

# ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 12: Extradition

##### *Section 155: Date of extradition hearing*

461. This section amends section 8 of the Extradition Act 2003 (“the 2003 Act”). That section obliges the judge to fix a date for the extradition hearing to begin, inform the person of the contents of the warrant, give the person information about consent and remand the person in custody or on bail. The date fixed for the extradition hearing to begin must not be later than the end of the “permitted period” which is 21 days starting with the date of the arrest. Section 155 inserts a new subsection (4A) into section 8 of the 2003 Act, the effect of which is that in cases where extradition proceedings have been adjourned because the person has been charged with an offence in the UK or is in custody serving a sentence of imprisonment or other form of detention in the UK, the permitted period is extended by the length of the adjournment.

##### *Section 156: Extradition barred if no prosecution decision in requesting territory*

462. *Subsection (2)* inserts new section 12A into the 2003 Act, which provides for a new bar to extradition in Part 1 cases on the grounds of “absence of prosecution decision”. This is intended to ensure that a case is sufficiently advanced in the issuing State (that is, there is a clear intention to bring the person to trial) before extradition can occur, so that people do not spend potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence.
463. New section 12A will ensure that, in cases where the person is wanted to stand trial, extradition can only go ahead where the issuing State has made a decision to charge the person and a decision to try the person (or is ready to make those decisions). Where it appears to the judge, from considering all relevant information and evidence, that there are reasonable grounds for believing that a decision to charge and a decision to try have not both been taken in the issuing State (and that the person’s absence from that State is not the only reason for that), extradition will be barred unless the issuing State can prove that those decisions have been made (or that the person’s absence from that State is the only reason for the failure to take the decision(s)). The courts have interpreted the provisions of the 2003 Act in a “cosmopolitan” way,<sup>1</sup> mindful of the differences in criminal procedure in other Member States, and it is anticipated that the courts will apply the same approach to the interpretation of section 12A and, in particular, the concepts “decision to charge” and “decision to try”.
464. *Subsection (1)* makes a consequential amendment to section 11(1) of the 2003 Act which requires a judge to consider whether any of the bars to extradition applies.

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<sup>1</sup> *Asztalos v Szekszard City Court Hungary* [2010] EWHC 237 (Admin)

*Subsection (3)* sets out transitional arrangements for cases where a Part 1 warrant (within the meaning of the 2003 Act) has been issued before section 156 is brought into force.

### **Section 157: Proportionality**

465. *Subsection (2)* inserts new section 21A into Part 1 of the 2003 Act, which will require the courts, in cases where an EAW has been issued in order to prosecute a person for an offence, to consider whether extradition would be (i) disproportionate, and (ii) compatible with the Convention rights (within the meaning of the Human Rights Act 1998). Human rights considerations have hitherto been dealt with in Part 1 cases under section 21, but following the amendments made in the Act (including the amendments to section 21 made by paragraph 105 of Schedule 11) that section will only deal with Part 1 cases where the person is unlawfully at large following conviction for an offence, whilst new section 21A will deal with Part 1 cases where the person is wanted for the purpose of prosecution for an offence. Under new section 21A, in deciding whether extradition would be disproportionate, the judge will have to take into account (so far as the judge thinks appropriate) the seriousness of the conduct, the likely penalty and the possibility of the relevant foreign authorities taking less coercive measures than extradition. The judge will not be able to take into account any other matters. If the judge decides that extradition would be disproportionate, the judge will have to discharge the person.
466. *Subsection (1)* makes a consequential amendment to section 11(5) of the 2003 Act to refer to the new section 21A. As a result, in a case where the EAW has been issued in order to prosecute the person for an offence, where a judge concludes that none of the bars to extradition listed in section 11(1) applies, he or she must proceed under new section 21A to consider the issues of human rights and proportionality.
467. *Subsection (3)* inserts new subsections (7A) to (7C) into section 2 of the 2003 Act to provide for the designated authority (currently the National Crime Agency) to operate an administrative proportionality filter in cases where the Part 1 warrant has been issued for the purpose of prosecuting the person for an offence. The aim is to prevent the most disproportionate cases from reaching court. It provides that the designated authority may not issue a certificate under section 2 of the 2003 Act where it is clear that a judge proceeding under section 21A would be required to order the person's discharge on proportionality grounds. In deciding this question, the designated authority must apply guidance issued by the Lord Chief Justice for England and Wales, with the concurrence of the Lord Justice General of Scotland and the Lord Chief Justice of Northern Ireland, for this purpose.
468. *Subsection (4)* requires that in the event that a judge has to consider whether section 21A is compatible with the law of the European Union, the judge must have regard to Article 1(3) of the EAW Framework Decision, which sets out that that Decision shall not have the effect of modifying the obligation to respect fundamental rights and legal principles as enshrined in Article 6 of the Treaty on the European Union. *Subsection (5)* sets out transitional arrangements for circumstances where a Part 1 warrant has been issued before section 157 comes into force.

### **Section 158: Hostage-taking considerations**

469. *Subsection (1)* repeals section 16 of the 2003 Act. Section 16 provides that, in Part 1 cases, a person's extradition is barred if the territory requesting extradition is a party to the International Convention against the Taking of Hostages, which was opened for signature at New York on 18 December 1979, and certain conditions apply. This ground of refusal is not included in the EAW Framework Decision and, as such, the repeal of section 16 of the 2003 Act will bring the law in the UK fully into line with the EAW Framework Decision.
470. *Subsection (2)* makes a consequential amendment to section 11(1), which lists the various bars to extradition, removing the reference to section 16. *Subsection (3)* sets

out transitional arrangements for circumstances where a Part 1 warrant has been issued before section 158 is brought into force.

### ***Section 159: Request for temporary transfer etc***

471. This section inserts new section 21B (Request for temporary transfer etc) into the 2003 Act. This new section transposes Articles 18 and 19 of the EAW Framework Decision.
472. New section 21B applies in Part 1 cases where the EAW has been issued for the purposes of prosecuting the person for an offence. It will allow, with both the requested person's and the issuing State's consent, the person's temporary transfer to the issuing State or for the person to speak with the authorities in that State whilst he or she remains in the UK (for example, by video link). Either party will be able to make a request to this effect (new section 21B(2) and (3)). The judge must, if the judge thinks it necessary to allow the other party to consider whether to consent to a request, adjourn proceedings for up to seven days (new section 21B(4)). If that party gives consent, the judge must adjourn proceedings for as long as seems necessary to allow the temporary transfer or conversation to take place (new section 21B(5)(b)). A person will not be able to make a request for temporary transfer if he or she has already consented to a request by the issuing State for temporary transfer (and likewise as regards speaking with the authorities of the issuing State whilst remaining in the UK) (new section 21B(7)). Similarly, a person will only be able to make one request for temporary transfer (and one request to speak with the authorities of the issuing State whilst remaining in the UK) (new section 21B(8)).
473. The effect of this provision will, in some cases, be likely to be the withdrawal of the EAW; for example, in cases where, having spoken with the person, the issuing State decides that he or she is not the person they are seeking or that he or she did not in fact commit the offence in question. In other cases, where extradition goes ahead, the person may spend less time in pre-trial detention, as some of the questions which need to be asked and the processes which need to happen ahead of the trial could take place during or as a result of the temporary transfer or conversation.

### ***Section 160: Appeals***

474. *Subsections (1), (3) and (5)* amend sections 26 (appeal against a judge's decision to order extradition in Part 1 cases), 103 (appeal against a judge's decision to send a case to the Secretary of State in Part 2 cases) and 108 (appeal against decision of the Secretary of State to order extradition in Part 2 cases) of the 2003 Act respectively. *Subsections (2), (4) and (6)* amend sections 28 (appeal against discharge at extradition hearing in Part 1 cases), 105 (appeal against discharge at extradition hearing in Part 2 case) and 110 (appeal against discharge by Secretary of State in Part 2 cases) of the 2003 Act respectively.
475. The effect of the amendments is two-fold. First, they make the requested person's and requesting State's rights of appeal under each of these sections lie only with the leave of the High Court. Second, they set out that the High Court must not refuse to entertain an application for leave to appeal by the requested person solely because it has been submitted outside the normal time period, if the person did everything reasonably possible to ensure that the notice was given as soon as it could be. Normally, notice of appeal must be given within seven days of the extradition order being made in Part 1 cases, and within 14 days of the date on which the Secretary of State informs the person of the order in Part 2 cases.
476. *Subsection (5)* also makes a technical change to section 108 of the 2003 Act to ensure the above amendment to that section takes into account changes made to that section by the Crime and Courts Act 2013.

***Section 161: Judge informed after extradition hearing or order that person is charged with offence or serving sentence in United Kingdom***

477. This section inserts new sections 36A, 36B, 118A and 118B into the 2003 Act.
478. The purpose of these new sections is to ensure that where a judge is informed after the end of an extradition hearing (in a Part 1 case) or after extradition has been ordered (in a Part 2 case) that the person to be extradited has been charged with an offence in the UK, his or her extradition *must* be postponed until the conclusion of the UK proceedings. Similarly, if a judge is informed after the end of the hearing or after extradition has been ordered that the person is serving a sentence of imprisonment or another form of detention in the UK, the judge *may* postpone extradition until the person is released from detention. At present, if, for example, a person is on bail pending his or her surrender to another country and he or she commits a crime in the UK before extradition, he or she must still be extradited no matter how serious the offence is. After that, the UK can either seek the person's temporary surrender or wait until the person has served the sentence in the requesting State. The new provision means that, in such cases, the domestic case must be dealt with first. This is in line with the legislation that applies where such circumstances come to light before the end of the extradition hearing or before extradition is ordered.

***Section 162: Asylum etc***

479. *Subsections (1) and (2)* amend sections 39 and 121 of the 2003 Act respectively, to ensure that a person who has made an asylum claim (either before or after the initiation of extradition proceedings) must not be extradited before that claim has been finally determined. Sections 39 and 121 currently apply only as regards an asylum claim made after the start of extradition proceedings.
480. *Subsection (3)* amends section 93 of the 2003 Act (which deals with the Secretary of State's consideration of Part 2 cases, once the judge has sent the case to the Secretary of State). It gives the Secretary of State the power to discharge the person if the person has been granted: (i) refugee status, or (ii) leave on the ground that it would be a breach of Article 2 or 3 of the European Convention on Human Rights to remove him or her to the requesting territory. This mirrors the powers which the Secretary of State has under section 70 of the 2003 Act, which applies at the initial stage of proceedings (that is, when the Secretary of State receives a request and must decide whether to issue a certificate). This amendment will ensure that people who are granted status or leave after the certificate has been issued can be discharged.

***Section 163: Consent to extradition not to be taken as a waiver of speciality rights***

481. This section repeals sections 45(3) and 128(5) of the 2003 Act.
482. The effect of these repeals will be to ensure that when a person consents to his or her extradition, he or she does not thereby lose the benefit of any speciality protection he or she would otherwise have. Speciality protection ensures a person is, in general, only proceeded against for the offence or offences listed in the extradition request. At present, sections 45(3) (for Part 1 cases) and 128(5) (for Part 2 cases) provide that a person waives speciality protection when he or she consents to extradition. Removing this waiver will enable those who wish to be extradited speedily to be surrendered quickly without risking being tried for any other alleged offences. It is anticipated that this will increase the number of people who consent to extradition at their initial hearing, reducing the costs associated with onward legal challenge.

***Section 164: Definition of "extradition offence"***

483. *Subsection (1)* substitutes new sections 64 and 65 of the 2003 Act for the existing ones. Section 64 defines "extradition offence" for Part 1 cases where the person has not been sentenced. Section 65 defines "extradition offence" for Part 1 cases where the

person has been sentenced. *Subsection (2)* inserts new subsection (1A) in section 66 of the 2003 Act (which supplements sections 64 and 65). *Subsection (3)* substitutes new subsections (1) to (5) in section 137 of the 2003 Act for the existing ones. Section 137 defines “extradition offence” for Part 2 cases where the person has not been sentenced. *Subsection (4)* inserts new subsection (7A) into that section. *Subsection (5)* substitutes new subsections (1) to (5) in section 138 of the 2003 Act for the existing ones. Section 138 defines “extradition offence” for Part 2 cases where the person has been sentenced. *Subsection (6)* inserts new subsection (7A) into that section.

484. These amendments to the 2003 Act will, first, simplify the existing definitions of “extradition offence”, which are long and complex.
485. Second, they will make clear that in all cases where part of the conduct took place in the UK, that conduct must be criminalised in the UK for extradition to be possible. “Dual criminality” is already a requirement in all cases except those where the conduct falls within the European Framework List (that is, the list of conduct set out in Schedule 2 to the 2003 Act). The changes simply clarify that even in European Framework List cases, *where part of the conduct took place in the UK*, dual criminality is required.
486. Third, they will set out that, in Part 1 cases, where the conduct takes place outside the issuing State, there is no requirement that in corresponding circumstances equivalent conduct would be punishable, under UK law, with imprisonment or another form of detention for a term of 12 months or a greater punishment. The substituted sections 64(4) and 65(4) deal with these cases. At present, these subsections require that the conduct be punishable under UK law with imprisonment or another form of detention for a term of 12 months or a greater punishment. But that requirement does not appear in the EAW Framework Decision. It will remain the case, however, that the conduct must constitute an extra-territorial offence under UK law.

***Section 165: Extradition to the United Kingdom to be sentenced or to serve a sentence***

487. **Section 165** substitutes a new subsection (2A) in section 142 of the 2003 Act. It sets out the test for the issue of a warrant under Part 3 of the 2003 Act, in respect of a person who has been convicted of an extradition offence in the UK. New subsection (2A) removes the requirement for the person to be “unlawfully at large”, instead requiring that extradition is being sought for sentencing or serving a custodial sentence and that either a domestic warrant has been issued or the person may be arrested without warrant.

***Section 166: Detention of extradited person for trial in England and Wales for other offences***

488. **Section 166** inserts a new section 151B into the 2003 Act to implement Article 3 of the Fourth Additional Protocol to the European Convention on Extradition, a multilateral treaty that governs extradition between Council of Europe Member States, other than where the EAW applies. The UK Government signed the protocol on 6 January 2014. New section 151B provides that a person may be detained whilst a request to waive the rule of speciality is being considered by the State that originally extradited him or her to the UK, provided certain conditions are met. Both States must have made the relevant declaration under the European Convention on Extradition and those declarations must still be in force (new section 151B(2)(a)). The Secretary of State must also give notification of the date on which detention is to begin and such notification must be explicitly acknowledged by the other State (new section 151B(2)(c)). The period of detention may not exceed 90 days beginning on the day the request to waive the rule of speciality is received (new section 151B(4)).

***Section 167: Proceedings on deferred warrant or request etc***

489. This section amends sections 180 and 181 of the 2003 Act to ensure that in cases where there are competing extradition requests and one case has been deferred pending the

outcome of the other, a judge can only resume proceedings in the deferred cases, or order that extradition is no longer deferred, in cases where the competing request has been disposed of in the requested person's favour.

***Section 168: Non-UK extradition: transit through the United Kingdom***

490. This section inserts new sections 189A to 189E into the 2003 Act.
491. New section 189A makes provision for the issue of certificates to facilitate the transit through the United Kingdom of a person who is being extradited from one territory to another territory (where neither of those territories is the United Kingdom). Where the destination territory is a Part 1 territory, it will be for the National Crime Agency to issue a certificate. In any other case, it will be for the Secretary of State to issue a certificate. A certificate will authorise a constable or other authorised officer to escort the person from one form of transportation to another, to take the person into custody to facilitate the transit and/or to search the person (and any item in his or her possession) for (and seize) any item which the person may use to cause physical injury (or, in a case where he or she has been taken into custody, to escape from custody).
492. New section 189B deals with cases where a person is being extradited from one territory to another (where neither of those territories is the United Kingdom) and he or she makes an unscheduled arrival in the United Kingdom. It allows a constable to take the person into custody, for a maximum period of 72 hours, to facilitate the transit of the person through the United Kingdom. There are similar search and seizure powers as appear in new section 189A.
493. New section 189C sets out that the powers in sections 189A and 189B include power to use reasonable force where necessary. It also makes clear that the search powers in those sections do not allow a constable or other authorised officer to require a person to remove any clothing other than an outer coat, jacket, headgear or gloves. Finally, it allows any item seized under those sections to be retained while the person is in transit.
494. New section 189D places a duty on the Secretary of State to issue a code of practice governing the exercise of the powers in new sections 189A and 189B and the retention, use and return of anything seized under those sections. The Secretary of State is required to publish the code in draft form, consider any representations made on the draft and, if considered appropriate, amend the code accordingly. The Secretary of State can then bring the code into effect by order which, by virtue of the amendment made to section 223 of the 2003 Act by paragraph 122 of Schedule 11, is subject to the affirmative resolution procedure. The Secretary of State may revise any such code, using the same procedures as described above. Failure by a police constable or other authorised officer to adhere to any code issued under new section 189D will not of itself make the officer liable under either criminal or civil proceedings. A code of practice made under this section can be admitted in court as evidence. Finally, new section 189D makes provision to deal with the case where the Secretary of State publishes a draft code before the section comes into force.
495. New section 189E defines various terms used in new sections 189A to 189D. Subsection (1) defines an "authorised officer" as a constable or a person who is of a description specified by the Secretary of State by order. Any such order would be subject to the affirmative resolution procedure (see paragraph 122 of Schedule 11).

***Section 169: Extradition to a territory that is party to an international Convention***

496. **Section 169** substitutes a new section 193 of the 2003 Act to enable the Secretary of State to designate international Conventions and specify conduct in relation to those conventions. The original section 193 allowed the Secretary of State to designate territories which are parties to Conventions. However, as territories frequently sign up to Conventions, the section proved difficult to operate.

497. Under the new section 193, the Secretary of State will only be able to designate Conventions to which the UK is a party and only specify conduct to which the relevant Convention applies. In the event that a party to one of those Conventions then made an extradition request for a person, it would be open to the Secretary of State to certify that: (i) the requesting State was a party to a Convention designated under section 193; and (ii) the conduct in the request was conduct specified in the designation order for the relevant convention. The effect would be that the 2003 Act would apply to the person's extradition as if the requesting territory were a territory designated under Part 2 of the Act (with certain modifications, as set out in section 193(4)). Examples of Conventions that could be designated include the UN Conventions on terrorism, the UN Convention against corruption and the UN Convention on transnational organised crime.

***Section 170: Electronic transmission of European arrest warrant etc***

498. This section amends section 204 of the 2003 Act, which makes provision for the information contained in an EAW to be transmitted to the United Kingdom electronically. This is intended to support the implementation of the second generation Schengen Information System ("SIS II"). Under SIS II, the designated authority (currently the National Crime Agency) will be required to consider whether to issue a certificate under section 2 of the 2003 Act on the basis of the information received electronically under the SIS II process. This information will be an English language summary of the information contained within the EAW, together with the original language version of the EAW itself. The amendments to section 204 of the 2003 Act allow certification to take place on the basis of this English language summary and the original language version of the EAW, rather than a translation of the full contents of the EAW.

***Section 171: Discount on sentence for time spent in custody awaiting extradition: England and Wales***

499. This section will ensure that time served in custody prior to extradition from a Part 1 territory, and purely for the purposes of extradition, is counted as time served towards the UK sentence in all situations, as is required under Article 26 of the EAW Framework Decision. As it stands, where a person who was convicted and sentenced in the UK, but who is subsequently unlawfully at large in another EU Member State, the Secretary of State for Justice has discretion as to whether to count time awaiting extradition against the sentence. Section 171 removes the Secretary of State's discretion.
500. **Section 171** inserts new subsection (3A) into section 49 of the Prison Act 1952. The new subsection provides that if a person who was unlawfully at large has been extradited to the UK from a Part 1 territory for the purpose of serving a sentence, the Secretary of State must exercise his power to count the time spent in custody awaiting extradition against the sentence. However, only time spent in custody solely awaiting extradition can be credited. If the requested person was also held prior to extradition for another reason, for example, on a domestic charge, this will not be credited. In all other situations, in relation to Part 1 territories, time served in custody awaiting extradition is already counted against the UK sentence.

***Section 172: Discount on sentence for time spent in custody awaiting extradition: Scotland***

501. **Section 172** makes corresponding provision for Scotland, by way of amendments to section 210 of the Criminal Procedure (Scotland) Act 1995. Section 210 of that Act makes provision for taking into account time spent in custody awaiting extradition to the United Kingdom, in cases where a person is extradited to be sentenced. As amended, it will refer to the 2003 Act rather than the Extradition Act 1989 as at present. It only applies in cases covered by Part 1 of the 2003 Act.

***Section 173: Discount on sentence for time spent in custody awaiting extradition: Northern Ireland***

502. **Section 173** makes provisions for Northern Ireland similar to those that section 171 makes for England and Wales. In Northern Ireland law, section 38 of the Prison Act (Northern Ireland) 1953 already provides that in cases where a person is sentenced *prior* to extradition from an EU Member State, a discount on sentence is given for time spent in custody awaiting extradition. Section 173 of the Act provides that a discount will also be given where the person is sentenced *post*-extradition.

***Section 174: Criminal Procedure Rules to apply to extradition proceedings etc***

503. This section will make appeals to the High Court in extradition cases subject to the Criminal (rather than Civil) Procedure Rules. This will mean that the whole extradition process is governed by the same procedure rules. Extradition hearings before a District Judge are already conducted according to the Criminal Procedure Rules.
504. *Subsection (1)* amends section 68 of the Courts Act 2003 which defines a criminal court for the purposes of determining those courts to which Criminal Procedure Rules are to apply; the amendment includes within the definition of a criminal court the High Court when exercising its jurisdiction under the 2003 Act. *Subsection (2)* amends section 1 of the Civil Procedure Act 1997 so as to exclude the High Court when exercising its jurisdiction under the 2003 Act from the list of courts subject to the civil procedure rules. *Subsection (3)* inserts new subsection (9) into section 157 of the 2003 Act so as to provide that criminal procedure rules may make provision about an application for a production order in an extradition case. Such an order, which is made by a Judge, requires the person to whom it is directed to give an investigator access to material that is relevant to an investigation but which the person could not otherwise lawfully disclose, for example, banking or other financial records. *Subsection (4)* inserts new subsection (10) in section 160 of the 2003 Act so as to provide that civil procedure rules may make provision about an application for and issue of a search and seizure warrant relating to special procedure material or excluded material in an extradition case. In summary, “excluded” material means personal records, medical samples and material created by a journalist, which someone holds in confidence and which relates to someone else; and “special procedure” material means other material created for professional or business purposes which someone holds in confidence.