



The European arrest warrant in practice

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This note is part of a series of standard notes dealing with extradition issues. Others in this series describe extradition generally,¹ how the European arrest warrant was introduced,² the UK/US Extradition Treaty,³ extradition requests from the US,⁴ and the case of Abu Hamza.⁵

¹ SN/HA/4168
² SN/HA/1703
³ SN/HA/2204
⁴ SN/HA/4980
⁵ SN/HA/2895

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1 Background

1.1 Introduction

The European Arrest Warrant (“EAW”) has replaced all the previous instruments concerning extradition between EU Member States. The warrant is a judicial decision by a court in one Member State to require the arrest and return of a person who is in another Member State. It applies where the person whose return is sought either faces prosecution for a criminal act where the maximum sentence is 12 months imprisonment or more, or has been sentenced to a prison term of at least four months. For 32 specified criminal offences, the requirement of dual criminality, i.e. that the conduct should be a crime in both Member States involved, is abolished if the offence is punishable by a maximum custodial sentence of at least 3 years in the requesting state. Traditional exceptions for political, military and revenue offences have gone, as has the court’s discretion to discharge when satisfied that it would be unjust or oppressive to return the person, due to the trivial nature of the offence.

The new arrangements followed a Framework Decision agreed by the European Parliament in February 2002, and the UK was one of the 8 Member States which met the implementation deadline of 31 December 2003, laid down in Article 34(1) of the Framework Decision. The Decision has now been transposed into national law by all 27 Member States (including the twelve who joined after December 2003).

1.2 Monitoring transposition

The European Commission has monitored the transpositions, and produced two reports about it. In February 2005, the Commission submitted to the European Parliament and the Council an initial evaluation of implementation of the EAW . This was revised in January 2006, to take into account Italian legislation which was not finalised until April 2005. The Commission was critical of Member States’ transpositions, and published an annexe setting out how the Commission thought they had fully, partially or wrongly transposed each Article of the Framework Decision in their national laws. The UK was among the Member States which took issue with

some of the Commission's findings, and the UK position was described in the House of Lords European Union Committee's report on recent EAW developments, in March 2006.⁶

The Commission's second report, published in July 2007, mentioned that most Member States had "reacted in writing" to the first report, but said:

Of these comments, more than half consist of information which the Member States should in the first place have transmitted to the Commission under Article 34 of the Framework Decision, a quarter are justified by errors of fact or interpretation in the first report, and the remainder involve assessments which the Commission cannot share or mere observations.⁷

The report described some constitutional difficulties which had, for a time, prevented Germany and Cyprus from operating the EAW procedures fully. It concludes that the EAW has been a success. However, it still makes much criticism of States' transpositions, with an admonition that there is a long list of Member States (12 including the UK) –

which need to make an effort to comply fully with the Framework Decision.

2 Proportionality

2.1 Concern at EU level

At the same time, the Presidency proposed discussion at EU level on the principle of proportionality, following evaluation visits showing that EAWs had been issued in cases such as:⁸

- detention of 0.45 grams of cannabis;
- detention of 1.5 grams of marijuana;
- detention of 0.15 grams of heroin;
- detention of 3 ecstasy tablets;
- theft of two car tyres;
- driving a car under the influence of alcohol, where the limit was not significantly exceeded (0.81 mg/l); and
- theft of a piglet.

Several evaluation teams had come to the conclusion in some Member States there was a need to set up mechanisms and rules at a national level allowing for a control of proportionality in order to avoid the issuance of EAWs for offences which, although falling legally speaking within the scope of Article 2 of the Framework Decision on the EAW, were not serious enough to justify the deployment by the executing State of the measures and the co-operation which the execution of an EAW requires. The ensuing discussion was inconclusive, with several members pointing out that further discussion was needed.

In January 2009 Czech Justice Minister Jiří Pospíšil addressed the Committee on Civil Liberties, Justice and Home Affairs. He said:

The members of the European Parliament responded positively to the intended evaluation of the European Arrest Warrant. They appraised this tool as a great

⁶ <http://www.parliament.the-stationery-office.com/pa/ld200506/ldselect/ldcom/156/156.pdf>

⁷ [Report from the Commission](#), 11 July 2007

⁸ [Proposed subject for discussion](#), 9 July 2007

success but they also remarked that it should focus only on serious criminal activity and not on minor offences.⁹

2.2 UK courts

The issue of proportionality also arose in the UK courts, when Poland sought extradition on a charge of “unintentional receiving of stolen property”. The alleged conduct was the acquisition for 100 zloty,¹⁰ of a mobile phone worth 300 zloty, which, based on the surrounding circumstances, he should and could have suspected that it had been obtained by a prohibited act. The Divisional Court rejected a submission that the conduct did not constitute an extraditable offence as it did not disclose the mens rea requisite for it to constitute an English offence. It also found that although the triviality of an offence was not, of itself, a ground for resisting extradition, there was no reason why it should not be taken into account in deciding whether the interference with a person’s right to respect for his private or family life which would result from his or her extradition is proportionate to the legitimate aim of honouring extradition treaties with other states. Nevertheless, it concluded that the facts of this case were nowhere near strong enough. Maurice Kay LJ is reported to have said, during one of the hearings –

...one is becoming used to European extradition cases for less serious offences than used to come before the courts for extradition, but in my reasonable experience of cases under the 2003 Act I have never seen one quite as low down the calendar as this.¹¹

2.3 Comments in the media

Some commentators have suggested that the volume of EAWs for less serious offences is excessive. Detective Sergeant Gary Flood of Scotland Yard’s extradition unit has estimated that 40% of all extradition cases dealt with by the Metropolitan police originated in Poland, with many of the offences being so minor they would lead to either a caution or no investigation at all in England and Wales.

In one case, according to Flood, a carpenter who fitted wardrobe doors and then removed them when the client refused to pay him, was subject to an extradition request by Poland so that they could try him for theft. In another case, the Polish authorities requested the extradition of a suspect for theft of a dessert. “The European arrest warrant contained a list of the ingredients,” Flood said.

He also said that Metropolitan police were chartering special planes to return suspects to Poland every three weeks.

According to District Judge Nicolas Evans, one of the five extradition judges for England and Wales:

The Polish system requires a trial for every criminal allegation, no matter how trivial, ... Singling out Poland as a source of extradition requests, he said that the increase in cases was placing increasing strain on the system and “a disproportionate amount of time is expended in cases which do not merit the effort”. Poland has already made 224 extradition requests this year, with Polish interpreters required and paid for by the court on 311 occasions.¹²

⁹ <http://www.eu2009.cz/en/news-and-documents/press-releases/the-second-day-of-the-minister-of-justice-in-the-european-parliament-7055/>

¹⁰ About £20 at current exchange rates

¹¹ [2009] Crim LR 31

¹² “[Door thief, piglet rustler, pudding snatcher: British courts despair at extradition requests](#)”, 20 October 2008, The Guardian

Sarah Ludford MEP wrote to *The Guardian* saying:

Your article highlighting trivial requests clogging up the system is one illustration of strain ... other problems are shown by current cases: the German demand to extradite Dr Fredrick Toben for Holocaust denial and an Italian demand to extradite Tunisian men where there is a real risk of onward deportation to torture.

The main reason for this is a failure by EU governments to invest in ensuring a level playing field. They have ducked the challenge of tackling substantive disparities in legal systems, patchy respect for fair trial and human rights, and tussles over where cases should be pursued. If they are not prepared to do this hard work, there should alternatively be an honest recognition of the need to invoke human rights, civil liberties, public policy and "stop wasting our time" bars to extradition to another EU country.¹³

3 The arrest of Gerald Toben

Dr Gerald Fredrick Toben is an Australian citizen who was born in Germany but has spent most of his life in Australia. In 1994 he founded "the Adelaide Institute" whose stated goal is to expose "the Holocaust Myth". He has served a term of imprisonment in Germany, and has also been the subject of legal proceedings in Australia in relation to material on the Institute's website. In October 2008, he was arrested while in transit at Heathrow Airport, under an EAW issued in Germany alleging that he had carried out "world wide internet publication" of material that was anti-Semitic, and denied, approved, or played down the mass murder of Jews perpetrated by the Nazis during the second world war.¹⁴

There was much criticism in the press. In the *Daily Mail*, Melanie Phillips wrote:

As a Jew, I am acutely alive to the vicious potential of denying the Nazis' attempted extermination of the world's Jews. ...But, through gritted teeth, I have to say that I am totally against the extradition of this man and appalled at the political and legal developments that have brought these moves about.

There are two fundamental issues at stake here. First is the threat to the principle of freedom of speech. Second is the erosion of Britain's power to uphold its own historic commitment to that principle.

(...)

More and more arrests and prosecutions are taking place against people who are deemed to offend against 'hate speech' - simply because they are preaching Christianity, denouncing immorality or even, in one consummately ironic case, scrawling on a wall 'Free speech for England'. And all this against the background of the campaign by certain Muslims who seek to outlaw even the term 'Islamic terrorism' in order to shut down debate about that particular threat. This sinister encroachment of hate crime into English law has little to do with preventing harm and more to do with an abuse of power. And the EU has put rocket fuel behind it.

It is this erosion of fundamental liberties and denial of national differences at the heart of the EU project which is behind the current alarming rise of neo-Nazi parties in countries such as Austria - which jailed David Irving for Holocaust-denial. It is not bigots like Fredrick Toben who pose the biggest threat to our freedom, but the EU and its incendiary doctrine of nation-denial.¹⁵

¹³ "Arrest warrant needs a level playing field", 21 October 2008, *The Guardian*

¹⁴ "Alleged holocaust denier held at Heathrow, 2 October 2008, *The Guardian*

¹⁵ "Holocaust-denial law and the attempted extradition of a man for publishing antisemitic material", 6 October 2008, *Daily Mail*

Freedom of speech is a bedrock of our society. Sure, it's not absolute; but we limit it only in the most rare of circumstances where it poses a direct threat to individuals, such as inciting or encouraging people to violence.

For similar reasons, we also outlaw incitement to racial hatred. But we draw a distinction, for example, between inciting hatred of people for what they inescapably are, which we rightly treat as a crime, and inciting hatred of their views, which we see as part of the cut and thrust of a liberal democratic society. That's why there was such uproar over the new crime of incitement to religious hatred.

Writing in *The Independent*, Chris Huhne said:

I respect the right of Germany, Austria and others to criminalise Holocaust denial, but I do not want to imitate them. That is why our courts should refuse extradition. The legal controversy does not end with the use of the warrant. Dr Toben is accused in Germany but his offence is to post on an Australian website. Germany has taken on itself the role of censor, because of the capacity to download content in Germany. It is hard to see where such an attempt to extend jurisdiction might end, or what its chilling effects on freedom of speech might ultimately be.

The technicalities may yet stop Dr Toben's extradition. The warrant is designed to respect each EU country's legal system by allowing automatic extradition, although it allows British courts to assess whether fundamental rights are being challenged. A clause in the legislation also allows our courts potentially to refuse extradition because the offence was committed outside the territory of the issuing member state, and does not allow prosecution here.

At least one member state - Belgium - has already said it will look behind a warrant to assess whether it should be executed. Poland issues about a third of all European arrest warrants received in the UK, and is said to treat abortion as murder. However, the Belgians have said they will not execute warrants for abortion or euthanasia. Belgium's attitude provides a precedent for refusal.

Whatever the outcome of Dr Toben's case, though, it highlights why it is important to reopen debate on the arrest warrant. I am not arguing, as the Conservatives do, that it should be ended. In a globalised criminal world, it has proved far too useful in extraditing one of the London bombers from Italy and in shutting down the old Costa del Crime in Spain. In the vast majority of cases, the EU arrest warrant is a good example of how member states can work together effectively.

The arrest warrant is extradition for the Ryanair age. If criminals can re-emerge hundreds of miles away in a different jurisdiction within hours of a crime, the state must be able to pursue offenders without the interminable bureaucracy that is such a feature of traditional extradition. But countries must be able to trust each other's legal systems and the responsible use of the warrant, or the political support for the warrant will wither.

The warrant was principally designed to ensure swift extradition between member states for offences such as murder, human trafficking, money laundering, organised or armed robbery, rape and terrorism. When the legislation was considered, the Commons committee warned about the inclusion of racism and xenophobia in the list of offences where it was unnecessary to prove it was against the host and issuing country's law, precisely because of differences in interpretation from one EU country to another.

The cleanest solution would be to exclude racism and xenophobia. But there may be other solutions that respect the essential differences in history and culture from one member state to another. In Britain, we value freedom of speech too highly to see it sacrificed because of the racist views of an oddball academic. Nor should we turn Dr Toben into a misplaced martyr. Strength of argument, widespread outcry and ridicule

will defeat the Holocaust-deniers. Let us not dignify their status or their argument with prosecution.¹⁶

District Judge Daphne Wickham ruled that the warrant was invalid because it contained inadequate detail of the alleged offences.¹⁷ It neither stated the name of the website nor where the propaganda was said to have been published from - merely referring to the 'world-wide internet'. She rejected an argument from the German authorities, that the required information could be acquired, saying:

"Compliance, in my view, cannot be fulfilled by a drip-feed of information as and when the issuing authority provides it.

"I find that the particulars are vague and imprecise, I find the warrant invalid and therefore discharge the defendant."

She added that she had not been required to decide at this stage whether the alleged crimes were valid extradition offences

Toben was released when the German Government withdrew its appeal, which was formally dismissed on 24 November 2008.¹⁸

4 Statistics

Reporting on recent developments (in 2006) the House of Lords European Union Committee said:

Use of EAW—UK experience

20. The Minister believed that the system was working well and that the figures demonstrated this.

(a) Inward

21. In the period 1 January 2004 to 22 February 2006, the UK received 5,732 EAWs. 175 have resulted in an arrest in the UK, with 88 persons being surrendered. The large discrepancy between the number received and the number of arrests is due to the fact that a large number of EAWs are posted as "alerts" on the SIS (Schengen Information System)¹⁶ or via Interpol and are therefore not directed at one Member State.¹⁹ As the Minister told us, very few have turned out to have a connection with the UK (QQ 17–21).

22. Not all requests for EAWs have been accepted by our courts. In 34 cases (of which 29 occurred in 2005) the EAW was discharged by the court, in a substantial number of those cases because of lack of information in the warrant. Other cases have been discharged on the grounds, for example, that the offence in question was not an extraditable offence or because, as a result of the passage of time, the judge considered that it would be unfair and unjust to order extradition. In no instance has the issuing State challenged the decision to refuse the EAW.

(b) Outward

23. Since 1 January 2004 the UK has issued 201 warrants, which have resulted in 90 arrests with 69 persons returned to the UK (Q 16). Of the 96 warrants issued in 2004, 47 resulted in arrest, of which 41 were surrendered to the UK. The Minister informed us that action was continuing in respect of five of the remaining six. The other request had failed following the judgment of the Supreme Court of Cyprus declaring it unconstitutional to extradite Cypriot nationals (see paragraph 27 below). The

¹⁶ "Holocaust denial and a case that shows flaws in the EU". 24 October 2008, *The Independent*

¹⁷ "Suspected Holocaust denier Dr Gerald Toben wins extradition fight", 30 October 2008, *Daily Telegraph*

¹⁸ "Suspected Holocaust denier avoids extradition", 25 November 2008, *The Guardian*

¹⁹ Provisions in the Coroners and Justice Bill are intended to facilitate UK use of the SIS

remaining 49 requests had failed because the person concerned had not been located in the territory of the requested Member State.²⁰

The most recent statistics were given in January 2009, in answer to a written PQ by Mark Francois:²¹

To ask the Secretary of State for the Home Department for what offences British citizens have been (a) arrested and (b) surrendered to the authorities of another EU member state under the provisions of a European arrest warrant since the Extradition Act 2003 came into force. [243022]

Meg Hillier: The Serious Organised Crime Agency (SOCA) is the designated authority for the receipt and transmission of European arrest warrants in the UK. There is no Government involvement in the operation of the EAW. The following table gives a total figure for the number of people extradited to and by the UK since the EAW entered into force on 1 January 2004 until September 2008.

It is not possible from current systems to provide data broken down into British and non-British nationals, nor into types of offence. SOCA is putting in place a new database to record this information non-retrospectively.

<i>Extradited from the UK</i>					
<i>Surrenders</i>					
<i>Part 1 EAW</i>	<i>2004</i>	<i>2005</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>
Total	23	75	151	320	351

Extradited to the UK					
Surrenders					
Part 3 EAW	2004	2005	2006	2007	2008
Total extradited	24	62	75	96	78

²⁰ <http://www.parliament.the-stationery-office.com/pa/ld200506/ldselect/ldeucom/156/156.pdf>

²¹ HC Deb 28 January 2009 c505W