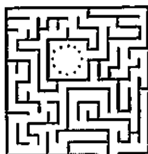


# THE AIRE CENTRE

Advice on Individual Rights in Europe

The AIRE Centre is grateful for the opportunity to submit some brief observation to the Extradition Review.

The AIRE Centre's contribution will confine itself to covering the operation of the **European Arrest Warrant** and will not refer to other matters in which we have been involved, such as the operation of the extradition arrangements with the USA which are now in place and are also the subject matter of this review.

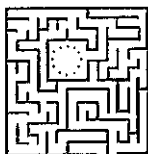
The AIRE Centre has conducted a three year project into cross-border justice in the EU (European Criminal Justice Project (ECJP): Cross-Border Solutions for Transnational Problems). Its primary focus was on the European Arrest Warrant and its implementation in the ECJP's target countries. The ECJP conducted research and held four workshops to which the key actors in the EAW process were invited. These included judges, government officials, practitioners, academics and NGOs.

The AIRE Centre was established in 1993 by its Founder and Director, Nuala Mole. It is a specialist advice centre providing assistance on individual rights in Europe under the two European legal orders, the European Union and the Council of Europe. In addition to providing legal advice, the Centre also litigates on behalf of applicants before the European Court of Human Rights. Flowing from its expertise, the AIRE Centre also provides training to judges, lawyers, NGOs and others globally. The AIRE Centre team has also written widely on issues affecting the rights of individuals and is involved in a number of projects on these issues.

It is of course an established principle that an individual cannot escape criminal proceedings by moving to another jurisdiction. These submissions below in no way seek to diminish this principle.

## The European Arrest Warrant

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (" the EAW") introduced a simplified procedure under which "surrender" replaced extradition in most cases involving requests for the transfer of individuals to other member states of the EU for the purpose of criminal proceedings or to serve sentences already passed. The EAW is predicated on the presumption that a level playing field exists in the administration of criminal justice in the EU and more importantly, on the presumption that the standards which are applicable in theory (under the European Convention on Human Rights and other international instruments) are applied in practice across the 27 member states of the EU. The EAW was adopted before any of the measures now being discussed to ensure that such a level playing field existed were in place. The cart has come before the horse, as it has in other aspects of the administration of EU cross border justice such as the asylum acquis (the Dublin Regulation and its associated Directives) and the mutual recognition of matrimonial judgments (the Brussels II bis Regulation). In all three areas of EU law, at the behest of the Member States, automatic transfers take place without the scrutiny necessary to ensure that proper safeguards are in place to guarantee that the fundamental rights of those transferred are respected in the administration of these schemes.



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**Exclusion of the CJEU**

2. The courts of the UK are required, as a matter of EU law and under the European Communities Act 1972 to apply the EAW. The courts of other member States have the right to make references for preliminary rulings (under Article 267 of the Treaty of Lisbon) to the Court of Justice of the European Union in order to seek clarification of the proper consistent EU interpretation to be given to any provision of the EAW. The UK courts have been prevented from having access to this important mechanism for ensuring that EU law is applied consistently across the Member States, because the UK Government has maintained withholding of such authorisation from the UK courts. (See ex Art 35 EU treaty and Article 10 of Protocol 36 to the Lisbon Treaty). The UK courts are denied access to the CJEU in cases which come before them, but nevertheless remain bound by rulings from the CJEU in cases coming before that court from other Member States. The UK courts and UK layersare thereby precluded from having any input - derived from their experience, expertise and concerns - into decisions which will bind them. The Lisbon Treaty came into force on 1st December 2009 and the UK can only maintain this exclusion of the CJEU from ruling on UK cases till 2014 after which it must either opt in to the judicial oversight of the CJEU or opt out of the EAW altogether. This exclusion of the possibility of making references to the CJEU remains an unsatisfactory state of affairs.

**Proportionality**

3. The principle of proportionality is not expressly found in the text of EAW but is found in Art 5 of the TEU which obliges Member States to observe this principle when taking any action under EU law. This clearly applies to any state which is taking the decision to issue or execute an EAW. The principle of proportionality is relevant in a number of ways.

4. Certain Member states of the EU – particularly, but by no means exclusively, Poland and some of the Baltic states – are issuing EAW's for trivial offences. Three issues arise

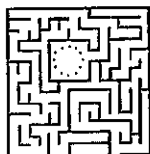
   (1) the triviality of the offence itself
   (2) the costs to the executing state
   (3) the consequences for the affected person

**The triviality of the offence**

5. Well publicised examples have been the theft of a piglet, the theft of two car tyres, driving a car whilst only slightly over the legal alcohol limit, possession of 0.45 grams of cannabis. The AIRE Centre has had a client being held in a UK prison for weeks pending surrender to face a charge of "conspiracy to steal a (one) mobile phone". Whilst EAW's cannot be issued for offences which do not potentially carry a sentence of less than one year's imprisonment, sentencing practices in the MS of the EU are so widely divergent that quite trivial offences can attract such a sentence.

**The costs to the executing state**

6. The AIRE Centre has not conducted research on the costs in the UK of executing an EAW but we understand the Irish authorities have estimated a cost over £20,000 per request. In any event the inevitable very significant costs associated with police time, judicial time (including any essential



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Advice on Individual Rights in Europe

legal aid and interpretation costs) and the costs of custody (if custody is imposed) for each case mean that if the principle of proportionality is to be respected, every EAW issued must be justified by the seriousness of the offence alleged to have been committed when compared with the costs of executing the warrant.

7. We return to the issue of proportionality below.

**The consequences for the affected person.**

8. The consequences for British Citizens, other EEA nationals and third country nationals alike can be very serious.

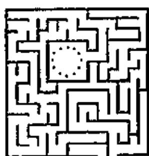
9. Routine denial of bail - Those whose surrender is sought to face charges, and who are not nationals of the requesting state, will almost invariably be refused bail after surrender for the simple stereotyped reason (illegal under the ECHR) that they are foreigners. The AIRE Centre is acting together with Fair Trials International in an application currently pending before the ECtHR against Greece for just such a refusal of bail in the well publicised case of Andrew Symeou. Even own nationals may be refused bail just because they have established their residence abroad. In any year more than 10.000 persons are held in pre-trial detention in states other than their state of residence. It is hoped that the eventual introduction of the European Supervision Order (previously FD 2009/829/JHA), which would permit the imposition of measures to secure attendance at trial which could be implemented in the home state, may alleviate this phenomenon, but for the time being this remains a serious problem.

10. Delay - Unreasonable, and thus unlawful under Article 6 ECHR, delays in the administration of justice in many EU states are well documented in the case law of the ECtHR. Pre-trial detention may be prolonged.

11. Prison conditions - The prison conditions, including the conditions in pre-trial detention, in some EU states have been found by the European Court of Human rights to be *systemically* in violation of the prohibition on inhuman and degrading treatment contained in Article 3 ECHR[1]. In particular, in the case of *Orchowski v Poland* (Application no. 17885/04), which became final only on 22 January 2010, the European Court noted that the problems of overcrowded and insanitary conditions in Polish prisons which led to a violation of Article 3 (prohibition of inhumane and degrading treatment) were not just historical – relating to conditions in 2004, when the complaint was lodged - but were systemic and unremedied at the time the Court delivered its JUDGMENT.

12. Legal assistance Access to effective legal advice and representation may be hampered by the lack of adequate provision of legal aid. In many jurisdictions there is no legal aid system such as we know in the UK and the accused without funds will be provided with a "court- appointed lawyer" who may allocate only a short time to taking instructions and provide cursory representation (see *Artico v.*

[1] Among others, see *Iliev & Ors v Bulgaria* Application nos 4473/02 ; 34138/04, 10 February 2011, *Kostadinov v. Bulgaria* Application no. 55712/00, 7 February 2008, *Staykov v Bulgaria* Application no. 49438/99, 12 October 2006, *Engel v Hungary* Application no. 46857/06, 20 May 2010, *Ali v Romania* Application no. 20307/02, 9 November 2010, *Dimakos v Romania* Application no. 10675/03, 6 July 2010, *Racareanu v Romania* Application no. 14262/03, 1 June 2010, *Karalevicius v Lithuania* Application no. 53254/99,7 April 2005, *Valasinas v Lithuania* Application no. 44558/98, 24 July 2001



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Advice on Individual Rights in Europe

*Italy,* Application no. 6694/74 and *Imbrioscia v. Switzerland,* Application no. 13972/88*).* The inadequacy of the interpretation provided both for the purpose of taking instructions and at the hearing is a separate issue of concern.

13. Transfer to serve the sentence in the home state If convicted and sentenced to a term of imprisonment the process for applying to return to the UK to serve the sentence in a British prison (under the Transfer of Sentenced Persons Convention and after the end of this year under Council FD 2008/909/JHA) is long and slow and cannot even be initiated until all appeals have been exhausted or abandoned because of the desire to return to the UK to be near family support.) It is important to note in this respect that the Dutch, for example, do not execute EAW's in respect of Dutch Citizens without the guarantee that they will, once sentenced, be able to return *promptly* to serve their sentences in the Netherlands.

14. These are some of the consequences *in the requesting state* which have to be endured by most of those surrendered, even those who are eventually acquitted of any offence. These are far more serious consequences than would be experienced if an individual was charged with a similar offence at home.

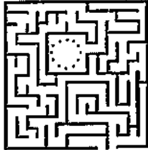
Residence rights in the UK

15. Those who are EEA nationals will often have established themselves and their families in the UK. Expulsion or exclusion from another EU state can only be imposed as a consequence of a criminal conviction which is such that the individual represents a "genuine present and sufficiently serious threat affecting one of the fundamentals interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted" (Directive 2004/38 arts 27-33). It is clear that the kind of trivial offence for which the surrender of unconvicted persons is sought under EAW's would not, even if those persons were convicted, justify their exclusion from the UK. Even many less trivial offences would not justify expulsion or exclusion. However, once the breadwinner has been surrendered to the requesting state, the spouse and children may be told by the Department of Work and Pensions or the UKBA that they no longer have the right to reside. The Citizens Directive makes provision for individuals (and their family members) to retain their residence rights in the context of temporary absences for e.g. military service or pregnancy and child birth. It makes no such provision for the retention of residence rights for those obliged to leave the jurisdiction under an EAW because they were charged with a criminal offence, *even if they are subsequently acquitted.*

16. Third country nationals are in an even worse position. They may lose their residence rights altogether if they remain outside the UK for a period of two years. In many EU jurisdictions such a period can easily precede a trial which ends in an acquittal, but the individual will have lost his residence rights in the UK.

**Alternatives**

17. The eventual introduction of the European Supervision Order (see paragraph 9) may go some way to making the system work more fairly, so that individuals are not required to leave their country of residence until the time of the trial and can be bailed or remanded in custody, as appropriate, in their home country pending trial.



# THE AIRE CENTRE

Advice on Individual Rights in Europe

18. Refraining from having recourse to EAW's in circumstances in which use could be made of the EU Mutual Assistance arrangements would avoid the need for many EAW's being sought in cases where the individual was only wanted for questioning and not yet charged with an offence .

19. The European Court of Human Rights has even recognised that, provided that all the necessary safeguards and adequate legal representation are in place, trial by video conferencing can be an alternative to moving people across great distances to stand trial. (See e.g. Sakhnovskiy v Russia, judgement 2 November 2010 , Marcello Viola v Italy , 2006)

The AIRE Centre remains at the disposal of the Review if any further elaboration of points raise above is required.

**Nuala Mole**
Director, The AIRE Centre

With assistance from Iqvinder Malhi