

EU defence rights: how the system can be improved

by Jonathan Mitchell

An open discussion on EU defence rights was held at the Institute of Advanced Legal Studies on October 21, 2011, organised by the IALS, the University of Birmingham, the European Criminal Law Association (UK), Fair Trials International, and Justice. A starting point was to look at what has been happening with defence rights in the UK, and to contrast and compare that with what is happening elsewhere in Europe. This opening analysis prompted a number of questions. At home in the UK, is there in reality a right of silence; and could there be any real protection in the principle of “double jeopardy” if it could be overruled by courts and prosecutors “in the interests of justice”? Why did the Human Rights Act 1998 not contain the equivalent of Article 13 of the European Convention on Human Rights (ECHR) – the “right to an effective remedy”? Was the 800-year-old British legal system so perfect in every way that no such right was needed?

The UK seems to see itself as “a cut above” many EU Member States, but does the UK legal aid system still deliver fair and accessible justice to those who need help, or is a radical overhaul overdue? At least a person being investigated in the UK can secure access to a lawyer at any time, even before police questioning, unlike in many other EU states. Section 58 of the Police and Criminal Evidence Act 1984 provides:

“(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult with a solicitor privately at any time”.

As for Europe, the fast-track European Arrest Warrant (EAW) has trashed many defence rights (eg knowing what the case against you is). There is no ability with an EAW to check whether the case against you “qualifies” as a “criminal offence” for the purposes of the warrant. Other serious shortcomings include the fact that many courts interpret “trial” to include “investigation”, and many persons are extradited under the EAW procedure, not for trial, but so that the police and prosecutors in the requesting country can question the suspect before deciding which charge they should bring.

It was never intended that persons should be sent to another state where there was no charge in place for which a trial would not soon follow their arrival. The reason that those who love the EAW glory in its perfection and all it

stands for is that that it speeds up the process for everyone, including the defendant. In reality it greatly assists prosecutors so that they can speedily extract people from one country to another not for the purpose of providing defendants with a speedy trial, but to gain unfair procedural advantages at the expense of the defendants, who far too often languish for years in prison while prosecutors are still making up their minds which charges to bring. The EAW procedure has become a “rubber-stamping” procedure where rights play little part.

Even in cases where Article 8 of the European Convention on Human Rights (ECHR) is invoked in EAW proceedings, there is no clear picture of the principles, standards, or levels of difficulty that courts should apply to prevent extradition.

SUBSTANCE OF THE SPEECHES AND DEBATE

The event was chaired by the author, and featured an introduction from Dr Simone White, a Legal Officer with OLAF and Associate Research Fellow at the IALS. The programme contained the following contributions: “Challenges facing the defence and the legitimacy of criminal justice within the EU”, Dr Marianne Wade, Senior Lecturer, Birmingham Law School, University of Birmingham; “The roadmap on procedural safeguards: progress so far”, Jodie Blackstock, Senior Legal Officer in EU Justice and Home Affairs, Justice; and “FTI case studies – the European Arrest Warrant and defence rights,” Daniel Mansell, Policy Officer, Fair Trials International. Concluding remarks were made by Professor John Spencer, Professor of Law, University of Cambridge and President of the European Criminal Law Association (UK).

1. The following is a brief summary of points made and issues raised during the seminar:
2. The European Court and the Convention has not worked, and there ought to be a more positive message.
3. Both prosecutors and defence lawyers expressed some disillusionment with how the criminal procedures were working both within their national legal systems and in European cases.

4. The aim to achieve approximation of law in Europe is in danger of achieving a standard which is the lowest common denominator.
5. There is a need for an EU defence network.
6. There is no supranational court in Europe.
7. The uses for a European Public Prosecutor.
8. There is a need for a diverse set of remedies to help the defence in criminal cases.
9. The need to ensure a more vigorous interpretation of “proportionality” in criminal cases.
10. A toughening-up of the way both lawyers and courts deal with cases to provide those in the EU criminal courts with a more active and focused processing.

THE CHAIR'S 10 CONCLUSIONS

The author in his role as chair drew the following conclusions from the points of discussion:

1. The principle should be to put citizens and those being pursued through the criminal courts first, NOT the institutions. That is why the ECHR has not worked. You only have to look at the constant failures to agree a common standard or framework decision on criminal procedural rights to see why this conclusion has been reached.
2. If there is disillusionment, it is because lawyers are not working hard enough to get the job done properly. There should be more contact between defence lawyers, and between defence lawyers and prosecutors.

Common case problems could be resolved by more contact between lawyers.

 - (i) Openly raising case problems as and when they occur both with other lawyers and the court.
 - (ii) Making more efforts to liaise with prosecutors and co-defenders to avoid coercive methods, for example by discussing what is proportionate and what is not with each other.
 - (iii) Assuming for themselves the burden of raising in court the defence rights that are being engaged in the case. Do not assume someone else, or another party to the proceedings, will do it for you.
 - (iv) Making preparatory informal contacts with opponents in European cases by email or telephone to obtain evidence or information about the nature of the charges, and any procedural or legal difficulties that may be encountered. If your opponents do not reply or answer your messages, then instead of feeling disadvantaged, raise the failure to respond with the court to obtain an effective remedy.
3. The aim is not to try to achieve the highest standard that can be agreed at any one meeting of EU Ministers, but to reach the highest standard of adherence to human rights standards in our courts, in our criminal procedures, and by our police forces and other investigators.
4. It is not the building of “castles” or fortresses wherein defence lawyers can meet and hide from their enemies that is needed, but proper funding to get down to the work that needs to be done in representing poor and badly organised people whose cases never get a hearing. There is no point in having a defence network that tries to do anything less than that.

In any event, most lawyers are intensely private individuals, who already have their own networks which they improve or vary from year to year. Their networks are designed to suit their particular practices, but importantly they are rooted in whom they can trust, based on hard experience in the field. Defence lawyers are secretive, even monastic in the way they work, suspicious, and independent, and they are unlikely to be coaxed beyond the first inaugural cocktail party launch to join some new supra-national institution. Better to work with your own network fortified by the existing known organisations if you run into a problem, rather than invent a new one.
5. Both the European Court of Justice in Luxembourg, and the ECHR in Strasbourg, should unite in one location in one single Supreme Court of Europe. That way such a court would bind itself to a more consistent line of authority in the judgments that it gives, and be a stronger and more formidable block against the repeated attempts by Member States to divide and rule the present two courts. It would be seen by ordinary people as a secure tower providing an effective remedy through lasting judgments.

Defence lawyers have long argued and pleaded for a single Court that acts single-mindedly in European cases to overrule decisions that affect where a cross-border case should be tried and gives a Ruling on where the case should be tried, where there has been an abject refusal to give proper disclosure to the defence of important evidence, and many other important matters. What is needed is a simple quick interlocutory procedure at the outset of cross-border cases to a single appellate court, so that injustice can be “nipped in the bud” at a stage when the management of the case can be changed for the better, rather than wait until the appeal stage when the trial is over. So many bad convictions would be avoided if this mechanism was available.

In the author’s view this interlocutory procedure should only deal with genuine cross-border cases where there is a clear “European” issue at stake. Later, as the new single court develops the case-law and procedural structure, it may be possible to expand the court’s remit. Who knows such an august

court should be one before whom recalcitrant Member States could be dragged to be made to comply with Eurojust and the rulings of the court, or other codes of conduct in criminal procedural cases.

6. The author is sceptical about the role of a European Public Prosecutor, and doubts whether it will work. There is a framework for a structure and rules in place, and here comes yet another institution with more rules for prosecutors but no defence framework or rules. There is already Eurojust and Europol; if this institution (the EPP) survives, the scope of its work should be strictly limited to truly European cases, with national cases excluded.

7. It is suggested the one institution that would be really useful right now is a European Legal Aid Office. This would deal with the grant of European legal aid in cross-border cases to those trapped in foreign prisons, or being taken through laborious interviews and investigations on foreign soil with no access to friends or family, or lawyers or experts or a trial.

In addition, for such cases a system of dual representation should become the normality, where the person sought to be extradited or removed should have a lawyer both in the requesting country and in the requested country. In short, the point of this scheme would be to deal with any actual or anticipated injustice by an appropriate procedural step in whichever of the two countries it is taking place. In addition, each set of lawyers could obtain evidence from their country for use in defending extradition or EAW proceedings, or for an eventual trial. If a prosecutor misleads a court in the UK about what was really going on in Holland, then the Dutch lawyers acting in Holland for the accused could act swiftly to investigate the prosecutor's claims, and speedily convey the results of their researches to their UK colleagues to deploy before the judge in the UK court in the UK. This has been very successfully carried out in many cases already. I have written in detail about the merits of such a scheme elsewhere.

8. A number of ideas were mooted during our discussions: a European Investigation Judge; a Central Information Agency; and a joint body to which both prosecutors and defence lawyers could turn.

Apart from the suggestions I made in the paragraphs above, there should be a "people's post" ie a European Criminal Law Ombudsman (male or female). This position should be occupied by an experienced practising defence lawyer with at least 10 years' experience, not a bureaucrat or an academic. The office should be based in all the EU Member States with the function of giving initial advice to applicants, then either helping the applicant to choose a lawyer to represent them from the national pool, or in certain exceptional cases (or in an emergency) directly instruct a lawyer on his or her

behalf, to take steps to remedy the situation. Again, I have written widely on a detailed structure for such a system.

9. We should be working towards a new "extradition lite" system for cross-border cases. This is a much more open and transparent system where instead of going ahead with the proceedings, attempts should be made by agreement to avoid them altogether.

In my work for the European Criminal Bar Association on a project assessing the problems associated with the European Arrest Warrant, I have been pleasantly surprised by what can be achieved with judges and lawyers working together rather than separately. One country, Poland, exacerbates the problems by having a rule which necessitates everyone being prosecuted if they have committed a crime, however insignificant the crime is.

Cooperation has been achieved, between UK and Polish lawyers acting in a dual representation model, in reaching agreements with Polish prosecutors for the voluntary surrender of the person sought, without the need for proceedings. In other cases financial penalties have been paid, thus avoiding any further proceedings. Some success has been achieved in preventing people from being held in custody by Polish lawyers making applications to Polish judges in advance of any proceedings to agree bail and other conditions. More use should be made of pre-trial measures to prevent detention where this is not needed. It just shows what can be achieved by talking to the "other side."

Not only does this practical way of working save money, it seriously reduces the personal hardship for those involved, and causes far less disruption to their working and their family lives. I have never seen any real evidence of the mythical concept of "mutual cooperation", and I have tended to dismiss it as a politician's dream, but I detect the first sign of a vulnerable green shoot pushing its way upwards through the European earth to the sunlight above!

10. In Europe we need a fairer processing system for our cases. There needs to be readable legislation from Europe which provides clear rules that can be acted upon speedily. No-one should be subjected to unnecessary delay. Active steps should be taken to process cases, allowing for a transparently fair opportunity to contest the case in a court of law.

In my view, now that most European capital cities have an EU office, consideration should be given to having regional centres for expediting cases. There could be liaison with the regional European Ombudsman's Office (if there was one) about difficult cases. Dual representation should be made easier by encouraging Law Societies and Bars to make existing directories of lawyers more widely available, or to

producing a “European Guide” to advocates and lawyers with experience of European cases.

Finally, there should be much more personal/professional involvement, first between lawyers to see if an agreement between both sides can be reached, and then followed by an approach to a judge who can examine the proposed agreement and give guidance or directions on the way forward.

Where there is a will there is a way! More telephoning and emails and harder work equals better, more amicable, and fairer results. 

Jonathan Stuart Mitchell

Barrister, 25 Bedford Row; Advisory Board, European Criminal Bar Association

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