

# The future of extradition from the UK: Protecting fundamental rights

By Emily Barley



**Due Process**

Reform the European Arrest Warrant.  
Protect Human Rights.

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# 1. Moving away from the EAW

In February 2020<sup>1</sup>, the UK government shared its intention to leave the European Arrest Warrant (EAW) system and reach a new extradition agreement with the European Union (EU). Having campaigned for withdrawal from the EAW for more than two years, Due Process welcomed this news.

However, withdrawing from the EAW alone does not guarantee that British citizens and residents will be protected from the abuses within the EAW system.

## The problems with the EAW

The EAW is the EU's 'fast-track' extradition system. It is deliberately formulated to have few protections and therefore increase the speed and number of extraditions between EU countries. The problems within it are so fundamental, and the checks and balances so few, that innocence is no protection – any person in any EU country is at risk of their life being turned upside down.

The problems with the EAW have been well documented, including by Due Process in its various reports. In brief, there are two fundamental problems with the EAW system:

- It assumes EU justice systems are of equal quality and in doing so limits protections for individuals against states that routinely abuse human rights<sup>2</sup>, such as Romania<sup>3</sup>, or rapidly descend into abuses, such as in Poland<sup>4</sup>.
- It does not allow British judges to examine the evidence against the accused to determine if there is a case to answer (*a prima facie* case), and even when there is irrefutable evidence of innocence extradition cannot be refused.

These two fundamental problems add up to a situation where a total lack of evidence against the accused, or even solid proof that an individual did not commit a crime, is not enough to prevent extradition, because British judges are not able to even consider such evidence. They must simply trust that the authorities in the EU country have done their jobs properly.

The grounds for appealing an EAW are extremely limited. They are:

- A procedural error – the paperwork has not been filed correctly. The paperwork is simply refiled in order for the process to continue.

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<sup>1</sup> Our approach to the Future Relationship with the EU; Prime Minister's Office, 10 Downing Street; February 2020 <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

<sup>2</sup> Human Rights abuses in European Arrest Warrant member states; Emily Barley, Lisl Biggs-Davison and Chris Alderton, Due Process; August 2018 <http://dueprocess.org.uk/2018/08/01/due-process-report-human-rights-abuses-in-european-arrest-warrant-member-states/>

<sup>3</sup> End 'trust, but not verify': Why the UK must halt extraditions to Romania immediately; Emily Barley, Due Process; October 2018 <http://dueprocess.org.uk/2018/10/18/due-process-report-end-trust-but-not-verify-why-the-uk-must-halt-extraditions-to-romania-immediately/>

<sup>4</sup> Extradition to Poland: Risks and responsibilities; Emily Barley, Due Process; June 2019 <http://dueprocess.org.uk/2019/06/17/due-process-report-extradition-to-poland-risks-and-responsibilities/>

- The crime the person is accused of is not a crime or they are below the age of criminal responsibility in the executing state, there is double jeopardy at play, or there is an ongoing prosecution in the executing state.
- If surrendering the person could be reasonably supposed to lead to a violation of their human rights. However, the legal test the European Court of Justice sets to prove abuses is impossibly high, meaning people are extradited despite serious systemic abuses.

These problems are not merely theoretical. Miscarriages of justice due to the EAW include: a person serving prison time after a case of mistaken identity only uncovered after journalists investigated; cases where EAWs have been used by authorities to pursue political enemies; people being accused after police brutality forced witnesses to point the finger at them; and serious abuses of human rights because of terrible prison conditions<sup>5</sup>.

The UK remains part of the EAW system until the end of the Brexit transition period.<sup>6</sup>

In UK law EU countries are referred to as 'category 1 territories', while non-EU countries the UK has extradition agreements with are called 'category 2 territories'.

### **The problems with the government's plan**

Although the government's plan to withdraw from the EAW is very welcome, the kind of agreement it is aiming for raises serious concerns. In the paper 'The Future Relationship with the EU: The UK's Approach to Negotiations', the government said:

*"The UK is not seeking to participate in the European Arrest Warrant as part of the future relationship. The agreement should instead provide for fast-track extradition arrangements, based on the EU's Surrender Agreement with Norway and Iceland which came into force in 2019, but with appropriate further safeguards for individuals beyond those in the European Arrest Warrant."*

There are four key issues with this plan:

First, the agreement between the EU and Iceland and Norway closely mirrors the EAW<sup>7</sup>, and has been described as 'EAW-lite'<sup>8</sup>. Inherent within it is the mutual trust and recognition<sup>9</sup> that is at the heart of many of the problems with the EAW. It would be very difficult, if not impossible, to formulate an EU-wide agreement that accounted for the varying standards of justice systems across the EU.

<sup>5</sup> This is not justice: The cases that show what is wrong with the European Arrest Warrant; Emily Barley, Due Process; February 2020 <http://dueprocess.org.uk/2020/02/10/due-process-report-this-is-not-justice-the-cases-that-show-what-is-wrong-with-the-european-arrest-warrant/>

<sup>6</sup> Brexit next steps: The European Arrest Warrant; Joanna Dawson, House of Commons Library; February 2020 <https://commonslibrary.parliament.uk/home-affairs/crime/brexit-next-steps-the-european-arrest-warrant/>

<sup>7</sup> European Arrest Warrant extends its reach into Norway and Iceland; Eurojust; October 2019 <http://www.eurojust.europa.eu/press/PressReleases/Pages/2019/2019-10-31.aspx>

<sup>8</sup> UK to withdraw from European arrest warrant; Jamie Grierson, Jennifer Rankin and Lisa O'Carroll, The Guardian, February 2020 <https://www.theguardian.com/uk-news/2020/feb/27/uk-to-withdraw-from-european-arrest-warrant>

<sup>9</sup> Comment: Attorney General's rule of law record could hinder EU extradition deal; Rebecca Niblock; February 2020 <https://www.freemovement.org.uk/attorney-generals-record-could-hinder-eu-extradition-deal/>

Second, the agreement requires courts in Iceland and Norway to take into account the case law of the European Court of Justice<sup>10</sup>. The government has promised to take the UK out of the jurisdiction of the European Court of Justice, but an agreement similar to that between the EU and Iceland and Norway would mean being technically out, but still very much bound by that court's decisions.

Third, there are practical barriers to such an agreement. Iceland and Norway are both part of the EU's Single Market, and within the Schengen Area of free movement. Both countries are also part of the SIS II information sharing system, which the UK government intends to leave at the end of the transition period. The agreement between the EU and Iceland and Norway is built on these other types of cooperation, which the UK intends to leave<sup>11</sup>. Not only is the agreement built on this close cooperation between those countries, but the free movement of people between them necessitates it. When the UK is outside of the EU and not subject to the free movement of people, this need will no longer apply.

Fourth, no detail has been given on the 'further safeguards for individuals' the UK government would like, and there has been no indication that the EU would be prepared to agree to such safeguards. It is the fundamentals at the heart of the EAW, and the surrender agreement between the EU and Iceland and Norway, which are the problem.

### **UK extradition arrangements with non-EU countries**

The UK has a series of bilateral extradition arrangements with non-EU countries, called 'category 2 territories'<sup>12</sup>. While the EAW is a purely judicial matter, extradition to category 2 territories is diplomatically led, and has judicial and diplomatic elements. Essentially, this means that both the courts and the Secretary of State for the Home Department must decide whether or not to surrender an individual.

These arrangements for non-EU, category 2 territories fall into two broader types, type A and type B, with one key difference between how the two groups of countries are treated – a *prima facie* case test.

Type A countries include signatories of the Council of Europe Convention on Extradition 1957, as well as the US, Canada, Australia and various others the UK has close relationships with. Type B countries are most of the rest of the world.

Extradition to Type A countries does not require a *prima facie* case to be made, while extradition to Type B countries does. It is also possible for countries the UK does not have extradition agreements with to make a request through diplomatic channels.

Aside from the *prima facie* case test, bars to extradition to category 2 territories are very similar to those that prevent surrender under an EAW, including bars such as double jeopardy and human rights considerations.

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<sup>10</sup> Surrender procedure between EU countries and Iceland and Norway; EUR-Lex; January 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133283>

<sup>11</sup> Comment: Attorney General's rule of law record could hinder EU extradition deal; Rebecca Niblock; February 2020 <https://www.freemovement.org.uk/attorney-generals-record-could-hinder-eu-extradition-deal/>

<sup>12</sup> Extradition: processes and review; Home Office; August 2019 <https://www.gov.uk/guidance/extradition-processes-and-review>

However, there are important differences that give additional protections. An additional bar to extradition to category 2 territories includes ‘extraneous considerations’<sup>13</sup>, which require judges *and* the Secretary of State to consider the motivation behind the charges and the risk of prejudice, unlike the EAW and the EU agreement with Iceland and Norway, which both require trust and reciprocity.

Both EAW and category 2 extradition cases must, at least on paper, take human rights into account. However, the European Court of Justice has set the threshold for the refusal of extradition so high that individuals are still extradited to countries with substantial, systemic and enduring human rights abuses, including Romania and Poland<sup>14,15</sup>. This is not the case with category 2 countries, where British judges and the Secretary of State are able – and required – to look impartially at the potential for human rights abuses in individual cases.

### **The US-UK agreement**

The best-known example of a category 2, type A agreement is the one between the UK and US. This is frequently highlighted as being inherently unfair<sup>16</sup>, as though the UK does not require a *prima facie* case to extradite to the US, the US does require ‘probable cause’ to extradite to the UK.

The current agreement between the UK and US also reduces protections<sup>17</sup> that were included in the previous agreement, such as narrowing the definition of political offences that people cannot be extradited for, and removing the requirement for individuals to only face charges for the crime they were extradited for.

As the UK increases safeguards for extradition requests from EU member states, it should also reconsider category 2 territory, type A agreements and move towards requiring a *prima facie* case to be made in all extradition cases.

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<sup>13</sup> Extradition; The CPS; February 2019 <https://www.cps.gov.uk/legal-guidance/extradition>

<sup>14</sup> Extradition ordered of Polish man in controversial landmark case; Mary Carolan, The Irish Times; November 2019 <https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/extradition-ordered-of-polish-man-in-controversial-landmark-case-1.4080428>

<sup>15</sup> End ‘trust, but not verify’: Why the UK must halt extraditions to Romania immediately; Emily Barley, Due Process; October 2018 <http://dueprocess.org.uk/2018/10/18/due-process-report-end-trust-but-not-verify-why-the-uk-must-halt-extraditions-to-romania-immediately/>

<sup>16</sup> It’s ridiculous to claim our extradition treaty with the US is fair; Fahad Ansari, The Guardian; October 2011 <https://www.theguardian.com/commentisfree/2011/oct/27/uk-us-extradition-treaty-unfair>

<sup>17</sup> The new UK-US Extradition Treaty; Ben Hayes, Statewatch; July 2003 <http://www.statewatch.org/news/2003/jul/analy18.pdf>

## 2. A better future for extradition

### The criteria for a good extradition agreement

Due Process will judge any extradition arrangement between the UK and EU by four key tests.

#### Prima facie case

*(pry-mah fay-shah) adj. Latin for "at first look," or "on its face," referring to a lawsuit or criminal prosecution in which the evidence before trial is sufficient to prove the case unless there is substantial contradictory evidence presented at trial.*<sup>18</sup>

The best guard against sub-standard justice systems is to require a *prima facie* case to allow extradition. This is because instead of being required to blindly trust the authorities and justice systems of other countries, British judges will be required to examine the evidence and decide whether to order extradition on that basis.

#### Protect human rights

To fulfil both its international legal obligations and moral obligations, the UK must not extradite individuals who are likely to have their human rights violated. At present, the assumption of equal quality within the EAW, the requirement for trust and mutual recognition, and the legal tests set by the European Court of Justice are all barriers to meeting this obligation. This reality is most obvious with requests from Romania, which continue to go ahead despite international censure of both prison conditions and political interference in the judiciary<sup>19</sup>.

It is important to note that the situation in EU countries, as around the world, can decline very quickly – as has been the case in Poland, where a new government was elected and quickly set about interfering in the judiciary<sup>20</sup>. EU mechanisms simply take too long to react, and the people making decisions within them prefer not to admit when EU countries are failing to meet their obligations. Therefore, any agreement that relies on the EU to keep member states in check, and/or be honest about the situation within them, will not protect human rights.

The best way to ensure the UK responds rapidly to changing situations abroad is to introduce a diplomatic check, as is currently the case with category 2 territories.

#### No unnecessary delays

The only real benefit of the EAW system is that it is usually fast. For that reason, many police services and prosecuting authorities support it. While it is important to reduce delays

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<sup>18</sup> Legal Dictionary, <https://dictionary.law.com/Default.aspx?selected=1598>

<sup>19</sup> End 'trust, but not verify': Why the UK must halt extraditions to Romania immediately; Emily Barley, Due Process; October 2018 <http://dueprocess.org.uk/2018/10/18/due-process-report-end-trust-but-not-verify-why-the-uk-must-halt-extraditions-to-romania-immediately/>

<sup>20</sup> Extradition to Poland: Risks and responsibilities; Emily Barley, Due Process; June 2019 <http://dueprocess.org.uk/2019/06/17/due-process-report-extradition-to-poland-risks-and-responsibilities/>

in extradition so that justice may be done as swiftly as possible, it is also important to recognise that justice takes time – and that there is a huge value in ensuring it is carried out to a high standard.

### **Outside of the European Court of Justice**

There are two key reasons the future extradition agreement with the EU must not fall under the jurisdiction of the European Court of Justice. First, because the government has promised it as a key plank of its Brexit policy:

*“That means that we will not agree to any obligations for our laws to be aligned with the EU's, or for the EU's institutions, including the Court of Justice, to have any jurisdiction in the UK.”<sup>21</sup>*

And second, because as described above the European Court of Justice is a barrier to adequately protecting the human rights of the people the UK surrenders.

Looking at the surrender agreement between the EU and Iceland and Norway makes it clear that the European Court of Justice can still determine the law in those third countries without technically having jurisdiction. Therefore, the UK must ensure it is *meaningfully* outside of the European Court of Justice's jurisdiction, not just technically.

### **How the government's plan measures up**

It is difficult to see how the government's plan for an extradition agreement similar to that between the EU and Iceland and Norway, but with additional safeguards, would be able to meet these criteria.

Any similar agreement would have mutual trust and recognition at its heart<sup>22</sup>, removing the possibility of demanding a *prima facie* case and requiring UK courts to turn a blind-eye to human rights abuses in EU member states. It would also be based on a largely judicial process (albeit with politically mandated trust and reciprocity enforced on our judges), removing the diplomatic checks that are so important to protecting human rights.

Further, such an agreement would most likely require UK courts to take into account European Court of Justice case law, leading to a situation where the UK is not meaningfully removed from that court.

Fundamentally, while the government's recognition of the need for further safeguards over and above the EAW and EU/Iceland/Norway arrangements is a positive step forward, achieving such safeguards within the framework that has been outlined will be nigh on impossible.

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<sup>21</sup> Our approach to the Future Relationship with the EU; Prime Minister's Office, 10 Downing Street; February 2020 <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>

<sup>22</sup> Comment: Attorney General's rule of law record could hinder EU extradition deal; Rebecca Niblock; February 2020 <https://www.freemovement.org.uk/attorney-generals-record-could-hinder-eu-extradition-deal/>

## A way forward

The key to unlocking an extradition agreement that meets these four keys tests is to get out of the ‘mutual trust and recognition’ an EU-wide, judicial-only framework requires. The best way to do this is to *not* negotiate with the EU as a whole, but to negotiate a series of bilateral agreements.

These agreements should either treat all EU countries as category 2, type B territories and require a *prima facie* case to be made every time, or carefully examine which countries have justice systems of sufficient quality to justify them being a type A territory, with no *prima facie* case required.

In doing so the government would not be starting from scratch, as there are a series of extradition treaties from the pre-EAW era to fall back on. This would require the amendment of primary legislation in the UK, and in some of those EU countries that have since repealed the legislation enacting those treaties would need to pass new legislation.<sup>23</sup>

This bilateral approach would also draw on the existing examples and experience of extradition treaties with various on-EU countries.

The benefits of this approach are numerous.

First, the agreement between the EU and Iceland and Norway was reached in 2006, but took 13 years to come into force due to the delay in member states implementing it in their own parliaments<sup>24</sup>. A bilateral approach would remove the potential for this kind of EU-wide delay, and also allow the UK to prioritise according to the countries it most urgently needs functioning agreements with.

Second, this approach would show much greater respect for human rights, with judges no longer required to have a large degree of blind faith in the authorities in EU member states, and instead required to look at the facts and risks of abuses with an impartial eye. The additional protection of the Secretary of State’s decision would ensure the UK is responsive to rapidly changing circumstances, as well as the sometimes difficult to assess underlying political motivations in extradition requests.

Third, though this system would mean many extraditions took longer to complete, those delays would only be the ones necessary to ensure every individual saw proper due process, in a return to the great British tradition of civil liberties.

Fourth, such a system would be fully aligned with the Government’s plan for future immigration. Whereas the EAW’s fast-track extradition system can be seen as the natural accompaniment to open borders, a tighter future immigration system must be matched by a more careful extradition process.

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<sup>23</sup> Brexit next steps: The European Arrest Warrant; Joanna Dawson, House of Commons Library; February 2020 <https://commonslibrary.parliament.uk/home-affairs/crime/brexit-next-steps-the-european-arrest-warrant/>

<sup>24</sup> Brexit next steps: The European Arrest Warrant; Joanna Dawson, House of Commons Library; February 2020 <https://commonslibrary.parliament.uk/home-affairs/crime/brexit-next-steps-the-european-arrest-warrant/>

Finally, negotiating extradition agreements on a bilateral basis is the only way to truly be outside of the jurisdiction and influence of the European Court of Justice, and therefore fulfil the promises made to the British public.

The approach outlined in this report restores balance in the UK's extradition policy between the need to continue with extraditions and the protection of fundamental human rights. It does this by rejecting the requirement for mutual trust and recognition at the heart of any EU-wide agreement, and treating EU countries with poor human rights records with the scepticism that a *prima facie* case, enhanced consideration of human rights, and the safeguards of a diplomatic as well as a judicial decision.

### 3. Additional safeguards

Aside from the UK government's 'EAW-lite' plan, and the set of bilateral agreements with diplomatic and judicial safeguards proposed in this report, there are other options to introduce even greater safeguards to the UK's extradition processes.

#### **Bars against extradition for British citizen**

Many countries in the world have enacted laws or regulations that protect their citizens against unfair extradition requests and have set high bars against extradition. This includes Russia and China, which do not extradite citizens at all, and the US and Germany. Although technically possible, the US rarely grants extradition of a citizen to a foreign country, while Germany's citizens can only be extradited to other EU member states.

With such varying and changing justice systems around the world, the UK should consider preventing the extradition of its citizens to foreign countries. Instead, criminal cases from abroad against citizens would be tried in the UK, and sentences served in the UK too. This approach would ensure all UK citizens have their fundamental rights protected in a properly-functioning justice system, whilst also paying for their crimes if found guilty.

#### **Empower the CPS to reject abusive extradition requests**

Under the EAW system and other existing extradition arrangements, the Crown Prosecution Service (CPS) has no discretion over which extradition requests it pursues. This leaves the CPS in the odd position of having to argue in court for extraditions it does not believe in, in cases it would not choose to prosecute if the alleged crime had taken place in the UK.

In UK criminal cases the CPS applies two tests before proceeding with a prosecution: the public interest test, which considers the seriousness of the allegations, the profile of the suspect, the impact on the victim, and the effect on the wider community; and the evidential test, which considers whether there is enough evidence against the accused to give a realistic prospect of conviction.<sup>25</sup>

Allowing the CPS to reject extradition requests it considers disproportionate, abusive, lacking evidence, or otherwise improper would ensure the UK only prosecuted extradition cases that meet the tests it applies in domestic cases. This additional safeguard would give further protection to individuals from abusive actions by foreign governments, and free up valuable court time.

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<sup>25</sup> The Code for Crown Prosecutors, The Crown Prosecution Service; October 2018  
<https://www.cps.gov.uk/publication/code-crown-prosecutors>

## 4. Appendices

### Appendix A: The EAW process

European Arrest Warrants follow a simple judicial process, enabled by the SIS II information sharing system. This system is applied to all EU countries, also known as 'Category 1 territories' in Part 1 of the Extradition Act 2003.<sup>26</sup>

Requests and surrenders follow this process:

- 1) The EAW request is submitted, usually electronically via an alert on the Second Generation Schengen Information System, known as 'SIS II'.
- 2) A certificate is issued, after a proportionality test, by the National Crime Agency.
- 3) An arrest is made by the police.
- 4) The initial hearing is held to confirm the individual is the person listed on the EAW, to inform the person of the procedures, and to fix a date for an extradition hearing if the person opposed extradition.
- 5) At the extradition hearing the judge considers whether the offence is an extradition offence, if any of the statutory bars apply, if extradition is proportionate, and if extradition is compatible with the person's human rights. This decision can be appealed.
- 6) The person should be extradited within 10 days of the final court order.

In some urgent cases the requested person can be arrested before an EAW has been received. This EAW must then be received in time for a court hearing 48 hours after the request.

For England and Wales EAW cases are heard in Westminster Magistrate's Court, while in Scotland they are heard in Edinburgh Sheriff Court, and in Northern Ireland in Belfast Magistrates Court.<sup>27</sup>

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<sup>26</sup> Extradition: processes and review; Home Office; August 2019  
<https://www.gov.uk/guidance/extradition-processes-and-review>

<sup>27</sup> European Arrest Warrants; National Crime Agency <https://nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/fugitives-and-international-crime/european-arrest-warrants>

## Appendix B: Category 2 extradition process

Extradition to category 2 territories is initiated through diplomatic means, and then follows both a diplomatic and judicial process.<sup>28</sup>

Surrender to type A category 2 territories does not require a *prima facie* case, but one is required for extradition to type B category 2 territories. A full list of type A and B countries is available from the Home Office.<sup>29</sup>

Requests and surrenders follow this process:

- 1) Extradition request is made to the Secretary of State.
- 2) Secretary of State, or Scottish Minister if the person is believed to be in Scotland, decides whether to certify the request. To be certified a request must be made by an appropriate authority, for a person accused or convicted of a crime in a category 2 territory.
- 3) Judge issues an arrest warrant if they are satisfied the request is for an extradition offence. The request must also include relevant information such as name, the arrest warrant from the category 2 territory, and evidence or information that justifies a warrant for arrest in the UK.
- 4) The person is arrested and brought before a court. At the preliminary hearing a date for the extradition hearing is set.
- 5) At the extradition hearing the judge must be satisfied that the offence amounts to an extradition offence, that none of the bars apply, that there is *prima facie* evidence for the request from the type B country, and that extradition would not breach human rights.
- 6) At this point the individual can appeal the judge's decision, but the appeal will not be heard unless and until the Secretary of State order extradition.
- 7) Secretary of State decides whether to order extradition, based on representations made within four weeks of the case being sent. The Secretary of State must make a decision within two months, or apply for an extension.
- 8) Unless there is an appeal, extradition takes place within 28 days of the decision.

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<sup>28</sup> Extradition: processes and review; Home Office; August 2019  
<https://www.gov.uk/guidance/extradition-processes-and-review>

<sup>29</sup> Extradition: processes and review; Home Office; August 2019  
<https://www.gov.uk/guidance/extradition-processes-and-review>



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