



## **Extradition (Provisional Arrest) Bill [HL] HL Bill 3 of 2019–20**

On 4 February 2020, the second reading of the Extradition (Provisional Arrest) Bill [HL] is scheduled to take place in the House of Lords.

### **Summary**

The Extradition (Provisional Arrest) Bill [HL] was announced in the December 2019 Queen's Speech. Its primary purpose is to create a power of arrest, without warrant, for the purpose of extraditing people for serious offences. This would apply to certain countries specified by the bill. In cases where these specified countries make a valid extradition request (as defined under the bill) a designated authority in the UK would be able to issue a certificate in respect of the request. The issuing of this certificate would allow a constable, customs officer, or a service police officer to arrest the individual specified without the need to apply to a court. The Government intends for the designated authority in the UK to be the National Crime Agency (NCA).

Were the UK to lose access to the European arrest warrant (EAW), provisions in the bill would allow for the Government to apply the new power of arrest to extradition requests made by some or all EU member states.

The bill would also make consequential amendments and create a power for the Government to make further consequential amendments to primary legislation through regulations. The bill consists of two clauses and one schedule.

Charley Coleman | 27 January 2020

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## I. Policy Background

The Extradition Act 2003 (the 2003 Act) provides for two systems of arrest in extradition cases based on the designation of the territory making the request. Territories are designated as either category 1 or category 2:

- **Category 1 territories:** Part 1 of the 2003 Act is the implementing legislation establishing the European arrest warrant (EAW) under Council Framework Decision 2002/58/JHA.<sup>1</sup> This is an extradition system based on the “principle of mutual recognition of judicial systems by EU member states and requires judicial authorities to recognise and act upon an arrest warrant made by the judicial authority of another member state”.<sup>2</sup> Territories under part 1 are referred to in the 2003 Act as ‘category 1 territories’.
- **Category 2 territories:** Part 2 of the 2003 Act, provides for extradition to those territories designated by order under section 69 of the 2003 Act. These are referred to as category 2 territories and are those with which the UK has formal extradition arrangements, but which are not category 1 territories.

Currently, UK police must seek a warrant from a judge before arresting someone who is wanted for criminal prosecution, or to serve a sentence, by authorities in a category 2 territory.<sup>3</sup> In contrast, UK police may immediately arrest someone on the basis of a warrant issued by a category 1 territory if the warrant has been correctly issued by the requesting authority and the National Crime Agency (NCA) has certified it. The bill’s purpose is to create “a power of arrest, without warrant, for the purpose of extraditing people for serious offences” in relation to specified category 2 territories, which are set out in the bill.<sup>4</sup>

Police usually become aware of a request by a category 2 territory through Interpol alerts. These are “systematically available to police and Border Force officers”.<sup>5</sup> The bill’s explanatory notes state that as a result, police may be aware that an individual is the subject of such an alert but under the current powers of the 2003 Act are unable to arrest them without applying to a judge for an arrest warrant.<sup>6</sup> The explanatory notes state that an application “takes at least a matter of hours” and argues that this creates a possibility that the individual could offend or abscond before being detained.<sup>7</sup> The Government has explained that while Interpol red notices are a common way to communicate extradition requests internationally, the power in the bill would not be limited to these notices and “would apply in respect of any international request for arrest”, provided that it complies with requirements set out in the bill.<sup>8</sup> The Government has argued that “many like-minded” countries provide the ability for their police forces to make arrests on the basis of Interpol alerts, citing “many EU member states”, Norway and Switzerland.<sup>9</sup>

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<sup>1</sup> [Explanatory Notes](#), para 13.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*, para 4.

<sup>4</sup> Extradition (Provisional Arrest) Bill, clause 1 and paragraph 3 of its schedule.

<sup>5</sup> [Explanatory Notes](#), para 5.

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*, para 6.

<sup>9</sup> Prime Minister’s Office, [The Queen’s Speech 2019](#), 19 December 2019, p 83.

The Government's background briefing on the Queen's Speech explained that the bill could be used in the event that the UK lost access to the EAW, following its withdrawal from the EU:

In the event that the UK no longer had access to the European arrest warrant after leaving the EU, the bill could be amended to apply to some or all EU member states subject to parliamentary approval.<sup>10</sup>

## 2. Provisions of the Bill: Overview

### 2.1 Clause 1 and the Bill's Schedule

The Extradition (Provisional Arrest) Bill [HL] consists of two clauses and one schedule. Clause 1 sets out the purpose of the schedule as follows:

The schedule—

- (a) creates a power of arrest, without warrant, for the purpose of extraditing people for serious offences, and
- (b) contains consequential amendments and a power to make further amendments.<sup>11</sup>

Part 1, paragraph 2 would insert new sections 74A, 74B, 74C, 74D and 74E into the 2003 Act after section 74 and a new schedule A1 before schedule 1 of that act. These amendments would create a new extradition process under part 2 of the 2003 Act.

#### **Power of Provisional Arrest**

New section 74A would allow constables, customs officers or service police officers to make arrests without a warrant based on a certificate issued by a 'designated authority' under new section 74B. The bill's explanatory notes state that it is the Government's intention for the NCA to be the designated authority.<sup>12</sup> Amongst its provisions, new section 74A would require the certificate to be given to the arrested individual as soon as practicable and that they must be brought before a judge within 24 hours of the time of their arrest (new section 74D sets out what the judge must consider at this stage).

#### **Designation of Specified Category 2 Countries and Issuing of Certificates by the NCA**

New section 74B(1) would provide the NCA with the power to issue the certificate based on a valid request made by an authority from a specified category 2 territory.<sup>13</sup> A specified category 2 territory is one listed in new schedule A1, which the bill would insert into the 2003 Act. Schedule A1 lists Australia, Canada, Liechtenstein, New Zealand, Switzerland and the US as specified category 2 territories. The Government has stated that these countries have been included in the schedule

<sup>10</sup> Prime Minister's Office, [The Queen's Speech 2019](#), 19 December 2019, p 82.

<sup>11</sup> Extradition (Provisional Arrest) Bill, clause 1.

<sup>12</sup> [Explanatory Notes](#), para 9. The briefing will henceforth refer to the NCA as the designated authority. The NCA is the UK's National Central Bureau for Interpol. However, the bill would allow for other authorities to also be designated, see page 4 of this briefing for further information.

<sup>13</sup> Section 74B(4) would provide that the designated authority could be designated under regulations made by the secretary of state.

because the UK “has a high level of confidence in them as extradition partners, in their criminal justice systems and in their use of extradition”.<sup>14</sup> New section 74B(7) would provide the secretary of state with the powers to make changes to the list in schedule A1 by regulations. The explanatory notes also state that should the UK lose access to the EAW a statutory instrument could be made to extend the bill’s new arrest power to some or all EU member states, subject to the affirmative procedure.<sup>15</sup> The Home Office has explained further that this would have the effect of re-designating category 1 countries as category 2 countries. It has argued it would likely be appropriate to specify some, or all of them, for the purposes of the bill, “thereby replicating the immediate power of arrest which applies to a certified European arrest warrant”.<sup>16</sup> The Home Office has also stated that the power could be used to remove specified category 2 countries should there be a sufficient deterioration in the standards of their criminal justice system.<sup>17</sup>

New section 74B makes provision for the issuing of certificates by the NCA. It is also the section that provides the secretary of state with the power to designate the NCA as a ‘designated authority’.<sup>18</sup> Further bodies may be so designated and different authorities may be designated for different parts of the UK.<sup>19</sup> The Government has explained that this power would allow it to reflect any future changes to the structure of the UK’s law enforcement arrangements.<sup>20</sup> The NCA may only issue a certificate contingent on requirements in 74B(1)(a) to (d). This includes that the NCA has reasonable grounds for believing the offence is a serious extradition offence and that it is satisfied that the seriousness of the conduct constituting the offence makes it appropriate to issue the certificate. The request must also be issued by an authority of a specified category 2 territory. Whether the offence was a “serious extradition offence” would be determined under sections 137 and 138 of the 2003 Act, subject to modifications set out in new section 74B9(a) to (e) applied. The Government has stated that the “key modification” is that the conduct in question must “constitute an offence punishable in the United Kingdom by a custodial sentence of three years or more”.<sup>21</sup> Under sections 137 and 138 of the 2003 Act this would normally be one year or more.

New schedule A1 would also provide that references in section 74B to a request “includes a request made before this Act is passed”.

### **Valid Requests for Arrest**

New section 74C would set out requirements that a request made by an authority in a specified category 2 territory would have to meet in order to be considered valid. New section 74C(1) would provide that a request for a person’s arrest would be valid if it was made in the approved way<sup>22</sup> and contained a correct statement and information referred to in 74C(2) to (5). The correct statement

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<sup>14</sup> [Explanatory Notes](#), para 7.

<sup>15</sup> *ibid.*

<sup>16</sup> Home Office, [Extradition \(Provisional Arrest\) Bill: Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee](#), 7 January 2020, para 26.

<sup>17</sup> *ibid.*

<sup>18</sup> New section 74B(4).

<sup>19</sup> New section 74B(5).

<sup>20</sup> Home Office, [Extradition \(Provisional Arrest\) Bill: Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee](#), 7 January 2020, para 23.

<sup>21</sup> [Explanatory Notes](#), para 44.

<sup>22</sup> That is that the NCA was satisfied that the authority making the request from the category 2 territory had the function of making such requests in that territory.

and information would depend upon whether the subject of the request was wanted for prosecution or had been convicted and was wanted for the purpose of being sentenced or serving a sentence. For example, if the individual is wanted for prosecution, the statement is that the person has been accused in the category 2 territory of an offence specified in the request and that the category 2 territory wishes for the person to be extradited for the purpose of prosecution.<sup>23</sup> The information includes the person's identity, the particulars of the alleged offence and the particulars of the sentence that may be imposed under the territory's laws.<sup>24</sup>

### ***Bringing the Arrested Before a Judge***

New section 74D would set out what a judge must do if someone provisionally arrested under section 74A is brought before them. This includes making an assessment as to whether a warrant for the person's arrest would be issued under section 73 of the 2003 Act if the person were not already under arrest. If the judge concludes that it would not, then they must order the person's discharge. If the judge concludes that it would, then the judge must proceed under new section 74E. Amongst its provisions, new section 74D would allow the judge to adjourn proceedings to allow more evidence to be produced if certain requirements are met. More than one adjournment may be granted but the total period of adjournments cannot total more than 72 hours, with allowances made for days of the weekend and bank and court holidays.<sup>25</sup> If the judge grants an adjournment then they must remand the person in custody or on bail.

New section 74E sets out what a judge must do if they decide under section 74D that a warrant would be issued under section 73 of the 2003 Act if the person were not already under arrest. The judge must inform the person that they have been accused of an offence in a category 2 territory or that they are alleged to be unlawfully at large after the conviction of an offence in such a territory. They must also remand them in custody or on bail and provide them with required information on consent. The information on consent is set out in new section 74E(2). This includes that the person may consent to extradition. The explanatory notes explain that a person arrested under new section 74A may consent to their extradition "subject to certain criteria (including legal representation at the time of consent) being met".<sup>26</sup> The explanatory notes explain that the bill does not alter the "subsequent process by which it is determined whether a person should be extradited from the UK" and that people arrested under the new power would benefit from existing safeguards available under part 2 of the 2003 Act in regard to the decision to extradite.<sup>27</sup> These include that extradition should take place if the court considered that this would breach the individuals human rights or if it considered that the request for extradition was politically motivated.<sup>28</sup>

### ***Consequential Amendments***

Part 2 of schedule 1 of the bill would make consequential amendments to a number of other pieces of legislation. Paragraph 29(1) of the schedule would also provide that the Secretary of State may "by

<sup>23</sup> Extradition (Provisional Arrest) Bill, schedule, paragraph 2, new section 74C(2).

<sup>24</sup> *ibid*, section 74C(3).

<sup>25</sup> [Explanatory Notes](#), para 56.

<sup>26</sup> *ibid*, para 59.

<sup>27</sup> *ibid*, para 11.

<sup>28</sup> *ibid*.

regulations make further provisions that is consequential on the amendments made by this schedule”. Paragraph 29(2) would provide that such regulations could “amend, repeal or revoke any provision made by primary legislation”. Such a regulation would be subject to the affirmative procedure. Any other statutory instrument containing regulations under paragraph 29 would be subject to the negative procedure. The Home Office has stated that the new power of arrest created by the bill has “ramifications for legislation beyond the strict confines of extradition law”.<sup>29</sup> It has argued that it is therefore “prudent” to include the regulation making power to address any further consequential amendments to primary legislation.<sup>30</sup>

## 2.2 Clause 2

Clause 2 includes the bill’s extent, commencement, and short title. For example, clause 2(1) would provide that any amendment or repeal made under the bill would have the same extent within the UK as the provision that had been amended or repealed. Clause 2(2) would allow the existing powers in the 2003 Act that enable the extension of its provisions to the British Overseas Territories and Crown Dependencies (sections 177 and 222), to be used to extend the amendments made by the bill.<sup>31</sup>

## 3. Commentary

The Government has explained that the purpose of the Extradition (Provisional Arrest) Bill is to reduce re-offending by “serious and organised criminals” and to improve efficiency of law enforcement.<sup>32</sup> It has also indicated that existing secondary legislation making powers could be used to re-designate EU member states from category 1 to category 2 countries. Powers under the bill could then be used to specify any or all of these as ‘specified category 2’ countries, should the UK lose access to the EAW.<sup>33</sup>

In 2017, the House of Lords European Union Committee discussed re-designating category 1 countries in its report on judicial oversight of the EAW.<sup>34</sup> The committee considered a scenario in which the UK was no longer able to participate in the EAW. This included whether the UK would be able to rely on the 1957 Council of Europe Convention on Extradition (as opposed to a new extradition agreement with the EU). The committee heard evidence from Professor Sir Alan Dashwood, professor of law at City University and emeritus professor of European law at Cambridge University, who argued that in such a circumstance it would be necessary to amend the 2003 Act:

There would have to be some interim arrangements, even if only unilateral ones. If it was beginning to look as if there would be no agreement on this issue, some provision would have to be made. There would have to be an amendment to the Extradition Act 2003, and part 1

<sup>29</sup> Home Office, [Extradition \(Provisional Arrest\) Bill: Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee](#), 7 January 2020, para 29.

<sup>30</sup> *ibid.*

<sup>31</sup> [Explanatory Notes](#), para 29.

<sup>32</sup> Home Office, [Impact Assessment: Extradition Provisional Arrest Power](#), 1 October 2019, p 1. This impact assessment was produced in October 2019. A substantively similar bill to the current bill was introduced in the Lords on 24 October 2019 in the 2019 session.

<sup>33</sup> [Explanatory Notes](#), para 7.

<sup>34</sup> House of Lords European Union Committee, [Brexit: Judicial Oversight of the European Arrest Warrant](#), 27 July 2017, HL Paper 16 of session 2017–19.

territories would have to become part 2 territories. There would be a problem with those member states that have rescinded their legislation implemented with the convention.<sup>35</sup>

Mike Kennedy, former president of Eurojust and former chief operating officer of the Crown Prosecution Service, also expected that the 2003 Act might need to be amended to move EU countries from category 1 to category 2.<sup>36</sup>

However, the committee expressed concern that amending the 2003 Act would not be sufficient because “extradition is a two-way, reciprocal arrangement”.<sup>37</sup> It argued that if the UK did not have pre-existing extradition arrangements with specific member states “extradition could become impossible at the moment of Brexit”. In its response to the committee, the then Government did not make reference to the committee’s comments on amending the 2003 Act.<sup>38</sup>

Writing primarily about the Home Office’s impact assessment, Rebecca Niblock, a criminal litigation partner at Kingsley Napley LLP specialising in extradition, has expressed concerns about the bill.<sup>39</sup> The impact assessment states that “the policy is expected to result in six individuals entering the [criminal justice system] more quickly than would otherwise have been the case”.<sup>40</sup> Ms Niblock argued that whilst this was laudable “a far graver concern” was the loss of the EAW.<sup>41</sup> She argued it was “disingenuous” for the Government to suggest that re-designating EU member states was “an additional benefit, ancillary to the primary one”. She also argued that whilst Interpol had “improved its processes significantly” in the past five years it remained “an unaccountable organisation that is frequently misused”.

In October 2019, the *Guardian* newspaper wrote that Richard Martin, the deputy assistant commissioner of the National Police Chiefs Council, had described the loss of the EAW as one of the police’s main concerns about a no-deal scenario. It quoted Mr Martin as saying that the police had been “pushing and advocating” to allow the police to arrest someone who was wanted on a red notice without having to get a magistrate’s warrant.<sup>42</sup> He said that the police had been in negotiations with the Home Office on the issue. The *Times* newspaper has quoted Martin Hewitt, chairman of the National Police Chiefs Council, as saying the provisions of the bill would “close a loophole” and help the police “protect the public from harm”.<sup>43</sup>

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<sup>35</sup> House of Lords European Union Committee, [Oral Evidence: Brexit: Judicial Oversight of the European Arrest Warrant](#), 29 March 2017, HL Paper 16 of session 2017–19, Q7.

<sup>36</sup> House of Lords European Union Committee, [Oral Evidence: Brexit: Judicial Oversight of the European Arrest Warrant](#), 5 April 2017, HL Paper 16 of session 2017–19, Q27.

<sup>37</sup> House of Lords European Union Committee, [Brexit: Judicial Oversight of the European Arrest Warrant](#), 27 July 2017, HL Paper 16 of session 2017–19, para 59.

<sup>38</sup> HM Government, [Government Response to the House of Lords EU Home Affairs Sub-Committee Report Brexit: Judicial Oversight of the European Arrest Warrant](#), December 2017.

<sup>39</sup> Rebecca Niblock, ‘[Changes Proposed by the Extradition \(Provisional Arrest\) Bill](#)’, *Law Society Gazette*, 6 November 2019. Rebecca Niblock stated that at the time of her writing the article “no legislative text [was] available”.

<sup>40</sup> Home Office, [Impact Assessment: Extradition Provisional Arrest Power](#), 1 October 2019, p 2.

<sup>41</sup> Rebecca Niblock, ‘[Changes Proposed by the Extradition \(Provisional Arrest\) Bill](#)’, *Law Society Gazette*, 6 November 2019.

<sup>42</sup> Vikram Dodd, ‘[No-Deal Brexit ‘Would Leave Police Unable to Arrest Those Wanted Abroad](#)’, *Guardian*, 11 October 2019.

<sup>43</sup> Richard Ford, ‘[Queen’s Speech: Boris Johnson Seeks to Brand Tories as the Party of Law and Order](#)’, *Times* (£), 15 October 2019.

#### 4. Further Information

- House of Lords Extradition Law Committee, [Extradition: UK Law and Practice](#), 10 March 2015, HL Paper 126 of session 2014–15; and [Government Response](#), July 2015, Cm 9106

*The House of Lords Extradition Law Committee was appointed in June 2014 to consider and report on the law and practice relating to extradition. It published its report on 10 March 2015. The report largely examined issues relating to the process of extradition itself, particularly in reference to the European arrest warrant. Chapter 10 of the report discussed how countries are designated under part 2 of the 2003 Act. This included the requirement for the provision of prima facie evidence by some countries based on their designation or their status as signatories of the European Convention on Extradition. It did not discuss the police's powers of arrest under part 2 of the 2003 Act.*

- House of Lords European Union Committee, [Brexit: The Proposed UK-EU Security Treaty](#), 11 July 2018, HL Paper 164 of session 2017–19; and [Government Response](#), September 2018

*Report by the House of Lords European Union Committee on a future security treaty between the UK and the EU. The issue of extradition is discussed throughout the report.*

- House of Commons Library, [The European Arrest Warrant](#), 18 April 2017

*Briefing published by the House of Commons Library in 2017, which provides an overview of the EAW and discusses the potential impact of the UK's withdrawal from the EU.*