

The European Arrest Warrant:  
Between Trust, Democracy and the Rule of Law

The Implementation of the European Arrest Warrant  
in England and Wales

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Review of the implementation of the European Arrest Warrant in England and Wales – Introduction to the Extradition Act 2003 – The European Arrest Warrant in practice – Assessing the Extradition Act 2003.

INTRODUCTION

The ambition of this article is to review the implementation of the European Arrest Warrant (EAW) in England and Wales in order to consider what lessons might be learnt from it, in both constitutional and/or criminal law terms. In brief, the Extradition Act 2003, which came into force on 1 January 2004, implemented the EAW.<sup>1</sup> Perhaps the most interesting question for lawyers elsewhere in Europe is to ask why the Act has not run into the difficulties faced in, for example, Germany, Poland, Belgium and Cyprus.

An introduction must start by reminding readers of some fundamental features of the British Constitution. First, the United Kingdom is made up of four separate jurisdictions. Alone of the member states, the UK is not straightforwardly a unitary state. Many powers have been devolved to its constituent parts: thus the prosecuting authorities in England and Wales are quite different to those in Scotland or Northern Ireland. This inevitably makes the implementation of European

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<sup>1</sup> Namely, Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states (2002/584/JHA). For an analysis of the Framework decision, see M. Massé, 'La décision-cadre', in M. Cartier (ed.), *Le Mandat d'arrêt Européen* (Bruxelles, Bruylant 2005).

initiatives more complex.<sup>2</sup> Thus, sections 157-160, 166-168, 171, 173 and 205 of the Extradition Act 2003 apply only to England, Wales and Northern Ireland. Sections 154, 198, 200 and 201 apply only to England and Wales. Sections 183 and 199 apply only to Scotland, and sections 184 and 185 apply only to Northern Ireland. All other sections of the Act apply to the whole of the United Kingdom. The focus of this article, however, is the implementation and application of the EAW in England and Wales, since this is the author's 'home' jurisdiction.

Secondly, the UK constitution is, as is well-known, not written in one constitutional document. One finds 'constitutional law' in a mass of legislation and case-law, and constitutional conventions also play a key role. The 'guiding principles' may be found in concepts such as Parliamentary sovereignty, the rule of law and the separation of powers but the precise meaning of these principles are subject to great debate.<sup>3</sup> Given the flexibility of the constitution, it is not surprising that the EAW was smoothly implemented: the Government wished to implement it; the Government has a majority in the House of Commons, and the measure therefore passed relatively uneventfully through the Parliamentary process, receiving Royal Assent on 20 November 2003. In this article, I shall describe the background to the Act and the Act itself only briefly, before moving on to a number of assessments (Parliamentary, judicial and other written commentaries), before raising some conclusions for constitutional and penal lawyers. This article does not seek to provide a thorough guide to the Act: for that readers should turn to the practitioners' guides.<sup>4</sup>

## THE EXTRADITION ACT 2003<sup>5</sup>

Extradition law was last overhauled in the Extradition Act 1989, which was itself largely a consolidation of previous legislation: Part 1 of the Criminal Justice Act

<sup>2</sup> A point which is sometimes unhelpfully overlooked by others in the European Union. Thus, by way of example, the 33<sup>rd</sup> Report of the European Scrutiny Committee of the House of Commons (28 June 2006) mentions 'the apparent resistance' of other member states to the need for the UK to have more than one central authority responsible for the proposed electronic exchange of criminal record information.

<sup>3</sup> Recommended textbooks include H. Barnett, *Constitutional and Administrative Law*, 5<sup>th</sup> edn. (London, Routledge Cavendish Publishing 2004); A. Bradley & K. Ewing, *Constitutional and Administrative Law*, 13<sup>th</sup> edn. (Longman, 2002); N. Parpworth, *Constitutional and Administrative Law*, 4<sup>th</sup> edn. (Oxford, Oxford University Press 2006); B. Thompson & M. Allen, *Cases and Materials on Constitutional and Administrative Law*, 8<sup>th</sup> edn. (Oxford, Oxford University Press 2005); C. Turpin, *British Government and the Constitution: Text, Cases and Materials*, 5<sup>th</sup> edn. (Butterworths 2002).

<sup>4</sup> See *infra* n. 44.

<sup>5</sup> See J. Spencer, 'The European Arrest Warrant' (2003-4) *Cambridge Yearbook of Legal Studies* 201 for a detailed analysis of the background and Parliamentary process behind the 2003 Act. Detailed practical information is available on both the Home Office and Crown Prosecution Ser-

1988, the Fugitive Offenders Act 1967 and the Extradition Act 1870 (as amended). The 2003 Act did not simply implement the European Arrest Warrant, but was a much wider reform of extradition generally. Only Part 1 of the Act (sections 1-68, of an Act which contains 227 sections and 4 Schedules) deals with extradition to 'Category 1 territories', EU countries operating the EAW. Much of the debate which has followed the Act has surrounded Category 2 extraditions, particularly those to the US, where the concern has been, in particular, the one-sided agreement with the US that there is no requirement for the US to provide *prima facie* evidence when requesting the extradition of US residents, although this continues to be necessary when the UK seeks the extradition of those in the US.<sup>6</sup>

All proposals for change which arrive from the European Union are considered by the relevant Government department, which then refers it to Parliament's two main European Scrutiny Committees.<sup>7</sup> These Committees consider the measure and the Explanatory Memorandum written by civil servants in the relevant Department. The Committees assess the political and legal importance of each EU document (about 1,100 per year) and determine which are debated in Parliament. All documents deemed politically or legally important are discussed in their weekly reports (available online at [parliament.uk](http://parliament.uk)). Ministers should not agree to proposals which the Committees have not cleared or which are waiting for debate. The Committees also monitor business in the European Council (through parliamentary questions and sometimes by questioning Ministers in person), and sometimes conduct general inquiries into legal, procedural or institutional developments in the EU. It is clear from these reports that the Government was enthusiastically behind the proposals for the EAW at the European level – it is hardly surprising therefore that the UK was swift to enact the Framework Decision.

The precise way in which it was proposed to change domestic extradition law was first explained in a Government consultation paper published in March 2001 called 'The Law on Extradition: A Review'. A point of interest here is the wide-

vice websites. See, in particular, <[www.cps.gov.uk/publications/communications/fs-extradition/index.html](http://www.cps.gov.uk/publications/communications/fs-extradition/index.html)>.

<sup>6</sup> See P. Garlick, 'The mysterious case of the new US extradition scheme', 154 *New Law Journal* (2004) p. 738, who questions the constitutionality of the implementation of this treaty agreement, signed by Government Minister in March 2003, incorporated in domestic law simply by delegated legislation, the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, S.I. 2003/3334; see also *R (Birmingham) v. Director of the Serious Fraud Office* [2006] 3 All E.R. 239, [2006] U.K.H.R.R. 450, *R (Norris) v. Secretary of State for the Home Department* [2006] EWHC 280, *Stapp v. United States of America* [2006] EWHC 1033.

<sup>7</sup> The European Scrutiny Committee in the House of Commons and the European Union Committee in the House of Lords. See J. Spencer & N. Padfield, 'L'integration des droits europeens en droit britannique', *Revue de science criminelle et de droit pénal comparé* (2006) p. 537-550 for details on the way in which European Union proposals become law in the UK.

spread use of consultation papers, reflecting the Government's avowed commitment to public consultation. Yet there is academic and political scepticism about this process. The short period allowed on many consultations encourages the belief that the costly consultation process is more for appearances, a public relations exercise, than for genuine democratic engagement. To this consultation, there were 22 written responses, seven of which requested that their responses should not be published. The remaining 15 were published on 24 October 2001. The Bill was then published in draft form on 27 June 2002, with another consultation period which was open until 30 September (three months, but over the holiday period!). There were only 11 responses to this second consultation, nine of which were published.

The Bill had a relatively bumpy journey through Parliament, attracting 'the simultaneous opposition of the euro sceptic right and of the libertarian left'.<sup>8</sup> The Bill was introduced into Parliament in the House of Commons on 14 November 2002, and had its brief '2<sup>nd</sup> Reading' on 9 December 2002. The Bill was discussed at length in Standing Committee D over 9 sittings in January 2003, and the Report stage and the third Reading took place on 25 March. The Bill then followed the usual procedure and was introduced into the House of Lords on 26 March, and had its second reading on 1 May 2003. There were then 9 sittings of the Grand Committee in the House of Lords to debate the Bill between 3 June and 10 September, the report stage took place over 3 days in October and the Bill completed its third Reading in the House of Lords on 12 November 2003. It returned to the House of Commons on 13 November for consideration of Lords Amendments, back to the Lords for their consideration of Commons amendments on 18 November and the Bill got Royal Assent on 20 November 2003.<sup>9</sup> Many of the points raised in debate seemed, as Alegre points out, 'to question the very fact of extradition, and many of the political debates concerned the protection of the British citizen rather than the protection of universal human rights'.<sup>10</sup> The end result is the Extradition Act 2003, divided into five parts:

#### Part 1 – *Extradition to 'category one' territories.*

This covers extradition to all EU countries operating the European Arrest Warrant (EAW), or, more accurately, to all countries which have been designated as 'category one territories' by the Home Secretary.<sup>11</sup> The practical exercise of the procedure is detailed in the next section.

<sup>8</sup> Spencer, *supra* n. 5, p. 207.

<sup>9</sup> Useful guides to Parliamentary procedure are to be found on Parliament's website. A table which sets out the dates and the Hansard references for each stage of the Act's passage through Parliament is to be found at the end of the Explanatory Notes to the Act.

<sup>10</sup> S. Alegre, 'The shifting face of extradition', 156 *New Law Journal* (2004) p. 1022.

<sup>11</sup> An up to date list of territories and their extradition status in relation to the UK can be found at <[police.homeoffice.gov.uk/operational-policing/extradition-intro/extrad-part-1?ver=](http://police.homeoffice.gov.uk/operational-policing/extradition-intro/extrad-part-1?ver=)

Part 2 – *Extradition to category 2 territories.*

Part 2 of the Act deals with extradition to all other countries, including other EU countries that have not yet implemented the EAW. Here, in addition to the information needed to in category 1 cases, the court must be satisfied that the request contains admissible evidence of the offence sufficient to establish a prima facie case against the person. However, this requirement does not apply in respect of extradition requests from the US, Canada, Australia and New Zealand, which, as has been noted, has been one of the most controversial aspects of the Act.<sup>12</sup>

Part 3 – *Extradition to the UK.*

This covers both requests to EAW countries and others. The Act provides that a number of persons including a prosecutor and a police officer may apply to the court for an extradition warrant, including an EAW. The court may issue an EAW where a UK warrant has already been issued for the person's arrest and there are reasonable grounds for believing that the person has committed an extradition offence or is unlawfully at large following conviction. Once issued, the EAW is transmitted to the country concerned by NCIS/SOCA (the National Criminal Intelligence Service/the Serious and Organised Crime Agency).<sup>13</sup> The procedure will then be in accordance with the legislation implementing the EAW scheme in that country. Requests to countries which do not operate the EAW scheme are made by the UK on a state-to-state basis according to the relevant extradition arrangement (bi-lateral agreement, multilateral convention or an ad hoc arrangement).

Part 4 – *Police powers in relation to export extradition requests.*<sup>14</sup>

Part 5 – *Miscellaneous and general.*

## THE EAW IN PRACTICE

The Home Secretary continues to wield considerable powers in the way the EAW applies in practice. The Act grants him considerable powers to specify the rules for the practical operation of the EAWs. As well as designating countries as 'Category

tion=1>. The list has been changed three times so far, as more countries have implemented the EAW.

<sup>12</sup> See *supra* n. 6.

<sup>13</sup> See the following section of this article.

<sup>14</sup> Details on these parts of the Act, as with the other parts, are available in the Explanatory Notes (published by the Government to accompany the Act, and available on the web) and on the Home Office website.

1' or Category 2', he is responsible for nominating the 'designated authority' through which incoming EAWs are received. Initially this was a police unit, the National Criminal Intelligence Service, in England and Wales, but the Serious and Organised Crime Agency, which was created by the Serious Organised Crime and Police Act 2005, took over all NCIS roles on 1 April 2006.<sup>15</sup> The police, as the designated authority, decide whether to certify the warrant concerned. If they do, the warrant can be executed by a police officer without the need to obtain a warrant from a court. The Crown Prosecution Service (CPS), the body responsible for prosecuting criminal cases investigated by the police in England and Wales, then acts as the representative for the requesting judicial authority in the proceedings before the English courts.

All extradition cases concerning people arrested in England and Wales have for many years been dealt with at Bow Street Magistrates Court in London. But this court was closed on July 14, 2006, and extradition cases are now heard at Horseferry Road Magistrates' Court, renamed City of Westminster Magistrates' Court. The initial hearing after arrest is heard by a District Judge (Magistrates' Court). At the initial hearing the District Judge must<sup>16</sup> decide whether the individual arrested is the person named on the warrant; fix a date for the start of the extradition hearing within 21 days of the date of arrest; inform the person about the content of the EAW; explain to the person that he/she may consent to return; and decide whether to grant bail or remand the individual in custody pending the extradition hearing.

At the main extradition hearing<sup>17</sup> the District Judge must decide a number of further issues. Firstly, is the offence an extraditable offence? This should have been straightforward following the provisions of the Framework Decision but sections 64-66 of the Act are astonishingly complex. Section 64 takes 818 words (!) to define the different types of conduct that constitute an extradition offence in respect of category 1 territories, but only in cases where the person is accused, but not yet convicted, of the offence in the category 1 territory or has been convicted of the offence but not yet sentenced, for it. Section 65 contains similar (and similarly complex) rules concerning extradition offences when the person has already been sentenced for an offence and is alleged to be unlawfully at large, and section 66 provides supplementary definitions defining the terminology of sections 64 and 65. It is not surprising that a number of cases have turned on the interpreta-

<sup>15</sup> This of course raises another key issue for constitutional lawyers: the status and accountability of the police. In England and Wales, there are currently considerable debates surrounding the tensions between the local, regional and centralized control, organization and accountability of the 43 police forces.

<sup>16</sup> See sections 7-8 of the Act. The following summary (including the bullet point paragraphs) is taken from <[www.cps.gov.uk/publications/communications](http://www.cps.gov.uk/publications/communications)>.

<sup>17</sup> See sections 9-21 of the Act.

tion of these sections,<sup>18</sup> and indeed, Lord Hope's comment that 'the fact that Part 1 of the 2003 Act does not match the requirements of the Framework decision is confusing to the unwary, and it appears likely that it will be a source of continuing difficulty'<sup>19</sup> seems an understatement.

The second question facing the District Judge at the main hearing will be whether there are any bars to the extradition. These bars are specified in s. 11 of the Act:

- (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of:
  - (a) the rule against double jeopardy;
  - (b) extraneous considerations;
  - (c) the passage of time;
  - (d) the person's age;
  - (e) hostage-taking considerations;
  - (f) speciality;
  - (g) the person's earlier extradition to the United Kingdom from another category 1 territory;
  - (h) the person's earlier extradition to the United Kingdom from a non-category 1 territory.
- (2) Sections 12 to 19 apply for the interpretation of subsection (1).
- (3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.
- (4) If the judge decides those questions in the negative and the person is alleged to be unlawfully at large after conviction of the extradition offence, the judge must proceed under section 20.
- (5) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 21.

These bars are explained in more detail in sections 12-19.

The third key question is whether the extradition is compatible with the person's rights under the European Convention on Human Rights. Section 21 of the Act provides an additional bar to extradition:

- (1) If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).

<sup>18</sup> See, in particular, *Office of the King's Prosecutor (Brussels) v. Armas* [2005] UKL67, [2005] 3 WLR 1079 discussed below.

<sup>19</sup> See *Office of the King's Prosecutor (Brussels) v. Armas*, *ibid.*, para. 48. Of course, criticism should not be targeted only at the domestic legislation. Massé, *supra* n. 1, criticises the Framework Decision, in particular for adopting simply a 'list' of extradition offences.

- (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
- (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.

Which rights are likely to be most in play? So far the litigation would suggest Article 8 (the right to respect for private and family life) of the ECHR. But of course section 21 was not necessary, since all EU countries are signatories to the European Convention on Human Rights and it is difficult not to agree with Spencer's conclusion that 'the inclusion of s. 21 in the Extradition Act was largely inspired by the desire to protect against injustice and human rights abuses, which is good. But behind it lurks a smug sense of cultural superiority which is less pleasing'.<sup>20</sup> The suggestion is that Parliament does not fully recognize that other European Union countries have criminal justice processes which adequately share the basic and minimum standards of the European Convention on Human Rights.

If the District Judge is satisfied that these issues have been met then he must make an order for the person's extradition. Appeals against the District Judge's decision go to the Administrative Court. Notice of appeal must be given within 7 days. The appeal must commence within 40 days of arrest, although the Administrative Court can extend this period if the interests of justice require it to do so. It is possible to appeal from the Administrative Court to the Judicial Committee of the House of Lords, provided that the Administrative Court certifies that the appeal involves a point of law of general public importance and either the Administrative Court or the House of Lords gives leave for the appeal to be brought.<sup>21</sup>

## ASSESSING THE EXTRADITION ACT 2003

### *Parliament's analysis*

We have already seen how Parliament was involved in discussing/analyzing the EAW long before the Extradition Act 2003 was passed. Even once a measure has been incorporated into domestic law, Parliament may, of course, still continue to monitor it in a number of ways. Ministers may be asked questions by Members of Parliament, and written answers often provide a treasure trove of data for researchers. An issue of public concern may be debated on the floor of one of the two Houses, though Parliamentary time is clearly limited. More often, one of the many Parliamentary Committees may choose to investigate an area of concern, and the evi-

<sup>20</sup> See *supra* n. 5, p. 217.

<sup>21</sup> The House of Lords is soon to be re-named the Supreme Court, once Part 3 of the Constitutional Reform Act 2005 is brought into force. The precise date depends on the provision of a court house. On 1 March 2006 the Lord Chancellor announced in a House of Lords written statement that the opening date for the re-furbished Supreme Court was now Oct. 2009.



dence received as well as the resulting Report will be published. Thus, the Home Affairs Committee of the House of Commons may choose at any time to investigate any area of Home Office policy which they consider merit investigation.<sup>22</sup> Committee reports pull into the public domain important information.

Of particular importance to this review is the 30<sup>th</sup> Report of the House of Lords Select Committee on the European Union.<sup>23</sup> This reported that, in the period 1 January 2004 to 22 February 2006, the UK received 5,732 EAWs. During this period, 175 had resulted in an arrest in the UK, and 88 people had been surrendered (the discrepancy between the number of requests received and the number of arrests is explained, we are told, by the fact that most EAWs are posted as 'alerts' on SIS16<sup>24</sup> or Interpol and are not directed at any one particular state). In 34 cases (of which 29 occurred in 2005), the EAW was discharged by a court, often because the warrant had inadequate or insufficient information. Other cases were discharged, according to the Report, because the offence was not an extraditable one or because, as a result of the passage of time, the judge considered that it would be unfair and unjust to order extradition. The Report states that in no case has the issuing State challenged the decision to refuse the EAW (though it is somewhat unclear what is meant by 'challenge' in this context). The Report also states that since 1 January 2004 the UK has issued 201 warrants, which have resulted in 90 arrests, with 69 people returned to the UK. One of those arrested was not returned to the UK because of the Supreme Court of Cyprus' decision that it was unconstitutional to extradite Cypriot nationals.

Parliamentary Committees have also examined the effects of the implementation (or the failure to implement) the EAW in other EU countries. Thus the 20<sup>th</sup> Report of the House of Commons European Scrutiny Committee<sup>25</sup> considered the European Commission's review of the implementation of the EAW in Italian law. The Report usefully summarizes the Commission's criticisms of the Italian position, and reminds the Government Minister that it, the Scrutiny Committee, had asked for an assessment of the effect of legal developments in Germany and Spain on the continuing viability of the EAW.

<sup>22</sup> Recent reports have been on Terrorism Detention Powers (4<sup>th</sup> Report, Session 2005-6, HC 910-I) and on Immigration Control (5<sup>th</sup> Report Session 2005-6, HC 775-I). The Committee announced in July 2006 that it will conduct a short inquiry into current issues relating to justice and home affairs (JHA) at EU level (including the Commission's proposals for implementation of the 'passerelle' clauses allowing co-decision and Qualified Majority Voting in certain JHA issues, and its mid-term review of the 'Hague programme': the Committee is seeking short written submissions from any interested parties before it takes oral evidence.

<sup>23</sup> House of Lords European Union Committee, 'European Arrest Warrant – Recent Developments', Paper 156 (2006) <<http://www.publications.parliament.uk>>.

<sup>24</sup> Schengen Information System.

<sup>25</sup> House of Commons European Scrutiny Committee, Twentieth Report (2006) <<http://www.publications.parliament.uk>>.

*The judicial response*

Whilst the Parliamentary reports may give a general and statistical overview, the law reports provide, on the other hand, an insight into individual cases. The Act has now been in force for nearly three years and the courts have had a large number of opportunities to consider its provisions. The reported cases (largely appeals or ‘judicial reviews’: challenges to the legality of the decision of the lower court)<sup>26</sup> give an insight into the practical workings of the new procedures which have clearly not been unproblematic, and the courts have been somewhat critical.

Early cases threw up some extraordinary anomalies. In *Handa v. High Instance Court of Paris, R (Handa) v. Bow Street Mags’ Ct*<sup>27</sup> the High Court struck down as irrational the refusal of a District Judge to adjourn extradition proceedings in circumstances where there was no statutory power which enabled a serving prisoner to be released earlier than he should be in order that he could be extradited. Here was a hole in the process: a French man serving a sentence for burglary in an English prison cannot be released early from his English prison to a French one when he is wanted for a murder investigation in France. As the court said, ‘The lack of a provision allowing early release in extradition cases undermined the purpose of the Extradition Act 2003 s. 37 and s. 186, and the sooner Parliament filled the yawning gap the better’. Yet the length of sentences (whether we are talking maximum penalties laid down by legislatures, or the sentences imposed by individual courts in individual cases, or the reality of the sentences actually served) vary enormously from one MS to another. Even bigger than the yawning gap identified in this case is the yawning discrepancies between member states. Is this an area for harmonization or another area where the EU should be encouraged to tread more slowly and more carefully?<sup>28</sup>

The most important decision to date must be the decision of the House of Lords in *Office of the King’s Prosecutor (Brussels) v. Armas*,<sup>29</sup> since this is a decision of the highest court in the UK.<sup>30</sup> Armas had been convicted and sentenced to five years’ imprisonment in his absence by a Belgian court. A year later the Belgian authority had issued an EAW for him. The warrant identified people trafficking, facilitation of unauthorized entry and residence and forgery of administrative documents as the offences for which C’s surrender was sought. He was arrested in the UK, but the District Judge had held that the Belgian request did not fall

<sup>26</sup> Several cases discuss whether appeal or judicial review is the appropriate route for a challenge: see for example, *Hilali v. Spain* [2006] EWHC 1239.

<sup>27</sup> *Handa v. High Instance Court of Paris, R (Handa) v. Bow Street Mags’ Ct* [2004] EWHC 3116.

<sup>28</sup> See M. Delmas Marty et al. (eds.), *L’Harmonisation des Sanctions Penales en Europe No. 5* (Unité Mixte de Droit Comparé de Paris, 2003) for a discussion of this difficult topic.

<sup>29</sup> *Office of the King’s Prosecutor (Brussels) v. Armas*, *supra* n. 18.

<sup>30</sup> See *supra* n. 21.

within s. 65 of the 2003 Act. The Divisional Court reversed this decision<sup>31</sup> and his further appeal to the House of Lords was unsuccessful. The House of Lords therefore remitted the case to the District Judge to continue the extradition hearing. Whilst the extradition request could not be brought under s. 65(2) of the 2003 Act – because part of C’s conduct specified in the arrest warrant took place in the UK (*see* s. 65(2)(a)) – the request could, in principle at least, be brought under s. 65(3) of the Act – because it does not matter for the purposes of that subsection that the conduct took place not only in Belgium but also in the UK. Lord Bingham made clear that:

The interpretation [of the Extradition Act 2003] must be approached on the twin assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of cooperation by the UK than the Decision required, it did not intend to provide for less (para. 8).

But despite this clear cut analysis it was also evident to the other judges in the House of Lords that the fact that the wording of the Act did not match the Framework Decision was likely to be a ‘source of continuing difficulty’,<sup>32</sup> and Baroness Hale called somewhat hesitantly for greater clarity:

It would be most unfortunate if the judicial authorities in our European partner states, using the form of warrant prescribed by the Framework Decision, were to find that the English judicial authorities were unable to implement it. Whether the solution should be legislative, or administrative, for example by way of routine requests to include such a statement where none appears on the face of the warrant initially presented, or whether it is possible for the judiciary to find a practical solution which is true to the spirit and the requirements of the Framework Decision, while properly safeguarding the liberty of the individual, it is not at present possible to say (Baroness Hale, para. 60).

Other cases have thrown up both legal and practical problems: in *Government of Germany v. Kleinschmidt*<sup>33</sup> the Divisional Court regretted that the statute did not make clear who was to effect service of the full EAW documentation. As Sedley LJ said,

The Extradition Act 2003 is throwing up a number of problems. The present one is not the only problem attributable to apparent haste in its composition.

<sup>31</sup> [2005] 1 W.L.R. 1389

<sup>32</sup> *See* Lord Hope, cited *supra* n. 19.

<sup>33</sup> *Government of Germany v. Kleinschmidt* [2005] EWHC 1373 (Admin), [2005] 3 All E.R. 759.

In this case, Kleinschmidt had not been served with the necessary documents but the Court held that the District Judge was entitled to adjourn the extradition hearing to enable effective service of documents. Thus, the German authorities won their appeal. Kleinschmidt therefore did not win his case, but the appellant in *Hunt v. Court of First Instance* did win.<sup>34</sup> In this case, the EAW from Belgium did not refer to the provision of Belgian law that rendered the conduct an offence, which is required so that it could be seen that the alleged conduct constituted an offence under Belgian law. As the warrant did not conform to the requirements set out in the Act, it was not a Part 1 warrant and it had to be quashed. The extradition process would have to begin again with further delay. But eight years had already elapsed since the events in question. Hunt, who had fully co-operated with the authorities, bore no responsibility for the significant delay on the part of the Belgian authorities. Therefore, the warrant had to be quashed and a declaration was ordered that H's extradition to Belgium in respect of the offences specified in the warrant was barred by s. 14 of the Act.<sup>35</sup> Similarly in *Hall v. Germany*<sup>36</sup> the appellant successfully appealed against a decision ordering his extradition to Germany on a European Arrest Warrant for an offence relating to drugs importation. A district judge had ordered his extradition to Germany pursuant to the s. 21(3). The warrant stated that he had commissioned another individual to collect drugs and smuggle them into Germany, and it was argued on behalf of the appellant that the warrant did not comply with s. 2(4) of the Act as it did not contain information as to the provision of German law under which the conduct was alleged to constitute an offence. The Administrative Court rejected the argument of the state of Germany that s. 2(4) should be given a broad and generous construction in order to facilitate extradition. Since the warrant did not give particulars of the provision of German law that rendered the conduct an offence under German law, it did not conform to the requirements set out in s. 2, the warrant was not a Part 1 warrant and it had to be quashed.<sup>37</sup> The precise detail required remains somewhat obscure: in *Parasiliti-Mollica v. Deputy Public Prosecutor (Messina)*,<sup>38</sup> the Court upheld the extradition of a man who was wanted by the Italian authorities in connection with a drug trafficking conspiracy. His argument

<sup>34</sup> *Hunt v. Court of First Instance* [2006] EWHC 165, [2006] 2 All E.R. 735. It is interesting at this point to re-consider Alegre's comment cited *supra* n. 10. It would be interesting to analyse court decisions in the context of the nationality of the applicant.

<sup>35</sup> A four year delay caused by the appellant fleeing his own country and evading arrest did not make it unjust or oppressive to return him: *R (on the application of Kaupaitis) v. Prosecutor General's Office (Lithuania)* [2006] EWHC 2185.

<sup>36</sup> *Hall v. Germany* [2006] EWHC 462 (2006) 150 SJLB 264.

<sup>37</sup> See also *R (on the application of Pillar) v. Bow Street Magistrates Court* [2006] EWHC 1886 where the Divisional Court allowed an appeal against the granting of an Austrian EAW whose terms were 'irretrievably vague and fell well short of satisfying the requirements of s. 2(4)'.

<sup>38</sup> *Parasiliti-Mollica v. Deputy Public Prosecutor (Messina)* [2005] EWHC 3262.

that the warrant had not been properly filled in and was invalid because it did not make clear what he was alleged to have done in the conspiracy, and did not make clear whether he was wanted for the purpose of conducting a trial or merely for an investigation was rejected. The warrant's description of the appellant as the co-author in complicity, meaning he was at the centre of the organization with which the conspiracy was concerned, was a sufficient description of his role.

It was not the foreign authorities at fault in the case of *Nikonovs v. Governor of HM Prison Brixton*,<sup>39</sup> but the private company contracted to deliver him to court in England. Here the Latvian prisoner successfully applied for habeas corpus (i.e., he obtained his release from prison) because the private company which was responsible to take him from the police station to court failed to realize that Bow Street Magistrates' Court was open on a Saturday. He had not been brought before a court 'as soon as practicable' as required by s. 4(3) of the Extradition Act 2003. The case shows the problems of communication which may arise particularly when too many agencies are involved in dealing with suspects. This is likely to become an increasing problem in the UK where criminal justice services are increasingly being fragmented, with public, private and not-for-profit organizations all being encouraged to compete for 'business'.<sup>40</sup>

But, in general, the courts have been robust in throwing out many appeals. This is hardly surprising given the limited role of the appellate courts in interpreting statutes. Thus, in *Hosseini v. France*, *Ahmed v. France*, *Zada v. France*<sup>41</sup> the appellants were wanted in France in relation to human trafficking offences. The High Court was unsympathetic to their argument that their extradition interfered with their rights under Article 8 of the ECHR: it was held that there was no particular feature of the appellants' family life in the UK that carried exceptional weight that would mean that extradition would be disproportionate. The decision of the French authorities to mount a prosecution was perfectly reasonable, given the links with France that appeared from the allegations set out in the warrant.<sup>42</sup> And in *Chalitovas v. Lithuania*<sup>43</sup> the appellant too was unsuccessful in challenging his extradition to Lithuania: he had been convicted of drug smuggling offences in Sweden and sentenced to three years and six months in prison. He was transferred to Lithuania to serve part of his custodial sentence, under the Convention on the Transfer of Sentenced Persons 1983, but the Lithuanian Courts de-

<sup>39</sup> *Nikonovs v. Governor of HM Prison Brixton* [2005] EWHC 2405.

<sup>40</sup> N. Padfield, 'A Critical Perspective on Private Prisons in England and Wales', in N. Capus et al. (eds.), *Public-Prive: vers un nouveau partage du controle de la criminalite?* (Chur/Zürich, Verlag Rüegger 2005).

<sup>41</sup> *Hosseini v. France*, *Ahmed v. France*, *Zada v. France* [2006] EWHC 1333.

<sup>42</sup> See also *Boudhiba v. Central Examining Court No. 5 of the National Court of Justice, Madrid* [2006] EWHC 167 (Admin).

<sup>43</sup> *Chalitovas v. Lithuania* [2006] EWHC 1978.

ferred the execution of the custodial sentence and imposed 'injunctions' or conditions on him, with which he failed to comply. He had then been ordered to serve the remaining year of the custodial sentence, but absconded. He was arrested in the United Kingdom on a European Arrest Warrant, but argued that he was not 'unlawfully at large from a prison in one territory (the imprisoning territory) in which he was serving a sentence...' (see s. 63(2)(a) of the Act) since he had not been imprisoned in Lithuania. The Divisional Court held, unsurprisingly, that his failure to appear to serve the deferred sentence meant that he was unlawfully at large from a prison just as much as if he had escaped from one. The wording of s. 63(2)(a) of the Act was not limited to mean 'escape' in a narrow sense. The Court drew two domestic analogies (a) where an individual was sentenced to imprisonment by a court but escaped from the prison bus before reaching the prison; and (b) where a non-custodial sentence was imposed on an individual, but the Court of Appeal Criminal Division later imposed a custodial sentence by an Attorney-General's reference (prosecution appeal) and that individual then failed to turn up to serve the sentence. Such people would rightly be described as 'unlawfully at large', and Chalitovas' appeal was dismissed.

#### *Other published comments*

There are now a number of admirable practitioner guides to extradition law,<sup>44</sup> and indeed to the Extradition Act 2003.<sup>45</sup> There have been a small number of academic analyses of the new Act,<sup>46</sup> as well as some more critical perspectives from non-governmental campaigning organizations such as JUSTICE<sup>47</sup> and Liberty.<sup>48</sup> Then there has been the predictable newspaper coverage, focused in particular on the negative. It is perhaps surprising that even the journalistic world has not seen fit to praise the speed with which some high profile suspects have been returned to the UK.<sup>49</sup> It has already been noted that much press coverage has focused on non-EAW cases: much has been written on the extradition of the so-

<sup>44</sup> For example J. Jones & A. Sambei, *Extradition Law Handbook* (Oxford, Oxford University Press 2005); A. Jones & A. Doobay, *Extradition and Mutual Assistance*, 3<sup>rd</sup> edn. (Sweet & Maxwell, 2004). See also M. Sikand, [2004] 4 *Archbold News* 7.

<sup>45</sup> J. Knowles, *Blackstone's Guide to the Extradition Act 2003* (Oxford, Oxford University Press 2004); A. Brown, 'Extradition Act 2003', in *Current Law Statutes* (London, Sweet & Maxwell 2004).

<sup>46</sup> See, for example, Spencer, *supra* n. 5, and his useful analysis in French: J. Spencer, 'La réception du mandat d'arrêt européen au Royaume-Uni', in Cartier (ed.), *Le Mandat d'arrêt Européen*, *supra* n. 1.

<sup>47</sup> S. Alegre & M. Leaf, *European Arrest Warrant: a solution ahead of its time?* (London, Justice 2003)

<sup>48</sup> See <[www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk)>.

<sup>49</sup> A suspected rapist/murderer from Latvia and a suspect terrorist bomber from Italy, for example.

called Nat West 3<sup>50</sup> to the US, commenting that now extradition is easier, it is being used when it might be fairer (and cheaper) for a trial to take place at home; and that it is being used against alleged 'white collar' financial or political crimes, rather than in other cases.

Does this summary suggest a lack of interest in the European Arrest Warrant? Perhaps, and if so, this can be interpreted in many ways. A lack of interest in European matters? Civil libertarians have of course more pressing concerns, whether it is the war in Iraq, the process of 'extraordinary rendition' (including the extent to which the UK Government may have been colluding in rendition flights over the UK) and the current plethora of anti-terrorist measures being passed through Parliament.<sup>51</sup> But this does not mean that there are not important conclusions to be drawn.

## CONCLUSIONS

The Extradition Act 2003 passed relatively smoothly and swiftly into law. The problems which are arising in practice reflect, in part, the problems of poor drafting. The criticisms from the courts suggest implementation might have been too swift, but from the Government's perspective the problem might be the Parliamentary process itself. Much 'European law', that under the 'first pillar', takes direct effect in domestic law,<sup>52</sup> or becomes domestic law by means of delegated legislation (statutory instruments). The Government would like to widen this power and bring more measures into law without undergoing the changes which can result from the Parliamentary Bill process. The Legislative and Regulatory Reform Act 2006, which was laid before Parliament in January 2006, granted Ministers vast powers to amend, repeal or replace primary legislation by means of secondary legislation. Widespread criticism of the way it proposed to allow the Government to by-pass Parliament<sup>53</sup> led to significant modifications to the Bill in May 2006. The Legislative and Regulatory Reform Act 2006, which reached the statute book in November 2006, is certainly a legislative measure which gives us cause to consider our domestic constitution, with many more lessons on the dangers of 'Parliamentary sovereignty' than are to be found in the Extradition Act 2003. So the answer to the question posed in the first paragraph of this paper (why has the Act not run into the difficulties faced in, for example, Germany, Poland, Belgium and Cyprus?) is straight-forward: there is nothing 'unconstitu-

<sup>50</sup> *R (Birmingham) v. Director of the Serious Fraud Office*, *supra* n. 6.

<sup>51</sup> The Terrorism Act 2000, the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006, etc.

<sup>52</sup> By reason of s. 2(1) of the European Communities Act 1972, as amended.

<sup>53</sup> David Howarth MP dubbed it the Abolition of Parliament Bill in the Times newspaper of 21 Feb. 2006.

tional' in the Extradition Act 2003, and indeed, it has been seen as relatively uncontroversial compared with a host of other enactments passed in the last few years.

Simple conclusions from the case-law might focus on poor drafting. But it is more important to note that implementation of the EAW in domestic law has done much to underline the constitutional uncertainties at the heart of Europe, particularly for a British audience. There seems to be no stopping the flow of European criminal justice initiatives. The European Arrest Warrant is just the tip of the iceberg. We are promised shortly a proposal for a framework decision on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings<sup>54</sup> to add to the host of framework decisions and draft framework decisions already in existence.<sup>55</sup> As John Spencer has said, 'In principle, a properly constructed single European prosecution system might well provide better safeguards for defendants (...) than a "horizontal" system made up of a patchwork of independent national systems (...). Not only is it possible for defendants to vanish down the cracks that exist between different national systems, the same thing can happen to defendants' rights'.<sup>56</sup> The important phrase in that quotation is at the start: 'in principle'. A full blooded and principled debate on the future of European criminal and constitutional law is essential, and seems only just to be beginning. That is the main lesson to be drawn from the implementation of the EAW in English law.



<sup>54</sup> See Commission MEMO/06/16 of Jan. 20, 2006.

<sup>55</sup> Listed in N. Padfield & K. Sugman, 'The spread of EU criminal law' [2006] 7 *Archbold News* 5. The Home Affairs Committee of the House of Commons announced in July 2006 that it will conduct a short inquiry into current issues relating to justice and home affairs (JHA) at EU level. These are likely to include the Commission's proposals for implementation of the 'passerelle' clauses allowing co-decision and Qualified Majority Voting in certain JHA issues, and its mid-term review of the 'Hague programme'. Among the key documents the Committee will consider is likely to be the Commission Communication of 28 June Implementing The Hague Programme: the way forward <[http://ec.europa.eu/justice\\_home/news/information\\_dossiers/the\\_hague\\_2006/documents\\_en.htm#communications](http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_2006/documents_en.htm#communications)>.

<sup>56</sup> [2003] 7 *Archbold News* 5.