Extradition and the European Arrest Warrant – Recent Developments

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Section Home Affairs Section

The use of both the European Arrest Warrant system and the UK/US Extradition Treaty have proved contentious in recent years.

This note is designed to complement two earlier Standard Notes on extradition namely: 'The UK/US Extradition Treaty' (SN/HA/2204) and 'The introduction of the European Arrest Warrant' (SN/HA/1703) which each set out background information to the introduction of the current extradition regime (governed by the Extradition Act 2003).

This note provides detailed information about a number of recent developments in this area, including the independent review of the Extradition system (led by Lord Justice Scott Baker) which reported in October 2011, and subsequent reforms introduced in the *Crime and Courts Act 2013* and the *Anti-social Behaviour, Crime and Policing Bill*.

Contents

1 Background

The United Kingdom has extradition relations with more than 100 territories by way of multilateral extradition conventions or agreements, or under bilateral extradition treaties. The *Extradition Act 2003* (the "2003 Act") makes provision for two broad schemes of extradition.

First, under the 2003 Act, EU Member States who have implemented the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States ("EAW") are designated for the purposes of extradition by order made under part 1 of the Act. They are commonly known as category 1 territories.

Second, other territories with whom the United Kingdom has extradition relations have been designated by order made under part 2 of the 2003 Act. They are commonly referred to as category 2 territories.

Details about these regimes are contained in two earlier Standard Notes on extradition namely: 'The UK/US Extradition Treaty' (SN/HA/2204) and 'The introduction of the European Arrest Warrant' (SN/HA/1703).

2 The position in the previous Parliament

In the previous Parliament, during the passage of the *Policing and Crime Bill*, the then Labour Government resisted substantive changes to the extradition arrangements on the issue of forum. Opponents of the current arrangement, such as NGOs Liberty and Fair Trials International, argued that safeguards should be put in place to allow the domestic courts to bar extradition when the conduct alleged to have constituted the crime took place in the UK and, taking all the circumstances into account, it would not be in the interests of justice to extradite. This is referred to hereafter as the "forum bar."

The subject of extradition to the United States became contentious following well known cases involving Gary McKinnon[1], the "Nat West Three"[2] and Ian Norris[3] and Babar Ahmad.[4] The question arose as to whether the extradition arrangements between the two countries were unbalanced. Concerns were raised about the level of evidence required to extradite UK citizens to the United States.

3 Report of the Joint Committee on Human Rights

On 22 June 2011, the Joint Committee on Human Rights published a report entitled The Human Rights Implications of UK Extradition Policy. On the issue of US/UK Extradition, the Committee said, amongst other things, that:

> The Government should increase the proof required for the extradition of British citizens to the US so as to require sufficient evidence to establish probable cause, as is required for the extradition of a US citizen to the UK. This will require renegotiation of the UK-US Extradition Treaty.[5]

And:

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1 See for example: *BBC Online*," UK Extradition Review - Key Cases", 18 October 2011
2 See for example: *The Guardian*, "Nat West three recant guilty pleas", 15 August 2010
3 See for example: *The Independent*, "Norris loses battle in UK courts against extradition to the US", 25 February 2010
4 See for example, *BBC Online*, "Terror Suspect Ahmad's e-petition to be debated", 24 November 2011
5 The Human Rights Implications of UK Extradition Policy, Para 192

> We recommend that the Government urgently renegotiate [an] article of the US-UK extradition treaty to exclude the possibility that extradition is requested and granted in cases [...] where the UK police and prosecution authorities have already made a decision not to charge or prosecute an individual on the same evidence adduced by the US authorities to request extradition.[6]

The Committee did not recommend a greater role for the Secretary of State, suggesting that:

> We note the arguments for increasing the role of the Secretary of State in the surrender of persons to countries under Part 2 of the Extradition Act. We are not convinced that changes should be made and, in any event, any additional powers would need to be carefully circumscribed to avoid those subject to extradition requests becoming "political pawns".[7]

The Committee also recommended that Parliament should be asked to commence the "most appropriate forum" safeguard in the *Police and Criminal Justice Act 2006*; that a requirement for the requesting country to show a prima facie case or similarly robust evidential threshold should be introduced; and that the European Arrest Warrant be renegotiated to correct a number of serious problems.

4 The Extradition Review

The Coalition Government's "Programme for Government" document, published on 20 May 2010, stated that, "We will review the operation of the Extradition Act – and the US/UK extradition treaty – to make sure it is even-handed."

On 8 September 2010, the Home Secretary commissioned an independent review of the UK's extradition arrangements. The review was led by the Rt Hon Sir Scott Baker, a former Court of Appeal judge, assisted by David Perry QC and Anand Doobay, two lawyers with expertise in extradition matters. A substantial Report was published on 18 October 2011.

The introduction to the Report noted that many of the criticisms of the current extradition arrangements were based on "misunderstandings" or "misconceptions":

> In the course of conducting our Review, it became apparent that some of the criticism directed at the Extradition Act 2003 was based on a misunderstanding of how the 2003 Act operates in practice. We were also concerned that many of the criticisms appeared to us to ignore or attach insufficient weight to the public interest that lies in having and operating effective extradition procedures. We also became aware that there was a misconception in some quarters as to the precise effect of a number of judicial decisions, some of which have received a great deal of public attention. In some instances, vigorous campaigns have been pursued through the media suggesting that extradition of a particular individual will be or has been unjust. During the course of the Review we were struck by the fact that out of the hundreds of cases that are dealt with by the courts each year, only a handful is relied upon as support for the contention that the existing law is defective.[8]

The Report rejected the argument that the UK/US Extradition Treaty is unbalanced:

> The United States/United Kingdom Treaty

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[6] Para 196

[7] Para 202

[8] Sir Scott Baker, David Perry QC and Anand Doobay, A Review of the UK Extradition Arrangements (Presented to the Home Secretary 30 September 2011), para 1.3

> 1.20 We have concluded that the United States/United Kingdom Treaty does not operate in an unbalanced manner. The United States and the United Kingdom have similar but different legal systems. In the United States the Fourth Amendment to the Constitution ensures that arrest may only lawfully take place if the probable cause test is satisfied: in the United Kingdom the test is reasonable suspicion. In each case it is necessary to demonstrate to a judge an objective basis for the arrest.
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> 1.21 In our opinion, there is no significant difference between the probable cause test and the reasonable suspicion test.
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> 1.22 In the case of extradition requests submitted by the United States to the United Kingdom, the information within the request will satisfy both the probable cause and the reasonable suspicion tests.
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> 1.23 In the case of extradition requests submitted by the United Kingdom to the United States the request will contain information to satisfy the probable cause test.
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> 1.24 There is no practical difference between the information submitted to and from the United States.

The Report acknowledged that there had been some difficulties over the question of proportionality in respect of the EAW, but stated that "apart from the problem of proportionality, we believe that the European arrest warrant scheme has worked reasonably well."[9] It made a number of practical recommendations to improve the operation of Part 1 of the 2003 Act (see Part 11 of the Report for full details).

The Report also concluded that a forum bar should not be introduced, stating that:

> 1.17 The extradition judges at City of Westminster Magistrates' Court could not think of any case already decided under the 2003 Act in which it would have been in the interests of justice for it to have been tried in the United Kingdom rather than in the requesting territory.

It suggested that the "major disadvantage of introducing the forum bar is that it will create delay and has the potential to generate satellite litigation. This would slow down the extradition process, add to the cost of proceedings and provide no corresponding benefit."[10]

The Home Secretary, Theresa May laid a Written Ministerial Statement on the same day the report was published publicly:

> I am today announcing the publication of an independent review of the UK's extradition arrangements, a copy of which has been placed in the House library. The review was announced to Parliament on 8 September 2010.
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> The Coalition's Government's "Programme for Government" document, published on 20 May 2010, stated that: 'We will review the operation of the Extradition Act – and the US/UK extradition treaty – to make sure it is even-handed.'
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> There are a number of areas of the UK's extradition arrangements which have attracted significant controversy in recent years. The government understands that these are longstanding concerns and I accordingly asked the independent panel to consider the following issues:
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> - the breadth of Secretary of State discretion in an extradition case

[9] Para 1.11
[10] Para 1.18

- the operation of the European Arrest Warrant, including the way in which those of its safeguards which are optional have been transposed into UK law
- whether the forum bar to extradition should be commenced
- whether the US-UK Extradition Treaty is unbalanced
- whether requesting states should be required to provide prima facie evidence

The review panel has reached the following conclusions:

- Improvements to the EAW can be made to ensure it functions more effectively through both legislative amendments and enhanced dialogue and co-operation at EU level;
- The forum bars to extradition should not be introduced; however, guidance for prosecutors on shared jurisdiction should be agreed and published;
- The UK's extradition arrangements with the US are not unbalanced. There is no practical difference between the information submitted by the UK and the US;
- Requesting states should not be required to provide prima facie evidence when making a request to the UK; however, the Government should periodically review the designation of extradition partners;
- The breadth of the Home Secretary's involvement in extradition should not be extended. Instead the panel recommends that cases in which a supervening event occurs after the end of the extradition process should be considered by the High Court rather than by the Secretary of State.

The Government will carefully examine the review panel's report and will announce what action is to be taken in due course.

5 Home Secretary's response to the Baker Review

On 16 October 2012, the Home Secretary responded to the Baker Review. Amongst other things, she indicated that a new forum bar to extradition would be introduced, and that decisions relating to whether extradition would amount to a breach of a suspect's human rights would now be a matter left to the judiciary. At the same time, she also announced that Gary McKinnon would not be extradited to the United States for health related reasons (saying that his extradition would result in a breach of his human rights).

Statement by Home Secretary Theresa May on extradition made on 16 October 2012

With permission, Mr Speaker, I would like to make a statement about the case of Gary McKinnon and the government's response to Sir Scott Baker's review of our extradition arrangements.

I will turn first to Mr McKinnon's case.

I should explain to the house that the statutory process under the extradition act 2003 has long ended. Since I came into office the sole issue on which I have been required to make a decision is whether Mr McKinnon's extradition to the United States would breach his human rights.

Mr McKinnon is accused of serious crimes. But there is also no doubt that he is seriously ill. He has asperger's syndrome, and suffers from depressive illness. The

legal question before me is now whether the extent of that illness is sufficient to preclude extradition.

As the house would expect, I have very carefully considered the representations made on Mr McKinnon's behalf, including from a number of clinicians. I have obtained my own medical advice from practitioners recommended to me by the chief medical officer. And I have taken extensive legal advice.

After careful consideration of all of the relevant material, I have concluded that Mr McKinnon's extradition would give rise to such a high risk of him ending his life that a decision to extradite would be incompatible with Mr McKinnon's human rights.

I have therefore withdrawn the extradition order against Mr McKinnon.

It will now be for the director of public prosecutions to decide whether Mr McKinnon has a case to answer in a UK court.

This has been a difficult and exceptional case and I would like to pay tribute to all of the Home Office officials and lawyers who have worked on this case over the years.

Baker Review

Mr Speaker, extradition is a vital tool. In a world where criminals and crimes can easily cross borders, it is vital to the interests of justice and public protection that criminals cannot avoid justice simply by sheltering behind a border.

But concerns about the working of our extradition law have grown over recent years. There has been public concern about the extradition regime operating in the European union, the European arrest warrant, and about the extradition arrangements outside the EU, principally with the United States.

That is why in September 2010, I commissioned a review into our extradition arrangements.

That review was undertaken by Sir Scott Baker - a former Judge in the court of appeal - and a distinguished and expert panel, including David Perry QC and Anand Doobay.

I am extremely grateful to them for the professional and thorough way they went about their work. Nobody who has read their near 500 page report can be anything but impressed by the depth and clarity of its analysis.

At the same time, there has been considerable parliamentary interest in extradition. In a debate last December, parliament agreed unanimously that it believed there were problems with both our US and EU extradition arrangements.

In coming to a decision on how the government should respond to the Baker review I have taken full account of the review’s recommendations as well as the views of parliament.

EAW

Yesterday I announced that the government's current thinking is that we will opt out of all pre-Lisbon treaty police and criminal justice measures. The government will give very careful consideration to these measures, including the European Arrest Warrant (EAW), and will then seek to opt back into those individual measures where it is in our national interest.

The EAW has had some success in streamlining the extradition process within the EU. But there have also been problems. There are concerns in particular about the disproportionate use of the EAW for trivial offences, and for actions that are not considered to be crimes in the UK. There are also issues around the lengthy pre-trial detention of some British citizens overseas. We know these concerns are shared by other member states.

We will therefore work with the European Commission, and with other member states, to consider what changes can be made to improve the EAW's operation. I believe this is necessary to ensure that the EAW provides the protections that our citizens demand.

Forum

There are also concerns about our extradition arrangements with countries outside Europe.

A key reason for the loss of public and parliamentary confidence in our extradition arrangements has been the perceived lack of transparency in the process.

I believe extradition decisions must not only be fair, they must be seen to be fair, and they must be made in open court, where decisions can be challenged and explained.

That is why I have decided to introduce a forum bar. This will mean that where prosecution is possible in both the UK and in another state, the British courts will be able to bar prosecution overseas, if they believe it is in the interests of justice to do so.

I have been conscious, however, of Sir Scott Baker's concern that the introduction of the existing forum legislation would lead to delays and satellite litigation. So rather than commence the existing provisions, as soon as parliamentary time allows I will bring forward a new forum bar, which will be carefully designed to minimise delays.

In parallel the director of public prosecutions will independently publish draft prosecutors' guidance for cases of concurrent jurisdiction.

And a bi-lateral protocol governing the approach of investigators and prosecutors in the UK and the US is being updated alongside this guidance.

US/UK treaty

Turning to the United States/United Kingdom extradition treaty, I agree with the Baker review that our arrangements are broadly sound and the treaty brings benefits to both of our countries. Less than two weeks ago, for example, we saw the extradition to America of Abu Hamza and four other terror suspects.

Although there is a perception that the evidence tests used by the US and the UK – probable cause and reasonable suspicion respectively – are unbalanced, Sir Scott Baker found that there is no significant difference between these two tests.

Prima Facie Evidence

Mr Speaker, I have also accepted the Baker Review's recommendations that a prima facie evidence test should not be reintroduced for those countries where it is not currently required.

The courts are already able to subject requests from all countries to sufficient scrutiny to identify and address injustice or oppression.

Re-introducing prima facie evidence would be likely to lead to further delays.

> And, Mr Speaker, it is absurd to propose that we should require prima facie evidence from countries such as the United States, Canada and Australia, when we do not require such evidence of other countries with far less mature judicial systems.
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> Secretary of State's Discretion
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> Mr Speaker, I also agree with the Baker review's recommendation that the breadth of the Home Secretary's involvement in extradition cases should be reduced. Matters such as representations on human rights grounds should, in future, be considered by the high court rather than the home secretary. This change, which will significantly reduce delays in certain cases, will require primary legislation.
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> Speeding up the process
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> Finally, I also propose to reduce delays in the extradition system, in the light of the recent extradition of terrorist suspects to the United States.
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> In addition to the measures I have just announced, the government will look further at proposals in the Baker review to introduce a permission stage for appeals to the UK courts.
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> We will work closely with the European court of human rights on a programme to reduce the wholly unacceptable delays which have occurred there.
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> And we have also been considering how we can reduce delays in the deportation of foreign nationals who pose a threat to our national security. There is scope for reforming rights of appeal, streamlining the stages, expediting cases through the court and looking again at the provision of legal aid for terrorist suspects.
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> Conclusion
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> Mr Speaker, as Sir John Thomas, the judge in the Abu Hamza case said, it is in the overwhelming public interest that our extradition arrangements function properly. They must also be fair. We must balance both strong safeguards for those accused of cross-border crimes, with assurance that justice will be done. That is the government's aim, that is what our proposals will produce and I commend this statement to the house.[11]

6 Crime and Courts Act 2013

Amendments to the 2003 Act were made via the *Crime and Courts Act 2013* to give effect to two of these proposals, namely the forum bar and transfer of the Secretary of State's discretion to consider human rights issues to the High Court.

The proposed amendments were published on 5 February 2013.

The Minister of State, Jeremy Browne, wrote to members of the Public Bill Committee on 5 February 2013 explaining the proposed new clause and schedule to the Bill:

> Forum (Part 1 of new Schedule Extradition)
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> The introduction of a forum bar to extradition responds to the widespread concern in Parliament, and amongst the public, that insufficient safeguards are currently built into cases of concurrent jurisdiction (that is, where two or more courts from different countries simultaneously have jurisdiction over a specific case).

[11] Home Office, Statement by Home Secretary on extradition, 16 October 2012

Rather than commence the existing provision in Schedule 13 to the Police and Justice Act 2006 (which are repealed by paragraph 9 of the new Schedule), which would have been cumbersome in practice, these amendments to the Extradition Act 2003 (the 2003 Act) introduce a carefully modified forum provision which has been designed to minimise delays, while providing greater safeguards for those who are subject to extradition proceedings.

The amendments to the 2003 Act allow a judge to bar extradition, on forum grounds, if the extradition would not be in the interests of justice. In considering whether or not to bar extradition, a judge will have to consider whether a substantial measure of the alleged criminal activity was performed in the UK. The judge would also consider:

- the interests of any victims;
- whether the Crown Prosecution Service (or equivalent) consider there should be no prosecution in the UK;
- whether the evidence is available in the UK;
- the location of witnesses; and
- the person's connections with the UK.

In cases where the prosecutor has taken a formal decision not to prosecute in the UK, because there is insufficient admissible evidence available or because it is not in the public interest for such a prosecution to take place, then a Prosecutor's Certificate can be issued to that effect thereby preventing extradition being barred on forum grounds. This will ensure that a judge cannot take a decision to bar extradition on forum grounds when a prosecution is not possible for one of these reasons.

A Prosecutor's Certificate could also be issued if the prosecutor believes that a UK prosecution is not possible because of disclosure difficulties arising from sensitive material. A Prosecutor's Certificate can be judicially reviewed but only as part of any extradition appeal to the High Court.

These new measures will apply to European Arrest Warrant (EAW) and non-EAW cases covered by the Extradition Act 2003.

I believe that these measures will make our extradition arrangements more open and transparent and will ensure that, in cases of concurrent jurisdiction, due consideration is given to any decision about whether or not a person could be prosecuted in the UK.

Representations on Human Rights grounds (Part 2 of new Schedule Extradition)

One of the key recommendations made by the Rt. Hon. Sir Scott Baker, in his review of extradition, was that the breadth of the Home Secretary's involvement in extradition cases should be reduced.

At present, the Home Secretary is obliged to consider human rights issues raised after the person has exhausted their statutory appeal rights because she is a 'public authority' for the purposes of the Human Rights Act 1998 (HRA) and section 6(1) makes clear that public authorities must not act in a way which is incompatible with the European Convention on Human Rights (ECHR).

If a person raises new human rights matters that have not been considered previously during the progress of an extradition case, the Home Secretary must consider them to ensure that the person's extradition would be compatible with those rights.

This can lead to significant delays while cases are considered, and any decision to uphold the extradition may be challenged in the courts.

By specifically preventing the Secretary of State from considering whether extradition is compatible with the ECHR and transferring consideration of such matters to the courts, the amendments to the 2003 Act will strike the correct balance between, on the one hand, ensuring late human rights issues which are deserving of the court's attention are considered and, on the other hand, ensuring that people are not able to abuse the system and delay extradition endlessly by means of raising last minute, specious human rights points which can then be the subject of Judicial Review. This change will also significantly reduce delays in cases which are currently referred to the Home Secretary and will ensure that decisions about judicial issues such as these are, rightly, taken in the courts.

It is legitimate for the Home Secretary to play some role in the extradition process and that will remain the case – Ministers will still sign an extradition order for Part 2 countries (that is, countries not covered by the EAW), to confirm that there are no statutory bars to extradition once it has been approved by the District Judge. This covers issues such as the death penalty, and speciality (that is, ensuring people are only tried for the charges on which they have been extradited), onward extradition from a third country and transfer from the International Criminal Court. These are areas where diplomatic assurances are occasionally required and it is right that Ministers should continue to deal with these.

A further change was made with respect to devolution issues in Scotland. Jeremy Browne explained this change:

We are taking the opportunity to make one other change to the 2003 Act. The Act makes provision for appeals in relation to extradition proceedings. In extradition proceedings in England and Wales, it is possible for a point of law raised in those proceedings to be appealed to the Supreme Court. In extradition proceedings in Scotland, the final court of appeal is the High Court of Justiciary, with one exception; there can be an appeal to the Supreme Court against the determination of a devolution issue raised in Scottish extradition proceedings. However, the 2003 Act does not take account of devolution issues in Scottish extradition proceedings being appealed to the Supreme Court. This creates issues regarding the power to detain a person who is subject to extradition proceedings pending the outcome of an appeal to the Supreme Court in a Scottish extradition case and the date by which such a person should be extradited following such an appeal. The Supreme Court commented on this in the case of BH(AP) & Another v the Lord Advocate & Another (Scotland) [2012] UKSC 24 and Lord Hope commented that he hoped these issues would be resolved by legislation. The provisions in Part 3 on new Schedule Extradition seek to address these issues.

The amendments to the 2003 act in Part 3 of the new Schedule seek to ensure that where a person seeks to appeal to the Supreme Court against a determination of a devolution issue in Scottish extradition proceedings the court has power to remand the person whose extradition is being sought in custody or on bail. The amendments ensure that the courts have this power until the person is extradited or discharged. The amendments also seek to set out the time limit for extraditing a person where a party to the proceedings seeks to appeal to the Supreme Court against the determination of a devolution issue raised in Scottish criminal proceedings. The time limit operates by reference to when the appeal becomes final as is the case where there is an appeal to the Supreme Court in English and Welsh extradition proceedings.

These changes are now contained in section 50 and Schedule 20 of the *Crime and Courts Act*, in force since October 2013.

7 Anti-social Behaviour, Crime and Policing Bill

Part 11 of the *Anti-social Behaviour, Crime and Policing Bill,* as originally brought forward, contained several clauses to amend the 2003 Act, relating to asylum and leave to appeal, as well as a number of technical changes.

Further Government amendments were added in Public Bill Committee, at Commons Report stage and in the Lords. The clauses followed the statement made by the Home Secretary on 9 July 2013, on the 2014 opt-out of those EU police and criminal justice measures adopted before the Lisbon treaty came into force, in which she committed to introduce further reforms to address longstanding concerns with the operation of the 2003 Act.[12]

The changes are summarised below:[13]

- Section 26 of the 2003 Act would be amended to remove of the automatic right to appeal against a decision to extradite. Instead, such an appeal will only lie with permission of the High Court.

- Sections 39 and 121 of the 2003 Act would be amended to ensure that a person who has made an asylum claim, either before or after the initiation of extradition proceedings, must not be extradited before that claim has been finally determined. Currently this only applies to asylum claims made after the start of extradition proceedings. Section 93 of the 2003 Act would also be amended to give the Secretary of State the power to discharge the person if they have been granted refugee status or leave on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove him or her to the requesting territory.

- A new section 12A would be added to the 2003 Act to deal with pre-trial detention. Section 12A would enable the UK courts to bar surrender of the subject of an EAW where the issuing state has not taken both a decision to charge and a decision to try the person, unless the person's presence in that country is required in order to do so.

- A new section 21A would be added to the 2003 Act which would require the judge at the extradition hearing to consider whether extradition would be disproportionate. The judge would have to take account of the seriousness of the conduct, the likely penalty, and the possibility of the issuing state taking less coercive measures than extradition. The Minister, Damian Green, explained that the new provision would ensure that extradition happens only when the offence is serious enough to justify it.[14]

- A new section 21B would be added to the 2003 Act which would enable the requested person to speak with the authorities in the issuing state before the extradition takes place, if they both consent. This would be made possible by either the temporary transfer of the person to the issuing state, or allowing the person to speak with the authorities in that state while he or she remains in the UK, for example by video link. This may mean that

[12] HC Deb 9 July 2013 cc177-180. See below for further detail.

[13] This list is not comprehensive; it includes the main substantive changes but not minor, consequential or technical amendments. For further details on the Bill's passage see *The Anti-social Behaviour, Crime and Policing Bill: Debate in Parliament – Commons Library Standard Note SN06639*; *Anti-social Behaviour, Crime and Policing Bill: Lords Amendments – Commons Library Standard Note SN06810*

[14] PBC 16 July 2013 c 495

where extradition goes ahead, the person spends less time in pre-trial detention, and in some cases the EAW may be withdrawn altogether where the issue is resolved through these preliminary processes.

- The 2003 Act would be amended to ensure that, where the judge is informed after the end of the extradition hearing that the person has been charged with an offence in the UK, the extradition must be postponed until the conclusion of the UK proceedings.

- The 2003 Act would be amended to ensure that speciality protection, which prevents a person from being tried for offences other than those set out in the EAW, will be retained in cases where the requested person consents to his or her extradition.

- The 2003 Act would be amended in order to clarify that where part of the conduct for which extradition is sought took place in the UK, and that conduct is not criminalised here, the judge must refuse extradition.

- The 2003 Act would be amended to confer a power on the Lord Chief Justice for England and Wales, with the concurrence of the Lord Justice General of Scotland and the Lord Chief Justice of Northern Ireland, to issue guidance to the National Crime Agency on the operation of an administrative proportionality check when deciding whether to issue a certificate under section 2 of the 2003 Act.[15]

- Section 142(2A) of the 2003 Act would be replaced to make clear that the fact that a person, who is wanted to be sentenced or to serve a sentence in the UK, is already in prison in the requested State, is no barrier to the issue of a European Arrest Warrant. This follows case in which a justice of the peace refused to issue a EAW because the subject was in prison in the requested State and could not therefore be considered to be "unlawfully at large".

- A new section 151B would be inserted into the 2003 Act to give effect to Article 3 of the Fourth Additional Protocol to the European Convention on Extradition, which the United Kingdom intends to ratify. Article 3 deals with the rule of speciality (the bar on a person being proceeded against for offences other than those listed on the extradition request) and provides an optional mechanism whereby States can detain a person whilst a request to waive the rule against speciality is being considered by the State that originally extradited the person.

The changes have, on the whole, been welcomed. The Opposition recognised that they "implement the sensible recommendations of the report on extradition prepared by Sir Scott Baker".[16] And Liberty have said "a number of the new clauses are welcome, and make positive changes to our extradition system by adding new safeguards for people at risk of transfer."[17] However, Liberty were also concerned that they "fall a long way short of the necessary reform ... which should be a precursor to the UK re-joining EU extradition arrangements".[18]

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[15] A certificate is issued to certify that an authority in a Part 1 territory which issued an arrest warrant is a judicial authority in that territory with the function of issuing arrest warrants.

[16] Gloria Del Pietro *PBC Deb 11 July 2013 c461*

[17] *Liberty's Second Reading Briefing on the Anti-social Behaviour, Crime and Policing Bill in the House of Lords* October 2013. Available at www.liberty-human-rights.org.uk [accessed 3 February 2014].

[18] Ibid.

And the removal of the automatic right of appeal, described by Liberty as a "crucial safeguard" remains contentious.

Edward Grange, vice-chair of the Extradition Lawyers Association, has expressed concern about the introduction of a leave requirement for extradition appeals brought by the requested person. He notes that there is no such amendment proposed for introducing a leave requirement for appeals brought by judicial authorities or requesting states following the decision of a judge or the Secretary of State for the Home Department to refuse an extradition request.[19]

At Report stage in the House of Lords, Lord Hodgson tabled amendments which would have removed the requirement for leave to appeal.

Introducing the amendments, Lord Hodgson said:

> I will briefly summarise what appears to be a slightly technical and arid set of amendments, but which would nevertheless have a very significant impact. They would restore to individuals arrested under an extradition warrant the automatic right of appeal which currently exists—an automatic right which the Government are proposing to remove under the terms of this Bill. Let me make it absolutely clear that these amendments do not somehow let individuals off the hook who are arrested under an extradition warrant. They merely preserve the right that those individuals enjoy at present.
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> ...
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> I will now set that summary in context. First, my particular concern is the impact of the Government's proposal on those arrested under what is known as a Part 1 warrant—more familiarly, the European arrest warrant—because of the very short timetable of EAW proceedings. Secondly, I want to make it clear that this is not an attack on the EAW generally. The EAW has enabled many very nasty criminals—terrorists and the like—to be speedily brought back or sent back to face justice. That is as it should be. Thirdly, and quite understandably, this Government—and, indeed, the previous Government—focus on these very high-profile cases, but the vast majority of cases do not involve matters of high importance.
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> In the last year for which records are available, there were 1,438 arrests under the EAW and 1,057 surrenders. For the most part, these involve ordinary members of the public for whom this will be an entirely strange and unfamiliar process and one which they are not well equipped to challenge. Some of them will have been arrested for crimes which they did not commit.
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> Therefore, it is on behalf of these people—Edmund Burke's "little platoons"—that I have tabled these amendments and ask for the House's support today.
>
> I shall be fair to the Government and my noble friend on the Front Bench. The Government asked Sir Scott Baker to review the operation of this country's extradition arrangements and they have implemented a great many of his recommendations. Further, as part of the Lisbon opt-out, opt-back-in procedure, the Government have indicated a number of further changes. For example, they expect much less use in future of the EAW for trivial crimes and that greater efforts will be made to ensure that cases are trial-ready before the surrendering of individuals takes place. Those are indeed welcome changes and I congratulate the Government on making them.

[19] Edward Grange *Leave it Out* The World of Extradition 12 May 2013. Available from http://worldofextradition.wordpress.com/2013/05/12/leave-it-out/ [accessed 6 February 2014]

However, while increasing these protections, the Government are proposing to remove one great protection—that of the automatic right of appeal.

I hope that the House will forgive me if I remind noble Lords of two particular aspects. The first, as regards the EAW, is just how compressed the process of surrender is. An arrest will be followed by a court hearing at Westminster magistrates' court within 48 hours. The accused will be represented by a duty solicitor who may or may not know anything about extradition.

...

A further hearing after that initial hearing will follow within 21 days, so that in as little as 35 days a person can be on his way to another jurisdiction, many of which will be operating with entirely unfamiliar procedures and conducted in a language which the accused probably does not understand at all.

Further, it is worth while remembering that, if the person wishes to appeal, he has in any case to make that appeal within seven days. I ask noble Lords to imagine the case of an unsophisticated person remanded in prison. His first legal representative, it turns out, knows nothing about extradition, so he has to make a change. He has to gather evidence, probably from at least two jurisdictions, perhaps involving many people, and put all that together into a case, and he has to do so within seven days while he is confined to prison. So much for the specifics of the compression of the EAW procedure.

The second point is the catastrophic impact that extradition can have on an individual—on his family, on his home, on his employment and indeed on his whole life. I shall not weary the House today with quotations from people who have been involved in these cases, but the stories of how people's lives have been turned upside down by mis-arrests and an inability to get the appropriate advice and help are truly horrifying. The step of a state arresting one of its own citizens and handing him or her over to another state to try is a very fundamental one. It needs to have a proper level of safeguards. That is why I have tabled these amendments today and why I think they are so important.

If I could look over the shoulder of my noble friend on the Front Bench and glance at his speaking notes, what do I think I would see there as the Government's wish behind the policy of removing the automatic right of appeal? I think the first thing would be that they were doing so because Sir Scott Baker recommended its abolition due to what he saw as a large number of unmeritorious appeals. However, the world has moved on since Sit Scott Baker undertook his review. First, the safeguards introduced by the Government, as I referred to earlier, through their amendments to the 2003 Act will now give weight to arguments which may previously have been deemed to be without merit due to the lack of a legislative basis. Therefore, it is likely that these reforms will reduce the number of unmeritorious appeals reaching the High Court. Further, the Government have introduced a requirement in Clause 145 of this Bill for the National Crime Agency to review extradition requests and sift out cases where it is clear that a judge would be required to order a person's discharge on the basis that extradition would be disproportionate. Taken together, those steps will certainly mean a substantial reduction in the number of EAW cases.

It is important to remember that, while Sir Scott Baker recommended that the automatic right of appeal should be removed, as a compensating factor he also recommended that the time in which an appeal could be launched should increase from seven to 14 days to match the period that exists for a Part 2 warrant. I tabled an amendment to that effect in Committee. Subsequent to that, and after discussions with

> my noble friend on the Front Bench, I reflected and concluded that the longer the appeal period, the more the well resourced "nasty" case could take advantage of these delays to frustrate the underlying purpose of the EAW. Therefore, I have not retabled that amendment, which we discussed in Committee on 11 December. Instead, I argue for the preservation of the status quo as regards appeal.
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> In conclusion, while I congratulate the Government on the changes and improvements they have made, I express sorrow and regret at their apparent determination to remove this important protection. I am convinced that British judges are quite capable of sorting the wheat from the chaff in appeal cases. Preserving the automatic right of appeal will undoubtedly help ordinary people inadvertently caught up in the machinations of the EAW. I believe that it is in the interests of justice that the automatic right of appeal should therefore be maintained. I beg to move.[20]

These amendments were supported by Liberty, JUSTICE and Fair Trials International, who issued a joint briefing, arguing:

> It is vital that individuals are given a fully opportunity to put together a case and identify any valid grounds on which their extradition should be refused, and the appeal process should reflect this. The potential impact of the introduction of a leave requirement on the ability of the person to comply with the appeal deadline must also be taken into consideration.
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> ...
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> In our view the leave requirement is liable to create unfairness and inequality of arms and we do not thing that it is justified.[21]

Lord Taylor responded for the Government:

> A key finding of Sir Scott Baker's review of our extradition arrangements was that the success rate of appeals was extremely low—less than 13% in 2010. In other words, the court system is burdened by unmeritorious appeals which delay hearings for all appellants. The purpose of the appeal filter is to address this problem by making appeals subject to permission from the High Court. I understand the points that my noble friend makes, but I must stress again, as I did in Committee, that these provisions will not prevent anyone applying for permission to appeal. Once an application has been made, the High Court will decide which cases should proceed to a hearing. Each application will be considered by a High Court judge.[22]

The amendments were subsequently withdrawn.

8 EU police and criminal justice measures: The UK's 2014 opt-out decision

Library Standard Note SN6684 *In brief: the 2014 bloc opt-out and selective opt-back-ins* provides some background on the Government's decision on whether to opt into or out of 130 EU police and criminal justice measures. The Government intends to opt out of all of these measures and then negotiate to opt back into 35 of them, one of which is the European

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[20] HL Deb 20 January 2014 cc530-532

[21] Fair Trials International, JUSTICE, Liberty *Anti-social Behaviour, Crime and Policing Bill: House of Lords, Report Stage Briefing* January 2014. Available from www.liberty-human-rights.org.uk/pdfs [accessed 5 February 2014]

[22] HL Deb 20 January 2014 c536

Arrest Warrant. The Government have committed to giving Parliament a vote on both the exercise of the opt-out and the list of individual measures.

On 9 July 2013 the Home Secretary made the following statement regarding the decision:

> With permission, I would like to make a statement on the decision whether the UK should opt out of those EU police and criminal justice measures adopted before the Lisbon treaty came into force.
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> As hon. Members will be aware, this is a stand-alone decision that the Government are required to make under the terms of the Lisbon treaty by 31 May 2014, with that decision taking effect on 1 December of that year. It covers about 130 measures, some of which it is clearly in our national interest to remain part of, but if we wish to remain bound by only some of the measures, we must exercise our opt-out from them all en masse and seek to rejoin those that we judge to be in our national interest.
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> ...
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> Let me briefly set out the rationale by which the Government have approached the decision. We believe the UK should opt out of the measures in question for reasons of principle, policy and pragmatism and that we should seek to rejoin only those measures that help us co-operate with our European neighbours to combat cross-border crime and keep our country safe.
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> On principle, I am firmly of the belief that that the UK's international relations in policing and criminal justice are first and foremost a matter for Her Majesty's Government. In policy terms, the UK has and will continue to have the ability to choose whether it should opt in to any new proposal in the field of justice and home affairs. It is therefore right that we take the opportunity to consider whether we wish to retain the measures that were joined by the previous Government and to decide on a case-by-case basis whether we are willing to allow the European Court of Justice to exercise jurisdiction over them in future.
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> Finally, the Government are being pragmatic. I have said before that we will not leave the UK open to the threat of infraction and fines which run into many millions of pounds by remaining bound by measures we simply cannot implement in time. That would be senseless. In a number of areas, the measures relate to minimum standards in substantive criminal law. Even before their adoption, the UK already met or exceeded the vast majority of these standards and will continue to do so whether or not we are bound by them.
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> As people have become more mobile in recent years, so too has crime. The Government have sought and listened carefully to the views of our law enforcement agencies which combat it. We understand that some of the measures covered by this decision are important tools that they need to protect the British public. The Government have identified 35 measures which we will seek to rejoin in the national interest.
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> One of the measures we will seek to rejoin, and on which I know many hon. Members have strong views, is the European arrest warrant. I agree with our law enforcement agencies that the arrest warrant is a valuable tool in returning offenders to the UK. Its predecessor, the 1957 European convention on extradition, had serious drawbacks. The arrest warrant has helped us to secure and accelerate successful extradition procedures, as shown by the case of Osman Hussain, one of the failed London bombers of July 2005, who was extradited back to the UK from Italy in less than eight

weeks. More recently, Jeremy Forrest, the teacher who was sentenced last month for absconding to France with one of his pupils, was extradited back to the UK less than three weeks after his arrest.

Since 2009 alone, the arrest warrant has been used to extradite from the UK 57 suspects for child sex offences, 86 for rape and 105 for murder. In the same period, 63 suspects for child sex offences, 27 for rape and 44 for murder were extradited back to Britain to face charges. A number of these suspects would probably have not been extradited back to Britain without the arrest warrant. We owe it to their victims, and to their loved ones, to bring these people to justice. However, the European arrest warrant has its problems, too, as hon. Members have eloquently explained in this House. The last Government had eight years to address these concerns, and did nothing; this Government have taken action. I am today proposing additional safeguards to rectify these problems and increase the protections offered to those wanted for extradition, particularly British citizens.

A number of hon. Members have explained how European arrest warrants have been issued disproportionately for very minor offences. I will address this by amending the Anti-social Behaviour, Crime and Policing Bill, which is in Committee, to ensure that an arrest warrant can be refused for minor crimes. This should stop cases like that of Patrick Connor, who was extradited because he and two friends were found in possession of four counterfeit banknotes.

We will also work with other states to enforce their fines and ensure that in future, where possible, the European investigation order is used instead of the European arrest warrant. This would allow police forces and prosecutors to share evidence and information without requiring the extradition of a suspect at the investigative stage.

Other hon. Members have expressed concerns about lengthy and avoidable pre-trial detention. I will amend our Extradition Act 2003 to ensure that people in the UK can be extradited under the European arrest warrant only when the requesting state has already made a decision to charge and a decision to try, unless that person's presence is required in that jurisdiction for those decisions to be made. Many Members, particularly my hon. Friend the Member for Enfield North (Nick de Bois), will recall the case of Andrew Symeou, who spent 10 months in pre-trial detention, and a further nine months on bail, in Greece, only to be acquitted. The change that I am introducing would have allowed Andrew Symeou to raise, in his extradition hearing, the issue of whether a decision to charge him and a decision to try him had been taken. It would likely have prevented his extradition at the stage he was surrendered—and, quite possibly, altogether. We will also implement the European supervision order to make it easier for people like Mr Symeou to be bailed back to the UK.

Other hon. Members are concerned about people being extradited for conduct that is not criminal in British law. I will amend our law to make it clear that in cases where part of the conduct took place in the UK, and is not criminal here, the judge must refuse extradition for that conduct. I also intend to make better use of existing safeguards to provide further protections. I will ensure that people who consent to extradition do not lose their right not to be prosecuted for other offences, reducing costs and delays. We propose that the prisoner transfer framework decision be used to its fullest extent, so that UK citizens extradited and convicted can be returned to serve their sentence here.

Where a UK national has been convicted and sentenced abroad, for example in their absence, and is now the subject of a European arrest warrant, we will ask, with their permission, for the warrant to be withdrawn, and will use the prisoner transfer arrangements instead. This change could have prevented the extraditions of Michael

> Binnington and Luke Atkinson, who were sent to Cyprus only to be returned to the UK six months later.
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> To prevent other extraditions occurring at all, I intend either to allow the temporary transfer of a consenting person, so that they can be interviewed by the issuing state's authorities, or to allow those authorities to do that through such means as video conferencing while the person is in the UK. Where people are innocent, this should lead to the extradition request being withdrawn. These are all changes that can be made in UK law, and that could have been made by the Opposition during their time in government. Co-operation on cross-border crime is vital, but we must also safeguard the rights of British citizens, and the changes that we propose will do that.[23]

A vote in favour of the opt-out took place in the House of Commons on 15 July 2013.[24] The second vote, on the final package of measures, is due to take place at some point in 2014, although it is not yet known when, or precisely what form it will take. It will follow the conclusion of the Government's negotiations with the European Commission and Council of Europe.

The Home Affairs Select Committee have subsequently recommended that there should be a separate vote on the arrest warrant at an early stage to provide a mandate for the Government's negotiations.[25]

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[23] HC Deb 9 July 2013 cc177-180
[24] HC Deb 15 July 2013 cc770-863
[25] Home Affairs Select Committee *Report: Pre-Lisbon Treaty EU police and criminal justice measures: the UK's opt-in decision* 31 October 2013