



The Case against the European Arrest Warrant

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INTRODUCTION

When I was a student at Southampton University in the mid-1990s I had the great honour of inviting and hosting a large number of political speakers to address lunchtime meetings open to every student. The subjects varied enormously. Perhaps it was not unusual but the ones that made the lasting impact and stand the test of time were not the ones that defended a particular policy of the Government of the day. The ones that stand the test were the ones that spoke of polity not just politics. One speech delivered in the debating chamber in Southampton stands, in my memory, head and shoulders above the others. The late Keith Joseph held the students spellbound. It turned out to be his last ever speech to an Open University audience and as I drove him back to the train station at the end he said it had brought to life again his great campus campaign in the 1970s to preach new Conservatism in the Universities throughout Britain.

Lord Joseph spoke that day from first principles. He asked the assembled student body to imagine that they were on a desert island and they had to build their society from scratch. He challenged them to think what would be the first things they might want. Some said a health service. Others a system of education. He challenged them to reflect as to whether these were the *first* things they would want whilst accepting they were desirable. Joseph was approaching the construction of society from pure first principles. As a student identified what he did consider to be the things that a society being created from scratch would need first he would spend a few moments developing why he believed that to be important. Unsurprisingly the first thing that he believed the new imagined island nation would need would be defence: 'Surely the first duty of any Government would be to maintain the security and integrity of the island and thereby the physical security of its citizens?' argued Joseph. The second he readily accepted (having relegated welfare systems and transport as lesser priorities) was a system of internal law and order. At this point Joseph dwelt at length on the centrality of a Parliament that set the law, of a police force not under day to day political control, and an independent judiciary who would listen to trials and then hand down sentences based on the outcome of deliberations of juries comprised of our peers.

I repeat all of that at length because of the importance of what Keith Joseph was trying to say to that group. He was challenging what would be the moral priorities if we were starting a country from the beginning. However he crucially made the point that we were not and, in particular, on the questions of our legal system we had a system that had developed over centuries.

So why is this in anyway relevant to consideration of the merits or otherwise of the European Arrest Warrant? Quite simply I would contend because it fundamentally alters what a British citizen can expect when he encounters the criminal justice system. Hitherto it was clear to that person what the process would be. And it would be as it had evolved over centuries. No longer. Where prior to the

introduction of the European Arrest Warrant a British subject could legitimately expect the same treatment at the hands of the courts if charged the implications of the European Arrest Warrant fundamentally undermine that legitimate expectation. Now at the request of judges in other jurisdictions we are willing, indeed obliged, to export our citizens to face charges for offences that may not even be crimes in Britain and before systems we would never endorse in our own country.

Such is the change that the European Arrest Warrant has brought, and continues to bring. For the reasons explored in subsequent pages this paper asserts that whatever the technocratic arguments advanced by its advocates at its induction and now parroted by its defenders in operations it is fundamentally incompatible with the system of justice with which Britain has prided herself over generations.

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Executive Summary

The European Arrest Warrant (EAW) system as currently constituted poses a clear and present danger to the liberty of British citizens.

Extradition is perhaps one of the most serious decisions the state will make over an individual's liberty, yet it has been reduced to a bureaucratic process by a desire to harmonise European legal systems that are fundamentally different.

On too many occasions citizens have been extradited and forced to spend many months detained without charge or prior to facing trial on evidence that was later shown to be remarkably weak.

While some member states reserve their use of EAW's for serious offences and following extensive investigation, others appear too trigger-happy to use the tool, whether for minor offences, to assist in investigations or where evidence is scant and where it is far from certain charges will be brought.

The status quo cannot be allowed to continue. Urgent reform is needed, ensuring that EAW's are only used where extradition is proportionate, necessary and at a stage in the investigatory process where there will not be a lengthy period of pre-trial detention or further investigation.

Recommendations

The following reforms are proposed to address the flaws in the EAW system, to protect British citizens and to reduce the burden on British law enforcement agencies.

- 1) Warrants should only be issued for serious crimes, and only granted where both the issuing and receiving state recognise the act as criminal
- 2) The issuing state should be required to produce evidence demonstrating why the warrant has been issued, and the individual should be able to challenge in a domestic court the lawfulness of the warrant on the basis of this evidence
- 3) Any request to extradite an individual must be proportionate in the circumstances
- 4) The receiving state should have the ability to refuse extradition if it does not believe the judicial process will respect the fundamental rights of citizens, and should be able to seek guarantees where doubts arises
- 5) If a warrant is refused by a single member state, the warrant should be deemed invalid in every member state

A brief history of the European Arrest Warrant

On 13 June 2002, the Council Framework Decision on the EAW and the surrender procedures between Member States was adopted and entered into force on 7 August 2003.¹ Its introduction can be seen as a response to terrorism and extremism in Europe and a supposed technical attempt to speed up and simplify the varying extradition processes of the Member States for those who had been convicted or accused of serious crimes.² This was a particular concern in the post-9/11 European context, although it could also be seen to sit easily with the integrationist agenda that the EU had. The degree of balance between fears of terrorism and greater security that pushed the agenda forward and the integrationist's desire for greater assimilation is up for debate.

The EAW (hereafter referred to as the EAW) was adopted "pursuant to Title VI of the Treaty on European Union, {abolishing} formal extradition procedures among Member States with respect to persons suspected of having committed serious criminal offenses or who have been finally sentenced".³ A brief analysis of the history leading up to the EAW may explain the structure and functions intended by the Decision.

Pre 9/11 Europe

1995 and 1996 Conventions on Extradition

In March of 1995, the Council Act regarding extradition between Member States of the EU was adopted, following on from the Treaty on European Union. The Act was specifically meant to simplify and coordinate the extradition procedures between the various Member States of the EU. Carrying on from Article K.3 of the Treaty on European Union (TEU)⁴, the coordination between Member States' own institutions indicates a desire to integrate judicial and legal systems at an early stage.

The Convention required Member States to surrender individuals wanted for extradition in a process that was simplified to no longer require individuals to be subject to submission of a request for extradition in order for their extradition to take place.⁵

¹ Council Framework Decision 2002/584/JHA. *Official Journal of the European Communities L 190/1*. 18 July 2002.

² Deeb-Racsmány. "Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court". *Leiden Journal of International Law*, 20 (2007). Pp. 170.

³ Vierucci, Luisa. "The European Arrest Warrant." *Journal of International Criminal Justice* 2 (2004). Pp. 275-285.

⁴ Article K.3, Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253.

⁵ "Simplified extradition procedure between Member States: Summary." Available URL: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l14015a_en.htm. Last accessed 06/09/2011.

The following year, also following on from Article K.3 of the TEU, the Council Act of 27 September 1996 put forward specifics of extradition, including under what circumstances extradition can take place.⁶ Importantly, the conditions included the principle that extradition may not necessarily be refused on the grounds that the individual subject to the request for extradition is a national of the State receiving the request.

The Tampere European Council

After basic steps to encourage legal and judicial coordination and simplifying extradition processes took place in 1995 and 1996, there was a continued call for further integration. After the terrorist attacks on the United States on 11th of September 2001, the pace of action encouraging integration in the third pillar of the EU sped up dramatically. Before 9/11, the steps toward integrating these systems took place at the Tampere European Council of October 1999. Tampere put forward an agenda for an 'Area of Freedom, Security and Justice' for the EU. This agenda was meant as a means by which to fully use all the provisions of the Amsterdam Treaty.

There were several landmark goals in the Tampere conclusions relating to the justice system and facets of the EAW. One particular goal in this agenda that may pertain particularly to the EAW is the idea that "the enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own" and "criminals must find no ways of exploiting differences in the judicial systems of Member States." Specifically, in this area, they were aiming for "better compatibility and more convergence between the legal systems of Member States."⁷

Additionally, the conclusions call for the establishment of "minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union." Similarly, the conclusions also make several proposals regarding mutual recognition of judgements in courts and decisions of judicial authorities.⁸

Finally, the conclusions included an encouragement of Member States to ratify the 1995 and 1996 EU Conventions on extradition.⁹ The conclusions state that the Council

⁶ "Convention on extradition between Member States: Summary." Available URL: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l14015b_en.htm. Last accessed 06/09/2011.

⁷ "Point 5, Tampere European Council 15 and 16 December 1999: Presidency Conclusions." Available URL: http://www.europarl.europa.eu/summits/tam_en.htm. Last accessed 05/09/2011.

⁸ *Ibid* 7, point 30-34.

⁹ *Ibid* 7, point 35.

“considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU.”

Most importantly, the conclusion states that “consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial.”¹⁰

Post 9/11 Europe

After the terrorist attacks on 9/11, the delays that had occurred in previous attempts to coordinate Member States' efforts to combat cross-border security and criminal threats ended. Greater coordination was desired to share intelligence, in particular in cases of terrorism and terror threats. Political will to bring about such coordination had previously been lacking. However, it had become obvious that the ability to police and prosecute cross-border cases of terrorism would be a particular issue in the post 9/11 world.¹¹

As the horrors of 9/11 resonated in Europe, the response was rapid.

Indeed, in written evidence to the Parliamentary Joint Committee on Human Rights, the Liberal Democrat MEP Sir Graham Watson who at the time served as the chairman of the European Parliament's Justice and Home Affairs committee said: “the proposal would still be on a shelf gathering dust if it hadn't been for the events in New York... Mr Bin Laden helped make it a reality”¹².

Member States were called to a European Council on 21st September, and again to a JHA Council in mid-October. Among the more important actions taken in the days following the terrorist attacks on New York and Washington was the decision to create a common definition of terrorism for use in legal and judicial procedures throughout the European Union. However, none of the proposals were new. In fact, both had been discussed repeatedly in the years leading up to the autumn of 2001.¹³

In these meetings following 9/11, the EAW was devised as a replacement to the previous legislation of the 1990's and also the remaining complicated extradition processes of individual Member States. The document itself, the Council Framework Decision of 13 June 2002, states that the EAW would replace these existing structures

¹⁰ *Ibid* 7.

¹¹ Grabbe, Heather. “Breaking new ground in international security.” In *Europe After September 11th*. Centre for European Reform (2001). Pp. 63-75.

¹² http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_11.pdf

¹³ Ucarer, Emek M. “Justice and Home Affairs in the Aftermath of September 11: Opportunities and Challenges.” *European Union Studies Association*, 15.2 (2002).

and follow on from the Conclusions of the Tampere European Council.¹⁴ It used the language of Tampere including the phrases “freedom,” “security” and “justice” in its objectives and said the EAW “provides for in this Framework Decision the first concrete measure in the field of criminal law implementing the mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation.”¹⁵

The Framework Decision came into force on 7th August 2002 and Member States were obligated to take required measures to comply with the decision by the end of the year in 2003.¹⁶

¹⁴ *Ibid 1*, points 1-7.

¹⁵ *Ibid 1*, points 5-6.

¹⁶ “The European Arrest Warrant: Summary.” Available URL: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33167_en.htm. Last accessed 6/09/2011.

When can the European Arrest Warrant be used?

The EAW is valid in each of the European Union's twenty-seven member states, meaning its influence stretches from the Irish city of Cork in the west all the way to the Latvian capital Riga in the East. There are no states in the European Union which have negotiated an opt-out to the EAW.

The EAW works on the principal of judicial reciprocity, meaning that an order issued by a judge sitting in a court on Romania or Bulgaria must be considered by the British criminal justice system to carry the same weight as that of a British judge.

EAW's can be issued in the course of conducting a criminal prosecution against an individual or enforcing a custodial sentence¹⁷. They cannot simply be issued during the conduct of an investigation into a crime or in cases where a suspect would serve less than twelve months in jail if convicted.

Once a warrant has been issued by a court in a European Union member state, orders are communicated directly to the national Police force in the prospective detainee's country of residence to arrest the individual concerned. In the UK, such requests are first certified by the Serious Organised Crime Agency (SOCA) to ensure they meet the criteria set out in Part 1 of the Extradition Act 2003.

SOCA does not record the number of EAWs issued to the UK which do not meet these criteria.¹⁸

After the certification of warrant, the individual is arrested and brought before a court where a judge determines whether or not the person specified in the warrant is the individual who has been arrested. They can then opt to either detain or bail the suspect.

Extradition to the country which has issued the warrant must take place within ninety days of issuing the EAW, although extradition can take place in 10 days if the suspect admits culpability for the crime and surrenders.

¹⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>

¹⁸ Parliamentary Answer, 26 Apr 2012 : Hansard Column 965W

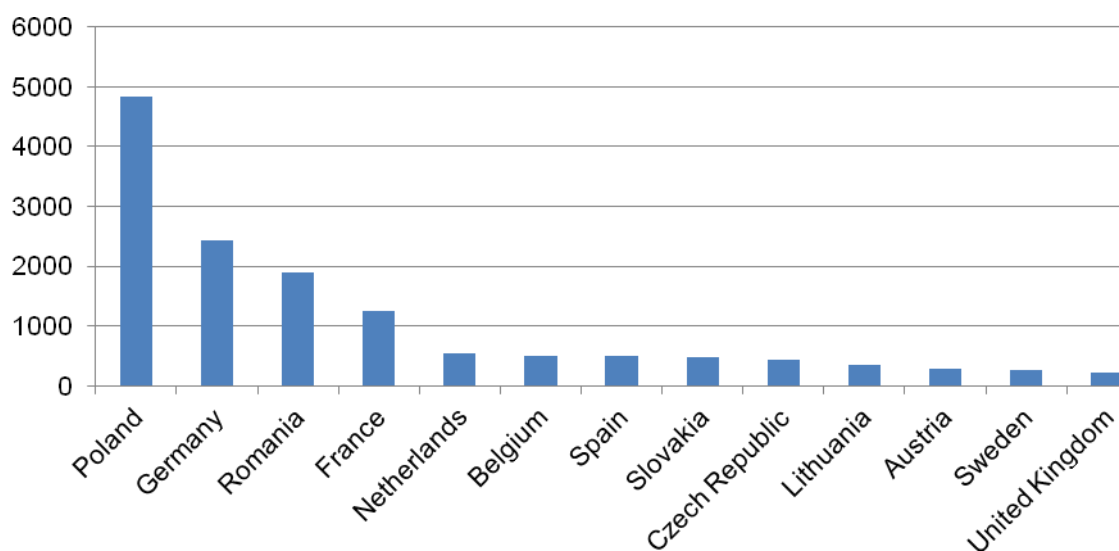
<http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120426/text/120426w0001.htm>

How widely is the European Arrest Warrant used?

As the issuing of EAW's is a matter for the individual judicial systems of each of the European Union's twenty seven member states, it is difficult to obtain an accurate figure of how widely the instrument has been used across the European Union.

Incomplete figures as to the number issued by each country are, however, available as a result of replies to a questionnaire issued by the European Council to all EU member states. The total figures, minus the totals from Bulgaria, Hungary and Italy who failed to respond, amount to a total of 14,789 EAW's during 2009¹⁹:

Total issued by state (2009)

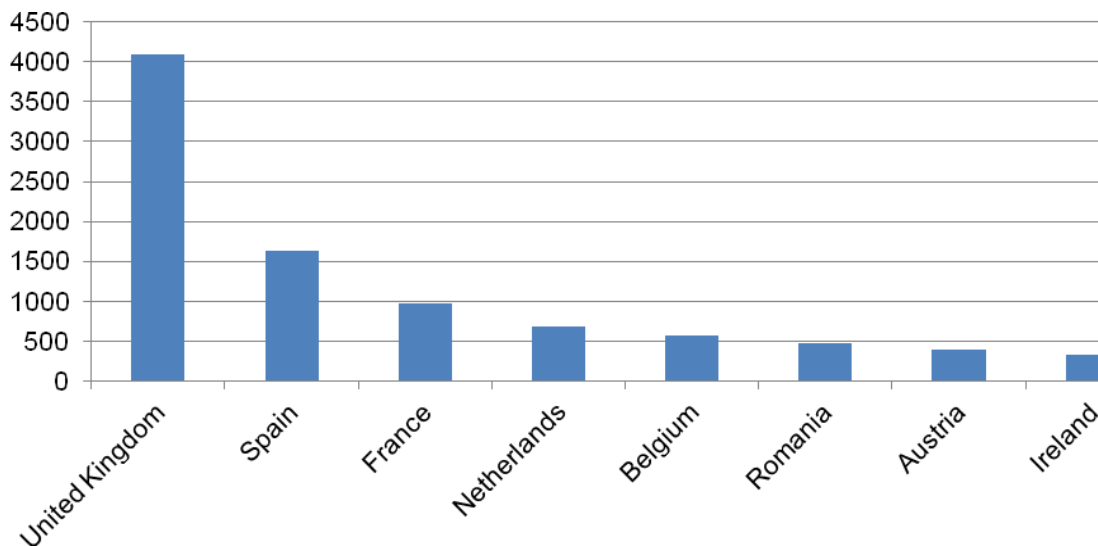


Poland	4844
Germany	2433
Romania	1900
France	1240
Netherlands	530
Belgium	508
Spain	489
Slovakia	485
Czech Republic	439
Lithuania	354
Austria	292
Sweden	263
United Kingdom	220
Latvia	171

¹⁹ Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant 2009 – issued by the European Council to all Member States

Finland	129
Greece	116
Portugal	104
Denmark	96
Estonia	46
Luxembourg	46
Ireland	33
Slovenia	27
Cyprus	17
Malta	7
Bulgaria	n/a
Hungary	n/a
Italy	n/a

Total number of EAW requests received by each member state (2009)²⁰



Across the European Union, available figures suggest that a total of 10,544 EAW's were issued by member states during the 2009 reporting period. This figure excludes figures for Bulgaria, Germany, Hungary and Italy who did not make this information publicly available.

The United Kingdom has used the EAW's procedure sparingly, issuing only 220 warrants in 2009 as compared to similarly-sized France who issued 1240 warrants.

²⁰ Home Office figures for 2009/10.

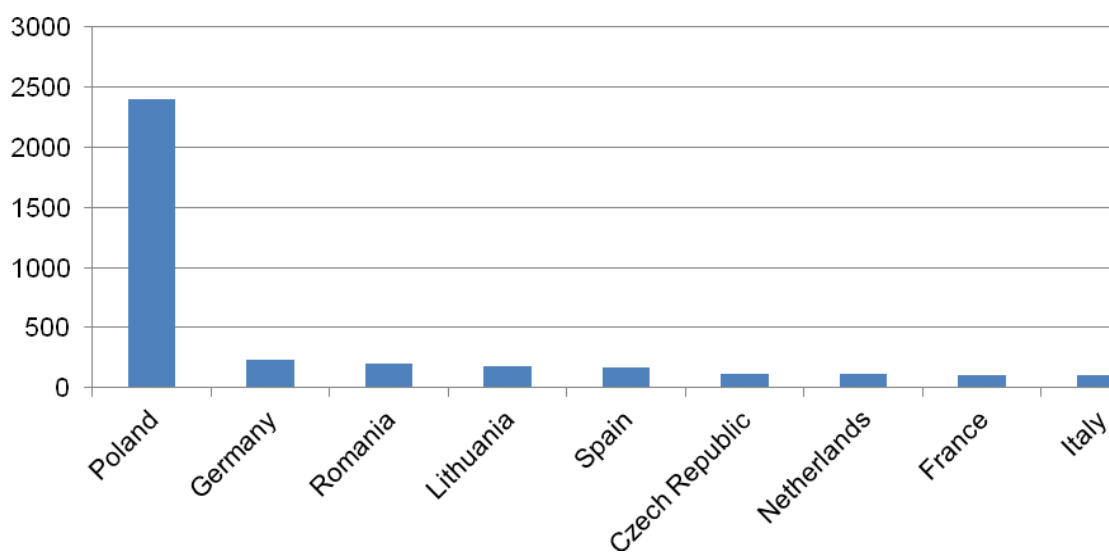
The UK did, however, receive a total of 4100 requests for the extradition of its citizens in 2009 – a total of 38.8% of the total number issued across the EU (not accounting for Bulgaria, Germany, Hungary and Italy).

United Kingdom	4100
Spain	1629
France	967
Netherlands	683
Belgium	565
Romania	473
Austria	387
Ireland	326
Czech Republic	310
Poland	286
Greece	216
Portugal	99
Slovakia	97
Sweden	93
Denmark	58
Slovenia	56
Lithuania	52
Estonia	38
Cyprus	27
Latvia	27
Finland	26
Luxembourg	21
Malta	8
Bulgaria	<i>n/a</i>
Germany	<i>n/a</i>
Hungary	<i>n/a</i>
Italy	<i>n/a</i>

The United Kingdom's use of the European Arrest Warrant

Home Office figures allow for one to obtain an accurate picture of the number which have been issued by the twenty-six other European Union nations against the United Kingdom²¹. The most recently available data in this respect suggests that a total of 4,100 warrants were issued for the arrests of British citizens in the 2009/10 period:

Total number of EAW requests received by the UK (2009)



²¹ Home Office European Arrest Warrant data, 2009

The total number of EAW's issued by Poland against the United Kingdom during this period (2403) is greater the entire number issued by the remaining twenty-five European Union nations (1697). According to a report by Andrew Gilligan in the Daily Telegraph, so many people (predominantly Polish citizens) "are extradited from Britain to Poland on minor charges that special fortnightly military flights are operated for them from a London airfield"²².

Poland	2403
Germany	235
Romania	197
Lithuania	183
Spain	167
Czech Republic	120
Netherlands	112
France	106
Italy	100
Belgium	90
Hungary	72
Latvia	55
Slovakia	54
Ireland	43
Bulgaria	42
Austria	30
Portugal	23
Greece	22
Sweden	11
Cyprus	8
Slovenia	7
Estonia	6
Finland	6
Denmark	3
Malta	3
Luxembourg	2

²² <http://www.telegraph.co.uk/news/uknews/law-and-order/7969981/Britain-left-to-count-cost-of-European-Arrest-Warrant.html>

Total number of EAW requests made by the UK (2009)

Spain	58
Ireland	39
Netherlands	31
France	25
Poland	19
Cyprus	5
Germany	4
Belgium	3
Italy	3
Romania	3
Greece	2
Hungary	2
Lithuania	2
Portugal	2
Austria	1
Bulgaria	1
Finland	1
Malta	1
Sweden	1
Czech Republic	0
Denmark	0
Estonia	0
Latvia	0
Luxembourg	0
Slovakia	0
Slovenia	0

In the case of seven European Union member states, not a single warrant for the arrest of one of their citizens was issued by a British court.

The principle of proportionality

On 9th January 2007, the Presidency of the European Council delivered a communiqué to the body's Working Party on Cooperation in Criminal Matters examining the application of the "proportionality principle" in matters relating to the EAW. The "proportionality principle", as included in Article 5 the pre-Lisbon Treaty on the functioning of the European Union stated

The "proportionality principle" is applied in respect of the four freedoms of the European Union – chiefly, the free movement of goods, services, persons, and capital. The then Treaty stated that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty"²³.

In recognising that the scope of the EAW may be habitually overstepping the boundary of what may be considered "proportional", the communiqué stated that:

*"the principle of proportionality requires that in each case a comparison be made inter alia between, on the one hand, the seriousness of the offence and, on the other hand, the measure, resources to be deployed in the executing State and, in particular, that it involves the deprivation of liberty of an individual"*²⁴

In practice, such a test has not been applied with EAW's being issued in respect of offences such as:

- The possession of 0.45 grams of Cannabis
- The possession of 0.15 grams of Heroin
- The possession of 3 Ecstasy tablets
- The theft of two car tyres
- The theft of a piglet
- Driving a car with a blood alcohol limit of 0.81mg/l (compared to a UK legal limit of 0.80mg/l²⁵)

²³ http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

²⁴ <http://www.statewatch.org/news/2007/jul/eu-eaw-evaluation.pdf>

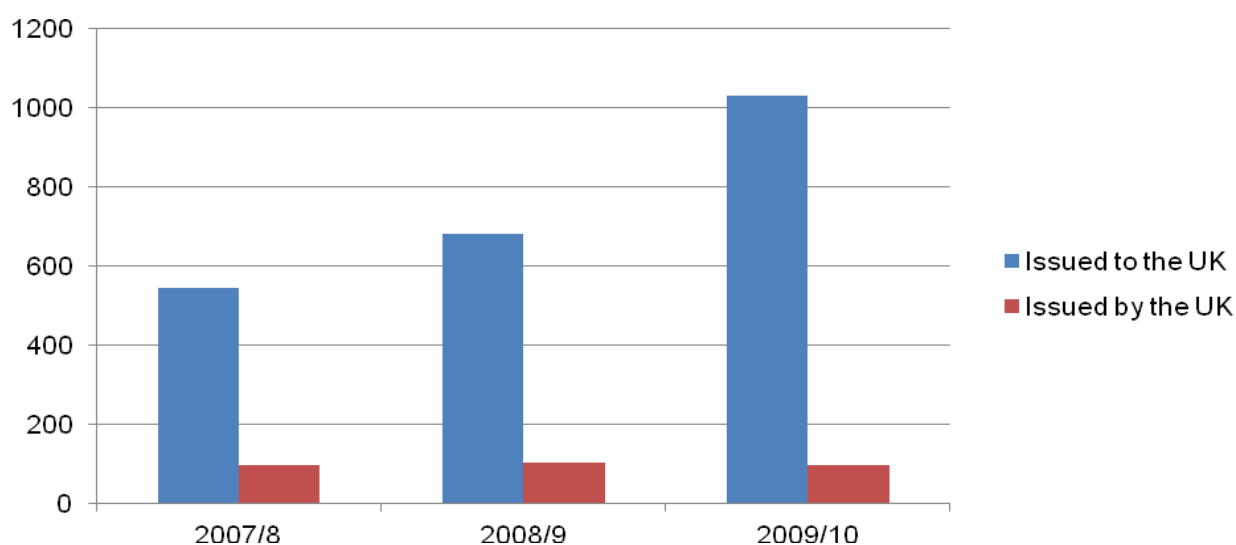
²⁵

<http://www.icap.org/PolicyTools/ICAPBlueBook/BlueBookModules/16BloodAlcoholConcentrationLimits/tabid/176/Default.aspx>

Viviane Reding, the European Commissioner with responsibility for Justice, Fundamental Rights and Citizenship has recognised that the EAW is frequently deployed in a disproportionate manner. In November 2010, she publicly stated that:

“European Arrest Warrants should not be issued mechanically, or automatically, for crimes that are not very serious such as bicycle theft. The national governments need to build up trust between their judicial systems so that the EAW works even more efficiently”²⁶.

Execution of the European Arrest Warrant in the UK²⁷



	Issued to the UK	Issued by the UK
2007/8	546	97
2008/9	683	104
2009/10	1032	98

²⁶ ‘European Arrest Warrant fights cross-border crime’. IP/11/454. 4 November 2011. Available URL: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/454&format=HTML&>

²⁷ Serious Organised Crime Agency (SOCA) Annual Reports 2008/09 and 2009/10

Habeas corpus and the European Arrest Warrant

As a result of the way by which the EAW can see British citizens extradited from the United Kingdom to a foreign country without having first had an adequate opportunity to demonstrate their innocence, questions have been raised about the compatibility of the EAW with the concept of habeas corpus.

In a House of Lords debate in January 2011, Lord Vinson of Roddam Dene put the following question to the Minister of State Baroness Neville-Jones:

Lord Vinson: *To ask Her Majesty's Government to what extent the European Arrest Warrant and European Investigation Order conform with the principle of habeas corpus.*

The Minister of State, Home Office (Baroness Neville-Jones): *The UK's transposition of the European arrest warrant complies fully with the concept of habeas corpus. UK implementation of the European investigation order will also be fully compliant. However, I understand that the noble Lord's principal concern is the separate issue of European arrest warrants being issued for trivial offences. The Government share this concern and are talking to other EU countries, bilaterally and through the European Union, to stop this happening.*

Lord Vinson: *I thank the Minister for her considered reply, but I am not as optimistic. The fact remains that hundreds of UK citizens are being compelled to appear before any EU court without the merit of the often frivolous charges being first assessed. They can be locked up without pre-trial. Is she not concerned that this totally overrides the ancient liberties of the British citizen enshrined in Magna Carta and habeas corpus? Will she assure the House that this will be resolved?*

Baroness Neville-Jones: *My Lords, the Government are concerned, as I have just said, with the disproportionate use of the European arrest warrant for trivial purposes.²⁸*

The problem highlighted by Lord Vinson was first identified by the late Sir Neil MacCormack, a Scottish National Party Member of the European Parliament in 2002 - prior to the EAW's introduction.

In a parliamentary amendment tabled by Sir Neil, those subjected to court action under the EAW would have been ordered to come to trial within 110 days or be freed. Sir Neil's amendment was opposed by both British Conservative and Labour MEPs and no similar attempt at defending habeas corpus on a pan-European level has since been proposed²⁹.

²⁸ <http://services.parliament.uk/hansard/Lords/ByDate/20110126/mainchamberdebates/part003.html>

²⁹ <http://www.telegraph.co.uk/news/worldnews/europe/1384025/EU-gets-a-new-arrest-warrant-but-safeguard-is-blocked.html>

The “dual criminality principle”

Under the EAW, British citizens or those living in the United Kingdom are able to be extradited to another European country for crimes which may not necessarily be offences under UK law.

Article 2.2 of the framework decision on the EAW and the surrender procedures between Member States decrees that there are thirty-two criminal offences which:

“are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European Arrest Warrant.”³⁰

The thirty-two offences are as follows³¹:

- Participation in a criminal organisation
- Terrorism
- Trafficking in human beings
- Sexual exploitation of children and child pornography
- Illicit trafficking in narcotics and weapons
- Corruption
- Fraud
- Money laundering
- Counterfeiting and piracy
- Environmental crime
- Facilitation of unauthorised entry and residence
- Murder
- Grievous bodily injury
- Illicit trade in hormonal substances, human organs, kidnapping, hostage-taking, racism and xenophobia
- Organised and armed robbery
- Illicit trafficking in cultural goods, swindling, racketeering and extortion
- Forgery
- Illicit trafficking in radioactive materials
- Trafficking in stolen vehicles
- Rape
- Arson
- Crimes within the jurisdiction of the International Criminal Court
- Unlawful seizure of aircraft/ships

³⁰ <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79929496C19050303&doc=T&ouvert=T&seance=ARRET>

³¹ Framework Decision 2002/584/JHA, Article 2

- Sabotage

On a parliamentary level, these concerns were first raised in a Home Affairs Select Committee report into the application of the EAW published in November 2002 in which MPs stated that they had "grave concerns about the abolition of the dual criminality safeguard" on the basis that the "variety of criminal justice systems and of legislative provisions within the member states of the EU makes it difficult for us to be [confident] that it will be acceptable in all circumstances for a person to be extradited from the UK to face proceedings for conduct that does not constitute a criminal offence in the UK"³².

Speaking in a House of Lords debate shortly before the EAW procedure entered into force Lord Filkin, the then Home Office minister, told peers:

*"If someone went to Germany and stood up in Cologne market place and shouted the odds, denying the Holocaust, and then came back [to Britain], they would be subject to extradition under the European Arrest Warrant."*³³

In this example, the fact the EAW would necessitate that a British court extradite them for a crime which would not be illegal in the UK represents an entirely unacceptable incursion by the European Union into the British criminal justice system.

In their 2002 report, the Home Affairs select committee also raised significant concerns about the ability of foreign judiciaries possessing the latitude to classify offences as falling into categories such as "participation in a criminal organisation", "racism and xenophobia" or "sabotage", even in cases where UK law would not judge such cases to fall into these categories.

In 2001, the report concluded that the conduct of twelve British citizens who were held by Greek authorities and threatened with twenty years imprisonment for spying after taking photographs of aircraft taking off from the Kalamata air base may have been judged to be an instance "sabotage" – a conclusion the British Crown Prosecution Services would not conceivably reach.

Given the size of the European Union it is unsurprising that a diverse range of policies and social attitudes exist, many of which influence the laws of individual member states. Examples are numerous.

It is perfectly legal to carry out an abortion in the United Kingdom while it is forbidden by law in Ireland. The use of soft drugs is tolerated by the Netherlands yet is considered an imprisonable crime in Finland. Euthanasia is legal in Belgium, yet someone assisting an individual in carrying out the procedure in the United Kingdom would potentially face murder charges for their actions.

³² <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmhaff/138/13804.htm>

³³ <http://www.indexoncensorship.org/2008/10/does-britain-have-a-holocaust-denial-law/>

The Scott Baker Review

On October 18 2011, Sir Scott Baker's year-long review into the UK's extradition law was published, which included consideration of how the EAW was functioning.

It stated: *"We have concluded that the European arrest warrant has improved the scheme of surrender between Member States of the European Union and that broadly speaking it operates satisfactorily. The biggest problem arises from the sheer number of arrest warrants issued by certain Member States without any consideration of whether it is appropriate to issue an arrest warrant and if there is a less coercive method of dealing with the requested person.*

*"This problem has been recognised by the European Union and the European Commission has accepted that a proportionality requirement is necessary to prevent European arrest warrants being used in cases which do not justify the serious consequences of a European arrest warrant."*³⁴

However, the review concluded that "overall we do not believe that Part 1 of the 2003 Act operates unfairly or oppressively."³⁵

The Scott Baker review did not recommend implementing a 'forum bar' for EAW cases, which would have required states to consider trying individuals in their country of residence rather than in the country issuing the arrest warrant. The key points Scott Baker raised with the operation of the EAW relate to the system being used for trivial offences and the length of time from extradition to trial.

To deal with these issues, the review recommended:

- Extradition should not occur if the issuing state is not 'trial ready'
- The UK should work with EU member states to end the use of extradition requests for minor offences
- New EU law is required to ensure fair trial standards are improved and to prevent un-necessary pre-trial detention

The review also recognised that currently decisions are made too quickly, with access to adequate legal advice not always assured. Furthermore, where the sentence at issue is relatively short, extradition should not always be permitted.

Finally, the review recommends reform to ensure that pre-trial detention is not excessive, and that alternatives are pursued to avoid situations where individuals are extradited and then detained for a prolonged period while awaiting trial. The example of Andrew Symeou, discussed in the next section, is one of the starkest. Extradited as a 20-year-old he spent 11 months in a Greek jail on manslaughter charges awaiting the decision of prosecutors.

³⁴ Scott Baker Review, Par 1.9

³⁵ Ibid, Par 1.15

When the European Arrest Warrant goes wrong

Andrew Symeou

Andrew Symeou was extradited in July 2009 to Greece facing charges of his connection with the death of Jonathan Hiles, a young man that died of injuries he received in a night club in Zakynthos in Greece.³⁶

In July 2007, Symeou went on holiday with friends to Greece. On the night of 20 July, Hiles was punched and fell off a stage platform in the nightclub 'Rescue.' Due to the injuries he sustained in the incident, Hiles died two days later.

Following the incident, Greek police questioned a number of witnesses, including five of Hiles' friends. Their statements indicated the attacker was a clean-shaven man wearing a blue shirt. According to his own testimony, Symeou was not in the club when the altercation took place, was unaware of the altercation, and did not fit the description of the assailant, having a beard and wearing a yellow shirt at the time.³⁷

However, on the 22 and 23 July, the same friends of Hiles gave new statements, identifying Symeou from a group photo, as the assailant. The photo is reported to have had Symeou circled and the word "perpetrator" appeared on it.³⁸ All their statements used identical wording despite being reported to have taken place at different times on different days.

Two friends that accompanied Symeou to the club that night were detained and questioned after the incident by Greek police. They claim they were held for eight hours, beaten and threatened and denied food or water until their statements corroborated the implication of Symeou.³⁹ After being released from questioning, the two friends left and reported their treatment to the British consulate and immediately recanted their statements. The two were reported to be bruised and terrified.⁴⁰

The original five witnesses also later recanted their statements indicating that they too had been beaten and their statements dictated to them.

³⁶ 'Andrew Symeou cleared over death on Zakynthos.' *BBC News London*. Available URL: <http://www.bbc.co.uk/news/uk-england-london-13810608>. Last accessed 08/09/2011

³⁷ 'Greek justice is no justice for Andrew Symeou- the Briton left in limbo.' *The Telegraph*. 13 March 2011. Available URL: <http://www.telegraph.co.uk/news/worldnews/europe/eu/8378204/Greek-justice-is-no-justice-for-the-Briton-left-in-limbo.html>. Last accessed 08/09/11.

³⁸ *Ibid* 2.

³⁹ 'Student accused of Greece nightclub killing is extradited.' *The Telegraph*. 23 July 2009. Available URL: <http://www.telegraph.co.uk/news/uknews/5893514/Student-accused-of-Greece-nightclub-killing-extradited.html>. Last accessed 08/09/2011.

⁴⁰ *Ibid* 2.

Despite the inconsistencies, Symeou was never questioned and did not learn of the incident until after his return to the UK. He was issued with an EAW on 18 June 2008 by the Greek authorities seeking his extradition from the UK, which was ordered by the UK courts in October of the same year. Symeou appealed the decision to extradite to the UK High Court, but lost and was extradited in July 2009.⁴¹

A trial was set for 4 June 2010, 10 months after the extradition. During this time he was held in deplorable conditions and reports being beaten due to his status as a foreigner. He was denied bail and until June of 2010.⁴² The trial was delayed several times for reasons including a failure to summons key witnesses from the UK, issues with a translator for the prosecution and a lawyer strike in Greece. The trial finally commenced on the 22 March 2011.⁴³

Finally, on 17 June 2011, Andrew Symeou was cleared by a Greek court. The prosecutor recommended he be acquitted and the jury delivered a verdict of not guilty. Hiles' father is reported to have debated the option of appealing the decision as yet no further investigation into the incident has taken place.⁴⁴

Dimitrinka Atanasova

Dimitrinka Atanasova, a Bulgarian legal secretary, fled to Britain after threatening to expose her boss – the country's chief prosecutor – for misconduct. That same chief prosecutor then personally requested her extradition from Britain on what a British judge agreed were "bad-faith", or trumped-up, charges of murder. Crucially, her case predated Bulgaria's EU membership and adoption of the EAW. She was freed, after several months in Holloway Prison, but could be rearrested under a warrant at any time⁴⁵.

Edmond Arapi

Edmond Arapi, an Albanian chef, was arrested while arriving at Gatwick Airport in June 2009. Unbeknown to him, an EAW had been issued for his arrest after he was tried and convicted in his absence by a court in Genoa for carrying out a murder in Italy in 2004. He was to face a sixteen year jail sentence⁴⁶.

⁴¹ "Andrew Symeou-Greece." *Fair Trials International*. Available URL of trial details PDF: http://www.fairtrials.net/cases/article/andrew_symeou1. Last accessed 08/09/2011.

⁴² "Andrew Symeou granted bail over death on Greek island." *BBC News: South East Wales*. 4 June 2010. Available URL: <http://www.bbc.co.uk/news/10240174>. Last accessed 08/09/2011.

⁴³ *Ibid* 2 and 6.

⁴⁴ "Greek court verdict on Jonathan Hiles death." *Wales Online*. 18 June 2011. Available URL: <http://www.walesonline.co.uk/news/health-news/2011/06/18/greek-court-verdict-on-jonathan-hiles-death-91466-28898511/>. Last accessed 08/09/2011.

⁴⁵ <http://www.telegraph.co.uk/news/uknews/law-and-order/7958208/Arrested-and-held-in-Britain-on-demand-of-EU-prosecutors.html>

⁴⁶ <http://www.thisisstaffordshire.co.uk/Chef-s-legal-battle-jail-nightmare/story-12519610-detail/story.html>

Despite the fact he possessed documentary evidence to prove he had been at work in a Staffordshire restaurant at the time the murder was carried out, he was held in Wandsworth prison for two weeks before being granted bail. He was subjected to twelve court appearances before the Italian court admitted they had sought the arrest of the wrong person following a brief check of Mr Arapi's fingerprints.

In quashing the extradition order Lord Justice Pitchford was scathing and described Mr Arapi as a man of "exemplary character"⁴⁷.

Deborah Dark

Deborah Dark was arrested in 1989 in France on suspicion of drug-related charges. After more than eight months in jail, the French courts found her not guilty of all charges and she was released, able to return to the UK.

However, the case was appealed to a higher court in France, and the verdict of not guilty was overturned, sentencing Dark to six years in prison. This appeal and conviction took place without Dark or her legal representation ever being notified and she was tried in absentia. Fifteen years later, in April of 2005, the French authorities placed an EAW on Dark for extradition from the UK to France. Dark was still unaware her trial outcome had been overturned and she'd been convicted of the crime.

After being arrested in Turkey, Spain and in the UK, she fought extradition in both Spain and the UK court systems. Finally, the EAW was removed in May 2010.⁴⁸

Patrick Reece-Edwards

Patrick Reece-Edwards, 49 from Dartford, was stopped by Polish police at a border crossing and after questioning, allowed to drive on. However, following the incident, he was arrested and held in custody in the UK on subject to an EAW from Poland on charges of possessing a forged motor insurance certificate.

Following his extradition to Poland, the charges were resolved by paying an administrative penalty and without any criminal record.⁴⁹

⁴⁷ <http://www.dailymail.co.uk/news/article-1286884/Father-walks-free-nightmare-murder-extradition-Italians-got-wrong-man.html>

⁴⁸ <http://www.telegraph.co.uk/news/uknews/law-and-order/7958208/Arrested-and-held-in-Britain-on-demand-of-EU-prosecutors.html>

⁴⁹ <http://www.telegraph.co.uk/news/uknews/law-and-order/7969981/Britain-left-to-count-cost-of-European-Arrest-Warrant.html>

The European Investigation Order

In April 2010, seven Member States, Austria, Bulgaria, Belgium, Estonia, Slovenia, Spain and Sweden, put forward a proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. This proposal is meant to replace the existing legal framework for gathering and transferring evidence between the different Member States.

The basis is on article 82(1) of the Treaty on the Functioning of the European Union, which refers to judicial cooperation in criminal matters being based on 'the principal of mutual recognition of judgements and judicial decisions'.⁵⁰ This follows on from the Tampere Council in 1999 goals of judicial cooperation in the EU.

Additionally, it is based on Council Framework Decisions 2003/577/JHA of July 2003 regarding the execution of orders freezing property and evidence and 2008/978/JHA of December 2009 on the European evidence warrant.⁵¹ However, holes in the various pieces of legislation existing on evidence gathering and sharing were complicated and uncoordinated. To combat this problem, the European Investigation Order (EIO) was written to have "one or several specific investigative measure(s) carried out in the executing State with a view to gathering evidence."⁵²

The initiative consists of a number of provisions for investigative measures including the temporary transfer of individuals held in custody for the purpose of investigation and gathering evidence. It would involve a number of mutual recognition instruments, bringing cross-border investigative procedures to a comparative collaborative level with the EAW.⁵³ Designed to accommodate a Europe with far more mobility of people, the EIO and the EAW are meant to work collaboratively to meet cross-border investigation and prosecution needs while attempting mutual recognition and equality amongst the legal and judicial systems of the various EU Member States.

After the draft directive was put forward, the UK Secretary of State Theresa May delivered a statement in Parliament to the following effect:

"The Government have decided to opt into the EIO because it offers practical help for the British police and prosecutors, and we are determined to do everything we can to help them cut crime and deliver justice. That is what the police say the EIO will do..."

⁵⁰ "Proposal for a Directive of the European parliament and the Council regarding the European Investigation Order in criminal matters." Council of the European Union: Interinstitutional File: 2010/0817 (COD). 9145/10.

⁵¹ *Ibid*, paragraphs 3-4.

⁵² *Ibid*, paragraph 7.

⁵³ "Commission comments on proposed European Investigation Order in Criminal Matters." JUSR/B/1/AA-et D (2010) 6815. Paragraph 4.

...In justice and home affairs, there are many ideas coming out of Brussels, such as a common asylum policy, that would involve an unacceptable loss of sovereignty. I want to make it absolutely clear to the House that I will not sign up to those proposals, and I have made that clear to my European counterparts. However, the EIO directive does not incur a shift in sovereignty. It is a practical measure that will make it easier to see justice-British justice- done in this country.

...The EIO will allow us to fight crime and deliver justice more effectively. It does not amount to a loss of sovereignty. It will not unduly burden the police. It will not incur a loss of civil liberties. It is in the national interest to sign up to it, and I comment this statement to the House."⁵⁴

⁵⁴ Hansard HC vol. 514 Col. 881-882 (27 July 2010).

Conclusion

The EAW fundamentally alters the expectations of a British citizen when he encounters with the Criminal Justice System. At the request of other Judges, the UK Government is indeed obliged to export its citizens to face the charges which may not even be a crime in the UK. As we all saw some examples above with regard to the legality of actions in one country and the illegality of the same in another proves this EAW to be a difficult one to be dealt with.

The concept of EAW is fundamentally incompatible with the systems of Justice with, which Britain has prided herself over the generations. The EAW should be issued for serious crimes and not for the petty or trivial ones. As of now, EAW is being issued regardless of the gravity of the crimes, whether being petty or grave. The people can be locked up in prison without a pre-trial for ages and problems arise when the person accused of the crime is proved to be innocent. The case studies show that innocent people were locked up in prison and were tortured without a trial or any charge against them, completely overriding the liberties of the British citizen which were guaranteed in the Magna Carta and the Habeas corpus.

The disproportionate impact of extradition for the acts or omissions which are not offences in the UK will raise concerns over the plan of abolition of the rule of 'double criminality'. The seven Member States, Austria, Bulgaria, Belgium, Estonia, Slovenia, Spain and Sweden, put forward a proposal for a Directive of the European Parliament and the Council regarding the European Investigation Order in criminal matters. This proposal is meant to replace the existing legal framework for gathering and transferring evidence between the different Member States. The EIO and EAW are meant to work collaboratively to meet cross-border investigation and prosecution needs while attempting mutual recognition and equality amongst the legal and judicial systems of the various EU Member States.

However, it is entirely possible that the EAW system can continue to be an important tool provided the EAW doesn't override the principles of proportionality and respects the rights and liberties of the individuals' extradited. In order for this to happen, the EU has to improve the Fair Trial System to avoid unnecessary pre-trial detention and to ensure that States are conferred the power to defer a person's extradition if the country requesting it is not prepared for starting the trial.

The pre-Lisbon treaty stated that "any action by the community shall not go beyond what is necessary to achieve the objectives of the Treaty". But in its application for extraditions it is so vivid that the Treaty has gone far beyond its proportionality. The "European Arrest Warrant should not be issued mechanically, or automatically, for crimes that are not very serious such as bicycle theft. The national governments need to build up trust between their judicial systems so that the European arrest warrant works even more efficiently".

Prime importance should be given to fair trial because the European Arrest Warrant fundamentally alters the rights and freedoms which are supposed to be expected in the justice systems. The EAW overrides the Principle of Reciprocity and also the Principle of Proportionality.

In conclusion, a dichotomy between justice and security needs to be bridged through a reformation of the extradition agreement in order to protect the interests, rights and liberties of UK citizens.

It is widely recognised that the first duty of any Government is to provide security to its country and her citizens to provide the space for civil society to grow and so defence mechanisms become the first priority. As such, safeguards to its subjects by protecting and maintaining integrity and providing security to its citizens are of utmost importance. The UK Government is no different and its paramount priority is to protect the citizens by providing the freedoms and protections under the law, which have long been cherished by British Citizens. Thus, bringing reformation to the Extradition Agreements would be a welcome and necessary demonstration of the British Government's allegiance towards its citizens.

Where next for the European Arrest Warrant?

While talking about the Principle of Judicial Reciprocity, an order by a Judge of another court in the EU must be considered or given the same weight as that of the British Judge. But the rule of double criminality has never been seriously contested. The laws of one State might differ from the other and an act which is legal in one State could become illegal in another State. So the laws of both states should be taken into consideration before issuing an arrest warrant. The issue of people being held without trial or charges is totally unacceptable and innocent individuals might become the victims of this atrocity. The case studies of EAW give an insight into what can happen when the EAW goes wrong. So a reformation on the extradition Agreement is unavoidable to protect the interests, rights and liberties of the UK citizens.

When the EAW is issued, the preliminary investigation could be done by the authority of the country receiving the application to establish the basis and stage of any investigation. Setting up a European Union specialised agency for this investigation can rapidly reduce the quantity of applications. The SOCA just certifies the EAW and the arrest of the individual will take place. It could assess whether the application for arrest is for a trivial matter or if the alleged offender is really the real offender in the particular case. This would reduce the chance of illegal detention (detaining people without any trial or any charges against them) and unwanted extradition of innocent people to other countries. Punishment for a crime is very important, at the same time the rights of the person should be taken into consideration. Some of the

case studies show that the offenders were treated badly, beaten and tortured. His human rights were being violated in all these cases. Detaining without proper evidence and proper charges is also a human rights issue. The legal principle that I remember at this juncture is that, no one is guilty until he/she is proved to be guilty. Everyone should be considered innocent until they are proved guilty. An accused shall always have the right to defend him/her and all the rights should be granted.

This EAW is a matter of importance among the European Member States, which is an international matter limited within the European Member States. An International court of Justice could be opted to conduct the trial of the people from two different countries since the ICJ is a World court. Fair trial and the human rights factor will all be covered in the ICJ considering the other European Courts, which follows the law of their country which would sometimes prove the legal action of one country to be wrong in theirs.

It is hard to reach any conclusion other than that the EAW and its operation is in need of fundamental reform if it is to have both the legitimacy and acceptance that Britain's own systems have taken for granted. Without such reform it should not stand.

About the Author

Conor Burns was elected as the Member of Parliament (MP) for Bournemouth West at the 2010 general election. Educated at St Columba's College in St Albans he went on to read Modern History and Politics at the University of Southampton where he served as chairman of the University's Conservative Association. He served as a Member of Southampton City Council from 1999 to 2001. Conor contested the Eastleigh constituency in the 2001 and 2005 general elections. After his election to Parliament he served briefly on the Education Select Committee before being appointed Parliamentary Private Secretary to Hugo Swire, the Minister of State at the Northern Ireland Office in August 2010. The following year he was appointed PPS to the Rt Hon Owen Patterson the Secretary of State for Northern Ireland. Before entering Parliament he held a number of jobs in the communications and finance sectors.

About Big Brother Watch

Big Brother Watch was set up to challenge policies that threaten our privacy, our freedoms and our civil liberties, and to expose the true scale of the surveillance state.

Founded in 2009, we have produced unique research exposing the erosion of civil liberties in the UK, looking at the dramatic expansion of surveillance powers, the growth of the database state and the misuse of personal information.

We campaign to give individuals more control over their personal data, and hold to account those who fail to respect our privacy, whether private companies, government departments or local authorities.

Protecting individual privacy and defending civil liberties, Big Brother Watch is a campaign group for the digital age.

If you are a journalist and you would like to contact Big Brother Watch, including outside office hours, please call +44 (0) 7505 448925 (24hrs). You can also email press@bigbrotherwatch.org.uk for written enquiries.

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