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# THE EUROPEAN ARREST WARRANT: THE ROLE OF JUDGES WHEN HUMAN RIGHTS ARE AT RISK

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## ABSTRACT

*This article examines the role of the judiciary in protecting fundamental rights in European extradition cases, in particular the impact of the European Court of Human Rights' decision in *Mss v Belgium and Greece*.*

The last decade has seen the European Union focus significant policy energy on building an EU-wide 'area of justice, freedom and security', ambitiously borrowing internal market concepts to bring about effective free movement of judicial decisions within Europe. In the creation of this common enforcement space, the EU has continually looked for ways of expediting and standardising many aspects of cross-border cooperation between police and judicial authorities, including evidence-gathering, extradition and the transfer of prisoners. The basis for this cooperation is the principle of 'mutual recognition': the mandatory execution of decisions on the basis of mutual trust – and the virtual elimination of any judicial or political discretion to look behind cooperation requests from fellow EU countries.

This article asks whether the mutual trust necessary for such cooperation really exists, or whether judges are being asked to place 'blind faith' in other EU countries' ability to uphold the fundamental rights of those facing criminal charges in their jurisdictions.

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\* Fair Trials International. FTI is a charity that campaigns on behalf of those facing trial in a country other than their own. We provide assistance to individuals through our dedicated casework team, while fighting the underlying causes of injustice with our policy interventions, research and training. While FTI welcomes legal measures that improve cross-border cooperation in tackling serious crime, we do not believe individuals' fundamental rights should be compromised in the process.

## 1. FAST-TRACK EXTRADITION

The flagship ‘mutual recognition’ instrument was the European Arrest Warrant (‘EAW’): a fast-track extradition system between EU member states which was introduced to tackle serious cross-border crime like terrorism and people-trafficking. Adopted against the backdrop of the 9/11 attacks, the EAW was implemented by EU member states in January 2004.

Seven years into the operation of this revolutionary extradition system, over 5,000 extraditions have taken place. Clear themes about its use – and abuse – have emerged. Some EU countries issue far more EAWs than others, often for strikingly minor offences. With the release of the latest European Commission report on the operation of the EAW in April,<sup>1</sup> recent calls for reform of the EAW from Members of the European Parliament<sup>2</sup> and the Council of Europe,<sup>3</sup> and a major review of the UK’s extradition arrangements currently ongoing,<sup>4</sup> now is a good time to take stock of the EAW’s impact.

## 2. HUMAN RIGHTS AND THE EAW FRAMEWORK DECISION

The Framework Decision on the EAW mentions fundamental rights but falls short of offering judges in executing states a fundamental rights basis to refuse extradition. Recital 12 states: ‘This Framework Decision respects fundamental rights’ and refers to the principles set out in the Charter of Fundamental Rights and Article 6 of the Treaty of the European Union. Article 6(3) of the Treaty notes that the ECHR, and fundamental rights protections contained in the constitutional traditions common to the Member States, constitute general principles of EU law.

Recital 12 also notes that nothing in the Framework Decision prohibits refusal of extradition where there are reasons to believe that the EAW has been issued for the purposes of prosecuting or punishing a person on the basis of their race, sex, religion, ethnic origin, nationality, political views or sexual orientation. Recital 13 states that no person should be surrendered to a state where ‘there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. However, the main body of the Framework Decision does

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<sup>1</sup> Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision on the EAW, 11 April 2011.

<sup>2</sup> European Parliament plenary debate, 8 June 2011.

<sup>3</sup> See Thomas Hammarberg’s (Council of Europe’s Commissioner for Human Rights), Human rights comment, 15 March 2011.

<sup>4</sup> UK Home Office’s Extradition Review Panel, due to report September 2011; and UK Joint Committee on Human Rights, which has conducted its own enquiry into the human rights impact of extradition, see report published 22 June 2011.

not include the risk of violation of human rights as an explicit ground for refusing an EAW.

This has not stopped some countries from including a human rights bar to extradition in their legislation implementing the EAW. Section 21 of the UK's Extradition Act 2003 states that the judge at the extradition hearing must decide whether the person's extradition would be compatible with their rights under the ECHR. Such an approach mirrors jurisprudence from the European Court of Human Rights ('ECtHR') which has held that a state's obligations under the Convention are engaged if it decides to extradite someone who risks being subjected to ill-treatment in the requesting country (*Soering v United Kingdom*<sup>5</sup>).

### 3. 'EXCEPTIONAL' CIRCUMSTANCES

The European Commission was not happy about the inclusion of such bars in some countries' implementing legislation. In its 2006 report on the EAW, it said: 'Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for refusal in the event of infringement.'<sup>6</sup> Although it was open for judicial authorities to refuse to execute an EAW where fundamental rights would be infringed, 'in a system based on mutual trust, such a situation should be exceptional'.<sup>7</sup>

If mutual trust in the human rights standards of other EU states were well-founded, then refusal to execute an EAW on human rights grounds should indeed be exceptional. Unfortunately, experience shows that the foundations for this trust are still shaky. Although all EU states are signatories to the ECHR, in practice they do not all respect fundamental rights to the same degree. Between 2007 and 2010 the ECtHR found that EU member states violated Article 3 rights (prohibition on torture and inhuman or degrading treatment) in 181 cases. Article 6 rights (the right to a fair trial) were found to have been infringed in 1,696 cases.<sup>8</sup>

The European Commission in its latest report on the EAW recognised that simply expecting all countries to adhere to the standards of the ECtHR 'has not proved to be an effective means of ensuring that signatories comply with the Convention's standards'.<sup>9</sup>

<sup>5</sup> [1989] ECHR 14.

<sup>6</sup> Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), Brussels, 24 January 2006, COM(2006) 8 final, 6.

<sup>7</sup> *Ibid.*, 6.

<sup>8</sup> European Court of Human Rights: statistical information.

<sup>9</sup> Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision on the EAW, 11 April 2011, 6.

Nonetheless, the refusal of EAWs on human rights grounds remains exceptional. In some states the human rights implications of extradition are not being considered at all prior to surrender being ordered. Even where states have enacted a human rights bar to extradition, that bar is being interpreted in a way which sets it so high it is virtually impossible to meet. This leads to a situation where, once people have been extradited, they are suffering the very rights infringements they tried to alert the court to at their extradition hearing. Both these problems stem from an approach to extradition that puts mutual recognition above human rights and places blind faith in the issuing state as guarantor of fundamental rights.

The risk of rights infringements in extradition cases is often raised in relation to Article 3 ECHR (focusing on the detention conditions in which people anticipate they will be held), and Article 6 (dealing either with allegedly unfair investigation or trial procedures that have occurred in the case before the extradition request, or with the requesting state's ability to ensure a fair trial after extradition).

#### 4. EXTRADITION AND ARTICLES 3 AND 6 ECHR

In certain circumstances, Article 3 and Article 6 rights will have extraterritorial application and contracting parties will be under a duty to ensure that the extradition or expulsion of an individual does not violate their rights under these Articles.<sup>10</sup> In terms of Article 3 such a duty arises 'where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country'.<sup>11</sup>

In *Mamatkulov and Askarov v Turkey*<sup>12</sup> the ECtHR gave guidance for determining whether such substantial grounds for believing that a real risk of treatment contrary to Article 3 exists: 'The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition.'<sup>13</sup>

Article 6 will have extraterritorial application in extradition cases where 'the fugitive has suffered or risks suffering a flagrant denial of a fair trial'.<sup>14</sup> The dissenting members of the Grand Chamber in *Mamatkulov*<sup>15</sup> clarified the meaning of a 'flagrant denial of justice': 'The use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial

<sup>10</sup> *Soering v United Kingdom* [1989] ECHR 14.

<sup>11</sup> *Chahal v United Kingdom* [1996] ECHR 54.

<sup>12</sup> [2005] ECHR 64.

<sup>13</sup> Para. 69.

<sup>14</sup> Para. 113.

<sup>15</sup> [2005] ECHR 64.

procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself.<sup>16</sup>

Instead, the word ‘flagrant’ ‘is intended to convey [...] a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article’ [para. 16]. This high standard makes it, in practice, very difficult to resist extradition on Article 6 grounds, particularly where the requesting state is a signatory to the ECHR. Such countries ‘should readily be assumed capable of protecting an accused against an unjust trial’.<sup>17</sup>

A number of FTI cases illustrate how difficult it is to persuade judicial authorities to look behind assertions by requesting states that fundamental rights are properly safeguarded in their jurisdictions.

## 5. FTI CASE STUDY: ANDREW SYMEOU

Andrew Symeou, then a 20-year-old student from the UK, was extradited to Greece under an EAW in July 2009. He had tried to resist surrender on Article 3 grounds, but the English courts found that Andrew’s extradition would be compatible with his rights under the ECHR. He was sent to Greece in July 2009.

After extradition, he spent a harrowing 11 months on remand in custody in Greece after being denied bail. He has described the conditions he was held in: a university student with no previous criminal record who still lived with his parents, he spent his 21<sup>st</sup> birthday in the notoriously dangerous Korydallos prison.

The conditions included: filthy and overcrowded cells (with up to six people in a single cell); sharing cells with prisoners convicted of rape and murder; violence among prisoners (one was beaten to death over a drug debt while Andrew was there); and violent rioting. The shower room floor was covered in excrement, there were cockroaches in the cells, fleas in the bedding, and the prison was infested with vermin.

This description conforms with information contained in the numerous expert reports placed before the court in Andrew’s Article 3 challenge to extradition. The Committee for the Prevention of Torture (‘CPT’) had reported the previous year that persons deprived of their liberty in Greece ‘run a considerable risk of being ill-treated’.<sup>18</sup> Amnesty International and other human rights NGOs had similarly criticised Greece’s prisons in the harshest terms.<sup>19</sup>

<sup>16</sup> Para. 16.

<sup>17</sup> *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21, para. 35.

<sup>18</sup> CPT, *20 years of combating torture 19<sup>th</sup> General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 1 August 2008–31 July 2009, 30.

<sup>19</sup> See, for example, the Joint report of Amnesty International and International Helsinki Federation for Human Rights, *Greece: Ill-treatment, shootings and impunity*, September 2002.

This evidence was held insufficient as a bar to extradition, because Andrew could not prove that he would be subjected to these types of conditions, and because in any case mistreatment was sometimes part of the European detention culture:

[T]here is no sound evidence that the Appellant is at a real risk of being subjected to treatment which would breach article 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in detention. Regrettably, that is a sometime feature of police behaviour in all EU countries.<sup>20</sup>

It is difficult to know what more Andrew could have done to bring the risk he faced to the court's attention and invoke his Article 3 rights before his extradition. He had never been to Greece before he went there as a student on his first holiday without his parents. He had not even been arrested or questioned by police in Zante at the time of the incident, and had no first-hand experience of Greek police procedures, remand facilities or prison conditions, before his surrender. The same is true of the majority of people extradited under the EAW system. Andrew's four-year ordeal finally came to an end on 17 June 2011, when he was acquitted by a Greek court.

## 6. FTI CASE STUDY: EDMOND ARAPI

Edmond Arapi was tried and convicted in his absence of killing Marcello Castillo in Genoa, in October 2004. He was sentenced to 19 years' imprisonment, later reduced to 16 years on appeal. Edmond had no idea that he was wanted for a crime or that the trial had even taken place. In fact, Edmond had not left the UK between 2000 and 2006. On 26 October 2004, the day of the murder, Edmond was at work in Trentham, Staffordshire.

Edmond was arrested in June 2009 at Gatwick Airport on an EAW from Italy, in front of his wife and young children, while returning from a family holiday abroad. It was the first he knew of the charges against him in Italy. Despite evidence which proved he was in the UK on the day of the murder, an English court ordered his extradition in April 2010.

Edmond attempted to resist extradition on Article 6 grounds, claiming that there was no automatic right to a retrial under Italian law. The court heard a raft of contradictory expert evidence about whether Edmond would be entitled to a full retrial, and whether his alibi evidence (and the witnesses he would need to testify about his whereabouts on the relevant date) would be admitted.

In Edmond's case, all appeals had been exhausted in Italy. This had happened without Edmond's knowledge – the hearings were attended on his behalf by a public defence lawyer and the conviction had been upheld. It seemed far from clear that

<sup>20</sup> *Symeou v Public Prosecutor's Office at Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin) at para. 65.

Italian law guaranteed a re-trial in these circumstances. What was clear was that Edmond risked being held for years on remand awaiting trial, as Italy has one of the worst records in Europe for delays in the justice system.<sup>21</sup>

Nevertheless, having heard conflicting evidence on Italian procedural law, the English court ordered his extradition in April 2010. It was only on the eve of his appeal at the High Court, that the Italian authorities decided to withdraw the EAW, admitting that they had sought Edmond in error. They provided information indicating that Edmond's fingerprints did not match those at the crime scene. Thankfully, this meant that Edmond avoided being separated from his family, including a newborn son, and spending time in an Italian prison waiting to find out if he would have an opportunity to prove his innocence.

## 7. THE APPROACH OF DOMESTIC COURTS – *RETTINGER*

These cases are emblematic of the hurdles faced by individuals who fear that extradition will breach their fundamental rights. Even in states where the implementing legislation contains a human rights bar, courts are rarely willing to exercise it.

In Ireland, section 37 of the European Arrest Warrant Act 2003 states that surrender is prohibited where it would be incompatible with Ireland's obligations under the ECHR. However, in the case of *The Minister for Justice, Equality and Law Reform v Robert Rettinger*,<sup>22</sup> the Irish Supreme Court found that the lower courts had not applied the correct test to ensure that extradition was compliant with the Convention.

Mr Rettinger was wanted in Poland to serve the balance of a two year sentence imposed following a conviction for burglary. He had spent 203 days in pre-trial detention in Poland before going to Ireland, where he was later arrested on an EAW. He argued that his extradition should be refused under section 37, on Article 3 grounds. He adduced affidavit evidence about his own first-hand experience of pre-trial detention conditions in Poland, a US State Department report on Polish prison conditions and the recent ECtHR decision in *Orchowski v Poland*<sup>23</sup> which had found prison conditions in Poland to violate Article 3.

The Irish High Court had held: 'It is inevitable that a respondent seeking to establish to the necessary standard of proof that in the future his rights will be breached if surrendered has a more difficult probative task than a person complaining of what has already occurred.'<sup>24</sup> The court found that surrender would not violate

<sup>21</sup> See, for example the Council of Europe's Interim Resolution CM/ResDH(2009)42 on the Execution of the judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy.

<sup>22</sup> [2010] IESC 45.

<sup>23</sup> [2010] ECHR 2280.

<sup>24</sup> Quoted at Para 7 of Supreme Court judgment.



Article 3 because it was not known which Polish prison the appellant would be sent to and it was therefore not possible to determine how he would be treated.

## 8. BURDEN AND STANDARD OF PROOF WHERE RIGHTS ISSUES RAISED

Nevertheless, the High Court certified two points of law to the Supreme Court. These concerned where the onus of proof lies when Article 3 evidence has been adduced (does it shift to the issuing state or remain on the requested person?) and what the standard of proof was when it came to showing that surrender was barred on Article 3 grounds (must the requested person prove that there is a probability that, if surrendered, he will suffer treatment contrary to Article 3, or is it sufficient for him to show that, on the balance of probabilities, there is a real risk that he will suffer such treatment?)

In considering these questions, the Supreme Court drew heavily on the ECtHR decision in *Saadi v Italy*,<sup>25</sup> and found that it is not necessary for a requested person to prove he will probably suffer inhuman or degrading treatment. It is enough to establish there is a 'real risk' as distinct from a mere possibility. Once the requested person has discharged the primary burden of adducing credible and substantial evidence of this risk, it is for the requesting state to 'dispel any doubts'. This is a matter the court must actively oversee to find out the 'foreseeable consequences [of extradition] bearing in mind the general situation there and his personal circumstances'.<sup>26</sup> The court's examination must be 'rigorous'. It must consider all the material before it and may attach importance to reports of independent human rights organisations. If necessary the court should obtain material of its own motion.

In this context the Supreme Court noted that, during the proceedings before the High Court, Poland had failed to cross-examine Mr Rettinger on his claims about Polish prison conditions or to adduce evidence that conditions had improved following the damning Article 3 findings in *Orchowski*. The Supreme Court found that the High Court had not applied the correct test and remitted the case back to the High Court so it could re-examine the issues. At the time of writing, there has been no fresh decision by the High Court.

## 9. 'WHOLLY EXTRAORDINARY CIRCUMSTANCES'

In a number of English cases the human rights bar to extradition has been interpreted in a manner which makes it almost impossible to meet. In *R (Klimas) v Prosecutors General Office of Lithuania*,<sup>27</sup> the requested person argued that, if extradited to

<sup>25</sup> [2008] ECHR 179.

<sup>26</sup> Para 27.

<sup>27</sup> [2010] EWHC 2076 (Admin).

Lithuania, he would be subjected to prison conditions which would violate his Article 3 rights. He relied on a 2009 US State Department report on Lithuania which included details of physical abuse being inflicted by prison guards and prison overcrowding, sometimes to 'an outrageous degree', with six prisoners detained in a cell measuring eight square metres.

The English High Court (Mitting J) did not accept that the appellant's extradition was barred on human rights grounds. Although he had shown that some prisons in Lithuania fell well below international standards, he had failed to show that, if extradited, he would be subjected to ill-treatment amounting to a violation of Article 3, or that there were substantial grounds for believing there was a real risk he would be.

The court also decided that, as a matter of principle:

When prison conditions in a Convention category 1 state are raised as an obstacle to extradition, the district judge need not, save in wholly extraordinary circumstances in which the constitutional order of the requesting state has been upset – for example by a military coup or violent revolution – examine the question at all.

The reasoning behind this approach was that if the requesting state is a signatory to the ECHR, then the person, once extradited, will be able to invoke Convention rights before domestic courts if his or her rights are infringed. If that proves unsuccessful, the person has recourse to the ECtHR. The issuing state is therefore the most appropriate place to raise human rights concerns, not the requested state.

## 10. A MATTER FOR THE REQUESTING STATE?

According to Mitting J, the formulation of this principle was based on the decision of the ECtHR in a removal case, *KRS v United Kingdom*.<sup>28</sup> In *KRS* the applicant argued that he should not be transferred by the UK to Greece to have his asylum claim processed there, because the Greek asylum system would fail to examine it adequately and he would be kept in inhuman and degrading detention conditions. The court found that Greece, as a contracting state, had undertaken to abide by its obligations under the Convention and in the absence of proof to the contrary it must be presumed Greece would comply with those obligations.<sup>29</sup>

In *Klimas*, Mitting J found that the approach in *KRS* applied equally to extradition cases. For that reason, he decided that human rights should only be considered in EAW cases in wholly extraordinary circumstances.

<sup>28</sup> [2008] ECHR 1781, this principle was first applied to an extradition case in *R (Jan Rot) v District Court of Lubland, Poland* [2010] EWHC 1820 (Admin).

<sup>29</sup> P. 18.

This approach ignores the fact that signatories to the ECHR are frequently found in breach of Convention rights and it does not enable the courts to play their important constitutional role of protecting individuals from the abuse of fundamental rights. However, more recent ECtHR jurisprudence suggests that this is not the right approach and it has not been followed in other English court decisions, as explained below.

### *MSS V BELGIUM AND GREECE*

A ground-breaking ruling by the ECtHR earlier this year in the case of *MSS v Belgium and Greece*<sup>30</sup> sheds further light on the duty of a court in a contracting state when expelling (or extraditing) an individual. The case involved the return by Belgium, under the Dublin II Convention, of an Afghan asylum seeker back to Greece, where he had initially entered the EU and been registered. His return had been ordered on the basis that: 'Belgium was not responsible for examining the asylum application; Greece was responsible and there was no reason to suspect that the Greek authorities would fail to honour their obligations [under asylum law]. That being so, the applicant had the guarantee that he would be able, as soon as he arrived in Greece, to submit an application for asylum, which would be examined in conformity with the relevant rules and regulations.'<sup>31</sup>

The applicant challenged the decision to transfer him to Greece, arguing that if this happened he would be detained in appalling conditions. Furthermore, he pointed to well-documented deficiencies in the Greek asylum system, which could see him sent back to Afghanistan without any examination of his reasons for leaving that country. (He had escaped a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul.)

These arguments were strengthened by the fact that, prior to the applicant's transfer, the UNHCR had sent a letter to the relevant Belgian minister criticising the conditions in which asylum seekers in Greece were detained, and recommending that Belgium suspend the transfer of asylum seekers to Greece. Despite this Belgian authorities ordered the applicant's transfer to Greece, which took place in June 2009.

## 11. TRANSFER TO DEPLORABLE DETENTION CONDITIONS

Once in Greece the applicant was subjected to appalling detention conditions. He was kept in a cramped cell with 20 others and given limited access to toilet facilities, provided with very little to eat, and had to sleep on either a dirty mattress or the bare floor. When he was released, he had no means of subsistence and slept in a park. After

<sup>30</sup> [2011] ECHR 108.

<sup>31</sup> Para. 17.

attempting to leave Greece using false papers, he was detained in the same facility where, he said, he was beaten by police officers.

The applicant lodged a complaint with the ECtHR, claiming, *inter alia*, that by transferring him to Greece the Belgian authorities had violated his Article 3 rights. The Belgian Government argued that it had sought assurances from the Greek authorities that the applicant faced no risk of ill treatment.

The Court held that 'the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention'.<sup>32</sup> Furthermore, the 'assurance' provided by the Greek authorities did not contain any guarantee specific to the applicant. It referred to the applicable legislation but gave no information about the situation in practice.

The court noted that Greece had been heavily criticised since 2006 for the conditions in its immigration detention centres. Reports from the CPT, the European Parliament's LIBE Committee, Amnesty International and Human Rights Watch had all pointed to deplorable conditions of reception and detention for asylum seekers in Greece including: arbitrary detention, overcrowding, inadequate sanitary facilities, lack of ventilation and physical violence inflicted by guards. Once released most asylum seekers were given inadequate information about how to find housing and work and this forced many to sleep rough.

## 12. 'CLOSE AND RIGOROUS SCRUTINY' BY JUDGES

The court found that 'these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources'.<sup>33</sup> The applicant had 'effectively suffered [...] from the very risks of which he had complained' to the Belgian authorities.<sup>34</sup> Belgium had therefore 'knowingly' exposed the applicant to conditions of detention and living conditions which violated Article 3.

The transfer to Greece had taken place without Belgium examining the applicant's complaints under Article 3 'as rigorously as possible'.<sup>35</sup> This was unacceptable: 'any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny'.<sup>36</sup> Belgium had limited its examination to verifying whether the applicant had provided 'concrete proof of the irreparable nature of the damage that might result from the

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<sup>32</sup> Para. 353.

<sup>33</sup> Para. 366.

<sup>34</sup> Para. 375.

<sup>35</sup> Para. 388.

<sup>36</sup> Para. 387.

alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation'.<sup>37</sup>

### 13. IS MSS APPLICABLE TO EXTRADITION CASES?

In the *MSS* case the Belgian government argued that, in assuming Greece would comply with its Convention obligations, the Belgian authorities had merely been following the Strasbourg court's decision in *KRS v United Kingdom*. However, the court found that, given the large amount of information about the deficiencies in the Greek asylum system (much of which had been published after the *KRS* decision) the Belgian authorities should not have assumed that Greece would respect its international obligations, in spite of the *KRS* case-law. The applicant should not be expected to bear the entire burden of proof.<sup>38</sup>

The jurisprudence on the extraterritorial application of Article 3 is clearly applicable to extradition matters due to the analogous nature of expulsion and extradition. Indeed, the *MSS* case has already been cited by UK extradition courts. In *R (Gorczyński) v District Court in Torun, Poland*,<sup>39</sup> for example, Mitting J found that the decision in *MSS* meant that 'the principle that I sought to extract from *KRS v The United Kingdom* ought [...] to be qualified and restated'.<sup>40</sup> Although a revolution or a military coup were paradigm examples of when the requested state should examine whether extradition would be ECHR-compliant, they were not exhaustive. However, Mitting J still found that human rights need not be considered by the requested state, unless there was clear evidence that the person's right to apply for relief before the courts of the issuing state and the ECtHR was illusory. 'Otherwise complaints about possible breaches of convention rights are a matter between the individual and the requesting state.'<sup>41</sup>

### 14. 'CLEAR AND COGENT EVIDENCE' CAN REBUT PRESUMPTION OF ECHR COMPLIANCE

However, this approach was not followed in *Agius v Court of Magistrates Malta*.<sup>42</sup> In this case Sullivan J said that he had 'no doubt' that the proposition that there is no

<sup>37</sup> Para. 398.

<sup>38</sup> Para. 352.

<sup>39</sup> [2011] EWHC 512 (Admin), see also *Palczynski v The District Court in Zamosc (a Polish Judicial Authority)* [2011] EWHC 445 (Admin).

<sup>40</sup> Para. 10.

<sup>41</sup> Para. 10.

<sup>42</sup> [2011] EWHC 759 (Admin).

need to undertake enquiries into the human rights implications of extradition, save in wholly extraordinary circumstances, 'goes too far'.<sup>43</sup> Following *MSS*, the starting point for any inquiry into whether extradition would be barred on human rights grounds was the presumption that the requesting state will fulfil its obligations under the ECHR. 'Given the underlying objective of the EAW scheme, that assumption is not easily displaced. However, it is capable of being rebutted by clear and cogent evidence, which establishes that, in any particular case, extradition would not be compatible with the defendant's Convention rights.'<sup>44</sup>

The other judge in the case, Maddison J, agreed. It would be wrong for a court to proceed on the basis that because the requesting state is an EU Member State the court need not examine the compatibility of the proposed extradition with the human rights of the requested person, except in exceptional circumstances. 'That examination should take place in every [EAW] case.'<sup>45</sup>

English courts have also applied *MSS* to extradition cases where Article 6 is raised. In *Janovic v Prosecutor General's Office, Lithuania*,<sup>46</sup> the court observed that where the requesting state is a member of the Council of Europe, this membership was not a 'complete answer' to Article 6 complaints.<sup>47</sup> Nevertheless, the court noted that where the requesting country was an EU country it would be 'very difficult to show' that there is a real risk of a total denial of Article 6 rights.

## 15. GROWING CALLS TO STRENGTHEN HUMAN RIGHTS SAFEGUARDS

*MSS* shows that it is inappropriate to place blind faith in a country's compliance with its ECHR obligations, merely because it is an EU Member State. Yet challenging extradition on human rights grounds remains almost impossible, even where the requesting country has a poor record of compliance.

It is wrong in principle to restrict the remedy of a person facing extradition to invoking rights in the issuing state, after extradition. Usually, this is too late as the damage is done: an unfair trial, an unsafe conviction, a criminal record, months or years in appalling detention conditions. This makes later infringement findings of no value to the individual and his or her family. In some states, even making complaints about conditions in prison carries serious risks for detainees, such as violence from prison officers and solitary confinement.<sup>48</sup>

<sup>43</sup> Para. 17.

<sup>44</sup> Para. 18.

<sup>45</sup> Para. 32.

<sup>46</sup> [2011] EWHC 710 (Admin).

<sup>47</sup> Para. 25.

<sup>48</sup> These were punishments reported to us by a client who was held on remand for several months in Poland.

Human rights concerns about the EAW regime have been raised by an increasing number of experts. For example, in March 2011 the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, wrote:

There is a need to strengthen the human rights safeguards in EAW procedures [...] The EAW has been used in cases for which it was not intended, sometimes with harsh consequences on the lives of the persons concerned. It is thus high time to reform a system that affects thousands of persons every year.<sup>49</sup>

A recent report<sup>50</sup> from the UK Parliament's Joint Committee on Human Rights urges the UK government to re-negotiate the EAW Framework Decision to incorporate a proportionality test, so as to prevent the disproportionate human impact of extradition for minor offences. It also says judges must be more active in assessing whether extradition should be refused because of a risk of fundamental rights violations: they must not just 'rubber stamp' other EU countries' extradition requests on the assumption that they will comply with fundamental rights obligations. The Committee heard evidence from Fair Trials International and several of our clients, including Deborah Dark, Edmond Arapi, Frank Symeou (Andrew's father) and Michael Turner. We made several concrete proposals for reform of the EAW system to ensure it operates effectively without infringing human rights. The Committee's report adopts the vast majority of these proposals and calls on the UK government to act on them.

## 16. CONCLUSION

In its recent Green Paper on pre-trial detention, the European Commission notes that 'the high level of confidence between Member States [...] is eroded where judicial authorities must repeatedly weigh this confidence against acknowledged detention-related deficiencies.'<sup>51</sup> While the Green Paper and other steps being taken at EU level to raise defence and detention standards are important, however, they are not enough to prevent injustice in extradition: changes are needed to the EAW system itself.

Human rights safeguards in the EAW system require strengthening. The Framework Decision on the EAW must be amended to allow requested states, once alerted to a serious risk of rights infringement, to ask issuing states for further

<sup>49</sup> Human rights comment, 15 March 2011.

<sup>50</sup> *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report of Session 2010–12, published 22 June 2011.

<sup>51</sup> *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, 14 June 2011.

information, and where necessary, to seek guarantees that the fundamental rights of the requested person will be respected.<sup>52</sup>

Such guarantees should be sought where the requested person has provided substantive evidence that his or her rights will be violated if surrendered. Where the issuing state does not provide satisfactory information or guarantees within a reasonable time, the requested state should be entitled to refuse to extradite.

The EAW system has seen some notable successes in combating major crime. It brings with it clear benefits, including efficiency, speed and simplicity. Nevertheless, too many cases of injustice are occurring and precious crime-fighting resources are being wasted in the misuse of this instrument. The number of people surrendered under the EAW rises each year; in 2009 alone 15,827 Warrants were issued and 4,431 people were extradited.<sup>53</sup> Reform is the only way to avoid a loss of confidence in Europe's fast-track extradition system and, more fundamentally, the EU's justice policy mandate.

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<sup>52</sup> For more detail on this and other suggested reforms to the EAW system see FTT's report on the EAW, May 2011.

<sup>53</sup> Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2009, European Council, 16 November 2010.