

Extradition and transit cases—a positive change

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Corporate Crime analysis: Jasvinder Nakhwal, partner in business crime at Peters and Peters, with William Green, associate, and legal researcher Craig Hogg, explains the key proposals in the government's draft codes of practice for extradition and transit cases, and anticipates a broadly positive response from practitioners.

Original news

Draft extradition codes of practice issued for comment, LNB News 02/11/2015 72

Revised codes of practice for extradition (the Code) and new codes of practice for extradition transit cases (the Transit Code) have been issued for consultation by the Home Office. Views were sought on whether the draft codes are correct and applicable for operational demands, while protecting the rights of individuals sought for extradition. The consultation closed on 30 November 2015.

Why has the consultation been started?

Transit cases are those where a person is in the process of being extradited from one non-UK territory to another, and passes through the UK, on their way to the territory to which they are being extradited.

Given the proposed revisions to the Code, and the proposed new Transit Code, the consultation sought views on whether the draft codes are correct and applicable for operational demands, while protecting the rights of individuals sought for extradition.

The first edition of the Code entered into force on 1 January 2004, pursuant to section 173 of the Extradition Act 2003 (EA 2003). It is modelled on, and supplements, the Police and Criminal Evidence Act 1984 (PACE 1984), and governs the exercise of police and customs officers' powers in extradition cases in England, Wales and Northern Ireland.

The Code has been revised to account for amendments made to EA 2003 by the Police and Justices Act 2006, the Policing and Crime Act 2009, the Crime and Courts Act 2013 and the Anti-Social Behaviour, Crime and Policing Act 2014 (ABCPA 2014), as well as amendments to PACE 1984.

The Transit Code is entirely new, introduced on account of new transit provisions in EA 2003, introduced through ABCPA 2014, s 168 and issued under EA 2003, s 189D.

What are the key proposals?

The key proposals are as follows:

The Code

The language of the Code has, in various sections, been modified from the first edition, for concision, clarity, or to make direct reference to provisions of EA 2003, legislation amending EA 2003, or PACE 1984. The Code has also been extended to be made available at ports, in addition to police stations covered by the existing code.

Further key proposals include:

Code B--searches, seizure, retention, use and delivery

- o deleting the rule that EA 2003 searches may only be undertaken for the purposes of obtaining evidence of the extradition offence for use in the prosecution of the person accused (and not merely to investigate crimes on behalf of the requesting authority or territory)
- o searchable 'premises' to include renewable energy structures as defined in Part 2 of the Energy Act 2004
- o before granting a search warrant, the justice of the peace must be satisfied that there are reasonable grounds for suspecting that, among other things, there is material on the premises that is admissible for the

- o extradition offence, 'on the assumption that the conduct constituting the extradition offence would constitute an offence in that part of the UK'. The same wording is added to the test for granting production orders
- o material seized or produced under EA 2003, ss 156-157 or 160-164 (warrants and orders) is only to be retained for 'as long as is necessary'
- o police may not deliver seized goods to the requesting authority until the person whose extradition has been ordered is 'physically surrendered' to representatives of the requesting territory (rather than when all legal proceedings relating to the extradition have been completed). Inspection by appropriate representatives of the requesting authority or territory is permitted having regard to the 'same factors as would fall to be considered in a decision to share evidence or police information with overseas authorities'
- o after the extradition order has been made, and extradition proceedings completed, a police officer must decide whether to deliver material under EA 2003, s 172, again having regard to 'the same factors as would fall to be considered in a decision to share evidence or police information with overseas authorities'

Code C--arrest, detention and treatment

- o the arresting police officer need not be in possession of either a Part 1 warrant or, now under the new Code, a 'copy of it' at the time of arrest under EA 2003, s 3, or EA 2003, ss 71 and 73 (arrest warrant following extradition request and provisional warrant, respectively)
- o a custody officer is now to record on the custody record, if known, whether the person has refugee status, or 'other form of protection based leave to remain in the UK'
- o detained persons must be provided with written copies of documents, encompassing their legal rights, arrangements for legal advice, the caution, a fair processing notice and a copy of the form setting out the stages of the extradition process, in a language they understand. Where the documents cannot immediately be provided, the information in the documents may be given through an interpreter and a written translation of the documents provided without undue delay

Code D--identification

- o the public sector equality duty under section 149 of the Equality Act 2010 has been introduced into Code D with respect to the identification of persons detained
- o the use of fingerprints and samples under EA 2003, s 166 has been widened to encompass national security grounds, for the purposes of a terrorist investigation, and the identification of deceased persons
- o fingerprints and samples may now only be retained until the point at which that person is physically surrendered to the representatives of the requesting territory or authority, or in other cases, until final determination of proceedings in the requested person's favour (including any appeal). Destruction must then occur as soon as practicable

Annex A--arrest

- o for provisional arrest under Part 2 arrest warrants, the judge must now have 'reasonable grounds for believing' that, in addition to the current Code factors, there is evidence that would justify the issue of the warrant for the arrest of a person at large after a conviction, within the justice's jurisdiction

Annex B--custody officer checklist

- o where appropriate, a Part 1 arrest warrant and certificate will need to be translated into a language that the detainee understands
- o rights to communicate with a High Commission, Embassy or Consulate may now be determined by reference to web pages of the Foreign and Commonwealth Office (FCO) or by telephone, email or letter

Annex C--summary of UK extradition process

- o persons arrested under EA 2003, ss 71 and 73 should be informed of the right to make an out-of-time application for permission to appeal on human rights grounds

Annex D--written notice to detained person

- o provision for the right to request an interpreter and to have certain documents translated into a language that they understand, when giving notice

Transit Code

These new provisions relate to persons in transit through any part of the UK, from one non-UK territory to another during the process of extradition, and include:

- o a requirement that the Code is available for consultation at each port and other location where a person is in transit
- o guidance for escorting persons where the relevant authority in the UK has issued a transit certificate under EA 2003, s 189A. Searches may be undertaken using reasonable force, seized items must be retained and returned
- o once the relevant UK authority has issued a transit certificate, persons in transit may also be put into custody in places other than police stations. Annex A of the Transit Code provides a risk assessment which must be carried out in such cases
- o to facilitate transit through the UK, a constable may, if necessary, take a person into custody at a police station. It is for the constable to determine whether police station custody is necessary. The constable should make any necessary arrangements with immigration authorities, open a custody record as soon as possible recording specific information relating to the extradition and transit, assess the person's understanding of English, and arrange an interpreter as necessary. As far as practicable, a person in transit should not be kept in police station custody for more than 72 hours. Where it is apparent that onward travel from the UK cannot occur within 72 hours, the custody officer should contact the relevant UK authority so that alternative arrangements can be made
- o where a person in transit makes an unscheduled arrival in the UK, EA 2003, s 189B applies. In these circumstances, a transit certificate will not have been issued at the time of arrival. On these occasions, a constable may take the person into custody, at a police station or elsewhere, to facilitate transit through the UK. Once enquiries have been made of the relevant foreign authorities, the UK authority may issue a transit certificate. Once a transit certificate has been issued, the constable is deemed to have taken the person into custody under EA 2003, s 189A(2)

What effect would the proposals have? What should practitioners be concerned or pleased about?

The proposed Code, if adopted, would necessitate a change to police and customs officer procedure, and impact upon the advice that practitioners provide to extradited persons.

It is expected that the Code will be broadly welcomed. Practitioners are likely to be pleased to see the draft Code made available at ports, the principle of double dual criminality being stated in the context of search warrants and production orders, and the requirement that goods seized and produced are retained only for 'as long as is necessary'.

Increased protections are also found in Code C, which requires refugee status to be noted on the custody record, and documents to be provided to the detained person, in a language that they understand (with associated safeguards in the Annex B checklist). Specific and separate guidance for transit cases should also be welcome, as it has hitherto not existed.

Some concern may be expressed over Code D proposals that widen the use of fingerprints and DNA samples to encompass national security grounds and for the purposes of a terrorist investigation, as well as the identification of deceased persons.

In any event, responses to the public consultation, which closed on 30 November 2015, will be illuminating.

Interviewed by Jenny Rayner.

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