

EXTRADITION AND BREXIT

As October 31st 2019 draws nearer, Britain's exit from the European Union and its exact terms become all the more important. One particularly pertinent element of withdrawal that will affect all of the European Union is the topic of Extradition. Yasin Patel and Amy Hazlewood look at the potential position of extradition post Brexit.

Introduction

Brexit means the UK is about to leave the remit of the European Arrest Warrant ("EAW"). The EAW has undoubtedly been a valuable instrument for UK justice.

The National Crime Agency stated that between 2010 and 2016, the UK requested that 1,773 individuals located across the EU should be arrested under the EAW. In total, there have been over 12,000 EAW arrests since April 2009, and over 1,000 people have been surrendered by other EU Member States to the UK. Before the EAW entered into force in 2004, the UK extradited fewer than 60 people per year to any country.

The value of the EAW is demonstrated in practical terms by actual cases being brought to court and people facing justice. One such example is the case of Zdenko Turtak. In March 2015, he raped an 18-year-old woman in Leeds after dragging her from a bus stop and beating her with a rock. A DNA match traced the offender to his home country of Slovakia. He was extradited under an EAW, convicted in Leeds Crown Court in October 2015, and sentenced to 14 years' imprisonment. Slovakia would not have been able to surrender one of its own nationals under any agreement other than the EAW. The question is whether people like Turtak will be extradited post Brexit or whether we will be closing this door to the accused facing justice.

The Changes

The Government released an explanatory memorandum to address what will happen to extradition arrangements in the event of no deal (whenever that is to be).

Part 14 of the Regulations will amend the previous orders under the Extradition Act 2003 to re-designate the current Part 1 territories to be Part 2 territories following the UK's withdrawal from the EU and the EAW Framework. This will allow for extradition requests from Member States, previously designated under Part 1 of the Act, to be administered under Part 2 of the Act based on extradition arrangements under the 1957 European Convention on Extradition. Accordingly, post-Brexit, the UK looks set to rely on the 1957 European Convention on Extradition Act.

Europe Convention on Extradition 1957

The 1957 Convention is a multilateral extradition treaty drawn up by the member states of the Council of Europe and in force between all of them. Importantly for the UK, the Convention is also available for signature by EU non-members. As of January 2012, Israel, South Africa and South Korea became EU non-members who had become signatories.

Accordingly, the UK may, post-Brexit, become a signatory to the Convention. However, a problem with this method is that extradition under the Convention takes almost 20 times longer than it does with the EAW, incurs higher costs, and creates fertile ground for potential political interference.

From the Explanatory Memorandum, it seems clear that the 1957 Convention will be presented as a default option. However, using the 1957 Convention as a fall back does solve all of the problems. Some Member States rescinded their legislation implementing the 1957 Convention when the EAW came into force.

Extraditing Own Nationals and the Principle of Reciprocity

To facilitate the implementation of the EAW, Portugal, Slovakia, Latvia, and Slovenia revised their constitutions to permit the surrender of their own citizens to an EU Member State or International Court, but not to non-EU domestic courts.

In reality, no country looks set to revise their constitutions in order to facilitate the UK extradition process post-Brexit. This leaves the UK, post-Brexit and thus outside of EAW, in the unsatisfactory position of being unable to extradite from many countries that it otherwise would have been able to under the EAW that the UK was a party to prior to Brexit.

In February this year, Germany submitted to the European Commission that it will stop the extradition of its citizens to Britain immediately after Brexit, even if the UK leaves the EU with a deal. The German constitution places strict limitations on the extradition of German nationals. Germany's decision to end reciprocity reflects its decision not to seek the required two-thirds majority required by its Parliament to adjust its extradition regime for Brexit.

Extraditing ones' own national citizens is one of the biggest advantages brought about by the European Arrest Warrant, and is an advantage that is only open to EU members. The stark reality is that whether there is a deal or not, EU countries are free to refuse to send their own nationals to Britain. Germany has signified its intention to make use of this freedom. More countries may follow.

Accordingly, other mechanisms are likely to be needed in order to re-establish the principles of reciprocity with regards to extradition arrangements.

Bilateral Agreements

The UK is likely to find itself in a position where it has to negotiate bilateral agreements with individual EU member states on arrest and extradition. The problem with this approach is that it will take time to negotiate the respective agreements, and each agreement will vary in substance and style. Discrepancies between respective agreements will inevitably make the area of extradition law a lot more complex and complicated for lawyers, extradition agencies and individuals who find themselves subject to extradition requests. Varying degrees of inconsistency and ambiguity between bilateral agreements risks allowing criminals to choose where to go in order to evade justice.

Surrender Agreements

Another option is for the UK is to negotiate a surrender agreement, similar to the one Norway and Iceland have with the EU. Norway and Iceland are the only non-EU countries to have negotiated a surrender arrangement with the EU. The agreement shares many of the benefits of the EAW including simplified procedures.

The problem with this arrangement is that it allows countries to refuse to extradite their own nationals. The agreement could also include a “political offence” exception in relation to terrorism offences. If this exclusion is applied to a UK-EU agreement, it would mean that EU countries could refuse to extradite suspected terrorists to the UK if their crimes are regarded as political in nature.

A further concern with this approach relates to time. Negotiating this exclusion from both sides in the Norway and Iceland negotiations had an impact on how long the negotiation and subsequent agreement took to conclude. The agreement was finalised in 2014 after 13 years of negotiation despite being members of the Schengen agreement. The agreement has still not been fully ratified and thus is still not in operation. This gives a concerning indication of how difficult and time consuming it is likely to be for the UK to negotiate and finalise a surrender agreement should the UK wish to adopt this approach.

In addition to this, the Government itself has said that there is “no guarantee that the UK could secure a similar agreement (to Norway and Iceland) outside the EU as the UK is not a member of the Schengen border-free area”.

It follows that the more that an agreement between the UK and EU differs from the EAW for various reasons, (for example, to include a proportionality test), the longer it will take to negotiate and agree.

Proportionality Test

The judicial authorities in the EU country issuing the EAW should carry out a 'proportionality check'. The assessment includes considering the seriousness of the offence, the length of sentence and the costs and benefits of executing an EAW. The purpose of the test is to ensure that the EAW is not misused for trivial offences. This is clearly an important principle when the law is applied with regards to extradition.

There are however concerns that the Government may be willing to exclude the requirement of proportionality in order to reach a swifter agreement on extradition arrangements. If the Government is planning to abandon the proportionality test in order to reach an agreement in a shorter timescale, it must first make it absolutely clear what the impact would be on UK security and justice.

The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) is also relevant to the UK's future extradition arrangements.

An agreement that is close to the EAW but does not entirely mirror it may include the provision that CJEU case law is not binding on the UK jurisdiction. But it will need to at least leave the option open for the UK courts to look at how other countries are interpreting and applying the law. However, any arrangement that is entirely analogous to the EAW, would necessarily have to comply entirely with the case law of the Court of Justice. Essentially, the closer the UK is to the EAW in its entirety, the closer the legislative framework cooperation will inherently have to be. This is likely to pose a significant problem to the Government who have a clear, and seemingly non-negotiable desire to end the direct jurisdiction of the CJEU in the UK.

Conclusion

There are undoubtedly serious legal and constitutional obstacles to achieving an extradition agreement that is equivalent to the existing EAW. All of the indications from the EU suggest that the closer the UK wants to remain to the status quo in its extradition arrangements after Brexit, the more likely it is that the EU will demand a stronger role for the Court of Justice of the EU.

It might be possible to replicate Norway and Iceland's extradition agreement without direct CJEU jurisdiction, but the UK could then lose the ability both to extradite individuals whose crimes could be considered political in nature, and the UK may also lose the ability to require some (or all) Member States to extradite their own citizens to the UK.

The EAW is not without its flaws. However, it is in everyone's interest that a decision is made with regards to arrangements that will be in place concerning extradition when the UK leaves the EU. The high number of extraditions between the EU and the UK and a commitment to the rule of law and fair trials from all concerned should provide an impetus for both the UK and the EU to reach a favourable agreement, but political considerations may well stand in the way.

Indicating that the UK intends to fall back on the 1957 Convention only addresses part of the problem. There will, more than likely need to be a patch-work combination of approaches needed in order to reach agreements between Britain and EU countries with regards to extradition arrangements post-Brexit (whether there's a deal, no deal or something in between).

To this end, more clarity is needed with regards to the trade-offs the UK will inevitably have to make. Furthermore, a lot more clarity is needed with regards to the inevitable negotiations and trade-off that will have to take place between Countries (like Germany) that intend to end the fundamental principles of reciprocity.