FAIR TRIALS INTERNATIONAL

Fair Trials International
3/7 Temple Chambers
Temple Avenue
London EC4Y 0HP
United Kingdom

Telephone +44 (0)20 7822 2370
Fax +44 (0)20 7822 2371

www.fairtrials.net

Outline proposal for European Parliament own initiative legislative report

Fair Trials International

The European Arrest Warrant eight years on – time to amend the Framework Decision?

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About Fair Trials International

Fair Trials International ("FTI") is a UK-based NGO that works for fair trials according to internationally recognised standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

FTI provides individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

Our work on behalf of people facing criminal trials outside of their own country provides us with expertise on criminal justice and fair trial rights issues. We are active in the field of EU Criminal Justice policy and, through our casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

For further information, contact:

Catherine Heard
Head of Policy
0044 207 822 2370
Catherine.Heard@fairtrials.net

Emily Smith
Policy Officer
0044 207 822 2370
Emily.Smith@fairtrials.net

Executive Summary

1. In its eight years of operation, despite several notable successes, the EAW's operation has been marred by placing the speedy surrender of persons to other Member States above the proper safeguarding of fundamental rights and the principle of proportionality. It has demanded blind faith in the standards of justice and procedural fairness of all European countries in the face of clear evidence of rights infringements. It has failed to deliver justice in a number of cases because of its over-rigid nature and its inability to safeguard fundamental rights and the proportionality principle.

2. The continued introduction of measures under the Roadmap on procedural safeguards is crucial in ensuring fundamental rights are respected across the EU. However, the Roadmap does not offer a total answer to concerns raised about the impact of the EAW on fundamental rights and about the EAW's over-use in disproportionate cases, which has major human and financial consequences.

3. Europe must work together to tackle serious cross border crime but, if we are to deliver a system which operates efficiently and in the interests of justice, action must be taken to eradicate unfairness from the EAW system and ensure it is compatible with the rights enshrined in the ECHR and the Charter of Fundamental Rights. To achieve this, the Framework Decision must be amended to provide for:

    i) Proportionality tests to stop the misuse of EAWs for minor offences;
    ii) Greater opportunity for courts in executing States, when alerted to a real risk of rights infringements, to seek further information and guarantees from the issuing state (and, ultimately, the power to refuse surrender if their concerns are not satisfactorily dealt with);
    iii) A requirement on issuing States to remove EAWs where surrender has been refused, on proper grounds, by another State; and
    iv) Deferred surrender until the prosecution in the issuing State is trial-ready, to avoid unnecessarily long periods in pre-trial detention.

    Unless action is taken to amend the Framework Decision on all four points, many more EU citizens will suffer injustice, and more resources will be needlessly wasted.

4. MEPs held a plenary debate on EAW reform in the European Parliament on 8 June 2011. Reform was supported by MEPs from a wide and influential political base and demonstrated a growing consensus on key areas for reform. While acknowledging that the EAW is vital for combating serious cross-border crime, the vast majority of MEPs agreed on the need for the EU to address the following flaws:

    - The disproportionate use of the EAW for minor offences, without regard for the human and financial costs of extradition;
    - The use of a fast-track extradition system without minimum standards of defence safeguards in place across Europe;
    - Excessive pre-trial detention periods in some EU States, coupled with unacceptable prison conditions.

    MEPs cited many of Fair Trials International's cases during the debate, as illustrating these problems, including the cases of Garry Mann, Andrew Symeou, Deborah Dark, Edmond Arapi, Cor Disselkoen and Robert Horchner.

Introduction

1. FTI recognises that the EAW is an important tool in combating serious cross-border crime and wants to see it working to deliver justice. The EU must remedy the flaws in the EAW system to avoid increased erosion of trust in the EAW and in mutual recognition as a whole.

2. Unfortunately, we are still a long way from an EU where every Member State offers sufficient fundamental rights protections for suspects and defendants. This reality makes enhanced safeguards in the extradition process even more important. The Procedural Rights Roadmap, crucially important in itself, cannot solve some defects in the EAW system, such as the absence of a consistent and binding proportionality test to ensure EAWs are only issued and executed in respect of serious crime.

3. With over 500 million EU citizens, 8 million of whom live in a State other than that of their nationality, effective justice policy depends on effective cooperation in cross-border cases. However, this cooperation must not be at the expense of basic principles of fairness and justice. Unfortunately, there has not been sufficient assessment of the human and financial costs of this "no questions asked" extradition regime. The EAW system has been in place long enough to demonstrate some of the dangers that can arise from mutual recognition when rights are not sufficiently protected.

Problem 1: no proportionality test in issuing State and no proportionality-based refusal ground in executing State, leading to widespread misuse of EAWs

4. In some EU countries, domestic procedures to issue Warrants do not respect the principle of proportionality and EAWs are, as the European Commission has acknowledged, being systematically issued for very minor offences. Not only does this lead to injustice in individual cases (given the draconian nature of extradition, in comparison with alternatives that would be available in cases without a cross-border element, such as a caution, a fine, or a conditional or suspended sentence); it also places a significant and unjustified burden on the resources of executing Member States' police and judicial authorities, court services, interpretation and translation facilities, legal aid services and detention facilities. According to the Commission it is therefore "essential that all Member States apply a proportionality test".[1]

5. The Commission has attempted to encourage this by amending the Handbook accompanying the EAW to include stronger guidance on proportionality and to recommend that issuing States consider alternatives to extradition before issuing EAWs. These changes represent useful added guidance for those Member States which already conduct a proportionality check before deciding whether to issue an EAW. Unfortunately, they do not tackle the root cause of the problem.

6. Some Member States issue a large number of EAWs because their constitutions or criminal codes require all offences to be prosecuted, no matter how minor, while other States' prosecution authorities enjoy a limited degree of discretion when deciding whether prosecution is in the interests of justice. This disparity led to Poland (population 38 million) issuing 3,753 EAWs in 2010 and Romania (population 21 million) issuing 2,000. The UK (population 62 million) issued 257 but received over 4,500. Germany (population 82 million) issued 2,096 EAWs but received over 13,000.

[1] Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision on the EAW, 11 April 2011

Case study: Patrick Connor

Patrick Connor (not his real name) was 18 when he was arrested in Spain with two friends in connection with counterfeit Euros. Patrick had no counterfeit currency on him or in his belongings at the time of the arrest, and has no idea how the notes came to be on his two friends or in their apartment. In total, the police found €100 in two notes of €50. Patrick and his friends were released and returned to the UK. Four years later Patrick was arrested on an EAW and extradited to Spain. Held in a maximum security prison in Madrid, and facing the prospect of up to two years in pre-trial detention, he decided to plead guilty. Patrick spent 9 weeks in prison before coming home to recommence his university career, his future blighted by a criminal record.

Solution

7. Proportionality can only be addressed satisfactorily by amending the Framework Decision, to ensure that proportionality is dealt with by the requesting State before an EAW is issued. This could be achieved by amending Article 2 so that an EAW may not be issued unless the requesting State is satisfied that the person's extradition from another Member State is necessary and proportionate. A list of criteria to be considered when assessing proportionality (such as the seriousness of the offence and the availability of alternatives to extradition) could be included.

8. However, the introduction of a proportionality check in the issuing State alone would not solve the problem of disproportionate use of the EAW. The requested State should also be able to refuse extradition where it would not be proportionate to execute the Warrant. This is a necessary additional safeguard, because the requested State often has access to information, such as the family circumstances and health conditions of the requested person, which the issuing State may not have when it issues the Warrant and carries out its own assessment of proportionality. These factors can, nevertheless, be crucial to a proper assessment of the proportionality of extraditing the individual for the alleged offence. A mechanism is needed to ensure they can be taken into consideration at the executing stage.

9. Furthermore, the issuing State is more likely to conduct a comprehensive proportionality assessment if it knows that proportionality will also be scrutinised in the requested State. A double proportionality check would ensure sufficient protection for requested persons and give executing States the ability to check whether the benefits of extradition justify the costs and serve the overall interests of justice.

10. The way to achieve this is through amending Article 3 of the Framework Decision to enable the executing State to refuse an EAW on grounds that extradition would be disproportionate. Some Member States already consider that, as executing States, their law allows them to conduct a proportionality test and refuse to execute a warrant if it is disproportionate.[2]

[2] See, for example, the German case *General Public Prosecution Service v C*, 25 February 2010

11. Proportionality is a fundamental principle of EU law[3] and it must be applied to the EAW process. If the EU does not take the lead on this, by eradicating disproportionate use of what is a highly valuable tool in the fight against cross-border crime, then it risks continued misuse of the EAW, which will steadily erode trust in the instrument and lead some Member States to apply their own proportionality tests when deciding whether to execute EAWs. This will lead to the instrument being applied in an ad hoc and inconsistent manner across the EU and undermine trust in the mutual recognition concept.

Problem 2: issuing authorities are not required to withdraw EAWs when they are properly refused by executing authorities

12. As matters stand, the principle of mutual recognition is entirely one-sided. Member States are obliged to recognise a warrant issued by another Member State, but not a decision by another State that a warrant should not be executed. If one country refuses to execute an EAW, for example because it is satisfied that the person is not the individual wanted for the alleged offence, or because it would breach a person's fundamental right to a fair trial (perhaps due to the amount of time that has elapsed since the alleged offence), this does not automatically invalidate the EAW. The individual subject to the warrant remains a wanted person and risks re-arrest, further hearings and additional legal costs, each time he or she crosses a national border.

13. This is the case even where extradition has been refused under one of the mandatory grounds for refusal laid down in the Framework Decision. In some cases, EAW alerts have remained in place even after a person has served their prison sentence in the State issuing the warrant. This represents an unacceptable curtailment of freedom of movement and clearly contravenes the principle of mutual recognition. It is also highly wasteful of resources.

Case study: Deborah Dark

Deborah Dark, a grandmother of two, was arrested and detained, first in Turkey, then in Spain and then in the UK. She was wanted to serve a prison sentence in France for a twenty-year old conviction she knew nothing about. Courts in both the UK and Spain had ruled that it would be unjust to extradite her to France, but she remained subject to the EAW in the rest of Europe. Too afraid to leave the country in case she was arrested again, Deborah was in effect imprisoned within the UK for 3 years and unable to visit her pensioner father in Spain. It was only in May 2010, following a lengthy campaign, that France finally agreed to withdraw the EAW against Deborah, 20 years after her conviction.

Solution

14. Action at EU level is required to require the issuing State immediately to withdraw an EAW, when one Member State has refused to execute it. Issuing Member States should also be required to ensure the removal of all corresponding alerts on EU and

[3] For example, see the *Internationale Handelsgesellschaft* case and Article 49(3) of the Charter of Fundamental Rights, which states: "The severity of penalties must not be disproportionate to the criminal offence"

international police databases (such as the Schengen Information System and the Interpol system).

15. The prompt withdrawal of warrants would ensure that individuals are not needlessly re-arrested or detained, and forced to use their own funds to pay lawyers in one or more jurisdictions to help them challenge their surrender.

16. In some situations, however, the fact that the requested State has refused an EAW does not necessarily invalidate the extradition request. If, for example, the EAW has been refused on the grounds that there is technical problem with the form of the warrant, then the issuing State can and should reissue the EAW. However, the suggested reform will ensure that where the EAW has been refused on proper grounds of principle, it is not simply left in place, effectively trapping a person in their home Member State without any remedy against the issuing State.

Problem 3: insufficient provision in Framework Decision for executing state courts to examine fundamental rights consequences of surrender and, if necessary, seek further assurances or information before ordering surrender

17. The EAW system is founded on mutual recognition; a principle which itself relies on mutual trust in the justice systems of all EU Member States. Unfortunately, experience shows that this trust is sometimes misplaced. In its implementation report the European Commission notes that, despite the fact that all Member States are subject to the standards of the European Court of Human Rights (ECtHR), "this has not proved to be an effective means of ensuring that signatories comply with the Convention's standards".[4]

18. Between 2007 and 2010 the ECtHR delivered 181 Article 3 infringement rulings against EU Member States (prohibition on torture and inhuman or degrading treatment). Article 6 rights (the right to a fair trial) were held by the ECtHR to have been infringed by EU countries in 1,696 cases over the same period.[5] It is an unfortunate reality that standards are not the same in every EU Member State and fundamental rights do not receive the same level of respect and protection in every country which is a party to the EAW.

19. There are two problems concerning human rights and the EAW: 1) in some States the human rights implications of extradition are not being considered at all prior to surrender being ordered; and 2) where States do apply a human rights bar to extradition, that bar is being interpreted in a way which sets it so high it is virtually impossible to meet (even where detailed and recent evidence has been adduced as to the risk of infringement if extradition takes place). Once people have been extradited, they suffer the precise rights infringements they tried to alert the court to at their extradition hearing. Both of these problems stem from an approach to extradition which places mutual recognition above the human rights of the requested person and places blind faith in the issuing State as guarantor of fundamental rights.

20. It is a long-established principle that a State's obligations under the Convention are engaged if it decides to extradite someone who risks being subjected to ill-treatment

[4] Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision on the EAW, 11 April 2011, p.6
[5] European Court of Human Rights: statistical information

in the requesting country.[6] The ECtHR has recently held that placing blind faith in the ability of the requesting State to guarantee rights, simply by virtue of being a signatory to the European Convention on Human Rights (ECHR), is unacceptable. In *MSS v Belgium and Greece*[7] (which, although it concerned the expulsion of an asylum seeker under the Dublin II Convention, is clearly analogous and applicable to extradition proceedings), the ECtHR held that:

The existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where […] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.[8]

21. It is wrong in principle to restrict the remedy of a person facing extradition to invoking rights in the issuing State, after extradition. Usually, this is too late as the damage is done: an unfair trial, an unsafe conviction, a criminal record, months or years in appalling detention conditions. This makes later infringement findings of no value to the individual and his or her family. In some States, even making complaints about conditions in prison carries serious risks for detainees: violence from prison officers and solitary confinement, as reports have verified.[9]

22. Despite this, domestic courts seem ever less willing to consider human rights grounds in extradition hearings, let alone refuse extradition on the basis of them. Mutual recognition virtually always "trumps" fundamental rights concerns, regardless of the human rights record of the State issuing a request.

23. It is clear that human rights safeguards in the EAW system require strengthening. Unfortunately the current references to human rights in the Preamble and Article 1 of the Framework Decision[10] are insufficient.

Case study: Garry Mann

Garry Mann, a 51-year-old former fireman from Kent, was arrested under an EAW in 2009. Garry was wanted in Portugal to serve a 2-year prison sentence. At his original trial in Portugal Garry had no time to prepare a defence and standards of interpretation were grossly inadequate. Garry's extradition was ordered by a British court despite compelling evidence that his original trial was unfair. Garry is currently serving his sentence in a Portuguese prison.

See also the case of Andrew Symeou (below under Problem 4)

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[6] *Soering v UK* [1989] ECHR 14
[7] [2011] ECHR 108
[8] Para 353
[9] See, for example, evidence from Robert Rettinger's affidavit, *MJELR v Rettinger* [2010] IESC45
[10] Framework Decision on the EAW, Recital 12, Recital 13 and Article 1(3)

Solution

24. Article 5 of the Framework Decision should be amended to allow executing States, once alerted to a serious risk of rights infringement, ask the issuing State for further information, and where necessary, guarantees that the fundamental rights of the requested person (as enshrined in the ECHR and the Charter of Fundamental Rights) will be respected. Such guarantees should only be sought where the requested person has first provided substantive evidence that his or her rights will be violated if surrendered. Where the issuing State does not provide the requested information or guarantees within a reasonable period of time, or the information provided is insufficient, then the requested State should be entitled to refuse to extradite.

25. This amendment would ensure that the human rights implications of extradition are rigorously scrutinised by executing judicial authorities, if they are alerted to grounds for concern. This is what is required by the European Court of Human Rights, as laid down in *Saadi v Italy*[11] and *MSS v Belgium and Greece.*[12] A similar position has been taken by the Grand Chamber of the Court of Justice of the EU, in the case of *NS and others v SSHD*[13]**,** in which it was held that any presumption that other EU Member States comply with the international human rights obligations should not be treated as conclusive. The Framework Decision should be amended to reflect these important rulings and ensure they are followed consistently by all Member States.

Problem 4: premature extraditions when issuing state is not "trial-ready", leading to unnecessary periods in pre-trial detention

26. Growing numbers are being extradited under the European Arrest Warrant, only to be held for months in prison, hundreds of miles from home, waiting for trial. Some countries' laws allow people to be detained for years before trial, others have no maximum period at all; and few countries have an adequate review system. This is exacerbating the severe overcrowding that already blights around half of all Member States' prisons.

27. Non-nationals are far more likely than nationals to suffer the injustice of arbitrary and/or excessive pre-trial detention and be deprived of key fair trial protections such as access to a lawyer, right to communicate confidentially with legal adviser, right to see important documents to prepare defence and access to an interpreter if needed. Inappropriate and excessive pre-trial detention clearly impacts on the right to liberty and the right to be presumed innocent until proven guilty.[14] It also has a detrimental effect on the rights of the suspect's family members under Article 8 ECHR. This is particularly so when the suspect is detained overseas, as visiting will be more costly and difficult.

28. There is also a wider socioeconomic cost of pre-trial detention, as lengthy detention usually results in the suspect losing his or her job. Where the pre-trial detainee is also the family's main breadwinner this has a severe financial impact on other family members. These knock-on effects further increase the costs of pre-trial detention to Member States.

[11] [2008] ECHR 179
[12] Grand Chamber *(Application no. 30696/09)*
[13] Grand Chamber of the Court of Justice, Joined Cases C-411/10 and C-493/10
[14] As guaranteed by Article 5 and Article 6(2) ECHR, respectively

Case summary: Andrew Symeou

Andrew Symeou, a twenty-one year old British student, was extradited to Greece in July 2009 to face charges in connection with the death of another young man at a nightclub on a Greek island. Andrew's extradition was ordered despite evidence that the charges he was facing were based on statements extracted by Greek police through the brutal mistreatment of witnesses, who later retracted their statements. Andrew also raised the prospect that extradition would breach his Art 3 ECHR rights. Such arguments were unsuccessful.

Once in Greece, Andrew spent a year in horrendous prison conditions, and has described how he awoke each morning covered in cockroaches and was frequently bitten by fleas in his bedding. The shower room floor was covered in excrement and the prison was infested with vermin. Despite family links in Greece and the fact that his father rented a flat for him to stay at, he was denied release pending trial on the basis that he was foreign and had not shown "remorse". He was held in a filthy, overcrowded cell for almost a year before being finally given "local bail". He was acquitted in June 2011, four years after the events in question. His father lost his business because of the costs incurred in helping with Andrew's defence. The family is unlikely to win compensation.

Solution

29. Some of the problems FTI has identified will be lessened by effective implementation of the European Supervision Order (from December 2012), but this cannot in itself stop countries from issuing and executing EAWs before the prosecuting State is ready for trial. What is needed is a "smarter" approach to extradition. The EAW was designed to achieve speedier extraditions and shorter delays to trial: it should **not** be used if prosecuting authorities in the issuing State are nowhere near ready for trial.

30. Deferred issue of, and surrender under, EAWs should be permitted, to ensure defendants are not surrendered speedily when there is no prospect of a speedy trial. Defendants able to meet supervision conditions in their home country should be allowed to do so, until prosecutors in the issuing state can satisfy the executing state that a trial will take place quickly after surrender. This will reduce the personal and financial impact of extradition and lengthy pre-trial detention – benefiting both individuals and Member States.

Conclusion

31. Numbers of European Arrest Warrants issued across Europe have increased, year on year, since the system's introduction. Eight years is long enough for reliable data to be gathered. Members of the European Parliament have expressed their concerns over flaws in the system, as has the European Commission. A legislative initiative lies within the competence and expertise of the LIBE Committee. Fair Trials International would be delighted to offer any further information or assistance to Members of the Committee as it considers its next steps.

Fair Trials International **1 February 2012**