



House of Lords Justice and Home Affairs Committee Inquiry on Post-Brexit UK-EU security cooperation – follow up Bar Council written evidence

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Scope of Response

This response addresses the following questions concerning the UK's implementation of Title VII (surrender) of Part III (law enforcement and judicial cooperation in criminal matters) of the UK-EU Trade and Cooperation Agreement 2020 ('TCA'):¹

- The effectiveness of the "proportionality test" conferred in Article 597 TCA.
- The impact of the "nationality exception" prescribed in Article 603 TCA.
- The impact of the suspension of Part III, Articles 692 and 693 TCA.

The response also addresses:

- The approach of the National Crime Agency ('NCA') to European arrest warrants issued under Council Framework Decision 2002/584/JHA ('FD EAW')² after Implementation Completion Day ('IPC')³ together with the nature and scope of provisional arrest under Part 1 of the Extradition Act 2003 ('the Act').
- Compliance with time limits for execution of Arrest warrants in Article 615 TCA.

Executive Summary

1. After concluding the TCA, Parliament did not modify Part 1 of the Act, which contains the framework for extradition from the UK to the EU States, to further incorporate the "proportionality principle" into UK law. Therefore, in England and Wales, the courts have approached proportionality in the same way for cases pre- and post-IPC. The Bar Council is not aware of any decision in which an appropriate judge has availed him or

¹ The Trade and Co-operation Agreement between the European Union, the European Atomic Energy Committee, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L 149 30.04.2021, p. 765).

² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender proceedings between Member States (OJ L 190, 18.07.2002, p. 1) as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ L 81, 27.03.2009, p. 24).

³ As defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020.

herself of the mechanism in the Political Declaration on Surrender ('the Political Declaration')⁴ to express concern about the proportionality of a person's extradition to a judge in the issuing State and invite a response therefrom. Therefore, the "proportionality principle" serves to regularise the approach of the UK courts in "accusation" cases at a bi-lateral level as opposed to affecting further change domestically.

2. The UK has always extradited its own nationals and so the "nationality exception" only affects extradition from the EU States to the UK. Given the quantity of EU States which now either refuse to surrender their own nationals to the UK or only do so under certain conditions,⁵ the Bar Council calls for greater transparency on (i) the approach that law enforcement and prosecution authorities adopt where a person cannot be surrendered from an EU State; (ii) how many surrenders have been refused under Article 603 and for what type(s) of offence(s); and (iii) the machinery developed to facilitate the transfer evidence abroad.
3. The NCA refuses to certify European arrest warrants issued after IPC under Part 1 of the Act. However, UK extradition law does not differentiate between the TCA and FD EAW. Indeed, Part 1 refers only to a '*warrant*' issued by a '*judicial authority of a category 1 territory*'.⁶ It is unknown why the NCA adopts this approach as, with the passage of time, there will be ever more post-IPC European arrest warrants in circulation. This will invariably lead to more circumstances in which there is a "law enforcement vacuum" when the NCA must ask an issuing judicial authority to reissue a European arrest warrant on an Arrest warrant *pro forma*. Since IPC, the courts have begun using the provisional arrest power in section 5 of the Act again. Consideration should be given to the effectiveness of this provision given the strict time limits for production and certification of an Arrest warrant.
4. In England and Wales, the authorities routinely violate the strict time-limits imposed for execution of Arrest warrants. Article 615 TCA requires that an Arrest warrant be executed as '*matter of urgency*' and, in any event, within sixty days, with a "long stop" of ninety days. However, where surrender is contested, proceedings often take more than a year. Consideration should be given to monitoring the time from arrest on a Part 1 warrant to physical surrender to the issuing State with a view to adopting measures to decrease delay.
5. Cooperation under Part III requires the Parties to give effect rights and freedoms enshrined in the European Convention on Human Rights 1950 and the Protocols thereto ('ECHR') that the UK has adopted (Article 524). The UK must also continue to receive a data adequacy decision from the Commission which confirms that its data protection regime adheres with various objectives as described in Article 525. If the UK denounces the ECHR, all cooperation under Part III will stop without more (Article

⁴ Declarations referred to in the Council Decision on the signing on behalf of the Union, and on a provisional application of the Trade and Cooperation Agreement and of the Agreement concerning security procedures for exchanging and protecting classified information (OJ L 444, 31.12.2020, p. 1478).

⁵ Notification by the European Union made in accordance with the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ C 117I, 06.04.2021, p. 5).

⁶ Section 2(1) of the Act.

692). Similarly, if either party fails to obtain a data adequacy decision from the other, Part III will be suspended (Article 693). Thus, to ensure that law enforcement and criminal cooperation continues, the UK must give proper effect to the ECHR and ensure that its domestic data protection standards are equivalent to those in the EU.

Proportionality Test

6. In EU law, questions concerning the proportionality of issuing a European arrest warrant are exclusively the province of the issuing Member State.⁷ Article 1(2) FD EAW obliges an executing judicial authority to execute a European arrest warrant based on the principle of mutual recognition save where a mandatory (Article 3) or optional (Article 4, Article 4a) bar applies, or a guarantee is not provided (Article 5). None of these grounds permits an executing judicial authority to consider the proportionality of issuance itself, although surrender must be compatible with the ECHR.⁸ Throughout its nearly twenty-year jurisprudence on the European arrest warrant, the Court of Justice of the European Union has continually emphasised that non-execution is '*intended to be an exception which must be interpreted strictly*'.⁹
7. In Part 12 of the Anti-social Behaviour, Crime and Policing Act 2014 ('ABCP'), Parliament amended the Act to introduce the concept of proportionality in "accusation" cases. An "accusation" case is one in which a person is sought for purposes of prosecution. Section 157 ABCP required the NCA to consider proportionality at the point of certification whilst, at the extradition hearing, an appropriate judge must also consider the question. In the latter, section 21A(1)(b) of the Act created a three-pronged test. Parliament did not amend the Act for "conviction" cases. These are those in which criminal liability has already been determined and sentence of imprisonment of at least four months imposed.¹⁰ In a case commenced before IPC, the High Court flatly rejected the submission that the three-pronged test for "accusation" cases could be applied to or "read into" "conviction" cases where a requested person was convicted in his or her absence and was guaranteed a right to a retrial on surrender.¹¹
8. It is only in an "accusation" case that a NCA officer and, later, an appropriate judge must consider proportionality. In respect of the latter, an appropriate judge must evaluate the following exhaustive factors before deciding whether extradition is proportionate: (a) the seriousness of the conduct; (b) the likely penalty on conviction; and (c) the possibility of the authorities in the requesting state adopting less coercive measures to extradition. Following promulgation of section 157 ABCP, Lord Thomas CJ gave guidance on the type of conduct for which extradition would be considered disproportionate save in exceptional circumstances.¹² At the end of 2014, the High

⁷ Part 2.4 of Commission Notice on how to issue and execute a European arrest warrant (OJ C 335, 06.10.2017, p. 14).

⁸ Article 1(3) FD EAW refers to the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 397), Article 7 of which is same in the nature and scope of Article 8 ECHR. See Article 52 of the Charter.

⁹ See, for instance, X (C-562/21 PPU) and Y (C-563/21 PPU) at §44.

¹⁰ See section 65(3)(c) and (4)(c) of the Act.

¹¹ *Saptelei v Romania* [2021] EWHC 506 (Admin).

¹² See section 2(7C) of the Act and paragraphs 50.A2-A5 to Practice Direction 50 to Crim PR.

Court guided appropriate judges in *Miraszewski and Ors v Poland* [2015] 1 WLR 3929; [2014] EWHC 4261 (Admin) which explains *inter alia* that the Lord Chief Justice's guidance serves as a "floor" as opposed to a "ceiling" of seriousness, appropriate judges should consider any information in their possession vis-à-vis sentencing practice in the issuing Member State or, failing that, domestic sentencing practice and they should not look behind a refusal to take less coercive measures where a reason is given.

9. In Article 597 TCA, the UK and the EU enshrined the principle of proportionality in respect of surrender: '*Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention*'.
10. Pursuant to the Political Declaration,¹³ which is annexed to the TCA, a judge in an executing State may inform a judge in the issuing State where he or she is concerned that the principle of proportionality has not been respected. The Political Declaration refers to the executing judge setting out his or her '*views on the application of the principle of proportionality*' which is then transmitted to the issuing State as a request for supplementary information under Article 613 TCA. Whilst the Political Declaration does not require an issuing judge to respond, it obliges the '*competent judicial authorities of the State to consider proportionality and the possible duration of pre-trial detention when implementing Title VII [Surrender] and note that this is consistent with their respective domestic laws*'.
11. The day before IPC, Parliament enacted various changes to the Act;¹⁴ however, it did not incorporate Article 597 thereto. Since then, there have been two authorities which examine the approach to proportionality post IPC. In neither *Badea v Romania* [2022] QB 828; [2022] 3 WLR 536; [2022] EWHC 1025 (Admin) nor *Banica v Romania* [2023] EWHC 405 (Admin) did the High Court conclude that Article 597 demanded a different approach to proportionality under Part 1 of the Act. In each, the constitution held that proportionality was already "incorporated" into extradition proceedings through the statutory proportionality test in "accusation" cases (section 21A(1)(b) of the Act) and Article 8 ECHR in both "types" of case (section 21A(1)(a) and section 21(1) of the Act).¹⁵ Further, the "general implementation" provision in section 29(1) of the European Union (Future Relationship) Act 2020 did not necessitate any further modification to Act. Thus, further alteration of the proportionality principles requires primary legislation nor judicial interpretation.
12. In terms of Article 8 ECHR, a line of authority developed from late 2020 which addressed the consequences in immigration law of "Brexit uncertainty".¹⁶ This reflected the fact that many EU citizens had exercised their Treaty rights to move to

¹³ See footnote 4.

¹⁴ Sections 11-13 of the European Union (Future Relationship) Act 2020.

¹⁵ See Lady Hale JSC (as she then was) in *HH & PH v Deputy Prosecutor, Italian Republic, Genoa and FK v Poland* [2012] UKSC 25; [2013] 1 AC 338; [2012] 3 WLR 90 at §8 and Lord Thomas CJ in *Poland and Ors v Celinski and Ors* [2016] 1 WLR 551; [2015] EWHC 1274 (Admin) at §§1-24.

¹⁶ See *Antochi v Amtsgericht Munchen, Germany* [2020] EWHC 3092 (Admin).

the UK and were unsure whether, following their surrender to the issuing State, they would be permitted to resume their lives here. Where relevant, appropriate judges were guided to weigh the subjective fear of expulsion and the (then) objective uncertainty vis-à-vis whether their immigration status and corresponding rights would be protected into the proportionality of extradition. In some cases, this tipped the balance in favour of discharge,¹⁷ whilst in most it did not.¹⁸ However, in several recent cases,¹⁹ the High Court has drawn a line under this litigation. With the entry into force of the Agreement on withdrawal of the UK from the EU 2019,²⁰ specifically the Citizens' Rights protections in Part II, taken together with the new immigration rules following Brexit, various constitutions found that there is no longer any objective uncertainty. Unless a requested person can prove prejudice based on the change in immigration rules since he or she exercised his or her free movement rights, this will not serve as a factor militating against extradition.

13. **Proportionality both in terms of Article 8 ECHR for both "accusation" and "conviction" cases and the statutory proportionality test for "accusation" cases (section 21A(1)(b) of the Act) remains the same. It is not believed that any appropriate judge has availed him or herself of the mechanism set out in the Political Declaration. The effectiveness of the mechanism is unclear since it does not mandate a review in the issuing State. Thus, Article 597 TCA serves to codify in international law the approach that the UK had adopted to cases prior to IPC. It remains to be seen the extent to which judicial authorities in the EU States will make use of the proportionality test when executing Arrest warrants issued by UK judicial authorities. Should Parliament wish to further embed the proportionality principle so that it applies to "conviction" cases, it must amend the Act to do so.**

Nationality Exception

14. The UK extradites its own nationals. Prior to FD EAW, however, many EU States refused to do so. The cornerstone of the area of freedom, security and justice is the mutual recognition of a fellow Member State's decision, including in the field of justice and home affairs.²¹ This meant, at least in terms of surrender within the EU, some had to alter their constitutions to facilitate extradition.²² The fact that FD EAW did not allow for a nationality bar, unlike all preceding extradition instruments,²³ was nothing short of revolutionary.
15. Following IPC, Germany, Greece, France, Croatia, Latvia, Poland, Slovenia, Slovakia, Finland and Sweden notified that they will not surrender own nationals to the UK whereas the Czech Republic and Austria will only so surrender with a person's

¹⁷ For instance, *Gorak v Regional Court in Poznan, Poland* [2022] EWHC 671 (Admin).

¹⁸ For example, *Ziembinski v Regional Court in Plock, Poland* [2022] EWHC 693 (Admin) or *Merticariu v Judecatoria Arad, Romania* [2022] EWHC 1507 (Admin).

¹⁹ *Gurskis v Latvia* [2022] 4 WLR 82; [2022] EWHC 1305 (Admin), *Pierkarski v District Court in Lublin, Poland* [2022] EWHC 1088 (Admin) and *Hojden v District Court of Gorzow Wielkopolski, Poland* [2022] EWHC 2725 (Admin).

²⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019 (OJ C 384I, 12.11.2019, p. 1).

²¹ Paragraphs 33 to 37 of the Conclusions of the European Council convened at Tampere on 15 and 16 October 1999.

²² See Article 16(2) of the Basic Law of the Federal Republic of Germany, for instance.

²³ For instance, the European Convention on Extradition (Paris, 13.XII.1957, ETS. 24), Article 6.

consent. In practical terms, Cyprus, Malta and Bulgaria surrender own nationals since their notifications depends on a reciprocal notification from the UK. For its part, Denmark imposes a complex series of conditions. Various EU States require guarantees that, if their national is convicted, he or she will be returned to them to serve a sentence of imprisonment.²⁴ Given the number of notifications, the Arrest warrant is a less effective tool than the European arrest warrant. This is perhaps most acute with Poland and France as, in the case the former, a sizeable number of Polish nationals moved to the UK whilst both were EU Member States, whilst, with respect to the latter, the countries share a large maritime border.

16. Whilst the UK extradites its own citizens,²⁵ there are two *de jure* bars which apply to “accusation” cases, namely the absence of a prosecution (section 12A of the Act) and forum (section 19B of the Act). These bars apply to all persons, British or otherwise. However, their effectiveness is questionable. Moreover, where convicted, UK citizens may apply to transfer their sentences from an EU State to UK under the Repatriation of Prisoners Act 1984 and the European Convention on the Transfer of Sentenced Person 1983.²⁶
17. Where a country does not extradite own citizens, it *should* have discretion to prosecute them in relation to conduct wherever committed. Thus, Article 603(3) TCA confers an obligation on an executing State to ‘*consider instituting proceedings against its own national which are commensurate with the subject matter of the Arrest warrant, having taken into account the views of the issuing State*’. The sub-article also requires a complainant to be informed of any decision not to bring criminal proceedings.
18. In order that Parliament can properly scrutinise the impact of the nationality exception, the NCA and Crown Prosecution Service should furnish information about the practical effect of Article 603 TCA. This should include *inter alia*:
 - a. The number of circumstances in which a prosecutor has not applied for an Arrest warrant since he or she knows that an EU State will invariably refuse execution.
 - b. The quantity of refusals under Article 603 TCA since IPC, including the executing State which gave the refusal and the type of crime of which the person was accused or convicted.
 - c. The measures that prosecutors in the UK have adopted so that an accused can be prosecuted abroad. This is paramount since the UK never signed the European Convention on the Transfer of Proceedings in Criminal Matters 1972.²⁷ Thus, consideration should be given to:
 - i. How many times has evidence been transferred to an EU State to facilitate a prosecution and if it led to prosecution, irrespective of whether a person was found guilty or not.

²⁴ See footnote 5.

²⁵ See *Love v Government of the United States of America* [2018] 1 WLR 2889; [2018] EWHC 172 (Admin) at §22 (Lord Burnett CJ).

²⁶ Convention on the Transfer of Sentenced Person (Strasbourg, 21.III.1983, ETS 112).

²⁷ European Convention on the Transfer of Proceedings in Criminal Matters (Strasbourg, 15.V.1972, ETS 73).

- ii. For what type(s) of offence(s) is consideration given to transferring evidence and unused material to an EU State.
- iii. Any protocols or procedures developed to protect informants, vulnerable witnesses or confidential information which may be disclosed in foreign criminal proceedings but may not fall for disclosure under domestic law or be subject to strict rules of evidence or procedure.²⁸
- iv. The approach to victims and witnesses with an interest in proceedings and who may be required to give evidence at a foreign trial, including notification of the executing State's decision *not* to institute proceedings.

ECHR and data adequacy decision

19. Cooperation under Part III TCA, which encompasses all law enforcement and judicial instruments in criminal matters, depends on the parties giving proper effect to human rights and fundamental freedoms. Given that all EU States are bound by the Charter of Fundamental Rights of the European Union,²⁹ which has the *same 'legal value as the Treaties'*,³⁰ in truth this measure addresses the possibility that the UK denounces the ECHR or otherwise dilutes the effect of the protections afforded through the Human Rights Act 1998 ('HRA').
20. It is known that the Commission and the EU States are closely monitoring the proposed legislative amendments to the HRA, including any measure to alter the effect of the European Court of Human Rights' decisions or grant of interim measures. Should there be amendments to the HRA which result in the fundamental rights enshrined in the ECHR being ignored or conferring lesser effect, then there is a mechanism through which the EU can "turn off" all cooperation under Part III (Article 692). This will be nothing less than catastrophic since Part III creates bi-lateral instruments and mechanisms to share operational information and travel data, transfer evidence, facilitate surrender, freeze and confiscate assets etc. The Bar Council need only reference that ENCROCHAT data was received from law enforcement authorities in France through an EU law mechanism. Should the ECHR be denounced, or the rights conferred therein restricted, such cooperation would not be possible leading to widespread impunity for the most serious crimes. It is no exaggeration to say that the UK's multilateral law enforcement and criminal cooperation capabilities would be set-back thirty years to the time of the fall of the Berlin wall.
21. In a similar vein, cooperation depends on the Parties maintaining broadly equivalent data protection standards. These are enshrined in two pieces of primary EU legislation,³¹ to which Parliament gave effect under the Data Protection Act 2018 whilst

²⁸ For instance, under the Criminal Procedure and Investigations Act 1996.

²⁹ Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

³⁰ Article 6(1) TEU.

³¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 04.05.2016, p. 1) and Directive (EU)

each is retained EU law in accordance with the provisions of the European Union (Withdrawal Act) 2018. Should the UK make substantive and substantial amendments to the way in which it processes “criminal” data, then the Commission may fail to grant the UK a data adequacy decision under either Article 45 of the Regulation and/or Article 36 of the Directive which would result in various titles being suspended until Part III, including transfer of passenger name record data (Title III) and cooperation with EUROPOL (Title V).³² The Commission and the EU States are carefully monitoring the progress and passage of the Retained EU Law (Revocation and Reform) Bill through Parliament, including which EU law instruments are excepted from the “sunset”. To ensure continued cooperation, the UK must ensure that the levels of protection afforded to personal data remains high and on par to that in the EU.

Post IPC European arrest warrants & provisional arrest

22. Under Article 632 TCA, any European arrest warrant issued prior to IPC is automatically treated as an Arrest warrant as if issued under the TCA surrender provisions. In such circumstances, the NCA generates a Certificate under section 2(7) of the Act which describes the European arrest warrant as a ‘Part 1 warrant’.
23. Whilst some EU countries directly transposed FD EAW into their national law, the UK’s incorporation thereof always differed substantially both in terms of language and structure.³³ Between 1 January 2004 and 31 December 2020, Part 1 of the Act never referred to a European arrest warrant or FD EAW. Instead, the language referenced judicial authorities in the territories which the Secretary of State designated under section 1(1) of the Act. In a statutory instrument, which has been amended from time to time,³⁴ the Secretary of State designated all EU countries and Gibraltar under Part 1 of the Act. Moreover, between 16 March 2020 and 31 December 2020, Iceland and Norway were included.³⁵ Thus, the Act has never distinguished between a European arrest warrant, an Arrest warrant issued under the TCA and an Arrest warrant issued under the EU/Iceland-Norway Surrender Agreement.³⁶
24. As a matter of practice, however, the NCA has refused to certify any European arrest warrant issued under FD EAW after IPC. Instead, officers request that the issuing judicial authority reissue the European arrest warrant under the TCA on Arrest warrant *pro forma*. As Article 632 foretells, there is a high degree of compatibility between the two instruments and a European arrest warrant normally contains all

2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119. 04.05.2016, p. 89).

³² See Article 693 TCA.

³³ See, for instance, Lord Hope in *Office of the King’s Prosecutor, Brussels v Armas & Ors* [2006] 2 AC 1; [2005] UKHL 67 at §26.

³⁴ The Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (SI 2003 3333).

³⁵ Article 2(1) and (3) of the Extradition Act 2003 (Amendments to Designations) Order 2020 (SI 2020 265).

³⁶ Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ L 292, 21.10.2006, p. 1).

information that an Arrest warrant requires. If not, an executing judicial authority can request further information under Article 613(2) TCA. Thus, there is no reason in UK law why a European arrest issued on or after 1 January 2021 cannot be certified under Part 1 of the Act. The requirement that an issuing State re-issues a European arrest warrant as an Arrest warrant may lead to delay and the possibility of impunity if a person is released from custody.

25. A constable can provisionally arrest a person where he or she *'has reasonable grounds for believing – that (a) a Part 1 warrant has been or will be issued'*.³⁷ When the UK opted into³⁸ the SIS II database,³⁹ which took effect from 13 April 2015,⁴⁰ provisional arrest fell out of use as the NCA received European arrest warrants in real time from the SIS II system and, where not in English, they were accompanied by a "Form A". In accordance with Article 26 of the SIS II Regulation, these comprise a machine generated summary of the contents of a European arrest warrant in all EU languages. The law in force immediately prior to IPC permitted an NCA officer to certify a European arrest warrant based on the contents of a Form A.⁴¹ Thereafter, at the initial hearing an appropriate judge would order the issuing judicial authority to supply a translation of the European arrest warrant into English within one or two weeks.
26. Given the UK's loss of access to SIS II and the NCA's refusal to certify European arrest warrants issued post IPC under section 2(7) of the Act, there is a "law enforcement vacuum" where authorities may know, via an INTERPOL Red Notice or a communication between National Crime Bureaux, that there is an active European arrest warrant for a person's arrest, but they either do not possess (i) the information on a TCA *pro forma* and/or (ii) a translation of the same into English.
27. Following provisional arrest, a person must be brought before the Westminster Magistrates' Court within forty-eight hours (excluding weekends and bank holidays etc) at which point the Part 1 warrant and Certificate must be produced.⁴² Upon an issuing judicial authority's application, there is power to extend this time by a further forty-eight hours where it *'could not reasonably comply'* with the time period, the proof of which falls on the issuing judicial authority which must be discharged on the balance of probabilities.⁴³

³⁷ Section 5(1) of the Act.

³⁸ Council Decision 2014/857/EU of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen acquis which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC (OJ C 430, 01.12.2014, p. 6).

³⁹ Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU (OJ L 312, 07.12.2018, p. 56).

⁴⁰ Council Implementing Decision (EU) 2015/215 of 10 February 2015 on the putting into effect of the provisions of the Schengen acquis on data protection and on the provisional putting into effect of parts of the provisions of the Schengen acquis on the Schengen Information System for the United Kingdom of Great Britain and Northern Ireland (OJ L 36, 12.02.2015, p. 9).

⁴¹ See section 204 of the Act as in force pre-IPC.

⁴² Section 6(2) and (2A) of the Act.

⁴³ Section 6(3B) and (3C) of the Act.

28. Notably, under Part 2 of the Act, the NCA is afforded seventy-two hours to produce a provisional arrest Certificate under section 74B and may be afforded multiple extensions of time upon application.⁴⁴ It is unclear why there are different time periods under each Part of the Act. Anecdotally, it is known that people have been discharged under section 6(7) of the Act where the issuing judicial authority either has not (i) issued an Arrest warrant on a TCA *pro forma* within forty-eight hours and/or (ii) supplied a translation thereof into English so that the NCA can certify it.
29. **The Bar Council recommends that NCA reconsiders whether, as a matter of UK law, it can certify European arrest warrants issued after IPC under section 2(7) of the Act. It cannot see any obvious legal impediment why not. Further, it invites the NCA to monitor the effectiveness of the provisional arrest sections of the Act and to report on whether people are discharged thereunder.**

Time limits for surrender

30. Article 615 TCA replicates Article 17 FD EAW and requires that an Arrest warrant be executed as a matter of urgency. A decision on surrender should normally be taken within sixty days with a “backstop” of ninety days. In England and Wales, in the ‘*special objective in extradition proceedings*’, the ‘*court the must have regard to the importance of – [...] (b) the conduct of extradition proceedings in accordance with international obligations, including obligations to deal swiftly with extradition requests*’.⁴⁵ Although Parliament transposed the time-limits into Part 1 of the Act,⁴⁶ which ostensibly requires, among others, that an extradition hearing take place within twenty-one days of arrest where a person does not consent to extradition, these are invariably exceeded.
31. Whilst there are no formal statistics on the time between arrest and physical surrender in a Part 1 case, anecdotal evidence suggests a four-month delay in obtaining a first listing of an extradition hearing at Westminster Magistrates’ Court and anywhere between four to six months to receive a paper permission decision from a single judge sitting in the High Court. Where a person seeks to renew an application for permission to appeal at an oral hearing, there is normally a two-month delay for a listing.⁴⁷ Thus, where a person contests his or her extradition, the timespan of a case readily exceeds one year, more than four-times the time limit agreed between the UK and EU.
32. **Given that the courts in England and Wales routinely exceed the agreed time limits, the Government should consider monitoring compliance therewith and taking measures to reduce delays so that Arrest warrant cases are processed more quickly and in compliance with international obligations.**

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⁴⁴ Section 74D(4) and (7) of the Act.

⁴⁵ Rule 50.2 Crim PR.

⁴⁶ Section 8(4) of the Act.

⁴⁷ In accordance with Rule 50.22 Crim PR.