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Report

Fair Trials International

The European Arrest Warrant seven years on – the case for reform

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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.

Acknowledgement

Although the views expressed in this document are our own, Fair Trials International wishes to thank Allen & Overy LLP for its hard work and support in compiling the comparative research contained in this report. Thanks to the firm's EU-wide network of offices, we have been able to draw on this wealth of legal expertise to present data on how eight European countries have dealt with fundamental rights issues in their own implementing legislation and case law.

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Executive Summary

1. Fair Trials International (“FTI”) welcomes this opportunity to present its views on the European Arrest Warrant (“EAW”). FTI’s casework team deals with numerous EAW cases each year. These cases provide a unique insight into the human costs of this fast-track extradition system, which has now been in place for over seven years.
2. In particular, FTI has identified the following flaws with the operation of the EAW:
 - EAWs are being issued for minor offences and without proper consideration of whether extradition is proportionate, notwithstanding the severe human and financial costs involved;
 - The judicial decision not to execute an EAW is not always respected by the issuing State, resulting in repeated arrests and hearings in other countries;
 - EAWs are being executed despite serious and well-founded human rights concerns; and
 - Persons sought under EAWs are not being provided with legal representation in the issuing State as well as the executing State.
3. This report sets out four proposed reforms which would tackle these problems and improve the EAW’s operation, both in terms of efficiency and the interests of justice. The suggested reforms are:
 - Amend the Framework Decision so that executing and issuing States are required to consider the proportionality of extradition;
 - Amend the Framework Decision so that issuing authorities are required to withdraw EAWs when they are refused by executing authorities;
 - Amend the Framework Decision to allow executing States to seek from issuing States further information and guarantees, before deciding whether to execute EAWs in cases where evidence has been adduced of a serious risk of infringement of fundamental rights; and
 - Include provisions in the draft Directive on access to legal advice and representation, to ensure that persons subject to EAWs receive legal representation in both the issuing and executing State.
4. Section B of this report contains a summary of a research project on the implementation of the EAW which was carried out for FTI with the generous support of Allen & Overy. Section C sets out detailed summaries of cases in which FTI has been involved. These cases illustrate the injustice of the current EAW system and have formed the basis for FTI’s suggested reforms. Statistical information on the EAW is contained in Annex 1 to this report.
5. FTI is delighted that the European Commission continues to monitor the implementation of the EAW and that it recognises that there is “considerable

room for improvement in the operation of the EAW”.¹ Furthermore, we welcome the important steps that the Commission has taken in safeguarding defence rights under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (the “Roadmap”).²

6. 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 now work to remedy the flaws in the EAW system. This will avoid further cases of injustice and an increased erosion of trust in the EAW and in mutual recognition as a whole.

Introduction

7. It is very much to its credit that the European Commission has acknowledged in its Third Implementation Report³ that there are serious problems with the EAW. The Commission’s report acknowledges many of the concerns Fair Trials International has previously raised, as outlined above (paragraph 2). The Commission has clearly accepted that, while the EAW has had several notable successes, it is far from perfect. The Commission’s report makes several concrete recommendations in order to remedy some of the system’s defects, as well as highlighting the importance of pressing ahead with the EU’s legislative programme under the Roadmap.
8. 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. However, more fundamentally, the Roadmap rights cannot solve some defects in the EAW system, such as the absence of a consistent and binding proportionality test.
9. Despite our serious concerns about the operation of the EAW, FTI recognises the need for an efficient 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, 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. FTI wants the EAW system to work properly,

¹ Letter to FTI from Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship: a copy of this correspondence is at Annex 2

² Roadmap of procedural safeguards, adopted in Council in November 2009

³ 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, available here: http://ec.europa.eu/justice/policies/criminal/extradition/docs/com_2011_175_en.pdf

upholding rather than undermining the justice, freedom and security that form the basis of the EU's policy mandate.

Section A: Suggested reforms to the EAW

i) Amend the Framework Decision so that executing and issuing States are required to consider the proportionality of extradition

10. In some EU countries, domestic procedures to issue warrants do not respect the principle of proportionality and EAWs are, as the 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 itself, 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".⁴

11. 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.

12. Some Member States, such as Poland, issue a large number of EAWs because their constitutions or criminal codes require all offences to be prosecuted, no matter how minor. This led to Poland issuing 4,844 EAWs in 2009. France, which has

Case summary: 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. For more information see Section C, case summary 1.

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

almost double the population of Poland, issued only 1,240 EAWs, while the UK issued 220 (see Appendix 1, page 3).

13. At a European Commission meeting of experts focusing on the EAW and proportionality on 5 November 2009, the representative from the Polish Ministry of Justice stated that Poland was “very interested in a solution at EU level to help it change its law and apply a proportionality test”. The representative noted:

*Poland’s law enforcement authorities are obliged to take all measures to bring someone to justice and the EAW is a tool that makes that possible. The only way for Poland to change this situation is via an amendment to the EAW Framework Decision.*⁵

14. Other Member States have expressed concern over the absence of a proportionality requirement in the EAW. Slovenia has noted that in some cases alternatives to extradition, such as mutual legal assistance or the use of the Schengen Information System, had not been explored by requesting States. This meant that EAWs had been issued where extradition was neither necessary nor proportionate. Cyprus has raised a similar concern, claiming that its judges often commented on proportionality and that this was an issue which should be urgently addressed at EU level.⁶

Case summary: Mikolaj Kowalski
Mikolaj Kowalski (not his real name), 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 Kowalski withdrew money from his bank taking him over the agreed overdraft limit. Despite the fact that Mr Kowalski repaid the entire debt to the bank in 2004, he now faces extradition to Poland to face a trial. For more information see Section C, case summary 2.

15. FTI considers that proportionality can only be addressed satisfactorily by amending the Framework Decision, in particular 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 which should be considered when assessing proportionality (such as the seriousness of the offence and the availability of alternatives to extradition) could also be included.

16. 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

⁵ European Commission Meeting of Experts: Implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant – The issue of proportionality, 5 November 2009

⁶ For the comments of Slovenia and Cyprus see the additional comments section of the responses to the European Council’s questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2009, 16 November 2010

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.

17. 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.

18. 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.⁷

19. Proportionality is a fundamental principle of EU law⁸ 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.

ii) Amend the Framework Decision so that issuing authorities are required to withdraw EAWs when they are refused by executing authorities

20. 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

⁷ See, for example, the German case *General Public Prosecution Service v C*, 25 February 2010

⁸ 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"

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.

21. 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.
22. Action at EU level is required to ensure that an EAW is automatically withdrawn 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 international police databases (such as the Schengen Information System and the Interpol system).
23. 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.
24. 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 a 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 grounds of principle, it is not simply left in place, effectively trapping a person in a particular Member State without any remedy against the issuing State.

Case summary: 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. For more information see Section C, case summary 3.

iii) Amend the Framework Decision to allow executing States to seek from issuing States further information and guarantees, before deciding whether to execute EAWs in cases where evidence has been adduced of a serious risk of infringement of fundamental rights

25. 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”.⁹

26. 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.¹⁰ 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.

27. 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 consider 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.

Case summary: 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. For more information see Section C, case summary 4.

⁹ 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

¹⁰ European Court of Human Rights: statistical information

28. 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 in the requesting country.¹¹ 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*¹² (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.*¹³

29. 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.¹⁴

30. 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.

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 conditions in his cell were so unsanitary that 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 rats, cats and mice. For more information see Section C, case summary 5.

¹¹ *Soering v UK* [1989] ECHR 14

¹² [2011] ECHR 108

¹³ Para 353

¹⁴ See, for example, evidence from Robert Rettinger's affidavit, *MJELR v Rettinger* [2010] IESC45

31. The Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, has raised similar concerns about the human rights implications of the EAW. In March 2011 the Commissioner 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.*¹⁵

32. 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 Decision¹⁶ are insufficient.

33. 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.

34. This amendment would ensure that the human rights implications of extradition are rigorously scrutinised by executing judicial authorities in cases where they are alerted to grounds for concern. This is what is required by the ECtHR, as laid down in *Saadi v Italy*¹⁷ and *MSS v Belgium and Greece*. The Framework Decision should now be amended to reflect this.

iv) Include provisions in the draft Directive on access to legal advice and representation, to ensure that persons subject to EAWs receive legal representation in both the issuing and executing State

35. The Framework Decision on the EAW specifies that a person sought for extradition must have legal representation in the executing Member State (Article 11 – rights of a requested person). No reference is made to legal representation in the issuing State. This means that most 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

¹⁵ Human rights comment, 15 March 2011: http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=124

¹⁶ Framework Decision on the EAW, Recital 12, Recital 13 and Article 1(3)

¹⁷ [2008] ECHR 179

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.

36. Our own cases at Fair Trials International frequently bear out the importance of having a lawyer in the issuing State, 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 is often 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.

37. A lawyer in the executing State will also not be as familiar with the human rights conditions of 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.

38. Furthermore, 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. Without this information, the defendant may be unable to raise bars to extradition, such as double jeopardy, pre-surrender. Without legal representation in the issuing State, the defendant may also be unrepresented at important pre-trial hearings taking place there.

Case summary: Edmond Arapi
In June 2009 Edmond Arapi was arrested in the UK under an EAW issued by Italy. Edmond was wanted to serve a sentence for murder, following conviction at an in absentia trial in 2004. The evidence used against Edmond at the Italian trial was consistent with mistaken identity. Edmond had documents showing he was in the UK when the crime was committed. Despite this, the English court ordered Edmond’s extradition. On the eve of his extradition appeal Italy announced it was withdrawing the EAW as further tests had shown Edmond’s fingerprints did not match those found at the scene. If Edmond had been provided with legal representation in Italy from the outset, then the fact that he was the victim of mistaken identity could have been discovered much sooner. For more information see Section C, case summary 7.

39. 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.

40. 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.

41. The forthcoming Directive under Measure C of the Roadmap on the right to legal advice offers the perfect opportunity to guarantee dual representation for persons requested under EAWs. Like its predecessor, the Directive on the right to information in criminal proceedings, the new Measure C Directive should include specific provisions on the EAW. The European Commission is to be congratulated for highlighting the clear need for dual representation (as well as its inherent benefits) in its recent EAW report.

42. The practical operation of dual representation would also be enhanced by the establishment of a network of extradition defence lawyers. This would expedite the allocation of a lawyer in the issuing Member State. Furthermore, greater communication between defence practitioners in different jurisdictions (to mirror the opportunities for dialogue currently enjoyed by police and judicial authorities) would improve the efficiency of the current system generally. Funding should be made available to establish such a network and provide further training for defence practitioners.

Case summary: Alan Hickey

Alan Hickey was serving a prison sentence for people-trafficking in France when he found out that he was wanted under an EAW to stand trial in Belgium. Alan was given very little information about the charges in Belgium, but he knew they were similar to the ones he had been sentenced for in France. FTI found a lawyer to act for Alan in Belgium: however, the lawyer was not given sufficient access to the case file. Once Alan had been extradited to Belgium and was standing trial, the judge ruled that his extradition had breached double jeopardy rules. This could have been avoided if he had been provided with effective legal representation in both countries from an early stage. For more information see Section C, case summary 8.

Section B: Comparative research on implementation of the EAW

Over the last year international legal practice Allen & Overy has generously carried out pro bono research for Fair Trials International on the implementation of the EAW in 8 EU Member States: Belgium, Czech Republic, France, Germany, Hungary, the Netherlands, Poland and Spain. This research particularly focused on the human rights aspects of implementation. A summary of the key findings of the research is set out below. The full country reports can be accessed on the Fair Trials International website.¹⁸

Belgium

The Belgian legislation implementing the EAW allows for refusal where there are serious grounds to believe that the execution of the EAW would infringe fundamental rights. The basis for this refusal ground is Article 1(3) of the Framework Decision which states, "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union." However, there is a presumption in favour of the issuing State, in the sense that the issuing State is presumed to respect human rights.

Czech Republic

There have been no cases of refusal to extradite in cases where requested persons have argued that extradition would violate their human rights. The Constitutional Court has stated that all Member States are party to the ECHR and this means that, following surrender, the requested person's rights human rights will be protected to the same standard applied in the Czech Republic.

France

Where it is established that the EAW has been issued with the aim of prosecuting or convicting a person because of his sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, this is a mandatory ground for refusing the warrant. The Supreme Court has found that it is beyond the remit of French courts executing requests to assess the proportionality of an EAW. Challenges to extradition based on Articles 3, 5, 6, 8 and 10 of the ECHR have failed.

Germany

Extradition can be refused on several grounds, including that it would violate the fundamental rights of the person subject to the EAW. German courts have held that they can examine the proportionality of an EAW request and refuse to surrender a

¹⁸ www.fairtrials.net

person on the grounds that to do so would be disproportionate. In *General Public Prosecution Service v C*,¹⁹ the court held that it could consider the proportionality of extradition by virtue of the fact that proportionality forms part of the German constitutional tradition, and also because “the principle of proportionality of criminal offences and penalties...is a general principle of the Union’s law”.

In the *Oberlandesgericht Hamm* case²⁰ an EAW was refused on *ordre public* grounds. The court held that the principle of proportionality and the fundamental rights of the requested person must receive as much respect in extradition proceedings as they would if a purely domestic trial were being conducted. The interest of prosecution in the issuing State had to be weighed against the right to private and family life as laid down in Article 8 ECHR and domestic law.

Hungary

The Hungarian implementing legislation contains a provision which enables the authorities to defer the surrender of the requested person for an indefinite period of time for the purposes of protecting his human rights.

The Netherlands

Extradition can be refused where there are substantial grounds to believe that the requested person's surrender will lead to a flagrant breach of his fundamental human rights. There is no statutory refusal ground on the basis of proportionality. However, the Dutch courts have ruled that under very exceptional circumstances such a refusal would be possible.

Poland

The Polish implementing legislation demands that extradition must be refused where the execution of the EAW would violate human rights or freedoms. Poland will only execute an EAW which relates to a Polish citizen if the act specified in the EAW was not committed in Poland, the act is an offence under Polish law, and surrender would not breach human rights. Article 6 ECHR challenges have been brought against extradition; specifically that Polish law fails to contain sufficient provision regarding the translation of the EAW which deprives individuals of the right to a fair trial. However, this challenge was dismissed.

Spain

There is no specific mention of human rights in the Spanish implementing legislation. However, the Spanish legal system is subject to the Spanish Constitution, which sets out a list of human rights practically identical to those contained in the ECHR.

¹⁹ Higher Regional Court of Stuttgart, 25 February 2010, NJW 2010, 1617-1619

²⁰ Higher Regional Court of Hamm, 25 February 2010, Az: (2) 4 Ausl A 163/08 and 89/09

Section C: FTI cases which illustrate key problems with the EAW

1) Disproportionate use of the EAW – Patrick Connor

43. Patrick Connor (not his real name) was just 18 when he went on holiday to Spain with two friends. While there, all three were arrested in connection with counterfeit euros. Patrick himself had no counterfeit currency on him or in his belongings when arrested and has no idea how the notes came to be on his two friends and in their rented apartment – in total, the police found 100 euros in two notes of 50. The boys were held in a cell for three nights. On the fourth day they appeared in court and had a hearing lasting less than an hour, at the end of which they were told they were free to leave but might receive a letter from the authorities later.

44. They returned to the UK and heard no more about it until four years later when, as Patrick was studying in his room at university, officers from the Serious Organised Crime Agency arrested him on an EAW.

45. Patrick was extradited to Spain and held on remand in a maximum security prison in Madrid. Other inmates told him he might be in prison for up to two years waiting for a trial. Under immense pressure and fearing for his future, he decided to plead guilty, even though several grounds of defence were available and he would have preferred to fight the case on home ground, on bail, and with a good lawyer he could communicate with in English. None of this was possible, and he ended up spending 9 weeks in prison before coming home to recommence his university career, his future blighted by a criminal record.

Patrick's case highlights: the need for a proportionality test to stop EAWs being issued for minor offences resulting in wasted costs and unduly harsh effects on individuals' lives.

2) Facing extradition for exceeding his overdraft limit – Mikolaj Kowalski

46. Mikolaj Kowalski (not his real name), 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 Kowalski withdrew money from his bank taking him over the agreed overdraft limit. The entire debt was repaid to the bank after it repossessed and sold his home. In 2004, he moved with his family to the UK where he has lived ever since.

47. On 23 July 2010, with no prior notice, British police arrested Mr Kowalski pursuant to the EAW. He is threatened with a criminal trial for a debt he paid off many years ago. The English court will now decide whether Mr Kowalski, in fragile health following 3 strokes in the past 2 years, will

Mr Kowalski's case highlights: the need for proportionality checks to stop EAWs being issued for minor offences.

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.

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

48. 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.



49. In 2007, Deborah was arrested at gunpoint in Turkey, while on a package holiday with a friend. The police released her, unable to explain the reasons for her arrest. Upon her return to the UK, she went to a 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.

50. 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 English court refused the extradition in April 2009 due to the passage of time.

51. As there is no provision for the withdrawal of the EAW by the issuing State in such situations, Deborah spent years as an effective prisoner in the UK – feeling unable to leave the country due to the risk of being

Deborah's case highlights: the need for EAWs to be removed immediately by issuing States once an executing State has declined to execute.

re-arrested on the same EAW. 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 3 years as an effective prisoner in the UK due to the risk of re-arrest.

4) Extradited after a grossly unfair trial – Garry Mann

52. 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 interpreted by a hairdresser who was an acquaintance of the judge's wife.



53. 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.

54. 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 UK police applied for a worldwide football banning order against Garry on the basis of the Portuguese conviction, but in 2005 an English Court held he had been denied a fair trial in Portugal and refused to make the banning order.

55. 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 an English court ordered his extradition to Portugal.

56. The case was heard by the English 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 available legal grounds upon which to refuse Garry's extradition.

Garry's case highlights: the need for courts to exercise discretion to refuse extradition on human rights grounds.

57. 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.

5) Student extradited to horrendous prison conditions – Andrew Symeou

58. FTI client, Andrew Symeou, tried and failed to resist extradition to Greece on Article 3 grounds. After extradition, Andrew spent a harrowing 11 months on remand in custody in Greece: his trial commenced recently but has been adjourned twice due to unavailability of qualified interpreters and court strikes. He has described to his parents the conditions he was held in: a university student with no previous criminal record who still lived with his parents, he spent his 21st birthday in a notoriously dangerous prison, Korydallos. His father Frank described some of the conditions in his oral evidence to the Committee on 1 February. The conditions included:



- filthy and overcrowded cells;
- sharing cells with up to 5 others including prisoners convicted of rape and murder;
- violence among prisoners: one was beaten to death over a drug debt;
- violent rioting;
- cockroaches in cell, fleas in bedding, prison infested with rats and mice shower room floor covered in excrement.

59. This description conforms with information contained in the numerous expert reports placed before the court in Andrew's Article 3 challenge to extradition. The Committee for the Prevention of Torture (CPT) had reported the previous year that "persons deprived of their liberty in Greece run a real risk of being ill-treated". Amnesty International and other human rights NGOs had similarly criticized Greece's prisons in the harshest terms.

60. This evidence was held insufficient as a bar to extradition, because Andrew could not prove that any of this would happen to him: and because in any case mistreatment was sometimes part of the European detention culture:

[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.*²¹

61. In hindsight, it is difficult to know what more Andrew Symeou could have done to bring the risk he faced to the court's attention and invoke his Article 3 rights before his extradition. He had never been to Greece before he went there as a student on his first holiday without his parents. He had not even been arrested or questioned by police in Zante and had no first-hand experience of Greek police procedures, remand facilities or prison conditions, before his extradition. The same is true of the majority of people extradited under the EAW system.

62. Information about the conditions Andrew was held in on remand was set out in detail in affidavit evidence from a solicitor who had visited him, as well as from Fair Trials International's caseworker, in support of another recent challenge on Article 3 grounds. Again, it was held that the test was not met and extradition was ordered.²²

Andrew's case highlights: the need for courts to exercise discretion to refuse extradition on human rights grounds.

6) Extradited before being charged – Michael Turner and Jason McGoldrick

63. Hungarian authorities sought the extradition of Michael Turner (right), a 27 year old British national from Dorset, and business partner Jason McGoldrick (37), following the failure of their business venture in Budapest.



64. Michael was extradited to Hungary under an EAW on 2 November 2009 and was held in prison for four months, during which time he was interviewed only once by police. He was released from jail on 26 February 2010 and was allowed to return to the UK, but was requested to return for further police interviews in April.

65. The EAW is intended to be used to extradite people to serve a prison sentence or for the purposes of a criminal prosecution. In Michael's case, however, an extradition took place even though no decision had yet been made to prosecute him. This improper use of the EAW subjected Michael and Jason to four unnecessary months in prison in extremely difficult conditions.

²¹ *Symeou v Public Prosecutor's Office at Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin) at para 65

²² *Herdman and ors v City of Westminster Magistrates Court* [2010] EWHC 1533 (Admin)

66. Michael's father, Mark Turner, has described how the pair were held in separate parts of a former KGB prison and were not allowed to contact family members or consular officials. Michael had to share a cell with three other prisoners and was only allowed out of the cell for one hour a day. Two weeks into his detention Michael was wearing the same clothes in which he had been arrested and had not been allowed to have a shower or clean his teeth. Prison officers refused to allow him to open parcels from his family containing basic items like toothpaste. Hungary's investigation is still ongoing with charges neither brought nor dropped against Michael.

Michael and Jason's case highlights: the need for the wide variation in standards of procedural rights protections across the EU to be taken into account in EAW proceedings.

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

67. 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 had not left the UK at all between the years of 2000 to 2006. 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.



68. 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.

69. 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 (and the witnesses he would need to testify about his activities and whereabouts on the day of the murder) would be admitted at any trial. Appeals had been exhausted in Italy (again, without Edmond's knowledge – they were attended on his behalf by a public defence lawyer and the conviction had been upheld).

70. It seemed far from clear that Italian law guaranteed a re-trial for defendants tried *in absentia*, where the conviction had been appealed. It was clear 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 English court ordered his extradition on 9 April 2010.

71. 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.

72. On 15 June 2010, the day the appeal against his extradition order was to be heard at the High Court, the 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. If Edmond had been provided with legal representation in Italy from the outset, then the fact that he was the victim of mistaken identity could have been discovered much sooner. 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.

Edmond's case highlights:

- ***the danger of placing complete confidence in the fair trial safeguards of requesting countries, merely on the basis that they are legally bound to comply with Article 6 ECHR.***
- ***The need for legal representation in the issuing State.***

8) Extradited in breach of double jeopardy – Alan Hickey

73. 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 France to stand trial for people-trafficking "with aggravating circumstances" and as part of a criminal conspiracy.

74. Alan was not given clear information about whom he was meant to have conspired with 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 extradition should be barred on "double jeopardy" grounds. However, given the lack of information about the charges in Belgium, Alan's French lawyer did not raise this issue at the extradition hearing. Alan's extradition was ordered before any further information could be gathered from Belgium.

75. Meanwhile in Belgium, hearings began in Alan's absence. Fair Trials International found a lawyer to act for Alan in Belgium 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: only two hours to read 17 boxes of prosecution documents. Alan's lawyer managed to get his trial delayed until after his surrender to Belgium.

76. Once released from France and in Belgium, Alan's concerns about double jeopardy were vindicated. The judge at Alan's trial found that some of the Belgian charges arose from the same events for which he was convicted in France. Alan pleaded guilty to the other offence and was given a suspended sentence.

77. Alan's extradition in breach of the double jeopardy rule could have been avoided if he had been provided with effective legal representation in both France and Belgium from an early stage.

Alan's case illustrates: the need for early access to legal advice in both jurisdictions in extradition cases.

Conclusion

78. In its seven 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.

79. The continued introduction of measures under the Roadmap on procedural safeguards is crucial in ensuring fundamental rights are respected across the EU. However, the very existence of the Roadmap illustrates that essential fair trial rights are not adequately protected in all EU States. We are delighted that the Commission continues to make progress in this area and that legislation is being drafted in a way which reflects that special measures are required for the EAW; for example the EAW-tailored Letter of Rights included in the draft Directive on the right to information in criminal proceedings.

80. Furthermore, the Roadmap does not offer a total answer to concerns raised about the impact of the EAW on fundamental rights. It will not, for example, tackle the issue of poor prison conditions faced by those wanted under conviction warrants.

81. 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 urgently on two levels to eradicate unfairness from the EAW system and ensure it is fully compatible with the rights enshrined in the ECHR and the Charter of Fundamental Rights.

82. First, change is needed to incorporate three vital safeguards into the EAW system: a proportionality test in the issuing and executing State; a provision allowing executing States alerted to a real risk of rights infringements to seek further information and guarantees (and refuse surrender if not provided); and a requirement on issuing States to remove EAWs where surrender has been refused by another State.
83. Secondly, continued action is needed to raise standards of justice across the European Union and implement the proposed Roadmap measures in full. This is crucial to the effective operation of the EAW, because the streamlined extradition procedure it has created is premised on the principle of mutual trust. The current absence of common standards in areas of fundamental procedural rights, bail and pre-trial detention represents a serious threat to the integrity and fair operation of the EAW scheme, leaving little room for mutual trust. Without proper defence rights, fast-track extradition carries an increased risk of an unfair trial and unjustified infringements of the rights to liberty and family life.
84. Unless action is taken on both of these fronts simultaneously, many more people will suffer injustice as a result of Europe's "no questions asked" extradition system.

Fair Trials International, May 2011