

Extradition: the EAW and Changes in UK Law:

- The European Arrest Warrant Framework Decision (2002/584/JHA) is the basis of European Extradition
- The Extradition Act 2003 implements the Framework Decision into domestic law and codifies the other conventions. It has been amended a number of times. Updated most recently by the Anti-Social Behaviour, Crime and Policing Act 2014 (now partially force).
- There has been a report by the UK House of Lords Select Committee
- Many more issues in Fraud cases with the US in particular
- The extensive use of INTERPOL Red Notices for political aims
- The Interaction with Sanctions and MLA
- The Anti-social Behaviour, Crime & Policing Act 2014

Trial Readiness (12A)

- The new section 12A (bar to extradition by reason of absence of a prosecution decision) requires refusal of extradition where authorities of issuing country have not made a decision to charge or try the requested person.
- This is an excellent example of amendments to the Act complicating the law
- It will have a significant impact on Italian and Polish Extradition
- Law set out from para 142 in *Assange* before the divisional court [2011] EWHC 2849 (Admin)
 - §151 “We do not see why looking at the matter through cosmopolitan eyes it cannot be said that a person can be accused of an offence even though the decision has not finally been taken to prosecute or charge; Ismail makes clear one cannot simply look at the matter as a common lawyer. In our judgment Mr Assange is on the facts before this court “accused” of the four offences. There is a precise description in the EAW of what he is said to have done. The extraneous evidence shows that there has been a detailed investigation. The evidence of the complainants AA and SW is clear as to what he is said to have done as we have set out. On the basis of an intense focus on the facts he is plainly accused. That is. as Lord Steyn said, decisive.”
- New statute changes the threshold considerably in using “charge” and “try”

Proportionality

- Amendments to section 2 and the new section 21A (person not convicted: human rights & proportionality) codifies a proportionality bar to extradition.
- Section 2 now requires that the National Crime Agency must consider proportionality as part of the EAW certification process and decline to certify where it is clear that a judge would be required to discharge on the basis of proportionality.
- Section 21A requires that, alongside consideration of human rights, judges must also consider whether extradition would be disproportionate.
- Only the following specified matters are considered– seriousness of the conduct, likely penalty if convicted, possibility of using less coercive measures – should be taken into account.
- Does not significantly add to the proportionality considerations previously encompassed by Article 8 ECHR via section 21 of the Act
- Proportionality
- In future less coercive measures may include greater use of the European Supervision Order
- The ESO establishes a system whereby the decision of a judicial authority in one Member State (the ‘issuing state’), imposing supervision measures on a non-resident defendant as an alternative to pre-trial detention, can be forwarded to the defendant’s state of residence (the ‘executing state’), which then has to recognise the decision and supervise the defendant itself.

Temporary Transfer

- Section 21B (temporary transfer) permits either the issuing authority or the requested person to make a request (one time only) for the temporary transfer of the requested person to the requesting territory or for a remote conversation

Appeals

- The amended section 26 (appeals) introduces a requirement for leave to appeal to the High Court in EAW and non-EAW Cases

- In addition if notice of appeal is given after the end of the permitted period (7 days in Part 1 cases / 14 days in other cases), the High Court must not for that reason to refuse to entertain the application for leave if the person did everything reasonably possible to ensure that the notice was given as soon as it could have been.

Forum

What is forum?

- The term ‘forum’ is essentially used to denote the most convenient or appropriate place for legal proceedings to be brought and determined.
- The Scott Baker Review of the UK’s Extradition Arrangement (2011) concluded that a forum bar should not be brought into force as it will ‘create delay and has the potential to generate satellite litigation ..prosecutors are far better equipped to deal with the factors that go into making a decision on forum than the courts.’
- It can only arise in ‘export’ cases where the requested person is wanted for the ‘purposes of prosecution’ (accusation cases).
- Forum provisions: the test
 - Contained within sections 19B-19F (Part 1) and sections 83 A-83E (Part 2) of the Act.
 - Test: Extradition of a person from the UK to another state is barred by reason of forum if the extradition would not be ‘in the interests of justice.’
- Forum provisions: Interests of Justice
- Extradition will not be ‘in the interests of justice’ if the Judge:
 - a) decides that a substantial measure of D’s relevant activity was performed in the United Kingdom.
 - b) Decides, having regard to the specified matters relating to the interests of justice (and only those matters), that extradition should not take place.
- N.B. ‘relevant activity’ is activity material to the commission of the extradition.

Forum Provisions:

- a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
- b) the interests of any victims of the extradition offence;

- c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
- d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
- Forum Provisions:
- e) any delay that might result from proceeding in one jurisdiction rather than another;
- f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—
 - i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and
 - ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;
- g) D's connections with the United Kingdom.
- In deciding whether the extradition would not be in the interests of justice, the Judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 1 territory concerned.
- Prosecutor's Certificate
- If the judge receives a 'prosecutor's certificate' relating to the extradition, they must decide that the extradition is not barred by reason of forum.
- A 'prosecutor's certificate' is a certificate given by a designated prosecutor which:
 - a) Certifies both Matter A and Matter B; and
 - b) Certifies either Matter C or Matter D
- Prosecutor's Certificate:

Matter A

Is that a responsible prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or part of the United Kingdom, in respect of the conduct constituting an extradition offence.

Matter B

Is that the responsible prosecutor has decided that there are one or more such offences that correspond to the extradition offences (the ‘corresponding offences.’)

- Prosecutor’s Certificate:

Matter C

- a) The responsible prosecutor has made a formal decision as to the prosecution of D for the corresponding offences.
- b) That decision is that D should not be prosecuted for the corresponding offences, and
- c) The reason for that decision is a belief that-
 - i) there would be insufficient admissible evidence for the prosecution
 - ii) the prosecution would not be in the public interest.

- Prosecutor’s Certificate

Matter D

- The responsible prosecutor believes that D should not be prosecuted for the corresponding offences because there are concerns about the disclosure of sensitive material in-
 - a) the prosecution of D for the corresponding offences, or
 - b) any other proceedings
- Prosecutor’s Certificates:
- A designated prosecutor may apply for the forum proceedings to be adjourned for the purpose of assisting:
 - a) In considering whether to give a prosecutor’s certificate in relation to the extradition.
 - b) In giving such a certificate;
 - c) In sending the certificate to the Judge
- Challenges to Prosecutor’s Certificates (s 19E, s83D)

A decision of a designated prosecutor relating to a prosecutor’s certificate in respect of D’s extradition may only be questioned by way of appeal.

The court on such an appeal, is required to apply the procedures and principles which would be applied by it on an application for judicial review.