Secondary Legislation Scrutiny Committee

Oral evidence: Criminal Justice (European Investigation Order) Regulations 2017

Tuesday 12 September 2017

5.00 pm

Watch the meeting

Members present: Lord Trefgarne (The Chairman); Lord Faulkner of Worcester; Baroness Finn; Lord Janvrin; Lord Kirkwood of Kirkhope; Baroness O'Loan; Lord Sherbourne of Didsbury; Baroness Watkins of Tavistock

Heard in Public Questions 1 - 9

Witnesses

I: Mr Nick Hurd MP, Minister of State for Policing and the Fire Service, Julian Fletcher, Head of International Criminality Unit and Stephen Jones, Legal Adviser, Home Office.
Examination of witnesses

Mr Nick Hurd MP, Julian Fletcher and Stephen Jones.

Q1  The Chairman: Good afternoon. Thank you so much for coming. I am asked to say that we are now going into public session. If you hear bells, they are division bells and not a fire alarm. The fire alarm will be activated orally, in which case please follow the clerk’s instructions. This is a formal evidence-taking session on the record and is being webcast live on audio only. A verbatim note is being taken, which will be put on the public record in printed form and on the parliamentary website, and we will of course send you a copy of the transcript for amendment of any errors. Do any members have any relevant special interests to declare? No. Thank you very much.

First of all, thank you very much for coming at such short notice. As I think you know, this is our last meeting before the so-called conference Recess. It would have been in late October that we would have seen you otherwise, so thank you very much for agreeing to come. I will start with a short question and then I will ask my colleagues to join in, if that is in order.

You know the instrument we are talking about, but I will read out the title if you would like me to: the Criminal Justice (European Investigation Order) Regulations 2017. In preparation for its consideration of this instrument, at our meeting in July the Committee asked for a number of clarifications. We received a response to these questions only on 7 September, seven weeks later, and after the Committee had met again. May we know why that delay occurred?

Mr Hurd: First, my Lords, let me start with an apology that is very sincere. I was frankly quite appalled when I was notified of this problem, which was very recently indeed. My first question in these situations is always, “Is this a cock-up or a conspiracy?”, and this was clearly a cock-up but a totally unacceptable cock-up, which showed disrespect to this Committee and the broader process of parliamentary scrutiny.

I am frankly embarrassed by it and various officials have fallen on their sword as a consequence of that. We are here to apologise and perhaps give some assurance to your Lordships that the matter has been taken sufficiently seriously that I have discussed it directly with the permanent secretary and it will be discussed in a ministerial meeting with the Home Secretary, because the Home Office takes the process of complying with the business of parliamentary scrutiny extremely seriously and we have lapsed here badly.

The Chairman: Thank you for that answer. That is, if I may say so, a very helpful answer and it will enable us to speed through the remaining questions more easily. We have a number of supplementaries, which you are aware of.

Mr Hurd: I have officials alongside me who will hopefully leave you in no doubt about the sincerity of our apology and I hope the quality of our
response will be reassuring. I may let them do much of the work from this point on.

Q2 Baroness Finn: The Explanatory Memorandum presented with this instrument assumes the reader has extensive knowledge of both the Directive 2014/41/EU and of the current UK system. It says, for example, "The transposition largely relies on existing law enforcement tools, such as search warrant and production orders, which broadly aligns with existing procedures under the Crime (International Co-operation) Act 2003 ... For outgoing requests the policy position has been to align the process for making European investigation orders with existing ones as far as possible".

Our guidance makes clear that we expect an Explanatory Memorandum to assume that the reader has absolutely no prior knowledge of the subject. Having given so little context, why were your officials unprepared for questions on how this mechanism would work?

Mr Hurd: That is a good question. I am not entirely sure that we were unprepared in terms of questions as to how this mechanism was to work. I have a sense that we dropped a ball and were very slow in responding to you. Julian or Stephen, do you want to respond directly to Baroness Finn?

Julian Fletcher: Thank you, Minister. Chairman, may I just add to what the Minister said my personal apologies. I am head of the unit responsible for this measure, so I apologise to the Committee and reiterate what the Minister said: this was definitely cock-up rather than conspiracy, if I may use his phrase. It was not a question of, given the detail in the explanatory memorandum, the difficulty answering the specific questions. It was purely because we had the administrative failure that meant we did not get to them until far too late for the Committee’s satisfaction. It is a matter of regret to me, but I hope we will be able to address any remaining questions from the Committee today and through the letter from the Minister sent last Thursday.

The Chairman: I am thinking we could compress some of this now, because you clearly understand and accept the concerns that we have expressed. Do you want to do any supplementaries to that?

Baroness Finn: No. Thank you very much.

The Chairman: There were some technical questions. Do you want to do question three, Lord Faulkner?

Q3 Lord Faulkner of Worcester: It is a short question. I imagine it will be a very quick answer. The letter that eventually arrived has addressed a number of our concerns, as indeed your replies this afternoon have. Could you just please clarify whether it will be the Home Secretary personally who will be authorising the prisoners to be sent abroad under these orders or some designated official and if it is an official, what sort of official will it be?

Mr Hurd: It will be Ministers.
Baroness O’Loan: Minister, the transposition date for the Directive is 22 May 2017 and we are grateful that you adjusted your implementation plans to enable full parliamentary scrutiny. The Explanatory Memorandum states that only nine other member states have so far transposed this directive. The list of participating states is much longer. How will the system operate if our legislation says that you should consider a European investigation order from Portugal or Poland or any other state that has not yet transposed the directive into domestic legislation?

Mr Hurd: The short answer, which I will ask Julian to expand on, is that where a country has not yet implemented the EIO, we would expect them to submit a request under another relevant legal base. For an EU member state that has not implemented the EIO, we would expect requests to be made under the EU Mutual Legal Assistance Convention 2000. Julian, do you want to expand on that?

Julian Fletcher: Yes. If I could add to the noble Baroness’s question, we had anticipated that it would be unlikely to be the case that as of 22 May all member states who are participating in the EIO would have implemented their own legislation, so there was always going to be an element of transition to this. In fact, as the Committee will be aware, the UK did not implement on 22 May itself.

There is a relevant legal base where we can continue, and in fact we do continue, to receive requests from countries that have not yet implemented. As more and more do so, it becomes easier for us administratively because we will be receiving more European investigation orders than under the previous regime, but the two run concurrently at present and we are able to consider those requests whether a country has implemented or not.

Baroness O’Loan: Can I be very clear that, should a country that has not implemented submit to the United Kingdom an order, you would just simply deal with it in the appropriate manner, rather than seeking to comply with the legislation that we have passed in this statutory instrument?

Julian Fletcher: Absolutely. It is perhaps relevant here that Ireland and Denmark are not participating in the European investigation order at all, so we continue to consider those under the existing regime.

Lord Sherbourne of Didsbury: Can I just raise, so I am clear, the point raised in the last substantive paragraph of the Minister’s letter? You say that a prisoner transferred from the UK must be returned to the UK by a member state. If the receiving member state failed to return a transferred prisoner what would be the recourse?

Julian Fletcher: I may require some assistance from my legal colleague sitting alongside us. The point here is that, as with other matters relating to EU law, the Court of Justice of the European Union would be competent to give a view on that. In this instance it would be on the application of the directive, and in particular Article 22(1), which we consider is clear a prisoner has to be sent back to the executing state—the UK—within the
period stipulated by the executing state. Stephen, I do not know if you wanted to add anything to that.

Stephen Jones: No, just that a ruling from the CJEU on that point would be binding on the member state in question, so they would be obliged then to give effect to that.

Lord Sherbourne of Didsbury: Okay. On a supplementary point, so I am absolutely clear, in the question of a UK prisoner transferred to country A under an EIO, are there any circumstances at all in which that state could then send him to country B in response to another EIO? Are there any circumstances at all in which that might happen?

Stephen Jones: We would say no. Article 22(6) in the directive—I have it in front of me—requires the receiving member state to keep that prisoner in detention in their territory until they are returned. Our interpretation of that is that it effectively prevents their being transferred on to an onward state. In the agreement between the receiving state and the sending state, it would be made clear that that was the case; that was our view.

Baroness O’Loan: What if the prisoner refuses to go?

Stephen Jones: If the prisoner refuses to consent to the transfer taking place, then it will not happen. Once the prisoner has been transferred to the UK the warrant authorising that prisoner’s detention and ultimate return to the sending country is in place, so it does not matter if the prisoner then withdraws their consent. That warrant is still in force.

Baroness O’Loan: Are you saying that he would be forcibly returned?

Stephen Jones: It would be subject to him raising a complaint about human rights or something and an injunction from a court or something—that would be the reason why they could not.

Baroness O’Loan: It could be that these prisoners would spend a very significant amount of time going through our legal system before they get back to some of these originating countries.

Julian Fletcher: It is difficult to say definitively it would never happen, but the number of requests anticipated is very few. We do not expect many of these at all and, certainly in the last five years, there have been no transfers of anybody under the existing legal provisions under a mutual legal assistance request. This is separate from a European arrest warrant or extradition matter.

The European investigation order is concerned with the gathering of evidence to use in a court of law for a prosecution principally to support an investigation in one member state. Where we are talking here about the potential transfer of a prisoner, it is in the context of if they cannot give a written witness statement, if they cannot appear by video link or if there is no other means by which their evidence can be supplied to the court in the investigation country—the then it is an option within the directive itself.
Baroness O’Loan: May I, Lord Chairman? It just seems to me that the package of European investigation measures has grown quite significantly in recent years. This is one further element of that package, and therefore the fact that there have not been many in the past does not necessarily mean that there will not be many in the future. That is my only comment.

Mr Hurd: I am sure that is right, which is why broadly we are supportive of the direction of travel in trying to get a better process around bilateral conversations on this subject. That is why we broadly support the direction of travel, but the context is we have not had any cases.

Lord Janvrin: Minister, can I ask a question about interception of communications? The Explanatory Memorandum explains that regulation 59 designates the European investigation order as an acceptable mechanism under the Investigatory Powers Act 2016 to allow the UK to provide information to other member states on the interception of telecommunications. Could there be an explanation of what this means in practice and what sort of data you envisage as transferrable?

Mr Hurd: In terms of process, my Lord, until the provisions of the 2016 Act come into force, interception requests made under the directive and under the convention will be dealt with under the RIPA regime. In terms of how requests are acted upon, RIPA officers will follow the National Police Chiefs’ Council’s internet protocol address resolution good practice guidance, and any interception of communications in response to an incoming EIO request would require a warrant under RIPA or the IP Act and the processes set out in RIPA will apply. In terms of the kind of data that we might be talking about, Julian, do you want to expand on that?

Julian Fletcher: Yes. A warrant could include the content of communications and communications data related to those communications, but it would be on a case-by-case basis under the existing RIPA Act or what will replace it in due course.

Lord Janvrin: It would be safeguarded; there would be a warrant required.

Julian Fletcher: Yes.

Baroness Watkins of Tavistock: Could I ask about the position post-Brexit?

Mr Hurd: You can try.

Baroness Watkins of Tavistock: That is fair. The “impact” section of the Explanatory Memorandum states that the new system is expected to be more effective and efficient than the existing mutual legal assistance (MLA) system. Our fourth report therefore raised the question of whether we will revert to the less efficient MLA process once the UK leaves the European Union. Can you explain the Home Office’s policy proposals in relation to this?

1 RIPA stands for the Regulation of Investigatory Powers Act 2000
Mr Hurd: To a very limited basis and probably not to your satisfaction. Everyone has a very strong understanding and view that, notwithstanding our leaving of the EU, close co-operation on security and law enforcement will continue and is very important to us and, I believe, to our European partners, but the precise nature of our ongoing participation in the practical co-operation mechanisms, including the MLA, I am afraid will be subject to negotiation.

Lord Kirkwood of Kirkhope: Minister, your evidence is very welcome. I am a new member of this Committee and this is one of the first cases I came across. Knowing a little about how you work, I was completely perplexed about the thing, but I am grateful that you have cleared that up right at the very beginning. That was a very valuable statement to make, because it left me with the impression, absent your explanation, that you just did not have the staff, either at the right quality or in enough numbers, to do this work properly.

Can you put your hand on your heart and say that you have the confidence from sorting out this glitch, as I am sure you will, to be able to be more confident this will not happen again? The reason I ask you that is you are Cabinet Minister material. My point is that Ministers change, and it does not matter how sincere you can be—and I believe you are. In 10 minutes there might be another Minister of state along doing this important job. How can we be confident that the lessons that you have learned and shared with us this afternoon are going to survive ministerial change?

Mr Hurd: Thank you for what you have said, and you and I have worked together, so you know that—I hope I was entirely sincere in what I said. I was genuinely upset by what happened, not least because we are talking about the Home Office. We are talking about one of the great departments in government, and this should not happen. To be fair to Julian, he put his hand up and said our system was not good enough and over the summer a ball got dropped, and he will have a drains-up on the system and the permanent secretary is alerted to it because this is an embarrassment to the department, so there are consequences in terms of accountability and raising the profile of it.

What we did not want to do is just blow some smoke over it. I wanted to come here and apologise very directly to you for something that was unacceptable. Since then I have had confidence in the officials. I hope you are reassured by the quality of the response that you have received, both in writing and verbally today, and you will form your own conclusions as to whether officials are on top of this or not. I am personally reassured and I can give you that assurance.

Lord Kirkwood of Kirkhope: I trust your judgment on these things. But we are not in a steady state. We are in a two-year Parliament for kick off and we have EU withdrawal looming—if that is the right verb, if looming is a verb—so this is all going to get more pressurised. I can tell you I am a new member of this Committee but the Chairman is absolutely jealous of parliamentary scrutiny at this end of the building. It is done on a much more professional basis than the other end, and I can say that to you
because I have been there.

Mr Hurd: You know.

Lord Kirkwood of Kirkhope: Can you give us some assurance as the numbers ramp up that you think that the quality will not suffer?

Mr Hurd: I can give you as much reassurance as I can. It needs to be tested. There will be a high volume of secondary legislation, but I am absolutely sincere in saying I hope and believe this instance we had to come and apologise for is exceptional and will not be repeated. It is a basic function of any department to support Ministers in the scrutiny process with Parliament. I cannot guarantee that balls will not get dropped at all because to err is human, but that is what has happened in this case.

The Chairman: Minister, we are enormously grateful to you. Thank you very much indeed for coming. Thank you for your careful acceptance of the problems that we have presented to you and let us hope they do not happen again.