

FOREWORD

This is an important book. The law of extradition used to be regarded as an arcane subject, a little-known speciality. The force of many factors has transformed it. The law of the European Union has given us the European Arrest Warrant: a challenging instance of harmonization. The law of the European Convention on Human Rights has given a new edge to extradition: a challenge to extradition's legal limits. Much crime is international, and knows no boundaries: fuelled by the internet, email, and other technologies, it exerts a further challenge, demanding that extradition procedures be swift and efficient. The law of extradition is no longer an arcane subject, and certainly ought not any longer to be a little-known speciality.

That is why this is an important book. It spans the history of the subject. So it should. Any area of law which touches the relations between sovereign states is likely to be in close contact with its own history, and its practitioners need to understand as much. History aside, this book is a comprehensive *vade mecum* through the modern British law of extradition, principally contained in the Extradition Act 2003. It explains the procedural and substantive law in great detail and does so clearly in no-nonsense language. It is especially helpful that the procedures are properly described, not least since extradition remains an area of the law where the relationship between judiciary and executive is unusual and perhaps unique. I think the book is particularly good on the bars to extradition and the impact of human rights law. The section on the relationship between extradition law and asylum law is also very useful—these are closely related territories, and lawyers practising in the area will be better informed as to the relation between them.

The book also ventures into broader, more strategic territory, with sections on International Criminal Courts and Tribunals and extradition law and practice in other jurisdictions. This is excellent. Specialist areas of our law become more and more isolationist. These comparisons are something of an antidote.

My impression is that the number of extradition cases coming before the Divisional Court is increasing. There are certainly many of them, and the arguments deployed are increasingly refined. This is a thoroughly modern, high quality textbook which will equip the profession as it needs to be equipped. I wish this second edition every success.

Lord Justice Laws
August 2010

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A. Definition

The term 'extradition' is frequently misused. It is therefore essential at the outset to define clearly its scope. **1.01**

Extradition is the formal, legal process for returning persons located in one country to another for one of the following purposes: **1.02**

- criminal prosecution;
- sentencing (if they have already been tried and convicted); or
- the carrying out of a sentence already imposed.

The transfer of persons for any other purpose cannot be termed extradition. Thus, for example, extradition does not lie where the purpose of return is to investigate an offence. **1.03**

- 1.04** As its name suggests, ‘extraordinary rendition’—the forcible transfer by state agents from one state to another without recourse to formal legal process—also falls outside the concept of extradition.

B. Origins

Early history

- 1.05** A detailed analysis of the history of extradition law is outside the scope of this work.¹ However, a number of key events and themes are instructive in understanding the present system.
- 1.06** Examples of what may loosely be termed extradition can be found as long ago as the twelfth century. Such transactions were rare, reflecting the jealousy with which states guarded their own sovereignty. Although from time to time there was debate on the issue, it would seem that they did not require a platform of domestic procedure or legislation.

Extradition Act 1870

- 1.07** By the nineteenth century, however, an increasing number of international extradition treaties targeting general crime required a coherent legislative basis in domestic law and led to the Extradition Act 1870 (‘the 1870 Act’), the first comprehensive domestic legislation in this field.

Characteristics

- 1.08** One characteristic of the earliest extradition arrangements has shaped the United Kingdom’s domestic procedural machinery for determining extradition cases from the 1870 Act through to the Extradition Act 1989 (‘the 1989 Act’): because extradition was considered to impinge upon state sovereignty, requests were naturally made on a state-to-state basis through diplomatic channels.²
- 1.09** It was, therefore, for the executive to first authorize the initiation of extradition proceedings before the courts, for the judiciary to then determine whether the subject was, as a matter of law, liable to extradition, and for the executive finally to decide whether a person deemed to be so liable should in fact be extradited.
- 1.10** As a further reflection of the seriousness with which interference with state sovereignty was regarded, most extradition treaties required a request for extradition to be supported by prima facie evidence in admissible format.
- 1.11** Older extradition treaties tended to contain lists of crimes, generically described, for which extradition would lie. At the domestic level there was an additional requirement to show dual criminality, namely that the conduct relied upon in the request amounted to an offence in both the requesting and the requested jurisdictions.
- 1.12** Small wonder then that a disproportionate number of leading decisions on evidence and offence definitions arise from extradition cases.

¹ For a detailed review of the history of extradition, see Alun Jones and Anand Doobay, *Extradition and Mutual Assistance* (3rd edn, Sweet and Maxwell, 2004).

² For a helpful summary of the bases upon which a state may assert criminal jurisdiction, see the previous edition of this work at 1.03–1.21.

European Convention on Extradition 1957

The first major inroad into these weighty requirements came in the form of the European Convention on Extradition 1957 ('the European Convention'), to which the United Kingdom acceded somewhat late in the day in 1990. As between participating states it removed the requirement to provide a prima facie case. Instead, a description of the offending conduct sufficient to satisfy the dual criminality test was all that was required. **1.13**

Commonwealth Scheme

In this regard, the European Convention was significantly in advance of the other main multilateral scheme, the Commonwealth Scheme ('the London Scheme'). Although, having the status of an agreement rather than a multilateral treaty, the London Scheme sought to provide a consistent overarching scheme to be reflected in the domestic extradition laws of Commonwealth states. **1.14**

The emergence at international level of increasingly different schemes of extradition has inevitably meant that domestic legislation has become lengthy and consolidatory in nature. **1.15**

Extradition Act 1989

The Extradition Act 1989—which provided the framework for extradition law for more than a decade until the beginning of 2003—was such an act. It encompassed essentially five extradition schemes: **1.16**

- the European Convention on Extradition;
- the London Scheme;
- treaty countries—primarily the United States (governed by Schedule 1 to the 1989 Act);
- United Nations conventions—section 22 of, and paragraph 15 of Schedule 1 to, the 1989 Act; and
- 'ad hoc' treaties.

Although now largely superseded by the Extradition Act 2003 ('the 2003 Act'), the 1989 Act retains some relevance. Firstly, all requests that were being considered by the courts and/or the Home Office before 1 January 2004 will still be governed by the 1989 Act. Secondly, the 2003 Act replicates some of the terminology used in the 1989 Act, such as 'unjust and oppressive',³ and adopts parts of the 1989 Act (for example, section 6 of the 1989 Act is now contained within the 'bars to extradition' in sections 11 and 79 of the 2003 Act). **1.17**

Against the backdrop of split judicial and executive functions, the emergence of judicial review effectively opened up a second means of challenge to extradition proceedings, thereby adding considerably to the delay and expense of the process. During the main period of operation of the 1989 Act, a fugitive could at the outset seek judicial review of the Home Secretary's authorization of the commencement of proceedings. He could then appeal those proceedings by way of an application for a Writ of *habeas corpus ad subjiciendum* before **1.18**

³ See ss 11(3) and 12(2) of the 1989 Act and ss 14, 25, 82, and 91(2) of the 2003 Act.

finally resorting to judicial review to challenge the Home Secretary's decision to order his extradition.

Extradition Act 2003

- 1.19** The means of reducing the potential for delay, it was believed, lay in part in what has been described as the 'judicialization' of extradition—that is, taking it out of the state-to-state arena and turning it into a transaction between judicial authorities. It is this step change which lies at the heart of the Framework Decision scheme and which is provided for by Parts 1 and 3 of the 2003 Act.
- 1.20** Like its predecessor, the 2003 Act seeks to consolidate a number of schemes (as well as codifying police powers in relation to search and seizure in extradition cases):
- Part 1: Extradition to category 1 territories (gives effect to the European Arrest Warrant (EAW) in export cases);
 - Part 2: Extradition to category 2 territories (covers all bilateral and multilateral treaties);
 - Part 3: Extradition to the United Kingdom from category 1 territories (and limited provisions relating to extradition from category 2 territories);
 - Part 4: Police powers in extradition cases;
 - Part 5: Miscellaneous, including international conventions and ad hoc arrangements.

It entered into force on 1 January 2004.

- 1.21** In addition to implementing the EAW scheme, the 2003 Act seeks to expedite and simplify proceedings under the other schemes by:
- limiting the role of the Home Secretary in Part 2 cases (and thereby reducing the prospect of judicial review proceedings); and
 - removing the prima facie case requirement with respect to requests from countries such as the United States and some Commonwealth and other countries.
- 1.22** There is no doubt that overall processing times for extradition cases and numbers of judicial review applications have been significantly reduced under the 2003 Act. However, the huge numbers of EAW cases now being processed have placed great strain on all stages of what is still a relatively complex and cumbersome procedure. It seems likely that further change will be required.

C. Types of extradition arrangement

- 1.23** Extradition arrangements made between states fall into one of four broad categories.

Bilateral extradition treaties

- 1.24** As the term implies, bilateral extradition treaties regulate extradition between two states only. Many of the United Kingdom's bilateral treaties are now extremely old and, in some cases, moribund. Notwithstanding the trend towards multilateral arrangements, bilateral treaties continue to be used to regulate key parts of the United Kingdom's extradition traffic, the most recent examples being the UK–USA Treaty of 2003 and the UK–UAE Treaty of 2006.

Multilateral arrangements

The term ‘multilateral arrangement’ may refer to a scheme targeted specifically at extradition⁴ or one targeted at a particular type of criminality and which provides for extradition as part of a range of measures to combat that criminality.⁵ **1.25**

Framework schemes

Framework schemes set out at an international level an overall framework for extradition transactions between participating states but leave the detail of implementation to national legislation. Two ‘framework’ schemes are of particular relevance to UK practitioners. **1.26**

The Commonwealth (or ‘London’) Scheme, originally established in 1966, regulates extradition between Commonwealth member states. **1.27**

The European Union Council Framework Decision on the European arrest warrant and surrender procedures between Member States 2002 (‘the Framework Decision’) was originally conceived as a simple ‘backing of warrants’ system. **1.28**

The initial proposal having stalled somewhat, the initiative derived renewed impetus in the aftermath of the World Trade Center attacks and was eventually concluded on 7 June 2002. **1.29**

It sets out a framework for expedited return between judicial authorities of member states. It is based on the high level of mutual trust (‘mutual recognition’) presumed to exist between member states. It is this which allows EAWs to be transmitted and dealt with as between judicial authorities of the states concerned, rather than on the conventional state-to-state basis. **1.30**

The Framework Decision prescribes such matters as the format of the EAW, time limits for conclusion of processes, and a limited number of bars to surrender, but leaves implementation to member states. In some, domestic enabling legislation simply adopts the Framework Decision in its entirety. In others, notably the United Kingdom and Ireland, the domestic legislation itself creates a scheme intended to reflect and implement the Framework Decision at national level. **1.31**

Ad hoc/special arrangements

‘Ad hoc’ extradition arrangements effectively entail a treaty specifically negotiated to secure the return of an individual or group of individuals. As such, they are the modern incarnation of the very earliest extradition arrangements. Unsurprisingly, they are rare. Circumstances warranting their use might include the need to extradite a particularly high-profile criminal or as a precursor to the conclusion of a bilateral treaty. **1.32**

D. Terminology

Like most specialisms, extradition law has generated its own terminology. It may be helpful at this stage to provide a brief explanation of the most frequently encountered terms. **1.33**

⁴ For example, the European Convention on Extradition 1957.

⁵ For example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (‘the Vienna Convention’).

Export extradition

- 1.34** Export extradition is the term used by some practitioners to describe extradition *from* the United Kingdom. Confusingly, such requests are sometimes referred to as *incoming* requests.

Import extradition

- 1.35** Import extradition is the term used by some practitioners to describe extradition *to* the United Kingdom. Such requests are sometimes described as *outgoing* requests.

Provisional arrest

- 1.36** Provisional arrest refers to the facility in most extradition schemes to secure the emergency arrest and detention of a person pending submission of the full extradition request. Arrest and detention is 'provisional' upon the submission of the full request within a given period specified under the relevant scheme. It will be considered in detail later.

Full order request

- 1.37** The term full order request is a throwback to the earlier Extradition Acts under which the Secretary of State had to authorize formal commencement of extradition proceedings with an Authority or Order to Proceed. It continues to be used in the context of proceedings under Part 2 of the 2003 Act to distinguish proceedings initiated following the submission of a formal request for extradition and the issue of the Secretary of State's certificate from those initiated by provisional arrest.

Speciality/specialty

- 1.38** Speciality/specialty is the protection afforded to persons surrendered or extradited. In essence it concerns the principle that, upon return, the surrendered person may only be dealt with for prior offences in respect of which his or her return was ordered. Those matters will hopefully have been the subject of the EAW or extradition request. However, the scope of the order for extradition may be narrower than the EAW or request. The exceptions to the general rule will be considered in detail later.

Veiled extradition

- 1.39** Veiled extradition describes the circumvention of lawful extradition procedures. In this jurisdiction it may be held to amount to an abuse of the court's process resulting in a stay of the criminal proceedings if the person is extradited.

The person

- 1.40** The person is the term introduced by the 2003 Act to describe the subject of extradition proceedings. He or she is also sometimes referred to as 'the requested person'.

Issuing judicial authority (IJA)

- 1.41** Issuing judicial authority (IJA) is the term used by the Framework Decision to describe whichever authority is empowered under a member state's domestic law to issue an EAW. In the United Kingdom, warrants must be issued by a court, but that is not necessarily the case elsewhere.⁶

⁶ See for example *Johannes Enander v The Governor of Her Majesty's Prison, Brixton and The Swedish National Police Board* [2005] EWHC 3036 (Admin), where the Administrative Court rejected a challenge to an EAW issued in a conviction case by a Swedish police inspector in accordance with Swedish law.

Central authority

Central authority is the term used by the Framework Decision to describe whichever authority is designated under domestic law as the central point for receiving/transmitting EAWs. The designated central authority for England, Wales, and Northern Ireland is the Serious Organised Crime Agency. For Scotland it is the Crown Agent. **1.42**

Executing judicial authority is the term used by the Framework Decision to describe whichever authority is designated under domestic law to order surrender on an EAW. In England and Wales this is a District Judge sitting at the City of Westminster Magistrates' Court in London, in Scotland, the Sheriff of Borders and Lothian, and in Northern Ireland, the Recorder of Belfast. **1.43**

The Schengen Information System (SIS)

The Schengen Information System (SIS) is an EU-wide secure database for the collection and exchange of information relating to immigration, policing, and criminal law, for the purposes of law enforcement and immigration control. It supports the practical operation of the Schengen Convention for the abolition of border controls which entered into force in 1995. **1.44**

Currently operated by fifteen EU member states, SIS uses a 'star architecture', with national systems updating a central system based in Strasbourg and vice versa in real time. Types of alert which may be placed on SIS include alerts for persons wanted on EAWs. The placing of such alerts obviates the need for an IJA to direct an EAW to a particular member state and should result in the initiation of extradition proceedings as soon as the person comes to notice. **1.45**

In 2000 agreement was reached on the United Kingdom's partial participation in Schengen: the police and judicial cooperation aspects ('third pillar') but not the immigration and border control aspects ('first pillar'). The United Kingdom's partial participation commenced on 1 January 2005. Technical difficulties have meant however that the United Kingdom does not yet operate SIS. This means that EAWs for persons in the United Kingdom have to be sent here once it has been established that the person is within this jurisdiction. Similarly, all the United Kingdom's outgoing EAWs have to be sent to a particular country rather than lodged by way of a pan-European alert. **1.46**

Rendition

Rendition describes the extradition process between Commonwealth states. It simply means extradition. It is used where there is no formal treaty in existence but participating states have made an 'arrangement' the terms of which are then incorporated into domestic legislation. **1.47**

Surrender

Surrender has been used to describe three distinct processes. Firstly, it was used in the context of extraditions between the United Kingdom and Ireland, prior to the entry into force of the EAW scheme. Until then, all Irish cases ran on the 'backing of warrants' system. Underlying this system was the notion that, as neighbouring states with close ties, it was convenient and appropriate for the United Kingdom and Ireland to adopt an expedited procedure in which the issues to be considered were limited. Thus an Irish request to the United Kingdom would simply involve sending a warrant to the United Kingdom where a police officer would place it before a magistrate for 'backing' (endorsement). The fugitive would then be arrested on the backed warrant and taken before a magistrate who would **1.48**

order his surrender to Ireland subject to the safeguards under section 2 of the Backing of Warrants (Republic of Ireland) Act 1965.

- 1.49** The second type of surrender relates to international criminal courts and tribunals: the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), the United Nations International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC) and the East Timor Special Panel for Serious Crimes (the list has grown and may continue to do so).⁷ Here the legal basis for transferring an individual from the United Kingdom to the jurisdiction of the international court or tribunal is very different from ordinary extradition procedures.
- 1.50** The ICTY and ICTR were established by the United Nations following the atrocities committed in the former Yugoslavia and Rwanda, respectively. As these bodies were created under Chapter VII of the United Nations Charter,⁸ all member states have an obligation to surrender persons indicted by these tribunals and these proceedings take precedence over any other domestic or extradition request from any other country. The obligations and procedures for surrender to these tribunals are contained in the relevant statutory instrument or Order in Council and no reference is made to these bodies in either of the two Extradition Acts. In the event that a request for surrender is received from any United Nations-established tribunal, the relevant Order in Council or statutory instrument will set out the necessary procedure and the crimes. In the case of surrender to the ICTY and ICTR, the UK court may only look at one issue—identity.
- 1.51** The East Timor Special Panel (ETSP) was created by regulations adopted by the United Nations Transitional Administration in East Timor (UNTAET). There is, therefore, no binding obligation on member states to cooperate with it or to comply with its orders and requests. The fact that the ETSP was not created under Chapter VII of the UN Charter does not, however, mean that states will not surrender persons indicted by it. Given the nature of the crimes over which the ETSP exercises jurisdiction, it would be unusual for a state not to comply with a request for a person's surrender, provided that a legal procedure is available.
- 1.52** The ICC was established by treaty at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome on 17 July 1998. It has jurisdiction over the 'core crimes' under international law: genocide, crimes against humanity, and war crimes. The Rome Statute received the requisite sixty ratifications on 11 April 2002 and it entered into force on 1 July 2002. The ICC therefore only has jurisdiction over crimes committed after that date. Requests from the ICC will be given effect by the International Criminal Court Act 2001.
- 1.53** The third type of surrender is return under the EAW system. Interestingly, in its domestic enabling legislation—Parts 1 and 3 of the 2003 Act—the United Kingdom has chosen to avoid the term 'surrender' and to continue to use the term 'extradition'.

⁷ For details as to the practice and procedure of international criminal courts and tribunals, see John RWD Jones and Steven Powles, *International Criminal Practice* (3rd edn, Oxford University Press/Transnational Publishers, 2003).

⁸ The ICTY was created by United Nations Security Council Resolution 827 (1993) and given effect in the UK by SI 1996/716. The ICTR was created by United Nations Security Council Resolution 955 (1994) and given effect in the UK by SI 1996/1296.

E. The key players

The multiplicity of agencies fulfilling different functions in the United Kingdom's extradition processes is the product of three separate jurisdictions, the introduction of the EAW, and the retention of more formal arrangements with countries outside the EU. The functions of the main agencies are summarized below. **1.54**

Serious Organised Crime Agency (SOCA)

SOCA's Fugitives Unit has five principal functions in relation to EAWs: **1.55**

- Certification. Under section 2 of the 2003 Act, it certifies incoming EAWs in respect of persons in England, Wales, or Northern Ireland. Certification means that the person may, without more, be arrested on the basis of the EAW.
- Coordination of EAW arrests.
- Transmission of requests for further information in respect of extradition proceedings in court and receipt of responses thereto.
- Coordination of surrender arrangements in respect of persons whose extradition has been ordered.
- Transmission of EAWs issued in England, Wales, and Northern Ireland to other EU member states.

In due course it will operate the Schengen Information System.

Interpol

Interpol is responsible for the transmission and reception of requests for provisional arrest to countries outside the EU. Its UK office is co-located with SOCA's Fugitives Unit. **1.56**

Home Office

Notwithstanding the 'judicialization' of extradition in cases involving the EAW, the Home Office retains a key role in extradition. In addition to an overall policy and legislative remit in relation to extradition, the Judicial Cooperation Unit has the following responsibilities: **1.57**

- Certification of incoming extradition requests from non-EU countries in respect of persons located in England and Wales. Certification permits the initiation of extradition proceedings.
- Transmission of requests for further information and receipt of responses thereto.
- In Part 2 cases briefing ministers in respect of whether or not to order extradition.

The Metropolitan Police Service (MPS)

The MPS' Extradition and International Assistance Unit ('the Extradition Squad') is responsible for: **1.58**

- The arrest of all persons wanted on EAWs who are located in the Metropolitan Police Authority (MPA) area. EAW arrests outside the MPA area are the responsibility of the relevant local force.
- The arrest of all persons whose extradition is sought under Part 2 of the 2003 Act who are located anywhere in England or Wales.

- Effecting the handover of persons whose extradition has been ordered from England, Wales, or Northern Ireland, whether or not they were originally arrested in the MPA area.
- Escorting back to the United Kingdom persons whose extradition has been ordered from non-EU countries.

Crown Prosecution Service (CPS)

- 1.59** The Extradition Unit of the Special Crime Division of CPS HQ represents the issuing judicial authority or requesting state in extradition proceedings before the English courts. Its role is considered in greater detail at F (below).

Crown Office and Procurator Fiscal Service (COPFS)

- 1.60** COPFS performs a similar function to CPS in providing representation for issuing judicial authorities/requesting states in extradition proceedings before the Scottish courts. The important distinction is that COPFS also performs the certification function in relation to EAWs carried out by SOCA in respect of cases in England, Wales, and Northern Ireland.

Crown Solicitor's Office Northern Ireland (CSONI)

- 1.61** The CSONI provides representation for issuing judicial authorities/requesting states in extradition proceedings before the Northern Ireland courts.

City of Westminster Magistrates' Court (CWMC)

- 1.62** All first instance extradition hearings in respect of persons arrested in England and Wales are conducted before one of a number of specially authorized District Judges sitting at CWMC.

Belfast Recorder's Court

- 1.63** All first instance extradition hearings in respect of persons arrested in Northern Ireland are conducted in Belfast before the Recorder of Belfast.

Court of the Sheriff of Borders and Lothian

- 1.64** All first instance extradition hearings in respect of persons arrested in Scotland are conducted in Edinburgh before a Sheriff of Borders and Lothian.

Administrative Court

- 1.65** All statutory extradition appeals from first instance decisions of the City of Westminster Magistrates' Court and/or the Home Secretary are heard by the Administrative Court sitting in London. The Administrative Court also deals with extradition-related judicial review applications. Most appeals are determined by a Divisional Court, comprising a Lord Justice of Appeal and a High Court Judge. However against a backdrop of a relentlessly increasing caseload a number of matters deemed to be suitable are being now heard by a single High Court Judge. Appeals in Northern Ireland are heard by the Queen's Bench Division of the Northern Ireland High Court and in Scotland by the High Court of Justiciary.

F. The role of the Crown Prosecution Service

- 1.66** Originally, requesting states were represented in extradition proceedings before the English courts by the Attorney General, reflecting the state-to-state nature of extradition requests.

By the 1930s however, much of the day-to-day conduct of the work had been informally devolved from the Attorney to the Director of Public Prosecutions, although there are recorded instances of the Attorney personally conducting advocacy in such cases even as late as the 1950s.⁹ However, no formal transfer of extradition functions from the Attorney to the Director took place until 1996. **1.67**

The role was finally put on a statutory footing by section 190 of the 2003 Act which amended the list of the Director's functions in section 3(2) of the Prosecution of Offences Act 1985 to include: **1.68**

- The conduct of any extradition proceedings.
- The provision of such advice as he considers appropriate in relation to actual or proposed extradition proceedings.

Similar provision is made in respect of the Lord Advocate in Scotland and the Crown Solicitor and Director of Public Prosecutions in Northern Ireland by sections 191 and 192 of the 2003 Act, respectively. **1.69**

Although the Director is obliged to act in extradition proceedings and will do so automatically, the issuing judicial authority or requesting state may elect to instruct its own representation at its own cost. **1.70**

The CPS' export extradition caseload is allocated to specialist extradition lawyers in the Extradition Unit of its Special Crime Division in London. **1.71**

From time to time the nature of the role has been considered by the courts and it is now possible to discern a number of principles. **1.72**

First and foremost, when conducting extradition proceedings, the CPS is not acting in its ordinary capacity of domestic prosecutor. Accordingly, it has no power of its own motion to discontinue those proceedings because they are not a prosecution within the meaning of the Prosecution of Offences Act 1985.¹⁰ **1.73**

Rather, the relationship between the CPS and the requesting authority or state is akin to that of a solicitor and client.¹¹ As a result, the CPS regards all its advices to the 'client' authority or state as covered by legal professional privilege. **1.74**

In the context of such a relationship it is hardly surprising that the Administrative Court appears to have concluded that CPS lawyers (or counsel instructed by them) may on occasion draft extradition papers for use in English proceedings.¹² Whether it would be proper for them to draft the whole EAW or extradition request is less certain and to draft papers **1.75**

⁹ *R v Governor of Brixton Prison ex p Kolczynski* [1955] 1 QB 540.

¹⁰ *R v Director of Public Prosecutions ex p Thom* [1996] Crim LR 116, followed in the context of the 2003 Act in *Government of Germany v Kleinschmidt* [2005] EWHC 1373 (Admin).

¹¹ *Ibid.*

¹² *R (on the application of the Government of the USA and the Senior District Judge, Bow Street Magistrates' Court) v Stanley and Beatrice Tollman*; *R (on the application of the Central Examining Court, Madrid and the District Judge, Bow Street Magistrates' Court) v Sander and ors* [2006] EWHC 2256 (Admin) per Phillips LCJ at para 126.

without the prior or subsequent knowledge and approval of the requesting authority or state inevitably risks an abuse of process challenge.¹³

- 1.76** In the event that a domestic prosecution on the basis of the requested conduct is also being considered, the CPS will ensure that ‘Chinese walls’ are put in place to separate its domestic prosecutors from its extradition lawyers, thereby avoiding any potential for conflict.¹⁴
- 1.77** Although the CPS will usually follow the instructions of the requesting authority or state, circumstances might exceptionally arise where a conflict between those instructions and its public role require the CPS to consider whether to withdraw from the case.¹⁵
- 1.78** When carrying out its export extradition functions, the CPS remains a public authority for the purposes of section 6 of the Human Rights Act 1988. As a result, serious default by a CPS official in doing so can warrant the Home Secretary making an order for compensation under his ex gratia compensation scheme.¹⁶

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¹³ *Central Examining Court of the National Court of Madrid v City of Westminster Magistrates’ Court* [2007] EWHC 2059 (Admin).

¹⁴ *R (on the application of Syed Talha Ahsan) v The DPP and the Government of the United States of America* [2008] EWHC 666 (Admin).

¹⁵ *R (on the application of Lotfi Raissi) v Secretary of State for the Home Department* [2007] EWCA Civ 243 per Auld LJ at para 48.

¹⁶ *Ibid.*