



Extradition (Provisional Arrest) Bill

House of Lords

Second Reading Briefing

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For further information contact

Jodie Blackstock, Legal Director
email: jblackstock@justice.org.uk direct line: 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. This briefing addresses the Extradition (Provisional Arrest) Bill,¹ ahead of Second Reading in the House of Lords on 4 February 2020. We have the following concerns regarding the Bill:
 - **We think that the new power of arrest created by the Bill is unnecessary. Provisional arrest powers already exist to cover urgent arrests and in addition, the material impact of the new legislation would be limited.**
 - **Further, we think that the law and order justification for the Bill is not made out and are concerned about the stripping away of the safeguard provided by a judicial warrant. In doing so, the Bill curtails the liberty of individuals and we would suggest that the consequent interference with Article 5 of the European Convention on Human Rights (ECHR) has not been justified.**
 - **Although the Bill does not create power of arrest whenever an INTERPOL red notice is issued, we are concerned about any move to expedite a system already open to misuse by member countries with derisory human rights records.**
 - **The real mischief an Extradition Bill ought to address is the possibility of the UK's removal from the EAW. Although the current Bill makes provision for this eventuality, its introduction raises questions as to the current status of the UK/EU negotiations on future criminal justice cooperation, and as to whether these will address the shortcomings currently associated with the EAW.**

¹ HL Bill (2019-20) [3].

New arrest power unnecessary

3. The Bill amends Part 2 of the Extradition Act 2003, which deals with extradition to non-EU territories with which the UK has formal extradition arrangements. Its provisions create a new power of arrest for extradition purposes (Clause 1, Schedule). This will enable law enforcement officers to arrest individuals without a warrant of arrest from a UK court where a request for an individual's arrest is certified as having been issued by a "specified category 2 territory" in relation to a serious offence (Schedule, paras 2 and 4).
4. The intended effect is to "bring a wanted person into Part 2 extradition proceedings in an expedited way...to reduce re-offending by serious and organised criminals as well as bringing about efficiency improvements for law enforcement, the UK Competent Authority and the Crown Prosecution service".² The introduction of the new power is further justified on the basis that currently, an application for a warrant "takes at least a matter of hours and creates a possibility that the person concerned could offend or abscond before being detained".³
5. However, provisional arrest powers already adequately exist to cover urgent arrests before a full extradition request is submitted from a category 2 territory (Extradition Act 2003, section 73). In such a case, a request from the issuing state for the accused's provisional arrest pending the submission of the full extradition documentation can already be submitted through the National Crime Agency (NCA) or INTERPOL,⁴ following which the CPS will request a provisional warrant from the court. These powers also cover cases where a full request has been submitted but is yet to be certified (Extradition Act 2003, section 74). Although it is true that an application to a judge is still required, in urgent cases this can be made "out of hours" to the relevant duty judge – if necessary, over email.

² Home Office, Extradition Provisional Arrest Power Impact Assessment (1 October 2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841191/Impact_Assessment.pdf p. 1.

³ Extradition (Provisional Arrest Bill) [HL] Explanatory Notes, para 5.

³ Ibid., para 5.

⁴ CPS, 'Extradition' (4 February 2019) available at <https://www.cps.gov.uk/legal-guidance/extradition>.

6. Further, it is misleading to suggest that the provisional arrest power proposed by this Bill will in reality allow officers to make urgent “on the spot” decisions to arrest. Should the National Crime Agency (NCA) be the “designated authority” envisaged by the legislation, it will have to review any extradition request and decide whether to certify the request as creating a provisional arrest power. Indeed, the impact assessment for the Bill suggests that “a triage process would take place to ensure that only alerts which conform to the legislative intention are certified and uploaded to UK systems for use by front line policing”.⁵ This would require careful scrutiny, not a “heat of the moment” decision after a person is identified entering the country. To do otherwise, without judicial oversight, would risk an arbitrary and unnecessary interference with the detention and fair trial rights of extradition suspects. In our view, the new power is unlikely to save time and is therefore otiose.
7. Quite apart from saving time, there is a risk that exercise of the new power will create satellite litigation, should the arrested person choose to challenge the validity of the original requesting state’s warrant (as required under Schedule, para 2, new para 74B(b)(i)). The only route for such a challenge would be by way of judicial review, raising the possibility of a months-long process in the Administrative Court before the extradition process could commence.
8. Further, the material effect of the power will likely be limited. The Home Office’s own impact assessment states “the policy is expected to result in 6 individuals entering the CJS more quickly than would otherwise have been the case”.⁶ This figure is not contextualised, although the “full economic impact” section of the Assessment spans a 10-year period. This is underscored by the fact that Government has provided no evidence detailing past instances of category 2 suspects evading justice through the current mechanism. On the current materials accompanying the Bill, it is hard to establish a justification for why this should occur in the future. Given this predicted infrequency, the introduction of an additional power to arrest seems not only unnecessary, but wholly disproportionate.

⁵ Ibid., p. 6.

⁶ Extradition Provisional Arrest Power Impact Assessment, p. 2.

9. Should the arrest power be retained, we would expect, at the very least, a commitment from the Floor of the House clarifying the commitment in the Bill's Impact Assessment regarding the 'triage process' (see paragraph 6, above). Narrowing the use of the power in this way would be desirable, avoiding a blanket approach to incoming alerts.

Potential Rights Infringement

10. We are concerned that the Bill risks watering down procedural safeguards in extradition cases, evident in the Bill's aim to "empower police officers to *immediately* arrest someone wanted for a serious crime ... without having to apply to a court for a warrant first"⁷ [emphasis added].
11. The new arrest power provides for the liberty of an individual to be restricted without judicial oversight (Clause 1(a)). This constitutes a potential interference with Article 5 ECHR which would require justification. The bypassing of a judicial warrant is premised only on the vague aspiration of reducing "the opportunity for the subject to escape and potentially commit further crime, which *may* lead to an economic and social impact upon society" [emphasis added].⁸ Even the Home Office's impact assessment notes that "it is not possible to give a precise estimate of the impact of the legislation, as it is unclear how much re-offending will be prevented".⁹ We are not convinced that the potential interference with Convention rights is justified, particularly given that a judicial process already exists.

Basis for arrest

12. The explanatory notes to the Bill suggest that "many countries (including most EU Member States) already afford their police forces the ability to arrest on the basis of INTERPOL alerts seeking the arrest of wanted persons. This Bill creates a power for the police and other relevant UK law enforcement officers to arrest an individual on the basis of *such an alert* without a UK warrant for arrest having

⁷ HMG, The Queen's Speech 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf, p.12.

⁸ Extradition Provisional Arrest Power Impact Assessment, p. 6.

⁹ Ibid., p. 7.

been issued first”. [emphasis added]¹⁰ While it is made explicit elsewhere in the notes that “the power in this Bill is not limited to red notices and would apply in respect of any international request for arrest”,¹¹ it is clearly anticipated that INTERPOL red notices will serve as the primary trigger for use of the new power.

13. The current position in England and Wales is that a red notice does not in itself amount to a domestic arrest warrant and this is unchanged by the Bill. However, under the new power the NCA will have to assess, without judicial (or prosecutorial) oversight, the validity of such a notice and the degree to which it is based on evidence rather than assertion.
14. INTERPOL red notices may be perfunctory. The potential for their misuse has been well-documented, with a number of the body’s member countries utilising the network in order to target and intimidate political opponents, including those involved in peaceful protest and refugees.¹²
15. Given this potential for abuse, it is critical that the list of “specified category 2 territories” is limited to those countries where there is a solid basis for trust in their criminal justice systems. It is of concern that this list can be expanded through secondary legislation (Schedule, para 2, new para 47B(7)), to include any country a Minister sees fit; currently, there is nothing to prevent regimes such as Syria, Russia or Venezuela from being added to the list. We invite some clarification from the Floor of the House on the factors the Government would take into account when proposing new countries.
16. We are also concerned at the inclusion of the United States of America on the current list of specified territories. The Explanatory Notes to the Bill provides reassurance that current safeguards relating to the death penalty remain unchanged: “if the court finds that [the individual’s] extradition is not barred, the Home Secretary cannot order their extradition if they could be, will be, or have

¹⁰ Explanatory Notes, para 6.

¹¹ Ibid.

¹² Fair Trials, ‘Defending Human Rights, Strengthening INTERPOL – INTERPOL is being used as a weapon against journalists, human rights defenders and refugees’ [undated] available at <https://www.fairtrials.org/wp-content/uploads/INTERPOL-Summary.pdf>.

been sentenced to death unless she receives a credible assurance that the death penalty will not be imposed or, if imposed, will not be carried out.”¹³ However, the UK Government’s decision in July 2018 not to seek assurances in the case of Alexander Kotey and El Shafee Elsheikh calls into question the reliability of this claim.¹⁴ As longstanding opponents of the death penalty in all circumstances, we would be wary about any moves to expedite extradition of suspects who could face capital punishment in retentionist jurisdictions such as the US.

Procedural safeguards

17. As a result of the above, we would therefore suggest that the Bill be amended to include the following two safeguards:

- i. The NCA should be able to filter out cases where it has reason to believe that one of the statutory bars to extradition will apply.¹⁵ In particular, a person should not be subjected to the new provisional arrest power in cases where the NCA ought to know they are a high-profile political opponent or human rights activist facing prosecution for politically-motivated reasons. In practical terms, this would allow a victim of a politically-motivated prosecution to provide advance notification to the NCA explaining why, if they receive an extradition request, the agency should not certify it.
- ii. The NCA should also ensure that any requests comply with the extradition arrangements under which the requests are issued. For example, requests must be compliant with the human rights requirements under INTERPOL’s constitution, and/or with any procedural or human rights requirements under the US-UK extradition treaty.

¹³ Explanatory Notes, para 11.

¹⁴ See ‘JUSTICE co-signs letter to the Prime Minister on the issue of the death penalty’ (October 2018) available at <https://justice.org.uk/justice-co-signs-letter-to-the-prime-minister-on-the-issue-of-the-death-penalty/>.

¹⁵ See Extradition Act 2003, ss. 11 and 79.

Replacing the EAW

18. The European arrest warrant (EAW)¹⁶ is an example of how multiple EU and national bodies work together to enable crime to be prosecuted effectively through the courts across the EU. Thousands of EAW requests are received by the UK each year (over 15,000 requests in 2018-19, leading to over 1,400 arrests). The EAW forms one of 35 measures that due to Protocol 36 of the Lisbon Treaty, the UK had the choice to no longer take part in, but after extensive review of their processes, concluded are necessary for the investigation and prosecution of crime in the UK.¹⁷ Without these measures, and the bodies that enable us to have a speedy and effective response to crime, the UK will be put at risk in relation to increasingly global criminal activity.
19. It would be helpful for Government to provide an update on the status of the UK/EU negotiations on future criminal justice cooperation so that Parliament is able to debate this Bill in context.
20. JUSTICE has for many years held concerns with the operation of the EAW: the lack of an effective defence for requested persons;¹⁸ its use for wide ranging criminal acts and for breach of low level sentencing; and the connected trial processes and prison conditions that requested people may face on their return.¹⁹ Despite this, the instrument is in our view better than having no agreed

¹⁶ Council framework decision, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), O J L190/1 (18.7.2001). See also the Extradition Act 2003, which gives effect to the Framework Decision.

¹⁷ See HMG, Decision pursuant to Article 10(5) of Protocol 36 TFEU, July 2014, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf and House of Lords, EU police and criminal justice measures: The UK's 2014 opt-out decision, 13th Report of Session 2012-13, HL Paper 159, (23 April 2013), <https://publications.parliament.uk/pa/ld201213/ldselect/ldcom/159/159.pdf>

¹⁸ See for example: J. Blackstock, *European arrest warrants: Ensuring an effective defence* (JUSTICE, 2012) available at <https://justice.org.uk/european-arrest-warrant/>; JUSTICE Response to the House of Lords EU Select Committee Inquiry: The 2014 opt-out decision, 2013, available at <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/VolofevidenceP36asat250313.pdf>

¹⁹ See Fair Trials, 'Beyond Surrender: Putting Human Rights at the heart of the European Arrest Warrant' (28 June 2018) available at <https://www.fairtrials.org/publication/beyond-surrender>.

framework, and the negotiations for withdrawal present an opportunity to ensure some of the remaining problems with the instrument are solved.²⁰

21. Nevertheless, it is crucial that any future extradition arrangement between the UK and EU is underpinned by human rights protections and robust procedural safeguards including judicial decision-making and legal representation.

²⁰ For which Baroness Ludford's work as an MEP on amending the warrant is extremely helpful: European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2014-0174+0+DOC+PDF+V0//EN> and its accompanying study EPRS, *Revising the European Arrest Warrant*, EAVA 6/2013, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET\(2013\)510979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979_EN.pdf)