

# FAIR TRIALS INTERNATIONAL

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## **LEGAL EXPERTS ADVISORY PANEL *EXTRADITION AND THE EUROPEAN ARREST WARRANT***

**Meeting held on 15 May 2009**

**Draft Minutes**

**Supported by:**



Criminal Justice 2008

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European Commission – Directorate-General Justice, Freedom and Security

**Draft Minutes**  
**Legal Experts Advisory Panel Meeting held on 15 May 2009**

**Attendance**

FTI Trustees

HH Dennis Levy QC (LEAP Chair) ("DL")  
Peter Lipscomb OBE (FTI Chair) (attended for part of the proceedings)

LEAP Members

Dinko Kanchev (BG) ("DK")  
Jonathan Mitchell (UK) ("JM")  
Matthew Pinches (UK) ("MP")  
Jodie Blackstock (UK) ("JB")  
Georgios Pyromallis (GR) ("GP")  
Wouter van Ballegooij (NL) ("WvB")  
Dr. Marianne Wade (GER) ("MW")  
Dianne-Olivia Hatneanu (ROM) ("DOH")  
Annalisa Angieri (IT) ("AA") ASF-I  
Luca Piterri (IT) ("LP") ASF-I

FTI Staff

Jago Russell (Chief Executive) ("JR")  
Wafa Shah (Policy Assistant) ("WS")  
Gavin Sullivan (Legal Caseworker) ("GS")

Additional Guests

John Jones (UK) ("JJ")  
Michiel Pestman (NET) ("MPe")

Apologies

Oliver Wallasch  
Aileen McColgan

**Welcome**

1. DL welcomed members to the second meeting of FTI's the Legal Experts Advisory Panel ("LEAP"). He provided a brief overview of FTI, explaining that it is a small London-based charity that works for fair trials based on international standards of justice and defends the rights of those facing charges in a country other than their own. He informed the members that JR would be facilitating the proceedings of the meeting.
2. JR explained that the purpose of LEAP is to enable FTI to derive policy expertise to inform the work of FTI. He explained that FTI has not had an opportunity to have a LEAP meeting sooner because of delays in finalizing funding for meetings and significant staff changes at FTI. He also explained that the topic for this meeting, the European Arrest Warrant ('EAW') and Extradition, was chosen as it is so closely linked to FTI's work. Members were then invited to introduce themselves to the rest of the panel.
3. The minutes of the first LEAP meeting in June 2008 were then considered. No objections were raised and the minutes were approved.
4. Given the considerable scope of the subject, it was agreed to move straight to a discussion of the human rights considerations which arise out of the implementation of the EAW. It was further

agreed that discussion of the principles underlying extradition law would come up during the course of the day.

**Item 1: Human rights considerations which arise out of the implementation of the EAW**

5. JJ was invited to talk about the implementation of the EAW in the UK and to open the discussion on the human rights implications of the EAW by outlining the Andrew Symeou case (on which both he and FTI are working). In particular he discussed the procedure for deciding on EAW requests under UK law, the very limited basis on which requests could be challenged and the very limited bars to extradition. It was noted that the key concept of EAW is mutual trust and cooperation between states. This is a departure from the traditional attitudes to extradition in the UK. In the past extradition was thought of as something exceptional and regarded with suspicion by the UK to its legal tradition and culture. After the implementation of the EAW scheme the situation has changed so that it is now practically 'extradition on demand'. It is therefore very hard in practice to get someone discharged.
6. Discussion: Following the presentation, LEAP members discussed the prospects of challenging an EAW request within their own jurisdiction and shared some of the concerns which arose out of the implementation of the EAW:
  - a) **The Netherlands** (MPe and WvB)
    - i. There is no possibility of an appeal against the initial decision and no possibility of judicial review. 95% of EAWs lead to surrender. It was noted that there is perhaps no other country in the EU has only granted one court competence over the EAW scheme and has denied requested persons the right to appeal a decision to extradite.
    - ii. The prosecutor has the authority to prevent extradition in cases where the offence partially took place on the territory of the Netherlands, but this power is rarely exercised;
    - iii. The Dutch courts are restrictive in their interpretation and application of the grounds for refusal of EAWs. The Dutch government is proactive about human rights and the need for EAWs to respect the principle of proportionality. However, judicial discretion to refuse to surrender under these grounds has been limited by the case law of the Dutch Supreme Court.
  - b) **Bulgaria** (DK) -
    - i. In Bulgaria the EAW scheme has been implemented by the Extradition and EAW Act 2005.
    - ii. Under the Bulgarian implementing legislation, requested persons have the right to appeal a decision to extradite.
    - iii. There are 29 regions in Bulgaria. The first EAW hearing is held in a regional court. The Court of Appeal acts as a court of second instance.
    - iv. The Bulgarian implementing legislation also requires a Bulgarian translation of the documents related to a case and the EAW itself. The absence of translated documents is grounds for releasing a person, but does not form grounds for refusing to surrender a requested person.

- v. Bulgarian courts tend to trust the courts of other countries. There is therefore a presumption that all EAWs are issued in compliance with international human rights requirements. Bulgarian courts therefore refuse to consider even well-founded objections on the basis of human rights.
- vi. In Bulgaria special laws trump general laws. The Bulgarian courts consider the EAW as special law which takes priority over the ECHR.
- vii. In Bulgaria detention automatically follows an EAW pending extradition. The requested person has a right to challenge detention.

The Bulgarian implementing Act is almost a verbatim reproduction of the framework decision. It is translated like a novel not a legal text. This has created a number of ambiguities which have led to cases within Bulgarian courts. However, the courts have failed to comment on these linguistic ambiguities.

c) **Romania (DOH) -**

- i. Romania became a member of the EU in 2007. However police were apprehending people subject to EAWs before accession. This formed a ground for the invalidity of EAWs issued before Romania's accession.
- ii. Romania faced similar problems to Bulgaria in translating the Framework Decision on the EAW.
- iii. It is understandable that most EAW requests come from eastern Europe. The justification for this is that in eastern European countries have very tough criminal justice policies. Theft is always considered a very serious offence and the penalty for theft is often three years imprisonment. Offences that look petty to other EU countries are often considered very serious in eastern Europe.

7. Other concerns expressed by members and matters raised for discussion:

- a) Further Research - All panel members agreed that it was important to support research into the fate of requested persons after they had been surrendered under an EAW. MW noted that a study conducted in the Netherlands by EuroMoS revealed that around 50% of persons surrendered to Belgium under the EAW were returned to The Netherlands without charge. This was evidence that the EAW scheme was not as successful as previously considered and that it was, in fact, being used to secure people for questioning.
- b) Discrimination – DOH was concerned that the variation in criminal justice policies across the EU could give rise to a form of discrimination in the implementation of the EAW.
- c) Compensation - Members raised the issue of compensation for time spent in custody pending the completion of proceedings relating to an EAW which does not lead to a charge. It was agreed that further research on methods to compensate requested persons should be conducted. It was also agreed that there was a need for common rules about compensation.

- d) Geographic reach of the EAW Scheme - It was noted that it was worrying that the EAW scheme applied in more countries than the number of countries which have ratified the Schengen Treaty. This has meant that the benefits of free movement have not reached all those people who are now subject to this simplified, fast-track extradition system.
- e) The use of EAWs for petty offences - It was noted that prosecutorial discretion was not exercised in some EU Member States, which may be one of the reasons behind the use of the EAW scheme to prosecute petty offences.
  - i. It was noted that in England and Wales the Crown Prosecution Service applies two tests before deciding to prosecute. The first is that there should be a *realistic prospect of conviction* and the second is that prosecution should be in *the public interest*;
  - ii. It was noted that some countries allowed prosecutors to drop cases when it is difficult to find suspects and for a limited number of other reasons;
  - iii. It was suggested that the ease with which the EAW scheme allowed prosecuting authorities to trace suspects may have meant that prosecuting authorities in some Member States find it easier to use the resources of another country to find suspects than to find people within their own country. This may have contributed to the increased use of EAWs for less serious offences in order to bolster conviction rates;
  - iv. All members agreed that the use of EAWs for petty offences undermined the integrity of the EAW scheme.
- f) Legal Aid:
  - i. It was agreed that the EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. One of the matters discussed by members was whether the duty to provide legal aid for persons requested under the EAW lay with the requesting state. It was agreed that, if the duty to provide legal aid was placed on the requesting state, the EAW scheme may gradually only be used for more serious offences, due to the financial implications of issuing EAWs for minor offences.
  - ii. Most members agreed that persons subject to a EAW should have access to a lawyers in the requesting state and in the executing state.
- g) Cost of EAW proceedings:
  - i. Members suggested that requiring the requesting state to bear the financial burdens with respect to an EAW (including the costs of subsequent transfers) would operate as an effective disincentive against requesting extradition for petty offences.
  - ii. It was suggested that it would be useful to request information about the costs to member states of implementing the EAW system.

## Item 2: Andrew Symeou Case

10. JJ gave an overview of the facts of Andrew Symeou's Case. A EAW for Mr Symeou was issued in June 2008 and extradition was ordered in October 2008. Mr Symeou's defence alleges that there is clear evidence demonstrating police misconduct during the investigation of the case. The defence is arguing that Mr Symeou should not be surrendered to Greece as upholding an EAW in his case would constitute an abuse of process. There was a general consensus amongst UK LEAP members that the UK courts should be allowed to refuse extradition when there is evidence of police misconduct during the course of an investigation which leads to an EAW being issued. LEAP members from other jurisdictions agreed that if Andrew Symeou was challenging the decision to extradite him in any other EU Member State, he would not be successful.

### 11. Other concerns expressed by members and matters raised for discussion:

- a) Legality of the principle of mutual recognition: One member questioned whether the principle of mutual recognition was a legal or a political concept and stated that courts should not be addressing the principle of mutual recognition if it is a purely political concept. However, LEAP Members generally agreed that the principle of mutual recognition was a legal concept as it had a legal basis in the Framework Decision on the EAW.
- b) Role of the courts in the EAW scheme: Some members expressed concerns that the EAW scheme was, in practice, an administrative rather than legal procedure. The role of the courts and lawyers was very restricted in practice.
- c) The Rule of Law: It was agreed that the EAW was never designed to undermine the rule of law and that it should therefore operate within a rule of law framework. In particular, it was noted that the courts are in the executing state to ensure that injustice is not created by the EAW scheme.
- d) Interlocutory hearings: One member suggested that an interlocutory hearing to determine the most appropriate forum of for a trial should be incorporated into the EAW scheme.
- e) Appeals: Members agreed that all EU Member states should allow requested persons the right to appeal a decision to surrender a person subject to a EAW. Implementing legislation in states must incorporate such a right, despite the fact that it is not guaranteed within the Framework Decision for the EAW.
- f) Costs: It was agreed that bearing the costs of transporting lawyers, witnesses, victims and defendants to the requesting states could constitute a huge financial burden on the requesting state. However, the obligation to meet these costs, if imposed on the requesting state, could alter prosecutorial policy in requesting states.
- g) Review of the EAW Scheme: JB informed members that the European Commission was planning to review the EAW scheme. She suggested LEAP forms a coalition to make submissions in relation to this review.

### Item 3: Removal of EAW alerts

12. JR opened the discussion with an overview of the facts of one of FTI's cases which raised the issue of the inability to remove EAW alerts from the SIS system, Interpol or Eurojust. In that case the courts in two EU member states had refused to surrender FTI's client due to an unreasonable lapse of time in requesting her extradition (20 years since her arrest). A number of other LEAP members discussed their experience of similar cases. MPe discussed a case in the Netherlands in which the Dutch courts had made an order requiring an EAW issued by Spain to be removed. Despite this, the Spanish authorities had not removed the warrant. MP spoke about Prisoners Abroad's experience of cases where an EAW remains live even after a person has served their sentence in the requesting state.
13. It was agreed that there is also no clear means of resolving disputes between states in relation to the removal of an alert or the withdrawal of a warrant. The result of this is unreasonable restrictions on a person's freedom to travel within the EU, making them prisoners within their own country. It was noted that the principle of mutual recognition does not apply to decisions taken by courts to refuse to grant extradition in the same way as it applies to decisions which lead to an EAW request.
14. Discussion:
  - i. There is a system to correct and apply for information held on the Schengen Information System ('SIS') to be altered under s. 110 of the Schengen Treaty. In practice however, this is not enough and simplified rules to remove alerts are necessary. In particular, the person concerned must seek relief from the courts in his/her home country while the only country which can remove the alert is the requesting state. The panel agreed that there was not enough information available to requested persons regarding the removal of arrest warrants.
  - ii. The panel discussed whether there should be a responsibility on the requesting state to remove an arrest warrant after a trial has concluded, a sentence has been served and after an executing state refuses to surrender a person. It was the general consensus that there should be such a duty on the requesting state.
  - iii. LEAP members were asked to consider whether there should be a responsibility on the requesting state to remove an arrest warrant after an executing country refuses to surrender a person requested under an EAW on general grounds. LEAP members agreed that the principle of mutual recognition should also extend to freedom enhancing decisions and therefore decisions taken by executing states not to surrender should be duly recognized by other member states. It was, however, agreed that identifying these general grounds would be a major challenge.
  - iv. Members of LEAP agreed that FTI should lobby individual countries to ensure a better system to remove EAW alerts is devised and rules to determine when a country must withdraw a EAW are formulated. Means to disseminate this information amongst requested persons must also be provided.
  - v. It was agreed that the best means of improving the system was through a test case in the ECJ as the existence of continuing EAW alerts constituted an unjustified restriction of the freedom of movement of an effected person. It was further agreed that a coordinated approach to litigation would be beneficial and it was proposed that a paper is circulated to NGOs within Europe to ensure that an appropriate case, if identified, makes it all the way to the ECJ.

- vi. LEAP members were of the opinion that there would not be much political opposition to improving the system of EAW alerts, therefore it was imperative that the issue received sufficient attention during the Stockholm Program and the European Commission's review of the EAW scheme.

#### **Item 4: Constitutional challenges to the implementation of the EAW Scheme.**

15. MW gave an overview of the cases in German, Polish, Czech and Cypriot Constitutional Courts regarding the constitutionality of the domestic legislation implementing the Framework Decision on the EAW in these countries. She stated that the debate about the status of the Framework Decision in the constitutional hierarchy of the EU has been reinvigorated by a new case in Germany which has led to the German Federal Court refusing to extradite a person subject to an EAW as a German Statute of Limitation barred prosecution for the offence which formed the subject of the EAW. She raised the following questions to start the discussion:

- a) What is the status of the Framework Decision on the EAW in the EU constitutional order and the constitutional order of the member states?
- b) Do we apply the Framework Decision on the EAW in the way that *Pupino* recommends or do the constitutions of member states take priority?

16. Discussion:

- a) The panel agreed that courts in member states have been reluctant to make a conclusive determination on the status of the Framework Decision on the EAW in the constitutional hierarchy of the EU and national jurisdictions.
- b) It was noted that the Italian implementing legislation included a number of variations to the Framework Decision on the EAW in order preemptively to address any conflicts with the Italian constitution.
- c) Some LEAP members were of the opinion that member states did not intend to create a Framework Decision which took precedence over their own national constitutions.
- d) The principle of proportionality, respect for the rule of law and other concepts which formed the primary core of the EU constitution and EU law, have always taken precedence over the Framework Decision of the EAW. The EAW scheme must therefore respect these superior constitutional principles. Courts in national jurisdictions must be reminded of this in order to ensure that the three pillars of the European Constitutional order do not collapse. It was suggested that it would be useful to provide a handbook for criminal lawyers, which would include constitutional arguments which could be used in relation to EAW cases.
- e) It was agreed that an amendment to the Framework Decision on the EAW is possible, but may be unrealistic in the near future. It was therefore suggested that the program to introduce minimum procedural rights across the EU could be used as a tool to promote the rights which should have been guaranteed to persons subject to EAWs in the Framework Decision on the EAW. Some panel members expressed cynicism about the likelihood of a successful program to ensure minimum standards in procedural rights across the EU. It was agreed that strengthening procedural rights within the EU would not be the complete solution to all of the problems with the EAW scheme.



- f) One member was concerned that an amendment to the Framework Decision on the EAW was unrealistic. LEAP should therefore also focus its energies to ensure the European Evidence Warrant does not replicate the shortcoming of the EAW.
- g) The role and effectiveness of the European Commission's Justice Forum was then discussed. Concern was expressed that research produced by academics was not included in deliberations of the Justice Forum.

#### **Item 5: Other Matters**

17. LEAP members were asked to raise any matters relating to the EAW which they felt required more discussion. Use of EAWs in cases where this was disproportionate was identified as a key issue requiring further discussion.
- a) Panel members agreed that a European Arrest Warrant Handbook with a chapter on proportionality was not sufficient to ensure member states respected the principle of proportionality when issuing an EAW.
  - b) Panel members identified the following practical ways to ensure EAWs are only issued when it is proportionate in relation to the offence:
    - i. transferring the costs of litigation to the requesting state;
    - ii. providing compensation to individuals who have suffered a restriction to their freedom of movement under a EAW which did not lead to a charge;
    - iii. a proportionality check could be introduced in all member states; It should be the requesting country's duty to assess whether it is proportionate to issue an EAW and a test similar to the '*realistic prospect of success*' test used by the Crown Prosecution Service in the UK could be employed;
    - iv. There should be an explicit reference to proportionality in any amended version of the Framework Decision on the EAW. The Handbook should be amended to state that there is an obligation on member states to respect the principle of proportionality when issuing EAWs as respect for the principle of proportionality is already a part of EU law. Members expressed concerns about the first sentence of the chapter on proportionality in the handbook on the EAW which simply states that there is no proportionality requirement with respect to EAWs.

#### **Summary of Proceedings**

18. JR summarized provided a brief summary of the two key findings of the discussions:
- a) It is clear that there are human rights concerns associated with the EAW scheme.
  - b) Courts in member states have not been very effective in using the ECHR and their own constitutions to ensure these human rights concerns are addressed.
19. The most effective means of addressing these issues, identified during the day, were discussed:
- a) Campaign for change using cases like that of Andrew Symeou to raise public awareness about the shortcomings of the EAW scheme;
  - b) Coordinating with other NGOs around Europe to identify and publicise cases in their own jurisdictions which make change within the EAW scheme a politically compelling issue;

- c) Lobbying nationally and at an EU level to ensure the shortcomings of the EAW scheme, as identified in this meeting, become more than a concern for lawyers and academics and become a political concern as well;
- d) Research investigating what happens to individuals once an EAW has been executed must be supported;
- e) Political support should be mobilised to ensure a clearer scheme for removing EAW alerts is devised and information about current methods to remove EAW alerts is made available to persons subject to an EAW alert.

20. Practical means to address some of the problems associated with the EAW scheme identified by the panel were as follows:

- a) The duty to bear some financial costs for litigation and transport should be transferred to the executing state;
- b) Distribution of costs relating to surrender should be included as an amendment to the Framework Decision on the EAW or should form the subject of bilateral agreements between states. However, some panel members voiced concern about the utility and fairness of such bilateral agreements due to the inequality of the bargaining position between member states;
- c) Compensation schemes should be formulated for individuals who have either been detained pending a EAW or have suffered a restriction in their freedom of movement under the EAW scheme;
- d) Legal aid should be made available for requested persons. It was the general view that if governments are made to bear the burden of EAW litigation they may automatically revert to the principle of proportionality to ensure a EAW is only issued for deserving cases.

21. Panel members added the following points to the summary:

- a) Requested persons should have a right to a defence lawyer in both the requesting state and the executing state;
- b) Training should be provided to defence lawyers to enable to make use of the new processes of European judicial cooperation and to enable them to use EU constitutional principles to challenge EAWs;
- c) Common European standards of minimum procedural defence rights will not eradicate all the problems associated with the EAW scheme; nonetheless proposals for a Framework Decision on Minimum Procedural Rights should be supported by members of the panel;
- d) It is clear that courts in the executing state should be able fully to consider whether the execution of an EAW would constitute an abuse of process.

### **Item 6: Membership of LEAP**

22. Although the attendance at the meeting, and the level of knowledge and experience were agreed to be very good, it was agreed that membership should be extended to around 50 academics, lawyers and NGOs. It is hoped that from this total pool of 50 members approximately 12 to 15 members would be available at any one time for a meeting, depending upon their expertise and the topics to be covered at each meeting.
23. Members were asked to send recommendations for new members to Wafa Shah at FTI. Panel members were informed that not all of those recommended would be able to join LEAP as the aim of expansion is to have a balanced representation in terms of geographical spread and expertise, and not to develop an enormous membership.

### **Item 7: The next LEAP meeting**

24. JR stated FTI would aim to convene three LEAP meetings each year. It was agreed that Friday was a good day for meetings. Members would be emailed with proposed dates for the next meeting, which would probably be held in September 2009.
25. Topics for consideration at future meetings were discussed:
  - a) JM suggested that it might be useful for LEAP to discuss developments in legal aid in early 2010 following the pilot projects being done in this area by the European Criminal Bar Association.
  - b) Interpretation and translation: It was agreed that this may be a useful topic to discuss at the next meeting as it would fit in with the plans of the Swedish Presidency to address interpretation and translation as the first right in its programme to promote minimum standards in procedural rights across the EU.
  - c) There was general consensus that discrimination against non-national defendants this would be an interesting topic to address.
  - d) It was considered that it would be useful to touch on the issues of bail for non-nationals and trials in absentia in future meetings.
  - e) The panel members agreed a meeting on policy matters which arose after the unveiling of the Stockholm Programme could form an excellent topic for a future meeting.
26. It was agreed that FTI would consider these proposals and inform members of the topic identified for the next meeting. Further ideas were also welcomed and should be emailed to Wafa Shah at FTI (wafa.shah@fairtrials.net)

### **Close**

27. DL thanked the panel members for attending the meeting. It was agreed that minutes and a final paper on the content of the discussions would be sent to all members within three weeks.
28. DL expressed thanks:
  - a) From all those present to Freshfields for the admirable conference room and refreshments provided for the Meeting;

- b) To all those present for attending, especially to LEAP delegates who had travelled from long distances;
- c) To JJ for delivering his paper;
- d) To WS for preparing the papers circulated prior to the meeting and for taking notes of the Meeting; and
- e) To JR for all he has achieved to FTI since he became C.E.O and for facilitating the proceedings so skillfully.