

The European Arrest Warrant

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I. BACKGROUND

IN BROAD TERMS, there are two approaches to returning suspects and convicted persons to the other countries where they are wanted, and would prefer for obvious reasons not to go.

One is what is called in the common law world ‘the backing of warrants’. Here, the authorities of the jurisdiction where the person is wanted issue their normal warrant of arrest, which is sent directly to the authorities of the jurisdiction where he is, who endorse it if it appears to be in order, and give it to their policemen to execute it as if it were their own. The suspect is then ‘lifted’, and handed over to the authorities of the country where he is wanted with the minimum of fuss—the unspoken premise being that the authorities of the requesting jurisdiction normally act lawfully and reasonably, and their arrest warrants can be taken at face value and acted upon unless a strong reason to the contrary can be given. This is the system that has operated as long as anyone can remember between the different parts of the UK. This entity at one time included the whole of Ireland; and surprisingly perhaps, the backing of warrants survived the war of independence and the emergence of the Republic of Ireland as an independent state. Even when relations between the countries were chilly, the judicial authorities were content to round up each other’s wanted men in this comparatively informal way—unless they were wanted for political offences. In 1965, the arrangement was confirmed on the UK side by an Act of Parliament.¹

The alternative system is formal extradition. Here the judicial authorities of the requesting state approach their government, asking it to approach the government of the country where the wanted person is for help. The government of the requesting state issues a formal request for help to the government of the other country, in the form of a demand for extradition.

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¹ Backing of Warrants (Republic of Ireland) Act 1965.

When received by the requested state, this passes to the courts, which traditionally ask to see not only the requesting state's warrant for arrest, but also the evidence on which it has been based. Then, provided they are satisfied (i) that there is a *prima facie* case, and (ii) that the offence is one of those covered by the extradition treaty between the two countries and (iii) it is one for which they would punish the offender if it had been committed there, the courts will make an order for extradition. This is then reviewed by the Home Secretary, and perhaps the Foreign Minister as well: and if they too are satisfied that everything is properly in order, and that it is in the national interests of the requested state to hand the suspected person over, he is eventually sent back. The unspoken premise behind formal extradition, unlike the backing of warrants, is that the procedure is exceptional, and that those who wish to use it have the burden of proving that it should be used. It is the usual arrangement between countries whose legal systems eye one another with suspicion, and between which travel is difficult and comparatively rare.

Traditionally, it is extradition that has governed the return of suspects and convicted persons between the UK and continental Europe—and indeed between the different states of continental Europe too. As has often been observed, an unwanted side-effect of the free movement within Europe of goods, persons, services and capital has been the equally free movement of crime and criminals. This has produced, as a new phenomenon, a growth in certain forms of trans-national crime. And it has also reinforced the much older and simpler phenomenon of people committing offences in country A, whose justice they seek to escape by running off to country B. The result has been a rapid increase in the number of suspects and convicted persons whose extradition is sought by one European Union country from another. The number of extradition requests to the UK, for example, has trebled in the 30 years between the 1970s and the present day.²

As extradition in its traditional form is slow, costly and uncertain, attempts have been made within Europe to speed it up, and to make it cheaper and more certain. With this in mind, Council of Europe Convention on Extradition was drawn up in 1957, to which various protocols were later added. Parallel moves took place within the context of the EC/ EU, or in its shadow, with the Schengen Convention in 1990, the Convention on Simplified Extradition Procedure between the Member States of the European Union in 1995, and a further European Union Extradition Convention in 1996. Most of these instruments were implemented by the UK—eventually. Thus the requirement to produce evidence to show a *prima facie* case in extradition proceedings with other European states, which the 1957 Convention sought to abolish, was suppressed as

²Home Office Press Notice No 303/2002 (14 November 2002) quoted by Broadbridge, n 20 below, p 19–20.

regards Europe by the UK in section 9 of the Extradition Act 1989; and the bars on extradition for political and for fiscal offences, which the 1996 Convention sought to abolish between EU Member States, were suppressed by the UK in 2002.³

However, despite these modifications, extradition between the Member States continued to be slow and costly. For example, in 1995 France sought the extradition from the UK of a person suspected of large-scale drug trafficking. Although he was arrested in the UK in 1995, it was not until September 2001 that he was finally extradited; meanwhile, his detention alone had cost the taxpayer over £120,000.⁴ In 1995, France sought the return of Rachid Ramda on charges of complicity in a series of terrorist bombings; although his extradition was initially ordered by the Bow Street magistrate in 1996 the proceedings were still running seven years later, and at the time this article is written (July 2004) he is still in the UK. In 2002 the Home Office estimated the average cost of a contested extradition case to be £125,000.⁵

In the light of this, influential people began to criticise the very existence of formal extradition as the vehicle for the transfer of suspects and convicted persons between the Member States of the European Union. The Member States, it was said, are united in a common respect for democratic principles and the rule of law, and they are all signatories to the European Convention on Human Rights. The time had come, it was said, to replace extradition with a something altogether simpler. The initial pressure for this change came from the UK: a fact that is surprising in the light of this country's reputation for resistance to moves towards European integration—though less surprising, given its experience with the backing of warrants.

II. THE FRAMEWORK DECISION OF 13 JUNE 2002

In 1997 the *Corpus Juris* project was published, which proposed a 'vertical' solution to the problem of trans-national fraud affecting the Community budget. The *Corpus Juris* put forward the idea of a European public prosecutor, who would investigate and prosecute budgetary fraud, as defined in a special European code, according to a set of uniform rules of procedure and evidence. Part of this scheme would be a 'European arrest warrant', valid throughout Europe, that would replace extradition in the

³ By the European Extradition Regulations 2002, SI 2002/419, made (while they lasted!) under delegated powers conferred by s 111 of the Anti-terrorism, Crime and Security Act 2001; see p 207 below.

⁴ An example given to Parliament by the Minister, Mr John Denham, on the Second Reading of the Extradition Bill in the Commons: HC 396 col 396 (9 December 2002).

⁵ Above n 2.

context of budgetary fraud offences. The *Corpus Juris* project was ill received in Britain, where the eurosceptic press predictably portrayed it as a secret plot by Brussels to bring about the abolition of the common law, and its replacement with a bogey of its invention called ‘the Napoleonic system’.⁶

Although not necessarily sharing these paranoid ideas, the British government was almost as opposed to the notion of a European Public Prosecutor as was the nationalist press. However, it had the realism to accept that trans-border crime in Europe was a genuine problem—and to see that that if a European Public Prosecutor was politically unacceptable, some other remedy must be found. As an alternative to the ‘vertical’ solution of a common set of rules administered centrally by a new European prosecuting agency, the British government put forward a ‘horizontal’ solution of ‘mutual recognition’: that the notion that the criminal courts of the Member States should in future automatically recognise and enforce one another’s decisions. As a Home Office Minister explained in a statement officially condemning the *Corpus Juris*, the government’s counter-proposal included ‘work towards abolition of extradition between Member States so that arrest warrants are directly enforceable’.⁷ On this general topic the UK government submitted a discussion paper to the Council of Ministers in Brussels in March 1999. The idea was taken up with enthusiasm by the European Council at Tampere in October 1999, which recommended ‘mutual recognition’ as one of its general conclusions.

The European Council ... endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities ...

With respect to criminal matters, the European Council ... considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of a fair trial.⁸

‘Consideration’ was being given to these matters in leisurely manner when the terrorist attack on the World Trade Center on 11 September 2001 put European co-operation against trans-national crime into sudden overdrive. With strong political pressure now applied, the Council of Ministers agreed a draft Framework Decision providing for a European arrest warrant in

⁶ Spencer, JR, ‘The *Corpus Juris* Project—Has it a Future?’ (1999) 2 *C Yearbook of European Law*, 355, 357–8.

⁷ Statement by Kate Hoey MP (26 May 1999).

⁸ Conclusions, paras 33 and 35.

just over three months, on 12 December. Six months later, the draft was formally adopted as the Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.⁹

The main lines of the scheme set out in the Framework Decision are as follows.

- (a) Transfer of suspects and convicted persons between the Member States will operate in future at the level of judicial authorities, and the final decision will no longer be made by the executive. Thus, if the *Pinochet* case¹⁰ were to recur, the Home Secretary would no longer have the power, as exercised by Mr Straw in that case, to block the extradition that the courts had ordered.
- (b) The procedure will be a summary one, based on the production by the requesting state of an arrest warrant, not the evidence on the basis of which the warrant was issued.
- (c) The procedure will be subject to time-limits. By Article 17 'A European arrest warrant shall be dealt with and executed as a matter of urgency'; the final decision must be made within 10 days where the requested person does not contest the proceedings, within 60 days where he does.
- (d) The 'double criminality' requirement will be abolished in respect of long list of offences, provided they are punishable with at least three years' imprisonment in the requesting state. The European arrest warrant may also be used for offences not on the Framework list, subject to a requirement of double criminality: provided in the case of wanted suspects they are punishable in the issuing state by at least 12 months' imprisonment, or in the case of wanted convicts, they were serving a sentence of at least four months.
- (e) A Member State may refuse to execute a European arrest warrant for a limited number of specified reasons, some of which are, obligatory, and most of which are optional (in the sense that Member States may choose whether to include them in their national legislation). In this list, the three bars do not appear, which feature prominently in the traditional law of extradition: (i) the offence is 'political', (ii) the offence is fiscal, and (iii) the person sought is a national of the requested state. But among the

⁹ 2002/584/JHA, [2002] OJ L190/1.

¹⁰ For the legal proceedings, see *Ex p Pinochet Ugarte* [2000] 1 AC 61; *Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; *Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147. For the Home Office Communiqué of 12 September 2000 announcing the end of the affair, see <http://www.homeoffice.gov.uk/docs/pinochet.html>.

optional reasons is the fact that the offence was committed wholly or partly within the requested state.¹¹

- (f) The rights of the person whose arrest is sought are guaranteed, but to a rather limited extent. By Article 11, he is entitled to an interpreter and to legal advice, and by Article 14, to a hearing, if he wishes to contest the proceedings. Clause 13 of the Preamble provides that ‘No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’ and Clause 12 provides that ‘Nothing in this Framework Decision may be interpreted as prohibiting refusing to surrender a person’ where ‘objective elements’ give reasons to believe that the real aim of the proceedings are political, racial, religious or sexual persecution. Article 5 allows Member States the option to require, when surrendering the wanted person, guarantees from the requesting state where he has been tried in his absence, or where the requesting state punishes the offence in question with life imprisonment. Clause 12 of the Preamble proclaims in general terms that the Framework Decision ‘respects fundamental rights and observes the principles recognised by Article 6 of the TEU and reflected in the Charter of Fundamental Rights of the European Union’. But there is no provision to the effect that a requested state must, or even may, refuse to give effect to a European arrest warrant because it feels that the subsequent legal proceedings in the requesting state may in some way infringe the wanted person’s rights under the European Convention on Human Rights—for example, by a trial process that does not respect the rights guaranteed by Article 6.

The Framework Decision was to be implemented quickly: by Article 32, ‘Member States shall take the necessary measures to comply with this Framework Decision by 31 December 2003.’

III. THE EUROPEAN ARREST WARRANT IN THE UK: PART I OF THE EXTRADITION ACT 2003

Having helped to invent the European arrest warrant, the UK government was faced with the problem of how to make the Framework Decision that provided for it part of national law.

¹¹ Article 5(7); this also allows the requested state to refuse where the offence was committed outside the requesting state, and the requested state does not allow prosecutions for the offence when committed extra-territorially.

Where Community Directives are concerned, section 2(2) of the European Communities Act 1972 enables the government to circumvent the normal legislative process and implement them by regulation. In the immediate aftermath of the September 11 atrocity, the government introduced an Anti-terrorism, Crime and Security Bill, in the depths of which were buried a clause designed to give it a similar power to implement Framework Decisions. This passed the House of Commons without difficulty, but the House of Lords revolted against it, and the clause was eventually amended so that it expired after six months, in July 2002. Although this enabled the government to pass regulations to give belated effect to the European Extradition Conventions of 1995 and 1996, it was unable to use this method to implement the Framework Decision on the European Arrest Warrant—and was therefore faced with using primary legislation. With that in mind, it published a Draft Extradition Bill in June 2002, which was formally introduced, with certain amendments, in the parliamentary session that began in the following November.

Persuading Parliament to pass this Bill proved to be no simple task, because the European arrest warrant turned out to attract the simultaneous opposition of the eurosceptic right, and of the libertarian left. Despite buffeting, the Bill survived largely intact, and the resulting Extradition Act 2003 received the royal assent in November 2003. Meeting the deadline laid down by the Framework Decision, it came into force on 1 January 2004.

The scheme that emerges from Part I¹² of the Extradition Act 2003 largely corresponds with the requirements of the Framework Decision. As the Framework Decision intended, the transfer of suspects and convicted persons between the UK and the rest of Europe is ‘depoliticised’. When the court has made an order, transfer follows automatically, and the Home Secretary’s consent to the transfer is no longer required. As far as individual cases are concerned, the Home Secretary now has the power to intervene in two situations only. First, where the wanted person is the subject of both a European arrest warrant and a traditional extradition request, the Minister can lay down the order in which the courts are to deal with the proceedings¹³; and secondly, he has a limited power to block a transfer on grounds of national security.¹⁴ However, in more general terms the Home Secretary does retain important powers to regulate the scope of the new procedure. Thus under section 1 of the Extradition Act, the European arrest warrant operates in respect of what are called ‘category one territories’—and whether a given country falls within this definition is laid down from time to time by the Minister, by Order.¹⁵ He also nominates by Order the

¹²Part II of the Act reconstructs the law on extradition towards other parts of the world.

¹³Section 179.

¹⁴Section 208.

¹⁵At the time of writing, the countries designated are Austria, Belgium, Cyprus, Denmark, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands,

‘designated authority’ through which incoming European arrest warrants are received; to which end the Home Secretary has (perhaps predictably) nominated not the courts, but the police.¹⁶

The list of offences to which the European arrest applies also corresponds with the Framework Decision. For the surrender of suspects, Article 64 of the ‘2003 Act’ lays down five categories: (i) conduct falling within the list of 32 types of offence set out in Article 2(2) of the Framework Decision, provided it was committed within the state issuing the warrant, and is punishable there by at least three years’ imprisonment; for offences in this category, there is no longer any requirement of ‘double criminality’; (ii) conduct taking place within the issuing state, provided it carries at least a year’s imprisonment there, and is punishable within the UK by a penalty no less severe; (iii) conduct taking place outside the territory of the issuing state, over which the issuing state assumes extra-territorial jurisdiction to punish with at least a year’s imprisonment, and which the UK treats in the same manner; (iv) conduct taking place outside the issuing state (but not in the UK), punishable with at least a year’s imprisonment by the issuing state, and carrying at least a year’s imprisonment where it occurs in the UK, and (v) conduct committed outside the territory of the issuing state, which the UK punishes with at least a year’s imprisonment, and which features on a list international criminal offences (genocide, crimes against humanity, etc). Offences in categories (i), (iv) and (v) do not lead to surrender under the European arrest warrant if any part of the offence occurred in the UK: a restriction that Article 4(7)(2) of the Framework Decision allows a Member State to impose. For the surrender of convicted persons, section 65 sets out a list that is similar: but for a convicted person to be liable for surrender for a ‘Framework list offence’ he must have been sentenced to at least a year’s imprisonment, and at least four months in order to be surrendered under any of the others headings.

As intended by the Framework Decision, the new procedure is a summary one. The European arrest warrant arrives on the desk of the ‘designated authority’—usually the National Criminal Information Service—who check the paper-work is in order, and send policeman or a customs officer to arrest the wanted person. On arrest, he is brought ‘as soon as practicable’ before ‘an appropriate judge’.¹⁷ There is an initial hearing at

Poland, Portugal, Slovenia, Spain and Sweden: Extradition Act 2003 (Designation of Part 1 Territories) Order 2003; Extradition Act 2003 (Amendment to Designations) Order 2004.

¹⁶Section 2(9). The Extradition Act 2003 (Designated Authorities) Order 2003 designates the National Criminal Intelligence Service; for Scotland the Crown Agent, who heads the prosecution service, is also designated.

¹⁷Section 4; by Section 67, this means, in Scotland, the Sheriff of Lothian and the Borders, in Northern Ireland a county court judge or resident magistrate nominated by the Lord Chancellor, and in England and Wales, a District Judge (Magistrates’ Courts)—née ‘stipe’—also nominated by the Lord Chancellor.

which the judge checks that the person before him is really the wanted man, and this leads on to an ‘extradition hearing’,¹⁸ at which the judge decides whether the offence for which the warrant has been issued falls within the statutory list. If it does, he orders extradition, unless he rules that one of a stated list of bars applies.

The 60-day time-limit mentioned in the Framework Decision is not reproduced directly in the Act, but with the aim of speeding up the process the possibilities of appeal are very much reduced. Under the old law, extradition decisions were open to a range of challenges, particularly in favour of the wanted person. He could seek habeas corpus, judicial review of the decision of magistrate’s court ordering extradition, and in due course, judicial review of the Home Secretary decision ordering the extradition to be carried out. These different forms of recourse were cumulative, and each one, if it failed, carried the possibility of appealing to at least one higher court. Under the new system, the decision of the ‘appropriate judge’—whether in favour of extradition or against it—can be appealed to the High Court.¹⁹ This appeal lies as of right, and on the facts as well as on the law. From the High Court a further appeal lies to the House of Lords: but only where the High Court certifies the existence of a point of law of general public importance, and either the High Court or the House of Lords itself grants leave.

The point at which the provisions of the Extradition Act significantly diverge from the terms of the Framework Decision are the legal bars to extradition. It was here that the government was forced to make a number of concessions to the opponents of the European arrest warrant in order to get the legislation through Parliament. The consequence, inevitably, is a longer list of bars than the Framework Decision envisaged. These will be examined after we have heard more about the grounds on which the European arrest warrant was opposed in the UK.

IV. OBJECTIONS TO THE EUROPEAN ARREST WARRANT²⁰

A major objection was the abolition of the ‘double criminality’ requirement in the respect of the offences listed in Article 2(2) of the Framework Decision. In general terms, there was resistance to the notion that a citizen of the UK could find himself extradited, to face trial abroad for some piece of behaviour that is legal here. There was particular concern that one of the categories in the Framework list is offences of ‘racism and xenophobia’.

¹⁸Section 9f.

¹⁹Section 26f.

²⁰For a full account of the public debate up to the end of 2002 see Broadbridge, *S The Extradition Bill*, House of Commons Research Paper 02/79 (6 December 2002).

This gave rise to one of the most astonishing europhobic scare-stories of all time: that the European arrest warrant would mean editors of British newspapers who wrote things critical of Europe or Europeans being arrested on warrants issued by foreign authorities, and dragged off across the Channel to be locked up indefinitely in European jails. The European arrest warrant would be used, it was said, to prevent our courageous newspapers telling the truth about Europe; according to one eurosceptic MEP, the European arrest warrant 'would give the EU total power to deal with its critics'.²¹

In response, the government pointed out (repeatedly) that the Extradition Bill would not have this effect, because although the 'double criminality' requirement would go for 'Framework list' offences, the Bill would not permit the extradition of people for Framework list offences if any part of them had taken place in the United Kingdom. Under the Bill, the only case in which a person would be liable for extradition for something that was legal in the UK was where he did it somewhere else, under the laws of which it was not. And this, said the government, was acceptable. We expect those who visit the UK to respect our laws, and also expect neighbouring states to co-operate by helping us to punish them when they do not, whether the behaviour is punishable in the neighbouring country or not. It is therefore reasonable for us to extend the same co-operation to our neighbours when the boot is on the other foot: even where the person to be kicked with it is one of our own citizens.

To this, some of the critics retorted that extradition is serious matter, and not justified except for offences that are serious. In its original form, the Bill provided for extradition without proof of 'double criminality' for offences on the Framework list if they carried a maximum penalty in the requesting state of only one year's imprisonment: which went beyond the requirements of the Framework Decision, which set a threshold limit of three. To allow extradition from the UK for behaviour that is legal here, and which the requesting state only regards as serious enough to punish with one year, could lead to proceedings which UK public opinion would regard as seriously oppressive. These arguments the government accepted, and the Bill was amended to require extradition only for 'Framework list offences' carrying a maximum penalty of three years in the requesting state.

Other objections were directed to the allegedly inferior quality of criminal justice in continental Europe. Some of these arguments were ideological rather than purely practical. Opposing the Bill at its second reading, the spokesman for the Conservatives declared his party's opposition to the European arrest warrant because it would make it easier for people to be sent for trial in the continental systems, which are inquisitorial, and therefore do not respect the presumption of innocence. Having proclaimed his

²¹Jeremy Titford MEP (UKIP), writing in the *Herts Mercury* (21 January 2003).

belief in the inherent superiority of the adversarial system, Mr Oliver Letwin said 'It is clear that Part I will make it very much easier to for people to be removed to places where the adversarial system does not apply, and the presumption of innocence in that sense is not applied.'²² A related argument focused on the right of silence. The European arrest warrant, it was said, would make it easier for persons to be surrendered to jurisdictions in which, unlike in the common law world, suspects are subjected to interrogation.

These ideological arguments were based, of course, on gross errors about the nature of criminal procedure in continental Europe, and to some extent on misunderstandings about criminal procedure in the UK as well. The first was the fallacy that in continental criminal procedure the burden of proof is reversed, the prosecution has the benefit of the doubt, and the defendant therefore has the task of establishing his innocence: a view held in the English-speaking world by every saloon-bar comparatist, but of course completely false.²³ The second fallacy is the notion that in the common law countries, defendants cannot be subjected to questioning against their will, whereas in the continental systems they can be, and routinely are—which means that the continental systems do not respect the right of silence. Although in the past it was often said that in the common law systems the defendant cannot be questioned against his will, this is no longer the case in the UK. Under the Police and Criminal Evidence Act 1984, the English police can detain suspects for questioning; and within the limits that the Act lays down they can force the suspect to listen to their questions, although of course he can legally refuse to answer.²⁴ And if in the UK the suspect cannot be further questioned after formal charge, whereas in France, for example, he is still liable to be questioned by authority in the form of the *juge d'instruction*, the continental defendant has the right, as in the common law countries, to refuse to answer.

Even if these arguments (which were much appreciated by the eurosceptic press) had been based on truth rather than on fiction, the difficulty that they pose is obvious, because they prove too much. The conclusion to which they point is not the rejection of the European arrest warrant, but the abolition of extradition, even in its classic form, to all parts of the world except those in which the common law prevails.

Ideological questions of this sort aside, the European arrest warrant was also criticised by those who were afraid that it would lead to extraditions

²²HC 396 col 396, col 57 (9 December 2002).

²³If only because the continental systems all subscribe to the European Convention on Human Rights, Art 6(2) of which provides that 'Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law.' See further Spencer, JR and Delmas-Marty, M *European Criminal Procedures* (Cambridge, University Press 2003) 21–3, and 596–600.

²⁴The Scottish police have had the power since the Criminal Justice (Scotland) Act 1980.

that in reality are oppressive or unjust. In practice, critics said, we cannot always count on the sound quality of the criminal justice administered by our neighbours. There is a risk, in some European countries, of criminal proceedings being used as an instrument of persecution. As *Liberty* put it,

Although at present a small number of countries would be involved, there is no guarantee that other countries would not also be added to Category 1 so that extradition without close scrutiny would be possible to countries with under-developed legal systems. The proposed expansion of the EU to include countries which formed part of the Soviet Bloc little more than a decade ago demonstrates the potential danger. The European Convention on Extradition has been signed by countries with appalling human rights records whose judiciaries in many cases are neither independent nor impartial. Whilst they may also have signed the ECHR, this is no guarantee that in an individual case the accused will receive his Convention rights.

Moreover civil law systems place a great deal of power in the hands of judge prosecutors whose decisions (as the Pinochet case showed) are very often not subject to executive control. The potential for abuse is obvious. There have been cases where these officials have been motivated by malice or political spite and have not acted in good faith.²⁵

Issues of bad faith aside, opponents of the proposal pointed to the risk of European arrest warrants that were issued on the basis of insufficient evidence by foreign authorities that were incompetent, or careless. Much was made in this context of the case of the Greek plane-spotters. In April 2001, a group of Britons were arrested near an airbase and convicted of espionage, the trial court rejecting their defence that they were merely plane-spotting. Their convictions were overturned on appeal in November 2002: rather quicker, it might be said, than a number of famous miscarriages of justice have been rectified in Britain—but not of course before an avalanche of comment had appeared in the British press about the unfairness and incompetence of continental justice. Much was also made of the case of Derek Bond, the British tourist arrested in South Africa at the instance of the authorities in the United States, who wrongly suspected him of fraud; under the European arrest warrant, it was said, Bond would have been whisked off to the United States without a chance to show the accusation was unfounded.²⁶ Critics also claimed that even where strong evidence of guilt exists, the European arrest warrant could lead to suspected persons being handed over to legal systems where the rights of the defence are not

²⁵ *Liberty's response to the Draft Extradition Bill*, October 2002, available at <http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/index.shtml/>.

²⁶ See the article by Jeremy Summers, *Times*, (8 April 2003) (who also fortified his argument by saying that in continental systems, the presumption of innocence is reversed).

properly respected, or where—far worse—they are subjected to physical maltreatment.

Extradition in its traditional form attempted to protect wanted persons against such risks as these by two devices: (i) requiring the requesting state to produce evidence to show a *prima facie* case, and (ii) refusing to extradite for ‘political offences’. In respect of Europe, British law had already abolished these two protections before the European arrest warrant was to be enacted²⁷; but, it was said, a vital degree of protection was still provided by the Home Secretary’s discretionary power to refuse extradition (and the power of the courts to control it by judicial review).

In this connection, much was made of the case of Rachid Ramda.²⁸ Ramda, an Algerian, was wanted in France for his alleged part in a series of terrorist bombings during 1995. After the English courts had ordered his extradition, he appealed to the Home Secretary to exercise his discretion so as to block the extradition, claiming that in France his human rights would not be respected. Among other things, he claimed that a confession had been beaten out of his co-defendant by the French police that implicated Ramda too; and that if tried in France, this confession would be used against him. When the Home Secretary rejected his request he sought judicial review of the Minister’s decision, which the Divisional Court quashed because it was supported by inadequate reasons: the Home Secretary should have engaged in detail with Ramda’s arguments, which he had not. Unsurprisingly, the case was misunderstood by public opinion on both sides of the Channel. In France, an English judge was seen to have insulted French justice, by accepting Ramda’s calumnies as the truth. For the British, of course, an English judge had saved an innocent from a miscarriage of justice by exposing the shortcomings of continental justice: so proving that we should think not twice but many times before introducing the European arrest warrant.

The *Ramda* case, it was claimed, showed that abolishing the Home Secretary’s discretion (and the power to judicially review it) would leave a gap that it was important to fill.²⁹ With that in mind, critics of the European arrest warrant proposal concentrated their efforts on ensuring that the list of possible bars to extradition provided in the Extradition Bill was as long as possible. Anxious to meet the deadline for implementing the Framework Decision, the government was obliged to make concessions. In consequence, Part I of the Extradition Act 2003 provides some bars to

²⁷ The Extradition Act 1989 abolished the *prima facie* case requirement for extraditions towards Europe, and the political exception was abolished by the European Extradition Regulations 2002, giving effect to Article 5 of the European Extradition Convention of 1996 (see above).

²⁸ *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278 (Admin).

²⁹ *Liberty*, n 25 above, para 9; JUSTICE briefing on the Extradition Bill 2002 for the Second Reading in the House of Lords, April 2003, paragraph 13.

executing the European arrest warrant that are not easy to reconcile with the either the spirit or the letter of the Framework Decision.

V. THE BARS TO EXECUTION

The final list of reasons for refusing to execute a European arrest warrant set out in Part I of the Extradition Act 2003 is as follows:

1. *ne bis in idem*; a person may not be extradited where, if the conduct had taken place in the UK, a British court would have refused to try the case because of a previous conviction or acquittal³⁰;
2. the warrant was tainted by ‘extraneous considerations’, in that it was really issued with a view to persecuting the wanted person on account of his race, religion, nationality, gender, sexual orientation or political opinions (or if executed, such persecution might be the result)³¹;
3. extradition would be unjust or oppressive because of ‘passage of time’³²;
4. the wanted person is under the age of criminal responsibility as understood in the UK; (as the age of criminal responsibility is lower in the UK than in almost any other state in Europe, this bar to extradition is unlikely to incur extensive use ...)³³
5. the person is wanted for an offence under the International Convention against the Taking of Hostages of 1979, the case could be tried in the UK, and if extradited the wanted person might suffer prejudice at trial through inability to communicate with his consular authorities³⁴;
6. no arrangements are in place between the UK and the issuing state to limit the trial of extradited persons to the offences for which they have been extradited³⁵;
7. the wanted person was in the UK because he had been extradited there from somewhere else³⁶;
8. the person is wanted for an offence which in the country that is seeking him is punishable with the death³⁷;
9. the person is wanted in order to serve a sentence that was imposed on him in his absence, his absence was not intentional,

³⁰ Extradition Act 2003 s 11 (1) (a) ; cf art 3(2) et 4(3) of the Framework Decision.

³¹ Extradition Act 2003 s 11 (1) (b) ; cf preamble to the Framework Decision, para 12.

³² Extradition Act 2003 s 11 (1) (c) ; cf art 4(4) of the Framework Decision.

³³ Extradition Act 2003 s 11 (1) (d) ; cf art 3(3) of the Framework Decision.

³⁴ Extradition Act 2003 s 11 (1) (e).

³⁵ Extradition Act 2003 s 11 (1) (f) ; cf art 27 of the Framework Decision.

³⁶ Extradition Act 2003 s 11(1)(g) and (h).

³⁷ Extradition Act 2003 s 1 ; cf preamble to the Framework Decision, para 13.

and if extradited the receiving state does not guarantee him a new trial in which he would have the right to a lawyer, to examine or have examined witnesses against him, and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him³⁸;

10. the extradition would be unjust or oppressive in the light of the person's physical or mental condition³⁹;
11. extradition would not be compatible with the wanted person's rights under the European Convention.⁴⁰

Of these 11 bars, eight are more or less referable to parts of the Framework Decision; but a number of them are vaguer, or more far-reaching. Thus (3) in the list above—(passage of time)—is related to various provisions in the Framework Decision allowing to extradition to be refused where the offence or sentence is time-barred because of a statutory limitation period—but the provision in the Extradition Act is obviously wider. Similarly, (9)—trial in absentia—is related to Article 27(1) of the Framework Decision, which allows Member States to surrender in such cases, subject to conditions—whereas the Extradition Act lays down a total bar.

Three bars, furthermore, seem to have no obvious basis in the Framework Decision at all. These are (5)—hostage taking, (10)—physical or mental condition—and (11)—surrender incompatible with the wanted person's ECHR rights; although of these, the last two could presumably be justified by reference to general statements in the Framework Decision about respect for fundamental rights.

It is difficult to object in principle to the fact that the Extradition Act contains an explicit bar on executing European arrest warrants when to do so would not be compatible with ECHR rights. As a general proposition of European human rights law, it seems clear that it constitutes a breach of person's human rights to deport or extradite him to a jurisdiction where there is a serious risk that his human rights will not be respected.⁴¹ But the way in which the matter is presented in the Extradition Act does give reason for disquiet. The Act does not present the incompatibility with ECHR rights as a bar which, when exceptionally established, justifies the non-execution of the warrant. Instead, it provides (in effect) that the judge must in every case consider whether the proposed surrender would be compatible with his Convention rights, and block it unless he is satisfied that it is. By section 21,

³⁸ Extradition Act 2003 s 20 ; Framework Decision, Art 5(1).

³⁹ Extradition Act 2003 s 25.

⁴⁰ Extradition Act 2003 s 21.

⁴¹ See inter alia *Soering v United Kingdom* (1989) 11 EHRR 439; *R (Ullah) v Special Adjudicator* [2004] 3 WLR 23, per Lord Bingham at p 36.

- (1) If the judge [is about to order extradition] he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
- (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

This is obviously not in accordance with the spirit of the Framework Decision, which was based on the idea that the EU Member States all have criminal justice systems that are trustworthy and Strasbourg-compliant, so that wanted men can be sent there without fear for their human rights unless, unusually, there is some reason particular to the case in hand for thinking otherwise. On the face of it, Section 21 looks like an invitation for the person facing extradition to parade before the judge a range of general criticisms of requesting country's legal system, in an attempt to persuade him that, viewed with a common lawyer's eye, it does not give defendants a fair trial as required by Article 6 of the ECHR. Whether in practice this section will have this effect depends, of course, on how our judges decide to interpret it. And this depends in turn on how much they know about the realities of criminal procedure in continental countries, and how far (if at all) they share the views about it that inspired the Conservative Party to oppose the Extradition Bill.

VI. CONCLUDING REMARKS

What is one to make of this?

If many of the criticisms of continental criminal procedure that appear in the British press are wildly wrong, the criminal justice systems of some of the Member States do appear to have defects that are worrying—in particular, concerning the provision of interpreters, and legal advice. The risk that other Member States refuse to execute European arrest warrants because of these defects might possibly lead in time to these faults being cured, with a useful effect of 'levelling up'. It is with the aim of 'levelling up' that, at the time of writing, the European Commission is working on a Draft Framework Decision, aimed to promote the protection of criminal defendant's rights to competent interpreters and effective legal advice.⁴² If this levelling up happens, so well and good.

But if 'levelling up' is on the agenda, lawyers in this country need to be aware of the beam in their own eyes, as well as the motes in their continental colleagues'. Paragon of perfection as British justice may appear to

⁴²For an account, see Allegre, S 'EU Fair Trial Rights—Added Value or No Value?' (2004) 154 *New Law Journal* 758.

British lawyers, our criminal procedure has a number of features which our continental colleagues are deeply shocked by. To name but a few, one is that where a person is held in custody and then at trial acquitted he has no legal right to compensation. Another is the rule that prison sentences are immediately effective, even where the sentenced person enters an appeal: so if the Greek plane-spotters had been convicted and sentenced in England instead of Greece, they would probably not, as they were, have been set free pending their appeal. Yet another is the fact that juries give unreasoned verdicts (and of course the fact that misbehaviour in the jury-room is not a ground for an appeal). From discussions with continental colleagues, I also know that there is widespread perception among them that British justice is fundamentally inefficient, because despite of its adversarial qualities—or possibly because of them—it too easily acquits the guilty and convicts the innocent. As I heard one continental lawyer say, ‘When British lawyers preach about the superiority of British justice, I silence them with two words: *Birmingham Six*.’

The inclusion of Section 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 there also lurks a smug sense of cultural superiority which is less pleasing.