ECBA
EUROPEAN CRIMINAL BAR ASSOCIATION
An association of European defence lawyers

Home Office Extradition Review

Response by the European Criminal Bar Association

The ECBA was founded in 1997 and has become the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe countries. The ECBA aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the day-to-day practice in criminal proceedings throughout Europe.

We welcome the UK Government's interest in reviewing its national extradition procedures, however our primary concern in relation to this review is with the workings of the European Arrest Warrant (the EAW) and the injustices that flow from it.

The yardstick we have used in dealing with this review is this: the person whom it is sought to remove from one jurisdiction to another must have a transparently fair opportunity of contesting the proceedings, including the ability with Legal Aid (where appropriate) to obtain legal representation in a Court, and that the jurisdiction of the Courts is open and available and not unreasonably restricted throughout the entire proceedings.

"Mutual Recognition" is a worthy ambition, but in recent years too many world governments have become obsessed with their own plans and objectives in extradition cases to the exclusion of fairness and justice. Unbridled ambition without rules leads to failure, and there is a real need for the Rule of Law and the Courts to resume a more constructive position in the Law of Extradition.

1. The breadth of the Secretary of State's discretion in an Extradition case

We believe that the Secretary of State should have a role in both Parts 1 and 2 of the Extradition Act 2003, and that this role should not be unduly restricted. There should be an opportunity for a person to make representations to the Secretary of State on defined issues, and that the Secretary's discretion can be exercised upon them: jurisdiction, triviality, the validity of the Request, Article 8 ECHR matters, issues surrounding specialty, and compatibility with the Human Rights Act, the European Convention on Human Rights, and the Charter on Fundamental Rights. In particular the bases of refusal should be set out in a new Section of the Act, which would also incorporate the general discretion to refuse extradition where it was "wrong, unjust, or oppressive" to do so.

2. The operation of the European Arrest Warrant, including the way in which those of its safeguards which are optional have been transposed into UK law

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(i) LEGAL REPRESENTATION and LEGAL AID

A. The watering down of the rights of persons undergoing extradition proceedings led, after the 9/11 outrage in the USA, to the European Arrest Warrant [EAW]. This has become in the hands of Prosecutors, Judicial Authorities, and Governments a popular "fast-track" process for extradition. The Framework Decision on the EAW was expedited to create a powerful tool in the fight against terrorism. Even at that early stage it was acknowledged that it was essential to retain a balance and that EU wide criminal procedural rights would be implemented. The European Commission introduced a draft Framework Decision of Procedural Rights in 2004 but, following years of negotiating and campaigning by EU bodies, NGOs and others interested in the rights of the European citizen, the initiative was whittled down from 30 to 5 possible rights and eventually collapsed. More recently the Swedish Presidency produced a "European Roadmap" of Rights which it is slowly progressing but currently only has one area successfully agreed (but not implemented), Translation and Interpretation.

B. Representation by a qualified lawyer at a criminal trial is considered important by most modern states. When it comes to extradition cases, legal representation is even more important:

Firstly because the temptation to obscure the real subject or purpose of the proceedings seems often for many governments or prosecuting authorities impossible to avoid; and

Secondly because there are more obstacles for the defendant or person being sought to overcome, namely the fact of having two state legal machines to fight against (the UK government and the Requesting State) often with quite different procedural systems, languages and geographical locations.

It is for that reason that we in the ECBA believe there is only one sensible solution for improving the operation of Extradition proceedings in the EU and the wider world, and that is to have "dual representation" i.e. legal representation in both the Requesting State and the Requested State. Only then can the person sought have access to the factual arena and the legal processes in the Requesting State, so that enquiries and investigations can be carried out, whose results can be used to challenge the factual or legal arguments that are being used to persuade the Requested Court to extradite.

In addition, and far more importantly, the defence may be able to take early preventative proceedings in the Requesting State under the dual representation system. The effect of such proceedings could be to stop the EAW procedure in its tracks, thus avoiding the proceedings and saving costs in the intended Requested State. Alternatively, lawyers instructed under the dual representation scheme in the Requesting State could provide evidence resulting from their investigations, or

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suggest solutions, payments or alternative remedies which might avoid the need for an EAW altogether.

C. Where considerable advantages are available to EU member States and others who use the EAW system, there should be comparable benefits that accrue to the defendants who are the objects of this EU initiative. Where the benefits of a fast-track system brings with it a rushed procedure and a diminution of procedural rights, there must be a mechanism to balance this unfairness. The Article 13 "effective remedy" for this, we suggest, is an EU-wide legal aid system provided centrally by the EU to pay for this dual representation. Only then could it possibly be said that something approaching equality of arms had arrived, and something real not illusory would be happening to improve mutual trust.

In the world-wide context we see no reason why dual representation should not be paid for by Legal Aid made available in the UK, so that lawyers are able to make the necessary checks and enquiries in the Requesting country as well as in the Requested. If the Treaties have been carefully drafted or amended for good and proper reasons, and the Government believes that a fair system of extradition must be maintained for the good health and prosperity of Britain's foreign interests and relations, then we see no alternative to a dual representation system.

D. An unforgivable situation has developed with the system for obtaining and granting legal aid in the UK for extradition cases. The defence case cannot get started because many defendants are bogged down without representation at the first hearing where fundamental issues often arise. This hugely increases the imbalance and unfairness between the prosecution and the defence because the defence are struggling to sort out problems of representation when they should be concentrating on the timetable, and how to deal with the case against them. We propose that non-means-tested legal aid should be available for all defendants to avoid these problems.

(ii) COSTS

There has been a huge increase in the number of EAWs in recent years with too high a proportion of them undeserving of attention. One way to bring about a greater scrutiny of their cases by Requesting countries that bring bad cases before the Extradition Courts, is to have a properly recognised and enforced system of penalties in Costs. It is time for the UK to stop funding the costs of the extradition proceedings on behalf of Requesting States, where there has been a failure to properly prepare the case. If there has been an incomplete Warrant, a deficiency in documentation, an abuse of process, a politically motivated Request, a failure to pass either the evidential or the public interest test, or where the offence is of a minor or trivial nature, a mechanism should be in place to penalise that State in Costs.

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We believe this would sharpen the minds of prosecutors and extraditing authorities and make them think twice about the cases they are pursuing, and they would soon learn that it doesn't pay to bring bad cases before the Courts.

(iii) EAW Issuing Authorities

There have been worrying violations of the system whereby EAWs come to be issued in certain EU states. The "officer authorised by law to exercise judicial power" (Article 5(3) ECHR has too often been a prosecuting authority and not a competent authority within the meaning of the Article "sufficient to offer the guarantees of independence required". This in our judgement has undermined the very beginning of the EAW system and the assumptions on which the rest of the proceedings are based. We suggest that the Extradition Act 2003 should be amended to insist that the UK will only process an EAW that has originated from "a Judge or other Officer authorised by law to exercise judicial power in a way that is independent of the parties, the executive and the legislature, and that there exist guarantees against outside pressures". Some of this wording is derived from the case of Findlay v UK, 24 EHRR p 221, para 73.

(iv) Disclosure of Investigative Measures

One of the persistent excuses made during extradition procedures is that the investigative measures and the reasons for decisions, even the decisions themselves, have not been reduced into writing by police officers, prosecutors, or EU institutions. We suggest there should be an EU Directive that all such investigative measures, the decisions and the reasons for them MUST be in writing. All sides will benefit, not just the Courts and those pursuing extradition, but also the Defence. In this way the material will be properly available and the Defence will be able to make Applications for disclosure or for Hearings in the early stages of the case.

The UK ought to enact amendments to legislation, or produce Rules, which penalise Requesting States in the proceedings themselves or in Costs who fail to provide proper records of the above. This is no idle bureaucratic matter. The absence of adequate and properly noted records where a criminal offence is alleged to have been committed may indicate a human rights abuse or other indication that the EAW ought not to be entertained.

(v) PROPORTIONALITY

In our view the Framework Decision must be amended to require a proportionality test.

Far too often people have been extradited in circumstances where the severe impact upon the individual, their livelihood, their reputation, and their private and family life has been disproportionate to the need to surrender them to another country. We do not

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consider that there are sufficient safeguards within the present EAW system, and we conclude that the UK should refuse the execution of an EAW where such execution would be disproportionate. A suitable amendment should be made to Part 1 of the Extradition Act 2003 to accommodate this bar to extradition.

(vi) The European Convention on Human Rights, The Charter on Fundamental Rights, and the Human Rights Act 1998

We consider that section 21 of the 2003 Act should be amended to require the Judge to decide whether the EAW Request is compatible not only with the Convention, but also with the Charter.

(vi) BAIL and TIME IN CUSTODY

There are two matters, bail and the length of time a person stays in custody before trial that must be addressed and improved throughout the EU to avoid the worst aspects of extradition under the EAW. At present there is a positively feudal system in Europe where EU states have lengthy and different time periods before a person can be released if no evidence is produced or no trial takes place. The EU states must fix a set time limit beyond which a person cannot be held in custody before trial, and criteria must be laid down for prosecutors and Courts to follow.

Bail should be more routinely granted, and the European Supervision Order has the capacity to address the unnecessary resort to custody which is so often the mindset at present.

In relation to sentences we implore EU member states to use the provisions of the Framework Decisions on custodial measures, probation measures and on recognition of financial penalties to create more efficient procedures, and to reduce the number of the more disproportionate EAW requests.

(vii) Trials in Absentia

A clearer and stricter definition of the concept of trial in absentia must be achieved to bring about a more uniform approach across the EU. The Court is required to check whether the defendant deliberately absented himself from trial, meaning that the person has made a conscious decision not to attend. There must be a fair guarantee that the person has the opportunity to apply for a retrial following surrender. We urge the UK to encourage other member states to implement and follow these provisions.

(viii) Removal of EAW "Alerts"

We have come across too many persons who have successfully challenged extradition being re-arrested every time they travel because the Requesting country refuses to remove the Warrant. There must be recognition by the other EU States of the decision

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in one EU country's Court NOT to extradite. It is a disgrace that many EU states fail to update or remove the Schengen "alerts" where appropriate, and too many States have failed to implement Article 111 of the Schengen Convention which provides for the possibility to apply to a Court in the territory of each Contracting Party to amend or review an alert. The UK should set an example itself by implementing this Article in domestic legislation.

3. Whether the forum bar to extradition should be commenced

In our view the forum bar ensures that where it is appropriate for a person to be prosecuted at home this should happen even where there is an extradition Request. This bar is of particular importance in relation to countries like the USA whose wide and selfish interpretation of jurisdiction issues is well-known. The UK should immediately include a forum bar in the extradition Act.

4. Whether the US-UK Extradition Treaty is unbalanced

We see no good reason why the USA should have such a low threshold test for extradition compared to other countries, especially where such generous treatment is not reciprocated by the USA when the UK seeks to extradite persons from there. It is an unjust anomaly that must be eradicated. The imbalance is not limited to the wording of the Treaty itself, but to the undue pressure which is sometimes unreasonably exerted on individuals, officials, and companies in the UK by the USA. A much wider Investigation of our relationship with the USA needs to be initiated than is envisaged by the above issue.

The UK must provide sufficient protection to people within its jurisdiction from wrongful extradition by all of the means we have tried to set out in other areas of this Response whether it is the USA or any other country that is seeking the extradition.

5. Whether Requesting States should be required to provide prima facie evidence

Our answer to this is yes. In the end all cases and all decisions depend on the evidence.

You can dress the evidence up as "information" or some other terminology but you are driven back to "what is the evidence?" We deplore the repeated tendency to avoid the evidence. We submit that in every kind of extradition request every country should be compelled to produce the prima facie case and the evidence to support it.

The price to be paid by the person being sought is too high to expect anything less, where months or probably years in custody may be served before the trial is over, to say nothing of the wrecked livelihood, reputation, family, home and social life that may result. We profoundly disagree with those who are opposed to this because we

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believe there is no substitute for going to the evidence itself. No amount of "dialogue" or other substitute for the real thing will do, but the evidence will speak for itself.

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