

Not worth the paper they're written on: The unreliability of assurances in extradition cases

By Emily Barley



Due Process

Reform the European Arrest Warrant.
Protect Human Rights.

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Executive summary

- The European Arrest Warrant (EAW), the fast-track extradition system between EU member states, is fundamentally flawed, and these flaws expose people extradited to some EU member states to violation of their human rights, breaching the UK's moral and legal human rights obligations.
- The system of 'assurances' was established to give protection to people being extradited to countries which have well-known, systemic problems which lead to human rights violations.
- However, with the best will in the world, these serious systemic problems make it impossible to guarantee the rights of every person extradited to affected countries - regardless of how many promises are made.
- As a result, there are many examples of assurances being broken in EAW cases. This effectively means that the UK has been party to violations of human rights.
- Furthermore, the UK government and courts do not monitor compliance with assurances, so the true scale of the problem is not known.
- This is not acceptable, and the government must act immediately to rectify this problem.
- First, extraditions to countries which have systemic problems leading to human rights violations must be halted immediately.
- Second, extraditions to countries which are found to have broken assurances should be halted. The guarantees they issue cannot be trusted and should be disregarded.
- Finally, the UK should use the opportunity of Brexit to ensure that in the future extradition arrangements with EU member states offer proper protection for human rights.

Background

The European Arrest Warrant (EAW)

The EAW is the EU's 'fast-track' extradition system. It is deliberately formulated to have few protections and therefore increase the speed and number of extraditions between EU member states. The problems within it are so fundamental, and the checks and balances so few, that innocence is no protection – any person in any EU country is at risk of their life being turned upside down.

The problems with the EAW have been well documented, including by Due Process in its various reports. In brief, there are two fundamental problems with the EAW system:

- It assumes the justice systems in EU member states are of equal quality and in doing so limits protections for individuals against states that routinely abuse human rights¹, such as Romania², or rapidly descend into abuses, such as in Poland³.
- It does not allow British judges to examine the evidence against the accused to determine if there is a case to answer (a *prima facie* case), and even when there is irrefutable evidence of innocence extradition cannot be refused.

These two fundamental problems add up to a situation where a total lack of evidence against the accused, or even solid proof that an individual did not commit a crime, is not enough to prevent extradition, because British judges are not able to even consider such evidence. They must simply trust that the authorities in the requesting country have done their jobs properly.

The grounds for appealing an EAW are extremely limited. They are:

- A procedural error – the paperwork has not been filed correctly. The paperwork is simply re-filed in order for the process to continue.
- The crime the person is accused of is not a crime or they are below the age of criminal responsibility in the executing state, there is double jeopardy at play, or there is an ongoing prosecution in the executing state.
- If surrendering the person could be reasonably supposed to lead to a violation of their human rights. However, the legal test the European Court of Justice sets to prove abuses is impossibly high, meaning people are extradited despite serious systemic abuses.

¹ Human Rights abuses in European Arrest Warrant member states; Emily Barley, Lisl Biggs-Davison and Chris Alderton, Due Process; August 2018 <http://dueprocess.org.uk/2018/08/01/due-process-report-human-rights-abuses-in-european-arrest-warrant-member-states/>

² End 'trust, but not verify': Why the UK must halt extraditions to Romania immediately; Emily Barley, Due Process; October 2018 <http://dueprocess.org.uk/2018/10/18/due-process-report-end-trust-but-not-verify-why-the-uk-must-halt-extraditions-to-romania-immediately/>

³ Extradition to Poland: Risks and responsibilities; Emily Barley, Due Process; June 2019 <http://dueprocess.org.uk/2019/06/17/due-process-report-extradition-to-poland-risks-and-responsibilities/>

These problems are not merely theoretical. Miscarriages of justice as a result of EAWs include: a person serving prison time after a case of mistaken identity only uncovered after journalists investigated; cases where EAWs have been used by authorities to pursue political enemies; people being accused after police brutality forced witnesses to point the finger at them; and serious abuses of human rights because of terrible prison conditions.⁴

The UK remains part of the EAW system until the end of the Brexit transition period⁵. The government is seeking a similar extradition system – dubbed ‘EAW-lite’ – as part of its Brexit negotiations. Due Process opposes this plan and has proposed an alternative in the report ‘*The future of extradition from the UK: Protecting fundamental rights*’⁶. The Due Process proposal would see EU member states treated the same way other countries – including allies – around the world are treated, with additional checks and balances to protect rights including a diplomatic decision in addition to the judicial process.

Assurances

The system of assurances was developed to enable extraditions under EAWs to continue to countries which routinely abuse human rights. Authorities from the requesting country essentially make promises to the court in the executing country that the individual in question will not have their human rights violated. These assurances may include the conditions the person will be detained in, the medical care they will receive, and/or other promises relevant to the specifics of the case.

Use of these assurances was clarified in the judgment set out by the European Court of Justice (ECJ) in April 2016⁷, following a request by a German court. The ruling stated that the EU’s principle of mutual recognition is not absolute, and that human rights concerns can be a reason for refusal of an EAW. It set out a two stage test: first, the court must assess whether or not there is a general risk of human rights violations, relying on objective information from bodies such as the European Court of Human Rights or the UN; and second, it must assess whether that risk applies to the specific individual, and can only refuse the EAW when the grounds are substantial.

Many judges have taken this to mean that if the requesting state makes assurances that human rights will not be violated, even if there are systemic problems, those assurances must be accepted. This has led to a situation where requesting authorities have made promises they are unable to keep, or do not intend to keep.

The flaws in the way assurances are used is the subject of this report.

⁴ This is not justice: The cases that show what is wrong with the European Arrest Warrant; Emily Barley, Due Process; February 2020 <http://dueprocess.org.uk/2020/02/10/due-process-report-this-is-not-justice-the-cases-that-show-what-is-wrong-with-the-european-arrest-warrant/>

⁵ Brexit next steps: The European Arrest Warrant; Joanna Dawson, House of Commons Library; February 2020 <https://commonslibrary.parliament.uk/home-affairs/crime/brexit-next-steps-the-european-arrest-warrant/>

⁶ The future of extradition from the UK: Protecting fundamental rights; Emily Barley, Due Process, July 2020 <http://dueprocess.org.uk/2020/07/02/due-process-report-the-future-of-extradition-from-the-uk-protecting-fundamental-rights/>

⁷ *Joined Cases C-404/15 and C-659/15 PPU* (European Court of Justice, 2016) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=966233>

The (un)reliability of assurances

Systemic problems and human rights violations

While the EU as a whole gives an impression of being a beacon of freedom and human rights, analysis of judgments from the European Court of Human Rights (ECtHR) has shown that several EU member states consistently violate human rights – especially in key areas relating to the criminal justice system.

Article 3 of the European Convention on Human Rights (ECHR) prohibits torture, including inhuman or degrading treatment. The majority of violations of Article 3 relate to prison conditions, and so this is a key consideration in extradition cases. The sad reality is that Romania and Greece violate Article 3 at similar rates to Russia, Ukraine and Turkey, with Poland, Bulgaria, Italy and Hungary not far behind.⁸

The other part of the convention relevant to extradition is Article 6, which protects the right to a fair trial. Violations of this right include unfair/biased trials, and cases dragging on for so long that it becomes abusive. Once again, research found that EU member states feature as frequent, consistent violators of the right to a fair trial, this time with Romania, Greece and Hungary near the top of the list.⁹

In Romania, the worst violator of Article 3 within the EU, these human rights violating prison conditions included serious overcrowding – including cases where inmates had only the space of a bed each, and sometimes had to share beds – inadequate medical care, infestations of rats and bugs, dirty and mouldy conditions, poor hygiene facilities, not having proper toilets and/or no privacy to use toilets, and use of violent 'special units' to keep inmates in order.¹⁰

In April 2018 the ECtHR recognised that Romania's prisons problem was substantial and system-wide, and gave a 'pilot judgment' – a process which obliges Romania to make and implement a plan of improvements¹¹. However, the majority of the measures in Romania's plan do not come to fruition until 2022¹², meaning systemic problems will remain until at least then. The Romanian Minister for Justice has previously admitted lying about a one billion

⁸ Human Rights abuses in European Arrest Warrant member states; Emily Barley, Lisl Biggs-Davison and Chris Alderton, *Due Process*; August 2018 <http://dueprocess.org.uk/2018/08/01/due-process-report-human-rights-abuses-in-european-arrest-warrant-member-states/>

⁹ Human Rights abuses in European Arrest Warrant member states; Emily Barley, Lisl Biggs-Davison and Chris Alderton, *Due Process*; August 2018 <http://dueprocess.org.uk/2018/08/01/due-process-report-human-rights-abuses-in-european-arrest-warrant-member-states/>

¹⁰ End 'trust, but not verify': Why the UK must halt extraditions to Romania immediately; Emily Barley, *Due Process*; October 2018 <http://dueprocess.org.uk/2018/10/18/due-process-report-end-trust-but-not-verify-why-the-uk-must-halt-extraditions-to-romania-immediately/>

¹¹ Press Unit, *Pilot Judgments* (European Court of Human Rights, 2018) https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf

¹² *Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot judgment Rezmives and Others V. Romania delivered by the ECtHR* (Romanian Ministry of Justice, 2018) https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5a9e7a6fec212d0cc097e6b3/1520335519718/20180125_Action+plan_Communication+from+Romania+concerning+the+cases+of+R+EZMIVES.pdf

euro prisons building programme, saying that she had 'good intentions' but that 'we do not have the money in the budget'.¹³

In Poland, Amnesty International¹⁴ and The Helsinki Foundation for Human Rights (HFHR)¹⁵ have sounded the alarm over political interference in the judiciary. Upon its election in 2015 the Law and Justice Party (PiS) set about 'reforming' the judiciary, including taking political control of the appointment of judges, trying to force the retirement of Supreme Court judges, and taking political control of disciplinary proceedings against judges¹⁶.

Both the European Commission¹⁷ and European Court of Justice¹⁸ have censured the Polish government for these actions, which have called the fairness of trials conducted in Poland into question¹⁹.

When these kinds of problems become systemic, abuse of human rights becomes practically unavoidable. As Ben Keith, a barrister at 5 St Andrew's Hill, put it:²⁰

"The problem with assurances are that they are fundamentally unable to change their physical situation. The fact that a country promises to be better is not doubted but how can they produce more prison places at the drop of a hat and find more space in already appalling and overcrowded prisons."

No accountability

The EU's principle of 'mutual trust and recognition' means that when requesting authorities in EU member states issue assurances they are taken at face value. There is no system to ensure accountability, and no consequences for breaking assurances.

The lack of monitoring is a problem that was highlight by the House of Lords Select Committee on Extradition Law in 2015. Their report stated:²¹

¹³ Claudiu Surmei, *Declarație uluitoare a Ministrului Justiției, Raluca Prună, în fața CSM: Am mințit la CEDO că am asigurat buget pentru șapte penitenciare - VIDEO* (MediaFax, 2016) <https://www.mediafax.ro/social/declaratie-uluitoare-a-ministrului-justitiei-raluca-pruna-in-fata-csm-am-mintit-la-cedo-ca-am-asigurat-buget-pentru-sapte-penitenciare-video-15780817>

¹⁴ *Poland's Reluctant Hero*, Barbora Cernusakova (Amnesty International, August 2018) <https://www.amnesty.org/en/latest/news/2018/08/polands-reluctant-hero/>

¹⁵ *The practice of the European arrest warrant in Poland as an issuing country*, Helsinki Foundation for Human Rights (May 2018) <http://www.hfhr.pl/en/publication/the-practice-of-the-european-arrest-warrant-in-poland-as-an-issuing-country/>

¹⁶ *Extradition to Poland: Risks and responsibilities*; Emily Barley, Due Process; June 2019 <http://dueprocess.org.uk/2019/06/17/due-process-report-extradition-to-poland-risks-and-responsibilities/>

¹⁷ *Rule of Law: European Commission acts to defend judicial independence in Poland*, European Commission (December 2017) http://europa.eu/rapid/press-release_IP-17-5367_en.htm

¹⁸ *Poland must immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges*, Court of Justice of the European Union (December 2018) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-12/cp180204en.pdf>

¹⁹ *EU: Firm action needed to save right to fair trial in Poland*, Amnesty International (March 2018) <https://www.amnesty.org/en/latest/news/2018/03/eu-firm-action-needed-to-save-right-to-fair-trial-in-poland/>

²⁰ Ben Keith, *Romanian criminals avoid extradition under UK law* (The Barrister, 2017) <http://www.barristermagazine.com/romanian-criminals-avoid-extradition-under-uk-law/>

²¹ *Extradition: UK law and practice - Select Committee on Extradition Law* (House of Lords, 2015) <https://publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/12615.htm>

"We believe the arrangements in place for monitoring assurances are flawed. It is clear that there can be no confidence that assurances are not being breached, or that they can offer an effective remedy in the event of a breach."

For the Select Committee, the implications of the lack of monitoring were very serious indeed:

"It is questionable, in our view, whether the UK can be as certain as it should be that it is meeting its human rights obligations"

As a result, they recommended that the government begin monitoring compliance with assurances, and regularly collate and publish details of assurances to make the process transparent. Neither of these recommendations has been enacted by the British government.

This lack of monitoring makes it difficult for subjects of EAWs to argue against extradition on the basis of assurances being broken in the past, as lawyers have to scramble around trying to find case studies themselves.

However, even when it is proven in court that assurances have been broken in the past, and the court accepts that is the case, extraditions can proceed. A case law update from Defence Extradition Lawyers Forum (DELF) gave an example of a case heard in Westminster Magistrates' Court:²²

"It acknowledged the existence of evidence – including Romanian admissions – that post-assurance extraditees had been held in conditions inconsistent with those guarantees."

However, the court still allowed extraditions to Romania to proceed:

"Having absolved the Romanian authorities for past breaches the risk of future breaches of assurances was dealt with shortly."

NGO Fair Trials International neatly sums up the problem with the system of assurances in its written comments on the *Prisacaru v. Belgium and Romania* case (8339/15)²³:

"...assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment."

The NGO concludes:

"Fair Trials accepts that such assurances, being solemn undertakings issued as between EU Member States, have to be accorded due weight. However, we would submit that in some circumstances – in particular where Council of Europe authorities continue to express concerns as to the implementation of relevant judgments or

²² DELF November 2016 Newsletter (Defence Extradition Lawyers Forum (DELF), 2016) <http://delf.org.uk/wp-content/uploads/2017/02/DELF-Newsletter-2-29.11.16.pdf>

²³ *Prisacaru v. Belgium and Romania App. No 8339/15: Written comments of Fair Trials* (Fair Trials International, 2018) <https://www.fairtrials.org/wp-content/uploads/2018/03/Fair-Trials-Prisacaru-Intervention1-final-clean.pdf>

where evidence of past breaches of assurances can be shown – the executing state must be willing to look behind such assurances as part of its duty to provide ‘independent and rigorous scrutiny’ of an Article 3 complaint under Article 13. It will, otherwise, simply return to blind faith and the ‘automatic and mechanical’ application of mutual recognition.”

What this means

The system of assurances was developed as a way to protect the rights of people being extradited under EAWs, in order to meet the human rights obligations of executing states.

However, years of experience has shown that simply taking the word of the requesting authority that they will not violate the human rights of the individual is not effective. As a result, the UK has inadvertently been party to the violation of human rights in perhaps hundreds or thousands of cases.

Unfortunately, we don’t know precisely how many people the UK was responsible for extraditing have subsequently been abused, because the government and courts do not make any effort to monitor compliance with assurances.

The conclusion that countries with sub-standard justice systems which violate human rights as a matter of course also end up abusing the human rights of people extradited under EAWs is not a radical one.

The conclusion that countries which have broken their promises on assurances many times in the past – because the systemic problems in their courts and prisons make it unavoidable – will break assurances in the future is also not a radical one.

Ignoring this problem will not make it go away: the only way for the UK to meet its human rights obligations under international law and ensure it is not party to violations in the future is to stop extraditing people to countries with sub-standard criminal justice systems.

Recommendations

- 1) Assurances do not work. The idea that all EU member states can be trusted to keep their promises in extradition cases does not stand up to even the briefest scrutiny. There must be consequences for countries which do not fulfil their human rights obligations.
- 2) Extraditions to countries with systemic problems which lead to human rights violations in their criminal justice systems must be halted immediately. Given the dire situation of its prisons, Romania is the country of greatest concern and action must be taken by the Home Secretary now.
- 3) Extraditions to countries which have repeatedly broken assurances must be halted immediately. Their promises cannot be relied on, and so this is the only way for the UK to fulfil its human rights obligations.
- 4) The Home Office should follow up on cases where assurances were given as a condition of extradition, as a matter of urgency. This information will determine which countries frequently break their promises.
- 5) The UK must not sign up to the 'EAW-lite' extradition system as planned as part of the Brexit negotiations. Instead, the UK should negotiate a series of bilateral extradition agreements which offer greater protection for human rights. See: *The future of extradition from the UK: Protecting fundamental rights*²⁴.
- 6) Under these new extradition agreements, the UK should continue to monitor compliance with assurances and the status of human rights in requesting countries to ensure that these problems do not arise again.

²⁴ The future of extradition from the UK: Protecting fundamental rights; Emily Barley, Due Process, July 2020 <http://dueprocess.org.uk/2020/07/02/due-process-report-the-future-of-extradition-from-the-uk-protecting-fundamental-rights/>



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