

Okresní soud v Ústí nad Labem  
Kramoly 641/37  
401 24 Ustí nad Labem

30 October 2012

**By fax & letter**

Ke sp.zn. 1 T 64/2004

**Re: European Arrest Warrant issued against \*\*\*\*\***

I write on behalf of Fair Trials International ('FTI') in connection with the motion submitted on behalf of Ms \*\*\*\*\* requesting the revocation of the European Arrest Warrant ('EAW') issued against her by the Okresní soud v Ústí nad Labem on 20 November 2009. In view of the urgency of the matter, this statement was submitted by fax on 30 October 2009, and the original was sent by recorded delivery on the same day.

We have been approached as an expert on the EAW and asked to comment on the question of the use of the EAW for minor offences, in particular where execution of the EAW will have severe consequences for the children of the requested person. We are also asked to comment on the possibility of a reference for a preliminary ruling to the Court of Justice of the European Union ('CJEU') under Article 267 TFEU. We offer these observations as an independent third party.

**I – ABOUT FTI**

FTI is a London-based human rights charity (registered charity no 1134586) which works to promote fair trials according to international standards of justice and to defend the rights of those facing criminal charges in a country other than their own.

Extradition forms an important part of our work. Each year we help many people facing extradition between EU Member States by providing advice, assistance and referrals. FTI has given evidence on human rights and extradition to the UK parliamentary Home Affairs Select Committee and Joint Committee for Human Rights; has provided detailed submissions to the UK Government's Extradition Review Panel; and regularly attends and gives evidence at expert meetings of the European Commission on the functioning of the EAW Framework Decision. FTI has also intervened in EAW cases before the High Court and the European Court of Human Rights, and supplies training to European criminal lawyers, including on making references to the CJEU in criminal practice.

At the heart of our expertise lies our individual casework. Each year we assist numerous people facing extradition from and to other Member States of the European Union. In all our extradition work, we collaborate with our Legal Experts Advisory Panel, a network of over 80 criminal defence practitioners, academics and NGO representatives from 22 Member States which convenes regularly to exchange information on EU cross-border criminal justice. We are thus uniquely placed to comment on the operation of the EAW in practice.

## **II – OBSERVATIONS**

### **A. Background: the use of the EAW for minor offences**

Under Article 2(1) of the EAW Framework Decision, an EAW ‘*may* be issued for sentences of at least four months’ (emphasis added). The question whether or not to use the drastic measure of extradition in cases which, technically, come within the scope of the EAW Framework Decision is thus a discretionary matter for the issuing judicial authority which it takes in accordance with national law and practice, subject to overriding fundamental rights obligations.

Several countries, including notably Poland, Bulgaria and Romania, applying national constitutional rules requiring them to prosecute in all cases, have considered themselves bound to use the EAW in any case coming within the scope of the EAW Framework Decision. Aside the impact on the liberty, family life and economic activity of the requested person that inevitably follows from extradition, the use of the EAW for very minor offences often means that other Member States face a disproportionate burden on their public finances when executing these EAWs.

These costs would typically include legal fees, interpretation and translation costs, costs of police, prison service and other agencies involved in arresting, transporting and detaining the requested person, court fees and other associated costs. At a Meeting of Experts convened by the European Commission on 5 November 2009, it was estimated by a member of the judiciary of Ireland that the average cost of executing an EAW was € 25 000, which is often vastly disproportionate to the gravity of the offence in question.

The European Commission highlighted this issue in a 2011 report (COM(2011) 175 final; see Annex 1) on the implementation of the EAW Framework Decision. At Part V, entitled ‘The Issue of Proportionality’, it commented that:

“Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences ... there is general agreement among Member States that a proportionality check is necessary to prevent EAWs from being issued for offences which, although they fall within the scope of Article 2(1) of the Council Framework Decision on the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires. Several aspects should be considered before issuing the EAW including the seriousness of the offence, the length of the sentence, the existence of an

alternative approach that would be less onerous for both the person sought and the executing authority and a cost/benefit analysis of the execution of the EAW. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate.”

In an effort to address these concerns, the Council of the EU amended its Handbook on the EAW (see Annex 2), which now includes a section on proportionality including a number of factors to be considered prior to issuing an EAW. It states that ‘in particular these will include an assessment of the seriousness of the offence’.

This section of the Handbook is directed primarily to authorities considering using an EAW for prosecution, as opposed to execution of a sentence. However, it is clear that the seriousness of the offence is in any event an important consideration. It has to be assessed whether the interest in enforcing a sentence for a very minor offence justifies the considerable burden upon the executing state.

We also point out that, under Article 4(3) TFEU, ‘pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties’. The creation of an ‘Area of Freedom, Security and Justice’ is frustrated when the executing state is required to follow costly procedures – the arrest and supervision of the person, the use of court resources, the provision of legal aid to the person – in order to execute an EAW based on very minor offences, when these could be applied to the detection and prosecution of domestic crime of a more serious nature.

It should be borne in mind that, if a suspended sentence which has been reactivated following a person’s departure from the state is not enforced, the original conviction is not deprived of punitive effect. In the event that the person reoffends in the state where s/he now resides, the criminal courts of that state will be able to have regard to it in accordance with Council Framework Decision 2009/315/JHA of 26 February 2009 on the exchange of information extracted from the criminal record between Member States, and will impose a commensurately heavier criminal penalty.

## **B. Proportionality obligations under the Charter and ECHR**

The use of the EAW is also liable to cause severe human impact on the requested person. When used for very minor offences, this impact is often seriously disproportionate. The case of FTI’s client Natalia Gorczowska demonstrates this:

- Natalia, a Polish national, was 17 when she was convicted of possession of 4 grams of amphetamines for personal use and given a 10-month suspended sentence. She left for the United Kingdom in an effort to start a new life and unfortunately omitted to inform the court, which activated the sentence. On arrival in the UK Natalia turned her life around, obtained stable employment and in 2011 gave birth to a son. In December 2012 she was arrested further to an EAW issued by the Polish court. She narrowly avoided extradition on her son’s first

birthday when the European Court of Human Rights granted an interim measure under Rule 39 of its Rules of Court indicating to the UK that it should not extradite her until further notice. The sentence was eventually re-suspended and the ECtHR application withdrawn.

The fact that use of the EAW can have such severe consequences clearly raises issues under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the 'ECHR'). It equally raises issues under Article 7 of the Charter, which applies in this context.

### *Application of the Charter*

The Charter is binding upon the judicial authority because it is part of primary EU law: Article 6(1) of the Treaty on European Union states clearly that the Charter has 'the same legal value as the Treaties'. The Charter is addressed to the Member States 'when they are implementing EU law' (see Article 51(1) of the Charter). According to the Explanations to the Charter, this provision means that the Charter is binding upon the Member States 'when they act in the scope of Union law'. There is no doubt that a Member State acts within the scope of EU law when issuing or executing an EAW.

That the Charter binds a Member State using the EAW was confirmed in the recent Opinion of Advocate-General Sharpston of 18 October 2012 in Case C-396/11 *Radu* [2012] ECR I-0000,<sup>1</sup> which clearly stated that a Member State must respect Article 6 of the Charter (right to liberty) when executing an EAW. The Opinion also agreed clearly with the position of the Commission, described above, according to which '[t]here is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate', thus recognising explicitly that operation of the EAW must be limited by fundamental rights in certain circumstances. As we will explain below, Article 7 of the Charter, which protects the right to family life, also implies an obligation not to use the EAW where execution will have a severe impact on the young children of the requested person.

### *Equivalence of Article 7 of the Charter and Article 8 ECHR*

Article 7 of the Charter provides that 'everyone has the right to respect for his or her private and family life'. This corresponds to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR'). The Charter makes it clear that rights with an equivalent in the ECHR have the same meaning and scope as the ECHR rights (see Article 52(3) of the Charter). Although in some cases the Charter can provide more extensive protection, the CJEU has indicated fairly clearly that, in the case of Article 7 of the Charter and Article 8 ECHR, the two provisions have the same meaning and effect, as interpreted by the case-law of the ECtHR (see Judgment of 5 October 2010 in Case C-400/10 PPU *McB* [2011] ECR I-581, paragraph 48).

### *Obligations under Article 7 of the Charter / Article 8 ECHR*

What obligations do Article 7 of the Charter / Article 8 ECHR imply for a state issuing an EAW? In the area of extradition, the ECtHR recognises that extradition represents an interference with the family

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<sup>1</sup> Czech version: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0396:CS:HTML>

life of the requested person, and must therefore be justified and proportionate. It takes the view that 'it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting State would be held to be an unjustified or disproportionate interference with the right to respect for family life' (*Lauder v. the United Kingdom* App. No 27279/95 (Commission Admissibility decision of 8 December 1997); a similar statement is to be found in *King v. United Kingdom* App. No 9472/07 (Admissibility Decision of 26 January 2010), paragraph 29).

This approach applies equally under the EAW. Applying these principles, the ECtHR has granted interim measures under Rule 39 of its Rules of Court requiring Member States to suspend execution of EAWs pending its decision. Aside from the *Gorcowska* case detailed above, in *E.B. v. the United Kingdom* (App. No 36019/10), in which FTI made third-party observations, a Polish national, mother of four children aged 4 months, 2 years, 11 years and 17 years, was sentenced to 18 months' imprisonment by a Polish court in February 2004 for insult, assault and threatening behaviour. She entered the United Kingdom in 2007 and an EAW was issued in July 2009. In November 2010, the ECtHR indicated to the United Kingdom that E.B. should not be extradited until further notice. These decisions show that, notwithstanding the strong public interest in favour of extradition, the ECtHR is prepared to consider that the use of the EAW may represent a disproportionate interference with the family life of the requested person and their young children in cases of minor offences.

The Supreme Court of the United Kingdom has, for its part, confirmed that extradition may in some circumstances be a disproportionate interference with the Article 8 ECHR rights of the requested person and their family. In *F-K v Polish Judicial Authority* [2012] UKSC 25, an EAW was issued for the surrender of a mother of five children aged 3 years, 8 years, 13 years, 17 years and 21 years. The Supreme Court considered that extradition of the mother would have an 'exceptionally severe' effect upon the younger children, and would be disproportionate in view of the comparatively minor nature of the offences alleged. It emphasised that particular care had to be taken to assess the potential impact of extradition on young children for whom the requested person is the primary carer.

The above decisions provide some guidance as to the Charter obligations of a judicial authority issuing an EAW. However, it is important to note that all of these decisions relate to cases brought from the executing state. In that context, the courts are able to assess the precise extent of the impact on family life at the time execution is sought. On the other hand, they are unable to assess the public interest in prosecution / enforcement of the sentence, which is a matter for the issuing state. They instead take the broad approach of assuming that there is a very preponderant public interest in honouring extradition agreements, in a spirit of international comity.

There is thus no clear indication of what sort of assessment Article 8 ECHR / Article 7 of the Charter requires of the issuing state, which is able to make a more precise assessment of the public interest in obtaining the repatriation of the offender to serve a sentence, taking into account the seriousness of the particular offence in question. It is submitted that the issuing judicial authority must balance

that public interest against the potential impact of extradition on the family life of the requested person.

In that context, it is quite clear that, under Article 8 ECHR / Article 7 of the Charter, close attention must be paid to the potential impact on the young children of the requested person. Apart from the extradition cases above, other case-law relating to international child abduction, where a child's wellbeing stands to be affected by separation from a parent, the ECtHR is clear that the best interests of the child must be 'the primary consideration' (see *Neulinger and Shuruk v. Switzerland* App No. 41615/07 (Judgment of 6 July 2010, paragraph 134).

This must apply equally under the Charter which, at Article 24(2), explicitly provides that 'in all actions relating to children, whether taken by public authorities or private institutions, *the child's best interests must be a primary consideration*' (emphasis added). In order to meet this requirement and accurately consider the proportionality of issuing an EAW, the issuing authority must consider the potential impact on children at the time when execution is sought. It should, for that purpose, consider up-to-date evidence made available to it.

Likewise, under Article 49(3) of the Charter, to which the Council's EAW Handbook refers, the requirement is that 'the severity of penalties must not be disproportionate to the criminal offence'. It should be noted that the *Oberlandesgericht Stuttgart* (Higher Regional Court, Stuttgart), in a decision of 25 February 2010 (Annex 3), found that Article 49 of the Charter was a general principle of EU law which should be taken into account by a court executing an EAW. Finding that the case-law applicable under the German constitutional principle of proportionality applied by analogy to Article 49(3), it stated that extradition was permissible even if the sentence underlying the EAW was 'according to German legal understanding too severe', but would be impermissible where the sentence appeared 'intolerably severe'. This approach confirms that the Charter does impose proportionality limitations on the use of the EAW. However, the *Oberlandesgericht Stuttgart's* approach to Article 49(3) reflects the general reluctance of the executing courts to impose local norms upon the issuing state by assessing precisely the seriousness of the offence, finding that an EAW should be refused only in grossly disproportionate cases.

Again, a slightly different test must be applied under Article 49(3) in the issuing state. The issuing judicial authority can assess precisely the seriousness of the offence under national law and custom, and determine whether the sentence is proportionate at the time its enforcement is proposed. To make that assessment accurately, it must have regard to contemporaneous evidence showing the immediate impact of the sentence.

It should be noted that, should an issuing judicial authority decide that use of the EAW would be disproportionate, and decides to impose a financial penalty as an alternative to enforcement of the custodial sentence, that penalty would have to be recognised by other Member States under Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

### C. Pupino and the interpretation of national law

We would equally underline the Judgment of the CJEU of 16 June 2005 in Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, where the CJEU stated that ‘national courts must interpret national law as far as possible in light of the wording and purpose of the framework decision in order to attain the objective which it pursues’ (paragraph 43). This is subject to the qualification that a national court cannot be required to interpret national law *contra legem* (paragraph 47).

Article 1(3) of the EAW Framework Decision makes it quite clear that the latter respects the fundamental rights guaranteed by the Charter. In order to achieve the objectives of the EAW Framework Decision, national courts should therefore interpret national law in accordance with Charter rights in order to ensure compliance with the EAW Framework Decision.

### D. The potential for a reference to the Court of Justice of the EU

#### *Jurisdiction*

Again, FTI is unable to comment on any rules of Czech national law, doctrine or practice regarding references to the CJEU. As a matter of EU law, it is certainly open to the Okresní soud v Ústí nad Labem to seek the guidance of the CJEU on the interpretation of the EAW Framework Decision and the Charter, by way of a reference for a preliminary ruling.

Under Article 35(2) of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon on 1 December 2009, Member States could accept the jurisdiction of the Court of Justice of the EC (as it then was) to give preliminary rulings on the interpretation on EU crime and policing laws like the EAW Framework Decision. The Czech Republic, upon acceding to the European Community, made such a declaration (see the Official Journal of the European Union, L 236 of 23.09.2003, p. 980;<sup>2</sup> see Annex 4).

Article 35(2) granted the option to give jurisdiction to refer questions to (a) any court or tribunal against whose decisions there is no judicial remedy under national law or (b) any court or tribunal (see the declaration mentioned above). The Czech Republic chose the latter option, thus explicitly granting first-instance courts like the Okresní soud v Ústí nad Labem the capacity to make references to the CJEU on the interpretation of EU laws in the area of judicial cooperation in criminal matters.

#### *Appropriateness*

A reference can be made by any court unless the issue of EU law in question is *acte clair*, that is, where the answer is clearly apparent from the existing body of case-law. In light of the absence of any case-law of either the ECtHR or the CJEU on the obligations of a judicial authority issuing an EAW, this point of EU law is anything but *acte clair*.

#### *The urgent procedure (PPU)*

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<sup>2</sup> Czech version: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12003T/AFI/DCL/26:CS:HTML>

Should the Okresní soud Ústí nad Labem wish to make a reference to the CJEU, it would be open to it to request the application of the Urgent Preliminary Ruling Procedure (PPU) provided for by Articles 107 to 114 of the Rules of Procedure of the CJEU (in the new version in force from 1 November 2012; see Annex 5). According to the statistics of the CJEU for 2011, the average time for consideration of a reference for a preliminary ruling under the PPU was just **2.5 months**.

The PPU procedure has been applied in several cases concerning international child abduction: see the *McB* case cited above; Judgment of 22 December 2010 in Case C-491/10 PPU *Zarraga* [2010] ECR I-14247; Judgment of 22 December 2010 in Case C-497/10 PPU *Mercredi* [2010] ECR I-14309; Judgment of 1 July 2010 C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673; and Judgment of 23 December 2009 in Case C-403/09 PPU *Detiček* [2009] ECR I-12193. In these cases, the child's interests clearly require a swift resolution of the case in order to minimise the uncertainty upon the child. There are parallels with situations involving the potential separation of the child and their parent.

### III – CONCLUSION

We hope that these observations are helpful to the Okresní soud v Ústí nad Labem in the context of the case before it. Should you require any further information, please feel free to contact us on [jago.russell@fairtrials.net](mailto:jago.russell@fairtrials.net), [alex.tinsley@fairtrials.net](mailto:alex.tinsley@fairtrials.net) or +44 (0)20 7822 2370.



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