

FAIR TRIALS INTERNATIONAL

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Submission

UK views on European Union's Justice and Home Affairs Future Work Programme 2009 - 2014

17 September 2009

About Fair Trials International

Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own.

FTI pursues its mission by providing 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.

Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

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1 Introduction

- 1.1 FTI welcomes this opportunity to provide our views to the Ministry of Justice on the UK's input into the next European Union Justice and Home Affairs five year work plan, the Stockholm Programme. This is in response to the invitation we received from the Ministry dated 11 August 2009 ("Invitation Letter").
- 1.2 This paper examines the opportunities presented by the Stockholm Programme. It presents arguments and case studies supporting the need to back Sweden's efforts to prioritize minimum procedural defence rights for all EU citizens, which we are pleased to note the UK Government also wishes to prioritize.
- 1.3 FTI sees great benefits in mutual cooperation and recognition in criminal justice, as part of the fight against serious organized crime. However, mutual recognition must be based on mutual trust, the foundations for which are not yet in place. The Stockholm Programme must address this by introducing minimum procedural defence rights across the EU. The UK Government should support Sweden's efforts to obtain political consensus on this issue, by:
 - i. backing the adoption of a framework decision on translation and interpretation;
 - ii. pressing for prompt action on a letter of rights and information about charges, the second of a series of measures Sweden has proposed; and
 - iii. calling for binding legislation on all these measures as an integral part of the Stockholm Programme.
- 1.4 The Government should also press for a review of the European Arrest Warrant system to ensure it delivers, rather than undermines, justice in Europe.

2 Executive summary

- 2.1 In the past decade, the EU has actively sought to build an area of justice, freedom and security within Europe. The dominant theme has been for member states to cooperate more effectively to bring to justice those convicted or suspected of criminal activity. The most notable development has been the creation of a fast-track system of extradition within Europe (the European Arrest Warrant or EAW). We believe this increased cooperation has resulted in real improvements in some areas of criminal justice, cutting down delays, increasing efficiency, and enabling serious organized crime that crosses national borders (such as human trafficking, money laundering and cyber-crime) to be tackled more effectively. These are laudable achievements.
- 2.2 We are, however, concerned that European cooperation in the fight against crime has been pursued with insufficient regard for basic principles of justice and fairness. The Stockholm Programme must include measures that will allow member states to trust each other's systems to deliver justice to the necessary standard. To date, there has been insufficient assessment of the human costs of existing measures such as the EAW and their potential misuse.
- 2.3 The injustices we encounter in our own casework show us that more must be done to improve the delivery of justice for the benefit of all EU citizens, wherever they happen to live, work, study or travel within the Union. In particular, our cases illustrate the importance of minimum procedural defence rights being guaranteed. In practice, it can often be more difficult for non-nationals than nationals to receive a fair trial. In addition, non-nationals spend more time in pre-trial custody than nationals and are much less likely to be granted bail.
- 2.4 We are pleased to note that the UK Government considers it a priority¹ for the EU to “ensure that every citizen can have confidence that, wherever they are in the EU...all defendants are guaranteed a fair trial”: and that a further priority² will be to improve co-operation with third countries in the field of criminal justice, including by “promoting the rule of law and human rights to help build stability and security outside the EU's borders.”
- 2.5 Whilst we understand the Government's wish to avoid contentious issues and seek to address problems “with the least possible degree of legislative intervention”³, we argue that in the context of minimum procedural safeguards in criminal proceedings, there is no option but to legislate to ensure that fair trial rights are respected and adequate remedies exist when they are not.
- 2.6 Finally, we fully support the Government's call for legislation promoting the audi-recording of interviews with suspects in police stations.

¹ At item (v) in the Invitation Letter

² At item (vii) in the Invitation Letter

³ Expressed in the UK's Contribution to the EU's New Multi-Annual JHA Work Programme dated October 2008, page 1

- 2.7 The Stockholm Programme will also incorporate measures on data sharing and data protection. Proper tests of proportionality, necessity, accuracy and security must be laid down, for any new surveillance, data sharing and data retention powers.

3 Need for changes in EAW system to ensure it operates fairly

- 3.1 The EAW system has been in place long enough to demonstrate some of the dangers that can arise from mutual cooperation, where mutual trust is not yet in place.
- 3.2 We highlighted this issue in a Submission to the EU Justice and Home Affairs Committee dated 31 July 2009 (annexed). In that Submission we suggested a number of concrete ways in which the EAW system could be strengthened to deliver greater justice without detracting from suspects' fundamental rights and without allowing the system to be abused through the issuance of unreasonable or improper extradition requests. In summary, we proposed:
- a. Checks to ensure EAWs are only issued when proportionate to the offence and in the interests of justice. Guidance and training to be offered on the proportionality criteria to be applied.
 - b. Domestic courts to receive guidance and training on how to exercise their powers to refuse to execute a warrant where, for example: execution will result in a breach of human rights; or the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.
 - c. The EU to introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting and the executing state. Individuals should usually have lawyers representing them in each country.
 - d. Legal aid to be provided for individuals subject to an EAW: the cost to be shared by the requesting and executing state.
 - e. Common rules implementing fairer laws on bail and pre-trial detention.
 - f. The system for removing EAW alerts from the Schengen Information System, Europol and Eurojust to be improved. If an EAW's execution is refused on a final basis in one member state, alerts for that EAW should be removed from the entire system, to prevent the individual's re-arrest in any other member state.
- 3.3 FTI wants to see the EAW and other mutual cooperation instruments work properly, so that they uphold rather than undermine the justice, freedom and security that lie at the core of the EU's mandate.

4 Protecting fundamental defence rights: the Roadmap and Stockholm Programme

- 4.1 On 1 July the Swedish Presidency published a "*Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings*" (Roadmap), a positive step which FTI welcomes. We are concerned that European cooperation in the fight against crime has forged ahead without sufficient regard for basic principles of justice and fairness.

The Stockholm Programme, the Roadmap and the Proposal presented by the European Commission on 8 July 2009 for a Framework Decision on the right to interpretation and translation of relevant documents in criminal proceedings (the "Proposal"), all represent an important opportunity for the EU to take measures which will enable Member States to trust each other's systems to deliver justice to the necessary standard.

- 4.2 The Roadmap itself makes out a strong case for introducing minimum procedural safeguards. Pointing to the fact that the removal of internal borders has increased cross-border criminality and that as a result more individuals are finding themselves involved in foreign proceedings, the Roadmap acknowledges that this results in suspects knowing less about their rights than they would if arrested at home, as well as language barriers making meaningful participation in their defence more difficult.
- 4.3 In FTI's experience, a single case often suffers multiple failures to respect basic rights. For example the lack of access to a lawyer or legal aid can be exacerbated by the lack of information on rights or on the prosecution case, or the lack of a quality interpreter or translations of important documents. Similarly, the inability of suspects to contact friends, family or consular officials as quickly as possible often prevents them from taking the necessary steps to exercise other key rights before their position in the case is irrevocably prejudiced.
- 4.4 The European Commission's proposals for the Stockholm Programme published on 10 June highlight the need to put ordinary citizens' interests at the heart of the project. FTI welcomes this stance and believes it should underlie the approach to guaranteeing basic defence rights as much as it does to the right to security and effective crime control.
- 4.5 However, although fair trial rights are enshrined in the European Convention on Human Rights and Fundamental Freedoms, FTI's cases show that they require further legislative force in order to become tangible for ordinary citizens. Only then can individuals depend on them with confidence wherever they happen to be in the EU. Bringing a claim to the European Court of Human Rights or seeking to assert Article 6 rights in domestic courts (particularly if one is not a national of the court concerned) does not offer sufficient means of protecting these rights in a timely or practical way. Arbitrary, unjust or discriminatory treatment in a criminal investigation or proceeding often has devastating and lasting consequences for individuals and their families. Legislation on minimum defence rights can help make Article 6 a meaningful and enforceable right.
- 4.6 We believe detailed and binding legislation on each measure, beginning with the current Proposal, is the best way to ensure this important aim is achieved. We were therefore encouraged by the Government's broadly positive response to the Swedish initiatives. In an Explanatory Memorandum on the Roadmap submitted by the Office for Criminal Justice Reform on 22 July 2009, the Government signaled its support for the Roadmap and for a step-by-step approach introducing measures that will meaningfully enhance the existing fundamental right to a fair trial. In a separate Explanatory Memorandum also released in July 2009, the Government indicated its broad support for the Proposal, referring to the

importance of “ensur[ing] there are accepted common minimum standards across the states of the EU in this field for the protection of those suspected of committing criminal acts...”.⁴

- 4.7 While we welcome the renewed attempt to prioritize defence rights, FTI is concerned at the absence of detail in the Roadmap about how or when legislation on minimum defence rights will be introduced. It is also concerning that it has not been expressly stated that the Roadmap safeguards will be developed within the framework of the Stockholm Programme. There needs to be an express statement in the Stockholm Programme that all the Measures in the Roadmap will be implemented during the course of the Programme.
- 4.8 We believe that the UK Government should take steps to press for binding legislation on all the Roadmap measures in the course of the Stockholm Programme. Not only should support be offered to the Swedish Presidency as they seek agreement on the current Proposal regarding interpretation and translation, but efforts should also be made to prioritize action on “Measure B”, regarding Information on Rights and Charges. In our experience it is a common complaint of non-nationals detained in cross-border cases that they are told little or nothing in their own language about their legal rights and are not provided with detailed information about the nature or cause of the allegations.
- 4.9 FTI believes that an important further benefit of legislating to improve and safeguard defence rights across the EU will be to prove to third countries and their nationals that the rule of law is paramount in criminal justice and home affairs policy in the EU.

5 Evidence of the need for legislation: FTI’s casework involving EU member states

We fully accept the need for cross-border cooperation in the fight against crime, but there must be no “trade-off” between the fundamental right to a fair trial and the need to fight crime. The very cornerstone of EU values is the right of all within the EU to be treated fairly in criminal investigations and proceedings. This entails citizens being allowed a full opportunity to defend themselves and participate meaningfully in their trial. These rights are not variables, to be weighed in the balance with other policy considerations. They are universal rights, which should now be restored to the centre of criminal justice policy. This point is best made by looking at cases involving real people. We do this below, examining various Roadmap measures in turn.

5.1 Translation and Interpretation

Case study: Teresa Daniels (TD), British national arrested in Spain

In 1997, TD and her companion AB were arrested at Gran Canaria Airport: almost 4 kilos of cocaine was found in 2 suitcases belonging to AB. On arrest, AB told police that TD had no knowledge of the drugs. No drugs were found on her person or in her luggage. At the trial (less than three months after her arrest), TD was asked a few questions and after 1 ½ hours was told she could leave. She assumed throughout the trial that she was there as a witness.

⁴ Paragraph 7, Explanatory Memorandum submitted by the Office for Criminal Justice Reform in July 2009

No interpreter was present to assist her and she could not follow the proceedings. AB maintained throughout the trial that TD had known nothing about his activities.

In a judgment issued six months later, TD was sentenced to 10 years. AB received the same sentence and was taken to prison to start his sentence; TD was allowed to go free pending her appeal. She was not sent the judgment or an English translation of it. She heard nothing further and was unaware that her appeal was in fact unsuccessful and her sentence had been reconfirmed. A letter from the Spanish authorities in response to a query from her MP suggested she had been discharged. However, an extradition request was later made by Spain and granted in October 2005 by the UK, resulting in TD's extradition, to serve her sentence in a Madrid jail. She was ultimately granted a royal pardon and released in January 2009.

When we became involved in the case (after the appeal) it became clear that the court had based its decision on a single entry in TD's personal diary about an expected payment she was looking forward to receiving. This in fact referred to a few thousand pounds' compensation for a personal injury claim relating to a car accident she had suffered, as she could have established if she had had a fair trial. The court relied on its own unofficial 'translation' of the relevant entry, which was later shown to be largely inaccurate. An official translation of the diary, carried out by a qualified translator, was also supplied to the court prior to trial, yet inferences were made by the prosecution and the court to the detriment of the defence based on the first, unreliable, translation. The official, accurate, translation was ruled inadmissible for being adduced out of time. The appeal court upheld the original decision in full.

In this case, having an interpreter at court throughout trial and being allowed to insist on official translations of key prosecution evidence in good time before the trial could well have prevented a gross miscarriage of justice.

(See also cases of the Stow brothers and of Garry Mann below. These cases also involved significant damage to the individuals' trials, caused by lack of interpreters and translations.)

5.2 Information on Rights and Information about the Charges

Case study: Andrew and Graham Stow (A and G), British nationals arrested in Portugal

A and G were considering opening a diving school. In July 1999 their dive boat was subjected to a thorough routine search by Portuguese customs officers in Faro and nothing was discovered. A few days later the Harbour Master in Faro asked the brothers to move their boat 250 metres down the wharf to make way for a larger boat. The next day one of the men dived below the boat and discovered boxes scattered over the sea bed. He began bringing the boxes up and around 15 minutes later officers from the Policia Judiciária arrived. A and G assisted the police in bringing up the boxes. They maintain they were completely unaware of their contents. Shortly thereafter they were arrested at gunpoint and accused of importing hashish into the harbour.

Immediately after their arrest, they were interrogated in Portuguese with no interpreter or legal adviser present. They were pressurised into signing confessions in Portuguese.

They did not see the charges against them in writing until a whole year after their arrest. The charges were in Portuguese. As their defence lawyer did not speak English, A and G had to rely on other remand prisoners to help them understand the document. Throughout the trial, the court-appointed lawyer only worked for the benefit of the court; the court proceedings were not translated for A and G; and only their responses to the judge were translated into Portuguese.

They eventually won a retrial only for the appeal to uphold the original decision. They served six years in jail in Portugal and nine months in a British prison following a transfer. They are now awaiting a decision from the European Court of Human Rights under Article 6.

Spanish cases

A number of our clients facing charges in Spain have complained about the *Sumário Secreto* procedure whereby the prosecution does not have to disclose any details about their investigation until as late as 10 days before the closure of the investigation. This seriously hampers the preparation of the defence. In many cases it results in the refusal of bail applications and the loss of any chance to prepare a defence case in good time, for example, by taking witness statements from possible defence witnesses while their recollection is still good, or adducing other evidence which could assist the defence.

Access to basic information about the charges and the prosecution's case must be given at a much earlier stage than this. Often the damage is done by the time the person knows his/her rights, particularly where lengthy pre-trial detention is a feature of the relevant member state's system, as is the case in Spain. It is also impossible to make proper bail applications without this basic information.

(See also under Garry Mann's case below regarding the damage caused by not being informed of legal rights, for example the right to seek a stay of proceedings in order to prepare a defence.)

5.3 Legal Aid and Legal Advice

Case study: Garry Mann (GM), British national detained in Portugal

On 15 June 2004 GM, a British national, was with friends in a bar in Albufeira, Portugal, when a riot took place in a nearby street. GM was arrested along with other suspects some 4 hours after the alleged offences. He was tried and convicted – along with 13 other defendants – less than 24 hours after his arrest. He had been attending the Euro 2004 football tournament and was arrested under temporary legislation in place at the time. The object of the legislation had been to allow for a fast track procedure to convict and deport foreign nationals caught “red-handed”. This was clearly inappropriate in GM's case, where identification was in issue.

GM was sentenced to 2 years' imprisonment on 16 June 2004 but, two days later, voluntarily agreed to be deported after being told he would not have to serve his sentence provided he did not return to Portugal for a year.

The trial was grossly unfair in a number of ways but perhaps the most striking is that GM had no time to prepare his defence, instruct a lawyer of his own choosing, or seek legal aid to help

pay for his own lawyer or interpreter. Unbeknown to GM at the time, it now appears, based on information from the Portuguese ministry of justice, that the temporary legislation contained a provision allowing suspects to request a one month stay of the proceedings to prepare their defence. Had a lawyer informed him of this, he could have taken advantage of it.

There were only two court-appointed lawyers for the 14 defendants and they were not given the time or opportunity either to cross-examine prosecution witnesses or to call witnesses for their own clients who could support their alibis and offer character evidence. The court-appointed interpreter translated for all 14 defendants, communicating with one, who would then convey the information to the others as best he could.

Garry Mann's EAW

For reasons that are entirely unclear, GM is now threatened with extradition to serve his sentence, having been served with a European Arrest Warrant in March 2009, despite never having returned to Portugal and having been in no trouble since. He is challenging his extradition.

In part because of his inability to instruct his own lawyer properly in good time before his trial and his unawareness of his legal right to a one month stay of proceedings, GM now faces a real risk of having to serve a jail sentence in Portugal for a crime he did not commit, his extradition having been ordered following a High Court hearing in July 2009. His original conviction was branded by District Judge Stephen Day⁵ as having been "*obtained in circumstances that are so unfair as to be incompatible with the Respondents' right to a fair trial under Article 6 ... [inter alia, because he and the other respondents] ... had inadequate time to instruct lawyers to conduct their defence appropriately*". FTI believes that extradition in these circumstances would amount to an abuse of process.

5.4 Communication with Relatives, Employers and Consular Authorities

In a number of cases we have seen unacceptable delays in allowing suspects to speak to family or consular officials. This causes prejudice to their ability to organize legal representation as well as unnecessary vulnerability to them and concern to their relatives. If they are absent from employment without explanation this can also cause problems for them. It is important to remember in this context that suspects are just that: they are entitled to a presumption of innocence and denying them basic communication rights is not consistent with this.

5.5 Green Paper on the Right to Review of the Grounds for Detention

Case study 1: Klaas Jan Bolt (KB), Dutch national detained in France

⁵ In an unsuccessful application for a football banning order brought by the Commissioner of Police against Garry Mann in July 2005

KB, a lorry driver, was hired by a Dutch transport company to make several trips between Spain and Netherlands in late 2004 and early 2005. During one such journey, he noticed he was being followed by a van. He stopped, checked his load and found cannabis hidden inside one of the containers. He immediately notified the Spanish police but was unable to make himself understood. He next telephoned his wife, who contacted the Dutch police. They advised him to abandon the lorry and return to the Netherlands and he followed their advice. Meanwhile, KB's former boss was arrested in France for possession of 4 tons of cannabis. Subsequently, KB was arrested in the Netherlands under a European Arrest Warrant and was extradited to France in the spring of 2005, having been falsely accused by his former boss of being part of the drug-smuggling operation. His accuser has since admitted he lied about KB's involvement in letters of apology written to KB's family, but this has unfortunately not led to KB's release.

Having been extradited to France in Spring of 2005, KB's trial was not conducted until Spring 2008. During this 3 year period he was remanded in custody, hundreds of miles from his family and unable to earn a living or provide for them. (He was ultimately convicted and sentenced to five years: there were serious concerns expressed over the adequacy of interpreting and legal representation.)

Case study 2: (MJ), British national detained in Spain (anonymity requested)

MJ was just 18 when he went on holiday to Spain with two friends. While there, all three were arrested in connection with counterfeit euros. MJ 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, then 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.

They returned to the UK and heard no more about it until 4 years later when, as MJ was studying in his room at university, officers from the Serious Organized Crime Agency arrested him on an EAW.

MJ 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 commence his university career, his future blighted by a criminal record.

The case of MJ is another example of how suspects' personal lives can be affected by the threat of needlessly lengthy pre-trial detention: in this young man's case, leading to pressure to plead guilty when he would have preferred to fight the charges.

6 Other matters for inclusion in the Stockholm Programme

- 6.1 In the UK's Contribution to the EU's New Multi-Annual JHA Work Programme dated October 2008 ("UK October 2008 Contribution"), particularly in the sections headed "Justice" and "Criminal Judicial Cooperation", a number of excellent proposals were made towards

strengthening mutual trust between member states' criminal justice agencies. These proposals recognized the importance of ensuring consistent high standards of justice and the protection of human rights. The UK Government expressly acknowledged the EU's crucial role in "ensuring that the rights of those charged with criminal offences are fully respected" while at the same time aiming to provide a high degree of protection against crime.

- 6.2 We particularly support the proposal in the UK October 2008 Contribution that the EU should "aim to discourage judicial authorities from issuing European Arrest Warrants for offences which, while extraditable, are likely in practice to be punished by way of a fine". The principle of proportionality has not been sufficiently respected in the operation of the EAW system, as we have argued elsewhere (see above, Section 3). We hope that the UK Government will back our other proposals for changes to the system during the course of the Stockholm Programme.
- 6.3 The UK October 2008 Contribution further supports legislation "promoting the audi-recording of interviews with suspects in police stations". FTI is in favour of such legislation. At a recent meeting of our Legal Experts Advisory Panel⁶, the seventeen panel members agreed that retaining recordings of interviews conducted by police or other investigative authorities, and of all court proceedings, would greatly assist in the resolution of questions or disputes about what was said. This is particularly important when a person is questioned or gives evidence through an interpreter, as is routinely the case in cross-border proceedings in the EU. Members pointed to the significant benefits to the administration of justice, including avoiding delays, minimising appeals and human rights challenges, and saving costs, which this simple measure would bring. In our experience at Fair Trials International, this measure would greatly reduce the scope for miscarriages of justice and the mistreatment or harassment of people questioned by police.
- 6.4 The Stockholm Programme will also incorporate measures on data sharing and data protection. This topic features in the UK October 2008 Contribution and is clearly a substantial area in its own right. For present purposes we restrict our comments to the general observation that proper tests of proportionality and necessity must be carried out for any new surveillance, data sharing and data retention powers. The accuracy and security of personal data must be guaranteed and mechanisms must be in place to correct or delete inaccurate information.

⁶ A group of practitioners, academics and other professionals which FTI has established and which meets three times a year to discuss important cases and issues in the field of cross-border criminal justice

ANNEX

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Submission

**Submission to the European Union Justice and Home Affairs
Council Working Group**

**The European Arrest Warrant: Problems and Recommendations for
Reform**

31 July 2009

About Fair Trials International

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1 Introduction

- 1.1 FTI takes this opportunity to provide its views to the Working Group on the European Arrest Warrant and to present arguments and case studies supporting the need for reform to ensure the system delivers justice in combating and punishing serious cross-border crime, as originally intended, without undermining the core EU values of upholding the rule of law and guaranteeing the right to a fair trial for all citizens.
- 1.2 In a highly diversified Union where over 500 million citizens live and over 8 million of them currently reside in another member state than that of their nationality, effective justice and home affairs policy clearly depends on mutual 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 costs of the EAW and its potential misuse. Our own casework regularly demonstrates those human costs and we take this opportunity to summarise some of this casework for the Working Group.
- 1.3 The EAW system has been in place long enough to demonstrate some of the dangers that can arise from mutual cooperation, when mutual trust is not fully established. FTI wants to see the EAW system work properly, upholding rather than undermining the justice, freedom and security that form the basis of the EU's mandate. We suggest ways in which the EAW system could be strengthened to deliver greater justice without detracting from suspects'

fundamental rights and without allowing the system to be abused through the issuance of disproportionate or improper extradition requests.

- 1.4 We illustrate our suggestions with a selection of case studies. We also provide a more detailed set of conclusions and recommendations deriving from the recent meeting of Fair Trials International's Legal Experts Advisory Panel, in the form of a Communiqué at Annex A.
- 1.5 FTI believes that the EAW fulfils an important aim in ensuring mutual recognition of judicial decisions between states and enabling simpler, speedier extradition procedures within the European area of free movement. However, in order for the scheme to be deemed a real success, it must be just and fair and respect the principle of proportionality and the rule of law.
- 1.6 Furthermore, as FTI has argued elsewhere (most recently, in its Submission^[1] to the Working Group dated 9 July 2009) there are unacceptable differences in rights for defendants across EU member states in the absence of standard minimum procedural safeguards and common standards on legal aid, bail and pre-trial detention. On the other hand, streamlined extradition procedures under the EAW scheme are premised on the principle of mutual trust, including trust in each other's trial procedures. The current absence of common standards in the areas of fundamental procedural rights, bail and pre-trial detention represents a further, separate threat to the integrity of the EAW scheme. FTI believes this is an argument for maintaining pressure both to introduce minimum standards **and** simultaneously to press for a fairer EAW scheme, bearing in mind that without minimum defence rights, extradition carries with it an increased risk of an unfair trial.
- 1.7 For the EAW scheme to operate fairly, member states need to accept responsibility for the financial implications of a justly operating EAW system. They should be financing legal aid so that defendants can obtain legal representation in both the executing and requesting countries and the timely provision of good quality translation and interpreting facilities. These financial implications do not appear to have been fully addressed at EU level and now require urgent consideration.
- 1.8 Below is a non-exhaustive list of significant problems being encountered under the EAW system. Further problems are highlighted in the annexed Communiqué.

2 Main problems with the European Arrest Warrant

Proportionality

- 2.1 Domestic procedures to issue and execute warrants do not always respect the principle of proportionality. This has several implications. Insufficient steps are being taken to prevent extradition for very minor offences. Insufficient attention is being paid by courts to the passage of time since the alleged offence.

Human rights considerations and rule of law

- 2.2 Insufficient attention is also being paid by courts to human rights considerations, and to whether the issue or execution of the EAW is consistent with or offends against the rule of law or otherwise amounts to an abuse of process.

^[1] Submission to the European Union Justice and Home Affairs Council Working Group, *The Roadmap published on 1 July 2009 by the Swedish Presidency, with a view to fostering protection of suspected and accused persons in criminal proceedings*

Legal representation and legal aid

- 2.3 Given the serious impact extradition can have on an individual's personal and family life and the likely problems that person will face in following the proceedings in another language and culture, it is essential they should have legal representation and that if necessary this should be paid for by legal aid.
- 2.4 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 support legal representation (in both the requesting state and the executing state) is often limited.

Removal of EAWs

- 2.5 It is unacceptable that individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW. 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 as laid out in the Framework Decision on the EAW.

3 Some suggestions for improvement

- 3.1 The following is a non-exhaustive list of improvements needed: additional suggestions are made in the annexed Communiqué. Many of these reforms need to be brought about by means of amendments to the Framework Decision on the EAW, for example to emphasize that domestic courts are empowered to apply implementing legislation in a manner that is consistent with fundamental EU rights and freedoms and respect for the rule of law.
 - i) Checks should be implemented to ensure EAWs are only issued when proportionate to the offence and in the interests of justice. Guidance and training should be offered on the proportionality criteria to be applied.
 - ii) Domestic courts should receive guidance and training on how to exercise their powers to refuse to execute a warrant where, for example: execution will result in a breach of human rights; or the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.
 - iii) The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting and the executing state. Individuals should usually have lawyers representing them in each country.
 - iv) The duty to provide legal aid to individuals subject to an EAW should be appropriately shared by the requesting and executing state.
 - v) Common rules implementing fairer laws on bail and pre-trial detention would also help eliminate unfairness in the way the EAW system currently operates.
 - vi) The system for removing EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for issuing them. If an EAW's execution is refused on a final basis in one member state, alerts for that EAW should be removed from the entire system, to prevent the individual's re-arrest in any other member state.

4 FTI Case Studies on EAW

Fair Trials International has worked with many clients who have suffered injustice under the EAW system. Below are some summaries of FTI cases illustrating how the scheme has operated unfairly in ways which the above recommended changes would help to prevent. More information on many of these cases can be found at <http://www.fairtrials.net/cases/>.

4.1 *Acquitted and released in 1989 –now she is wanted across Europe – Deborah Dark*

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, a European Arrest Warrant (EAW) was issued by the French authorities for Deborah to be returned to France to serve her sentence.

In 2007, Deborah was arrested at gunpoint in Turkey, while on a package holiday with a friend. The police released her and were unable to explain the reasons for her arrest. Upon her return to the UK, she went to the police station and tried to find out the reasons for her arrest. She was told there was no arrest warrant against her.

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.

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 City of Westminster Magistrates' Court refused the extradition in April 2009. As there is no provision for the withdrawal of the European Arrest Warrant, Deborah is still at risk of being re-arrested on the same EAW if she ever leaves the UK and travels across Europe.

4.2 *20 year old Briton being extradited on evidence obtained by police brutality – Andrew Symeou*

Andrew, then a university student of exemplary character and a bright future ahead of him, was on holiday with friends in Zante, Greece in 2007. One night while Andrew was in Zante, another young Briton fell off an unguarded stage in a night-club, tragically dying two days later from his head injury. Andrew insists he was not even in the club at the time – and many witnesses have since confirmed this. He was never sought for questioning at the time, and knew nothing about the incident when he flew home at the end of his holiday.

A year later, he was served with an EAW seeking his extradition to Greece to stand trial for murder and, all appeals having failed, has now been extradited and is being held in custody in Greece. Only

during the course of his UK legal challenge did it emerge that the EAW is based on completely flawed evidence, much of it extracted through the brutal mistreatment of two witnesses who have since retracted their (word-for-word identical) statements. We believe that it is an abuse of the EAW scheme to extradite someone to face trial based on this evidence, but the British courts rejected these arguments. Even if the Greek courts ultimately throw out the case, Andrew may well be forced to spend months in a Greek jail awaiting the trial.

4.3 *Extradition sought after a grossly unfair trial – Garry Mann*

Garry Mann, a 51-year-old 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 24 hours after his arrest. He had no time to prepare his defence and standards of interpretation at the trial were grossly inadequate. He was convicted following a widely publicised trial in Albufeira and sentenced to 2 years imprisonment on 16 June 2004. On 18 June 2004 he voluntarily agreed to being deported and was told that provided he did not return to Portugal for a year, he would not have to serve his sentence.

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 Metropolitan police applied for a worldwide football banning order against Garry, but in 2005 the Court held he had been denied a fair trial in Portugal and refused the order. Earlier this year Garry was astonished to have been arrested on an EAW, alleging he was wanted in Portugal to serve a 2 year prison sentence. His extradition hearing concluded on 29 July, with judgment reserved until 18 August 2009. We have argued that he should not be extradited to serve a prison sentence following a trial which one British court has already decided breached his basic fair trial rights.

4.4 *Warrant based on police brutality – Yarrow and Tonge*

Michael Tonge and Lee Yarrow were arrested on holiday in Crete in 1999 after a nightclub fight in which Michael sustained injuries. Lee was released from police custody after 4 days but Michael was held on remand for 4 months, during which he was beaten, kicked, flogged with rope and denied food and medical treatment. He was then released and came back to England, only for both men to receive EAWs in 2005, with no explanation for the delay. At their eventual trial in Greece, charges were dropped against Lee. Michael was convicted of assault, served a short sentence in Greece and was released and returned to the UK in August 2007. Once again, an EAW was executed despite serious police misconduct and abuse and following unreasonable delay.

4.5 *UN called their trial unfair, but brothers extradited anyway – Michael and Brian Hill*

In 1997 the Human Rights Committee of the United Nations reported that Michael and Brian Hill had been denied a fair trial in Spain following their arrest in 1985 and were entitled to a remedy “entailing compensation” as a result. But Spain failed to comply with this ruling. Instead, it issued an EAW seeking the brothers’ extradition to Spain. In October 2005, Michael Hill was arrested in Portugal and extradited to Spain where he served 7 months for breach of parole conditions. They had already served three years in prison in Spain.

Conclusion

FTI is grateful for this opportunity to provide our views on the EAW and illustrate them with some of our clients’ experiences. We would be delighted to deal with any queries on this Submission: contact details are provided on page 2.

ANNEX A

FAIR TRIALS INTERNATIONAL

Communiqué issued after the Fair Trials International Legal Experts Advisory Panel Meeting (15 May 2009, London)

The European Arrest Warrant



Criminal Justice 2008

With financial support from Criminal Justice Programme

European Commission – Directorate-General Justice, Freedom and Security

Introduction

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

Injustice arising from the EAW Scheme

4. It is clear that a person's extradition to another country can have a serious impact on the enjoyment of their basic rights to liberty, to respect for their private and family life and, in some cases, their right to a fair trial. Although it was accepted that states should continue to cooperate in bringing to justice those guilty of criminal offences, it was considered that the fast-track system for extradition within Europe (the "EAW") was, in many cases, leading to injustice.
5. The following problems with the operation of the EAW scheme were, in particular, identified:
 - i. Authorities in member states are not fully taking into account the burdensome effects of extradition on individuals and as a result there is an absence of sufficient safeguards against extradition for very minor offences.
 - ii. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality and EAWs have, in practice, been issued for very minor offences. Not only does this lead to injustice in individual cases but also places a significant and unjustified burden on the resources of member states. This is also contrary to the underlying purpose of the EAW scheme, being to tackle serious organised crime and terrorism.
 - iii. The right to an effective appeal against a decision to extradite has not been granted to individuals subject to an EAW in all Member States. Furthermore, the rules regarding the availability of legal aid for individuals subject to an EAW are unclear

and vary from state to state. There is also limited availability of legal aid to support legal representation in the requesting state and the executing state.

- iv. The Framework Decision on the EAW makes it clear that the EAW scheme is subject to the obligation to respect fundamental rights and the rule of law. Courts in member states have not, however, been effective in upholding the integrity of the EAW scheme by using the European Convention on Human Rights and the human rights protections in their own constitutions to ensure that the injustices which arise out of the implementation of the EAW are addressed.
 - v. There is regrettably much uncertainty and ambiguity concerning the status of the Framework Decision on the EAW within the constitutional framework of the European Union and domestic legal systems. Constitutional challenges to domestic legislation implementing the Framework Decision on the EAW in Germany, Poland and Cyprus represent this ambiguity. This has contributed to the reluctance of domestic judicial authorities to interpret the Framework Decision on the EAW and respective implementing legislation in light of fundamental principles of European law, including respect for fundamental rights and the free movement of people.
 - vi. It is unacceptable that individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW on general grounds such as the passage of time. In some cases, EAW alerts have remained in place even after a person has served their prison sentence in the state issuing the warrant.
6. In order for the EAW scheme to be deemed a real success the scheme must operate in a just and fair way which respects fundamental rights, the principle of proportionality and the rule of law. Proposals to provide guarantees of basic procedural rights across Europe should be welcomed but would not, in themselves, be sufficient to remedy the flaws with the EAW.

Action Required for a Fairer EAW Scheme

7. The following urgent action was recommended by the panel:
- i. Extradition and the prospect of a trial abroad is in and of itself hugely burdensome on individuals and should not be used for minor offences. Appropriate procedures must be implemented in executing states to ensure EAWs are only issued when proportionate to the offence. The chapter on proportionality in the European Arrest Warrant Handbook is not sufficient to ensure member states respect the principle of proportionality when issuing an EAW.
 - ii. Judicial authorities in member states have the authority to ensure extradition procedures within Europe respect the rule of law, the fundamental principles of EU law and human rights guarantees in domestic constitutions. Domestic courts should be more willing to exercise this authority to refuse to execute a warrant where:

- a. the execution of the warrant will result in a breach of human rights;
 - b. the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.
- iii. Training should be provided to defence lawyers to equip them to use EU constitutional principles to challenge inappropriate uses of EAWs.
- iv. Compensation schemes must be made available to individuals who have spent time spent in custody pending the completion of proceedings relating to an EAW which does not lead to a charge.
- v. The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting state and the executing state and it was essential for individuals to have lawyers representing them in each country
- vi. The financial burdens resulting from the implementation of EAWs should be borne by the issuing state to create a disincentive against inappropriate uses of the EAW scheme.
- vii. Mutual recognition of judicial decisions must be pursued and promoted within Europe for decisions not to execute a warrant just as they are for decisions to issue a warrant. Decisions to refuse to execute an EAW on general grounds, such as the passage of time, by one Member State should be recognised in other member states.
- viii. The system for *removing* EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for *issuing* EAW alerts. The system for removing EAW alerts must also be made more accessible to individuals.
- ix. Further research is needed into the fate of individuals against whom EAWs had been executed in order adequately to gauge the success of the EAW scheme. In particular, it would be instructive to collect statistics on the conviction and charge rates in cases where individuals have been surrendered under an EAW. It is also necessary to determine what legal aid and legal representation is available to individuals being tried after the execution of an EAW against them. Research in these areas by the European Union, Member States and independent bodies like EuroMos must be encouraged and supported.
- x. Coordinated action must be taken by civil society organisations across the EU to highlight the cases of injustice which are currently arising from the EAW scheme. As well as lobbying for change to the Framework Decision on the EAW, member States should be lobbied to fulfil their duty to ensure that the domestic

implementation of EAW scheme complies with the fundamental principles enshrined within the European legal system.

Conclusion

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