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Extradition - Rule of Speciality

Note for Minister

Nature of the rule

1. The effect of the rule of speciality as generally provided for internationally (for example, in the 1957 European Convention on Extradition) is that extradition may not be granted unless provision is made by the law of the requesting country that the person claimed will not be proceeded against for an offence committed prior to his surrender other than that for which his extradition has been granted except (a) with the consent of the requested State or (b) where the person has not left the territory of the requesting State within a specified period of his final discharge in respect of the offence for which he was extradited or has returned to that State's territory after leaving it. The requested State is, however, required to consent to the bringing of additional charges if the offence for which consent is requested is itself one for which there is an obligation to grant extradition. The rule therefore is not designed to shield people against additional charges in general but only against additional charges for offences of a non-extraditable nature - i.e. minor offences, revenue offences, offences under military law which are not offences under the ordinary criminal law, political offences and offences connected with political offences.

Position under 1965 Act

2. Part II of the Extradition Act 1965, which governs extradition to places other than Britain and Northern Ireland, provides for the rule of speciality (sections 20 and 39). However, Part III, which contains the backing of warrants procedure we operate with Britain and the North, contains no similar rule. It does provide for an alternative type of safeguard not found in Part

II, namely that the High Court (or the Minister) may direct that a warrant shall not be endorsed for execution or that a person arrested under Part III shall be released if the Court (or the Minister) is of opinion that there are substantial reasons for believing that the person will, if removed from the State, be prosecuted or detained for an offence (other than the one covered by the warrant) which is a political offence or an offence under military law which is not an offence under ordinary criminal law.

Existing "gentlemen's agreement" on speciality

3. Part III of the Act therefore contains no specific prohibition on the bringing of additional charges against a person who has been returned from Britain or Northern Ireland or vice versa. However, there were dicta in the Supreme Court judgments in the Shannon case in 1984 which might nevertheless be taken as indicating that the rule of speciality applies in Part III cases. Accordingly, an informal "gentlemen's agreement" was arrived at between the former Attorney General and the British Attorney General whereby additional charges would not be brought against a person extradited from this jurisdiction without the agreement of the authorities here - and vice versa. This unwritten "agreement" was arrived at in the course of discussions on particular extradition cases which had a political "flavour". It was not spelled out whether the agreement related only to cases of that kind or to all cases.

British proposal for a written understanding

4. The British side in discussions at official level with the Anglo-Irish Conference last year took the initiative in proposing that the existing understanding should be put on a somewhat more formal, written basis, though they made it clear that they did not envisage - and would be opposed to any suggestion - that there would be a legally binding international agreement as

such on the matter. They circulated a paper which they proposed should form the basis of those new arrangements.

No provision for speciality in 1987 Act

5. The previous Government proceeded with the recent Extradition Bill on the basis that the rule of speciality would not be incorporated into Part III of the 1965 Act. While it is obviously not appropriate to make assumptions as to why precisely the Government made their decision, the following considerations were before them:

(a) It was known that the British would oppose such a change.

(b) While the Shannon case dicta about speciality were not easy to interpret, the better interpretation seemed to be that it would be a breach of faith (and, by implication, an unacceptable one) for the British to add a new charge, after extradition, if the new charge related to an offence that was not, itself, extraditable. It appeared, however, that it should be possible to take adequate precautions against a "breach of faith" of this kind without changing the statute law - an underlying point here being that such a statutory change would be open to misrepresentation by Unionists and their allies at a time when the Bill was being held out as a measure facilitating law enforcement through extradition rather than the reverse.

(c) A written understanding, such as the British were clearly willing to have, together with the existing safeguards in Part III of the 1965 Act (paragraph 2 above), would be likely to be adhered to very carefully by both sides (extradition is a two-way process) if only because there would be a strong common interest in ensuring that there would be no avoidable "mishaps".

It was understood, of course, that the details of the written understanding would have to be negotiated.

6. The British paper sets out that warrants should be forwarded in respect of all offences in respect of which it is intended to charge a person. In other words, neither side should adopt a practice of sending only one warrant (which would be enough to secure extradition) if other warrants also exist or there are other charges for which warrants may be got. However the bringing of additional charges would be permitted in those (relatively few) cases where new evidence, justifying charges, came to light following the fugitive's return. The British paper proposes that these cases could be divided into two categories which they described (we think unnecessarily and somewhat misleadingly) as "terrorist" and "non-terrorist" cases. Before any new charges could be added in what they were calling "terrorist cases" - but which actually meant any case in which the political defence had been invoked but failed prior to extradition - the requesting authorities would be required to consult the requested jurisdiction and new offences would not be added where it was agreed that any of the exceptions recognised by the Act applied. In "non-terrorist" cases (i.e. any case in which the political defence had not been relied on prior to extradition), the requesting jurisdiction would be free to add or substitute charges for other offences if but only if they were confident that those offences were not political etc. If the requesting jurisdiction was in any doubt whatsoever on the point it would be obliged to consult the requested state.

7. The British paper was the subject of some discussion towards the end of last year in the working group of officials that was set up under the Anglo-Irish Conference to deal with extradition policy and harmonization of criminal law matters. These discussions were still some distance from a

conclusion. The main issue that had arisen in the discussions concerned the role of the "requested" jurisdiction in relation to the bringing of additional charges. The British side's proposal was that the requesting jurisdiction should consult the requested jurisdiction about adding or substituting charges. While they as good as said that they could not envisage circumstances in which the view of the requested jurisdiction would be disregarded, they were concerned with "perceptions" - meaning, once again, the problem of misrepresentations whereby it would be claimed that the effect of extradition was being eroded. On the other hand, something that said, only, that they - or we - would "consult" did not seem to be sufficient from our point of view in that it would appear to leave the requesting jurisdiction free to proceed with charges against the advice of the requested jurisdiction. The British side indicated that there would be strong objection from their point of view to a requirement of formal consent by the requesting jurisdiction. They also said that they would face serious presentational difficulties if their authorities were to be seen (by Unionists and their "backers" in Britain) to be relinquishing the right to make their own decisions in relation to prosecutions. At the same time there seemed to be an acceptance that in reality it would not make any real difference whether the requirement was for consent or consultation since in practice it would not make sense for the requesting jurisdiction to go ahead with additional charges against the advice of the requested jurisdiction.

Alternative draft proposal prepared in Department of Justice

8. It seemed that they could accept a formulation which would ensure that charges would not be added or substituted without the consent of the requested jurisdiction but that would not actually say this in so many words. In order to help to get minds focussed on the key issues involved, a draft document, which took the form of an amendment of the British paper and proposed such a

formulation, was prepared in this Department and circulated on 14 January 1987 to the other officials on the Irish side in the Working Group. It was envisaged that if the draft document commanded general support at that level it would be submitted to the Cabinet Committee on Northern Ireland affairs for approval before it would be handed over to the British side.

Discussion paper prepared by previous Attorney General

9. The Department of Foreign Affairs agreed generally with our draft but proposed some (minor) changes of emphasis and language which, in general, we had no difficulty in accepting. We received no comments at official level from the Attorney General's Office but on 4 March 1987 we received a document which apparently was written by the Attorney General personally as a basis for discussion. This document made no direct reference to our document but appeared to refer exclusively to the British Paper. It could be fairly summed up as taking the line that we should not embark on anything in the nature of an arrangement or an agreement, however informal, with the British lest we might be held to have some kind of responsibility in an individual case if something "went wrong" and that instead we should simply allow the British to give us a unilateral note setting out the procedures and criteria which they would apply as regards the bringing of additional charges. The document did not indicate how the matter of additional charges would be catered for in cases of extradition from Britain or the North to this jurisdiction.

10. While one can see why such an approach might commend itself, it does seem to have some significant weaknesses.

First, by accepting a document without demur even when it deals - as here - with matters in which both sides have an interest and a responsibility, one is surely acquiescing in its contents. So, the net effect would seem to be very

similar to having an agreed document. Indeed, if what one is concerned about is the possibility of the Irish authorities being blamed in the event of the British failing to fulfil the criteria laid down, it is arguable that greater blame would attach to the Irish authorities in that event if no firm arrangements had been entered into with the British on the matter but they had simply set out unilaterally what they proposed to do and we had not demurred.

Second, extradition is something which involves two-way traffic (indeed, at present the inward traffic is considerably heavier than the outward - persons got back from Britain and the North numbered 28 and 20 in 1985 and 1986 respectively, as compared with 10 and 3 extradited to those jurisdictions in the same years). We on our side may need to add extra charges after we get somebody back on extradition from Britain or Northern Ireland. In fact, the situation has already arisen in practice. It is difficult, therefore, to see how a bilateral arrangement could be avoided, even if this were desirable.

Third, the question arises whether this kind of approach is acceptable anyway in our dealings with Britain in a context which has strong Northern Ireland connotations. Is it appropriate in that context that, in determining policy, a high priority should be given to the consideration that, if a particular case gave rise to some adverse publicity, we might be deemed to be to some extent responsible?

11. All of this could be summed up by saying that it seems doubtful if such an approach would give us very much credibility.

Content of proposal prepared in Department

12. The draft paper which we circulated on 14 January proposed that the bringing of additional charges would be permitted where new circumstances, justifying new charges, arose following the fugitive's return. The British

paper referred to new evidence but we felt that, while in the great majority of cases the circumstances which would justify unforeseen new charges being brought would be new evidence, there might be other circumstances. There might be situations where there would be no new evidence as such but new circumstances would make existing evidence appear in a new light so as to justify different charges. The need to substitute new charges might also arise where a witness became unavailable, for example, of course, since extradition is a two-way system, the need to add or substitute charges in such circumstances could arise on our own side as well as on the British side.

13. Our draft paper also proposed to retain the distinction drawn in the British side's draft between (a) cases in which the political offence exception was invoked but failed in the requested jurisdiction before extradition and (b) cases in which it was not. (We proposed, however, that the "terrorist"/"non-terrorist" tags, which we regarded as misleading, should be dropped). In all cases in the first of these categories where it is proposed to add or substitute offences, the authorities of the requesting jurisdiction would ascertain from the authorities of the requested jurisdiction whether they regard the new offences as political etc. The text would record that both sides accepted that the authorities in the requested jurisdiction would be in a better position to evaluate whether such an additional offence was political etc. and that the system should be operated in accordance with the views of the requested jurisdiction. In cases where the political offence exception had not been invoked before extradition the requesting jurisdiction could add or substitute new offences where but only where they were confident that they would not be political etc. But if they were in any doubt whatsoever the requesting jurisdiction would ascertain the views of the authorities of the requested jurisdiction on the point. Both sides would accept in this regard also that the system should be operated in accordance with the views of the requested jurisdiction.

14. The only reason underlying the distinction between the two types of case is the avoidance of an additional procedural requirement that has never down the years been considered necessary and which in the cases concerned is nothing but a formality since, in accordance with international norms, consent, if required, cannot be withheld. For example, if an "ordinary decent criminal" is extradited to Britain on certain charges of burglary and if after his extradition he admits that he committed a number of other burglaries as well, it seems to be unnecessary, as between jurisdictions that find it possible to operate, mutually, a special "backing of warrants" procedure, to go through the formality of seeking permission.

15. At a recent "internal" discussion between officials on the Irish side of the Working Group the question was raised whether there should not be a requirement that the agreement of the authorities of the requested jurisdiction be sought in <u>all</u> cases in which it was proposed to add or substitute charges. The essential argument put forward in support of this suggestion was that, if there was any discretion at all left to the British authorities to decide to add or substitute charges without consultation, there would be a risk that in some cases they would "get it wrong" and add a charge in respect of an offence that would turn out to be political. We do not see that there is any objective validity in this: possibly, very occasionally, they might "get it wrong", since human error is always a possibility, but in the circumstances in which that might be envisaged as a (remote) possibility, it is very probable that we, if consulted, would "get it wrong" too. However, at the end of the day, this is a matter of <u>political</u> judgment: it is a matter of perceptions rather than reality and the answer may depend on whether, for wider policy reasons, we want to appear flexible or intransigent. Under our proposed draft if the British authorities are in any doubt whatsoever about whether or not the additional offence might be held to be political, they must

consult (as, for instance, where the extradited person claims after his extradition that the additional offence which it is proposed to charge is political). Given that any mistake or error of judgment in this matter on the part of the British authorities would result in controversy and could jeopardise their extradition arrangements with this country, it should be in their interests to see that the system is operated properly.

16. There are other practical arguments in favour of confining the requirement of consultation to cases where there is some doubt that the additional offence might be political. A requirement to give consent in all cases could have an inhibiting effect on the administration of justice in ordinary crime cases. Such consent of its nature is something that would not be lightly given even in what might on the face of things appear to be an obviously "non-political" case and would be likely to give rise to requests for further information and delays in the bringing of charges in the requesting jurisdiction. Since extradition is a two-way system, this could give rise to unfavourable public comment in "ordinary" crime cases pending here, where the accused's extradition had been obtained from Britain or the North and it was proposed to add charges. Besides, the task of the Minister for Justice in giving consent in all these cases might prove to be something of an embarrassment inasmuch as the existence of the arrangements about consultation would presumably have to be made public if it was to fend off criticism about lack of safeguards in the matter of speciality and the Minister would be likely to be at the receiving end of representations not to consent in individual cases.

17. While the extent of extradition traffic to Britain and Northern Ireland in the past few years (10 persons returned in 1985, 3 in 1986) might not suggest any substantial "traffic", the fact is that there has been a decrease

in that traffic recently, presumably because of the kind of difficulties that have arisen about warrants etc. These difficulties may prove to be temporary, especially in view of the efforts that are being made to sort out the problems about warrants. The average number of extraditions, to Britain and Northern Ireland in the years 1981 - 1984 was 42, nearly all of them cases in which there would have been no suggestion whatsoever of a "political" connection. If the traffic were to return to that kind of level, the administrative burden of a consent procedure could be considerable.

18. The procedure proposed would not, of course, provide an absolute guarantee but a consent procedure in all cases would not do so either. The only way to safeguard in watertight fashion against the possibility of something going wrong would be to allow no charges at all to be brought other than those contained in the extradition warrants and this is not a real option as it would prohibit the bringing of additional charges of "ordinary" crime against offenders and would be much more restrictive than the rule of speciality that is set out in Part II of the 1965 Act and that is provided for in the European Convention on Extradition (and, more generally, internationally). Such an arrangement with the British would, of course, be reciprocal. It would preclude the bringing of additional charges, for example, in a case where a person was extradited to this country from Britain for murder or rape and it transpired, after he was got back, that he was also the person who had committed other offences of murder or rape. It would be unthinkable that we should be party to, or propose, an arrangement with the British which would mean that additional charges could not be brought in such a case.