The European Arrest Warrant and Defence Rights

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Abstract

Fair Trials International is a unique human rights organisation which assists those facing trial in a country other than their own, including requested persons under the EU's mutual recognition extradition system: the European Arrest Warrant. This article uses case studies to highlight the problems with the Arrest Warrant and sets out proposals for reform of the system.

I. Introduction

Over the last ten years the European Union has placed increasing emphasis on enhancing and improving the cooperation between EU Member States in criminal justice matters. Internal market concepts have been borrowed to justify the creation of cross-border prosecutorial tools which enable the "mutual recognition" of judicial decisions. The flagship measure was the European Arrest Warrant[1] ("EAW"), a fast-track extradition system between EU States.

Unfortunately, in the bid for increased cooperation, fundamental rights have been sidelined. Steps are now being taken to remedy this under the EU's programme of legislation on defence rights (the so-called Roadmap of Procedural Safeguards)[2]. Despite recent progress under the Roadmap[3] we are still a long way from an EU where every Member State offers sufficient fundamental rights protections for suspects and defendants.

Fair Trials International ("FTI") offers advice and assistance to those standing trial in a country other than their own; including many facing extradition under the EAW. This article uses FTI case studies to highlight some of the problems with the EAW and suggests how the system can be improved to ensure adequate protection for defence rights.

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[1] Framework Decision on the European arrest warrant and the surrender procedures between Member States, (2002/584/JHA), 13 June 2002.

[2] Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, (2009/C 295/01), 30 November 2009.

[3] Only one Directive, on the right to interpretation and translation, has been adopted at EU level and will not be implemented by Member States until 2013, further Directives on the right to information about rights and charges and on the right to access a lawyer and communicate upon arrest are currently being negotiated at EU level.

II. Fair Trials International case studies

1. 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 sentenced to 19 years' imprisonment, which was later reduced to 16 years on appeal.Edmond had no idea that he was wanted for a crime or that the trial or appeal had even taken place. In fact, Edmond had not left the United Kingdom at all between the years 2000 and 2006. The first that Edmond knew of the conviction in Italy was when he was arrested under an EAW in June 2009 at Gatwick Airport in the UK while returning from a holiday in with his family.

At Edmond's extradition hearing in the UK he argued that he was the victim of mistaken identity. On 26 October 2004, the day that Castillo was murdered in Genoa, Edmond was at work at Café Davide in Trentham, Staffordshire, UK, and attending classes to gain a chef's qualification. He had witnesses who could attest to this, as well as written evidence including invoices and delivery slips which he had signed on the day in question. However, the judge at the extradition hearing, Mr Justice Riddle, noted that technically the EAW was filled out correctly so there was nothing he could do.

a) Right to a retrial

The next issue at Edmond's hearing was whether he would be granted a retrial if surrendered to Italy. All appeals had been exhausted in Italy by a court-appointed public defence lawyer who had acted for without his knowledge. At the extradition hearing Mr Justice Riddle reviewed the case law on the extent to which a executing State should look at the domestic law of the issuing State during extradition proceedings. The judge concluded:

"The overwhelming trend since the introduction of European Arrest Warrant [has established that] we should readily assume that European Convention countries comply with article 6."[4]

Nevertheless, Mr Justice Riddle did hear evidence about the right to a retrial under Italian law. There was a raft of contradictory expert evidence about whether Edmond would be entitled to a full retrial after extradition to Italy, and whether his alibi evidence, including the witness testimony he would need to confirm his whereabouts on the day of the murder, would be admitted at any trial.

It seemed far from clear that Italian law guaranteed a retrial for defendants tried *in absentia* where the conviction had been appealed. What was clear, however, was that Edmond risked being held for years on remand awaiting trial, as Italy has one of the worst records in Europe for delays in the justice system. Nevertheless, having heard conflicting evidence on Italian procedural law, the court ordered his extradition on 9 April 2010.

[4] *The Judicial Authority in Genoa, Italy v. Edmond Arapi*, City of Westminster Magistrates' Court, unreported.

FTI worked extensively on Edmond's case: attempting to persuade the Italian authorities to withdraw the EAW, working with legal contacts in to help establish the identity of the real perpetrator (who was thought to be Albanian), and raising the profile of his case with the public and politicians.

b) Warrant withdrawn

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

2. Alan Hickey

Alan Hickey, a lorry driver from London, was convicted in France of people-trafficking and sentenced to serve 18 months in prison in December 2009. Alan pleaded guilty to this offence after the judge told him orally that if he did so, he would be free sooner, whereas if he pleaded not guilty, he would spend years in pre-trial detention. While he was in prison in France, Alan found out that Belgium had issued an EAW seeking his surrender from to stand trial for people-trafficking "with aggravating circumstances" and as part of a criminal conspiracy.

a) Limited access to the case file

Alan was not given clear information about with whom he was meant to have conspired or when or where the conspiracy was meant to have taken place. He was concerned that the Belgian charges related to the same matter for which he had already been sentenced in France. This would mean that his extradition would be barred on "double jeopardy" grounds. However, given the lack of information about the charges in Belgium, Alan's French lawyer could not raise this issue at the extradition hearing. Alan's extradition was ordered before any further information could be gathered from Belgium.

Meanwhile in Belgium, hearings began in Alan's absence. FTI found a lawyer to act for Alan in on a *pro bono* basis, to represent him in his absence and to try and uncover more information about the Belgian case. If we had not intervened, a court-appointed lawyer assigned to represent Alan in his absence would have had no chance to take instructions from him. Worryingly, even once instructed, Alan's lawyer was only granted limited access to the case file: two hours to read 17 boxes of prosecution documents. However, Alan's lawyer did manage to have his trial delayed until after his surrender to Belgium.

b) Double jeopardy

Once released from France and extradited to Belgium, Alan's concerns about double jeopardy were vindicated. The judge at Alan's trial found that all but one of the Belgian charges arose from the same events for which he had been convicted in France. He had therefore been extradited in breach of double jeopardy. Most of the charges were dropped, Alan pleaded guilty to the outstanding offence and he was given a suspended sentence.

3. Andrew Symeou

Andrew Symeou, then a 20-year-old student from the UK, was extradited to Greece under an EAW in July 2009 on manslaughter charges. Following his surrender Andrew was denied release pending trial by a Greek court on the basis that he had not shown sufficient remorse for committing the crime which he was accused of – despite him entering a not guilty plea. Another reason given by the court was that Andrew was a non-national and therefore was assumed to represent a flight risk. This was despite the fact that Andrew had met all his supervision conditions in the UK and his father had arranged to hire a flat for him to stay at during the run-up to the trial.

a) Pre-trial detention

Following the decision of the court to impose pre-trial detention, Andrew spent a harrowing 11 months on remand in Greece. A university student with no previous criminal record who still lived with his parents, he spent his 21st birthday in the notoriously dangerous Korydallos prison. The prison conditions Andrew has described include: filthy and overcrowded cells (with up to six people in a single cell); sharing cells with prisoners convicted of rape and murder; violence among prisoners (one was beaten to death over a drug debt while Andrew was there); and violent rioting. The shower room floor was covered in excrement, there were cockroaches in the cells, fleas in the bedding, and the prison was infested with vermin.

Andrew's description is similar to that contained in numerous expert reports on Greek prison conditions placed before the UK extradition court prior to Andrew's surrender. Andrew argued that his extradition should be refused on the grounds that he would be kept in prison conditions in Greece which would breach his human rights. The Committee for the Prevention of Torture had reported the previous year that persons deprived of their liberty in Greece "run a considerable risk of being ill-treated".[5] Amnesty International and other human rights organisations had similarly criticised Greece's prisons in the harshest terms. This evidence was held insufficient as a bar to extradition. The UK court stated:

[5] Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 to 29 September 2008, p.12.

"[T]here is no sound evidence that the Appellant is at a real risk of being subjected to treatment which would breach article 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in detention. Regrettably, that is a sometime feature of police behaviour in all EU countries."[6]

It is difficult to know what more Andrew could have done to bring the risk he faced to the court's attention and invoke his Article 3 rights before his extradition.

b) Acquitted at trial

Andrew was extradited despite the fact that Greek prosecutors were not yet ready for trial: prosecution delays meant that he did not stand trial until almost two years after his extradition. This is time he could have spent under supervised release in the UK, continuing with his studies at university, rather than being held in appalling detention conditions in Greece. His four-year ordeal finally came to an end on 17 June 2011, when he was acquitted by a Greek court.

III. Fair Trials International's campaign for reform

FTI recognises the need for an effective system of extradition within the European Union. 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, FTI's cases illustrate the human cost of Europe's fast-track 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. FTI wants the EAW system to work properly, upholding rather than undermining the justice, freedom and security that form the basis of the EU's policy mandate. With this in mind, FTI has campaigned to highlight the serious flaws in the EAW system while making positive suggestions for reform.[7]

1. The human rights implications of extradition

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 most recent implementation report on the EAW the European Commission noted that, despite the fact that all Member States are subject to the standards of the European Court of

[6] *Symeou v. Public Prosecutor's Office* at Court of Appeals, Patras, Greece [2009] EWHC 897 (Admin) at para 65.

[7] Some of our suggested reforms are set out below, for more information see FTI's detailed report: The European Arrest Warrant Seven Years On – The Case for Reform, available online: http://www.fairtrials.net/publications/article/the_european_arrest_warrant_seven_years_on_the_case_for_reform.

Human Rights ("ECtHR"), "this has not proved to be an effective means of ensuring that signatories comply with the Convention's standards".[8]

Between 2007 and 2010 the ECtHR delivered 181 Article 3 infringement rulings against EU Member States. Article 6 rights were held by the ECtHR to have been infringed by EU countries in 1,696 cases over the same period.[9] 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.

a) Varying standards

Human rights concerns about the EAW regime have been raised by an increasing number of experts. For example, in March 2011 the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, wrote:

"There is a need to strengthen the human rights safeguards in EAW procedures […] The EAW has been used in cases for which it was not intended, sometimes with harsh consequences on the lives of the persons concerned. It is thus high time to reform a system that affects thousands of persons every year."[10]

The European Commission itself has recognised that poor human rights standards in relation to detention conditions undermine mutual trust. In its recent Green Paper on pre-trial detention, the Commission noted that "the high level of confidence between Member States […] is eroded where judicial authorities must repeatedly weigh this confidence against acknowledged detention-related deficiencies."[11]

b) Judicial scrutiny

FTI's cases illustrate how the EAW system can expose individuals to poor human rights standards in other Member States with minimal scrutiny of the potential consequences of extradition. Andrew Symeou's case shows how difficult it can be to persuade an extradition court that surrender to an EU Member State will violate human rights. This was something explicitly recognised by the judge in Edmond Arapi's case who spoke of an "overwhelming trend" that courts should assume that signatories to the ECHR comply with fundamental rights.

This "blind faith" approach was taken to the extreme in a number of recent UK cases. In *R (Klimas) v. Prosecutors General Office of Lithuania*,[12] the requested person argued that if extradited to Lithuania he would be subjected to prison conditions which would violate his Article 3 rights. The UK High Court did not accept that

[8] 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.

[9] European Court of Human Rights: statistical information.

[10] Human rights comment, 15 March 2011.

[11] Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, 14 June 2011, p.5.

[12] [2010] EWHC 2076 (Admin).

the appellant's extradition was barred on human rights grounds. Although he had shown that some prisons in Lithuania fell well below international standards, he had failed to show that, if extradited, he would be subjected to ill-treatment amounting to a violation of Article 3, or that there were substantial grounds for believing there was a real risk he would be. The court also decided that, as a matter of principle:

"When prison conditions in [an EU Member State] are raised as an obstacle to extradition, the district judge need not, save in wholly extraordinary circumstances in which the constitutional order of the requesting state has been upset – for example by a military coup or violent revolution – examine the question at all."[13]

This approach ignores the fact that signatories to the ECHR are frequently found in breach of Convention rights and it does not enable the courts to play their important constitutional role of protecting individuals from the abuse of fundamental rights. However, recent ECtHR jurisprudence suggests that this is not the right approach.

c) *M. S. S. v. Belgium and Greece*

In *M.S. S. v. Belgium and Greece*[14] the ECtHR clarified the duty of a court in a contracting State when expelling (or extraditing) an individual. The case involved the return by Belgium, under the Dublin II Convention, of an Afghan asylum seeker to Greece, where he had initially entered the EU and been registered.

The Court found that Belgium had failed to adequately scrutinise the human rights implications of transferring the applicant to Greece. In particular, the Court held that:

"[T]he 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, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention".[15]

The *M.S. S.* decision shows that it is inappropriate to place blind faith in a country's compliance with its ECHR obligations, merely because it is an EU Member State. FTI has called for EU countries to ensure that their extradition courts comply with *M.S. S.* and effectively scrutinise the human rights implications of extradition.

2. The European Supervision Order and deferred surrender

One way in which to protect requested persons from avoidable rights violations is to ensure that surrender only takes place when it is absolutely necessary. Premature use of the EAW followed by delays before trial can lead to needless pre-trial detention, sometimes in poor conditions, and an aggravated interference with Article 8 rights.

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[13] Ibid. para 13.
[14] Application no. 30696/09, Judgment date 21 January 2011.
[15] Ibid., para 353.

Andrew Symeou's case shows how extradition, when the prosecuting State is not trial-ready, can lead to injustice. Andrew effectively missed out on two years of his life, waiting for a trial which was delayed due to prosecution errors. He was also subjected to almost a year in pre-trial detention; something which wouldn't have been necessary if he had been tried promptly following his surrender.

The premature use of the EAW is a problem recognised by the UK Government's Extradition Review Panel. The independent Panel was established in September 2010 and tasked with reviewing the UK's extradition arrangements. After receiving written and oral evidence from a range of interested parties, including FTI,[16] the Panel published its comprehensive findings in October 2011.[17]

Like FTI, the Panel has called for effective implementation of the European Supervision Order[18] ("ESO") to help avoid requested persons who are non-nationals spending unnecessary time in pre-trial detention. The ESO lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention. The Framework Decision must be implemented by all Member States by 1 December 2012.

The Panel also suggests deferred surrender as a possible solution, whereby the requested person would remain on supervised released in the executing State until their presence is necessary in the issuing State. The Panel found that a system of deferred surrender would "meet the concerns of lengthy pre-trial custody and would be consistent with the concept of a single European area in which free movement of persons is guaranteed and where there is mutual recognition of judicial decisions".[19]

This is a more radical approach, as it would require amendment to the Framework Decision on the EAW.[20] However, the Panel argued that it should be looked at in more detail if the ESO does not succeed in limiting the use of unnecessary pre-trial detention for non-nationals. FTI agrees, and has long called for such a sophisticated approach to using the EAW.

3. Dual legal representation

The Framework Decision on the EAW specifies that a person sought for extradition must have legal representation in the executing Member State.[21] However, no reference is made to legal representation in the issuing State. This means that most

[16] FTI's submission to the Panel is available online: http://www.fairtrials.net/publications/article/submission_-to_the_extradition_review_panel.

[17] A Review of the United Kingdom's Extradition Arrangements, available online: http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review.

[18] Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009/829/JHA, 23 October 2009.

[19] A Review of the United Kingdom's Extradition Arrangements, para 11.43.

[20] Specifically Article 23, which requires that the requested person be surrendered no later than 10 days after the final decision on the execution of the EAW.

[21] Article 11 – rights of a requested person.

requested persons are represented at the extradition hearing by a lawyer who is not familiar with the law and practice of the issuing State or the conditions pertaining there. In practice, this makes it more difficult to obtain information on key issues about the case, as this information can only be obtained by a lawyer in the issuing jurisdiction.

FTI's cases frequently bear out the importance of having a lawyer in the issuing State. For example, if Edmond Arapi had been provided with prompt access to a lawyer in Italy, details about the prosecution case which cast doubt on the validity of his conviction could have been discovered earlier. This may have meant that the EAW was withdrawn sooner and his extradition never ordered at all.

Alan Hickey's case shows how the absence of legal representation in the issuing State can mean that the defendant lacks important knowledge about the contents of the prosecution case file. Although FTI managed to secure legal representation for Alan in Belgium, it came too late to halt his extradition. A right to a lawyer in Belgium immediately may have prevented him from being extradited in violation of double jeopardy.

a) Expert legal advice

In some cases access to expert advice in the issuing State is the only way to persuade the court in the executing State that extradition should not take place. For example, to establish whether the EAW has been issued for prosecution or mere investigation purposes. The latter would amount to an improper use of the EAW, yet specialist legal advice from the issuing country is often required to make this point in extradition proceedings and provide the court with evidence regarding what constitutes "conducting a criminal prosecution" under the law of the issuing State.

Specialist legal advice is also crucial to determine the soundness of assurances given by the issuing State on, for example, whether a retrial will be available in cases of conviction *in absentia*: our own experience shows that such assurances can be incomplete or misleading and the procedural position can often be unclear. Without a defence lawyer in the issuing State, it is impossible to find out the true position or test the assurances given by the issuing State.

A lawyer in the executing State will also not be as familiar with the human rights conditions in the issuing State, meaning a challenge on human rights grounds might fail despite there being a serious risk of rights violations. Without defence contacts in the issuing State, it can be difficult for a lawyer in the executing State to gather reliable evidence about the human rights situation in the issuing State, particularly within the strict deadlines of the EAW system.

b) Cost implications

Ensuring dual representation, particularly when funded by legal aid, clearly has cost implications. However, effective and timely communication between defence

practitioners in both issuing and executing States can actually save money. For example, contact between defence practitioners in the two Member States can prevent the need for voluminous evidence requests being made. Defendants might also be more inclined to consent to surrender if they were confident that certain arrangements had been made by lawyers acting for them in the issuing State.

In many cases, representation in the issuing State can facilitate negotiations between the defence and the issuing judicial authority, leading to the withdrawal of the warrant altogether. This saves resources which would have been wasted in needless extradition hearings and unnecessary surrender and pre-trial detention (which all have huge personal implications too). It has been estimated that the average cost of executing a single EAW to surrender is EUR 25,000.[22]

c) Dual legal representation and Measure C

The initial draft of the European Commission's Directive on the right to access a lawyer[23] (Measure C of the Roadmap of procedural safeguards) contained specific provisions on access to a lawyer in EAW cases. Articles 11(2) and (3) of the initial draft guaranteed anyone arrested under an EAW access to a lawyer (regardless of national law) and set out exactly what that right entails. Article 11(3) of the initial draft of the Directive provided the requested person with "the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State".

Unfortunately, these provisions on the right to a lawyer in the issuing State have already been removed from the current draft of the Directive. A large majority of Member States were "reluctant to making substantial modifications to the good working EAW Framework Decision, and that they hence did not want to introduce rules to the EAW scheme on the right of access to a lawyer in the issuing State."[24]

FTI is disappointed with this development; the organisation's work assisting individuals caught up in the EAW process illustrates the importance of providing rapid legal assistance, free of charge for those unable to pay for it, in both the issuing and executing State. FTI will therefore continue to campaign for dual legal representation in EAW cases and for the provisions on legal representation in the issuing State to be reinserted into the final version of the Directive on the right of access to a lawyer.

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[22] Meeting of Experts, Implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant: The issue of proportionality, Brussels, 5 November 2009, p.3.

[23] Proposal for a Directive of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, Brussels, 8 June 2011.

[24] Proposal for a Directive of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – The right of access to a lawyer in European Arrest Warrant proceedings, Brussels, 24 October 2011, para 9.

IV. Conclusion

FTI's cases illustrate the human cost of fast-track extradition. In order to ensure that the EAW operates fairly, the EU must do three things: 1) insert the necessary safeguards into the EAW system so that requested persons are afforded adequate protection during EAW proceedings; 2) continue to pass strong measures under the Roadmap so that standards are raised generally across the EU; and 3) encourage Member States to use the EAW in a more sophisticated manner, for example by deferring surrender where appropriate and utilising the EAW in tandem with the ESO.

Until these steps are taken the EAW will continue to cause injustice. We are counting the costs of implementing measures such as the EAW without EU-wide minimum defence guarantees in place to ensure the fair treatment of suspects. Not only are individuals suffering serious injustice, but the trust necessary for enhanced cooperation in the EU is being undermined.