

The decision to opt in to the European Arrest Warrant poses grave consequences for British residents, destroying important legal rights which have been the hallmark of eight centuries of constitutional history



Eight hundred years later, the death of Magna Carta

By Stuart Wheeler

On 12 January 2015, 500 of the great and the good (or at any rate the well-heeled) sat down to a sumptuous dinner at the Guildhall. Cost: £500 per head. This was to celebrate the 800th anniversary of Magna Carta, which is widely regarded as one of the most important documents in the world.

Celebrate? A funeral procession would have been more appropriate. The irony was that some six weeks before the dinner the Coalition government had in effect killed off the famous Clause 38 of Magna Carta which provided: 'No judicial officer should initiate legal proceedings against anyone on his own mere say-so, without reliable witnesses brought for

that purpose'. The way the Coalition government had killed this clause was to opt in to the European Arrest Warrant (EAW) which removed that protection.

A little history. Magna Carta was agreed to by King John on 15 June 1215. It was not really a piece of legislation, more a treaty between King John and 25 barons. In any case King John very soon persuaded Pope Innocent III to annul it. In 1225, King Henry III re-issued a much revised version of Magna Carta and that was later put onto the statute book by Edward I in the Magna Carta Act 1297. Almost all of that has now been repealed, but the ideas of Magna Carta have had a huge effect over the centuries on the laws not





only of this country but of many others, mainly English-speaking ones.

But it has not influenced many, if any, of the other countries of Europe. In Europe, Pope Innocent III was busy getting the Holy Inquisition going at the same time as King John was acquiescing in Magna Carta. An assumption implicit in any defence of the EAW is that there should be mutual recognition of the legal systems of all EU countries. 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, no questions asked. This philosophy is based on mutual trust in the ability of all EU member states to deliver justice and uphold human rights. Unfortunately, the foundations for that trust are not yet in place and the trust does not exist, for good reasons.

Standards of justice vary greatly from one EU country to another and human rights do not receive the same respect in every member state. Unfortunately, this reality has largely been ignored in the push for ever greater mutual recognition and cross-border cooperation. Defence rights have been sidelined, not strengthened, in the name of greater cooperation, and blind faith in the criminal justice systems of our EU neighbours has led to many cases of injustice. It is notable, for example, that Croatia is part of the European justice system, even though the accession review highlights problems with corruption in its police and judiciary.

Although most of the 1297 Act has been repealed, two crucial clauses from Magna Carta, which found their way into the 1297 Act, remain. They are Clauses 39 and 40 of Magna Carta which provided: 'No free man shall be seized or

imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.'

What the EAW does is to make it compulsory, if a state which is a member of the EU demands it, for another state to send to the requesting state a person whom the requesting state wants to try for an alleged offence, or wants to have him to serve out a sentence, *without any evidence that he has done anything wrong*. As the former MP and Maastricht rebel Christopher Gill points out, Magna Carta's Article 38 states that 'no bailiff shall upon his own unsupported accusation place any man upon trial *without producing credible witnesses to the truth of the accusation*' (emphasis added). Yet the EAW does just that. It is quite clear that no evidence is required because the 'framework decision', which established the EAW, lists the requirements for the EAW to be effective and there is no mention whatever of evidence in that list. Nor, as far as I am aware, has any EAW ever been found invalid because of the fact that there was no evidence put forward.

At the Guildhall dinner in January, speeches were given by the foreign secretary and the master of the rolls in praise of Magna Carta, but not a word was said about this voluntary surrender of Magna Carta's guarantee to UK citizens. That might have taken the gloss off the occasion. This is typical of the way the establishment happily ignores what does not suit it. Another example of this comes from when I was honoured to be invited to the main celebration held on 15 June at Runnymede, and was delighted to discover that there would be debates. At last, I thought, an opportunity to discuss the arrest warrant. But no: the 'debate' sessions were to be a 'series of short recorded talking-head commentaries'. Some debates! I did not go.

Why did the Coalition opt in to the European Arrest Warrant?

An extraordinary aspect of the decision by David Cameron and the Coalition government to opt in to the EAW is that nothing compelled them to do it. The prime minister, who has been at pains to say how he intends to get back many powers from other members of the EU, did not have to negotiate in any way about this. As Christopher Gill says: 'All this from the very man who wants to see powers repatriated back to the UK!' All the prime minister had to do, having exercised the UK's right to opt out of a block of 130 crime and justice measures, including the EAW, was to refrain from then opting back in.

This is the legislation about which Mr Cameron, then an opposition MP, had made a number of points during the passage of the Extradition Act 2003, which initially took Britain in to the EAW:

- 'Let us be clear about what it means. One of our constituents goes to Spain on holiday, commits an alleged offence, and returns home. All that is necessary [for the UK to be compelled to send him to Spain] is that the warrant is correctly filled out.' (House of Commons, 9 December 2002)
- 'I will vote against the Bill because I disapprove of Part 1 [of the EAW], specifically the charge to dual criminality. It has for many years in this country been a safeguard that one cannot be extradited for something that is not an offence in this country, and that safeguard should not be lost.' (House of Commons, 9 December 2002)
- 'Proponents of the European Arrest Warrant always ask why someone should be protected just because they have managed to cross a border. They have been in Germany, Spain or Portugal, so why should they suddenly have protection when they get back to good old Blighty? My answer would be that our legal system is here to protect our citizens, and that

that protection should be given up only if we can really trust the legal systems of other states. This whole question turns on whether we trust other member states' criminal justice systems.' (House of Commons, 25 March 2003)

Why then did David Cameron's criticisms of the EAW disappear when he came into office? I think the main reasons were as follows. Firstly, the government is seeking to make various changes to the EAW to deal with its shortcomings. These changes, however, should have been made before we opted in. As it is, we have no certainty that they will be made at all.

Secondly, even critics of the EAW like Fair Trials International have recognised the need for an efficient system of extradition within the EU, arguing that effective justice policy depends on effective co-operation in cross-border cases. I think that both David Cameron and the home secretary, Theresa May, would have thoroughly agreed with that. But, as Fair Trials International has described: 'Unfortunately, there has not been sufficient assessment of the human and financial costs of this "no questions asked" extradition regime.'

Thirdly, there has been a suggestion that the free movement of people within the EU required effective extradition arrangements to prevent criminals from evading justice. Indeed, in a letter to *The Daily Telegraph* last November, a large number of legal luminaries made this point and went on to allege that failure to opt in to the EAW would risk Britain becoming a safe haven for refugees from justice.¹ But can it really be argued that Britain might become a safe haven just because they will not be handed over without evidence of a prima facie case?

Finally, a point which may sound odd but which is, in my view, the biggest influence of all: when in opposition, politicians can comfortably criticise the shortcomings of the EU and indeed criticise the ministers of other member states. When, however, they are in power, they have to


go to meetings of senior ministers of the other member states and they do not like being the only one in the room to stand out against what everyone else wants. There have been other examples of this.

Let me come back to the history. That a legal challenge soon followed the Coalition's decision to opt in to the EAW last year cannot have been a surprise. Yet, as noted above, a large group of top lawyers, including a former president of the Supreme Court and the then president of the Law Society, wrote to *The Daily Telegraph* (just before the challenge had been initiated) saying that unless the government did opt in the UK would be more at risk from foreign criminals.

No doubt our judges make every effort to avoid being biased, but it is hard to think of anything which could have put more pressure on a court than a letter from such an impressive group of legal luminaries. In my view those who signed the letter should, in spite of – indeed partly because of – their distinction, be ashamed of themselves. In a criminal case their intervention might have been deemed contempt of court.

In spite of that I decided to go ahead and take on the government, trying to prevent it from opting in. Two QCs had advised me that I had, at the very least, an arguable case that the government could not legally opt in. The case was brought on with extraordinary speed, on a Friday, only a few days after it was initiated, and the litigants were told by the court that judgment would be given that afternoon. If the loser wished to appeal, we were told, the Court of Appeal would hear it the following Monday. That is very rare indeed and of course it suited the government (as well as me) very well.

I lost and I did not appeal: litigation is expensive! I do not say that the decision was wrong. I certainly do not say that the court was in fact biased. Nevertheless, the millions of pounds of taxpayers' money being spent on celebrating Magna Carta without, I believe, a single mention of the appalling effect on it of the

A group of judges in black robes and white wigs walking away from the camera. The text is overlaid on the image.

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EAW, coupled with the letter to *The Daily Telegraph*, signed by many of our top lawyers, worries me a lot. Political correctness, and the actions of senior lawyers, appear to me to mean that it is at present very hard to get an inconvenient opinion given consideration. This is, in my view, an important issue in its own right, quite apart from the iniquities of the EAW.

Rights before the law have been destroyed

Serious criticisms of the EAW are acknowledged even by those who defend the opt-in. For example, in an article making the case for the UK to opt in, academics Maria Fletcher and Professor Steve Peers accept that the arrest warrant had ‘resulted in a number of British suspects being surrendered to countries where they then faced excessive periods in prison before trial – bail being notoriously difficult to attain as a foreign suspect’. They go on to say that alternative options to improve the situation did exist and that the authors would submit that they were preferable to opting out. The fact is, however, that none of those options has actually been adopted.²

Miss Fletcher and Prof Peers go on to deal with the danger of miscarriages of justice. They suggest a solution to this may arise from the government’s apparent willingness to participate in an agenda to ensure minimum standards or procedural safeguards to those who find themselves caught up in the criminal justice system across the whole EU. They admit that reaching such an agreement would be ‘not easy’. They then go on to make the not very impressive point

that those who object to the EAW on the grounds that it sometimes results in miscarriages of justice should hardly be among those calling for repeal of the Human Rights Act and the UK’s withdrawal from the European Convention on Human Rights (ECHR). That is irrelevant. The real question is not whether those who object to miscarriages of justice may in some way be putting forward an argument which is inconsistent with something else they have said. The point is whether the argument is valid.

The House of Lords EU Select Committee dismissed the concerns of those proposing an opt-out on the grounds that they were not supported by the evidence and did not provide a convincing reason for exercising the opt-out.³ The committee went on to say, oddly, that they had failed to identify any significant, objective justification for avoiding the jurisdiction of the Court of Justice of the European Union (CJEU). They added that alternative arrangements would raise legal complications and result in more cumbersome, expensive and less effective procedures, thus weakening the hand of the UK’s police and law enforcement authorities. The negotiation, they said, of any new arrangements would also be a time-consuming and uncertain process.

But these points are, I believe, worth very little indeed compared with the shocking fact that the UK citizen’s (or resident’s) guarantees of hearings in open court, with evidence produced, before a person may be imprisoned or deported, have been destroyed. Let me quote here a piece by Torquil Dick-Erikson, an expert

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in comparative criminal justice who has given close attention to the EAW question:

It is said by its apologists that the EAW is good for Britain because it enables us to obtain the speedy extradition of our own criminals who have taken refuge in other EU countries (and by the way, if we controlled our own borders this would not be so easy for them). Now our own police and Crown Prosecution Service should never request the arrest of someone (whether inside or outside Britain) unless they have already collected enough prima facie evidence against him. They do this anyway, and they did it before the EAW – they would send an extradition request with an indication of the evidence against the suspect. They would continue to do it after the EAW was repudiated and we reverted to previous arrangements. Our own procedures would not change. The difference would be that the foreign prosecutors requesting us to extradite someone would also have to provide evidence against the wanted person. At present they can have people extradited on a mere whim, or a hunch, or a “feeling” that the person in question is guilty, they do not need to shew any hard evidence. This has led to cases of manifest injustice, amply documented.

As for the ‘honey-pot’ argument – that without the EAW Britain will become a magnet for criminals from all over Europe – well, the difference from the present arrangements will simply be that before granting extradition, we will want to see evidence of a prima facie case to answer. If the foreign state is unable or unwilling to supply us with any indication of evidence against the person they wish to have extradited, then how are we to tell that the person they want is, or could well be, a criminal? To believe otherwise is to deny the presumption of innocence, which is surely one of the bedrock values of our civilisation. To preserve our presumption

of innocence is surely better than to acquiesce in a presumption of fairness in other systems, which has on too many occasions been shown to be unwarranted.⁴

Serious injustices for British residents

But does the EAW matter? Yes it does. In 2014/15, EAWs resulted in the arrest of 1,586 residents of the UK and 1,093 being surrendered to the requesting state.⁵

An odd point about the lack of attention given to the EAW is that far more attention has been given to the problems of those whom the United States wish to extradite from the UK. Yet figures from 2009 show that since 2003 only 63 people were extradited from the UK to the USA, while in 2009/10 alone 699 people were extradited from the UK to other EU member states under the EAW. The surrender of individuals between states clearly has significant human rights implications, potentially engaging the right to protection from inhuman or degrading treatment (Article 3 of the ECHR), the right to liberty and security (Article 5), the right to a fair trial (Article 6), and the right to respect for private and family life (Article 8). There have been some serious injustices:

1 Keith Hainsworth, 64, an Ancient Greek tutor, was seized at Calais, as he and his wife Pippa returned from a weekend in Paris, on the basis of a Greek EAW. He was thrown into a French police cell, banned from speaking to his wife or a lawyer, accused of ‘malicious arson’ in Greece, with his wife as an accomplice – and branded an ‘environmental terrorist’ by a French judge, an allegation not on the EAW. This led to a five-week nightmare which culminated in Mr Hainsworth being flown to Greece from France under armed guard, thrown into a notorious Athens jail and then transported on a nine-hour journey in a ‘cattle truck’ prison transfer wagon with menacing

Greek criminals, before he was finally freed and returned home on the Tuesday. When he had appeared in court and it was announced that the evidence against him had been given from a named man there were giggles in court because that man was notorious as a mischief-maker. Mr Hainsworth now faces a bill of £40,000 for legal fees and other costs and I have no reason to think that anybody else but him will pay them.

2 Colin Dines, a retired judge, was caught in a similar type of injustice. In 2010, Italian authorities issued an EAW against him, alleging involvement in a telecoms fraud. He was woken and arrested in his home in the night by British police and bundled off to a prison in Rome for an investigation which then petered out. He then languished under the threat of prison for five and a half years.

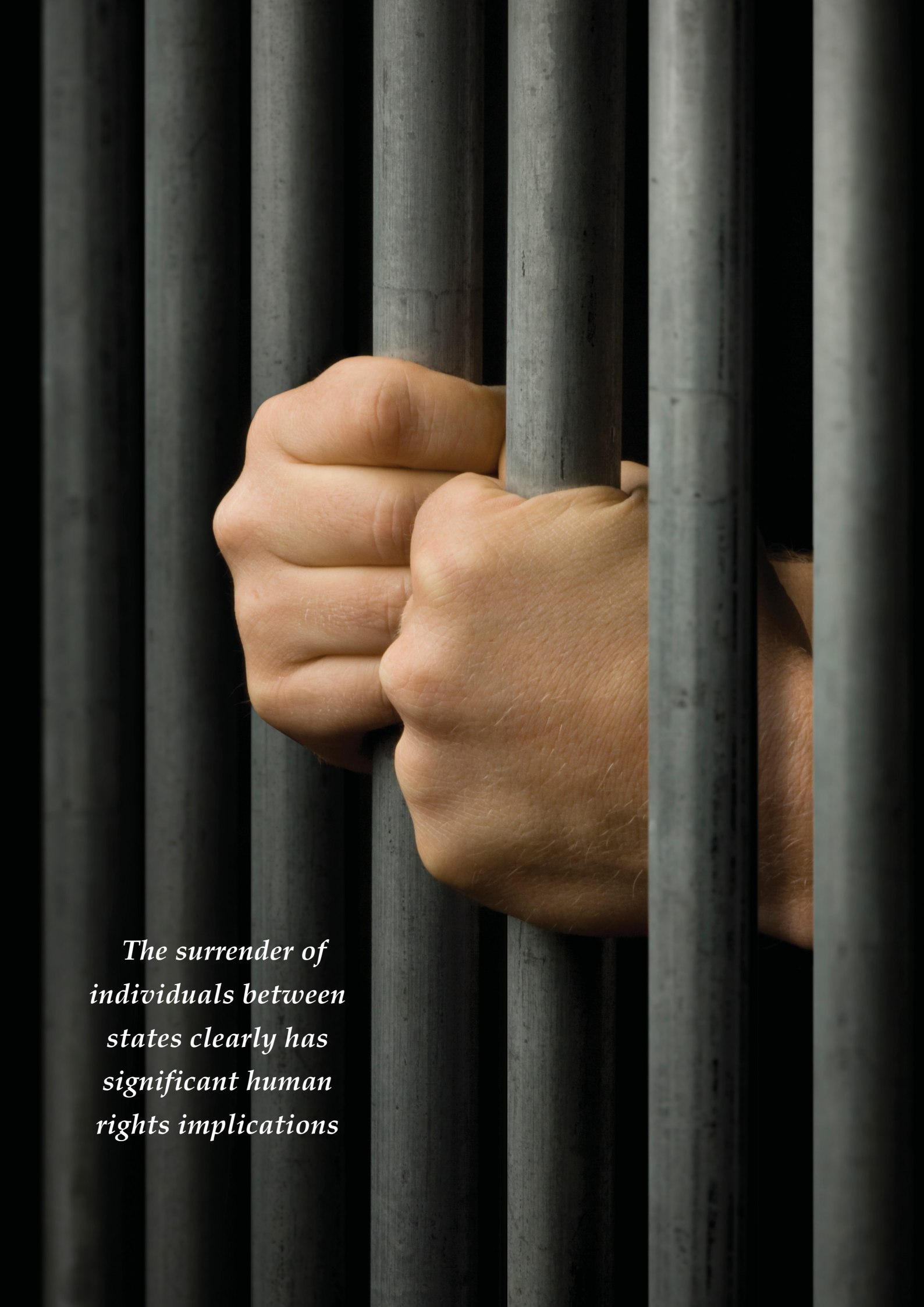
3 In 1989 Deborah Dark, a grandmother, was arrested in France on suspicion of drug related offences and held in custody for eight and a half months. Later that year she was acquitted on all charges. So she was released from jail and returned home to the UK. But the prosecutor appealed against the decision without notifying Deborah or her French lawyer. The appeal was heard in 1990 with no one there to present Deborah's defence, which is obviously intolerable. She was found guilty in her absence and sentenced to six years imprisonment. Again, she was not informed that an appeal had taken place, nor notified that her acquittal had been overturned. As far as she was concerned she had been found not guilty on all charges and was free to start rebuilding her life.

In April 2005, 15 years after the conviction on appeal, an EAW was issued by the French authorities for Deborah to be returned to France to serve her sentence. She was not informed about this and in 2007 she was arrested at gunpoint in Turkey while on a package holiday with a friend. The police were

unable to explain the reasons for her arrest. So she was released and on her return to the UK she went to a police station and tried to find out the reasons for her arrest. She was told that she was not subject to an arrest warrant. Yet in 2008, when she travelled to Spain to visit her father who had retired, and she then tried to return to the UK, she was arrested and taken into custody in Spain, where she faced extradition to France. After one month in custody the Spanish court refused to extradite Deborah and she was released from prison and took a flight back to the UK. Her ordeal was still not over. On arrival in the UK she was arrested yet again, this time by the British police at Gatwick. Fortunately the English court did refuse the extradition in April 2009 due to the passage of time.

4 Andrew Symeou, a client of the highly respected body, Fair Trials International, was sent to Greece on an EAW and spent a harrowing 11 months on remand in custody in Greece. His trial then started but was adjourned twice because of the unavailability of qualified interpreters and because of court strikes. He spent his 21st birthday in a notoriously dangerous prison, Korydallos. The conditions were said to have included filthy and over-crowded cells, sharing cells with up to five others including prisoners convicted of rape and murder, violence among prisoners: one beaten to death over a drug debt, violent rioting, cockroaches in the cell, fleas in the bedding, prison infested with rats and mice and the shower room floor covered in excrement. He was eventually released.

In relation to the case of Colin Dines, Dominic Raab, Dines' constituency MP and now parliamentary under-secretary at the Ministry of Justice, pointed out there were two fundamental flaws in the EAW system. First, there is the obvious one that those opposing the EAW cannot ask whether there is even the slightest evidential case to answer.



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Secondly, the EAW makes the plainly unsupportable assumption that there are common standards of justice across Europe whereas in fact the post-Soviet justice systems in many eastern European countries are appalling.⁶

Theoretically that could be a justification for refusing to act on an EAW, but it is difficult to see the courts of this country throwing out an EAW on the basis that the requesting state did not have a fair trial system or treated people in an inhumane manner. That would make for very serious political problems. All the same the Belgian legislation implementing the EAW does allow for refusal where there are serious grounds to believe that the execution of the EAW would impinge fundamental human rights. The basis for this ground for refusal is Article 1 (3) of the framework decision. So perhaps a defence against an EAW may one day be put forward in our courts.

To be rid of the European Arrest Warrant, Britain must be rid of the EU

Leaving the EU is now the only way out of the EAW. Why? Because there is no provision in Protocol 36, which is what gave the UK its ability to choose whether to opt in, to enable it to opt out again later. This may not seem completely convincing, but it is certainly unanimously agreed, with evident confidence by those with whom I have discussed the point, that once something has become law in the EU, that is the end of it. By implication, even if you had the opportunity not to opt in, that does not mean that you have the opportunity later to opt out again. I am confident that, in practice, though

one might be able to put up a plausible argument to the contrary, the European Court of Justice, the relevant court for this matter, would hold in favour of the common view. That court

has a very distinct record of findings ‘in law’ which suit the EU.

There have clearly been some cases – see above – where those sent abroad under an EAW have not been treated properly while in prison awaiting trial, have had to wait in prison far too long before being tried and/or have not been given a fair trial. In the preamble to the council framework decision of 13 June 2002, which established the EAW, paragraph 13 states: ‘No person should be removed, expelled or extradited to a state where there is a serious risk that he or she will be

subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’ On the record, it is clearly arguable that some of the states to which our residents have been sent do present a serious risk of at least ‘degrading treatment or punishment’. I believe the lawyers for a person subject to an EAW should consider this defence in suitable cases. As I have already stated, however, I think political considerations would in practice make it highly unlikely that a court would accept this defence.

Article 5 of Protocol 36 says, in connection with the UK’s wish to opt in, that ‘the union institutions and the UK shall seek to re-establish the widest possible measure of participation of the United Kingdom in the *acquis* of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence’. All this, I

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believe, tends to show that the person whose presence is requested is unlikely to succeed in avoiding extradition.

It could be argued that David Cameron should, in his current negotiations with other members of the EU, ask that we should be allowed to leave the EAW. One trouble with that would be that he would look rather silly, having completely voluntarily agreed in November last to opt in.

To quote Christopher Gill again: 'What an

irony it is that in this very year in which we might well have been celebrating the 200th anniversary of the defeat of the 19th century manifestation of continental totalitarianism, the focus will instead be on the 800th anniversary of Magna Carta, the fundamental tenets of which the government has so recently, deliberately and gratuitously, trashed.'

What is done is done. There is only one way now to get rid of the EAW and I welcome it. We must leave the EU.

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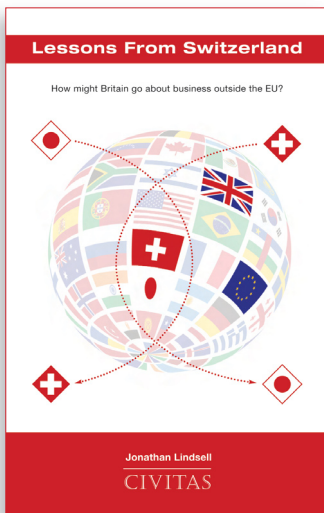
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Notes

- 1 Lord Phillips of Worth Matravers et al, 'European Arrest Warrant – the case for opting in', *The Daily Telegraph*, 6 November 2014
- 2 Maria Fletcher and Steve Peers, 'The European Arrest Warrant: the case for the UK to stay in', *EU Law Analysis*, 4 November 2014
- 3 Quoted in Jonathan Lindsell, 'We should opt out of the EU police and criminal justice measures', *Civitas*, 9 July 2013
- 4 Torquil Dick-Erikson, 'Why Britain must repudiate the European Arrest Warrant', Campaign for an Independent Britain, 2014
- 5 Historical European Arrest Warrants statistics, Calendar and Financial year totals 2004-April 2015, National Crime Agency
- 6 Dominic Raab, 'UK must opt out of this Kafkaesque web of injustice', *The Mail on Sunday*, 16 November 2014



Should Britain choose to quit the European Union it would take back from Brussels responsibility for negotiating its own trade deals with economies around the world. In this study, Jonathan Lindsell takes a look at how Switzerland has fared as a European nation outside the EU. With an economy much smaller than Britain's, not to mention the EU's, it has hammered out trade agreements with an impressive array of global partners. But what kind of terms is it able to extract?

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