

UK–EU extradition arrangements post Brexit

With UK-EU negotiations continuing, **Kevin Roberts & Charlotte Glaser** discuss the UK's anticipated departure from the European Arrest Warrant

IN BRIEF

- ▶ Background to the EAW.
- ▶ The transition period.
- ▶ What happens following the transition period?
- ▶ The UK's options.
- ▶ Recent developments.

As the world continues to grapple with one of the worst global pandemics in modern history, the UK government's progress on Brexit has slipped from the headlines. Following the latest round of negotiations between the UK and EU at the end of July, the UK's Chief Negotiator with the EU, David Frost, released a statement stating that it is 'unfortunately clear that [the UK and EU] will not reach in July the early understanding on the principles underlying any agreement'. The next round of negotiations begin on 17 August. Undoubtedly, high up on the list of matters being discussed is the European Arrest Warrant (EAW); specifically, the UK's anticipated withdrawal from the EAW and what fills the lacuna left behind by such a withdrawal.

Background to the EAW

The EAW is a tool that can be employed by any EU member state to force the repatriation, by another member state, of an individual who has been identified as a criminal suspect or convicted of a criminal offence, in order that they can be put on trial or serve a term of imprisonment. It has been hailed as one of the success stories arising out of the European project. The EAW was introduced in response to the EU's free movement of people (and of course their assets) policy and the acknowledgement that criminals could take advantage of the benefits that flowed from such a freedom.

Prior to the EAW's implementation in 2004, it reportedly took on average up to one year to extradite individuals. While giving evidence to the Joint Committee on Human Rights (the Committee) in March 2011, the then UK Director of Public Prosecutions (DPP), Keir Starmer QC, told the Committee

that the EAW regime is 'quicker and clearer' than its predecessor, and 'in a case where someone consents to be extradited under a European arrest warrant, they are usually surrendered in about 16 days. If it is contested, it is about 93 days'. That is in part as a result of the fact that a decision to execute an EAW must be made within 60 days of the arrest of the individual who forms the subject of the warrant, with the possibility to extend that period by 30 days, or within ten days of that person's surrender to the relevant authorities. In 2005, shortly after the implementation of the EAW, it took just over 50 days to extradite Hussain Osman, one of the perpetrators of the failed London underground bombings in July 2005, from Italy to the UK. By comparison, under the previous extradition regime between the UK and EU member states, it took ten years to extradite Rachid Ramda, one of the perpetrators of the 1995 Paris Metro bombings, from the UK to France.

Data released from the National Crime Agency reveals that between 2009 and 2017 a total of 82,242 extradition requests were made to the UK under the EAW regime, which resulted in 13,390 arrests. Over the same period, the UK made 2,229 extradition requests under the EAW regime, leading to 1,411 arrests. While those figures could suggest that the UK has been more a benefactor to the EAW regime than a recipient of its benefits, there can be no doubt that the EAW has been one of the UK's critical weapons in its fight against serious crime.

The transition period

On 31 January of this year, following a number of extensions and 47 years of membership, the UK left the EU. It now has until 31 December (providing that the transition period is not extended) to negotiate

any future trading relationships and criminal justice and security co-operation with the EU before new rules take effect on 1 January 2021. Under the EU–UK Withdrawal Agreement (the WA), which came into force the day after the UK left the EU, the UK is able to continue to make use of the EAW regime provided that the process for extradition commences before 31 December 2020. However, under the WA, EU member states can refuse to extradite their nationals to the UK, and, similarly, the UK can decline to execute a warrant issued in favour of one of its nationals.

What happens following the transition period?

The EU has stated that in the event that the UK is willing to maintain free movement of people's rights for EU citizens, it could continue to participate in, and benefit from, the EAW regime. The UK government has made it clear that following the expiration of the transition period, it will not recognise freedom of movement for EU citizens, and, in any event, it intends to withdraw from the EAW. To that end, Pt 1 of the Extradition Act 2003 (EA 2003), which gives effect to the EAW, requires amendment. Accordingly, following the end of the transition period, as a result of provisions set out in The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, EU member states will be re-designated as territories under Pt 2 of EA 2003. Part 2 applies to countries that have international extradition treaties with the UK.

One of the reasons put forward by the UK government for the decision to withdraw from the EAW is that by negotiating its own fast-track extradition model, akin to Norway and Iceland, the UK will be able to negotiate safeguards beyond those currently offered by the EAW. It is not clear what the substance of those safeguards might look like and whether in reality the UK will enjoy anything close to the benefits afforded to EU member states under the EAW regime.



The UK's options

If, during the transition period, the UK is not able to successfully negotiate an extradition agreement with the EU, from 1 January 2021 the UK's extradition relationship with EU member states will be governed by the previously recognised extradition arrangement, the 1957 European Convention on Extradition (the 1957 Convention), as ratified by all EU member states. Article 28(2) of the 1957 Convention permits the UK to enter into supplemental bilateral or multilateral agreements. As well as amendments to the UK's legislation, that option will likely require amendments to a number of EU member states' relevant laws. As might be expected, the advantages afforded to the parties under that arrangement are not as extensive as those provided under the EAW regime. Indeed, the grounds upon which extradition can be refused under the 1957 Convention are arguably less prescriptive. By virtue of Art 6 of the 1957 Convention, parties can refuse to extradite their nationals, and under Art 3 there is a 'political offences' exception. In addition, the decision as to whether an individual is extradited to or from the UK will be influenced by the UK's diplomatic relations with relevant member states, and the time period within which an extradition hearing should take place under Pt 2 of EA 2003 is greater than the equivalent period under Pt 1 of EA 2003. However, some of the safeguards afforded under the EAW regime, such as the proportionality test, which was implemented by the UK government in 2014, are not available under Pt 2 of EA 2003, thereby leaving fewer grounds upon which an extradition request under Pt 2 can be resisted.

One of the options available to the UK is to attempt to agree bilateral agreements with each of the 27 EU member states, or member states with whom the UK has developed strategic coalitions, such as Spain. However, that process is likely to take years to negotiate and implement, and navigating 27 separate agreements will be far less straightforward than negotiating a pan-European one. Further, criminals are likely to benefit from the inconsistencies that will flow from the implementation of a number of individual extradition agreements. In addition, under that option, the UK government would have to consider what role the Court of Justice of the European Union (the CJEU) might play in reviewing the implementation of any such agreements and how much deference the UK government would be willing to show towards an authority for which it has at times very publicly shown little regard.

Remaining subject to the authority of the CJEU in whatever guise is unlikely to prove very popular with the British electorate. At the same time, the EU will be keen to

maintain CJEU oversight in any extradition arrangement into which it enters with the UK. The recent extradition agreement that Norway and Iceland, both members of the Schengen Agreement, negotiated with the EU has been praised by the UK government and appears to circumvent the issue of CJEU oversight. It does so by introducing a 'mechanism' by which the parties must remain up-to-date with CJEU and relevant Icelandic and Norwegian case law. The Surrender Agreement, as it is termed, finally came into force on 1 November last year. Therefore, given its relatively recent implementation, it remains to be seen how that condition will operate in practice. Indeed, one can easily see how an issue arising from such an agreement might require some sort of judicial intervention and scrutiny. Equally, it should not be forgotten that it took over a decade for the Surrender Agreement to be agreed upon and ratified following scrutiny by national and European parliaments. Admittedly the fact that the UK has already been a party to the EAW could marginally accelerate any such process. However, unlike Norway and Iceland, the UK is not a party to the Schengen Agreement which could make negotiating the terms of any extradition agreement more challenging.

It would appear that we are still some way off from discovering what will replace the EAW on 1 January next year. Whatever arrangement supersedes that regime, it will almost certainly be slower, more expensive and more resource-intensive. Indeed, one of the benefits afforded by the EAW was that, unlike what came before it, it decentralised decision-making such that decisions could be made by regional police forces and not only those located in the Capital. That helped to streamline enforcement of the EAW regime. Further, one of the ways in which the EAW has been so effective is the absence of what is known as the 'double criminality' requirement in relation to 32 categories of offences, including terrorism and drug trafficking. That is to say that a person can be extradited from member state A to member state B in circumstances where the conduct for which they are being extradited does not constitute a criminal offence in member state A (provided that the offence is punishable by a maximum term of at least three years' imprisonment in member state B). The Surrender Agreement similarly provides that the parties can make a declaration that the double criminality requirement does not apply in respect of the same group of 32 offences, provided that the equivalent custodial term of at least three years is also applicable.

Negotiating an extradition agreement with the EU will present many legal and constitutional challenges for the UK government, not least because a number of EU

member states, such as Germany, Slovenia and Austria, are constitutionally prevented, save for in limited circumstances, from extraditing its citizens to countries outside the EU. Alison Saunders, another former UK DPP, told the EU Home Affairs Sub-Committee in November 2016 that a total of 22 EU member states have restrictions on extraditing their nationals to countries outside the EU.

Recent developments

In January 2020, the UK government introduced the Extradition (Provisional Arrest) Bill which amends Pt 2 of EA 2003 and affords police officers the power to arrest individuals without a warrant for extradition purposes in relation to a number of specific countries outside the EU in certain circumstances. The government has not ruled out the possibility of extending the provisions contained therein to EU countries in the event that the UK does indeed withdraw from the EAW, and, resultantly, EU member states become designated territories under Pt 2 of the EA 2003. The Political Declaration (PD) between the UK and EU, which was agreed on the same day that the WA was agreed, and similarly relates to the UK's conditions for withdrawal from the EU, states that time limits for extraditing individuals should be imposed in any extradition arrangement. It also explores the prospect of removing the double criminality requirement which could, if implemented, offer less protection to individuals who find themselves subject to an extradition request.

Comment

Reassuringly, certain sections of the PD go some way to addressing, in theory, the inefficiencies that are likely to result from the UK's withdrawal from the EAW. However, there can be no doubt that whatever form any future UK-EU extradition arrangement takes, the UK is unlikely to enjoy the range of benefits that the EAW regime offers. Any agreement is likely to include a clause permitting the parties to refuse the extradition of its nationals. In practice, that will present many challenges for enforcement agencies. Indeed, it may lead to individuals who are involved in crimes that are in some way linked to the UK escaping prosecution in the UK because the countries in which they reside refuse to extradite them, or do not recognise the conduct as criminal. Similarly, the increased workload and additional logistical challenges that are likely to result from a new arrangement will place an ever-greater burden on already significantly stretched prosecuting authorities. **NLJ**

Cadwalader White Collar Defense and Investigations partner **Kevin Roberts** and associate **Charlotte Glaser** (www.cadwalader.com/).