CRIMINAL PROCEDURE RULES PART 17: EXTRADITION

INVITATION TO COMMENT ON PROPOSED NEW RULES

RESPONSE TO CONSULTATION ON BEHALF OF THE

CRIMINAL BAR ASSOCIATION

Introduction

1. The Criminal Bar Association (CBA) represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest Specialist Bar Association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Executive summary

2. The Criminal Procedure Rule Committee ("CPRC") is considering a proposal to make new rules about extradition and invites comments to that end. The rationale for proposing the new rules is that it is unsatisfactory for the CPR to continue to contain no relevant, up to date, provision for extradition proceedings. It acknowledges that such rules are likely to be of limited practical use to experienced extradition judges and practitioners, but (it is suggested) are instead likely to assist strangers to extradition.

3. We disagree and in general we do not endorse the proposed new rules in their current form.

   a. In an extradition hearing Section 77 of the Extradition Act 2003 [the Act] grants the appropriate judge the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were a summary trial. Far from having no rules, by section 77 all the rules relating to summary trial are incorporated.

   b. All 'outgoing' or 'export' extradition cases are dealt with by one magistrate's court, the Westminster Magistrates' Court. Furthermore, within that court extradition cases are only dealt with by designated district judges. These judges are few in number and are extremely capable of keeping control of case management issues whether the practitioners before them are experienced and regular or are new to extradition. Timetables and time limits are regularly being set for the service of documents, evidence and skeleton arguments. At present the overall objectives of the CPR are best served by the flexibility of bespoke directions; we fear that these rules represent inflexibility and may hinder rather than help.

   c. The Extradition Act of 1989 contained 38 sections, the 2003 Act has 227. The result of a statute which breaks the extradition process down into

quite so many small steps is that much of what might ordinarily been contained in CPR rules is in fact set out in the Act itself. It has rendered the creation of CPR rules otiose. As the CPRC acknowledges, the Act 'contains comprehensive provision, not only for the court's powers but also for the manner, and sequence, in which those powers are to be exercised. '

d. Another consequence of the Act being so prescriptive is that since coming in to force nearly a decade ago there have been a vast number of extradition appeals on matters of procedure and well as substance. The High Court has created extensive case law which addresses many specific procedural points. There is a danger that these rules may be inconsistent with some of that case law or may fail to incorporate all High Court's rulings. In the time permitted for response we have not conducted a full analysis.

Comments

4. The CPRC invites comments on the proposal generally, and in response to two specific questions:

    1) Insofar as the rules follow the Act, do they do so accurately and clearly, or is there anything in them liable to mislead the reader?

    2) Bearing in mind that other, existing, Criminal Procedure Rules will apply, are there any other procedure rules than these needed, and ifso about what ?

Question 1) Insofar as the rules follow the Act, do they do so accurately and clearly, or is there anything in them liable to mislead the reader?

5. The CPRC acknowledges that the draft procedural rules are 'compelled' by the structure of the Act. That is no doubt why when one considers the draft rules next to the Act there is a sense in which the draft rules are little more than a paraphrase or

summary of some of the sections of the Act. In every instance where the wording deviates from the wording of the Act we prefer the original statute rather than the summary contained within the draft rules. And, if the solution is thought to be to amend the rules faithfully to reflect the wording of the Act it does rather demonstrate that the rules add little or nothing to this comprehensive statute.

6. Where the wording of the rules and the Act depart, we also have concerns that the rules will only complicate matters for "strangers" to extradition proceedings, and will perplex judges and regular practitioners who may strive to attach significance to difference in wording where no separate meaning was intended. We have concerns that the "stranger" may be inclined to use the proposed rules as a substitute for the Act. This would carry the risk that they would not be aware of the entirety of the law to be applied and the statutory context in which the relevant considerations are set out. The stranger would be working from two documents rather than one and we do not see that they will benefit from this in any way.

7. By way of example only, we are struggling to comprehend:

   a. In rule 17.3(2) (a) the wording s.41(4) of the Act is omitted, namely that *"If the person is not before the judge at the time the judge orders his discharge, the judge must inform him of the order as soon as practicable."* (It is an example of where a provision of the Act most resembles a rule of court and is yet omitted.)

   b. In rule 17.8 (1) (c) the rule is engaged following the service of **any** Order in council which applies to the request, rather than simply identifying 'the order **by which the territory in question is designated as a category 2 territory.**' Is the difference intentional?

   c. In rule 17.8 (1)(b) the rule refers to a Secretary of State's certificate that the request was **received** in the way approved for the request, whilst the Act refers to the Secretary of State's certifying that the request was **made**

in the approved way. [see section 70(8)].

d. In rule 17.2(b) the definition of "prosecutor" differs from the definition contained in the Act regarding bail in s.198(3) namely prosecutor *"means the person acting on behalf of the territory to which extradition is sought;"*

8. This is not an exhaustive list, and we genuinely have tried to understand whether the differences are intentional, but have failed to discern any good reason for them. Additionally we appreciate that some of the differences might at first blush seem trivial, but in extradition proceedings technical arguments concerning wording are not uncommon.

9. Furthermore the rules appear to introduce new burdens and requirements not envisaged by the Act, the most obvious are:

a. By section 74 (7) the appropriate judge is required to inform the person when he first appears that he is accused of the commission of an offence. Rule 17.11 (2)(a)(i) elevates that requirement to the level where the court is required to explain the allegation in the warrant. At the first appearance that will be a difficult task for the court and is not one envisaged by the Act.

b. Section 41 requires the appropriate judge to discharge the defendant if he is ***informed*** that the warrant has been withdrawn. Rule 17.7 introduces the giving of *notice* that the warrant has been withdrawn ***by the authority that certified the warrant***. The Act allows the judge to act on information, the rules require notice, and more importantly notice from SOCA, the authority certifying the warrant. This is an important distinction because what the author of the rules may not have appreciated is that the framework decision does envisage levels of communication which are not exclusively through SOCA. There is no reason why the information could not be provided direct from the issuing judicial authority to the judge in the UK.

c. Section 4 of the Act does not require the person applying for discharge to apply in writing and serve the application. We believe that this is a deliberate omission. Parliament has provided for discharge at the very earliest point in the process based on non service of a warrant or delay in bringing the person before the court. In many case the defendant is foreign, with little English and in custody. In practice when these issues arise at court, often at the first hearing, they are dealt with summarily and immediately. The system appears to work well and we know of no body of opinion which suggests that any party regards written notice as required or indeed desirable. In any event, in appropriate circumstances a judge will require the argument to be committed to writing using his ordinary case management powers. We query why Rule 17.16(2)(a) introduces this new requirement for notice in writing and service. We do not feel that the application should be in writing unless the court otherwise directs.

10. Some of the rules are just plain wrong as a matter of law for example:

a. Rule 17.3(b)(iv) is incorrect. Under s.8A and s.76A of the Act where a person is charged with an offence in the UK proceedings **must** be adjourned until either the charge is disposed of, withdrawn, discontinued or ordered to lie on the file.

b. Rule. 17.13 (2) prohibits the court from considering the issue of physical or mental condition until all other matters have been decided, however, under sections 25 and 91 of the Act issues of health can be considered **'at any time in the extradition hearing'.**

11. In the same vein it is extremely common for the Human Rights arguments [sections 21 & 87] to be so intertwined with the other defence arguments advanced that they are heard together. In practice whilst the court in its ruling proceeds to decide each sections of the Act in the designated order, it aspires to hear all arguments at one extradition hearing. As such Rule 17.13(2) has no impact whatsoever on any aspect

of the process and procedure. In reality the 'stranger' would be better assisted if told that despite the sequencing of the Act the defendant must present all the arguments to be advanced at the extradition hearing on one occasion as far as reasonably practicable.

12. Some rules are confusing and yet so general that they raise more questions than they answer. For example Rule 17.4, in what manner is it envisaged that the court officer ought to serve notice of, for example, discharge on the Secretary of State? In short the CBA do not feel that it is necessary to include the duty of the court officer within the CPR. [or if so 'Court Officer' ought to be defined] And secondly, requiring the court officer to give such assistance to the court as is required would appear to be axiomatic. Is it suggested that there is any sanction for breach of this rule by the Court Officer? We fail to understand how a stranger to extradition would be assisted by this rule, or how a seasoned practitioner might apply it.

13. We also have some drafting points:

    a. **17.5(2):** we feel that this section may be misconstrued as dealing with all arrests rather than the procedure following a provisional arrest. **It** would be clearer if this rule were split in two, dealing separately with procedure after arrest and procedure after provisional arrest (this has been done at 17.8-17.11 m relation to Part 2.)

    b. **17.13(2)(a)(i):** we feel it would be clearer if the rules referred directly to the requirements set out in the statute, i.e. "the documents at s.70(9)"

14. The issue of reporting restrictions is complex, it is one area in which extradition cases are in a totally difference category to domestic cases. For the most part there are not restrictions on reporting extradition cases because there is no trial in the UK to prejudice. In practice the only situation in which reporting restrictions are relevant, is where the case involves children, in which case the

court will consider the application in respect of identifying them under section 39 of the Children and Young Persons Act 1933. Beyond the issue of children it is extremely rare for there to be extradition proceedings and a concurrent UK case or investigation, because proceedings in the UK halt the extradition process. The rules do not reflect this fundamental difference and the proverbial stranger to extradition would not thus be greatly assisted in this regard.

15. Whilst we recognise the CPRC's concerns that the CPR should have provisions for the entirety of the criminal courts, we are confident that this purpose could be achieved by simply referring the reader to the Act.

Question 2) Bearing in mind that other, existing, Criminal Procedure Rules will apply, are there any other procedure rules than these needed, and if so about what?

16. Many cases are conducted with the use of Video link, rule 29 deals with this.