



JUSTICE Briefing on the Extradition Bill 2002
For Second Reading in the House of
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1. JUSTICE is an independent all party law reform and human rights organisation which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. The Extradition Bill, published on November 15th 2002 (and amended in standing committee on 21st January 2003), aims to streamline the process of extradition in the UK to avoid unnecessarily lengthy and cumbersome legal proceedings. It introduces a two-tier system of extradition depending on which country is requesting extradition. Category 1 territories are, basically, the EU and Schengen states (including, upon accession, those candidate countries due to join the EU in 2004); Category 2 territories are all other countries with which the UK has extradition arrangements. This briefing will concentrate on Part 1 of the draft bill relating to Category 1 territories reflecting JUSTICE's ongoing work on EU criminal justice.
3. In relation to Category 1 territories, the bill is intended to implement the EU Council Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States (EAW)¹. Two key aspects of this legislation are the removal of a final executive decision in extradition to Category 1 territories and the erosion of the principle of dual criminality in relation to a number of types of offence listed in Article 2(2) of the EAW. The comments made in this briefing will deal both with concerns relating to human rights and procedural safeguards and with issues surrounding the accurate implementation of the EAW.

Key Observations on the Bill

4. JUSTICE welcomes the attempt to streamline cumbersome extradition legislation. The drafting of the Bill is, however, often more complex than is necessary, with provisions referring back on themselves in a manner which does little to aid clarity. The Bill leaves

¹ OJ L 190, 18.7.2002, p.1

far too wide a discretion to the Secretary of State to designate territories as category 1 or 2 by order leaving it far from clear what countries exactly are intended to be designated as such. This means that the Secretary of State would be free, for example, to apply the European Arrest Warrant type scheme to extraditions to the United States or to the Ukraine, simply by designating those countries as category 1 territories by Order in Council. The Bill would also benefit from clarification as to whom an “appropriate person” might be when mentioned, for example in provisions relating to arrest. There seems no reason to leave such a definition to an order; the provisions should clearly specify the legislative intent.

5. JUSTICE welcomes the inclusion of provisions relating to human rights considerations, extraneous considerations and the physical and mental health of the person in the extradition hearing. The amendment to clause 2 of the Bill which specifies the information required in a European arrest warrant addresses one of the main issues raised by JUSTICE throughout consultation on the Bill. This amendment is welcome as it goes some way in allowing a judge to come to a reasoned decision as to the legality of the request.
6. JUSTICE believes that the European Arrest Warrant should be implemented with the highest level of procedural safeguards possible but the Bill seems to take the EAW at its lowest in terms of safeguards. Where clauses in Part 1 are mirrored in Part 2 our comments apply to both.
7. In particular, we believe that the Bill should:
 - a) **Specify that the EAW provisions will not apply retrospectively (and make a declaration in accordance with Article 32 EAW to that effect);**
 - b) **Specify who exactly will be authorised to execute a warrant and establish that the person arrested must be shown the warrant on arrest or as soon as is practicable thereafter;**
 - c) **Set out procedure and evidential requirements for the establishment of identity in clause 7 of the bill;**
 - d) **Set out procedures for *inter partes* hearings for applications to extend time limits;**
 - e) **Ensure that free legal advice is made available prior to consent being accepted;**
 - f) **Apply the rule against double jeopardy to “acts” rather than “offences”;**

- g) **Make the possibility of the death penalty an absolute bar to extradition by removing clause 15(2) of the bill;**
- h) **Refrain from making statements of presumed consent to further prosecutions or re-extradition following surrender under Articles 27 and 28 of the EAW;**
- i) **Require a guarantee of a retrial in cases of conviction *in absentia*;**
- j) **Abolish dual criminality only in relation to offences included in the Article 2.2 list of the EAW carrying at least a maximum of three years;**
- k) **Include the framework list in the text in the interests of legal certainty;**
- l) **Maintain a high standard of evidence required for establishing the existence of a *prima facie* case in Part 2 cases; and**
- m) **Make operation of the statute subject to the terms of international obligations.**

Arrest

8. Clause 3 allows a warrant to be executed “by a constable or by an appropriate person”. Such “appropriate person” will be specified by the Secretary of State in an order for the purposes of this section. Before such an order can be made, according to clause 204, a draft must have been laid before Parliament and approved by a resolution of each house. JUSTICE believes that this is an unnecessarily complex format giving an unduly wide discretion to the Secretary of State to designate persons as appropriate for executing a warrant. The Bill should specify exactly who can execute a warrant making it clear who is envisaged by this provision, for example customs officers.
9. Clause 4 states that if a warrant or a copy of the warrant has not been shown to the person at the time of arrest, it must be shown to him as soon as is practicable **after his request**. This means that there is no requirement for a person arrested under such a warrant to be shown the warrant unless he asks for it. Neither is there a requirement to inform the person that they may see the warrant. This is unjustifiable. There should be a positive obligation to show the person the warrant or a copy of the warrant in a language that they can understand as soon as is practicable following arrest.

Human Rights - the Extradition Hearing

10. JUSTICE welcomes the inclusion of a specific duty on the judge in the extradition hearing to decide whether extradition would be compatible with Convention rights and to discharge the person if not. The inclusion of this duty in Clause 21 of the draft bill leaves no doubt as to the scope of applicability of the Human Rights Act 1998 in extradition proceedings. It reinforces the principle, recently outlined in the case of *ex parte Ramda*² that the fact that the requesting state is a signatory to the European Convention on Human Rights (ECHR) does not *per se* mean that extradition will be compatible with convention rights.
11. The drafting of this clause is, however, slightly unclear as it refers to “the extradition” which could be interpreted as meaning only the actual return. JUSTICE assumes that the intention of this clause is that human rights considerations will apply to both the proceedings and the actual return so that Art 5(4) ECHR procedural rights³ would be applied in the extradition hearing and proceedings.
12. Under current extradition legislation there is a statutory bar on return where an extradition request has been made in bad faith. The Courts have found that requests emanating from European countries may be in bad faith⁴. JUSTICE is pleased to see the inclusion of a bar to extradition for extraneous considerations at Clause 13 in the Bill which was absent from the consultation document. This goes some way to curing the difficulty that there may be cases where a request made in bad faith is not necessarily “arbitrary” within the definition of Article 5 ECHR.
13. JUSTICE welcomes the inclusion of clause 25 as an additional protection allowing the judge to refuse or adjourn extradition on the basis that it would be unjust or oppressive due to the person’s mental or physical condition.
14. JUSTICE has already raised its concerns to the Government that retrospective application of the abolition of dual criminality entailed by Article 2 of the EAW could amount to a breach of Article 7 ECHR, the right to no punishment without law⁵.
15. The relaxing of the principle of dual criminality will mean that the UK is effectively accepting the criminal laws of all other Member States of the EU without a clear picture of what those laws might be. This could raise specific difficulties under Article 7. Although it

² R v Secretary of State for the Home Department, *Ex Parte Rachid Ramda* (2002), [2002] EWHC 1278 (Admin)

³ R v Secretary of State for the Home Department, *Ex Parte Kashamu* – (2002) QB 887

⁴ *Ex Parte Rachid Ramda*, supra

⁵ JUSTICE letter of 24th May 2002 to Bob Ainsworth, Home Office Minister

is accepted that extradition itself is not a penalty for the purpose of Article 7, the resulting penalty in the requesting state could be. This could cause problems, in particular, where the EAW is applied retrospectively to offences which occurred prior to the coming into force of the EAW. The principle of certainty under Article 7 ECHR could be threatened by the erosion of dual criminality.

16. In practical terms, retrospective application of the EAW could lead to requests being received which apply to people who may have been involved in conduct in the past which is not criminalised in the UK. Those people may be established in this country and have developed strong family and professional ties with this country in the knowledge that the UK does not criminalise the alleged conduct, or, indeed, precisely because the UK does not criminalise the alleged conduct. In certain circumstances this could affect the principle of proportionality⁶.

17. JUSTICE believes that the UK Government should avoid this problem by taking advantage of the transitional provisions allowed for in Article 32 of the EAW Framework Decision and making a statement to the effect that it will continue to deal with requests relating to acts committed before a specified date, in accordance with the extradition system applicable before January 2004. Such a declaration should be reflected in the provisions of the Bill. Similar statements have already been made by France, Italy and Austria⁷.

Procedural Safeguards

Identity of the Accused

18. Clause 7 addresses the identity of the accused, but contains no specification on the evidential standard required or where the burden of proof lies. The drafting appears to create the role of investigating magistrate which is unknown to UK law. **In the interests of procedural rigour, JUSTICE believes that the Act should state whether the burden of proof is persuasive or evidential and outline the standards of evidence acceptable along with identifying the party which must produce such evidence.**

Certification of the warrant

⁶ see for example offences listed in para 36 below.

⁷ OJ L 190, 18.7.2002, p.19

19. JUSTICE is concerned that Clause 2 does not provide a sufficient degree of assurance in the certification of the warrant. The certifying body should not simply be the police or NCIS – an appropriately qualified certifying body should be specified, perhaps from within the CPS of the Home Office extradition team.

Extension of time limits

20. Clause 8(5) allows an unfettered discretion to extend time limits on the request of one of the parties without any need for representations from the other party or possibility of review of the decision. **JUSTICE believes that the right to make representations is crucial when a decision is made impacting on a person’s right to liberty. All hearings relating to extensions of time limits should be *inter partes* and decisions should be subject to review. The Act should contain clear procedures for applications to extend time limits.**

Details of the Warrant

21. Clause 10 requires the judge to decide whether or not the offence specified in the Part 1 warrant is an extradition offence. There is no specification of the information needed in the warrant in order for the judge to come to such a decision. While the Framework Decision on the European Arrest Warrant contains an annexe model of the warrant, there is a degree of flexibility as to the information included on the warrant. In the interests of legal certainty the Act must explicitly state the details required on the warrant to allow the judge to reach a reasoned decision. In particular, the details of the offence must include sufficient detail of the legal basis of the offence and the specifics of the conduct alleged in order for the judge to establish a reasoned connection between the offence or type of offence and the conduct. So, for example, assault occasioning actual bodily harm where the assault involved hitting someone with a computer could not reasonably come under the heading of “computer related crime” included in the framework list as the computer is merely an incidental element of the offence.

22. **JUSTICE believes that the Act should specify the information needed on the warrant to allow the judge to decide whether the offence (in the light of the alleged conduct) amounts to an extradition offence. In the absence of sufficient information to come to a reasoned decision on this point, it is difficult to see how the judge can ensure that such decisions and subsequent detention do not amount to a breach of Article 5 ECHR on the grounds of arbitrariness.**

Withdrawal of a Part 1 warrant

23. Clauses 40, 41 and 42 address the situation where a warrant is withdrawn while extradition proceedings are ongoing. JUSTICE is pleased to see that these provisions have been changed from the draft bill and no longer allow for a person to be held for 7 days following withdrawal of a warrant. The bill does not, however, specify a time frame for the judge to inform the person of the order for discharge where the person is not before the judge at the time that the order is made. The effect of the order is clearly empty until the person has been informed of it and the bill should specify that the judge must inform the person as soon as is practicable.

Asylum Claims

24. Clause 39 outlines the position where asylum is claimed by the person who is the subject of a warrant. The clause is drafted in an extremely complex form and is not in line with the Nationality, Immigration and Asylum Act 2002. It fails to secure the rights of the individual, in particular, clause 39(9) removes all protection and possibility of appeal where the asylum claim is rejected by the Secretary of State and certified as clearly unfounded.

25. The provision should simply establish that anyone who has applied for asylum cannot be extradited until there has been a final determination of his or her asylum claim. The certification procedures under asylum legislation must not apply where the individual is subject to an extradition request as there is a danger of extradition being used to enable a state to persecute its own nationals.

Consent to Extradition

26. Clause 44 relates to consent to extradition. JUSTICE believes that free legal advice must be available prior to consent, given the irrevocable nature and the very serious consequences of consent including, in particular, the waiver of the specialty rule following extradition. Such serious consequences require that sufficient safeguards be in place to protect the rights of the individual. The extremely coercive nature of extradition and the complexities of extradition law demand that adequate legal advice must be available to an individual in such circumstances. **JUSTICE believes that the bill must contain a provision that the judge before whom consent is given must be satisfied that:**

- 1. the person before him has been informed of their right to free legal advice and has understood that information, and**
- 2. that access to such legal advice was made available to them before consent is deemed to have been given.**

Specific Bars to Extradition

27. Clause 11 of the bill lists the specific bars to extradition to Category 1 territories. They are:

the rule against double jeopardy;

extraneous considerations;

the person's age;

the death penalty;

hostage-taking considerations;

specialty;

the person's earlier extradition to the United Kingdom from another Category 1 territory;

the person's earlier extradition to the United Kingdom from a non-Category 1 territory.

These bars are then further defined in sections 10-16.

Double Jeopardy

28. Clause 12 of the bill defines double jeopardy as a bar to extradition:

A person's extradition to a Category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction if he were charged with the extradition offence in the part of the United Kingdom where the judge exercises jurisdiction.

29. The first difficulty with the text of Clause 12 of the Bill as an implementation of the EAW, is that the bill refers to the "extradition offence" rather than the "same acts".

30. The abolition of the dual criminality requirement in relation to the 32 types of serious offence contained in Article 2 of the EAW means that a request for extradition under the EAW need not be based on an offence known to UK law (either in England and Wales or in Scotland). If a request were made for an offence in another Member State which was not an offence in UK law, a defendant would not "be entitled to be discharged under any

rule of law relating to previous acquittal or conviction if he were charged with the extradition offence in the part of the UK where the judge exercises jurisdiction". No such rules of law would exist in relation to an offence not known to law. This would mean that in cases where the principle of dual criminality did not apply, the rule against double jeopardy would not apply using the proposed text in the draft bill. This is presumably not the intention.

31. The EAW text clearly states that a final judgment on the **same acts** is a mandatory bar to surrender and implementing legislation should reflect this rather than the narrower Protocol 7 ECHR Article 4 ECHR notion of double jeopardy.
32. The second difficulty is that the text of the bill seems to impose our own domestic rules relating to double jeopardy in deciding whether this bar to extradition is applicable. The rules and procedures relating to final judgments and appeals there from vary enormously throughout the EU and Council of Europe Member States. The text of the EAW and European case law⁸ clearly demonstrate an intention for the rule against double jeopardy to cross European borders so that once you have a final judgment for conduct in one Member State, proceedings may not be initiated for that same conduct in another Member State. The definition of a final judgment should be the definition given in the country where that judgment was made.
33. This European notion of *ne bis in idem* should be reflected in the text of the UK bill which will implement the European Arrest Warrant.
34. Under current UK law, the wording contained in the draft bill may provide greater procedural safeguards than a draft more closely based on the EAW provisions. However, given the proposals contained in the Criminal Justice Bill relating to double jeopardy, it is not certain that applying the UK law in relation to double jeopardy will in fact result in a higher level of safeguard.

Death Penalty

35. The bar to extradition by reason of the death penalty set out in clause 15 does not apply if the judge receives written assurance that a sentence of death would either not be imposed or, if imposed, would not be carried out. JUSTICE can see no reason for the inclusion of clause 15(2) in the context of Category 1 countries (as no EU countries or

⁸ Cases C-187/01 *Gozutok* and C-385/01 *Brugge*, Advocate-General's opinion of 19 September 2002

candidate countries have the death penalty), nor any justification for the extension of the Part 1 scheme to include countries which maintain the death penalty. **The death penalty should be an absolute bar to extradition. The inclusion of clause 15(2) does not appear consistent with the UK government's recent signature of Protocol 13 to the ECHR abolishing the death penalty in all circumstances, or ratification of Protocol 6 to the ECHR concerning the death penalty. A number of other EU Member States have introduced an absolute bar on extradition, irrespective of written assurances in cases where the death penalty could be imposed for the offence in question in the requesting state⁹.**

Specialty

36. The inclusion of specialty in clause 17 as a bar to extradition is somewhat misleading. When clause 17 is read in the light of clause 53 "presumed consent to other offence being dealt with", it appears that the degree to which the rule of specialty will be maintained in relation to Category 1 territories is far from clear.

37. Clause 17(3)(d) states that speciality will not be a bar to extradition where there are speciality arrangements with the Category 1 territory and the offence is:

"an extradition offence in respect of which the appropriate judge is treated by Clause 53 as giving his consent to the person being dealt with."

38. Clause 53 allows that the judge be treated as having given consent to the person being dealt with in the Category 1 territory for another offence if the United Kingdom and the territory concerned have each given notification under article 27.1 of the EAW.

39. The rule of specialty offers a key safeguard against abuse of the system. It should be considered as completely separate from the issue of dual criminality. It would be possible for offences prosecuted following surrender in the absence of the rule of specialty to raise other possible grounds for non-return, for example, because of an amnesty or because of a territoriality issue. A decision for return on the basis of such offences might have been refused. It is therefore not appropriate to issue a blanket waiver although, on a case by case basis and with the agreement of the surrendered person, a waiver could be appropriate.

⁹ e.g. Italy – Constitutional Court, Sent – 223/96 Caso Venezia

40. **JUSTICE** urges the government not to make a notification of presumed consent to possible prosecution for other offences under Article 27.1 or to surrender or subsequent extradition under Article 28.1 of the EAW. An indication of the government's intent not to make such notifications would be reflected in the deletion of clauses 53 and 54 of the draft bill.

Conviction in absentia cases

41. Clause 20(2) of the draft bill states that the judge must discharge a person where he was convicted in his absence, not having deliberately absented himself from his trial, and "would not be entitled to a retrial or (on appeal) to a review amounting to a retrial". The text of the EAW Framework Decision allows for Member States to demand a guarantee that the subject of the EAW in such circumstances, "will have the opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment"¹⁰.
42. **JUSTICE** believes that the wording in Clause 16(2)(c) of the bill should reflect the level of protection offered by the EAW and the UK's avowed position on the right to retrial in cases of conviction *in absentia*.

Extradition Offences – Dual Criminality

43. Clauses 63 and 64 of the bill set out what constitutes an extradition offence in relation to Category 1 territories. For pre-conviction requests in respect of offences falling outside the type of offences listed in Article 2.2 of the EAW, an extradition offence is defined as conduct which would attract a sentence of at least 12 months imprisonment in both the UK and the requesting state – for these cases, the dual criminality principle still applies and the level of extraditable offence is basically unchanged from the current situation.
44. **JUSTICE** is primarily concerned by the definition of an extradition offence in relation to pre-conviction cases which fall within Article 2.2 of the EAW and are not subject to the dual criminality requirement – that is, that conduct must constitute an offence both in the issuing state's law and in the law of the UK.
45. Article 2.2 of the EAW abolishes dual criminality in relation to a list of 32 types of offence where they are punishable with a maximum sentence of at least three years detention

¹⁰ Article 5(1) EAW Framework Decision, *supra*

according to the law of the issuing Member State. Whether or not conduct comes within the list is a matter for the judge in the issuing state to decide – the types of offence on the list are not defined and even where there is a degree of harmonisation at EU level (such as in the case of racism and xenophobia), the application of the EAW is not restricted to EU definitions of offences. The abolition of dual criminality in relation to offences carrying a maximum sentence of at least three years is indicative of the intention that this should apply only to serious offences (although in practice in the UK potential maximum sentences of over three years are common even for relatively minor offences such as shoplifting, this is not the case in most Member States). While the EAW allows Member States to abolish the principle of dual criminality more widely in Article 2.4, Member States are not required to go beyond the provision in Article 2.2 in implementing the EAW.

46. The bill goes beyond the requirements of the EAW effectively abolishing dual criminality for extradition requests from Category 1 territories for conduct within the Article 2.2 list carrying at least a maximum of 12 months sentence. This provides a significantly lower level of protection than that required by the EAW.
47. It is difficult to ascertain exactly what kind of conduct may be covered by such a low threshold in Member States and in the candidate countries that are due to join the EU when the EAW comes into force in 2004. The principle of mutual recognition is based on mutual trust in the judicial systems of the Member States but not on mutual knowledge. The current or future laws applicable in Member States for types of offence which could be classified as “participation in a criminal organisation”, “racism and xenophobia”, “swindling” or “computer related crime” are an unknown quantity. Extradition is an extremely coercive measure that has serious implications for a person’s right to liberty and private and family life. Such a coercive measure should only be used in very serious cases if the principle of proportionality is not to be breached.
48. When considering the application of these provisions, it must be borne in mind that the threshold in relation to pre-conviction offences has no regard for the sentence that would in fact be imposed for the alleged conduct, only the potential sentence for the offence is considered.
49. As a demonstration of the kinds of offence that could give rise to the execution of an EAW where dual criminality is abolished, the following offences carrying a maximum of at least 1 year but less than 3 years sentence are found in the criminal codes of some EU

Member States and candidate countries. They are all offences which could be construed as being of a racist or xenophobic type, depending on the facts of the case:

Lithuania – Art. 72 of the criminal code punishes infringement of national and racial equality rights with up to 2 years imprisonment.

France – Art. 36 of the law of 29 July 1881 criminalises causing public offence to a foreign head of state (until 15 June 2000 this was punishable with up to one year's imprisonment and a fine of 300 000 francs, it no longer carries a possible custodial sentence).

Italy – Art. 405 of the criminal code - Disturbing the religious function of a Catholic cult carries 16 months imprisonment.

50. In the UK, we still have draconian laws relating to blasphemy. The fact that prosecutions are rarely taken for blasphemy does not remove the potential for blasphemy to form the basis for issuing an EAW. The recent Strasbourg case of *Colombani and Others v France*¹¹ found that the French penal law relating to causing offence to a foreign head of state was in breach of Article 10 ECHR, the right to freedom of expression. This case concerned a prosecution of journalists for citing an EU report which linked the King of Morocco and the Moroccan royal family to the illicit drugs trade. The prosecution was brought by the French authorities on the insistence of the King of Morocco. These examples are put forward to demonstrate the lack of knowledge that Member States have about the kinds of laws that exist in other states and the types of sanctions that they carry. This problem is exacerbated by the fact that it is impossible to predict future developments in the criminal law of Member States¹². **The EAW should be implemented at its highest, abolishing dual criminality only for offences of the type on the list in Article 2.2 which carry at least a maximum of 3 years custodial sentence. This would go some way to avoid the abusive use of the coercive measure of extradition for minor offences which do not constitute crimes in this country.**

51. JUSTICE is concerned that the bill contains only a reference to the Framework Decision in defining that class of extradition offences. **In the interests of legal certainty, the Framework list should be imported directly into the Act.**

¹¹ Judgment of 25 June 2002

¹² As can be seen by the recent criminalisation of Batasuna, a political party with over 600 elected representatives in Spain.

Part 2 - Retention of Prima Facie Case Requirement

52. With regard to Part 2 cases, many of the points raised above in relation to Part 1 also apply. Clause 83 of the Bill, however, relates to the *prima facie* case requirement which is only maintained in relation to Part 2 cases. This requirement provides an important safeguard in the case of requests emanating from Category 2 territories, the majority of which are not signatories to the ECHR. JUSTICE is concerned that the *prima facie* case requirement is effectively removed or at least diluted by the admission of a summary of a statement as evidence included in clause 83(3). **A high standard of evidence should be required for establishing the existence of a *prima facie* case.**

53. The standard of evidence required is further eroded by clauses 133/134 relating to the admissibility of faxed documents and the levels of authentication required. Again, JUSTICE believes that the procedural requirements on the standard of evidence need to be tightened up in order to maintain the requirement of a *prima facie* case.

Relationship between International Obligations and Domestic Rights

54. JUSTICE urges the government to specify in clauses 1 and 68 that the Act is operative in accordance with the relevant bilateral or multilateral treaty, thus ensuring that domestic rights are not less than those accorded by the relevant international obligation. The clauses should specify this and JUSTICE would put forward the following possible wording:

“This Act shall have effect in relation to that state, but subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the order.”

JUSTICE

September 2002

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