



Meeting Summary

An Area of Freedom, Security and Justice – Reviewing Extradition within the EU

Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 20 January 2011

The meeting was held under the Chatham House rule

Speakers:

Rachel Barnes
Barrister, Three Raymond Buildings

Catherine Heard
Head of Policy, Fair Trials International

Chair: Elizabeth Wilmshurst
Associate Fellow, Chatham House

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Introduction

There are over 500 million EU citizens. 8 million of them live in a State other than that of their nationality. There are also millions of third country nationals living and working in the EU and subject to its justice systems.

Effective justice and security policy depends on effective cooperation in criminal cases, including an efficient extradition system. However, it must and need not involve sacrificing basic principles of fairness and justice.

The European Arrest Warrant ('EAW') was introduced by a 2002 EU Framework Decision, which was incorporated into UK law by the Extradition Act 2003. Although the EAW accounts for the vast majority of the extraditions from the UK, until recently it has received far less public and political attention than UK-US extradition.

The EAW introduced a common mechanism for the extradition of individuals between EU States. Underlying this is the principle of the mutual recognition of the judicial decisions of other EU countries. Mutual recognition is predicated on the assumption of mutual trust in the national criminal justice systems of our EU neighbours. It is said that given the unacceptable differences in protections for defence rights and treatment of alleged criminals, between not only Eastern and Western European States but also across Western European States, there is not (yet) a sound basis for such trust. If right, this presents a major obstacle to fair extradition and highlights the importance of enhanced safeguards in the extradition process.

Human rights and other concerns

Extradition engages a number of human rights. These include: the right to protection from inhuman or degrading treatment (Article 3 of the European Convention on Human Rights ('ECHR')); the right to liberty including the right to be tried within a reasonable time or to be released pending trial (Article 5 ECHR); the right to a fair trial (Article 6 ECHR) including the right to a

presumption of innocence until proven guilty; and the right to respect for private and family life (Article 8 ECHR).

Where those wanted under EAWs are non-nationals of the requesting state, the right to equal treatment without discrimination (Article 14 ECHR) is also engaged. Non-nationals in any jurisdiction often face significant disadvantages including longer periods of pre-trial detention and difficulties communicating effectively with lawyers, understanding proceedings and participating effectively in their defence.

The case summaries by Fair Trials International annexed to this report highlight particular human rights problems including:

- Individuals are being extradited to stand trial on charges based on improper police investigations, including where evidence has been obtained through police brutality;
- Following extradition people are spending unacceptable periods of time in pre-trial detention, sometimes in prison conditions which are inhuman or degrading;
- Once extradited, people are standing trial in legal systems which do not afford sufficient protection for defence rights, thus jeopardising the right to a fair trial;
- Individuals have been extradited to serve prison sentences even where there is compelling evidence that their original trial was unfair;
- People are facing extradition decades after an alleged offence;
- Individuals face extradition even where there is clear evidence that they are the victim of mistaken identity.

The speed with which the EAW was adopted was partly due to the pressure for effective counter-terrorism policy following 9/11. States which acceded to the EU later – Bulgaria, Cyprus, Czech Republic, Hungary, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia – were not involved in the negotiation process. It is likely that insufficient account was taken during negotiations of how the different nature and state of development of these States' domestic justice systems could affect the operation of the EAW regime.

The potential for abuse is expanded by misuse of the EAW. First, EAWs should, by law, only be used to prosecute or enforce a sentence. However, there are examples where judicial authorities have sought extradition for investigative purposes only. Second, under the Framework Decision, EAWs can only be issued where the person is accused of committing an offence punishable by specified minimum periods of imprisonment. In practice, many EAWs are issued for offences which are so minor that these sentences are very unlikely to be imposed. This is especially true of requesting States such as Poland which lack prosecutorial discretion in issuing EAWs. In a recent case a UK court considered this problem and requested that, before seeking extradition, the issuing judicial authority should consider whether they would be likely to exercise discretion to commute sentences. Third, EAWs can only be issued by a national 'judicial authority'. It is for each Member State to determine what constitutes a judicial authority for this purpose. In certain states non-independent institutions, such as the police, have been designated as "judicial authorities".

The European Arrest Warrant and the UK

The review of the operation of the Extradition Act, announced by the Government in 2010, includes the operation of the EAW and the way in which those of its safeguards which are optional have been transposed into UK law. The independent review panel is being led by Sir Scott Baker. He is joined by two independent lawyers with expertise in extradition matters; David Perry QC and Anand Doobay. The panel is expected to produce its report by late summer 2011.

In its early years in the UK the EAW system was treated as a specialist area handled by few practitioners. All first instance cases are heard by seven specialist District Judges sitting at the City of Westminster Magistrates' Court. Today, many of those hearings in the magistrates' court are dealt with by solicitors in general criminal practice rather than specialist extradition barristers.. The domestic integration of the EAW regime has produced a relatively quick process for the effective surrender of individuals. In many cases this works as it was intended to do: as a streamlined, efficient system for surrendering individuals either to face trial or to serve a sentence imposed after conviction in another EU Member States. There is however a tension between the dual objectives of achieving effective judicial cooperation and ensuring adequate human rights protection.

The current bars to extradition are extremely limited. There is no power to refuse on grounds of lack of proportionality or where there is a reasonable belief that the person is the victim of mistaken or stolen identity. This leads to injustice in individual cases and places an unjustified burden on police and court resources. Additionally, the time limits for filing appeals under UK law are very strict. Where these filing deadlines are missed, the cause of delay is generally irrelevant.

The UK Extradition Act does include a bar to extradition where extradition would not be compatible with the ECHR.¹ UK courts have struggled with how this should be interpreted to strike the correct balance between rights protection and respect for the principle of mutual recognition. The prevailing view is that the fact that the requesting state is a party to the ECHR is, without more, sufficient to ensure compatibility with the ECHR unless there is a specific detailed basis for doubting that the individual's human rights will be respected. A recent case held that only in "wholly extraordinary circumstances" such as "a military coup or violent revolution" would the court need to look at prison conditions as a potential human rights bar.² This restrictive approach, which conflicts with earlier attitudes,³ is underpinned by a fear that invocation of the human rights bar would undermine mutual trust or bring serious delay to the proceedings.

The case law is clear that the courts deciding on extradition should not go beyond the level of protection required by the European Court of Human Rights. For example, surrender would only be prevented where there is real risk that the particular individual will be tortured or receive cruel, inhumane or degrading treatment or punishment (Article 3 ECHR). It is not possible to challenge transfer on the basis of the general conditions, situation or attitudes of foreign authorities and institutions.

Even where one country refuses extradition this does not automatically cancel the EAW. The person subject to the EAW remains a wanted person and risks re-arrest, further hearings and legal costs, each time he or she crosses a national border.

Where UK courts have refused to extradite on human rights grounds, they have often been criticised by the requesting State. In a recent case the UK court refused to execute a warrant because the individual's severe mental illness meant that it would be unjust to extradite him. The requesting State

¹ See section 21.

² *R (Klimas) v Prosecutors General Office of Lithuania* [2010] EWHC 2076 (Admin)

objected that this decision infringed the principle of mutual trust and that there was no provision in the Framework Decision to refuse to surrender on the basis of the physical or mental health of the wanted person. Although there is a bar to extradition on grounds of mental health under the UK Act, there is no equivalent limitation under the EU Framework Decision.⁴ The Framework Decision does not extend the principle of mutual recognition to the recognition of judicial decisions not to execute EAWs.

Reform proposals

It is important to enhance human rights safeguards while not jeopardising the efficiency of the EAW system. A number of protections included in the EU Framework Decision could be added to the UK Extradition Act and the UK could also introduce enhanced freestanding protections which would not breach the Framework Decision. However, the most significant advances in protection would require European cooperation to amend the Framework decision and cannot be achieved by the UK acting alone. This presents a significant political challenge but is necessary if the EAW system is to operate fairly and effectively. There are a number of safeguards already in the Framework Decision, which should now be added to the UK Extradition Act. Under EU law there is a bar to extradition where the individual can serve their sentence at home, where the UK is the most appropriate place for trial or where a custodial life sentence without review could be imposed. Parliament recently passed an amendment to the Extradition Act, not yet in force, which would allow refusal of extradition where the UK is the most appropriate place for trial. For example, where the offence was wholly committed in the UK and all the evidence is located in the UK.

The UK should also amend the Extradition Act to address specific areas of concern not dealt with by EU law. There is need for greater flexibility in the appeal of extradition cases. The strict time limits should be relaxed. At present, individuals have a right of appeal and there is no requirement of permission. This has led to many speculative appeals causing significant delay in the EAW system. A requirement of permission would ensure that only those cases with a reasonable prospect of success proceed to appeal.

³ See e.g. *Lisowski v Regional Court of Bialystok (Poland)* [2006] EWHC 3227 (Admin)

⁴ Section 25

The Extradition Act should also be amended to allow more information to be requested where there are reasonable grounds to believe that the person sought under the EAW is the victim of mistaken or stolen identity.

The bar for refusing extradition on human rights grounds should be clarified and amended. One suggestion is that extradition should be refused where there is a real risk that the person would be subject to treatment which, if committed by UK authorities, would constitute breach of the Human Rights Act.

The Framework Decision should be amended to include a general requirement that the use of the EAW is proportionate to the actual offence and the effect of extradition. It is important to note that Poland, which is frequently criticised on this basis, has asked the Commission to introduce a proportionality test. Financial penalties, such as the costs of hearings, could be introduced for countries which issue disproportionate EAWs.

Another suggestion is for a short stay of proceedings in appropriate cases once the requested person is brought before the executing judicial authority to enable the issuing judicial authority to consider whether it will proceed with the EAW or not.

It is also important to improve the system for terminating EAWs. If a court in one Member State decides that extradition would be unjust, mutual recognition should require that this decision is respected across the EU and the warrant should be withdrawn immediately.

It may appear attractive to suggest that European countries should be able to request guarantees from the requesting state regarding procedural safeguards for trial and to decline to execute a warrant if sufficient assurance is not provided. However, assurances are problematic because there is currently no way to monitor and enforce them.

Another suggestion was that some of the problems accompanying the EAW system could be avoided if the UK extended the principle of extra-territorial criminal jurisdiction under which UK courts could try offences committed abroad. This would run contrary to current principles in this country of largely territorial jurisdiction.

Conclusion

Although in many cases the EAW scheme is operating as intended, similar types of problems with it are being experienced by judges, courts and lawyers across the EU. This suggests that some of the system's defects can only be resolved at EU level with changes to the framework legislation. Persuading European policy-makers of the need for root and branch reform of the prized 'flagship mutual recognition instrument' is not easy but progress is being made. Commissioner Viviane Reding has acknowledged that 'there is considerable room for improvement in the operation of the EAW system', a proportionality test being a key priority.

It is also necessary that criminal defence standards be raised across the Member States. Although EU States have been reluctant to harmonise domestic criminal standards, there is now room for some optimism. The EU has a 2009 Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings. One Directive, on the right to interpretation and translation, has already been adopted at EU level but will not be implemented by Member States until 2013. Another, to guarantee basic information on legal rights and on the charges brought, is currently under negotiation. Also envisaged is a new law designed to ensure speedy access to legal advice and representation, legally aided where necessary.

Summary by Sean Aughey

ANNEX – DETAILED CASE SUMMARIES PROVIDED BY FAIR TRIALS INTERNATIONAL (FTI)

Facing extradition for exceeding his overdraft limit - Jacek Jaskloski

Jacek Jaskloski, a Polish schoolteacher and grandfather who lives in Bristol, is being sought on an EAW to face trial for “theft” in Poland. The alleged offence refers to a period in 2000 when Mr Jaskloski withdrew money from his bank taking him over the agreed overdraft limit. The entire debt was repaid to the bank and in 2004 he moved with his family to the UK where he has lived ever since.

On 23 July 2010, with no prior notice, British police arrested Mr Jaskloski pursuant to the EAW. He is threatened with a criminal trial for a debt he paid off many years ago. The British courts will now decide whether Mr Jaskloski, in fragile health following 3 strokes in the past 2 years, will be sent to prison in Poland or allowed to remain with his family, including his wife who is caring for him and who herself has serious disabilities.

Wanted for a crime he could not have committed – Edmond Arapi

Edmond Arapi was tried and convicted in his absence of killing Marcello Miguel Espana Castillo in Genoa, Italy in October 2004. He was given a sentence of 19 years, later reduced to 16 years on appeal. Edmond had no idea that he was wanted for a crime or that the trial or appeal even took place. In fact, Edmond hadn't left the UK at all between the years of 2000 to 2006. On 26 October 2004, the day that Marcello Miguel Espana Castillo was murdered in Genoa, Edmond was at work at Café Davide in Trentham, and attending classes to gain a chef's qualification.

Edmond was arrested in June 2009 at Gatwick Airport on an EAW from Italy, while he was on his way back from a family holiday in Albania. It was the first he knew of the charges against him in Italy, which does not automatically guarantee a re-trial for defendants tried in absentia. A British court ordered his extradition on 9 April 2010.

FTI worked extensively on Edmond's case; attempting to persuade the Italian authorities to withdraw the EAW, working with Albanian lawyers to help establish the identity of the real perpetrator, and raising the profile of his case with the public and politicians.

On 15 June 2010, the day the appeal against his extradition order was to be heard at the High Court, Italian authorities decided to withdraw the EAW, admitting that they had sought Edmond in error. They provided information indicating that Edmond's fingerprints did not match those at the crime scene. Thankfully, this meant that Edmond avoided being separated from his wife and children, including a newborn son, and spending time in an Italian prison awaiting retrial.

Acquitted in 1989, yet British grandmother was still wanted 20 years on – Deborah Dark

In 1989, Deborah Dark was arrested in France on suspicion of drug related offences and held in custody for eight and a half months. Her trial took place later in 1989 and the court acquitted her of all charges. She was released from jail and returned to the UK. The prosecutor appealed against the decision without notifying Deborah or her French lawyer. The appeal was heard in 1990 with no one there to present Deborah's defence. The court found her guilty and sentenced Deborah to 6 years' imprisonment. Again, she was not informed that an appeal had taken place, nor notified that her acquittal had been overturned. As far as she was concerned she had been found not guilty of all charges and was free to start rebuilding her life. In April 2005, fifteen years after the conviction on appeal, an EAW was issued by the French authorities for Deborah to be returned to France to serve her sentence. She was not informed about this.

In 2007, Deborah was arrested at gunpoint in Turkey, while on a package holiday with a friend. The police released her and were unable to explain the reasons for her arrest. Upon her return to the UK, she went to the police station and tried to find out the reasons for her arrest. She was told that she was not subject to an arrest warrant. In 2008 Deborah travelled to Spain to visit her father who had retired there. On trying to return to the UK, she was arrested and taken into custody in Spain, where she faced extradition to

France. Deborah refused to consent to the extradition, and was granted an extradition hearing. After one month in custody, the Spanish court refused to extradite Deborah on the grounds of unreasonable delay and the significant passage of time. Deborah was released from prison and took a flight back to the UK. However, her ordeal was not over.

On arrival in the UK, Deborah was arrested again - this time by the British police at Gatwick airport. Once again, she refused to consent to the extradition and was released on bail pending another extradition hearing. The City of Westminster Magistrates' Court refused the extradition in April 2009 due to the passage of time.

As there is no provision for the withdrawal of the EAW, Deborah spent years as an effective prisoner in the UK – feeling unable to leave the country due to the risk of being re-arrested on the same European Arrest Warrant. In May 2010, after FTI helped build public and political support for Deborah's case, France finally agreed to remove the EAW, but only after Deborah had spent years as an effective prisoner in the UK due to the risk of arrest.

Extradited after a grossly unfair trial – Garry Mann

Garry Mann, a 51-year-old former fireman from Kent, went to Portugal during the Euro 2004 football tournament. On 15 June 2004 while Garry was with friends in a bar in Albufeira, a riot took place in a nearby street. Garry was arrested along with other suspects some 4 hours after the alleged offences. He was tried and convicted, less than 48 hours after his arrest. He had no time to prepare his defence and standards of interpretation at the trial were grossly inadequate. The proceedings were translated for Garry by a hairdresser who was an acquaintance of the judge's wife.

He was convicted following a widely publicised trial in Albufeira and sentenced to two years' imprisonment on 16 June 2004. On 18 June 2004 he voluntarily agreed to be deported and was told that, provided he did not return to Portugal for a year, he would not have to serve the sentence.

Back in the UK, Garry tried unsuccessfully to appeal his conviction. In October 2004 he lodged an appeal to the Constitutional Court in Lisbon but heard nothing from the Court. Separately, the Metropolitan police applied for a worldwide football banning order against Garry, but in 2005 a UK Court held he had been denied a fair trial in Portugal and refused the order.

Garry was astonished when in 2009 he was arrested on an EAW, alleging he was wanted in Portugal to serve a two year prison sentence. In August 2009 a British court ordered his extradition to Portugal.

Through no fault of his own, the appeal deadline in Garry's case was missed by less than 24 hours. As a result the High Court refused to hear his appeal. Instead, Garry was forced to seek a judicial review of SOCA's decision to execute the EAW.

The case was heard by the UK's High Court in March 2010. Lord Justice Moses described the case as an "embarrassment" and said: "If there was a case for mediation or grown up people getting their heads together then this is it." The judge said that new evidence from the Foreign and Commonwealth Office "lends force to his belief that a serious injustice" had been committed against Mr Mann. Despite this there were no grounds upon which to refuse Garry's extradition.

Recognising that his options were running out Garry wrote to the Home Office and requested that he serve the sentence in the UK. This was refused as there was no legal mechanism to allow it. Garry was surrendered to prison in Portugal in May 2010, where he remains today. He is due to be transferred back to the UK where he will continue to serve his sentence. Unfortunately, Garry recently learned that his transfer will not take place in time for him to be in the UK before Christmas.