POLICY NOTE

THE EXTRADITION ACT 2003 (PART 2 TERRITORIES) (DESIGNATION OF PROSECUTORS) (SCOTLAND) ORDER 2022

SSI 2022/127

The above instrument is made by the Scottish Ministers in exercise of the powers conferred by section 83E(2)(b) of the Extradition Act 2003 and all other powers enabling them to do so. The instrument is considered to be subject to the default procedure (laid before the Parliament only) under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

1. Purpose of the instrument

To provide that the Lord Advocate and Procurators Fiscal are designated as prosecutors who can issue a prosecutor's certificate under section 83C of the Extradition Act 2003 where a court is considering whether a person's extradition to another territory is barred by reason of the 'forum bar'.

Legislative background

2. The Crime and Courts Act 2013 ("the 2013 Act") amended the Extradition Act 2003 ("the 2003 Act") to introduce 'forum bar' provision. The effect of these provisions is to prevent extradition in circumstances where the alleged offences could be prosecuted in the UK and where it would not be in the interests of justice to extradite.

3. The 'forum bar' provisions were commenced in Scotland by the UK Government in September 2021. However, in order for these provisions to be brought fully into effect, it is necessary for Scottish prosecutors to be defined as 'designated prosecutors' who can issue a prosecutor's certificate.

4. A prosecutor's certificate is a notice that a designated prosecutor can provide the court, stating that the prosecutor has firstly, considered the offences for which the person could be prosecuted in the UK; secondly, decided that there are one or more such offences which correspond to the extradition offence; and, thirdly, decided either that the person should not be prosecuted in the UK for a corresponding offence because the prosecutor believes that there is insufficient admissible evidence, or that it would not be in the public interest, or that the person should not be prosecuted in the UK because of concerns about disclosure of sensitive material. Extradition cannot be barred on forum grounds if a designated prosecutor issues such a certificate, other than in appeal proceedings, in which case any review of the prosecutor's decision to issue a certificate is handled as if it were a judicial review.

5. While the power to designate prosecutors for this purpose in respect of proceedings relating to Part 1 of the 2003 Act lies with UK Ministers, the power to designate prosecutors in respect of proceedings relating to Part 2 of the 2003 Act lies with Scottish Ministers, as a result of the operation of section 141 of the 2003 Act which requires "Secretary of State" to be read as "the Scottish Ministers" in the context of matters within Part 2 relating to Scotland only.

Policy objectives

6. The order will provide that the Scottish prosecutors listed in this order will be able to give a prosecutor's certificate in "forum proceedings" conducted pursuant to Part 2 of the 2003 Act as amended. In contrast with the position in England and Wales, where there are a number of agencies that can initiate prosecutions, in Scotland, all prosecutions are made by the Crown Office and Procurator Fiscal Service. The order therefore designates them as prosecutors that can issue a prosecutor's certificate.

7. This will ensure that the 'forum bar' provisions are fully commenced in Scotland and that there is no risk of a future extradition decision being ruled unlawful on the grounds that the forum bar provisions were not fully in effect at the time the decision was taken.

Procedure

8. Section 223 of the 2003 Act does not specify a Parliamentary procedure for this order. For this reason, it is considered that section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies, and that this order is not subject to any further procedure after laying before the Parliament.

Consultation

9. The order has not been subject to any formal public consultation. However COPFS have been informed.

Impact Assessments

10. The order does not have any implications for equalities, children, privacy, the environment, island communities or human rights as it simply designates the prosecutors who can issue a prosecutor's certificate in Scotland. In any individual case, where extradition is being considered, the sheriff is required to consider the human rights of the person being sought when determining the extradition request and this order does not change that position.

Financial Effects

11. The Cabinet Secretary for Justice and Veterans confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Directorate for Justice
March 2022