FAIR TRIALS INTERNATIONAL

Submission

Sub-Committee E (Justice, Institutions and Consumer Protection) and Sub-Committee F (Home Affairs, Health and Education) of the House of Lords Select Committee on the European Union

Inquiry into the UK's 2014 Opt-out Decision (Protocol 36)

14 December 2012

About Fair Trials International

Fair Trials International (**Fair Trials**) is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice and provides advice and assistance to people arrested across the globe. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our law reform work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights.

Fair Trials is particularly active in the field of EU criminal justice policy. We work closely with the European Commission and Members of the European Parliament to develop measures to protect basic defence rights so that every person suspected or accused of a criminal offence in Europe receives a fair trial.

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Context of this inquiry

1. Fair Trials has long been active in the field of EU criminal justice policy through our 'Justice in Europe' campaign, which calls on Europe to work together to improve protection for basic fair trial rights. We are working closely with the European Commission and Members of the European Parliament to develop strong legal measures to safeguard the defence rights of people suspected or accused of a criminal offence in Europe. We have also worked to build consensus on the need for reforms to end unnecessary and unjust pre-trial detention in the EU and to improve the operation of existing and proposed judicial cooperation measures, including the European Arrest Warrant and European Investigation Order. This work is informed by our Legal Experts Advisory Panel, a network of almost 100 experts in criminal justice and human rights from 24 Member States.

2. Fair Trials welcomes this opportunity to present its views on the UK's 2014 opt-out decision (Protocol 36) to the Justice, Institutions and Consumer Protection and the Home Affairs, Health and Education Sub-Committees of the House of Lords Select Committee on the European Union. The issues raised are complex, but important for the millions of British citizens who live, travel and work in EU countries. The inquiry is an opportunity to bring clarity and coherence to the politically divisive issues that the opt-out decision raises. In July 2012, Fair Trials published a Q&A on the UK's 2014 opt-out decision, with the aim of explaining the key issues in simple terms and setting out Fair Trials' position (See **Annex 1**).[1]

3. We do not consider this to be an "all or nothing" decision as it has sometimes been portrayed. First, a full opt-out from all EU laws on crime and policing is not possible. Even if the UK decides to opt out of all EU laws adopted pre-Lisbon, it will still be bound by laws it has opted into since. These include the directives on the right to interpretation and translation and on the right to information in criminal proceedings. Secondly, the provisions of Protocol 36 make it likely that the UK could decide to opt out and then opt back in to certain measures.[2]

4. The Home Secretary has stated that the Government's current thinking is that the UK will opt out of all the pre-Lisbon measures and negotiate to opt back in to individual measures that it is in the national interest to re-join.[3] It has undertaken to facilitate a debate and vote in each House of Parliament before a decision is made, although it is not yet clear what form this vote will take. Given this approach, the main focus of this submission is on whether the UK Government should select to opt back into the European Arrest Warrant (**EAW**) in its current form.

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[1] The Q&A is also available at http://www.fairtrials.net/wp-content/uploads/2012/09/Fair Trials2014opt-outJuly2012.pdf

[2] For commentary on this point see e.g. Steve Peers, "The UK's planned 'block opt-out' from EU justice and policing measures in 2014", Statewatch analysis 2012, available at http://www.statewatch.org/analyses/no-199-uk-opt-out.pdf : `The UK has the option, 'at any time afterwards', of notifying its wish to opt back in to the pre-Lisbon third pillar acts which 'have ceased to apply to it' (Article 10(5)). (...)it should be emphasised at the outset that in the large majority of cases, the UK will not need the consent of other Member States to opt back in to these acts.'

[3] Announcement by Theresa May in the House of Commons, 15 October 2012, available at http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121015/debtext/121015-0001.htm#1210154000006 (Column 35)

European Arrest Warrant

5. UK police and law enforcement authorities have made it clear that they want to remain a part of the EAW system.[4] They have highlighted how the EAW has speeded up the extradition procedure, meaning that extradition requests issued by the UK to other EU Member States are dealt with quickly. They have also highlighted that it has facilitated the swift removal from the UK of people suspected or convicted of criminal offences in other EU countries to stand trial or serve their sentences.

6. Opting out of the EAW would mean that the UK's extradition arrangements with other EU countries would be governed by the Council of Europe's Convention on Extradition.[5] Extraditions between the UK and Council of Europe members (as well as other signatories to the Convention, like the United States) who are not part of the EU currently take place within the framework of this treaty. All Member States are a party to it, but the system is different and it is a slower procedure than the EAW. Despite this, we believe that other Member States will continue to wish to engage in effective extradition arrangements with the UK, whether or not we remain a part of the EAW system.[6]

7. Fair Trials fully accepts the need for a fair and effective system of extradition within the EU. In an EU without borders, effective justice policy depends on efficient cooperation in transnational cases. However, we see numerous cases of injustice resulting from the overly rigid nature of the EAW system and its inability to safeguard fundamental rights and the principle of proportionality. See **Annex 2** for some examples of these cases.

8. There is now widespread recognition of the need to reform the EAW. There have been three inquiries into the UK's extradition laws in the UK and concrete reforms to the EAW Framework Decision have been recommended.[7] In June 2011, MEPs held a plenary debate on EAW reform in the European Parliament. Action to address the problems with the EAW Framework Decision was supported by MEPs from a wide political base and demonstrated a growing consensus on key areas for reform. The Commission has also expressed its concerns, acknowledging that there is "considerable room for improvement in the operation of the EAW system."[8]

9. As well as reform to the UK's own implementing legislation, the Extradition Act 2003, there are a number of amendments required to the Framework Decision and we recommend the following:[9]

[4] See for example remarks by Bill Hughes CBE QPM, Former Director-General of the Serious Organised Crime Agency, at the Law Society on 29 November 2012
[5] Council of Europe Convention on Extradition, Paris, 13.XII.1957 available at http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm
[6] In 2011 for example, the UK received 6,760 EAWs from other Member States and surrendered 999 people (Council of the European Union Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2011)
[7] The Scott Baker Review reported October 2011, the Joint Committee on Human Rights reported in June 2011 and the Home Affairs Committee reported in March 2012.
[8] Letter from Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship to Fair Trials International,19 November 2010.
[9] For Fair Trials' recommendations for reform of the Extradition Act 2003 see our submission to the Extradition Review Panel, available at http://www.fairtrials.net/documents/FTI_submission_to_the_extradition_review_panel.pdf

Proportionality: A proportionality test should be introduced. Fair Trials sees numerous cases of extradition requests for minor offences and where the circumstances of the suspects and their families make the effect of extradition disproportionate.

Protection of fundamental rights: Courts in executing states should be given a greater opportunity, when alerted to a real risk of rights infringements, to seek further information and guarantees from the issuing state (and, ultimately, the power to refuse surrender if their concerns are not satisfactorily dealt with).

Removal of warrants: The Framework Decision should be amended to require states to remove an EAW where this has been properly refused by an executing authority. The lack of remedies available to people in this position, who risk re-arrest and imprisonment each time they cross an EU border and are therefore virtual prisoners in their home state, is unacceptable.

Deferred extradition should be permitted where a case is not "trial ready". Fair Trials sees numerous cases where people are extradited under an EAW before any decision has been made to prosecute and are then held for months in prison under extremely difficult conditions awaiting trial. Fair Trials also hopes that greater use will be made of the European Supervision Order to address this problem.

10. We hope that the UK will lead the growing calls for sensible reforms to the EAW system in Europe. Given the severe human impact of unjust extradition, we do not believe that the UK should opt into the EAW in its current form. From 2014, the European Commission will have important powers to take the action needed to ensure that Member States comply with the EAW. Sensible reform now would ensure Member States could not be subject to such proceedings if their national law allows for a higher level of protection of basic rights than the EAW Framework Decision.[10] We welcome the Home Secretary's announcement that the Government will seek to work with the European Commission and EU Member States to consider which changes should be made to the EAW.[11]

11. The EAW has been operating now for eight years and it would be the sign of a mature law-maker to review the legislation and introduce changes to address problems. This could be achieved by a legislative proposal from the Commission or through amendments to the Framework Decision initiated by Member States.[12] We believe that the EU Court could also provide the legal certainty needed as to the human rights considerations which Member States must take into account when operating the EAW. The recent Advocate-General Opinion in the *Radu* case, for example, if followed by the Court, provides much needed confirmation of the need for national courts to consider both proportionality and human rights issues in EAW cases.

[10] The UK implementing legislation, for example, contains a provision enabling the court to refuse to extradite where this would breach the requested person's human rights and German courts apply a proportionality test when deciding whether to extradite someone under an EAW. Neither of these refusal grounds is set out in the Framework Decision.
[11] Statement on extradition by Theresa May, 16 October 2012, available at http://www.homeoffice.gov.uk/media-centre/news/gary-mckinnon-extradition
[12] Under the Lisbon Treaty, the backing of seven Member States is needed to initiate legislation.

Defence rights in the EU

12. The mutual cooperation instruments introduced in an effort to create an "area of justice, freedom and security" within Europe are based on the principle of "mutual recognition". Mutual recognition means that if one EU country makes a decision (for example that a person must be extradited to face a criminal trial or serve a sentence), that decision will be respected and applied throughout the EU. However, mutual recognition instruments such as the EAW have demonstrated that there is not yet a sound basis for mutual trust, not least because basic fair trial rights are not adequately protected in many EU countries.

13. The number of prosecutorial measures that are part of the opt-out decision mean that it is vital that the level of mutual trust is increased. Sadly, until recently, the UK has done little to support EU initiatives in this area, preventing EU defence rights protections being passed under the Lisbon Treaty to accompany the EAW. This was a mistake and has contributed to the injustice caused by the EAW. The reforms brought about in the 1980s to police procedure and practice mean that the UK has excellent practice to contribute and there are clear benefits to us in ensuring that fair trial rights, taken for granted in the UK, are protected in every EU Member State.

14. In recognition of the fact that fair trial rights are not adequately safeguarded in many EU countries, the EU adopted the Roadmap on procedural defence rights (the **Roadmap**) in 2009. This gave a mandate for a series of laws designed to ensure better protection of defence rights in Europe. The first two laws under the Roadmap, guaranteeing the right to interpretation and translation in criminal proceedings and to information on arrest, have now been passed. The UK opted in to these laws, which as post-Lisbon measures will continue to bind it regardless of the 2014 decision. Disappointingly, the UK has chosen not to opt in to the third law under the Roadmap, which will provide the right for suspects to access a lawyer on arrest.

The European Supervision Order

15. We believe that the UK has also failed to implement the European Supervision Order (**ESO**), a Framework Decision passed under the Lisbon Treaty which was supposed to have been implemented by all Member States by 1st December 2012.[13] The ESO lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention. This could have a huge impact on people arrested abroad, who are often denied bail simply because they are non-nationals. Unless the ESO is implemented into UK law, it will not be available to the many British citizens who may spend months or years in foreign prison awaiting trial away from home, often in horrendous conditions.

16. The Government has attributed this failure to comply with its EU obligations to the fact that "the UK's future participation in those measures within the scope of the 2014

[13] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 2009 L 294, p. 20-40.

decision, which includes this measure, is still being considered."[14] The EU criminal justice system will not stand still for two years while the UK considers the opt-out decision. The ESO is an important measure, and it highlights the need to consider all 130 laws subject to the opt-out decision and not just those that assist prosecutors and law enforcement officers.

Jurisdiction of the Court of Justice of the European Union

17. Much has been made of the effect that the CJEU's expanded jurisdiction in 2014 will have on the UK if it were to remain a part of pre-Lisbon crime and policing laws. This topic was not covered in detail in our Q&A published in June.

18. Arguments have been made that 'the [CJEU] has a long history of extending the remit of the EU institutions through judicial activism' and that it has 'radically changed the meaning and scope of EU rules'.[15] Some fear that, due to an apparent failure of the Court to agree with Member States' submissions in a number of cases, the CJEU has an agenda that is alien to national legal systems and that this will force UK courts to apply laws in a manner that is not consistent with the statute books. There is a particular concern that the UK will be disproportionately affected by the CJEU's judgments due to its common law system.[16]

19. The Court's judgments provide little evidence to support these views. Many cases have in fact had a positive effect on both British citizens and on the national interest.[17] In the case of *Cowan,* for example, a British citizen subject to a violent assault on the Paris metro was able to claim compensation as a recipient of services, bringing about a change in French domestic law which had previously limited such claims to French nationals.[18] In cases involving criminal law, the Court has shown reluctance to interfere with Member States' domestic law.[19] In relation to the EAW, it has upheld provisions of national law in several cases.[20]

20. The CJEU is the EU's highest court. National courts refer questions to it on the validity and interpretation of EU laws and its rulings help to ensure laws are applied consistently

[14] Written response to Dominic Raab MP's question to the Secretary of State for Justice, HC Deb, 1 November 2012, c398W
[15] "Cooperation not Control: The Case for Britain Retaining Democratic Control over EU Crime and Policing Policy", Report for Open Europe 2012, available at http://www.openeurope.org.uk/Content/Documents/Pdfs/CooperationNotControl.pdf
[16] See e.g. Open Europe, "An unavoidable choice: More or less EU control over UK policing and criminal law", available at http://www.openeurope.org.uk/Content/Documents/PDFs/JHA2014choice.pdf
[17] See e.g. Case C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform*, judgment of 25 July 2008. The concept of direct effect has been instrumental in breaking down trade barriers within the EU and creating the internal market which has been of enormous benefit to the UK.
[18] Case C-186/87 *Ian William Cowan*, Judgment of 2.2.1989
[19] See for example Case C-507/10 X , judgment of 21 December 2011 and Case C-79/11 Maurizio Giovanardi and Others, judgment of 12 July 2012 concerning the interpretation of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings in which the CJEU defers considerably to the national legal systems of Member States.
[20] See e.g. Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, judgment of 3 May 2007, in which the CJEU agreed with the Member States that it was not contrary to the principle of legality for Article 2(2) of the EAW Framework Decision to abandon double criminality checks in respect of the Framework List offences. See also Case C-123/08 *Wolzenburg*, judgment of 6 October 2009, in which the Court found that the Dutch law laying down a five-year minimum residence requirement before a non-national could benefit from the protection offered by Article 4(6) EAW was justified.

by Member States throughout the EU. The Court's judgments can provide welcome clarity on provisions of EU law, as demonstrated by the *Radu* case. From December 2014, the CJEU will be able to hear references on EU crime and policing laws from all national courts.[21] The CJEU also enforces EU law by ruling on infringement actions brought against EU countries by the European Commission for failure to implement EU laws or apply them consistently with fundamental rights.[22] The UK courts have acknowledged the benefit of the role of the CJEU in this area. In a recent decision, a UK Supreme Court justice commented that the inability of the court to refer a question to the CJEU made it difficult to interpret unclear points of EU law.[23]

Recommendations and conclusions

21. Fair Trials recommends that the UK uses the 2014 decision as an opportunity to build on the growing consensus for reform of the EAW to create a fair and effective system of extradition within Europe. Unless these flaws are remedied by CJEU case law, we believe that the UK should not opt into the EAW without first securing political commitment to key reforms to the European legislation that created the EAW.

22. There is a danger that the opt-out decision will focus on picking and choosing those measures that are perceived to combat cross-border crime without building a sound basis for the trust needed to underpin mutual recognition measures like the EAW. Such measures will not operate fairly unless they are accompanied by effective guarantees of basic fair trial rights. The UK should play a constructive role in the ongoing debates on important procedural rights measures such as the directive on the right to access a lawyer. The UK should also implement the European Supervision Order, which could prevent Britons being detained for months or years pending trial in other EU Member States. These measures will guarantee respect for the rights of the thousands of Britons exercising their right of free movement across the EU every year.

23. Fair Trials welcomes the role that the CJEU can play both in improving the consistency of the application of EU law and ensuring that measures are applied in conformity with basic fair trial standards. The case-law shows that it can provide helpful interpretation on unclear points of EU law to ensure accurate and consistent implementation in all Member States. The UK has an excellent record of implementing and complying with EU measures, and it is important to recognise the benefits that the extended jurisdiction of the CJEU could bring, both to UK citizens and to the courts by enabling them to refer questions of interpretation.

Fair Trials International **December 2012**

[21] The UK and 8 other countries have blocked national courts from referring questions on pre-Lisbon EU crimes and policing laws until 2014. From December 2014, the countries will no longer be able to stop their courts making these references.
[22] The only exception will be for the UK and Ireland, for those EU laws that they have chosen not to participate in, or (in the UK's case) opted out of as part of the 2014 decision.
[23] *Assange v The Swedish Prosecution Authority*, [2012] UKSC 22, dissenting judgment of Lady Hale, paras. 179 and 185