



A missed opportunity

Alex Tinsley discusses the European Supervision Order

One serious concern about pre-trial detention in today's European Union is the fact that foreign defendants, assumed to pose a flight risk, often spend long periods remanded in custody. The European Supervision Order (ESO) is an important new tool intended to tackle this problem by enabling defendants from one EU state facing charges in another to be bailed back to the home state pending trial. Member states had until 1 December 2012 to implement this new EU law, but the UK has not done so. This is a missed opportunity. If EU judges are prepared to rely on each other to monitor bailed defendants, the ESO could make a big difference.

The problem: detention of non-residents

Every year, Fair Trials International assists hundreds of people arrested outside their own country. Although detention is supposed to be an exceptional measure of last resort, many of these face detention for months or years while their case is investigated and prepared for trial. In Spain, for instance, pre-trial detention can last up to four years.

Without family or social connections in the trial state, non-resident defendants are seen as a flight risk and are consequently detained, whereas they would be good candidates for bail in their own country. The courts, both in the UK and elsewhere, feel unable to rely on the normal bail conditions – regular reporting, residence requirements and so on – which work better when accompanied by strong ties to the local area. As a result, these defendants face losing their jobs and prolonged separation from their family, and the presumption of innocence is weakened. Even if released, local reporting requirements may prevent their returning home and leave them dependent on the trial state's social security systems.

This situation often arises after the premature extradition under the European arrest warrant (EAW). All too often, defendants are requested under EAWs issued while investigations are still at a relatively early stage, long before the case is trial-ready. Judges nevertheless feel bound to comply with these requests, only for extradited persons then to spend long periods awaiting trial, unable to get bail because of their residence status.

The European Supervision Order

The Framework Decision (2009/829/JHA) on the ESO provides a potential solution to these problems. This new EU law establishes a system whereby a court in one EU state can rely on the authorities of another EU state to enforce bail conditions, enabling the defendant to return home pending trial. This is how it is intended to work:

- The authority in the trial state issues a 'decision on supervision measures' (a bail decision), along with a tick-box proforma specifying what supervision measures (reporting, curfew requirements and so on) are to be monitored. This is an ESO.
- The ESO is forwarded to the competent authority in the state where the defendant 'lawfully and ordinarily resides' (not necessarily the defendant's country of nationality) with their consent, or to another state at their request provided that state consents.
- The second or 'executing' authority is then required to recognise the decision and take all necessary measures to monitor the supervision measures, at the latest within 20 days of receipt.
- Like other EU laws of this kind (including the EAW), there are only limited grounds for refusal by the executing authority: for instance if the ESO is incomplete or deficient; or if the executing state disputes that it is the state of lawful and ordinary residence.
- For certain conditions that are harder to supervise, such as driving bans or addiction treatment, member states are required to declare in advance that they are willing to enforce them. Absent this declaration, an ESO containing one of these measures can be refused.
- If a supervision measure is breached, the authority enforcing the ESO compiles a report (again, a proforma is supplied). This is sent to the issuing authority, which will decide whether to vary the obligations or issue an arrest warrant.
- The assumption is that the person will voluntarily return to the prosecuting state to face trial. If they do not, the ESO provides for their return by means of extradition under an EAW.

For a more thorough run-through, see page 29 for details of our online *Guide to the ESO*.

