UK applies new simplified extradition procedures to USA and over a hundred other countries

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- controversial UK-US treaty ratified
- use of Statutory Instrument "an abuse of democracy"- shadow Home Secretary
- UK Extradition Act 2003 given full effect
- UK citizens and non-nationals may now be extradited on the basis of "information" rather than actual "evidence" to 108 countries, from Albania to Zimbabwe

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On 1 January 2004, by Order of the Home Secretary David Blunkett, the UK's "Category 2" extradition partners were decided. This apparently innocuous measure has the effect of ratifying the controversial **Extradition Treaty between the UK and the USA**, signed by UK Home Secretary David Blunkett and US Attorney General Tom Ashcroft on 31 March 2003. This agreement removes the requirement on the US to provide *prima facie* evidence when requesting the extradition of people from the UK, but maintains the requirement on the UK to provide evidence to satisfy the US constitution's "probable cause" when seeking the extradition of US nationals.

The Order designating the category 2 countries (**SI 2003/3334**) implements the UK Extradition Act 2003 and opens the way for the extradition of suspects from the UK on the basis of "information" - rather than actual "evidence" - to the US and another 107 countries, many with dubious human rights records. The Act covers UK citizens and third-country nationals.

No debate or vote on extradition treaty with US

The entry into force of **Statutory Instrument 2003 No. 3334** means that the UK-US extradition treaty will have been signed and ratified with no prior debate and no parliamentary vote. The Home Secretary signed the Treaty with his US counterpart under "royal prerogative" (powers which were never "democratised") and delegated powers (the 1989 Extradition Act). Parliament was not consulted and did not receive the text of the Treaty until almost two months after its signature.

On 20 November 2003 the recently agreed **UK Extradition Act** entered force. The Act contains two different sets of extradition procedures. The first is for EU member states applying the European Arrest Warrant ("category 1" countries; **the EAW entered into force on 1 January 2004** between the UK and seven other EU member states). The second set of rules covers extradition to the "category 2" countries (these rules are explained below). Article 69(1) of the Extradition Act 2003 allows the Home Secretary to designate the

category 2 countries by way of Statutory Instrument (SIs, also known as "Orders").

Statutory instruments

SIs are a form of legislation that allow the provisions of an Act of Parliament to be brought into force or altered without a formal Act of Parliament (they are also referred to as secondary, delegated or subordinate legislation). SIs are subject to "parliamentary approval" only in the sense that they "laid before Parliament". Draft SIs in fact automatically become law after a short period if no-one objects. There are were more than 3,000 SIs in 2003. A Joint Committee (comprised of MPs and Lords) on Statutory Instruments, and several committees in the House of Commons, "supervise" the process. The Joint Committee should report "unusual or unexpected" SIs to parliament.

The two draft SIs designating the category 1 and 2 countries in the Extradition Act were considered together with a third (on the UK authorities that can issue EAWs) on 15 December 2003 by the *Third Standing Committee on Delegated Legislation* in the House of Commons. Together, they would give full effect to the UK Extradition Act 2003.

The Committee's debate on the three draft SIs lasted a little over an hour and began with several committee members criticising the Home Office for failing to provide them with copies of the draft texts far enough in advance of the meeting. A government minister then explained the SIs and the two opposition parties expressed serious concerns, both about the EAW and the lack of reciprocity in the UK-US treaty. Menzies Campbell, liberal democrats, who is not a member of the committee but attended the debate, said:

> *insofar as the orders would allow the extradition of United Kingdom citizens to the United States on the basis of identification only, without establishing probable cause, they should be resisted. I have no personal animus against the Minister, but I regret to say that I found her justification for the orders disingenuous …*
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> *It is clear … that she now accepts that if the orders pass into law, United Kingdom citizens will enjoy lesser constitutional rights than citizens of the United States enjoy…*
>
> *What is now proposed is extradition based on identification. Anyone who knows anything about the practice of criminal law knows that evidence based on identification is notorious for being the least reliable…*
>
> *I ask those who feel tempted or disposed to vote for the orders to wait until a*

constituent is the subject of extradition proceedings on the basis of identification alone. I am willing to bet my bottom dollar, since we are talking about the US, that they will be beating at the doors of the Minister and the Home Office to say how unfair and unreasonable our provisions are that allow for their constituents to be treated in that way. (**Full-text of debate** from Hansard)

Twelve members of the Committee were present for the debate. They voted 10 to 2 in favour of the draft SI on category 1 and unanimously for the other two SIs. David Heath and John Pugh, both liberal democrats, voted against.

An "abuse of democracy"

Three days later, on 18 December 2003, the three Orders were formally "laid before parliament" by under-secretary of state Caroline Flint (Home Office) and subject to what is known as the "affirmative resolution procedure". The Joint Committee on delegated legislation met that day and categorised the three SIs as not requiring the "special attention of both Houses" (**Joint Committee report**, pdf). Two weeks later, on 1 January 2004, the three SIs became law.

While it is very rare for SIs to be rejected by parliament since it requires the intervention of significant number of MPs or the opposition party, it has happened before. In this instance, however, the timing of the Orders meant that such an intervention was almost impossible since parliament was winding down for Christmas and there were just three days of parliamentary business remaining. The government used the 31 December 2003 deadline for the implementation of the European Arrest Warrant as a justification for the timing of the SIs (though the category 2 schedule is entirely unrelated to the EAW). Referring to the *de facto* ratification of the UK-US extradition, David Davis, shadow Home Secretary, called the process an "abuse of democracy", while Charles Kennedy, leader of the Liberal Democrats, said:

The home secretary seems to make a habit of ignoring parliament when it suits him. This is a case in point - retrospective legislation should be properly debated in the House [of Commons] - not slipped through in the pre-Christmas rush (Guardian, 15.12.03).

US senate to vote on treaty UK

The UK-US extradition treaty will not enter into force until ratified by the US side - the Home Office has confirmed that no further action is needed from the UK. While there is no

vote in the British parliament, the Treaty needs a two-thirds majority in the US Senate to pass. It will first be considered by the Senate Foreign Relations Committee, which may reject it (though this highly unlikely). The Senate is expected to begin scrutiny of the agreement soon and the American Civil Liberties Union has already called upon on senators to reject the treaty. The ACLU expresses a number of concerns including the erosion of judicial review from the approval of extradition requests, the elimination of the statute of limitations as a defence against extradition, provisional arrests and detentions (which can last for as long as sixty days with no formal extradition request providing supporting details) and the retrospective application of the Treaty: **ACLU** (link)

UK Extradition procedures for Category 2 countries

[An explanation of Category 1/EAW procedures is available **here**]

Under part 2 of the **Extradition Act 2003**, a person can be arrested for the purpose of extradition on the basis of either an international arrest warrant (transmitted to the NCIS by Interpol) or a "certificate" issued to a judge by the Home Secretary following a formal extradition request. These must satisfy a judge that:

> *- the offence of which the person is accused or has been convicted is an extradition offence, and*
>
> *- there is written information that would justify:*
>
> > *(a) the issue of a warrant for the arrest of a person accused of the offence within the justice's jurisdiction, if the person in respect of whom the warrant is sought is accused of the commission of the offence;*
> >
> > *(b) the issue of a warrant for the arrest of a person unlawfully at large after conviction of the offence within the justice's jurisdiction, if the person in respect of whom the warrant is sought is alleged to be unlawfully at large after conviction of the offence.*

For countries not listed in category 2, "written information" is replaced by "evidence".

Following an arrest the person must be bought before a judge as soon as possible for the initial *habeous corpus* hearing. If the extradition request is admissible (i.e. the certificate or warrant is in order) the person will be remanded in custody or bailed to return. Unless the

person consents to their extradition, the judge must set a date for the main extradition hearing not longer than two months away. In the case of provisional arrest warrants, the two months begin when the judge receives the extradition request (this must be within 45 days; Articles 69-76).

At the extradition hearing the judge first considers whether any of the bars to extradition apply. These are:

> *(a) the rule against double jeopardy;*
>
> *(b) extraneous considerations [such as "political" offence, human rights and fair trial considerations];*
>
> *(c) the passage of time;*
>
> *(d) hostage-taking considerations(Articles 79-83)*

Where a person's extradition is sought for the purposes of prosecution or in relation to *in absentia* trials, the judge must then decide whether there is a "case to answer". In normal criminal proceedings evidence would be presented to substantiate the allegations but within the new extradition proceedings:

> *the judge may treat a statement made by a person in a document as admissible evidence of a fact if:*
>
> > *(a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and*
> >
> > *(b) direct oral evidence by the person of the fact would be admissible*

The judge must take into account the nature, source, authenticity, substance and impartiality of any documents (Articles 84 and 86).

If the extradition request concerns a person already convicted by a court (Article 85) or the judge is satisfied that the suspect has a case to answer, "he [sic] must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act" (Article 87). If this proviso is satisfied, the judge sends the case to the Home Secretary for a final decision.

The Secretary of State must decide within two months whether any of the remaining barriers to extradition apply (Article 93). These are the death penalty (Article 94); the speciality rule (the person can only be charged for the offences named in the extradition request, Article 96) or the re-extradition rule (the person was earlier extradited to the UK from another country who has attached conditions regard their onward extradition, Article 97). The person whose extradition is sought has six weeks in which to make representations before the Home Secretary takes a final decision.

Appeals

Either side can appeal to the High Court against the decision of the extradition judge or the Home Secretary within 14 days on "questions of law or fact" and may be based on new information (Articles 103-113). Appeals against the judicial decision to send the case to the Home Secretary will not be considered until after the Home Secretary has taken a decision.

Decisions of the High Court maybe appealed to the House of Lords by either side (again within 14 days). Leave to appeal will only be given where:

> *- the High Court has certified that there is a point of law of general public importance involved in the decision, and*
>
> *- it appears to the court granting leave that the point is one which ought to be considered by the House of Lords*

Documents

1. **Analysis of UK-US Extradition Treaty** (*Statewatch News Online*, July 2003).

2. **UK Extradition Act 2003** (received royal ascent on 20 November 2003).

3. **Statutory Instrument 2003 No. 3333** designating category 1 countries for extradition purposes.

4. **Statutory Instrument 2003 No. 3334** designating category 2 countries for extradition purposes.

5. **European Arrest Warrant limps into force** (*Statewatch News Online*, January 2004).