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BRIEFING NOTE ON CLAUSE 195, CRIME AND POLICING BILL 2025

Introduction

Clause 195 of the Crime and Policing Bill 2025 (CPB) proposes significant amendments to s 20 & s 85 Extradition Act 2003 (EA 2003) (the right to a re-trial following conviction in absence), aiming to reverse the effect of two key UK Supreme Court decisions: *Bertino v Public Prosecutor's Office, Italy* [2024] UKSC 9 and *Merticariu v Judecatoria Arad, Romania* [2024] UKSC 10 and significantly weaken protections that have been in place since the inception of the EA 2003 for extradition to both Part 1 territories (countries within the European Union) and Part 2 territories (countries outside the EU).

The judgments in *Bertino* and *Merticariu* applied established principles under Article 6 of the European Convention on Human Rights (ECHR) and ensured the interpretation of s 20 complied with the **UK–EU Trade and Cooperation Agreement (TCA).** This clause would undermine the vital safeguards imposed by Parliament; they raise serious concerns regarding the **rule of law**, the **right to a fair trial**, and compliance with both **Article 6 ECHR** and the TCA**.**

Recommendations

- **Protect the right to a re-trial following a conviction** *in absentia* by proposing an amendment removing Clause 195 in its current form.

  Or

- Maintain the principle that extradition cannot proceed unless the person has an **unqualified right to a retrial** on return by proposing an amendment to redraft Clause 195(2)(a) and 195(3)(a) to amend the text of proposed sections 20(5)(b) and 85(5)(b) EA 2003.

- Ensure that a person is only deemed present at trial through the presence of an **instructed** legal representative by proposing an amendment to redraft Clause 195(2)(b) and 195(3)(b) to amend the text of proposed sections 20(7A) and 85(7A) EA 2003.

Key Problems with the Proposed Amendments

(1) *Removing 'entitlement' to a re-trial*

The UK has long maintained a principled opposition to convictions in absence, grounded in both common law and Article 6 ECHR. Sections 20 and 85 EA 2003 reflect this by requiring UK judges to assess whether the person concerned has a genuine entitlement to a retrial if they have been convicted in their absence, and have not waived their right to a trial in their presence.

The permissive approach other countries take to convicting a person and also sentencing in their absence is contrasted with the strictly defined pre-conditions, including notice requirements, applicable in the UK.

In *Merticariu* and *Bertino*, the Supreme Court affirmed that a conviction secured in a person's absence must be remediable by a real and effective opportunity for a retrial. It held that under ss 20 and 85, the right to a retrial must not be conditional on a discretionary decision made in the requesting state. In particular:

- An entitlement to a retrial cannot be contingent on the court in the requesting state making a factual finding that the requested person was not present at or was not deliberately absent from their trial, in circumstances where the extradition court has concluded that they were not deliberately absent (*Merticariu,* paragraphs 51 & 60). An interpretation the Court held was consistent with protections under Article 6 ECHR (paragraph 54).

- A person may waive their right to be present at trial, but such a waiver must meet the standard imposed under Article 6, and therefore must be deliberate and unequivocal (*Bertino*, paragraph 54).

Clause 195 would reverse these protections, allowing extradition based on **discretionary rights**, rather than relying on clear guarantees. It would allow extradition even where the right to a re-trial is **only conditional** on the requesting state later deciding the person was not deliberately absent, when a UK judge has already reached that conclusion. This is a serious regression and may lead to individuals, including British citizens, serving sentences for convictions they had no chance to contest.

The real-world importance of these protections is illustrated by the case of Edmond Arapi. In 2006, Mr Arapi, a UK resident, was convicted *in absentia* of murder by an Italian court and sentenced to 16 years' imprisonment. In 2009, an arrest warrant was issued seeking his extradition from the UK. In fact, Mr Arapi had not been in Italy at the time of the alleged offence and had a verified alibi; his conviction was the result of mistaken identity and serious procedural failures. The extradition was only halted following legal challenge and press attention which brought these issues to light. Had the UK courts been required to accept, without further scrutiny, the requesting state's assertion regarding his "presence" (he was represented by a court appointed lawyer) under Clause 195, Mr Arapi would have been surrendered and unjustly imprisoned for a crime he plainly did not commit. His case underscores the need for meaningful judicial assessment of whether a requested person truly was convicted in their presence and has a real and effective right to a retrial.

Further, there is no viable public policy argument in favour of this amendment. The Supreme Court did not make a new law by recognising that there is a fundamental difference between "right to a retrial" and "a right to ask for" a retrial (*Merticariu* §20). All the Supreme Court did in *Merticariu* was to reaffirm the meaning of the word entitled, approving the long established decision in *Bohm v Romania* [2011] EWHC 2671 (Admin), which held that the word "entitlement" does not mean "perhaps" or "in certain circumstances", and overturn the conflicting decision in *BP v Romania* [2015] EWHC 3417 (Admin) which found the right to apply for a re-trial was sufficient.

To the extent that there is a public policy argument that Romania cannot currently offer an effective retrial, that must be considered in context. It will only affect the small number of cases where (a) a person was convicted in their absence and (b) the UK courts, applying established Article 6 standards, concluded that he did not deliberately absent himself from the

trial. In those circumstances, requiring an entitlement to a re-trial is entirely consistent with Article 6, and the public policy principles of a right to a fair trial.

Clause 195 and the UK–EU Trade and Cooperation Agreement (TCA)

Prior to Brexit, extradition arrangements across the EU were governed by the EAW Framework Decision 2002/584/JHA. This was amended by the Framework Decision 2009/299/JHA (the 2009 FD) with a deliberate strengthening of the protections for people convicted in their absence, seeking to harmonise those protections across the EU. The UK (with others) advocated for the amendments, with an explanatory memorandum of 30 January 2008 emphasising the importance of fundamental rights in this context, which in turn fosters legal certainty and facilitates the principle of mutual recognition while taking account of 'various national legal systems'. As recognised by the Supreme Court, s 20 (as currently drafted) already met the requirements and thus EA 2003 did not requirement amending.

These protections are now found in Article 601(1)(i) of the TCA which governs the extradition arrangements between the United Kingdom and the European Union following Brexit. Article 601(1)(i) establishes clear and detailed conditions under which extradition may proceed in cases in which a person has been convicted *in absentia*. This includes where they have prior knowledge of the trial, legal representation by a lawyer specifically "mandated" by the requested person, or the right to a retrial upon surrender. Clause 195, by removing or diluting these protections, **first** risks breaching the UK's international obligations under the TCA and undermining the reciprocal respect for fundamental rights that underpins the extradition arrangements between the EU and UK member states, and **second** sweeps aside the carefully formulated position of the UK Government, endorsed at the European level.

Finally, under Part 1 (s 20), the amendments ought to be unnecessary. If the Requesting State issues a warrant which complies with the requirements and criteria identified in the 2009 FD, now enshrined in Article 601(1) and the pro forma warrant at Annex 43 of TCA, then the information provided will be determinative of the questions under s 20. It is only when those requirements have not been met does the 2009 FD leave the question to be determined by the Requested State (see *Bertino* paragraphs 44-45 and *Merticariu* paragraphs 23-29).

Under Part 2 (s.85), the amendments removing the entitlement to a re-trial are even more grave, because extradition, by definition, is being sought by a country that does not comply with Article 6 ECHR, thus the fair trial standards are likely to be lower.

(2) *Deeming someone present through a court appointed lawyer*

The proposed change at subsection 7A means an extradition defendant could be treated as being present via a lawyer, even if there was no contact between them and a court appointed lawyer. Subsection 7A provides that a person who was legally represented at trial – regardless of their physical absence and whether the representation was court-appointed or uninstructed – is to be treated as having been convicted "in their presence". This legal fiction undermines fundamental fair trial rights. *Merticariu* is one of many examples where the foreign court appointed a lawyer, yet the lawyer was not acting on the defendant's instructions.

It is crucial that a distinction is drawn between a lawyer acting on instructions consistent with Article 6 ECHR and a lawyer simply appointed by the Court. The UK, in considering its obligations under Article 6, must remember that the ECHR "is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective' and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Sejdovic v Italy* (no. 56581/00), paragraph 94).

Further, the insertion of 7A is wholly unnecessary. As affirmed in *Bertino* at paragraph 46, the Courts already treat a person as present by dint of their instructed lawyer. The sole purpose of this amendment is therefore to treat someone as being present because a court formally appointed a lawyer, whom the person has never met, instructed or spoken to.

In conclusion, Clause 195 signals a regrettable shift in the UK's longstanding principled approach to extradition. Rather than promoting high standards of fairness and due process, the proposed changes appear aimed at accommodating the practices of a small number of jurisdictions whose conviction-in-absence procedures have repeatedly been found to fall short of Article 6 ECHR standards and/or fail to comply with the requirements in the 2009 FD and now the TCA. This is not a moment for the UK to race to the bottom or align itself with the lowest common denominator. Post-Brexit, the UK has an opportunity – and indeed a responsibility – to demonstrate that leaving the EU does not mean abandoning our commitment to fundamental rights. Upholding robust protections in extradition cases strengthens the UK's position as a reliable partner in international cooperation and reinforces the credibility of our justice system on the global stage.

DEFENCE EXTRADITION LAWYER'S FORUM

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