Justice Committee

UK Government's 2014 opt-out decision

Letter from the Faculty of Advocates

EU CRIMINAL JUSTICE MEASURES: UK OPT OUT

Thank you for your letter of 17 January 2014. I apologise that I have not responded within the specified deadline. As you may be aware, I gave evidence on behalf of the Faculty to the House of Lords EU Select Committee. In that evidence, I expressed the view that the UK should not exercise its opt-out. I said this:

"In a world where people and capital can move freely across borders, it is essential that there are good and sound measures for co-operation in the operation of the criminal justice system. It is worth recalling that in the United Kingdom we have had a common market for a little over 300 years, and with that has come the necessity for close mutual co-operation between the various criminal justice jurisdictions of the United Kingdom in the investigation and prosecution of crime. It seems to me the one comes with the other."

I remain firmly of that view.

In its written evidence to the Committee the Faculty commented as follows:

"The Faculty has concerns regarding the loss of measures that are essential for the investigation and prosecution of serious crime in Scotland. In particular, the European Arrest Warrant has proved to be a highly effective vehicle for the delivery of suspected criminals; both those who have fled this country and those from abroad who have sought refuge here. The absence of such a mechanism would, inevitably, result in the UK encountering greater difficulty in repatriating suspects from abroad. Worse still, the UK could become something of a bolt-hole for criminals engaged in organized crime or terrorism. The Faculty expects that further difficulties could arise with the loss of access to vital data bases and shared intelligence-gathering resources."

Those concerns remain.

I recognize that some features of the European Arrest Warrant have been controversial. I also recognize that the question of whether improvements are better achieved by opting out and then seeking to opt back in or from "within the tent" is ultimately a political question. However, my strong impression is that, generally speaking, the European Arrest Warrant system works well. As Helen Malcolm QC, of the English bar, said to the House of Lords Committee: "… the reason we signed up to the EAW was because it was better, quicker, simpler, cheaper and involved one single document that every police officer around Europe would recognize and would fill in, subject to interpretational difficulties, more or less the same way." In her statement given on 9 July 2013 on the opt-out decision, the Home Secretary stated: "I agree with our law enforcement agencies that the Arrest Warrant is a valuable tool in returning offenders to the UK. Its predecessor – the 1957 European Convention

on Extradition – had serious drawbacks. The Arrest Warrant has helped us secure and accelerate successful extradition procedures – as shown by the case of Osman Hussain, one of the failed London bombers of July 2005, who was extradited back to the UK from Italy in less than eight weeks. More recently, Jeremy Forrest, the teacher who was sentenced last month for absconding to France with one of his pupils, was extradited back to the UK less than three weeks after his arrest".

The last question of the evidence session which I attended before the House of Lords Committee was from Lord Judd: "If we go through this process of opting out and then trying to get some sort of ad hoc arrangements to replace what we have now, will our effectiveness in fighting terrorism, in fighting international crime and in dealing with it judicially be more effective or less effective in your view?" My answer was as follows: "I think the answer from a legal perspective has to be less effective unless we can move seamlessly to a set of measures that replicates the content of the measures we have just opted out of". That remains my view. After all, the UK opted into these measures in the first place because it was conceived to be in the national interest that we should participate in those measures. Insofar as it is in the national interest to be party to those measures, any gap between the block opt-out coming into effect and opting back into those measures would be undesirable.

If there were to be a gap between the block opt-out coming into effect and opting back into the European Arrest Warrant, for example, there would be a period during which the extradition of suspected criminals who are wanted for trial in Scotland would be more difficult and during which the extradition of persons wanted for trial (or to serve their sentence) in other Member States of the EU would likewise be more difficult. There would be legal uncertainty as to the basis upon which extradition could proceed (if it could proceed at all) during that interregnum.

In the absence of the European Arrest Warrant system, extradition to and from any of the Member States of the EU currently covered by the European Arrest Warrant system would depend on the existence of a treaty arrangement providing for extradition with that Member State. It may be that the Council of Europe Convention – albeit that the Home Secretary stated that it "had serious drawbacks" - could be invoked, at least in relation to some Member States. However, Helen Malcolm QC observed in her evidence to the EU Select Committee that this would not follow automatically in all Member States, since in some Member States the Convention would have been superseded by the European Arrest Warrant. She observed that in those states, reintroduction of the Convention for the purposes of the extradition to the UK might require amendment to that state's domestic legislation. Unless a multilateral interim arrangement were to be put in place, it would be necessary to consider the arrangements for each Member State separately.

In any event, from the perspective of the domestic law of the jurisdictions of the UK, unless some entirely new regime were to be introduced by statute to deal with the interregnum, it seems likely that – assuming that bilateral or multilateral arrangements could be entered into on an interim basis with other Member States – extradition from the UK to the other Member States of the EU would require to be dealt with under Part II of the Extradition Act 2003 instead of under Part I. The procedure under Part II is significantly more cumbersome than Part I procedure. In effect, even if arrangements were to have been worked out with all the other Member

States in question, we would have a system which would, in relation to Member States of the EU, be slower, more cumbersome, and more expensive than we currently have. Individuals would be liable to be held on remand in Scotland awaiting an extradition decision for longer periods than is currently the case.

James Wolffe QC
Dean of Faculty
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