed. The Bill will ensure that in such cases, a judge can only resume proceedings in the deferred cases, or order that extradition is no longer deferred, in cases where the competing request has been discharged in the requested person's favour.

Non-UK extradition: transit through the United Kingdom

25. Clause 147 provides for the issue of certificates to facilitate the transit through the United Kingdom of a person who is being extradited from one territory to another (where neither of those territories is the United Kingdom). A certificate authorises a constable or other authorised officer to escort the person from one form of transportation to another, to take the person into custody to facilitate the transit, and to search the person (and any item in his or her possession) for any item which he or she may use to cause physical injury (or, where he or she has been taken into custody, to escape from custody).

Extradition to a territory that is party to an international convention

26. At present, the Secretary of State may designate territories with which the UK does not have formal extradition relations, but which are parties to conventions and specify conduct in relation to them. This has proved difficult to operate, for example, because territories frequently sign up to conventions, and because it is difficult to respond quickly to changes to countries' names or to the creation of new countries. Clause 148 deals with this problem by allowing the Secretary of State to designate conventions rather than territories. The Secretary of State will only be able to designate conventions to which the UK is a party and only specify conduct to which the relevant convention applies. The effect would be that the 2003 Act would apply to the person's extradition as if the requesting territory were a territory designated under Part 2 of the Act. Examples of conventions that could be designated include the UN Conventions on terrorism, the UN Convention against corruption and the UN Convention on transnational organised crime.

Credit for time in custody awaiting extradition to United Kingdom to serve sentence

27. Article 26 of the EAW Framework Decision requires that the period of time an offender is held under an EAW pending extradition is counted as time served towards any sentence in the requesting State. The Criminal Justice Act 2003 already provides for this time to be counted towards the sentence in cases where the offender is held on an EAW prior to being extradited and sentenced in the UK. However, there may be circumstances in which an offender is held under an EAW having already been sentenced in the UK – for example, if he or she absconds and is subsequently arrested and held under an EAW awaiting return to serve their UK sentence. In these circumstances, counting the time held on the EAW towards the sentence is currently at the discretion of the Secretary of State. Clause 149 amends the relevant provisions in section 49 of the Prison Act 1952 to ensure that it is counted. This will ensure that the requirements of Article 26 are given full effect.

28. It is already current practice, in line with the UK's obligations under Article 26, for the Secretary of State to exercise his or her discretion to allow time spent on an EAW to count towards sentence; this amendment will formalise in the legislation that this time will always be credited in such cases.

Criminal Procedure Rules to apply to extradition proceedings etc

1. Clause 150 will make appeals to the High Court in extradition cases subject to the Criminal (rather than Civil) Procedure Rules. This will mean that the whole extradition process is governed by the same procedure rules. Hearings before the District Judge are already covered by the Criminal Procedure Rules.

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