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International Law Discussion Group Meeting Summary

The Right to a Fair Trial Outside One's Own Country

22 September 2009

Introduction

The International Law Discussion Group meeting was held at Chatham House on 22 September 2009 and chaired by Elizabeth Wilmshurst. Participants included legal practitioners, academics, and government representatives.

Speakers were Jago Russell, Chief Executive, Fair Trials International[1] and Eleanor Hourigan, a legal adviser at the Foreign and Commonwealth Office.[2]

The Right to a Fair Trial Outside One's Own Country

The topic for discussion is framed as a question – "The Right to a Fair Trial Outside One's Own Country?" This is more of a challenge than a question. Everyone has a right to a fair trial, whoever they are and wherever they are in the world. It is an enormous challenge to get a fair trial outside of your own country.

Fair Trials International

Jago Russell has been Chief Executive of Fair Trials International ("FTI") since the end of last year.

Fair Trials Abroad was founded in 1992 when Stephen Jakobi OBE recognised the vulnerability of people facing criminal charges outside their own country. Unable to speak the local language, unfamiliar with the legal system and detained hundreds of miles from family and friends, Stephen Jakobi saw that the risk of miscarriages of justice for non-national defendants was enormous.

Obtaining a fair trial outside one's own country defines the charity's activity.
Helping people facing the ordeal of criminal charges outside their own country is still at the heart of what the charity does. It is the only charity that helps individuals facing charges in a foreign country in their fight for justice.

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[1] www.fairtrials.net

[2] Eleanor Hourigan was speaking in her personal capacity.

Every month, FTI receives 40 to 50 calls for help from people. They are contacted by people in prisons all over the world awaiting trial or who have already been convicted. They are also, increasingly, being contacted by people who are threatened with extradition to a foreign country either to serve a sentence or face trial.
Every year FTI helps over 500 vulnerable individuals, offering useful advice or referrals to everyone that contacts the charity. One of the most useful things FTI can do for people is to find them a good local defence lawyer and the charity is lucky to have an excellent network of lawyers to whom they can refer people.

At any one time FTI is providing in-depth assistance to about 50 people. With so many requests for help, it is difficult to choose which cases they will take on. Each case is considered individually with a focus on the following three questions: (A) Does the case raise serious fair trials concerns? (B) How vulnerable is the individual in question? (C) How much can FTI do to help?

Cases

In many cases, FTI has worked quietly, behind the scenes, to help local lawyers to prepare strong defence or appeal grounds. Some of the cases have been high-profile:

In 1997 FTI campaigned for Louise Woodward – a British nanny – who was convicted of second degree murder by a US court and sentenced to a minimum of fifteen years imprisonment after the death of a baby in her care. In 1998 an appeal court in America concluded that it would be a miscarriage of justice to let her murder conviction stand.

Another high-profile case was that of the Greek plane spotters - In late 2001, twelve British and two Dutch plane-spotters were arrested in Greece and charged with espionage after taking photographs of planes during air shows. Their case led to widespread public and political outrage. A year after their arrest, FTI's political campaigning and legal interventions resulted in the acquittal of all of the men.

Other recent high-profile cases have included the case of Deborah Dark (whose extradition to France is now sought twenty years after her acquittal was overturned by an appeal held in absentia by a French court) and Andrew Symeou (extradited to Greece in August). There was also the case of Michael Shields.

Michael Shields was eighteen years old when he travelled to Turkey to watch Liverpool FC play in the Champions League final in May 2005. On the way back he stopped over in Bulgaria. On 30 May 2005 at 5 a.m. a local man, Martin Georgiev, was attacked outside a café in Bulgaria, in an incident involving English football fans. He was badly beaten, suffering a fractured skull.

Stephen Jakobi observed the trial and there were undoubtedly serious flaws:

- Before an identification parade was conducted, the police gave Michael Shields a white t-shirt to wear, and then drove him past the café where witnesses still at the scene were able to clearly see him;
- He was then made to participate in an identification parade, during which he was handcuffed in front of the witnesses and lined up with people who looked dissimilar to him;
- The British High Court in late 2008 (considering whether Jack Straw had the power to pardon Michael) said that the quality of this identification evidence "would have been carefully scrutinised in this jurisdiction";
- The Bulgarian courts also refused to take any account of the fact that another person had confessed to the crime. Importantly, they refused requests for them to ask the British police to cooperate with them in interviewing this other person;
- There was no CCTV evidence and Michael Shields had an alibi (a number of his friends gave evidence that he was in his hotel at the time of the incident).

Michael was found guilty of attempted murder and sentenced to fifteen years' in prison. In 2006, he was transferred back to the UK to serve the remainder of his sentence.

Jack Straw decided in September 2009 that he considered Michael to be morally and technically innocent of the crime and pardoned him.

The case raises some questions:

First, what might a decision to pardon a person convicted in another country have on the willingness of states to transfer people in future? In Michael's case the risk is not great as the Bulgarian authorities expressly told the UK government that they had the power to pardon Michael. The states parties to the Council of Europe Convention on the Transfer of Sentenced Persons expressly agreed that they should maintain the power to pardon a transferred person. (Article 12 of the Convention: "Pardon, amnesty, commutation: Each Party may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.")

Secondly, how should a country deal with miscarriage of justice cases when the miscarriage took place in a foreign jurisdiction? Is a pardon the most appropriate mechanism and should it be carried out by an member of the Executive, elected by the public? Pardon being the only route in such cases is not satisfactory, not because it may give rise to a floodgates issue but because a Government minister will in effect be deciding guilt and innocence, but it seems

that it cannot be right for a person to have no right to have the case reviewed – for a victim of a miscarriage of justice to be kept in jail.

For their clients, FTI uses every available tool to fight for the protection of fair trial rights and to prevent miscarriages of justice:

- FTI help their clients to understand the legal system clients are involved in and refer them to local lawyers and other sources of support.
- With their international network of experts they fight for basic fair trial rights to be respected in local courts; however, they recognise that they are no replacement for locally qualified defence lawyers. In some cases, they have made applications to the European Court of Human Rights or submission to UN Treaty Monitoring bodies.
- Through FTI's public campaigns and lobbying they exert public and political pressure for justice at home and abroad.

The Universal Right to a Fair Trial

The right to a fair trial/due process is universal. This fundamental right is guaranteed by numerous international and regional human rights instruments. Article 11 of the Universal Declaration proclaims: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence"; Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights also confer this right.

The following must, however, be central parts of this right:

- The presumption of innocence;
- The right to understand and know the case against you;
- Adequate time and facilities to present your defence;
- No undue delay;
- The right to present a defence to the court
- The right to cross examine witnesses;
- The right to an interpreter if you cannot understand the language of the court;
- The right against self-incrimination.

There are huge challenges to obtaining a fair trial in many countries of the world. It is not FTI's position that the British way of guaranteeing this right is the best.

Why the Focus on Fair Trials for Non-nationals – why not Fair Trials for Everyone?

Fair Trials International does not have a policy that foreign cases ought to be given a higher standard of fairness than local cases. But it focuses on cross border cases because people

facing charges in another country are particularly vulnerable. FTI also deals with non-UK nationals seeking assistance in the UK; however, fewer cases can be taken on.

FTI has worked in a few Muslim countries; however it is very difficult to get defence expertise in certain Muslim countries. Increased co-operation with local lawyers is nevertheless sought, and assistance might be given by, for example, suggesting precedents to local lawyers.

Interpretation

Most of the people asking for help have not had access to a translator or interpreter meaning they cannot understand the statements they are told to sign, the questions put to them by police, what they are alleged to have done or the nature of the case against them. How then can they possibly defend themselves?

Most clients had never had their rights explained to them in a language they understand; have never had the legal system explained to them. Most have no idea how long they will have to wait before the case comes to court, what they can demand in terms of family contact, legal advice or interpretation.

Direct Discrimination

There are clients who are victims of direct discrimination because they are foreigners – singled out for mistreatment by prison officials or fellow-prisoners, targeted because it is believed they will be able to pay large bribes. When you think of the shocking talk of "foreign criminals", "foreign prisoners" in large swathes of the British media this risk is, sadly, all too obvious.

No Ties

For most clients, visits or even telephone contact from family and friends is a rare luxury and some spend months or years in jail without the ability to see any of these vital support networks.

Non-national defendants are often held for much longer in pre-trial detention as they are often denied bail. Without a permanent address in the country concerned, or local support networks and family to live with they are often considered a flight risk or at greater risk of reoffending.

The statistics in Europe alone make this clear:

- In Greece and Malta about half of the prison population are non-nationals;
- In Belgium, Austria and Italy about 40% are non-nationals;
- In Italy 30% of the total prison population (over 12,000 people) were non-nationals in pre-trial detention.

Solutions

What, if anything, can be done to persuade courts that non-nationals are not more of a flight risk than nationals and, accordingly, to grant them bail. Perhaps the answer to this is greater cooperation between countries.

The way a country's criminal justice system treats non-national defendants provides a litmus test for justice in that country. There is no doubt that states face major challenges in ensuring that non-nationals have the necessary resources properly to defend themselves. Providing access to adequate standards of translation and interpretation alone is hugely expensive and difficult even for wealthier states. It is, however, vital to a person's ability to defend themselves.

In the case of non-nationals the price of justice may be higher. It is, however, a price that must be paid if justice is to be done, if we are to be sure that the innocent are not wrongly convicted.

The Growing Challenge

The number of people travelling abroad for work or pleasure has increased hugely with people travelling further afield. This has resulted in a major rise in the number of people facing charges outside their own country and the fair trial challenges they face.

In response to the horrific attacks of 9/11 there has been huge political pressure for governments to cooperate in tackling cross-border crime:

- States have assumed greater powers to prosecute for things people do in another country;
- More and more information is shared across borders by criminal justice agencies;
- Traditional barriers to extradition have been dismantled.

Extradition

The extradition arrangements between the US and the UK have understandably come under a great degree of scrutiny – the absence of a requirement for prima facie evidence (at least where extraditions from the UK to the US are concerned); the absence of any test to ascertain whether any prosecution should take place. There has been particular anger about the apparent inequality between what evidence is required by the US before they will extradite one of their citizens to the UK and the lower level of evidence that the UK requires before extraditing someone to the US. This perceived inequality struck a chord in the UK. It certainly appealed to widespread and unfortunate anti-American feeling in a large proportion of the population.

The European Arrest Warrant

Fair Trials International has focused on highlighting major concerns about the fast-track system of 'surrender' (but the effect is the same as extradition) within Europe – the European Arrest Warrant ("EAW"). In the past decade, the EU has sought actively to build an area of justice, freedom and security within Europe. The dominant theme has been for member states to cooperate more effectively to bring to justice those convicted or suspected of criminal activity. The European Arrest Warrant, created in 2002, is the most notable development in this area. It is a no-questions-asked system of extradition as a quick way of surrendering people from one European country to another. People can be surrendered to face trial or serve a prison sentence. It was rushed in as part of the EU's response to the terrorist threat and was meant to help tackle serious cross-border crime more effectively. The new system has removed all political discretion in extradition decisions, done away with the traditional legal barriers to extradition and made transfers much quicker.

In effect if a court in one EU member state issues an arrest warrant, courts in other EU member states (and some other countries like Norway and Iceland) will recognise this decision and arrest and extradite the person to the requesting country without asking too many questions.

The Warrant has already been used to transfer thousands of individuals. In 2008 nearly 12,000 Warrants were issued across the EU. In 2008 in the UK alone over 350 were extradited under a European Arrest Warrant and this is set to increase to over a thousand.

FTI does not disagree in principle with simpler, speedier extradition procedures within the European area of free movement. As people can cross borders within Europe much more easily it is necessary to ensure that they cannot, in this way, evade justice.

FTI cases have, however, given real cause for concern about how this system is operating in practice.

Proportionality

Authorities in member states are not fully taking into account the burdensome effects of extradition on individuals and as a result there is an absence of sufficient safeguards against extradition for very minor offences. EAWs have, in practice, been issued for very minor offences. Not only does this lead to injustice in individual cases but also places a significant and unjustified burden on the resources of member states. This is also contrary to the underlying purpose of the EAW scheme, being to tackle serious organised crime and terrorism.

Fundamental Rights

The Framework Decision on the EAW makes it clear that the EAW scheme is subject to the obligation to respect fundamental rights and the rule of law. Courts in member states have not, however, been effective in upholding the integrity of the EAW scheme by using the European Convention on Human Rights and the human rights protections in their own constitutions to ensure that the injustices which arise out of the implementation of the EAW are addressed.

EAWs and Unreasonable Delay

Warrants have been issued many years after an alleged offence was committed - in one FTI case, twenty years later. Once Warrants have been issued there is no effective way of removing them, even after extradition has been refused.

Individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW. This is particularly unacceptable in cases where the execution of an EAW has been refused due to passage of time, the mental or physical health of a defendant or one of the mandatory grounds for refusal as laid out in the Framework Decision on the EAW.

A Principled Approach to Cross-Border Justice

States need to cooperate to tackle cross border crime, terrorism and drug trafficking. More and more people will certainly face criminal charges outside of their own country. A more principled approach to cross-border justice is needed, one which is based on respect for fundamental rights and the rule of law, one which recognises the vulnerability of non-nationals.

In practice this could mean:

- States respecting the right to liberty and ensuring that non-nationals do not spend more time in pre-trial detention than a national would. One proposal at a European

Union level is a European Supervision Order under which all courts in Europe would agree to enforce bail conditions imposed by another national court.

- Making sure that non-nationals have all of the tools needed to prepare their defence. This would include information on the charges against them in a language they understand, translations of key documents and interpretation during a trial, states refusing to extradite someone if there is a real risk they will not get a fair trial or to serve sentence coming from an unfair trial.

- States recognising the enormous impact on a person's family life of extradition to another country, and time served in a foreign prison. This should translate into:
  - Not extraditing people for minor offences;
  - States taking reasonable steps to enable people to maintain contact with their families;
  - Prisoner transfer agreements so that those convicted overseas can serve their sentences closer to family and friends.

FTI have prepared briefing papers on these issues.[3]

Cross Border Cases and Fair Trials for Everyone

In July 2009 the Swedish Presidency published its "Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings ("Roadmap')". It points out that introducing basic EU standards for the protection of procedural rights will enhance mutual trust in other states' systems, thus improving mutual cooperation. The Roadmap envisages the creation of specific binding legislation covering:

- The right to interpretation and translation;
- Information on Rights and Information about the Charges;
- Legal Aid and Legal Advice;
- Communication with Relatives, Employers and Consular Authorities;
- Special Safeguards for Vulnerable Persons; and
- The Right to Review of the Grounds for Detention.

These efforts clearly result from states' concerns about the treatment of their own nationals in other EU member states and from the desire to build a sound basis for the mutual trust that is required by mutual recognition in areas such as the European Arrest Warrant. However, these safeguards would not only apply to non-national defendants but to all defendants. Thus, in the context of translation and interpretation, non-English speaking people in the UK would

[3] See www.justiceineurope.net

benefit from the proposed framework decision as would Albanian speakers in Greece, Romanians in Italy etc.

A principled initative to get procedural rights in place, the Swedish proposal is a gradual approach to each right. FTI understands that the British Government is broadly supportive of this proposal which can raise fair trial standards for everyone. Most EU countries have rules in this respect but there is a problem with their implementation. Thus, improved EU legislation, in this respect, can offer people clear legislation they can point to and an important tool for people to use. Greater co-operation between EU states is necessary to achieve this.

Countries could usefully assist each other in their efforts to ensure that their legal systems effectively protect basic human rights. Not only can wealthier states provide financial support but experience and best practice can also usefully be shared.

Taking again the example of the European Arrest Warrant, in practice, states would have to co-operate to tackle cross border crime and to improve the current system:

- Checks should be implemented to ensure EAWs are only issued when proportionate to the offence and in the interests of justice. Guidance and training should be offered on the proportionality criteria to be applied. Extradition and the prospect of a trial abroad is in and of itself hugely burdensome on individuals and should not be used for minor offences. Appropriate procedures must be implemented in executing states to ensure EAWs are only issued when proportionate to the offence. The chapter on proportionality in the European Arrest Warrant Handbook is not sufficient to ensure member states respect the principle of proportionality when issuing an EAW.

- Domestic courts should receive guidance and training on how to exercise their powers to refuse to execute a warrant where, for example: execution will result in a breach of human rights; or the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities. The British courts already have powers under the Extradition Act to refuse surrenders on human rights grounds, but they have been so deferential to the principle of mutual recognition, to the idea of European Cooperation and to the unrealistic promise of guaranteed defence rights under the ECHR that they have very rarely exercised these powers. Judicial authorities in member states have the authority to ensure extradition procedures within Europe respect the rule of law, the fundamental principles of EU law and human rights guarantees in domestic constitutions.

- The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting and the executing state. Individuals should usually have lawyers representing them in each country.
- The duty to provide legal aid to individuals subject to an EAW should be appropriately shared by the requesting and executing state.

- Common rules implementing fairer laws on bail and pre-trial detention would also help eliminate unfairness in the way the EAW system currently operates.

- The system for removing EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for issuing them. If an EAW's execution is refused on a final basis in one member state, alerts for that EAW should be removed from the entire system, to prevent the individual's re-arrest in any other member state.

As a response to this worrying trend, the Commission presented a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union in 2004. After three years of discussion and despite widespread support, this proposal was not adopted. Six member states (including the UK) opposed the measure on various grounds, including that it did not provide a sufficient legal basis, that the EU's mandate was limited to cross border cases and that the European Convention on Human Rights offered adequate protection to those facing criminal charges throughout the EU.

Reform in this area has, however, remained a priority under the Hague Programme and the first right to be considered is the right to translation and interpretation and a draft Framework Decision has been published by the European Commission. FTI understand that the British Government (which vetoed previous attempts to create enforceable minimum procedural safeguards) has indicated that it is minded to support these proposals.

Consular Activity

There is a difference between "consular assistance" (part of the consular activities as set out in Article 5 of the Vienna Convention on Consular Relations 1963), sometimes referred to as "consular support" or "consular protection" (for example in Article 20 of the EC Treaty), which focuses on assisting distressed nationals overseas and "diplomatic protection" (which includes the espousal of an individual's claim by a State) and which generally happens after the event, when a person is no longer in distress overseas.

Consular relations are governed by international agreements, whether using the framework of the Vienna Convention on Consular Relations (VCCR), or bilateral consular conventions.

Of particular relevance to detained nationals is Article 36 VCCR which provides that, if an individual so requests, the consular officers of his State of nationality should be informed of his detention overseas. Consular officers have the right to visit, communicate with the detained person and arrange for legal representation. General human rights concerns in an individual's case are one of the concerns of consular officers. The VCCR and international human rights instruments are complementary in consular activity, since whilst consular instruments provide for consular access (within any reasonable limits set down by the receiving State), international human rights law is a tool used by consular officials in assisting nationals.

When dealing with consular work in a foreign state it is important to look at what particular human rights treaty the state is a party to. Diplomacy and the effectiveness of diplomatic efforts have to be carefully judged, often considering a range factors, in particular any relevant welfare considerations; one of the principal consular concerns is the wellbeing of a person.

UK consular policy is set out in a regularly updated document entitled "support for British Nationals abroad: a guide", along with a number of more specific thematic leaflets. However there are a few myths that need to be addressed. Contrary to common belief, the consulate:

- Cannot provide legal advice (but can give basic details of local procedures);
- Cannot pay for lawyers or provide people with financial support (but can provide a list of local lawyers and interpreters);
- Cannot get people out of prison (but can keep in touch with them);
- And can put people in contact with relevant NGOs.

Some NGOs, (such as Prisoners Abroad), focus on working with people in detention, providing welfare fund assistance. Other NGOs focus on fair trial issues (e.g. FTI) or the death penalty (e.g. Reprieve). The FCO Pro Bono Lawyers Panel can provide legal assistance to an individual's local lawyers, including in cases of individuals facing the death penalty. An individual's consent is normally required to put them in contact with an NGO.

In their activities consular offices will have regard to a range of potential welfare issues rather than having any specific focus on fair trial/criminal cases. One of the key issues in this context is that welfare and the concept of fair trials are not issues to be considered as belonging to separate realms, but rather can be complementary.

The *Avena* case in the International Court of Justice illustrates the duties of states with regard to consular notification under the VCCR. Mexico took the US to the Court over the failure to notify its consular officials in relation to Mexican nationals then on death row in Texas. Following the ICJ judgment President Bush asked the Governor of Texas not to carry out the

death sentence, but the request was refused. The difficulties of implementation of ICJ judgments, following the *Medellin* case in the US Supreme Court, continue and it will be interesting to see whether President Obama manages to solve the problem.