Response to the
Home Office Extradition Review

January 2011

For further information contact

Jodie Blackstock, Senior Legal Officer (EU: JHA)

Email: jblackstock@justice.org.uk Tel: 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100

Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction and summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. We welcome the Government's interest in reviewing extradition procedure. The Extradition Act 2003 (the Act) has now been in force for six years and there are particular aspects which have been shown to impact adversely on the rights of those sought for extradition or surrender to the European Union. The panel convened include experienced extradition lawyers who we are sure will consider the issues from a practical perspective and attempt to recommend realistic proposals for reform. Our response echoes that approach.

3. Our submission will focus largely on the European arrest warrant, where we have particular expertise. However, we have do make some observations about Category Two cases. We adopt the issues set out by the Secretary of State in her statement announcing the review:

    1) Breadth of Secretary of State discretion in an extradition case;
    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;
    3) Whether the forum bar to extradition should be commenced;
    4) Whether the US-UK Extradition Treaty is unbalanced;
    5) Whether requesting states should be required to provide prima facie evidence

    Our recommendations are set out in bold throughout the text. In summary, with respect to UK legislative acts, we consider that:

    - **The Secretary of State ought to have a residual discretion to refuse extradition, specified overtly in section 93 of the Act, and drafted in terms similar to sections 21 and 87, to decide whether the extradition would be compatible with Convention rights;**
    - **Section 21 of the Act should be amended to require a judge to decide whether the EAW request is compatible not only with the Convention, but also with the Charter on Fundamental Rights;**
    - **A check should be inserted into Part I of the Act which would create a bar to extradition if the issuing state cannot show its decision is proportionate;**

- **The Act should be amended to enable the return of a national or resident to serve their sentence in the UK to be made a condition of surrender, pursuant to article 5(3) of the Framework Decision;**
- **The UK should implement by way of domestic legislation the article 111 Schengen Convention jurisdiction to remove alerts once a judicial decision to refuse an EAW has be reached;**
- **The forum amendment contained in the Police and Justice Act 2006 should be enacted;**

1. Breadth of Secretary of State discretion in an extradition case

4. The restriction of the Secretary of State's discretion was reduced under the Act. It has no role to play in Part 1 matters, having been replaced by judicial scrutiny. In Part 2 matters the secretary of state is required to make the final decision on extradition where the judge does not order discharge. The residual discretion provides an additional layer of scrutiny where diplomatic rather than judicial dialogue is appropriate. The grounds upon which the Secretary of State can review extradition are however limited to assurances against the death penalty, agreements negating speciality and agreements relating to earlier extradition. There may be other situations which require the diplomatic assurances of the requesting (or additional) states. **We believe that this residual discretion to refuse extradition ought to be specified overtly in section 93 of the Act, and could be drafted in terms similar to sections 21 and 87, to decide whether the extradition would be compatible with Convention rights.**

5. However, the replacement of the discretion by judicial process is only successful if the court's jurisdiction is not unduly restricted. This is the concern in relation to European arrest warrant cases and transfer to designated category 2 territories. The approach of the courts in England and Wales thus far to applications to resist extradition based on human rights grounds has been to adhere closely to the principle of mutual recognition and impose a high threshold to surmount. This will be considered in detail below.

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

Introduction

6. There can be no doubt that the EAW has been instrumental in improving the fight against cross-border crime and in bringing to justice suspects who have fled to other member states. Overall, the impact of the EAW on crime has been considerable. At the same time, the EAW has been administered in relatively minor cases, in which the usefulness of surrender procedures has been doubted by the courts of the executing member state. These cases have raised serious concerns about the proportionality of the EAW, in respect of both the administration of such cases, and the impact upon the fundamental rights of the requested person. Furthermore, whilst the trial procedure was presumed by the EU drafters to be largely uniform across the EU, mutual trust continues to be an objective rather than an achievement.[1] Most disconcerting is the reality of differences in human rights standards across EU member states, in particular with respect to provision and quality of interpretation and translation, and legal representation.[2] Case law has shown that prison conditions in certain member states are very poor and the questioning techniques used by the police in some member states still involve methods that should have no role to play in a European Union which respects and guarantees fundamental human rights.[3]

7. Against this background, increasing use of the EAW has been observed since its inception. In 2005, nearly 6,900 EAWs were issued by 23 member states.[4] This increased in 2007 to a total of 9,413 from 18 member states.[5] The most recent figures demonstrate that in 2009, 15,800 EAWs were issued by 25 member states.[6] Poland was responsible for 4,844, approximately 40%. As such, Poland can confidently be considered the most active state

---

[1] Nadja Long, *Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level,* January 2009

[2] See E. Cape, Z. Namoradza, R. Smith and T. Spronken, *Effective Criminal Defence in Europe* (Intersentia. 2010), a summary of the findings is available here:

http://www.justice.org.uk/images/pdfs/ECDR%20Executive%20Summary%20and%20Recommendations.pdf

[3] For example Greece (*Herdman v City of Westminster Magistrates' Court* [2010] EWHC 1533 (Admin), paras 33-44; *MJELR v. Rettinger* [2010] IESC 45; Tilburg and Griefswald, *An Analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU: Draft Introductory Summary*, European Commission, DG JLS/D3/2007/01, January 2009. See particularly overseas territories, a summary of which is available in J Blackstock, *Four Years of the European Arrest Warrant: What Lessons are there for the Future?* JUSTICE Journal (2009) Vol 6 Number 1, pp 28- 49 at 43 and 44.

[4] Long, page 14

[5] Ibid.

[6] Council of the European Union, *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2009*, 7551/710 REV 7 (Brussels, 24th November 2010) , Annex, p 3 + 7551/710 REV 7/COR 1

issuing EAWs. This enthusiasm is commonly explained by the principal of legality – the Polish prosecutor is not allowed to ask whether prosecution would be in the public interest. Other active Member States are Germany and France (with 2,433 and 1,240 EAWs issued respectively). The UK made 220 requests and received 80 surrendered persons as a consequence (36%). The success rate (i.e. the percentage of EAWs which resulted in the effective surrender of the requested person) of Poland was only 28%. Germany was not much more successful with 32% (777/2,433 – although the 777 does not differentiate between EAWs issued in 2008 and 2009) and France could only obtain surrender in 34% of cases. Ireland appears to be one of the most effective Member States with a success rate of 48%.

8. Germany received by far the most requests for surrender (11,310 through the Schengen Information System). Thereafter, the UK received 4004, followed by Spain at 1,629 and France at 967. Most member states returned the majority of those arrested. The UK arrested only 863 of those requested, suggesting that many of those presumed to be in the UK were not actually here. Of those arrested, 628 were returned (73%). Ireland however only returned just over 50% of the people arrested, of which over half consented to the surrender.

9. The main sources relied upon for our response are the recent review carried out by the EU Justice and Home Affairs Working Group,[7] and a report of an EU Commission experts meeting[8] (the Experts Report). In our view the key problems with the operation of the EAW are as follows:

i) Involvement of non-judicial authorities;
ii) Proportionality;
iii) Compliance with human rights treaties (ECHR and the Charter);
iv) Trials in absentia;
v) Inconsistency in application;
vi) Challenges to a Schengen Alert in non-issuing member state;
vii) Absence of dual representation

[7] Final Report on the Fourth Round of Mutual Evaluations (the Fourth Round Report) 8302/2/09 (Brussels, 18 May 2009)

[8] *Implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant: The issue of proportionality* (Brussels, 5th November, 2009)

I. Involvement of non-judicial authorities

10. In a number of member states it is possible for an EAW to be issued by non-judicial authorities – most often by public prosecutors.[9] The EAW is designed to be subjected to judicial scrutiny in both the issuing and executing member states, yet this is not happening in all instances. This undermines the justification of limited review of the request in the executing member state by reliance upon the mutual recognition of fair and adequate judicial decision making in the requesting state.

11. There is currently no guidance as to the definition of a judicial authority other than that contained in article 6 EAW, which provides that it must be competent by virtue of the law of the member state. This might mean that the concept of 'judicial authority' should be more precisely, and restrictively, defined by amending the Framework Decision. Whilst we accept that it is not possible for the UK to assert a need for a strictly judicial decision maker, recent decisions of the European Court of Human Rights in relation to the role of the French prosecutor display a need for impartial and objective decision making.[10] The UK *could* insist on issue of a warrant in accordance with this principle when it receives EAWs and an amendment to the Extradition Act 2003 to enable this could be made.

II. Proportionality

12. In JUSTICE's view it has been repeatedly demonstrated that EAWs have been issued in cases which do not justify the costs or consequences to the individual's private and family life of the surrender to another country. Yet, since the Framework Decision does not provide a proportionality test, there is no requirement for the judicial authority in the issuing member state to consider the necessity and suitability of an EAW request.

13. Both the Fourth Round Report and the Experts Report recognised the need for a test which balances the seriousness of the offence against the consequences of the execution of an EAW. Most member states and experts agree that such a proportionality test should be

[9] Denmark continues to require the minister of justice to issue the arrest warrants.

[10] See *Moulin v France*, App. No. 37104/06, ECtHR (Chamber judgment of 23rd November 2010), which found a violation of article 5(3) ECHR since a decision made by a prosecuting authority was not a competent legal authority within the meaning of the Article sufficient to offer the guarantees of independence required. See also *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. ¶ 63 (2008) (holding that French authorities violated Article 5 (1) ECHR when they detained plaintiffs on a boat for thirteen days without supervision by a judicial authority). The final Grand Chamber judgment was on March 29, 2010, *Medvedyev v. France*, App. No. 3394/03, Eur. Ct. H.R. at ¶ 103 (2010) (affirming the judgment).

undertaken by the issuing judicial authority, in the interests of ensuring compliance with the ECHR and the Charter, as well as adhering to the purpose of EU involvement in this area.[11]

14. The Reports suggest that the following factors should be taken into account in assessing the proportionality of an EAW.

- seriousness of the offence (recognising, however, that there are different perceptions of seriousness in each member state)
- likelihood of a conviction
- expected sentence
- number of previous convictions of the requested person
- age of the requested person
- views of the victim

15. To this end, JHA Council conclusions recommended amendment to the EAW Handbook[12], which has now taken place.[13] The advice places weight on the need to consider proportionality before issuing. We welcome the advice contained therein, in particular that considering the severe consequences for a requested person, an issuing member state should assess a number of factors, including many of the above. The guidance also suggests that the issuing member state consider alternatives such as using less coercive mutual legal assistance measures, video conferencing, issuance of a summons over the Schengen Information System, or using the framework decision on the mutual recognition of financial penalties. These suggestions have been echoed by experts.[14] The guidance does not in our view go far enough however, since those member states which do not already follow a proportionality test will be free to ignore it.

16. The possibility of allowing the executing member state to decide whether the execution of an EAW would be disproportionate has been raised by some commentators. This would of course reduce the effectiveness of the current system by affording further grounds of refusal and less uniform application of the EAW scheme. Accordingly it is very unlikely that a move in this direction will be agreed at EU level and it is therefore unrealistic to demand such an amendment to the Framework Decision. Nevertheless, some member states have already introduced a proportionality requirement at the executing stage. For example, the German

---

[11] As propounded by the ECJ in the Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad,* [2007] ECR I-03633, paras 57 and 58

[12] Council, Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant, during the Spanish Presidency of the Council of the European Union - Draft Council Conclusions, 8436/2/10 REV 2 (Brussels, 28th May 2010), adopted at the 3018th JHA Council meeting 3rd and 4th June 2010, Press Release, p 33, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf

[13] Council, Revised version of the European Handbook on how to issue a European Arrest Warrant, 17195/1/10 REV 1 (Brussels 17th December 2010), pp 14, http://register.consilium.europa.eu/pdf/en/10/st17/st17195-re01.en10.pdf

[14] In the Experts Report and see also Case Comment by Vogel and Spencer: [2010] 6 Crim LR 474)

courts apply a proportionality test in accordance with the German Constitution. Cyprus also reviews proportionality in accordance with the EU principle of proportionality.[15]

17. As such, we consider that the Framework Decision must be amended to require a proportionality test. Such a test, based upon the European Court of Justice's jurisprudence[16] and the Reports' recommendations could be drafted as follows:

> (1) In deciding whether or not to approve an EAW, the issuing judicial authority shall consider whether, in the public interest, an EAW is necessary and suitable in all the circumstances of the case.
> (2) In particular, the issuing judicial authority shall, amongst others, take the following factors into account:
> (a) the seriousness of the offence;
> (b) the harm caused to the victim or the community;
> (c) the likelihood of pre-trial detention;
> (d) the likelihood of a conviction;
> (e) the previous convictions of the requested person;
> (f) the age of the requested person;
> (g) the connection of the requested person with the issuing Member State.
> (3) If the issuing judicial authority finds that, in all the circumstances of the case, an EAW is not necessary and suitable, it shall refuse to approve the EAW. The judicial authority will give reasons for its decision.

18. In our view, the UK should be pursuing such an amendment at EU level by making all possible endeavours for the issue to remain a priority on the JHA agenda. **In the meantime, given the jurisprudence of both the ECJ, the ECtHR and other jurisdictions set out above, we argue that it would not be inconsistent with the Framework Decision (since it must itself be interpreted in accordance with EU law) for the UK to read in a requirement of proportionality to be demonstrated by the issuing authority upon request. Such an amendment could be made to Part 1 of the Extradition Act 2003.** Since the Framework Decision was adopted prior to the Lisbon Treaty, there could be no infringement proceedings as a result. Indeed, since all experts have acknowledged that

---

[15] See Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, ex parte Fedesa* [1990] ECR 1-4023, at para 13:

> The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

[16] Ibid.

proportionality problem, it would be highly unlikely for the Commission to seek such proceedings in any event.

III Compliance with human rights treaties

19. The EAW does not lessen the member states' obligations to respect fundamental rights, as guaranteed in the ECHR. Challenges to EAWs which have been brought on ECHR grounds in the UK have tended to raise articles 2, 3, 5, 6 and 8 of the ECHR. Many of the challenges brought on ECHR grounds fail because the threshold applied by the UK courts is extremely high.

20. Article 2 protects the right to life. It is has increasingly been argued that a requested person might commit suicide following surrender to another member state,[17] or that he might be at risk of murder in prison by individuals belonging to rival groups. Article 3 ECHR protects the right not to be tortured or exposed to inhuman and degrading treatment. Prison conditions in some EU countries could be considered inhuman and the treatment of prisoners as degrading, especially if the prisoners are non-nationals. The European Court of Human Rights has held that the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention.[18] However, Lord Bingham held in *R v Special Adjudicator ex parte Ullah,*[19] that the requested person must show 'strong grounds for believing that, if returned, they would face a real risk of being subjected to torture, inhuman or degrading treatment or punishment'. In *S v The Court of Bologna*, despite a psychiatric report showing that the appellant was suicidal, the district judge took note of the doctor's opinion that the appellant might be better treated in Italy where he spoke the language, and that litigation can provoke and prolong anxiety. Of interest was his willingness to consider the nature of the extradition offence – in borderline offences the seriousness of the offence might be taken into account when deciding whether it would be unjust or oppressive to extradite. This demonstrates an ad hoc willingness to consider proportionality.[20]

21. Recent cases which sought to argue article 3 violations have failed because of this high standard. Andrew Symeou, who subsequently became severely depressed in Greece as a

---

[17] See *S v The Court of Bologna* [2010] EWHC 1184, paras 13 to 16, in which Mr Justice Foskett recorded the recent spate of cases in which this ground has been argued.

[18] See *Kudła v. Poland*, Application No. 30210/96, ECHR 2000-XI (Grand Chamber), paras 92-94.

[19] [2004] 2 AC 323, a test since reiterated by the Grand Chamber of the European Court of Human Rights in *Saadi v Italy* (2008) 24 BHRC 123.

[20] *S* also gave evidence that he risked ill treatment in Italian prisons but was disbelieved by the District Judge.

result of his treatment in pre-trial detention, was surrendered to Greece despite his assertions that he would be mistreated by the police and would be kept in inhuman prison conditions. Ouseley J held in *Symeou v Public Prosecutor of Patras*:[21]

> '[t]here is no sound evidence that the Appellant is at a real risk of being subjected to treatment which would breach article 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in detention. Regrettably, that is a sometime feature of police behaviour in all EU countries.'

22. In *Herdman*, the requested persons relied on Andrew Symeou's experiences to try and prove that their article 3 rights would be breached in Greek prisons. However, the Court held that they had to consider evidence of systemic human rights violations rather than that of individuals. Furthermore:

> '[h]aving considered the evidence, we are of the view that it falls a long way short of the high threshold necessary to establish an article 3 bar to extradition. Disturbing and deplorable though the accounts of the prison conditions we have seen are, they do not show strong grounds for believing that these appellants, if returned to Greece, face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.'[22]

23. Article 5 ECHR has equally be relied upon to prevent extradition. The House of Lords has however rejected reliance upon habeas corpus in extradition cases:

> The question that a judge in an extradition hearing had to decide was whether the offence specified in the European arrest warrant was an extradition offence, not whether it could be proved. An application for habeas corpus on the ground that, for whatever reason, there was no case to answer in the requested state must always be rejected as having been excluded by the provisions of the EA 2003.[23]

24. Article 5 was also relied upon in *Herdman* with respect to the availability of bail in the issuing state for foreign suspects. The Court observed however that provision for bail in Greece is generally compliant with the ECHR:

> There are judicial mechanisms in place that enable the refusal of bail to be reviewed, and the evidence of Mr Kyriakides [the appellant's Greek lawyer] is to the effect that

---

[21] [2009] EWHC 897

[22] at [46].

[23] R (Hilali) v Governor of Whitemoor Prison & Another [2007] EWHC 939 (Admin); [2008] 1 AC 805

there are no limits to the number of appeals that a defendant is entitled to file. If the Greek courts treat the non-residence of defendants as a material consideration, the same applies in the case of foreign nationals facing a criminal trial in this country.[24]

25. Article 6 challenges usually focus on the prospect of delay in the issuing member state commencing proceedings against the requested person[25] having a subsequent effect on the fairness of any trial that may take place. A person must show there will be a "flagrant breach" of his article 6 rights[26] which means that these cases are only successful if a lengthy period of delay has taken place,[27] and only if not occasioned by the requested person.[28]

26. Many cases also raise article 8 challenges, claiming a breach of the right to respect for the requested person's family life by the upheaval of extradition. It was held in *Jaso and others v Central Criminal Court Madrid*,[29] '[t]here have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's article 8 rights'. Similarly, in *Sandru v Government of Romania,*[30] Elias LJ did not accept that "the triviality of the offence or length of sentence can, certainly in circumstances of this case, begin to bring this case within article 8".

27. It is disappointing that UK Courts have not sought to protect UK citizens from the lower standards of other jurisdictions. However, Courts have adhered to the nature and purpose of the framework decision, and therefore the principle of mutual recognition, as required by the House of Lords in the early cases following the introduction of the scheme into UK law.[31] The UK Courts must be convinced by evidence that standards are sufficiently low to bar extradition. Our proposal to enable this evidence to be sought is below under title 'Dual Representation' at paragraphs 37 to 41.

28. It should be noted that with the coming into force of the Treaty of Lisbon, the Charter on Fundamental Rights is now binding on the EU institutions and on the member states when

---

[24] *Herdman, ibid.* at 51. We find that the conclusion reached with respect to non-discrimination on grounds of nationality is somewhat concerning, since the material issue is not how foreign nationals are treated in this country, but in the issuing state as compared to its nationals. The availability of the EAW ought to remove reliance on foreign nationality as a ground for remand in pre-trial detention.

[26] Per Lord Phillips in *RB (Algeria) v Secretary of State for the Home Department* [2009] 2 WLR at [141]

[27] See *Lisowski v Regional Court of Bialystok* (Poland) [2006] EWHC 3227 (Admin) where a delay of 11 years was sufficient to create a bar.

[28] In *Oraczko v District Court of Krakow* [2008] EWHC 904 a passage of 9 years was not considered unjust or oppressive as there were findings that the appellant had fled Poland to evade conviction.

[29] [2007] EWHC 2983 at [57]

[30] [2009] EWHC 2879

[31] See *Office of the King's Prosecutor, Brussles v. Cando Armas* [2006] 2 AC 1 and *Dabas v Spain* [2007] 2 A.C. 31

they implement EU law.[32] Issuing and executing courts implement EU law when they issue or execute an EAW. Therefore, they act within the scope of EU law and the Charter is binding upon them. It remains to be seen whether cases brought raising infringement of the Charter will result in a differing threshold for engaging rights, or whether the courts will simply follow ECtHR case law. The Charter is a more contemporary and extensive human rights instrument, which explicitly provides that the ECHR standards should not prevent the Union providing more extensive protection.[33] As such, certain standards could be raised within the EU. There is the possibility, for example, that the right to human dignity provided in article 1 could be engaged to argue that surrendering someone to a member state where present prison conditions would be a breach of a person's right to human dignity[34] – which seems to imply a lower threshold from the right to be protected against torture, inhuman or degrading treatment in article 3 – would be in breach of that state's Charter obligations, thereby preventing surrender. This will depend upon decisions of the European Court of Justice interpreting the Charter provisions in areas where the member states have given the Court jurisdiction. In any event there is an opportunity for UK courts to improve standards of protection in reliance upon the Charter, should such arguments be brought before them. **To underline this, however, given the particular situation of EAW cases, section 21 of the Act could be amended to require the judge to decide whether the EAW request is compatible not only with the Convention, but also with the Charter.**

iv. Trials in absentia

29. Another argument raised regularly is that requested persons have been convicted without their knowledge. The Framework Decision provides that in these circumstances, the issuing state must guarantee that the person has the opportunity to apply for a re-trial following surrender, unless the person was summoned in person or otherwise informed of the date and place of the hearing.[35] This provision has caused some difficulties. For example, in cases where the defendant was sent a letter informing him of the trial date, but did not receive the letter, it is not clear if the framework decision deemed him to have been informed. Moreover, in some member states it is not necessary for a defendant to be informed of the trial date if he is legally represented. This may be acceptable in the law of the issuing member state but the executing court may require the accused to have actually been informed.

---

[32] Though its exact reach in the UK as a result of Protocol 30 remains to be determined by the preliminary reference in *Saeedi*, *R (on the application of) v Secretary of State for the Home Department & Ors* [2010] EWHC 705 (Admin) (31 March 2010)

[33] Article 52(3) Charter on Fundamental Rights (the Charter)

[34] Which is arguably the case with the overcrowded conditions in Polish prisons, see the Irish Supreme Court decision in *MJELR v.Rettinger* [2010] IESC 45, and see also the evidence regarding Greek prisons submitted in *Herdman*, supra.

[35] Article 5(1) EAW

30. As with the definition of 'judicial authority,' a stricter definition of the concept of 'trial in absentia' would resolve this issue, and has in fact been attempted in the Framework Decision on decisions rendered in the absence of the person concerned at the trial.[36] This Framework Decision amends the EAW by inserting article 4a and appears to provide a framework which deals with all national differences, by requiring that the requested person be informed in person of the pending trial and consequences of non attendance. The Framework Decision need not be implemented until 28th March 2011 and as such its impact is not yet ascertainable. Unresolved question will remain. For example, how do member states deal with defendants who dispute that they received information about the trial, even though the relevant box on the EAW form has been ticked?

31. Under section 20(3) of the Act the court is required to check whether the defendant deliberately absented himself from the trial, meaning that the person concerned has made a conscious decision not to attend.[37] In order to ensure that this test is satisfied, we hope that the UK will be actively encouraging other member states to implement the Framework Decision on *in absentia* judgments.

v. Inconsistency in application

32. The Framework Decision does not contain an article on how to deal with accessory offences. The Fourth Round Report notes that "[t]his gives rise to divergent legislations [*sic*.] and practices in the member states as regards the execution of EAWs insofar as they relate to these offences". In some member states the absence of provisions on accessory offences means that no surrender of accessory suspects is possible. Therefore, the Fourth Round Report suggests that the issue should be examined with a view to creating a legal framework in the EAW to allow for the surrender of accessory offenders.

33. The point in the proceedings when the EAW should be issued also varies, with differing interpretations of 'conducting a criminal prosecution' in article 1(1) of the Framework Decision. The UK will not surrender people for investigation but many member states are content to surrender for interrogation to aid a decision to charge. The question of when a criminal prosecution commences is a complex one for more inquisitorial jurisdictions where prosecutors are involved from the moment of arrest. In *Court of First Instance of Hasselt v Bartlett*[38] it was argued that surrender was sought simply for the Belgian prosecutor to be able to ask some questions relating to ongoing investigations. As such, the requested person had not yet been accused of a crime and should not be surrendered, according to UK law. In the

[36] (2009/299/JHA), OJ L 81/24 (27.03.09)

[37] *Atkinson and Binnington v Cyprus* [2009] EWHC 1579

[38] [2010] EWHC 1390

light of letters from the Belgian investigating judge, however, Toulson LJ concluded 'that he is not merely a suspect wanted for questioning, but that he is someone who faces an accusation of criminal offences for which his extradition is requested in order for him to be prosecuted.' A similar decision was reached by Aikens LJ in *Asztaslos v Szekszard City Court*.[39] As such, the approach outlined in these judgments should make seeking a warrant easier for attentive states; By stating unequivocally on the face of the warrant that prosecution is intended, UK courts will be obliged to accept that this is the case. It will be very difficult to verify whether this is correct, however.

vi. Challenging a Schengen Alert in a non-issuing member state

34. EAWs are often transmitted through the Schengen Information System (SIS). The SIS allows for the issuing member state to update or remove an alert when appropriate, but it is not possible for the executing court upon refusal of the surrender request to remove the alert.

35. As such, suspects can remain subject to alerts. For example, Deborah Dark had been the subject of a French EAW alert since 2005. As a result, she was arrested on several occasions trying to travel to and from Turkey and Spain. On each occasion it was held that the EAW should not be executed because of the passage of time. However, France maintained the alert and as a consequence, Ms Dark's ability to exercise her right to free movement was severely curtailed.[40]

36. Article 111 of the Schengen Convention provides for the possibility to apply to a court in the territory of each Contracting Party to amend or review an alert. This article has not been implemented by those parties however. The Fourth Round Report recommends that the domestic provisions on article 111 should be evaluated. In order to effect full implementation, we consider that the Framework Decision should be amended to bring in the substance of article 111. The development of SIS II has been repeatedly stalled, but it should also be directed to address this failing. **However, the UK could implement the article by way of domestic legislation which would at least enable the UK to begin to attempt to control alerts in relation to warrants refused here.**

[39] [2010] EWHC 237 where the court rehearsed many of the French request cases on this issue. Only where the warrant itself appears equivocal should extrinsic expert evidence be referred to, since this approach is contrary to the intentions of the Framework Decision.

[40] For further information see http://www.fairtrials.net/cases/spotlight/deborah_dark/

vii. Absence of dual representation

37. Whilst the Framework Decision requires the possibility of representation in the executing state, there is no requirement for a lawyer qualified in the issuing state to be available. As such, there is rarely any challenge to the issue of an EAW by a defence representative in the issuing member state prior to surrender. Nor is the requested person usually able to challenge the validity of the EAW in the executing state based on the law of the issuing member state, or to assert that surrender to the issuing member state would breach his fundamental rights since in most cases there is a lack of evidence to meet the high standards required by our courts to support these claims.

38. Clearly human rights challenges should only be made when there are good to reasons to do so. In *Radziszewski v Circuit Court in Olsztyn* [2010] EWHC 601 a Polish man required detention in a special security unit. He complained:

> [O]n more than one occasion that his objection to being housed in what for shorthand I will call a VPU is that the other prisoners in that unit are likely to be paedophiles and ex-policemen. They are not people who, he says, you could have a conversation with, and he says that to be housed with them is, in his words as translated from Polish, "a catastrophe". What is not suggested is that he would be unsafe there. While his fellow inmates might be socially disagreeable to him, that cannot of itself trigger a claim under Article 3 or Article 2.

39. Equally, in *Dula v Director of Public Prosecutions Zwolle*[41] the Polish defendant had been informed of proceedings in the Netherlands (he had acknowledged receipt of the summons) while imprisoned in Poland. He failed to instruct any lawyers in his Dutch case and was convicted in absentia. Swift J found that:

> The appellant was offered another opportunity to participate in the trial process when notice of the judgment was served upon him, together with documents informing him about the appeal process. Again, the evidence is that he did not avail himself of that opportunity. It may be that the documents which he received were a little opaque in relation to the precise circumstances in which he would be able to lodge an appeal, but there was no evidence before the District Judge that there was any confusion on his part about that or, that he had requested an explanation, or as to any practical or other difficulties which prevented him from doing so.

40. Nevertheless, whilst these arguments were dismissed by the district judges on the evidence before them, and there is no evidence in the judgments to suggest their findings were wrong,

[41] [2010] EWHC 469

our research has shown that human rights standards differ markedly across the EU;[42] There will be occasions where there are reasons to consider concerns about prison conditions ought to be treated seriously, or that lawyers could not be instructed abroad to deal with the issue because of securing legal aid. In the UK legal aid can be sought for an expert in another member state to provide some assistance, but this is very ad hoc and depends largely on existing contacts that the instructed UK lawyers might have with credible foreign lawyers. Furthermore, often the reasons for challenge can only be made in the issuing country.

41. We believe that many of the concerns raised above in relation to flaws in the EAW process could be resolved through dual representation. A formal defence network organised and supported administratively for this purpose would assist with making this practice routine. It would enable lawyers in the issuing state to attempt to resolve concerns about the validity of the warrant prior to a decision being made on surrender. It would enable instructions from a requested person to be fully investigated and supported by evidence, ensuring that real possibilities of ill treatment are prevented. This would also assist with the proportionality problems outlined above, by enabling these arguments to be properly raised in the issuing state, and where undertakings could be given by a lawyer for payment of a fine or voluntary attendance for questioning, the draconian resort to an EAW might be avoided.

Additional EU Instruments

42. It is also important to be aware of other instruments passed at EU level which will provide an opportunity to mitigate the problematic effects of the EAW once implemented. The UK should strive to ensure that domestic legislation is prepared in readiness for these deadlines and encourage other member states to do likewise.

43. The European Supervision Order[43] (ESO) has the potential to have substantial impact. Rather than issuing an EAW, member states can agree to requested persons remaining on bail in the executing country until trial. It is hoped that the UK will implement its provisions by the deadline next year, should this be identified as a priority. But it will require other member states to recognise its value and apply the instrument at the point of police bail in the issuing country following interrogation. If bail could be more routinely exercised, many of the concerns about prison conditions pre-trial could be alleviated. Interestingly in the Herdman case, despite lengthy court proceedings, when the Greek court held the initial hearing, the requested persons were granted bail to return to the UK on sureties. Irrespective of the ESO,

[42] See note 2 above.

[43] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention

where the grounds for refusal relate to concerns about pre-trial detention, the whole arrest warrant process could be avoided by holding a video link hearing, and/or having an early indication about bail which would allow the suspects to attend voluntarily.[44]

44. With respect to possible sentences upon conviction, the Framework Decision provides at article 5(3) that:

> Where a person…is a national or resident of the executing member state, surrender may be subject to the condition that the person, after being heard, is returned to the executing member state in order to serve there the custodial or detention sentence passed against him in the issuing member state.

45. **The UK has not implemented this article and as such cannot request the return of its nationals or residents as a guarantee to be given prior to surrender. Rather, the UK is limited to using mutual legal assistance arrangements which do not offer the same guarantees. This would easily be remedied by an amendment to the Act**.

46. Whilst mutual legal assistance arrangements under the Council of Europe Convention on the Transfer of Sentenced Persons[45] exist, this can only take effect once a defendant begins to serve their sentence. Furthermore, the EU has taken steps through the framework decisions on recognition of custodial sentences[46] and probation measures[47] to create a more efficient procedure, which will replace the Council of Europe Convention. As the preamble to the custodial sentence instrument explains:

> Sentenced persons may be transferred to serve the remainder of their sentences only to their State of nationality and only with their consent and that of the States involved. The Additional Protocol to that Convention of 18 December 1997, which allows transfer without the person's consent, subject to certain conditions, has not been ratified by all the member states. Neither instrument imposes any basic duty to take charge of sentenced persons for enforcement of a sentence or order.[48]

Both instruments could be invoked in relation to conviction EAWs which, where the conviction was accepted, would counteract the adverse impact on the article 8 ECHR rights of the

---

[44] With respect to video links, however, we reiterate the need to ensure high standards of technology, the opportunity for private consultation with legal representation and a system which will enable interpretation to be provided. We consider that an EU recommendation on standards in video links is necessary, given its increasing use in cross border proceedings.

[45] Council of Europe Treaty Series No. 112 (Strasbourg, 21.03.1983)

[46] Council Framework Decision 2008/909/JHA of 27 November 2008, OJ L 327/27, 5.12.2008

[47] Council Framework Decision 2008/947/JHA of 27 November 2008, OJ L 337/102, 16.12.2008

[48] At recital 4.

requested person. We would therefore urge the speedy implementation of the framework decisions during this year, and for the UK to impress upon the other EU member states the preference of using these instruments in conviction EAW cases.[49]

47. The two instruments recognising sentences do not encompass accompanying penalties, such as fines. For these offences, the framework decision on recognition of financial penalties[50] was due to be implemented by 22nd March 2007 and was in fact implemented in the UK by way of Part 6 of the Criminal Justice and Immigration Act 2008, coming into force on 1st October 2009.[51] Its implementation across the EU has been slow, but the instrument is now in force in 21 member states.[52] There are as yet few statistics on its impact, but those available demonstrate increasing use.[53] Poland implemented the framework decision as of 18 December 2008.[54] Given that practitioners and officials in both the UK and Poland report that the EAW has been frequently used by Poland in relation to non payment of fines, use of this instrument could greatly reduce the EAW requests from Poland. It is disappointing that Poland has not made more use of this instrument. It is hoped that, as recommended by the Council Cooperation in Criminal Matters Working Party[55], further work on raising awareness of the instrument domestically, bilateral arrangements as to the optional elements of the framework decision and communication between member states about methods of implementation will take place and lead to use of these instruments. We hope that the UK will lead this exercise in the interests of reducing disproportionate EAW requests.

48. The Roadmap on Procedural Safeguards[56] has generated a framework decision on interpretation and translation,[57] though this will not need to be implemented until 2013. Further instruments on information about rights, legal representation, consular assistance and notification of interested persons, vulnerable suspects and length of pre-trial detention are

---

[49] Whilst we do not wish to focus too readily on the practical implementation of these instruments, we would observe the need to take representations from the sentenced person in order to ensure there are no grounds for refusal of the request.

[50] Council Framework Decision 2005/214/JHA of 24 February 2005, OJ L 76/16, 22.3.2005

[51] Pursuant to the Criminal Justice and Immigration Act 2008 (Commencement No. 11) Order 2009 No. 2606

[52] Council of the EU, *Framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties – Information provided to the General Secrtariat*, 16924/1/10 REV 1, (Brussels, 8 December 2010)

[53] Council of the EU, *Framework decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties - Follow up of the mutual recognition instruments – outcome of the discussions based on the results of the questionnaire on implementation*, 17998/10 (Brussels, 20 December 2010), p 4. See also the accompanying questionnaire at 17205/10 (Brussels 16 December 2010)

[54] 17205/10 p 96.

[55] See 17998/10, supra.

[56] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009.

[57] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010.

envisaged. These measures should have been secured prior to enhanced cooperation in criminal matters. Since this concern was not adhered to,[58] we urge the UK to support the speedy implementation of these measures in order to improve human rights standards across the EU. In particular, we would urge the UK to support a dual representation article in the upcoming measure on legal representation, to ensure effective representation in cross border cases, as we set out in paragraphs 37 to 41 above.

Conclusions on the operation of the EAW

49. Ultimately it should be recognised that the UK is in a strong bargaining position given its option to remain a party to the justice and home affairs area of EU involvement pursuant to Protocol 36 of the TFEU. It would be immensely problematic for other member states were the UK to decide to cease the operation of these instruments in the UK, given that the UK receives the most EU citizens, and UK citizens travel the most across the EU. The UK also receives a large proportion of the EAW requests now that the instrument is fully operational across the EU. As such, the UK is in a position to exert pressure upon other member states to reform the EAW procedure at the EU level by (1) amendment to the framework decision to include a proportionality test, (2) implementation of article 111 of the Schengen Convention discretion to remove an alert where an EAW is refused, and (3) ensuring that all accompanying instruments are fully implemented in each member state.

50. Domestically, we would observe that there is no question of the UK being subject to infraction proceedings in the EU if amendments to the Act are made to introduce a proportionality check, since the current system operates under a framework decision not a directive.[59] Furthermore, it would not be unreasonable for an amendment to the Act to import into the proportionality check a question of whether subsequent instruments ought first to have been used, and if so, to postpone surrender until the judicial authority of the issuing state has made such a request, or justified the continuing EAW request.

---

[58] Concerns shared by many civil society organisations and the European Parliament prior to adoption of the Framework Decision, see amongst others, JUSTICE, AI, OSJI, *Joint Submission on Legal Basis*, available at: http://www.justice.org.uk/images/pdfs/Submission%20on%20legal%20basis%20of%20procedural%20rights%20framework%20d%85.pdf and also European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, *Implementation of the European Arrest Warrant and Joint Investigation Teams at EU and National Level,* January 2009, PE 410.67, http://www.statewatch.org/news/2009/feb/ep-study-european-arrest-warrant.pdf

[59] Were amendments to the framework decision to be agreed, the instrument would automatically become a directive and receive enforcement powers of the Commission and the jurisdiction of the Court of Justice of the European Union,[59] but any such amendment would necessarily import a proportionality test in any event. The UK would not therefore be in breach of the instrument.

3. Whether the forum bar to extradition should be commenced

51. It is hard to understand why the forum bar contained in section 42 and schedule 13, paragraphs 4 and 5 to the Police and Justice Act 2006 was not adopted. Paragraph 6 required a resolution in both Houses of Parliament and no agreement has been reached.

52. With respect to Part 1 of the Act, the Framework Decision provides for the option to create a forum bar and other member states have included this in their domestic implementation. It therefore is within the intention and purpose of the European arrest warrant scheme for own nationals to have prosecutions dealt with in their own member state. With respect to Part II territories, there is even less obligation to international arrangements since article 6 of the Council of Europe Convention on Extradition[60] (ECE) allows for contracting parties to refuse to extradite its own nationals and article 7 provides a forum bar. Where other treaty arrangements have been created unilaterally, should the instrument be silent as to forum, there cannot be an international rule of law preventing the amendment being enacted. In particular, there is no article of the UK-US Extradition Treaty 2003 that would bar the forum amendment.

53. Indeed, a decision otherwise is against the purposes of extradition arrangements which are after all to prevent criminals evading justice. Where a crime is committed by a national of a member state within its jurisdiction, evasion is not in issue. The amendment still retains the court's discretion by requiring the judge to consider the interests of justice before making a decision. In particular, the judge must take into account whether the national prosecution authorities have decided to prosecute. Therefore the amendment does not create an absolute bar.

54. In our 2006 briefing when the amendment was proposed in the House of Lords, we commented:

> The failure to include such provision in the Extradition Act is of particular concern with regard to the United States because of the expansive interpretation of jurisdiction there in relation to some crimes. In some cases a single email passing through an ISP in the US, or the publication of a company's annual reports to a single shareholder there, can trigger jurisdiction.

55. With expanding use of the internet and international transactions, such risks, possibly through inadvertence, are prevalent in many jurisdictions. The forum bar ensures that where it is appropriate for a person to be prosecuted at home, this route remains available despite an

[60] ETS No. 24 (1957)

extradition request. **We consider in the interests of ensuring the right to private and family life of those suspected of crime, and in the interests of legal certainty, the forum bar must be enacted.**

4. Whether the US-UK Extradition Treaty is unbalanced

56. We consider that the political focus upon the question of balance in the Treaty is somewhat misguided: the real question is whether the United Kingdom is providing sufficient protection to people in its jurisdiction from wrongful extradition and complying with its human rights obligations. Much attention has been given to how similar the US Constitution's 'probable cause' requirement is to the tests of establishing a prima facie case or reasonable suspicion in the United Kingdom. In fact in the case of *Gerstein v Pugh*,[61] the US Supreme Court explained the protection of the Fourth Amendment (which provides for probable cause) by reference to the English common law:

> At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, Pleas of the Crown 77, 81, 95, 121 (1736); 2 W. Hawkins, Pleas of the Crown 116-117 (4th ed. 1762) …. The justice of the peace would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, supra, at 583-586; 2 W. Hawkins, supra, at 116-119; 1 J. Stephen, History of the Criminal Law of England 233 (1883) …. This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment … and there are indications that the Framers of the Bill of Rights regarded it as a model for a 'reasonable' seizure.[62]

57. Examination of the Treaty alone discloses a clear difference in that article 8(3)(c) imposes an obligation solely on the UK:

> [F]or requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested.

However, section 71(2) of the Act requires the executing judge in order to execute the warrant of arrest to be satisfied that there are reasonable grounds for believing that an extradition offence has been committed and that there is sufficient evidence to justify the issue of a warrant in a domestic case. Effectively the test for extradition to the US from the UK is one of reasonable suspicion that the extradition offence has been committed. We believe that this is a low threshold and that to restore the prima facie case requirement in relation to designated Part 2 countries would act as a safeguard in a small number of cases. However, the probable

[61] 420 U.S. 103 (1975)

[62] *Ibid.* at 114-116.

cause test is also not equivalent to a prima facie test and is in itself a low threshold. As we state below, we believe that other safeguards are more important and effective to protect defendants' rights.

5. Whether requesting states should be required to provide prima facie evidence

58. The removal of the requirement to produce prima facie in relation to Part I countries is a requirement of the European arrest warrant scheme. This is a reflection of the evolution of judicial cooperation in criminal matters over the past ten years which has seen not only the arrest warrant produced, but 15 instruments importing the mutual recognition concept into cross border EU instruments which replace mutual legal assistance conventions developed through the Council of Europe. These instruments not only remove the prima facie evidence test, but the requirement for double criminality, the role of the executive, specialty, and the protection of nationals, traditionally considered to be the preserve of national sovereignty. We have set out above our concerns with respect to the EAW scheme. We do not believe any of these would be solved by insisting on a prima facie evidence requirement. Nor do we believe that it is realistic to attempt to import such a test back into the scheme for requests received by the UK. Should there be doubt about the veracity of a request, the Act allows for dialogue with the issuing state, and indeed many cases have involved lengthy delays whilst further evidence is sought to clarify matters raised on the form, such as identification and types of offence.[63]

59. With respect to the designated territories, all are party to the ECE or are common law jurisdictions with a highly developed criminal justice system similar to our own. The ECE (article 12(2)) and UK-US Extradition Treaty (article 8) provide that requests for extradition must be supported by:

> (a) as accurate a description as possible of the person sought, together with any other information that would help to establish identity and probable location;
> (b) a statement of the facts of the offense(s);
> (c) the relevant text of the law(s) describing the essential elements of the offense for which extradition is requested;
> (d) the relevant text of the law(s) prescribing punishment for the offense for which extradition is requested;
>
> Where a request is made for prosecution, the state must additionally provide:
>
> (a) a copy of the warrant or order of arrest issued by a judge or other competent authority;

[63] The most extreme case must be a request from Latvia to the Netherlands, in which the Latvian judge had entered on the form with regards to sentence: 'the applicable sentence is life imprisonment or deprivation of liberty for a term of not less than fifteen years and not exceeding twenty years and police supervision for a term not exceeding three years and confiscating of property, or the death penalty.' It was necessary for the Dutch court to contact the issuing court to clarify whether the death penalty was still available as a punishment for the offence. The answer was of course in the negative, but the dialogue added a month to the length of proceedings (*BM8102, Rechtbank Amsterdam*).

(b) a copy of the charging document, if any;
and where a request is for the carrying out of a sentence,

(a) information that the person sought is the person to whom the finding of guilt refers;
(b) a copy of the judgment or memorandum of conviction or, if a copy is not available, a statement by a judicial authority that the person has been convicted;
(c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and
(d) in the case of a person who has been convicted *in absentia*, information regarding the circumstances under which the person was voluntarily absent from the proceedings.

In addition, both treaties provide that where additional information is necessary to enable a decision to be taken, the requesting state *shall* provide it.[64]

60. Once this information has been reviewed, the executing judge must be satisfied that there is a reasonable suspicion that an offence has been committed, pursuant to section 71(2)(a) of the Act. Whilst we agree with the legitimate concern that the extradition process may be abused, in practice it may be that a prima facie evidence test for designated territories will not provide much of a safeguard. Given the sophisticated nature of most of these jurisdictions, with their developed legal systems, if an issuing state is capable of asserting that it seeks extradition where it in fact knows there is insufficient evidence to support a prosecution, it would not be difficult for the state to present 'evidence' sufficient to satisfy a prima facie case test by other equally dubious means (such as the product of fabrication or oppressive treatment of witnesses).

61. We believe that a prima facie evidence test would offer an additional safeguard that may be effective in a small number of cases to prevent wrongful extradition - for example, it did so in the Lotfi Raissi case. However, to remove all current designations would import a test for ECE parties that has not existed in some cases for 30 years, yet ECE countries are not immune from the risks presented by the removal of a prima facie evidence test.

62. A prima facie test might hope to prevent politically motivated prosecutions being mounted, though a bar to such extraditions exists pursuant to sections 79 and 81 in any event, though of course the burden of proof is on the requested person to satisfy the extradition judge.

63. Moreover, a prima facie test would not prevent human rights violations, which are intended to be protected by section 87 of the Act. We are more concerned about the requests for extradition from ECE parties which purport to comply with the European Convention on

[64] See article 10 of the US-UK Extradition Treaty and article 13 ECE.

Human Rights, but in fact are repeatedly before the Strasbourg Court for violations of articles 3, 5 and 6. Russia contributes a substantial proportion of cases before the Court.[65] With respect to the United States, whilst maintaining strong Constitutional rights, it is not accountable to an international court like the European Court of Human Rights and there is no international body that can hold US ministers politically accountable. By way of contrast, in Europe the Committee of Ministers, and more recently the EU by way of article 7 TEU, may sanction member state's political representatives for breaches of international obligations.

64. Our particular concerns with respect to the US system relate to the more draconian sentencing practices of many states where life without parole is the only alternative to capital punishment in capital trials, and can be imposed for a range of serious offences. The UK Courts have considered this issue following *Soering v United Kingdom*[66] where the ECtHR held that the:

> inherent obligation not to extradite […] extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to the inhuman or degrading treatment or punishment proscribed by that Article.[67]

65. In ruling that the death row phenomenon constituted 'cruel or unusual treatment or punishment' the court appeared to take a relativistic approach, relying heavily upon the fact that Jens Soering would not evade justice as he could also be tried in his native Germany.[68] In *R (on the application of Wellington) v Secretary of State for the Home Department*, [69] a split majority of the House of Lords ruled in favour of a relativistic approach to ECHR challenges. *Per* Lord Hoffman:

> Article 3 [ECHR] does not apply as if the extraditing State were simply responsible for any punishment likely to be inflicted in the receiving state. It applies only in a modified form which takes into account the desirability of arrangements for extradition.[70]

The desirability of granting extradition is to be assessed in light of whether the individual would otherwise evade justice altogether[71] as well as the need to take into account the

---

[65] We have included in the Annex extracts from the Amnesty International Annual Report 2009 which highlights concerns about these states.

[66] [1989] 11 EHRR 439

[67] *Soering,* Para. [88].

[68] *Ibid*. Para. [89].

[69] [2008] UKHL 72, [2009] 1 AC 335

[70] Wellington, Para. [22].

[71] *Ibid*. See: Lord Hoffman, paras. [21] and [23].

democratic views of the legislature of the state where it is proposed to try the claimant.[72] As such, the threshold for a successful ECHR challenge has been higher in extradition cases than in purely domestic cases.

66. In *Kafkaris v Cyprus*[73] the Grand Chamber of the Strasbourg Court in a majority judgment noted that a life sentence was "not in itself prohibited by or incompatible with article 3" but that the *imposition of an* irreducible *life sentence* "may raise an issue" under article 3. The majority added that a life sentence would not be classified as irreducible where it was either *de jure* or *de facto* reducible, even if that meant that in practice it may be served in full. The Court held:

> In determining whether a life sentence in a given case can be regarded as irreducible the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. An analysis of the Court's case-law on the subject discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3.[74]

However, the Court repeated that it would be slow to interfere with a state's specific criminal justice system, provided that the system does not contravene the principles set out in the ECHR. On the facts, given that there was an opportunity for release, by way of the President exercising his prerogative of mercy or release on license under Cyprus' prison law, the Court did not find a violation.

67. This conclusion was cited with approval by the majority in *Wellington*; Lord Hoffman indicated that irreducible life sentences "would not *ipso facto* infringe Article 3[75]" since the Strasbourg court had couched its opinion in the term 'may' rather than 'shall', and concluded that a whole life sentence may not necessarily constitute inhuman and degrading treatment in violation of Article 3, unless it is deemed disproportionate. On the facts of *Wellington*, the requested person was sought on murder charges in Missouri, where life without parole would be imposed in place of the death penalty. Lord Hoffman held:

> The power of the Governor of Missouri to pardon a prisoner or to commute his sentence to one of imprisonment with the possibility of parole shows that it is reducible *de jure*. Is it reducible *de facto*? The evidence shows that the power has been sparingly used, in some cases for the benefit of battered women who killed after brutal treatment, in one case when the conviction was demonstrated to have been

---

[72] *Ibid*. See: Baroness Hale, para. [52] and Lord Carswell, para. [6].

[73] (Application No 21906/04) (unreported) 12 February 2008

[74] *Ibid*. para 98.

[75] *Ibid*. *Per* Lord Hoffman, Para. [19].

> wrong, in another case in return for co-operation in another prosecution. It must be accepted that if the appellant is convicted of first degree murder in the circumstances alleged against him, his prospects of release would be poor. But the requirement that the sentence must be reducible *de facto* cannot mean that the prisoner in question must have a real prospect of release. Otherwise the more horrendous the crime, the stronger would be the claim not to be extradited. It must mean that the system for review and release must actually operate in practice and not be merely theoretical.

68. Since the power was deemed similar to the exercise of power in *Kafkaris,* the House concluded that there would not be a violation of article 3.

69. However, the ECtHR has admitted the case of *Babar Ahmad*[76] in which the fact that the defendants face the possibility of receiving life sentences if extradited to the US raises "serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits". The Court further accepted that a 50 year minimum sentence imposed on a 35 year old could also raise an issue under Article 3.

70. We also consider internment in 'supermax' prisons where inmates are detained in solitary confinement and austere conditions to present an article 3 ECHR violation. In *Babar Ahmad* the Court also considered the admissibility of the applicants' complaints that detention in ADX Florence (a supermax prison) would give rise to a violation of article 3 ECHR.

71. The first applicant, who has a disability, faced a 'real risk' of spending a short period of time in custody at the Supermax prison. On merit, the Court declared the applicant's complaint inadmissible, the potential ill treatment being deemed insufficiently severe to raise an issue under article 3. However, the other three applicants all face a real risk of lengthy detentions in ADX Florence. The Court considered that their complaints raise serious questions of fact and law of such complexity that their determination should depend on an examination of all the merits. The Court also declared admissible the applicants' argument that special administrative measures imposed during the applicants' detention in ADX Florence could render their extradition incompatible with Article 3 ECHR. The final decision is expected imminently, and may limit extradition to the United States with respect to both irreducible sentences and detention conditions.

72. We would reiterate our conclusion with respect to dual representation in relation to EAW cases for Part II extradition cases, since it is the ability to present evidence of human rights violations which will convince the UK courts that the high thresholds are met. An overt

[76] *Babar Ahmad and others v United Kingdom* (2010) 51 E.H.R.R. SE6

obligation for the Secretary of state to consider representations for human rights violations and to seek assurances may assist in this regard, as set out at point one above.

Diplomatic Assurances

73. We would also observe that whilst it may be considered appropriate to accept diplomatic assurances in some cases where the country offering them has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States,[77] in others where reliable sources have reported that authorities have tolerated practices in violation of the Convention, assurances will not prevent Convention violations.[78] The European Court of Human Rights has further held that assurances do not absolve:

> the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention … The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.[79]

74. An assurance can only therefore be considered relevant by a court if it is sufficient to eliminate the real risk of the requested person's Convention rights being violated. In JUSTICE's view, the UK government's policy of negotiating assurances with countries known to use torture in order to reduce the risk of ill-treatment to those returned is therefore hopelessly flawed.[80]

JUSTICE
January 2011

[77] *Babar Ahmad and others v United Kingdom*, para 105.

[78] *Saadi v Italy* (2008) 24 BHLR 123, para 147.

[79] *Ibid.* para 148.

[80] For a detailed review of the caselaw on assurances, see JUSTICE, *Response to Counter Terrorism Review,* (August 2010) pages 34 to 52, available at: http://www.justice.org.uk/images/pdfs/JUSTICE%20response%20to%20CT%20review%20aug%2010%20FINAL.pdf

Annex

Amnesty International Report 2009: Fair Trials, Torture and Prison Conditions

Albania

There were allegations that detainees had been tortured or otherwise ill-treated, *usually immediately after arrest and during questioning*.

Detention conditions amounted in some instances to inhuman and degrading treatment. Medical care was inadequate and prisoners with mental illnesses were generally not separated from other prisoners, and received little or no specialist treatment. Detainees, even after being remanded in custody or convicted, often remained in police stations where conditions were generally very poor. This was due to administrative delays and lack of prison capacity.[81]

Armenia

Dozens of opposition members were arrested in the aftermath of the 1 March violence, including many high-ranking figures associated with Levon Ter-Petrosian, the main rival to Serge Sargsian, and members of the opposition Republic party. Some of those arrested were reportedly beaten or ill-treated in police custody. Many of those arrested were still in pre-trial detention at the end of the year. The Council of Europe repeatedly expressed concern at the excessive length of the official inquiry into the March events, and the continued imprisonment, in some cases without trial, of dozens of opposition supporters. The trial of seven of those detained started on 19 December.[82]

Russia

Trial procedures did not always meet international standards of fair trial and there were continuing concerns about *lack of respect for the rule of law*. In some cases with *a political context, the treatment of suspects amounted to persecution*. The right of suspects to legal representation during investigation was repeatedly violated.

[81] http://report2009.amnesty.org/en/regions/europe-central-asia/albania.

[82] http://report2009.amnesty.org/en/regions/europe-central-asia/armenia.

Torture and ill-treatment of detainees and prisoners were reported from throughout the Russian Federation. Methods detailed included beatings, electric shocks, suffocation with plastic bags and being forced to stay in painful positions for prolonged periods. There were also reports of rape in detention. Some detainees were denied necessary medical treatment.[83]"

Bulgaria

On 6 March, Bulgaria was found by the European Court of Human Rights to be in violation of the prohibition of inhuman or degrading treatment. Nikolai Kirilov Gavazov, a prisoner accused of rape, *spent nearly two years on remand* in a tiny, windowless cell in Pazardjik prison, central Bulgaria. *The Court also found that the seven-year length of the court case was excessive.*[84]

Latvia

In March, the European Committee for the Prevention of Torture, reporting on a visit in December 2007, strongly criticized the authorities for failing to investigate fully allegations of ill-treatment of detainees by law enforcement officials and prison staff, and improve detention conditions in police stations and prisons. Conditions had been found on some occasions to be inhuman and degrading.

The Committee reported allegations of deliberate physical ill-treatment of detainees by prison staff at Daugavpils Prison and Riga Central Prison. The Committee also received reports of psychological ill-treatment, such as prison staff verbally abusing detainees and threatening to put inmates in cells with other inmates prone to violence.

The Committee expressed particular concern at the allegations of frequent and severe inter-prisoner violence in various prisons. These included severe beating, sexual assault (including rape) and threats. The Committee highlighted the case of a juvenile prisoner in the Šķirotava Prison in Riga who had been repeatedly raped by fellow inmates. The Committee expressed concern that the staff had apparently been aware of the situation, but had failed to take effective steps to protect the minor.[85]"

[83] http://report2009.amnesty.org/en/regions/europe-central-asia/russia.

[84] http://report2009.amnesty.org/en/regions/europe-central-asia/bulgaria.

[85] http://report2009.amnesty.org/en/regions/europe-central-asia/latvia.

Israel

Some 900 Palestinian prisoners from the Gaza Strip were denied any family visits for a second year. Many relatives of Palestinian detainees from the West Bank were also denied visiting permits on unspecified "security" grounds. Many parents, spouses and children of detainees had not been allowed visits to their detained relatives for more than five years. No Israeli prisoners were subject to such restrictions.

Almost all Palestinian detainees were held in prisons in Israel in violation of international humanitarian law, which prohibits the removal of detainees to the territory of the occupying power. This made it difficult or impossible in practice for detainees to receive family visits.

Reports of torture and other ill-treatment by the Israeli General Security Service (GSS) increased, *especially during interrogation of Palestinians suspected of planning or involvement in armed attacks*. Methods reported included prolonged tying in painful stress positions, sleep deprivation and threats to harm detainees' families. Beatings and other ill-treatment of detainees were common during and following arrest and during transfer from one location to another.[86]

Turkey

Persistent allegations were made of ill-treatment in prisons and during transfer. Punishments, including solitary confinement, were arbitrarily imposed on prisoners. Small-group isolation remained a problem across the prison system for people accused or convicted of politically motivated offences.

Protracted and unfair trials persisted, especially for those prosecuted under anti-terrorism legislation. Convictions under anti-terrorism laws were often based on *insubstantial or unreliable evidence*.[87]

South Africa

Torture and other ill-treatment by police, prison warders and private security guards continued to be reported and sometimes led to the deaths of detainees. Corroborated cases included

[86] http://report2009.amnesty.org/en/regions/middle-east-north-africa/israel-occupied-territories.

[87] http://report2009.amnesty.org/en/regions/europe-central-asia/turkey.

the use of electric shock and suffocation torture and prolonged assaults with batons, fists and booted feet. In several cases police interrogators and prison warders attempted to conceal evidence relating to the cause of death. Crime suspects, injured by anti-crime vigilante groups, were sometimes denied emergency medical care while held in police custody, leading in one case, in December, to the death of a detainee.[88]

USA

Indefinite military detention without charge at Guantánamo of foreign nationals designated by the US administration as "enemy combatants" entered its seventh year.

Conditions of detention, particularly the degree of isolation, in Guantánamo's Camp 5, 6 and 7, and their potential impact on the physical and psychological health of detainees already distressed by the indefinite nature of their detention, continued to cause serious concern.

There were reports of ill-treatment by police and prison officers on the US mainland, often involving cruel use of restraints, or electro-shock weapons.[89]

[88] http://report2009.amnesty.org/en/regions/africa/south-africa.

[89] http://report2009.amnesty.org/en/regions/americas/usa.