

# Extradition and Brexit: What comes next?

1. The impact of Brexit upon the legal architecture of the UK's relationship with the EU is very significant. Over the years of EU and single market membership, the UK has developed a close relationship with EU institutions and structures. The UK has helped to found and promote police cooperation, information exchange, pooled databases and mutual recognition of judicial authorities.
2. The list of these mechanisms and institutions is long:
  - a. The European Arrest Warrant, which is the primary means of bringing criminals to justice across the EU. Over 8,000 people were extradited from the UK to other EU states between 2004 – 2015;
  - b. The Schengen Information System, SIS or Schengen II, operative since April 2015. It established a real-time alert system between all EU and Schengen area police forces. The UK has issued over 13,000 alerts using SIS II in the first year since its implementation;
  - c. The EU Prüm Convention, which established the free exchange of information between EU law enforcement bodies, such as fingerprint and DNA records, along with vehicle registration data;
  - d. The Eurodac Regulation established a fingerprint database for identifying asylum seekers and those whose border crossing are said to be *'irregular'* ;
  - e. EUROPOL: the EU's law enforcement agency, aimed at assisting EU member states in the fight against serious international crime and terrorism. Currently headed by a British national, Robert Wainwright;
  - f. EUROJUST: the EU body dealing with judicial cooperation in criminal matters.

## The European Arrest Warrant

3. The EAW scheme was created by the 2002 European Council Framework Decision, it is given domestic effect in the UK via the Extradition Act 2003.
4. Recital 5 of the Framework Decision sets out the objectives to be achieved by the European Arrest Warrant (EAW) scheme:

The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by

a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

5. The European Arrest Warrant is the facilitator of relatively speedy extradition of criminal suspects and convicts between EU member states. It is intended to ensure, from arrest to the decision to extradite, the process takes no longer than 60 days: *Article 17 Framework Decision 2002*. In practice, it takes longer in many cases, but usually within 3 months or so.

### **Why is extradition important?**

6. There has been an exponential increase in extradition requests to the UK over the years. In 1962 there were but 3 extradition requests to the UK, by 1973, these requests had grown to 19. In 2003, the year before the European Arrest Warrant scheme entered into force, the number of requests had risen to 114. However, as of 2016, there were 14,279 EAW requests made to the UK, with 2,102 arrests and 1,271 surrenders.<sup>1</sup>
7. Although not all extradition requests involve serious offending, in 2015 there were a significant number of arrests for very serious offences: according to the National Crime Agency, there were 28 arrests in cases involving murder/manslaughter, 48 for grievous bodily harm, 29 for rape and 127 for robbery.
8. If there is any reduction in the UK's ability to deal with serious offenders wanted in other countries, there is a real risk the UK will become a safe haven for criminals, including those convicted or accused of the most serious offences.

### **Part 2 cases**

9. All non-EU countries are treated as Part 2 countries, per the Extradition Act 2003. The significant difference between European Arrest Warrants – the Part 1 countries – is that extradition is dealt with as between governments, and not judicial authorities. The presumptions of mutual trust and respect do not apply to the same

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<sup>1</sup> See, Historical European Arrest Warrants statistics, 9 May 2016 at: <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/historical-eaw-statistics/693-historical-european-arrest-warrants-statistics-calendar-and-financial-year-totals-2004-may-2016>

degree. This means that in a Part 2 case, an extradition judge, if satisfied that the person should be extradited, will not order extradition but rather will send the case to the Secretary of State for her to make that decision.

10. According to the Crown Prosecution Service, Part 2 cases take three times as long as Part 1, taking on average 10 months to resolve, while they are four times more expensive.<sup>2</sup> The case of the alleged computer hacker, Gary McKinnon, wanted by the United States took 6 years to resolve.<sup>3</sup> The case of Khaled Al Fawaaz, an alleged associate of Osama Bin Laden took 14 years to conclude.<sup>4</sup> Even taking the average of 10 months, there is little doubt that the system would simply grind to a halt if all Part 1 cases were converted to Part 2. It would place an unmanageable administrative burden on the Home Office, which, some might say, has struggled to deal with the demands of immigration and asylum law on its resources.
11. The immediate corollary would be a failure to detain and deal with suspects and convicts wanted in other jurisdictions, who would remain at large in the UK with a significant risk to public safety.
12. The Extradition Act 2003 is no longer the mirror image of the 2002 Framework Decision. Since its entry into force, there have since been a few bolt-on additions to the Act. These include s. 21B, a '*Request for temporary transfer etc*'. This provides the opportunity for either the requesting state or the requested person to seek to utilise measures which are less coercive than physical extradition and for extradition proceedings to be adjourned pending their outcome. A requested person may agree to travel to the requesting state, under safe passage, for the purposes of interview, or that interview may take place over a video-link or in consular premises of the requested state.
13. Another addition is s. 21A – proportionality. This section applies only to accusation cases and was added to permit the court expressly to consider proportionality as a separate consideration to human rights. Poland is one country in particular which issues vast numbers of EAWs, often for very low level offending. For example, between 2005-2013, Poland issued 31,000 EAWs across Europe; by contrast, in the same period the UK issued 1,300.<sup>5</sup> Section 21A of the EA 2003 requires the judge to assess (a) the seriousness of the conduct alleged to constitute the extradition

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<sup>2</sup> See, House of Lords Select Committee report, Brexit: future UK-EU security and police cooperation at [136]:

<https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/7707.htm>

<sup>3</sup> See, Gary McKinnon extradition to US blocked by Theresa May, BBC News, 16 October 2012: <http://www.bbc.co.uk/news/uk-19957138>

<sup>4</sup> See, *Meeting Khaled al-Fawwaz - Bin Laden's man in London*, Frank Gardner, BBC news, 9 October 2012: <http://www.bbc.co.uk/news/world-us-canada-19887669>

<sup>5</sup> See, European Parliament Infographic, 23 June 2014 at:

<http://www.europarl.europa.eu/EPRS/140803REV1-European-Arrest-Warrant-FINAL.pdf>

offence; (b) the likely penalty that would be imposed if D was found guilty of the extradition offence; and (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.

14. What these amendments and departures from the FD 2002, is the existing UK legal framework for EU extradition can depart from the EU uniform standard yet still operate within it. It suggests that it may be possible for extradition with the EU to carry on after Brexit. But there are still significant problems to be overcome.
15. Principal among these is the role of the Court of Justice of the European Union (CJEU). This is the body charged with providing interpretative and definitive judgment on the application of EU law and the 2002 Framework Decision and extradition.
16. Prison conditions and Article 3 of the Convention – torture and ill-treatment – has been a matter of particular focus of defending extradition requests in recent years. This has recently related to gross overcrowding and very poor material or violent conditions in Bulgaria, Italy, Romania and Lithuania. Concerns have also been raised in relation to France and Portugal. Even Belgium has been attacked for appalling conditions during a series of prison officer strikes in 2016 which left their prisons dangerously overcrowded and prisoners held in inhuman and degrading conditions. For balance, the Howard League for Penal Reform has highlighted that HMP Wandsworth is currently operating at 168% capacity<sup>6</sup>, while prison suicides are at record levels in England and Wales.
17. Whereas previously, extradition could be barred on Article 3 grounds due to concerns over prisons, the judgment of the CJEU in *Aranyosi and Calderaru* CJEU [2016] 3 W.L.R. 807 has directed a change in approach: if there is evidence of very poor prison conditions, extradition is not to be halted, but rather an information exchange process between the judicial authorities must be undertaken. Only following such an exchange, where the responses have been unsatisfactory is one EU judicial authority to refuse to extradite on Article 3 grounds: see, *Kirchanov & others v Bulgaria* [2017] 2048 (Admin) for a recent example.
18. In the curiously named case of *Bob-Dogi* [2016] 1 W.L.R. 4583, the CJEU ruled that an EAW was invalid if it was not founded upon a domestic arrest warrant; it ruled that the Hungarian practice of self-certifying EAWs was not compatible with the EAW scheme. These are but two examples of the role of the CJEU in regulating the EU-wide approach to extradition requests. The question is therefore, whether the UK

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<sup>6</sup> See, Howard League for Penal Reform, Wandsworth, at: <http://howardleague.org/prisons/wandsworth/>

could continue to engage with EAWs post-Brexit, and if so, how would that be regulated?

### **What does the UK government want from Brexit?**

19. In 2016, it was difficult to determine what the government's aims were beyond '*Brexit means Brexit*'. Now Brexit appears to mean leaving, but with a 2-year, possibly longer transition period, in which the UK will seek to complete the arrangements necessary for leaving. It is clear that, although the risk of the UK crashing out of the European Union on 29 March 2019 without a deal and without proper and adequate security and criminal justice mechanisms appears to have lessened, it remains a very real risk indeed.
20. For example, the UK government has acknowledged that, after leaving day, the current legal framework that underpins the UK's cooperation with the EU on security, law enforcement and criminal justice will no longer apply: *Future Partnership Paper: Security, law enforcement and criminal justice, September 2017*
21. This is consistent with the Prime Minister's position that a red-line in the UK's negotiations is the end of jurisdiction for the European Court of Justice. However, as the Court of Justice of the European Union is the body charged with oversight of the application of EU law, including the EAW scheme, it is very difficult to see how the cooperation on extradition, for example, can continue as now.
22. In her Florence speech, the Prime Minister said this:

So we are proposing a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation: a treaty between the UK and the EU.<sup>7</sup>
23. Any such a treaty will require a body to oversee and resolve disputes in extradition matters, as the CJEU currently does. But such a body would have to act consistently with, and with deference to the case law and approach of the CJEU. It would be hard to see any autonomy or appreciable difference between the work of the CJEU on extradition matters now, and the work of any new court or body established by a new treaty. There is also the question of the costs of setting up and maintaining such a court and who would pay for them. Should the EU be expected to part-fund such a court, when it is set up for the convenience of the UK's Brexit needs, for example?

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<sup>7</sup> See, PM's Florence speech: a new era of cooperation and partnership between the UK and the EU at <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>

24. Further, will any such treaty be plain sailing? The evidence suggests not. The European Free Trade Association (EFTA) states of Iceland and Norway have spent many years trying to reach an agreement on extradition with the EU. The European Council agreed to negotiate with them in 2001. This resulted, in 2006 in the Council Decision on Extradition which largely mirrors the EAW scheme.

25. However, there are three important points to note:

- a. Iceland and Norway have retained an exemption which allows them to refuse to extradite their own nationals: *Article 7* This is significant, because it reflects the position of 17 current EU member states before they agreed to the EAW scheme; this is why the EAW scheme places such emphasis on mutual trust and respect between judicial authorities because of the change in attitude in those 17 states in permitting the extradition of their own nationals;
- b. There is no court to resolve disputes in the Iceland/Norway – EU agreement; rather, any dispute is to be referred to EU and national government representatives who are to resolve any issues within 6 months (*Article 36*); the parties are to keep CJEU case law under constant review, and there is to be regular mutual transmission of national and CJEU decisions (*Article 37*);
- c. Although the agreement was approved by the EU on 27 November 2014, it is still not in force, 16 years after the fact.

26. While the UK has been operating within the EAW scheme for the past 13 years, the fact the Iceland/Norway agreement on extradition is near identical to the EAW scheme underlines how a rapid resolution of the UK's new arrangements can neither be assumed nor assured.

27. Where would refusing to be bound by the CJEU leave the UK? It would be complicated. All Council of Europe member states are or were state parties to the 1957 European Convention on Extradition. However, especially for monist states where international treaties and agreements have primary domestic effect, the adoption of the 2002 Framework Decision has superseded the 1957 Convention leading many EU member states to rescind that Convention. The UK could not expect such member states to alter their domestic law to accommodate the use of this instrument after Brexit. Or even if it could, the time it would take would likely be prohibitive. Bearing in mind also that the 1957 Convention is accompanied by lengthy amendments – some 16 pages worth – as each country inserted its own provisos and caveats, not to mention the provision which permits state to refuse to extradite their own nationals. Moreover, any individual resisting extradition to the UK could point to the uncertainty of standards in the UK, including public statements

by the Prime Minister about her general wish to withdraw from the European Convention on Human Rights.<sup>8</sup>

28. The other alternative would be for the UK to secure 27 bilateral agreements on extradition with the remaining EU member states. These would be similar to the agreements which apply in Part 2 countries. As set out above, that would lead to an unmanageable case load, enormous delay and huge increases in costs. Any reduction in the efficacy of extradition arrangements increases the risk to the public from convicted and alleged criminals who live in the UK.

29. Therefore, we can conclude that:

- a. The rejection of ECJ/CJEU jurisdiction undermines the prospects of any new treaty being viable and effective or quick to agree;
- b. The alternative model – the treaty – will necessarily mean much the same as now, since no extradition treaty could operate other than in concert with the CJEU approach; there will be additional costs associated with such arrangements which the UK will likely be expected to bear;
- c. The timescale to implement such an arrangement is likely to be indeterminate but measured in years bringing with it a significant public security and safety risk.

### **Security cooperation**

30. Of course, the question of security cooperation is much broader and deeper than mere extradition arrangements. The architecture set out above is intricate and interweaved. It may be possible to arrange for the UK to retain access to databases and perhaps enjoy an associate membership of those structures. The UK is after all not a member of the Schengen free travel zone, but is a member of Schengen II on information exchange. But each area will have to be negotiated and agreed and there is no evidence that such matters have properly been discussed, still less concluded between the parties. Moreover, there is the question of cost. These bodies and institutions are financed through EU member states' budgetary contributions. The UK will have to pay its share and there may well be political reluctance here to do so.

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<sup>8</sup> On 18 May 2017, the Prime Minister committed to remaining in the ECHR for the duration of the next parliament, having previously expressly stated her wish to withdraw: see, e.g. *Conservative manifesto: Theresa May announces UK will remain part of European Convention of Human Rights*, Independent, 18 May 2017:

<http://www.independent.co.uk/news/uk/politics/conservative-manifesto-uk-echr-european-convention-human-rights-leave-eu-next-parliament-election-a7742436.html>

31. Certainly, the UK will lose the opportunity it currently enjoys for British judges to sit in the ECJ and for British nationals to hold senior and influential positions in the bodies such as Europol.<sup>9</sup>

## **Conclusions**

32. From her Florence speech, it is now clear that the Prime Minister wishes to maintain cooperation on security, crime and law enforcement with the EU and to do so via a treaty. The type, shape and form of any such treaty are entirely open to question. Even so, it is hard to envisage any treaty arrangement which seeks to maintain the existing architecture of bodies and arrangements operating without a major, and determining role played by the CJEU and the EU itself.

33. More broadly, the suggestion that we are heading for *Brexit existing as name only*, or *BEANO*, certainly appears plausible in the crime and security context.<sup>10</sup> Only, the best case scenario would see the UK enjoying all of the same features of its current EU membership, with a strong case to continue contributing to the EU's costs, but without a seat at the decision-making table. If that is the best we can do, then anything less will not only weaken our security by default, it may encourage criminals to view the UK as a safe haven and may leave the UK vulnerable to future, serious terrorist events.

34. After the 23 June 2016 Brexit referendum, there is still a great deal of uncertainty and a huge amount of work to do, just in order to remain where we currently are. While the trade benefits of the so-called, new global Britain are for others to extol, in crime, security and law enforcement terms, Brexit rather begs the question, '*Why do it?*'.

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<sup>9</sup> See, Europol, Executive Director profile: <https://www.europol.europa.eu/executive-director-of-europol>

<sup>10</sup> See, Brexit in name only and the politics of transition, David Allen Green, Financial Times, 1 August 2017: <https://www.ft.com/content/afc39739-d889-3f11-a9f2-f41258408c69>