

Tony Wilson

Background to the Extradition Act 2003 and Amendments

Extradition Act 2003

- The Government set out its proposals to reform the law on extradition in a consultation document “The Law on Extradition: A Review” in March 2001.
- The review explained of particular significance was the way in which the [Pinochet] case threw into high relief many of the problems of UK extradition law, most notably the lengthy delays which can occur in complex, contested extradition cases. Much of the 17 months of the Pinochet case was taken up in court proceedings. In this respect, the case was not unusual: the inordinate length of time it could take at that time for a person to be extradited, even to another EU member state, and the multiple avenues for appeal, formed a major motivator for reform
- The proposals outlined under the subsequent Bill comprised two broad categories. EU member states fall under category one territories, other extradition partners fall under category two territories.

Extradition Bill

- Proposals for category one territories included:
 - A streamlined system, based on the introduction of the European arrest warrant, which removes duplication and delay, will reduce the time from an average of 18 months to three months and will cut costs over time.
 - An extradition hearing before a District Judge within 21 days of arrest, the right of appeal to the High Court, and in limited circumstances the right of appeal to the House of Lords.
 - The removal of Ministerial decision-making except in rare circumstances - extradition to EU partners is a matter for the courts, not for politicians.
 - EU member states will no longer be able to refuse the surrender of a fugitive simply because they are one of their own nationals.
 - Extradition will not take place where it would breach a fugitive's rights to a fair trial as set out in the European Convention on Human Rights.

Extradition Bill

- Proposals for category two territories included:
 - A streamlined system, removing the unnecessary and wasteful duplication of hearings and appeals that plague the current system.
 - A simplification of the rules governing the authentication of foreign documents, for instance faxed documents will be accepted as valid.
 - The retention of safeguards for fugitives, such as the principles of dual criminality and speciality.
 - The Home Secretary will maintain a reduced role in the appeal process as an additional safeguard for difficult cases.
 - A single point of appeal at the end of a case instead of an appeal against the Judge's decision, followed by a later appeal against the Home Secretary's decision.

The 2007 EAW review

- All 27 had transposed the decision, but the Commission found that there were some shortcomings: The major difficulty resides in the different degrees of transposition of those articles of the Framework Decision which deal with the optional and mandatory grounds for non-execution. Article 3 of the Framework Decision provides for only three mandatory grounds for non-execution, namely: amnesty, ne bis in idem (no one may be prosecuted, sentenced or punished twice for the same offence) and the fact of the wanted person being below the age of criminal responsibility. Article 4 lays down only seven optional grounds for non-execution which Member States may or may not transpose into their domestic law. Some Member States are still reluctant to surrender their nationals and have reintroduced the double criminality test, making such surrenders much more complicated. In so doing, some Member States have limited the application of the principle of mutual recognition. Other Member States have, moreover, stopped surrendering their nationals while insisting on additional safeguards not provided for in the Framework Decision. Lastly, numerous problems have arisen in relation to the determination of the competent judicial and central authorities pursuant to Articles 6 and 7 of the Framework Decision. Although the Framework Decision on the European arrest warrant provides that the issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State, and that the executing judicial authority shall be the competent judicial authority of the executing Member State, some Member States have in fact designated either directly or indirectly the Ministry of Justice. Other Member States have designated the Ministry of Justice to fulfil the task of the central authority by entrusting to it powers akin to those of a judicial authority

Extradition Act Amendments - Forum

- The subject of extradition to the United States became contentious following well known cases involving Gary McKinnon , the “Nat West Three” and Ian Norris and Babar Ahmad. The question arose as to whether the extradition arrangements between the two countries were unbalanced.
- In 2010 the Government commissioned the “Scott Baker “ review which reported in 2011 “we were struck by the fact that out of the hundreds of cases that are dealt with by the courts each year, only a handful is relied upon as support for the contention that the existing law is defective”. It thought the EA2003 balanced and rejected the call for a forum bar because it might cause delay and satellite litigation but recommended proportionality wrt EAW

EA2003 Amendments - Forum

- On 16 October 2012, the Home Secretary responded to the Baker Review. Amongst other things, she indicated that a new forum bar to extradition would be introduced, and that decisions relating to whether extradition would amount to a breach of a suspect's human rights would now be a matter left to the judiciary. At the same time, she also announced that Gary McKinnon would not be extradited to the United States for health related reasons (saying that his extradition would result in a breach of his human rights).
- The Forum Bar was introduced under the Crime and Courts Act 2013 together with a number of other amendments designed to reduce the possibility of delays. Most significant was the reduction of the Secretary of State's discretion by the transfer of consideration of human rights issues to the Courts.

EA2003 Amendments

- On 9 July 2003 the Home Secretary made a statement on the Opt in whilst committing to reform several aspects of the 2003 Act “
“One of the measures we will seek to rejoin, and on which I know many hon. Members have strong views, is the European arrest warrant. I agree with our law enforcement agencies that the arrest warrant is a valuable tool in returning offenders to the UK. Its predecessor, the 1957 European convention on extradition, had serious drawbacks. The arrest warrant has helped us to secure and accelerate successful extradition procedures, as shown by the case of Osman Hussain, one of the failed London bombers of July 2005, who was extradited back to the UK from Italy in less than eight weeks. More recently, Jeremy Forrest, the teacher who was sentenced last month for absconding to France with one of his pupils, was extradited back to the UK less than three weeks after his arrest.”

EA 2003 Amendments

- S26 would be amended to remove of the automatic right to appeal against a decision to extradite. Instead, such an appeal will only lie with permission of the High Court.
- Sections 39 and 121 of the 2003 Act would be amended to ensure that a person who has made an asylum claim, either before or after the initiation of extradition proceedings, must not be extradited before that claim has been finally determined.
- A new section 12A would be added to the 2003 Act to deal with pre-trial detention. Section 12A would enable the UK courts to bar surrender of the subject of an EAW where the issuing state has not taken both a decision to charge and a decision to try the person, unless the person's presence in that country is required in order to do so.

EA2003 Amendments

- A new section 21A would be added to the 2003 Act which would require the judge at the extradition hearing to consider whether extradition would be disproportionate. The judge would have to take account of the seriousness of the conduct, the likely penalty, and the possibility of the issuing state taking less coercive measures than extradition. The Minister, Damian Green, explained that the new provision would ensure that extradition happens only when the offence is serious enough to justify it.
- A new section 21B would be added to the 2003 Act which would enable the requested person to speak with the authorities in the issuing state before the extradition takes place, if they both consent. This would be made possible by either the temporary transfer of the person to the issuing state, or allowing the person to speak with the authorities in that state while he or she remains in the UK, for example by video link. This may mean that where extradition goes ahead, the person spends less time in pre-trial detention, and in some cases the EAW may be withdrawn altogether where the issue is resolved through these preliminary processes.

EA 2003 Amendments

- The 2003 Act would be amended to ensure that, where the judge is informed after the end of the extradition hearing that the person has been charged with an offence in the UK, the extradition must be postponed until the conclusion of the UK proceedings.
- The 2003 Act would be amended to ensure that speciality protection, which prevents a person from being tried for offences other than those set out in the EAW, will be retained in cases where the requested person consents to his or her extradition.
- The 2003 Act would be amended in order to clarify that where part of the conduct for which extradition is sought took place in the UK, and that conduct is not criminalised here, the judge must refuse extradition.
- The 2003 Act would be amended to confer a power on the Lord Chief Justice for England and Wales, with the concurrence of the Lord Justice General of Scotland and the Lord Chief Justice of Northern Ireland, to issue guidance to the National Crime Agency on the operation of an administrative proportionality check when deciding whether to issue a certificate under section 2 of the 2003 Act.

EA 2003 Amendments

- Section 142(2A) of the 2003 Act would be replaced to make clear that the fact that a person, who is wanted to be sentenced or to serve a sentence in the UK, is already in prison in the requested State, is no barrier to the issue of a European Arrest Warrant. This follows case in which a justice of the peace refused to issue a EAW because the subject was in prison in the requested State and could not therefore be considered to be “unlawfully at large”.
- A new section 151B would be inserted into the 2003 Act to give effect to Article 3 of the Fourth Additional Protocol to the European Convention on Extradition, which the United Kingdom intends to ratify. Article 3 deals with the rule of speciality (the bar on a person being proceeded against for offences other than those listed on the extradition request) and provides an optional mechanism whereby States can detain a person whilst a request to waive the rule against speciality is being considered by the State that originally extradited the person.