

FAIR TRIALS INTERNATIONAL



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Experts Advisory Panel Meeting (15 May 2009, London)

The European Arrest Warrant



Criminal Justice 2008

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Introduction

1. Fair Trials International ('FTI') formed the Legal Experts Advisory Panel ('LEAP') in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual interest and concern and to provide advice, information and recommendations to inform FTI's work.
2. The second meeting of LEAP took place in London on 15 May 2009. LEAP members representing seven European countries were in attendance and the meeting was chaired by HH Dennis Levy QC.
3. As part of its casework, FTI regularly receives requests for assistance in cases which involve a European arrest warrant ('EAW') and FTI has become increasingly concerned about the human rights issues which arise out of the operation of the EAW scheme. The topic of the May meeting was therefore the law and policy surrounding Extradition and the EAW.

Injustice arising from the EAW Scheme

4. It is clear that a person's extradition to another country can have a serious impact on the enjoyment of their basic rights to liberty, to respect for their private and family life and, in some cases, their right to a fair trial. Although it was accepted that states should continue to cooperate in bringing to justice those guilty of criminal offences, it was considered that the fast-track system for extradition within Europe (the "EAW") was, in many cases, leading to injustice.
5. The following problems with the operation of the EAW scheme were, in particular, identified:
 - i. 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.
 - ii. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality and 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.
 - iii. The right to an effective appeal against a decision to extradite has not been granted to individuals subject to an EAW in all Member States. Furthermore, the rules regarding the availability of legal aid for individuals subject to an EAW are unclear and vary from state to state. There is also limited availability of legal aid to support legal representation in the requesting state and the executing state.
 - iv. 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.

- v. There is regrettably much uncertainty and ambiguity concerning the status of the Framework Decision on the EAW within the constitutional framework of the European Union and domestic legal systems. Constitutional challenges to domestic legislation implementing the Framework Decision on the EAW in Germany, Poland and Cyprus represent this ambiguity. This has contributed to the reluctance of domestic judicial authorities to interpret the Framework Decision on the EAW and respective implementing legislation in light of fundamental principles of European law, including respect for fundamental rights and the free movement of people.
 - vi. It is unacceptable that 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 on general grounds such as the passage of time. In some cases, EAW alerts have remained in place even after a person has served their prison sentence in the state issuing the warrant.
6. In order for the EAW scheme to be deemed a real success the scheme must operate in a just and fair way which respects fundamental rights, the principle of proportionality and the rule of law. Proposals to provide guarantees of basic procedural rights across Europe should be welcomed but would not, in themselves, be sufficient to remedy the flaws with the EAW.

Action Required for a Fairer EAW Scheme

7. The following urgent action was recommended by the panel:
- i. 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.
 - ii. 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. Domestic courts should be more willing to exercise this authority to refuse to execute a warrant where:
 - a. the execution of the warrant will result in a breach of human rights;
 - b. the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.
 - iii. Training should be provided to defence lawyers to equip them to use EU constitutional principles to challenge inappropriate uses of EAWs.
 - iv. Compensation schemes must be made available to individuals who have spent time spent in custody pending the completion of proceedings relating to an EAW which does not lead to a charge.

- v. 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 state and the executing state and it was essential for individuals to have lawyers representing them in each country
- vi. The financial burdens resulting from the implementation of EAWs should be borne by the issuing state to create a disincentive against inappropriate uses of the EAW scheme.
- vii. Mutual recognition of judicial decisions must be pursued and promoted within Europe for decisions not to execute a warrant just as they are for decisions to issue a warrant. Decisions to refuse to execute an EAW on general grounds, such as the passage of time, by one Member State should be recognised in other member states.
- viii. 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* EAW alerts. The system for removing EAW alerts must also be made more accessible to individuals.
- ix. Further research is needed into the fate of individuals against whom EAWs had been executed in order adequately to gauge the success of the EAW scheme. In particular, it would be instructive to collect statistics on the conviction and charge rates in cases where individuals have been surrendered under an EAW. It is also necessary to determine what legal aid and legal representation is available to individuals being tried after the execution of an EAW against them. Research in these areas by the European Union, Member States and independent bodies like EuroMos must be encouraged and supported.
- x. Coordinated action must be taken by civil society organisations across the EU to highlight the cases of injustice which are currently arising from the EAW scheme. As well as lobbying for change to the Framework Decision on the EAW, member States should be lobbied to fulfil their duty to ensure that the domestic implementation of EAW scheme complies with the fundamental principles enshrined within the European legal system.

Conclusion

- 8. The EAW scheme was implemented to ensure perpetrators are brought to justice and do not take advantage of Europe's open borders to escape responsibility for criminal offences. Faith in the EAW scheme and, more broadly, in the ability of the European Union to build an area of freedom, justice and security within Europe will be undermined if the EAW continues to cause injustice in individual cases. Mutual cooperation in criminal justice must remain subject to the fundamental principles underlying the European Union: respect for human rights and the rule of law.