

FAIR TRIALS INTERNATIONAL



Communiqué issued after the Fair Trials International Legal
Experts Advisory Panel Meeting (5 February 2010)

- (1) European Arrest Warrant: Developments since May 2009
- and
- (2) Letters of Rights: Information on Charges



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 concern and to provide advice, information and recommendations to inform FTI's work. The fourth meeting of LEAP took place at the offices of Clifford Chance in London on 5 February 2010. 22 LEAP Members representing 12 European jurisdictions attended. The meeting was chaired by HH Dennis Levy QC.
2. Since the May 2009 meeting on the European Arrest Warrant ('EAW') this topic has received much attention. FTI's own EAW casework has increased, as has that of several Members. Members agreed that the issues highlighted at the May 2009 meeting continue to cause concern, including:
 - i. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality. Extradition is often ordered for minor offences and insufficient attention is being paid to the passage of time since the alleged offence;
 - ii. Insufficient attention is being paid to human rights considerations and whether the issue or execution of an EAW offends against the rule of law or amounts to an abuse of process;
 - iii. Given the serious impact extradition has on an individual's personal and family life and the likely difficulties the person will face in understanding proceedings in another language and culture, legal representation is essential, if necessary paid for by legal aid;
 - iv. The rules regarding the availability of legal aid for individuals subject to an EAW are unclear and vary from state to state. Legal aid to pay for representation (in both the requesting and executing States) is often limited;
 - v. Individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW. This is particularly unacceptable in cases where the execution of an EAW has been refused due to passage of time, the mental or physical health of a defendant or one of the mandatory grounds for refusal laid down in the Framework Decision on the EAW.
3. The first part of this meeting was spent revisiting the EAW, in particular: the proportionality issue; rising costs being incurred by Member States as a result of the increase in EAWs being issued; availability of bail following surrender; legal challenges to the EAW; and the possibility of a test case at the European Court of Justice.
4. Members agreed that problems with the EAW are being exacerbated by the continuing lack of minimum defence protections in the EU. The investigative stage of criminal proceedings is of paramount importance to protecting fair trial rights. The absence of timely and clear information about legal rights and the charges against the suspect devalues the right to a fair trial, making rights that exist in law illusory in practice. The second half of the meeting focused on this issue. Presentations were made by academics conducting research in the field and Members discussed existing practice in their own jurisdictions and made recommendations for an EU-wide letter of rights.

European Arrest Warrant (EAW): introduction of a proportionality check?

5. At the European Commission's experts' meeting in November 2009, the consensus was that: (a) the lack of a reliable proportionality check was the greatest defect in the EAW system; and (b) any duty to conduct proportionality checks should fall on the issuing State. The Commission is considering which Framework Decisions need to be recast as Directives following the abolition of the "Third Pillar" under the Lisbon Treaty. This could provide an opportunity for reforming the EAW legislation.

Court of Justice test case on proportionality/freedom of movement grounds?

6. Members agreed that Court of Justice guidance was needed on which categories of case were serious enough to justify use of an EAW: the list of 32 offences and a certification regarding applicable minimum sentences were not sufficient in themselves. The *Kadi*¹ case established that the EU principle of proportionality, inspired by Member States' constitutions, prevailed in any dispute over the interpretation of EU law or domestic implementing legislation.
7. A reference could be made either by the issuing State (taking the position that a refusal by another State on proportionality grounds was contrary to the EAW Framework Decision and the principle of mutual recognition), or by the executing State (seeking clarification and certainty on the proportionality principle and support for a decision to refuse surrender on proportionality grounds). Good statistical evidence and the right test case would be needed to illustrate that a State was issuing EAWs disproportionately.
8. A Court of Justice reference could also be made by a national Court to which an individual had applied under Article 111 of the Schengen Convention for removal of an alert after surrender had been refused, if the issuing State refused to recognise this refusal and remove the EAW. The principle of mutual recognition based on mutual confidence would support such a reference as being necessary to uphold the right of free movement.
9. Draft reference questions would be prepared for a sub-group of Members to review. Efforts would be made to identify a suitable case for a reference.

Political lobbying for a proportionality test, backed by statistics on EAW use and costs

10. Members agreed that a further way to get States to address the proportionality problem was to exert political pressure through effective lobbying and campaigning. To be effective, this would need to highlight:
 - i. the human cost, in individual cases, where EAWs were issued for trivial offences; and
 - ii. the resources being wasted by over-use of EAWs where more appropriate and proportionate solutions were available.
11. Governments should be receptive to sensible suggestions for curbing costs incurred in processing unnecessary and disproportionate EAWs and using appropriate alternative measures. Statistics should be provided to government departments and political representatives to illustrate the problem. Members agreed to send Freedom of Information requests to their governments asking:
 - i. how many EAWs were issued;
 - ii. how many EAWs were received (and from which issuing States);
 - iii. with what eventual outcomes (proportion of EAWs resulting in release without charge, acquittal, how long spent in pre-trial detention); and
 - iv. estimated costs per EAW received or processed, broken down into:

¹ Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council of the European Union and EC Commission*, 3 C.M.L.R. 41 (2008)

- court costs for proceedings;
- detention;
- prosecution costs;
- defence representation;
- interpreting/translation; and
- transportation.

12. Members agreed that an effective way of shifting the cost burden to the issuing State was to impose a fixed charge of up to €5,000 per EAW.

Recent EAW trends in Member States: (a) challenges on proportionality and other grounds

Ireland: Decisions from the Irish High Court are producing useful jurisprudence on proportionality. Many trivial EAWs are received from Poland and the Czech Republic: the resulting high costs are exacerbated by substantial legal aid and interpreter costs.

France: Old warrants are finding their way onto crime databases and re-emerging as EAWs. France has lengthened its limitation period to 20 years, so if a minor is arrested for possessing 2g of marijuana today, he could receive an EAW for that offence more than 20 years later. There should be a limit of 5 years for EAWs with judges empowered to renew them for further 2 year periods if appropriate.

Spain: Spain imprisons more people than any other Member State (one third of prisoners being foreign nationals). In 2009, it issued 1,800 EAWs, but only received 117. It is almost impossible to challenge an EAW successfully in Spain. Many public defenders know nothing about the EAW. They are paid only €300 per case, so clients are being advised not to challenge surrender. The statute of limitations allows EAWs to be issued decades after the events in question and this should be changed, in the way suggested for France (above).

Poland: Conflicting information had been reported on why so many EAWs are being issued by Poland. The principle of legality is often identified as the reason but this was questioned by some at the November 2009 experts' meeting.

Germany: For German nationals, the court sometimes applies proportionality principles in denying surrender, whereas a Polish client was recently surrendered for theft of €25.

Bulgaria: The EAW has been favourably received. The prevailing view is that Member States receiving EAWs should not carry out proportionality tests, as this contradicts the principle of mutual recognition. Instead, they must presume that the issuing State has satisfied itself as to proportionality. Bulgarian statistics suggest that in 2008, 38 people were surrendered, 4 EAWs were refused and 4 were pending. The 4 refusals were on technical grounds: no proportionality-based refusal is permitted.

UK: Surrenders have been refused where: the requesting country is not ready to prosecute but merely wishes to investigate; surrender would breach specialty; and where re-trials following a conviction *in absentia* were not guaranteed.

Hungary: The recent FTI case of Turner and McGoldrick, surrendered to Hungary, was widely covered in the media. They spent months on remand and prosecutors appeared to be merely investigating and not ready to prosecute². Members agreed it should be possible to challenge such a premature use of an EAW as contrary to Article 1.1 of the Framework Decision regarding the permitted uses of an EAW, which do not extend to mere investigation.

² as apparently now accepted following their release from Hungarian custody on 27 February 2010

Recent EAW trends: (b) refusal of bail following surrender

13. Members agreed it is virtually impossible for a defendant to avoid pre-trial detention once surrendered, despite the risk of absconding not being identifiable in every case. However, if bail is refused on pure nationality grounds, this could be challenged via a reference to the Court of Justice or European Court of Human Rights (as in the case of Andrew Symeou, extradited to Greece in July 2009).

UK: Availability of EAWs to secure attendance at trial has been used with limited success to get bail.

Spain: Non-availability of bail is a particularly serious problem given pre-trial detention periods of up to 4 years.

Portugal: The maximum period of pre-trial detention has been reduced to 3 years and 6 months. Portugal does not trust in the EAW system to guarantee a person's attendance at trial and refuses bail in most non-national cases.

Letters of Rights: Information on Charges

14. It was agreed that timely information is crucially important because if defence rights are not exercised early, irreparable harm can be done to the defence. Not only would clear and timely information about rights reduce this risk: the requirement to provide it would foster greater respect for defence rights among police and prosecution officers. Many States do not provide information on rights until after initial interrogation and often only do so orally (therefore, unverifiably). In England and Wales, a person must be informed in writing on arrest of the rights applicable including, most importantly, access to free legal advice.
15. There is highly variable underlying rights provision across Member States: for example, in many States there is no right to the translation of key documents. There is also great variance in what rights are referred to in Letters of Rights: many Letters do not refer to the right to an interpreter, yet that right is theoretically guaranteed in the legal systems of all States. In some countries, Letters of Rights are provided, but not in translation.
16. Research suggests that although many Member States have legislated to provide information on rights to suspects, they are not in fact providing it. In some cases, Letters of Rights improve protections, for example, referring to the right to free access to a lawyer from the first arrest, but if the approach is too formalistic, loopholes can be exploited by prosecution authorities.
17. Poor compliance with fair trial rights is partly due to defence lawyers' inability to provide their clients with effective representation and preserve their fair trial rights (often due to unacceptably low legal aid provision in many States). Bar associations and law societies are not doing all they could to ensure adequate training and monitoring so that the highest possible professional standards are met. Members agreed that, given this situation, adequate, clear and timely information on rights is all the more important.

Panel's recommendations on Letters of Rights/Information on Charges

18. The legislation must recognize the risks suspects face at the early investigative stage, before they have contacted legal advisers, consular officials or relatives. The inequality of arms at this stage is at its greatest and must be compensated for by clear, timely information, even before arrest is made.
19. Difficulties arise in defining what should trigger the provision of information on charges because "charge" is not a universally recognized concept. What matters is the way a person's situation could be affected by developments in the case: for example, when a witness becomes a suspect. Members suggested that the Commission and its researchers consult practitioners as well as government and prosecution officials, to ensure rights to information are adequately safeguarded for all EU legal systems. Additional protections should be inserted for young or vulnerable suspects.
20. All suspects must be given, as soon as possible after becoming a suspect, clear information, in a language and form they can understand, about their rights to:
 - contact with consular officials and family members or other trusted persons
 - legal advice and representation (including information that a lawyer's presence is allowed during police questioning (if applicable))
 - legal aid
 - interpretation
 - translation of key documents
 - the right to silence (if applicable); and
 - information about the charges and the reason for arrest or detention.
21. Where a person is asked to confirm that information has been given, the time and date it was given must also be required to be stated. It is not acceptable for information about rights or charges only to be given orally, or for police to self-certify its provision. Verification procedures must exist. In this context, consideration should be given to tape- or audio-recording of the provision of information.
22. Where information on a right is provided, nothing must be said or done by police or prosecution authorities to suggest it might be detrimental for a suspect to seek to exercise that right.
23. Clarity of information is crucial: arrest is a traumatic experience for most, and information at or immediately after the first contact with police, in clear and simple language the suspect understands, is therefore necessary. Translations into locally prevalent languages are necessary. The Letter of Rights must be clear about precisely *when* each right arises, for example, when the suspect has a right to legal advice.