



Extradition

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Author: Sally Broadbridge
Home Affairs Section

The *Extradition Act 2003* introduced new procedures which now govern extradition to and from the UK. The Act greatly reduced the Home Secretary's role in extradition proceedings and his broad discretion to approve or refuse a person's extradition. Decisions about whether or not individuals should be extradited are now largely made by judges at extradition hearings. The Act sets out in specific terms the circumstances in which judges may refuse extradition requests.

This note discusses:

- the changes introduced by the *Extradition Act 2003* and the Act's designation of countries as Part 1 or Part 2 territories for the purposes of extradition;
- a summary of procedures for extradition to Part 1 and Part 2 territories

Library standard note SN/HA/2204 on *The UK/US Extradition Treaty* covers the history of the legislation that became the *Extradition Act 2003* and the background to the 2003 treaty in more detail. It also outlines reactions to the treaty. Some of the recent cases involving extradition requests made by the US are summarised in SN/HA/4980. Information about the European Arrest Warrant is provided in SN/HA/1703 and SN/HA/4979.

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A. The *Extradition Act 2003*

Under the *Extradition Act 2003* each of the countries with which the UK has extradition arrangements has now been designated in orders made by the Home Secretary as being in one of two categories – Category 1 or Category 2. Different extradition procedures then apply, depending on whether the country requesting extradition is a Category 1 (or “Part 1”) territory or a Category 2 (or “Part 2”) territory. These procedures are summarised at the end of this note.

The Explanatory Notes to the 2003 Act set out other features of the new procedures as follows:

- the adoption of the Framework Decision on the European Arrest Warrant creating a fast-track extradition arrangement with Member States of the European Union and Gibraltar;
- retention of the current arrangements for extradition with non-European Union countries with important modifications to reduce duplication and complexity;
- a simplification of the rules governing the authentication of foreign documents;
- the abolition of the requirement to provide prima facie evidence in certain cases;
- a simplified single avenue of appeal for all cases.

The *Extradition Act 2003* also allows Part 2 territories to be further designated¹ so that:

- a territory need only provide “information” rather than “evidence” to satisfy tests for the issuing of arrest warrants under sections 71(4) and 73(5) of the 2003 Act
- a judge need not apply the sufficiency of evidence test in s. 84(1) if the person whose extradition is sought has not been convicted
- a judge need not apply the sufficiency of evidence test in s. 86(1) if the person whose extradition is sought has been convicted in their absence

Three designation orders designating territories as Category 1 or Category 2 for the purposes of the 2003 Act, and providing the further designation for certain Category 2 territories described in the previous paragraph, were made on 18 December 2003 and came into force with the *Extradition Act* on 1 January 2004.² The orders, which were subject to the affirmative procedure, were considered in draft and approved by the House of Commons Standing Committee on Delegated Legislation on 15 December 2003³ and approved by a

¹ under ss.71(4), 73(5), 84(7) & 86(7)

² *Extradition Act 2003 (Designation of Part 1 Countries) Order 2003* SI 2003/3333; *Extradition Act 2003 (Designation of Part 2 Countries) Order 2003* SI 2003/3334; *Extradition Act 2003 (Part 3 Designation) Order 2003* SI 2003/3335

³Third Standing Committee on Delegated Legislation Monday 15 December 2003 c1-30

formal vote in the House of Commons itself on the draft *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003* on 17 December 2003.⁴ They were considered and approved by the House of Lords on 16 December 2003.⁵

The effects of these orders are described below.

1. Part 1 territories

All European Union (EU) member states have been designated Part 1 territories following their implementation of the EU Framework Decision on the European Arrest Warrant (EAW), although there is nothing in the 2003 Act which restricts designation as a Part 1 territory to those countries which operate the scheme.⁶

Under the Council of Europe Convention on Extradition, signed by the United Kingdom in 1990 and implemented in 1991, the need for prima facie evidence for extradition between member states of the Council of Europe who are parties to the convention is excluded. The simplified extradition system set out in the EU Framework Decision on the European Arrest Warrant (EAW) Scheme also removes what is known as the “double criminality” requirement (that is, the requirement that the conduct for which extradition is sought should be a criminal offence in both the country requesting extradition and the country from which a person’s extradition is being sought) for certain types of conduct.⁷ The Preamble to the Framework Decision describes the EAW Scheme as being based on the high level of confidence held by the EU Member States for one another⁸ and the decision was agreed on the basis that a defendant would receive the same level of protection under the criminal justice system of any Member State. All EU Member States are required to comply with the European Convention on Human Rights (ECHR) and alleged breaches by them of the ECHR can be referred to the European Court of Human Rights.

Some commentators have criticised the removal of the need for prima facie evidence and of the double criminality rule for extradition between EU Member States, noting that standards of justice vary considerably within the EU and that there are significant variations between EU Member States in what constitutes criminal conduct.⁹ In 2004, a warrant was issued in Germany for the arrest of Gerald Toben, alleging Holocaust denial committed in Australia, where it is not a criminal offence. He was arrested at Heathrow airport on 1 October 2008, and his extradition hearing is set for 17 October.¹⁰

<http://www.publications.parliament.uk/pa/cm200304/cmstand/deleg3/st031215/31215s01.htm#end>

⁴ HC Debates 17 December 2003 c1697

⁵ HL Debates 16 December 2003 cc1062-1075, 1079-1080

⁶ See Jones and Doobay on *Extradition and Mutual Assistance* (Third Edition 2005) paras. 5-007-5-010

⁷ This is the requirement that the act in respect of which extradition is sought must have been committed within the jurisdiction of the state demanding extradition; must be a crime in that state and in the state from which extradition is requested and must be listed in an extradition treaty between the two states under some name or description by which it is known in both states.

⁸ Framework Decision 2002/584/JHA Preamble, Para. 10

⁹ “All things being unequal?” – *Times* 17 October 2006; “Mr Blair extradited? Not as crazy as it sounds” – *Times* 11 June 2007

¹⁰ “Nobody is safe from the long arm of EU law. If a Briton commits an act which is legal at home but forbidden in Europe, he can still go to prison. That’s a step too far, says Philip Johnston”, 6 October 2008, *Daily Telegraph*

2. Part 2 territories

Under the 2003 designation orders made on 18 December 2003 over a hundred states were designated Part 2 territories. As the Home Office website notes:

Territories designated under Part 2 are either members of the [European Convention on Extradition](#); the [London Scheme for Extradition within the Commonwealth](#); or else they are parties to bilateral extradition treaties with the UK.¹¹

The states which are designated Part 2 territories are:

Albania, Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Azerbaijan, The Bahamas, Bangladesh, Barbados, Belize, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Canada, Chile, Colombia, Cook Islands, Croatia, Cuba, Dominica, Ecuador, El Salvador, Fiji, The Gambia, Georgia, Ghana, Grenada, Guatemala, Guyana, Hong Kong Special Administrative Region, Haiti, Iceland, India, Iraq, Israel, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Liechtenstein, Macedonia (FYR), Malawi, Malaysia, Maldives, Mauritius, Mexico, Moldova, Monaco, Montenegro, Nauru, New Zealand, Nicaragua, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Russian Federation, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Serbia, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Switzerland, Tanzania, Thailand, Tonga, Trinidad and Tobago, Turkey, Tuvalu, Uganda, Ukraine, Uruguay, United Arab Emirates, The United States of America, Vanuatu, Western Samoa, Zambia and Zimbabwe.¹²

A number of Part 2 territories were also given the additional designation, enabling them to dispense with the requirement to provide prima facie evidence with their extradition requests.¹³ The full current list of Part 2 territories which have been given this further designation is:

Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, , New Zealand, Norway, Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine, United States of America, Hong Kong Special Administrative Region (for the purposes of section 71(4) and 73(5) of the Act).¹⁴

B. Extradition Procedures

1. Part 1 territories

The Home Secretary has no role in proceedings for extradition to Part 1 territories. The Home Office website contains a summary of extradition arrangements under the 2003 Act and includes the following note on the procedures that will follow a person's arrest in connection with a request for their extradition to a Part 1 territory:

¹¹ <http://police.homeoffice.gov.uk/operational-policing/extradition-intro/extrad-part-2>

¹² *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 SI 2003/3334 Article 2*

¹³ *ibid.* Article 3

¹⁴ *ibid.* as amended

Initial hearing

At the initial hearing after a person's arrest, the District Judge must confirm, on the balance of probabilities, the identity of the requested person; inform the person about the procedures for consent; and fix a date for the extradition hearing if the requested person chooses not to consent to his or her extradition.

Extradition hearing

The extradition hearing should normally take place within 21 days of arrest. If the judge is satisfied that the conduct amounts to an extradition offence and that none of the bars to extradition apply (the rule against double jeopardy; extraneous considerations; passage of time; the person's age; hostage-taking considerations; speciality; the person's earlier extradition), he is required to decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998. If the judge decides that question in the affirmative, he must order the person to be extradited.

Dual Criminality Test

The Framework Decision contains a list of 32 categories of offence for which the "dual criminality" test is not needed. The offence must carry a minimum 3 year sentence in the issuing state.

If the conduct for which extradition is sought is not covered by one of these list offences, then the conduct must be an offence in both the issuing and executing states. Also, if any of the conduct for which extradition is sought was carried out outside the issuing state, the conduct must be an offence in both the issuing and executing states.

Appeals

An appeal against extradition must be lodged within 7 days of a person's extradition being ordered.

High Court

The requested person may appeal to the High Court if the judge orders his extradition.

The issuing territory may appeal against the discharge of the person by the judge at the extradition hearing.

House of Lords

The decision of the High Court may be appealed against in the House of Lords by either the requested person or the issuing territory provided that leave to appeal has been given by either the High Court or the House of Lords.

An appeal to the House of Lords can only be made on a point of law of general public importance and where it is agreed by the High Court that the point is one which should be considered by the House of Lords. Section 32 of the 2003 Act refers.

Surrender

The person in respect of whom extradition has been ordered should normally be extradited within 10 days of the final court order. If there are exceptional

circumstances, and with the agreement of the Issuing State, this time-limit can be extended.¹⁵

2. Part 2 territories

The Home Office website includes the following summary of arrangements for extradition from the UK to Part 2 territories under the 2003 Act:

Extradition Act 2003- Part 2

Extradition relations with category 2 territories are governed by Part 2 of the 2003 Act. The main elements of Part 2 of the Extradition Act 2003 are:

- Removal of the duplicated and overlapping roles of the courts and ministers found in the 1989 Act
- a streamlined appeals procedure
- a reduced role for the Secretary of State and removal of his broad discretion

Extradition from the United Kingdom requires decisions by both the Secretary of State and the courts. The overall time taken to complete a case can vary considerably depending, for instance, on its complexity. Independence of the judiciary means that the Secretary of State has no influence over the time a case takes to clear the judicial stages.

[...]

Extradition Requests

Under Part 2 of the 2003 Act, requests to the United Kingdom should be made to the Secretary of State. The Secretary of State then issues a certificate and sends the papers to the court. The court then issues a warrant for the requested person's arrest. The documentation can only be certified if the requirements of section 70 of the 2003 Act are met. In cases where the requested person has been convicted, the documentation must also include a statement that the person is "unlawfully at large", i.e. has been convicted and is liable to immediate arrest and detention.

Requesting states are advised to submit a draft request to the Crown Prosecution Service to ensure potential difficulties are resolved before the request is finally submitted

Documentation

Generally the information required to accompany the request will include:

- (a) particulars of the person whose return is requested;
- (b) particulars of the offence of which he is accused or was convicted;
- (c) in the case of a person accused of an offence, a warrant or a duly authenticated copy of a warrant for his arrest issued in the requesting state, or for a provisional arrest, details of such a warrant;

¹⁵ <http://police.homeoffice.gov.uk/operational-policing/extradition-intro/extrad-part-1>

(d) in the case of a person unlawfully at large after conviction of an offence, a certificate or a duly authenticated copy of a certificate of the conviction and the sentence, or for provisional arrest, details of the conviction;

(e) evidence or information that would justify the issue of a warrant for arrest in the UK, within the jurisdiction of a judge of the court that would hold the extradition hearing – see “Evidence” below.

Evidence

Some countries are not required to provide prima facie evidence in support of their request for extradition. These countries are, as at 28 July 2005:

Albania, Andorra, Armenia, Australia, Azerbaijan, Bulgaria, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, New Zealand, Norway, Romania, Russian Federation, Serbia and Montenegro, South Africa, Switzerland, Turkey, Ukraine and the United States of America.

Preliminary Hearing

After the person has been arrested, he is brought before the court as soon as is practicable and the judge sets a date for the extradition hearing.

Extradition Hearing

The judge must satisfy himself that the request meets the requirements of the 2003 Act, including dual criminality and where appropriate, prima facie evidence of guilt; and that none of the bars to extradition apply (the rule against double jeopardy; extraneous considerations; passage of time or hostage-taking considerations). Finally, he is required to decide whether the person’s extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998. If he decides all of these questions in the affirmative, he must send the case to the Secretary of State for the latter’s decision whether the person is to be extradited. Otherwise, he must discharge the person.

Secretary of State

Where a case is sent to him, the Secretary of State must consider whether surrender is prohibited because:

i) the person could face the death penalty:

This is an absolute prohibition unless the Secretary of State receives an adequate written assurance from the requesting state that the death penalty will not be imposed, or will not be carried out, if imposed;

ii) there are no speciality arrangements with the requesting country:

The condition of “speciality” requires that the person must be dealt with in the requesting state only for the offences in respect of which the person is extradited (except in certain limited circumstances); or

ii) the person was earlier extradited to the UK:

This might require the Secretary of State to obtain the consent of the earlier extraditing country, before the person can be extradited on to the requesting state.

In this event, the defence has to make any representations within six weeks of the case being sent to the Secretary of State (42 days, including the day the case was sent). The Secretary of State has to make his own decision within two calendar months of the day the case is sent to him, or else the person may apply to be discharged.

However, if the representations are complex and require enquiries being made of the requesting state, the Secretary of State may apply to the High Court for an extension of the decision date, of any length but usually of no more than two months – it is a matter for the court as to whether and for how long this is granted, although it has not to date refused any such application. More than one extension may be sought in any one case; and granted if it appears necessary.

If the Secretary of State does find that surrender is prohibited, he must order the discharge of the person. If none of the three prohibitions apply, or appropriate assurances have been given, the Secretary of State must order the person to be extradited.

Appeals

a) High Court

A requested person may appeal within 14 days to the High Court if:

- i) the district judge sends the case to the Secretary of State; and
- ii) the Secretary of State orders his extradition.

Such an appeal may be against either or both of the decisions at (i) and (ii).

A requesting state may appeal within 14 days to the High Court against the discharge of the requested person by:

- iii) the judge at the extradition hearing; or
- iv) the Secretary of State (after the case has been sent to him by the District Judge).

b) House of Lords

A decision of the High Court in an extradition case may be appealed against in the House of Lords by either a requested person (or if a person is discharged by the High Court, by a requesting state) provided that leave to appeal has been granted. An appeal to the House of Lords can only be made on a point of law of general public importance and where it is agreed by the High Court that the point is one which should be considered by the House of Lords. Section 114 of the 2003 Act sets out the details and time limits for such an appeal.

Surrender

Unless there is an appeal the person whose extradition has been ordered should be extradited within 28 days of the Secretary of State making his decision. Where there is an appeals process, the 28 days will begin once all the legal remedies have been exhausted. If there are exceptional circumstances, this time-limit can be extended, although if the person applies to the District judge for discharge, reasonable cause must be shown for the delay.¹⁶

3. Consideration of human rights issues at extradition hearings.

Section 3 of the *Human Rights Act 1998* requires that, as far as is possible, courts should read and give effect to legislation in a way which is compatible with Convention rights (the rights set out in the European Convention on Human Rights). The courts themselves are also public authorities for the purposes of the *Human Rights Act 1998* and must comply with

¹⁶ <http://police.homeoffice.gov.uk/operational-policing/extradition-intro/extrad-part-2>

Convention rights. In determining questions which have arisen in connection with Convention rights the courts are also required by section 2 of the *Human Rights Act 1998* to consider the jurisprudence of the European Court of Human Rights.

At extradition hearings judges are specifically required by the *Extradition Act 2003* to decide whether a person's extradition would be compatible with Convention rights within the meaning of the *Human Rights Act 1998*. Judges must refuse an extradition request if they consider that the person's extradition would not be compatible with Convention rights, which include the right to liberty and security under Article 5 and the right to a fair trial under Article 6.¹⁷ Where a requested person appeals to the High Court and the House of Lords against the decision of a judge at an extradition hearing or a decision by the Secretary of State issues involving Convention rights may also be raised in the appeal proceedings.

In April 2009, the High Court allowed the appeals against extradition orders of four men sought by the Rwandan government on charges of genocide, on the ground that extradition would violate Article 6 of the ECHR, which safeguards the right to a fair trial. Laws and Sullivan LJ found that there was a real risk that they would suffer a flagrant denial of justice if returned to Rwanda for trial.¹⁸ The men are Vincent Bajunya (now Brown), Celestin Ugirashebuja, Emmanuel Nteziryayo and Charles Munyaneza.

¹⁷ These Articles are set out in full in Schedule 1 of the *Human Rights Act 1998* which is available on the internet at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>

¹⁸ "High Court halts extradition of four men wanted for Rwanda genocide: Judges rule that suspects must be set free", 9 April 2009, *The Times*