

EXTRADITION (PROVISIONAL ARREST) BILL

Memorandum from the Home Office to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Extradition (Provisional Arrest) Bill (“the Bill”). The Bill was introduced in the House of Lords on 7 January 2020. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The Bill is comprised of two clauses (an introductory clause and a clause on extent, commencement and short title) and a Schedule. Part 1 of the Schedule contains the main amendments to the Extradition Act 2003 (‘the 2003 Act’), including provision for the new power of arrest set out below. Part 2 of the Schedule concerns consequential amendments.

3. The Bill creates a new power of arrest for extradition purposes in Part 2 of the 2003 Act. Part 2 deals with extradition to territories with which the UK has formal extradition arrangements based on the exchange of requests between governments. Territories designated under the 2003 Act for the purposes of Part 2 are known as “category 2 territories”. Examples of category 2 territories are countries to which the European Convention on Extradition applies. In contrast, Part 1 of the 2003 Act is designed to implement arrangements based on the mutual recognition of arrest warrants, such as the European Arrest Warrant system. Territories designated under the 2003 Act for the purposes of Part 1 are known as “category 1 territories” and currently include EU Member States and Gibraltar.

4. The new power of arrest will enable law enforcement officers to arrest individuals without a warrant of arrest from a UK court in certain cases falling under Part 2 of the 2003 Act. This new power will only apply where the request for an individual’s arrest for extradition purposes (which could, for example, take the form of an Interpol red notice) has been certified as having been issued by a specified country (one of the listed countries to which the new power of arrest will apply) in relation to a serious offence.

5. The designated authority (see paras 20 to 21 below) may issue a certificate in relation to a request for arrest. In order to issue a certificate, the designated authority must have received a valid request for the person’s arrest from a specified category 2 territory, the criteria regarding the seriousness of the offence must be met and the authority must be satisfied the request is made under arrangements which allow such a request only if a warrant for the

person's arrest has been issued in the category 2 territory or the person is alleged to be unlawfully at large after conviction of an offence in the category 2 territory. If the individual is arrested, the person must be brought before a judge within 24 hours of arrest. In order to continue the extradition proceedings, the judge must be satisfied that, were the individual not already under arrest, a warrant for their arrest would be issued. If the judge is so satisfied, the extradition proceedings will continue in the normal way. The Bill therefore enables persons who fall within the scope of the legislation to be brought into the extradition system more efficiently. However, the legislation does not affect the subsequent process by which it is determined whether a person should be extradited from the UK.

C. DELEGATED POWERS

6. The Bill includes the following:

- a. an expansion of the existing powers to extend provisions of the 2003 Act to the British Overseas Territories at clause 2(2);
- b. an expansion of the existing power to extend provisions of the 2003 Act to the Channel Islands and the Isle of Man at clause 2(2);
- c. a power to commence provisions of the Bill at clause 2(4);
- d. a power to make transitional or saving provision in connection with commencement at clause 2(6);
- e. a power to designate an authority for purposes of issuing a certificate in respect of a request for arrest at new section 74B(4), inserted by para 2 of the Schedule;
- f. a power to amend the list of territories to which the new power of arrest will apply, and in consequence to amend section 74C to change what it means to make a request in the approved way, at new section 74(B)(7), inserted by para 2 of the Schedule;
- g. a power to make further consequential provision at para 29 of the Schedule.

7. There are further amendments to existing provisions of the 2003 Act which, while not creating delegated powers, may be of interest to the Committee. These are set out in section D of this memorandum.

Clause 2(2): Extension to British overseas territories

Power conferred on: Her Majesty

Power exercised by: Order in Council

Parliamentary Procedure: Negative Procedure

Context and Purpose

8. Clause 2(2) extends the scope of the existing delegated powers in section 177(2) and (3) of the 2003 Act. Those powers enable (by way of an Order in

Council) provisions of the 2003 Act applicable to extradition from the UK to be extended to a British overseas territories, where extradition is from a British overseas territory to a territory falling within Part 1 of the 2003 Act or the UK (section 177(2)), or to the Channel Islands, Isle of Man or territory falling within Part 2 of the 2003 Act (section 177(3)). Section 177(4) states that the provisions may be applied with modifications. Clause 2(2) of the Bill will ensure that the amendments made by this Bill can be extended to any or all of the British overseas territories as appropriate.

Justification for taking the power

9. The purpose of the powers in section 177 of the 2003 Act is to ensure that a comprehensive framework for extradition from the British overseas territories can be established. The powers were exercised in the Extradition Act 2003 (Overseas Territories) Order 2016 (S.I. 2016/990), in consultation with the governments of the 13 British overseas territories. The Department considers that the new power of arrest created by this Bill should be made available to the British overseas territories, in case they wish to avail themselves of it. It is therefore appropriate to ensure that the amendments made by this Bill to the 2003 Act fall within the scope of the powers in section 177 of that Act.

Justification for the procedure

10. Legislation by Order in Council is the appropriate procedure where the Government intends to make provision for the peace, order and good government of the British overseas territories. Orders in Council made under section 177 of the 2003 Act are subject to the negative procedure. The extension of the scope of the powers in section 177 by clause 2(2) of the Bill is in keeping with its existing scope and consequently does not, in the Department's view, warrant any change to the scrutiny arrangements for such Orders.

Clause 2(2): Extension to Crown Dependencies

Power conferred on: Her Majesty

Power exercised by: Order in Council

Parliamentary Procedure: None

Context and Purpose

11. Clause 2(2) of the Bill also extends the scope of the delegated power in section 222 of the 2003 Act. Section 222 provides for the extension of provisions of the 2003 Act to any of the Channel Islands or the Isle of Man, with any modifications specified in the Order.

Justification for taking the power

12. The power in section 222 of the 2003 Act is similar to the powers in section 177 above and is intended to enable the operation of extradition procedures in the Channel Islands and the Isle of Man. The power in section 222 has not to date been exercised. However, the Department considers that it is appropriate to ensure that the provisions relating to the new power of arrest inserted by this Bill into the 2003 Act can be made available to the Channel Islands and the Isle of Man. The extension of the provisions to the Channel Islands or the Isle of Man would occur only with the agreement of those jurisdictions' authorities.

Justification for the procedure

13. As with the original power in section 177 of the 2003 Act, the power as extended by clause 2(2) is not subject to any parliamentary procedure. This reflects the customary position for Orders in Council extending provisions of an Act to the Crown Dependencies.

Clause 2(4): Commencement

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and Purpose

14. Clause 2(4) contains a power for the Secretary of State to bring the substantive provisions of the Bill into force by commencement regulations.

Justification for taking the power

15. Allowing provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the substantive provisions of the Bill at the appropriate time, having regard to the need to issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

Justification for the procedure

16. As is usual with commencement powers, regulations made under clause 2(4) are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

Clause 2(6): Power to make transitional or saving provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and Purpose

17. Clause 2(6) confers on the Secretary of State power to make such transitional or saving provisions as she considers appropriate in connection with the coming into force of the provisions in the Bill.

Justification for taking the power

18. This power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation and the Bill, without creating any undue difficulty or unfairness in making these changes.

Justification for the procedure

19. The Department considers that the power to make transitional or saving provision need not be subject to any Parliament procedure as the purpose of the power is simply to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. The substance of the Bill will be considered during the passage of the Bill through Parliament.

Schedule: Part 1 Paragraph 2 (new section 74B(4)): Power to designate the relevant authority for issuing certificates

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative Resolution

Context and Purpose

20. The new power of arrest created by this Bill will apply where the designated authority has issued a certificate in respect of a request for arrest under new section 74B of the 2003 Act. The designated authority may only issue a certificate under section 74B if certain criteria are met. Specifically, the designated authority must have received a valid request, made by an authority of a specified category 2 territory, for the person's arrest. It must be satisfied the request is made under arrangements which allow such a request only if a warrant for the person's arrest has been issued in the category 2 territory or the person is alleged to be unlawfully at large after conviction of an offence in the category 2 territory. It must also have reasonable grounds for believing that the offence specified in the request is a serious extradition offence. To constitute a serious extradition offence, the offence must be punishable in the UK with a custodial sentence of three or more years. Finally, the designated authority must be satisfied that the seriousness of the conduct constituting the offence makes it appropriate to issue the certificate.

21. New section 74B(4), as inserted by paragraph 2 of the Schedule to the Bill, gives the Secretary of State the power to designate an authority for the purposes of issuing certificates under section 74B. By virtue of new section 74B(5), the Secretary of State may designate more than one authority and designate different authorities for different parts of the UK. The intention is to designate the National Crime Agency (“NCA”), which is the UK’s National Central Bureau for Interpol, as the authority responsible for issuing such certificates.

Justification for taking the power

22. Having established on the face of the Bill the power of the designated authority to issue a certificate, with the effect that the new power of arrest applies, as well as the criteria for issuing a certificate in respect of a request for arrest, the Department considers that the designation of the authority responsible for issuing a certificate is an appropriate matter to be left to secondary legislation. A regulation-making power will afford the appropriate degree of flexibility to amend the designated authority in the light of changing circumstances, including alterations to the functions of law enforcement bodies in the UK.

23. The ability to designate multiple bodies and to designate different bodies for different parts of the United Kingdom is intended to ensure that any changes to the structure of the UK’s law enforcement arrangements can be adequately provided for. The approach taken in new section 74B(4) and (5) mirrors the approach taken to the designation of the authority responsible for certification of European Arrest Warrants under Part 1 of the Act (see section 2(9) and (10) of the 2003 Act).

Justification for the procedure

24. Given that the framework for the issuing of a certificate will be provided for in the Bill, and that the use of the power to designate an authority for these purposes is unlikely to be controversial, the Department considers that the negative procedure affords an appropriate level of parliamentary scrutiny. The application of the negative procedure is also consistent with the procedure for designating an authority for the purposes of issuing a certificate in respect of a European Arrest Warrant under Part 1 of the Act (see section 223 of the 2003 Act).

Schedule: Part 1 Paragraph 2 (new section 74B(7)): Power to add, vary or remove a reference to a territory or description of territory (new section 74B(7)(a)) and consequential power to amend section 74C so as to change what it means to make a request in the approved way for the purposes of that section (new section 74B(7)(b)),

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative Resolution

Context and Purpose

25. New Schedule A1, as inserted by this Bill, sets out the list of specified category 2 territories. These are territories which have been designated for the purposes of Part 2 and which have been specified in new Schedule A1, with the effect that the new power of arrest can apply to requests for arrests made by the appropriate authorities of those territories.

26. New section 74B(7)(a), as inserted by paragraph 2 of the Schedule to the Bill, gives the Secretary of State the power to amend the list of territories in new Schedule A1 to add, vary or remove a reference to a category 2 territory.

27. New section 74C, as inserted by this Bill, sets out the criteria for a “valid request” for arrest from such a territory. Subsection (1) provides that a request is valid if, as well as containing the specified statement and information, it is made in the approved way. Subsection (6) explains that a request is made in the approved way if it is made by an authority which the designated authority believes has the function of making such requests in that territory.

28. New section 74B(7)(b), as inserted by paragraph 2 of the Schedule to the Bill, is only exercisable in consequence of the exercise of the power in new section 74B(7)(a). It gives the Secretary of State the power (where a reference to a category 2 territory is added, varied or removed) to amend section 74C so as to change what it means to make a request in the approved way. This is intended to enable similar provision to be made, where appropriate, as that made in sections 70(5) to 70(6) of the 2003 Act; these subsections set out the variations to the meaning of “the approved way” for making extradition requests from the British Overseas Territories and for the Hong Kong Special Administrative Regime. For example, where a newly specified territory had a number of different authorities which had the function of making requests, the power in new section 74B(7)(b) would enable one or more authority to be singled out as the appropriate authority for making valid requests.

Justification for taking the power

29. The Department considers that the proposed regulation-making power provides the appropriate level of flexibility to amend the list of specified category 2 territories, and to amend the definition of making a request in the “approved way”, in response to changing circumstances. Leaving such matters to secondary legislation ensures that the Government can respond in timely fashion to potential future developments, and that such response provides certainty and clarity as to the appropriate manner of request from amended or newly specified territories. For example, if the UK were not to have access to the European Arrest Warrant or a similar tool, with the effect that EU Member States become re-designated as category 2 territories, it is likely to be appropriate to specify some or all of them for the purposes of this legislation (thereby replicating the immediate power of arrest which applies to a certified

European Arrest Warrant). It may also be appropriate to specify what making a request in the approved way means in respect of these states. Provision may similarly be required for other territories specified in the future. Further, in the unlikely event of a deterioration in the standards of the criminal justice system of a specified category 2 territory, it is likely to be appropriate to remove such a country from the scope of this measure.

Justification for the procedure

30. Whether a territory should be included within new Schedule A1 will require close consideration of the criminal justice systems and extradition practices of the relevant countries. This will include consideration of the authority, or authorities, in the territory from whom it would be appropriate for requests for arrest to be certified. The Department therefore considers it appropriate that the regulation-making power should be subject to the affirmative procedure to afford both Houses the opportunity to debate and approve any revisions to the list of specified category 2 territories, and amendments to what constitutes a request made “in the approved way” from such a territory. Moreover, this is a Henry VIII power, which further argues for the application of the affirmative procedure. The application of the affirmative procedure is also consistent with the affirmative procedure that applies to the designation of territories for the purposes of Part 1 and 2 of the 2003 Act (see sections 1, 69 and 223 of the 2003 Act).

Schedule: Part 2 Paragraph 29: Power to make further consequential amendments

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution.

Context and Purpose

31. Paragraph 29 of the Schedule confers a power on the Secretary of State to make further provision that is consequential on the amendments made by the Schedule to this Bill. Regulations under paragraph 29 may amend, repeal or revoke any provision of primary legislation. They may also make transitional, saving or incidental provision.

Justification for taking the power

32. The Bill already contains a significant number of changes to primary legislation as a consequence of Part 1 of the Schedule in the Bill. However, as the Bill creates a new power of arrest for extradition purposes, with ramifications for legislation beyond the strict confines of extradition law (see for example the consequential amendments made to the Nationality, Immigration and Asylum

Act 2002 and the UK Borders Act 2007 in paragraphs 7 and 25 to 27 of the Schedule to the Bill respectively), the Department considers that it would be prudent for the Bill to contain a power to deal with further consequential provisions to primary legislation by secondary legislation.

33. As the consequential amendments to secondary legislation will be of a detailed and technical nature, the Department considers it is appropriate to deal with these by way of secondary legislation.

34. The power conferred by this clause is limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on the amendments made by the Schedule to the Bill.

Justification for the procedure

35. If regulations made under this power do not amend, repeal or revoke primary legislation, they will be subject to the negative resolution procedure (by virtue of paragraph 29(6)). If regulations made under this power amend, repeal or revoke any provision made by primary legislation, they will be subject to the affirmative resolution procedure (by virtue of paragraph 29(5)), as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

D. OTHER PROVISIONS OF INTEREST

36. Paragraphs 18 and 19 of the Schedule amend sections 193 and 194 of the 2003 Act respectively and may be of interest to the Committee.

Amendment of section 193

37. Section 193 creates a mechanism whereby the UK can give effect to the terms of an international Convention on extradition involving territories which have not been designated for the purposes of Part 1 or Part 2 of the 2003 Act ('category 1' and 'category 2' territories respectively). Subsection (1) contains a delegated power which allows the Secretary of State to designate international Conventions and specify conduct to which the Convention applies (the Bill does not amend that power). Where a territory which is a party to a designated Convention makes a request for a person's extradition, the Secretary of State may then (if appropriate) certify that certain conditions are met. If the Secretary of State does so certify, the effect is that the 2003 Act applies in respect of the person's extradition as if the requesting territory were a category 2 territory, but as if certain provisions of the 2003 Act were omitted. Section 193(4) sets out the provisions to be omitted.

38. Paragraph 18 of the Schedule to the Bill amends the list of provisions to be omitted in section 193(4) to include reference to the provisions relating to the new power of arrest inserted by the Bill (new sections 74A to 74E). The effect of this is to ensure that the new power of arrest can only be made available in respect of specified category 2 territories.

39. The Bill does not amend the delegated power itself or the conditions to be certified. However, the Department draws the Committee's attention to these provisions, given that the amendment in paragraph 18 of the Schedule will add to the list of provisions in primary legislation which are to be omitted if the Secretary of State certifies the conditions to be met in relation to a person's extradition under section 193. The Department considers that the amendment is appropriate, and consequential upon the overall legislative aim of ensuring that the new power of arrest is only applicable in respect of specified category 2 countries.

Amendment of section 194

40. The amendments made by paragraph 19 of the Schedule to section 194 of the 2003 Act are similar in nature to those made to section 193. Section 194 allows the Secretary of State to certify an extradition request where she believes that arrangements have been made between the UK and another territory for the extradition of a person to the territory and that the territory is not a category 1 or category 2 territory. Under section 194(4), the effect of certification is again that the 2003 Act applies in respect of the person's extradition, but as if with certain provisions of that Act were omitted. For the same reasons as above, the amendments made by paragraph 19 add the provisions relating to the new power of arrest (new sections 74A to 74E) to the list of provisions to be omitted.

Home Office
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