

In the European Court of Human Rights
E.B. v the United Kingdom (Application No. 63019/10)

1. The AIRE Centre is a London-based NGO whose mission is to promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights. In addition to its work on the ECHR with which the Court is familiar, the Centre also provides advice to approximately 450 people each year (either directly or as second-tier advice to lawyers and advisers) on aspects of European Union ('EU') law. The Centre's EU law work includes advice and representation in relation to the free movement of EU citizens and their family members, the implementation of agreements between the EU and third countries, the EU "asylum acquis", the EU law applicable to the unlawful removal or retention of children in cross border situations ("EU Regulation 2201/2003, also known as the Brussels II bis Regulation) and the whole spectrum of cross-border EU criminal justice measures, such as the European Arrest Warrant ('EAW'). The Centre regularly conducts surgeries in prisons in the London area to provide advice and information on both EU law and the ECHR for EU national prisoners. The AIRE Centre is frequently asked by the European Commission and other EU bodies to consult, formally or informally, on EU measures, including cross-border criminal justice measures. In 2009-2010 the AIRE Centre implemented a project funded in part by the European Commission on EU cross-border criminal measures, resulting in a publication, *European Cross Border Justice: A Case Study of the EAW* by Theodora Christou (St Pauls Press, 2010, Annex A). A bi-product of this project was the establishment of a European Judicial Network dedicated to cross border criminal justice convened by Lord Justice Thomas.

2. Fair Trials International ("FTI") is a UK-based NGO whose mission is to work for a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused. FTI has launched a campaign, 'Justice in Europe', aimed at ensuring that the EU respects and strengthens the right to a fair trial and advocating for reform of the EAW. FTI also provides support to individuals who have been surrendered from one EU Member State to another under the EAW.

3. FTI and the AIRE Centre have an ongoing co-operation. The AIRE Centre's Director, Nuala Mole, and one of its legal consultants, Theodora Christou, are members of FTI's Legal Experts Advisory Panel (known as 'LEAP'), which convenes regularly to exchange information on cross-border criminal justice as it is implemented across Europe. The Centre's experts work regularly with FTI's experts in delivering training in this field.

4. The AIRE Centre and FTI ('the Interveners') are grateful to the Court for the opportunity to intervene in this case.

5. Although this Court has considered on several occasions¹ the compatibility of the Convention with certain actions taken by EU Member States pursuant to EU Framework Decision 2002/584/JHA ("FD") (Annex B) (which created the European Arrest Warrant ("EAW")), this appears to be the first occasion on which a Chamber of the Court will consider the compatibility of such actions with Article 8 of the Convention.² The Court has granted the AIRE Centre and FTI ('the Interveners') permission to provide the Court with information about the

¹ *Pianese v Italy and Netherlands* (2010); *Mondero Angora v Spain* (2008).

² Although the applicant in *Stapleton v Ireland* (decision, 2010) claimed that his surrender under an EAW from Ireland to the United Kingdom would violate his Article 8 rights, the Court found that his application did not give rise to an issue under that Article (§ 33).

theory and practice of the EAW, including information about the wider provisions of EU law and their interface with the Convention. They will do so in the light of Article 8, although of course without reference to the specific facts of this case.

6. The intervention comprises three parts. In Part A, the Interveners review the history and structure of the EAW while highlighting the human rights issues that it raises. In Part B, the Interveners examine the relevance of Article 4(6) of the EAW FD and this Court's judgment in *M.S.S v. Belgium and Greece* (Grand Chamber, 2011). Part C provides relevant information on EU law on the free movement of persons.

Part A

7. The EAW was adopted to put in place a simplified system which would replace extradition procedures in proceedings between Member States of the EU.³ As the European Commission put it in its recent, third report on the EAW FD, the EAW FD aims to reinforce 'the free movement of persons within the EU by providing a more efficient mechanism to ensure that open borders are not exploited by those seeking to evade justice' (Annex D page 3). The EAW FD, enacted pursuant to Articles 31(1)(a) and (b) and Article 34(2)(b) of the Treaty on European Union (Annex C), entered into force on 1 January 2004.

8. EAWs can only be issued by judges in the requesting state. They can seek the surrender of an individual, either for the purposes of (i) the prosecution of an offence, or (ii) to enforce a post-conviction custodial sentence or (iii) to enforce a pre-trial detention order that has already been imposed by a court. The offences for which EAWs can be issued are specified in the FD and are punishable under the law of the requesting EU Member State (thus abolishing the principle of 'dual criminality'); however in cases where surrender is sought for prosecution the offence must carry a minimum possible sentence of twelve months. Where a final conviction has already occurred, the minimum custodial sentence imposed is four months. The EAW FD is predicated on the principle of mutual recognition by EU Member States of each other's judicial decisions (see Recitals, 2 and 6, and Article 1(2), of the EAW FD). Thus EAWs must be issued by a judge. An EU Member State requesting surrender of an individual from another EU Member State is not under any obligation to show, substantively, that there is a prima facie case to answer.

9. Under Article 1 of the FD, EU Member States are under an obligation to execute an EAW. The FD however sets out circumstances in which EU Member States must refuse to execute an EAW. The mandatory grounds for non-execution are found in Article 3. The decision also sets out the circumstances in which EU Member States may refuse to surrender. The discretionary grounds are found in Article 4, particularly Article 4(6). (see Annex B). This intervention will focus on those discretionary grounds.

10. In addition, Article 1(3) of the EAW FD expressly provides:

³ The Court will find background information about the EAW Framework Decision at pages 13-32 of Annex A. The Court may also wish to consult the collection of essays *Still Not Resolved? Constitutional Issues of the European Arrest Warrant* (eds. Elspeth Guild and Luisa Marin, 2009), which includes essays by Nico Keijzer on 'Origins of the EAW Framework Decision' and 'The EAW Framework Decision: Some Highlights'.

This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

11. Any action taken under an EAW is governed by EU law. It must therefore be in conformity with fundamental-rights principles, including those of the Convention and those set out in the EU Charter of Fundamental Rights (“CFR”). Since the coming into force of the Lisbon Treaty on 1 December 2009, Article 6 of the Treaty on European Union (Annex C) makes clear that the CFR now has the same value in the EU legal order as the Treaties themselves (i.e. the Charter is primary EU law). When taking any action governed by EU law, EU Member States, as a matter of EU law, are also required to respect ECHR rights (such as Articles 3 and 8), which have corresponding articles in the Charter (Articles 4 and 7, respectively). Where there are CFR provisions which correspond to Articles of the ECHR, the CFR provisions must have at least the same scope and meaning as the corresponding Convention provision;⁴ the CFR is also applicable to EU Member States when they are implementing EU law.⁵ There are decided cases where national courts implementing the EAW have refused to allow the execution of EAWs on the sole basis that the return would violate an individual’s ECHR rights (Annex E).

12. Where the execution of an EAW engages a Convention right such as Article 8, the phrase ‘in accordance with the law’ in Article 8 § 2 thus means in accordance with the applicable EU law. (The Court will recall that in *Aristimuño Mendizabal v France* (2005), this Court found that an interference with the right to respect for private life which was in violation of EU law on the free movement of persons, was contrary to Article 8, as it was ‘not in accordance with the law’, the law in that case being EU law (§ 79).)

13. The Interveners urge the Court to give careful consideration to FTI’s recent submissions to the UK Parliament’s Joint Committee on Human Rights on the EAW (Annex F). FTI has specifically noted the following human rights concerns arising in the context of the human rights implications of the EAW and the European Investigation Order⁶:

- *the EAW is being used to extradite people for minor offences, disproportionately interfering with their fundamental rights;*
- *individuals are being extradited to stand trial on charges based on improper police investigations, including where evidence has been obtained through police brutality;*
- *following extradition people are spending unacceptable periods of time in pre-trial detention, sometimes in prison conditions which are inhuman or degrading. Once extradited, people are standing trial in legal systems which do not afford sufficient protection for defence rights, thus jeopardising the right to a fair trial;*

⁴ Article 52(3) CFR reads as follows: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

⁵ Article 51(1) CFR reads as follows: ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’

⁶ See Annex F, Fair Trials International’s submission to the Joint Committee on Human Rights.

- *individuals have been extradited to serve prison sentences even where there is compelling evidence that their original trial was unfair;*
- *judicial decisions not to execute EAWs are not being recognised by issuing countries, resulting in an unjustified curtailment of individuals' right to liberty;*
- *people are facing extradition decades after an alleged offence;*
- *extradition is taking place for investigative purposes only, when authorities in the issuing State are not ready to mount a prosecution;*
- *individuals face extradition even where there is clear evidence that they are the victim of mistaken identity;*
- *the basis for refusing extradition where it would result in a human rights violation is not being used effectively in practice and requires clarification.*⁷

14. The Interveners are thus concerned that in practice the EAW FD's simplified extradition procedure creates a real risk that surrenders under the EAW will violate Convention rights. This is in part because the EAW is premised on the fiction that all EU Member States respect Convention rights in their criminal law system. Cases in which this Court has found systemic violations of human rights in EU Member States' criminal justice and prison systems make this clear. *Dimitrov and Hamanov v Bulgaria* (2011), §§ 110-123; *Śławomir Musiał v Poland* (2009), § 96. See also, in relation to Article 6 (criminal proceedings), *Ali v Romania* (2010); *Henryk Urban and Ryszard Urban v Poland* (2010); *Užkauskas v Lithuania* (2010); *Pocius v Lithuania* (2010); in relation to Article 3 (prison conditions), *Savenkovas v Lithuania* (2008).

15. In the Article 8 context, it is important to note that the speed with which EAW surrenders take place⁸ leaves little time for consideration of the interference with the private and family life of those being surrendered and their family members. The impact of such interference with private and family life may be aggravated due to systemic, unreasonable delays in criminal proceedings in the requesting State of the kind condemned in *Dimitrov and Hamanov*.

16. The Court of Justice of the European Communities and its successor institution, the Court of Justice of the European Union (both referred to hereafter as the 'Court of Justice'), have considered various cases about the EAW (Annex I). That Court was however unable to be seised of the issues arising in the present case surrounding the inter-relationship between the provisions of the EAW FD, the CFR and the ECHR. Under Article 35 of the Treaty on European Union (Annex C) Member States could refuse to permit their national courts or tribunals to refer questions for a preliminary ruling to the Court of Justice in the normal way⁹ if they related to measures such as the EAW although those courts were still obliged to apply these measures as EU law. Since the Treaty of Lisbon came into force on 1 December 2009, EU Member States can only continue to opt out of the Court of Justice's jurisdiction over the EAW until December 2014.¹⁰ The UK Government declined, and still declines, to accept the jurisdiction of the Court of Justice in these matters. The English courts considering the present case could therefore not have referred questions to the Court of Justice in this matter in order for

⁷ See *ibid.*

⁸ As the European Commission has explained: '*The average surrender time for those who did not consent was 48 days. This contrasts very favourably with the pre-EAW position of a one-year average for the extradition of requested persons....*' Annex D, page 3.

⁹ Such 'normal' preliminary rulings were made, before 1 December 2009, in accordance with Article 234 of the Treaty Establishing the European Community and, since, under Article 267 of the Treaty on the Functioning of the European Union. These provisions can be found at Annex C.

¹⁰ This is provided for under Article 10 of Protocol 36 to the Lisbon Treaty (Annex C).

that Court to deliver a preliminary ruling as to the proper interpretation to be given to the matters of EU law at issue.

17. The Interveners appreciate that this Court has always held that international comity governs extradition regimes including that established under the EAW.¹¹ The free movement of persons within the EU can create opportunities for those suspected of, or convicted of committing criminal offences to flee justice.¹² Recourse to a mechanism like the EAW, in addition to the procedures of Brussels II bis may sometimes be appropriate to ensure that States fulfil their obligations under Article 8 in the context of wrongful child abductions. This Court considered such a case in *Shaw v Hungary* (2011), §§ 21-22. However, the Interveners believe it is important, particularly in the absence of relevant judicial input from the Court of Justice of the European Union into cases arising in the UK (cf. *Bosphorus v Ireland* (2005), § 164), for this Court to note that domestic courts must take into consideration the right to respect for private and family life of those being surrendered under the EAW as well as of their family members. In particular, in the light of FTI's apposite observation that people often face surrender under the EAW many years after the alleged offence was committed, and in the light of case law of this Court showing that this is indeed a systemic problem in some EU Member States (see, e.g., *Dimitrov and Homanov*), the Interveners urge the Court to find that, in some circumstances, depending on the nature of the offence and the surrounding circumstances, the passage of time may render the execution of an EAW incompatible with the individual's rights under Article 8 ECHR, because it is disproportionate in all the circumstances to the legitimate aim of preventing disorder or crime. See, *mutatis mutandis*, *Neulinger and Shuruk v Switzerland* (Grand Chamber, 2010), § 145; *Maslov v Austria* (Grand Chamber, 2008), § 91.

Part B

18. Where a proposed surrender under an EAW would constitute an interference with a Convention right, such as the right to respect for private life (whether in the context of 'moral and physical integrity',¹³ or established ties with the country of residence,¹⁴) or the right to respect for family life, the executing State is therefore required to conduct an exercise in which it examines whether the proposed surrender – in addition to being in accordance with the law and in pursuit of a legitimate aim – is proportionate to that aim. In examining questions of proportionality this Court has frequently looked at whether there was a viable alternative available to the state which would have constituted a less serious interference, whether recourse to that alternative has been considered and whether appropriate reasons had been put forward for rejecting the alternative.¹⁵

19. Such an alternative exists within the EAW. Under Article 4 of the EAW FD, EU Member States have the express discretion to decide not to surrender certain categories of requested persons. In relation to those whose surrender is sought for the execution of a custodial sentence or detention order, Article 4(6) of the EAW FD provides the following specific ground for not executing an EAW:

¹¹ See, e.g., *Stapleton v Ireland* (decision, 2010), §§ 28-30.

¹² Indeed the proper pursuit and prosecution of such persons may be imposed under the ECHR through the obligations under the procedural limb of Articles 2, 3 and 4. See, e.g., *Agache and Others v Romania* (2010).

¹³ See, e.g., *X and Y v Netherlands* (1985), § 22 and *Bensaid v United Kingdom* (2001), § 46.

¹⁴ See, e.g., *A.W. Khan v United Kingdom* (2010), §§ 42-43.

¹⁵ See, e.g., *Moser v Austria* (2006), § 66; *P., C. and S v United Kingdom* (2002), § 116.

if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law....(emphasis added)

20. Where the circumstances set out in Article 4(6) apply, the surrender is thus not mandatory. Such non-surrender does not imply that the person whose surrender is sought can thereby escape justice. On the contrary, in circumstances where a person's links to the requested state are of either a nature or of a duration that the surrender would amount to an interference with Article 8 rights, Article 4(6) provides that the requested State can decline to surrender and opt instead to execute the sentence itself. This provision is the mirror image of the provisions of the Council of Europe Convention on the Transfer of Sentenced Persons ("the Transfer Convention") and EU FD 2008/909/JHA on the mutual recognition of custodial sentences and measures involving deprivation of liberty (Annex O) (which EU Member States must implement by 5 December 2011.)

21. Article 4(6) of the EAW FD, the Transfer Convention and the EU Framework Decision 2008/909/JHA are all measures which have been adopted at European level to provide a legal framework for minimising the seriousness of the interferences with private and family life which would otherwise be the inevitable consequence of incarceration in a State other than the State in which the affected individual is staying or resides.

22. The United Kingdom, however, has to date adopted no legislation to transpose Article 4(6) of the EAW FD into domestic law. The consequence of this is that there is no express provision of UK domestic law requiring EAW decision makers to examine the relevance for the execution of the request of the fact that a requested person is resident in the UK. Nor is there any express provision requiring the authorities even to explore the possibility of a requested person who is resident in the UK serving his or her sentence in the UK. The Joint Committee on Human Rights of the UK House of Lords and House of Commons has expressed concern about this lacuna and recently recommended that the UK remedy this by amending the relevant domestic legislation (The Extradition Act 2003):

We note that Article 4(6) of the Framework Decision allows the requested state to deny execution of the EAW issued for the purposes of serving a sentence where the requested state undertakes that the sentence will be served in that state. We recommend that this safeguard be transposed into the Extradition Act 2003 as this would significantly reduce the impact of such execution EAWs on Article 8 rights.¹⁶

23. The Interveners invite the Court to consider applying, by analogy, the approach taken by the Grand Chamber in *M.S.S. v Belgium and Greece* (2011) to a situation where the transfer of an individual from one EU Member State to another would engage that person's Convention rights. The Grand Chamber noted that '*under the [Dublin II] Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention*' (§ 340). See also *M.S.S.*, § 358. The Court, in considering the compatibility with Article 8 of any proposed surrender, will wish to consider the alternative options to surrendering someone to another EU Member State provided for in the EAW. If the person concerned is '*staying in, or is a national or a resident of*

¹⁶ The full report can be found at <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15602.htm>. It was produced by the UK Parliament's Human Rights Joint Select Committee and published on 11 June 2011.

the executing Member State’ and is sought ‘*for the purposes of execution of a custodial sentence or detention order*’, this Court, it is respectfully submitted, should consider whether the requested State has provided for the possibility of executing the sentence in accordance with its domestic law and whether it has transposed Article 4(6) into that law.

24. Like Article 3(2) of the Dublin II Regulation, Article 4(6) of the EAW FD provides a mechanism by which EU Member States can respect the mutual recognition of decisions implementing EU law, while ensuring that Convention rights are not thereby infringed .

25. In *M.S.S.*, the Grand Chamber noted, in relation to the Dublin II Regulation, that ‘*the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers*’ (§ 350) The same is true, *mutatis mutandis*, of the EAW FD, of which the Commission has written:

[T]he past seven years have also shown that, despite its operational success, the EAW system is far from perfect. Member States, European and national parliamentarians, groups from civil society and individual citizens have all expressed some concerns in relation to the operation of the EAW and in particular its effect on fundamental rights. There are also shortcomings in the way some Member States implement the Council Framework Decision.

...

From the issues raised in relation to the operation of the EAW it would seem that, despite the fact that the law and criminal procedures of all Member States are subject to the standards of the European Court of Human Rights, there are often some doubts about standards being similar across the EU.... This situation has informed the Commission’s ongoing work in the implementation of the roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings.

These passages are taken from the Commission’s recent, third report on the EAW FD. The Interveners urge the Court to consider this brief report, found at Annex D, in its entirety.

26. The European Commission focused particularly on the issue of proportionality, stating that ‘*Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences.... The Commission is of the view that... it is essential that all Member States apply a proportionality test*’.

27. Because of the procedural obstacles that have prevented the referral of cases such as the present one to the Court of Justice, the Interveners respectfully submit that guidance from this Court as to the application of Article 8 to decisions to execute EAWs against those who are staying in or resident in the requested State would be most welcome. The Interveners, taking inspiration from the Court’s judgment in *Üner v Netherlands* (Grand Chamber, 2006), § 57, respectfully submit that the factors to be taken into account in such cases include cumulatively or severally:

- a. the nature or severity of the offence of which the individual is accused;
- b. the length of stay in the country from which the individual is to be surrendered;
- c. the time elapsed since the alleged offence has occurred;

- d. the individual's family situation, including factors such as the length of the marriage, the length of stay of other family members in the country from which the person is to be surrendered, and other factors expressing the effectiveness of a couple's family life;
- e. whether there are children and, if so, their ages;
- f. the nationalities of the various persons concerned.

Part C

28. In deciding whether or not to surrender an individual in the light of the effect on the private or family life of the individual being surrendered or her/his family members, the Interveners submit that it is important for this Court to appreciate those aspects of EU law which govern the free movement of EU citizens and their family members. While not all of those subject to the EAW will necessarily be EU citizens, the EAW is likely to affect EU citizens and their family members disproportionately as compared with non-EU citizens.

29. Articles 20 and 21 of the Treaty on the Functioning of the European Union (Annex G) confer on citizens of EU Member States citizenship of the EU and the right to move freely within the territory of the EU Member States, 'subject to the limitations and conditions laid down in Treaties and by the measures adopted to give them effect'. EU free movement law consists of these Treaty provisions, along with several others (see Title IV TFEU, Annex G). It also consists of EU secondary legislation, notably EU Directive 2004/38, which sets out the rights of EU citizens living in other EU Member States and the residence rights of their family members (regardless of nationality) (Annex H). Other relevant instruments include EU Regulation 883/04, on the co-ordination of social security schemes within the EU, and EU Regulation 492/2011 (formerly Regulation 1612/68) on the free movement of workers.

30. The rights of EU citizen migrants within the EU can be summed up as follows. EU citizens exercising the right to stay or reside in another EU Member State can only be excluded or expelled from the host Member State on grounds of public policy, public security or public health, and then only if they 'represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' (Directive 2004/38, Article 27). After five years' lawful, continuous residence in accordance with EU Directive 2004/38, EU citizens living in another EU Member State acquire permanent residence (Directive 2004/38, Article 16). The grounds of public policy, public security and public health noted above and set out in Article 27 no longer suffice to justify their expulsion once the permanent residence is established. Member States must show that the grounds of public policy or public security are 'serious' (over and above the 'serious threat' required for shorter-term residents) before expelling an EU citizen or family member with permanent residence (Directive 2004/38, Article 28(2)). EU Member States must show 'imperative grounds of public security' to justify the expulsion of an EU citizen who has resided on their territory for the last ten years. They must similarly show "imperative grounds" for the expulsion of a child (unless that expulsion is 'necessary for the best interests of the child') (Directive 2004/38, Article 28(3)).

31. There has been little guidance from the Court of Justice on the relationship between the EAW FD and Directive 2004/38. An EAW relates only to the requested individual. Where that individual is the custodial parent of EU citizen children, any concomitant expulsion of children (i.e an expulsion due to the surrender of the custodial parent) must have been established to be in their best interests. As a matter of EU law as well as under the Convention, when deciding on the surrender of the parent the authorities are therefore under an obligation to consider whether the surrender would imply the expulsion of any children. They must further assess whether such an

expulsion would be in the child's best interests. Absent these inherent procedural safeguards the surrender and its associated expulsions will not be lawful.

32. The Court of Justice has clarified that EU law on the free movement of persons applies to this situation and that a Member State must not violate EU law on the free movement of persons (e.g. Directive 2004/38) when implementing the FD. See Case C-128/08 *Wolzenburg* (Annex I), (§§ 44-46). That case concerned a German citizen who had been given a suspended sentence in Germany for a drugs offence. He immediately moved to the Netherlands. Shortly afterwards the German authorities revoked the suspension of his sentence because he had violated the conditions attached to its suspension. As an EU citizen Mr Wolzenburg's presence in the Netherlands was regulated by Directive 2004/38. The Court of Justice was asked to consider, inter alia, whether it was lawful for the Netherlands to refuse Mr Wolzenburg the benefit of Article 4(6) of the EAW FD (see paragraph 24 above) solely because he did not yet have a permanent residence card (which was the condition Dutch law laid down for enjoyment of the benefit of Article 4(6)). The Court affirmed that the Dutch authorities could not make enjoyment of the benefit of Article 4(6) of the EAW FD dependent on the possession of a permanent residence card (issued after five years' residence, see above, paragraph 30) since such a document is only declaratory of rights that EU citizens automatically acquire (§ 53). Importantly, the Court found (§76):

Where a Member State has implemented Article 4(6) of that decision without, however, laying down specific conditions relating to the application of that provision, it is for the executing judicial authority to make an overall assessment in order to determine, initially, whether the person concerned falls within the scope of the provision. A single factor characterising the requested person, such as the length of time that person has resided in the Member State concerned, cannot, in principle, have a conclusive effect of itself. (emphasis added)

As noted above (see paragraph 22), the UK has to date not transposed Article 4(6) and has thus laid down no specific conditions for its application and the dicta in paragraph 76 of *Wolzenberg* apply.

Those dicta would seem to suggest that where other Article 8 considerations are engaged, the situation may fall within the scope of Article 4(6) irrespective of the length of the individual's residence. However, the Court of Justice found that an EU Member State could, if it *expressly* so chose when transposing Article 4(6), in principle restrict the application of Article 4(6) to those EU migrant citizens who had resided on their territory for at least five years (§ 74). In reaching this conclusion, the Court of Justice in *Wolzenberg* did not refer to Article 8 of the Convention (which it has done in other cases)¹⁷ or to the corresponding Article 7 of the CFR, but focussed its consideration of Article 4(6) of the EAW FD on the link between that provision and the general EU law on the free movement of persons.

33. This lack of clarity about the relationship between the EAW FD and EU law on the free movement of persons extends to other issues. Under Article 24 of Directive 2004/38, EU citizens and their family members living in another EU Member State are entitled to equal treatment vis-à-vis host Member State citizens in relation to all matters falling within the scope of the Treaty. Social assistance (welfare benefits) falls within the scope of the Treaty. See, e.g., Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles*, § 42 (Annex K). In the United Kingdom, the 'right to reside' test restricts access by EU migrant citizens and their family members to

¹⁷ See, e.g., Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform*, § 79 (Annex J).

social assistance benefits to those who are entitled to them as a matter of EU law. The relevant legislation can be found at Annex L.

34. The AIRE Centre has been asked to advise on cases involving low-income EU migrant families living for a long period of time in the UK in situations where one parent works and the other looks after their children. If the working parent is arrested, and detained, (and *a fortiori* if s/he is surrendered pursuant to an EAW) the effects on the family can be devastating. The detained parent is no longer considered a ‘worker’. see for example, *SO (imprisonment breaks continuity of residence) Nigeria* [2011] UKUT 00164 (IAC) (Annex M). The other parent and children no longer have a ‘right to reside’ for the purposes of entitlement to social assistance benefits or housing and homelessness assistance. In some cases the parent who has not been arrested, may find herself threatened with separation from her children if she cannot support them.¹⁸

35. Such a situation will constitute an interference with the right to respect for family life (cf. *Moser v Austria* (2006)), which may not be justifiable under Article 8 § 2 of the Convention.

Conclusion: The Interveners hope that the information set out above will assist the Court in considering the present case. They remain at the Court’s disposal should any further information or clarification be required.

¹⁸ This is because the kind of social assistance provided for impoverished parents under the Children Act 1989 is not available to EU parents in this situation, in accordance with Schedule 3 of the Nationality, Immigration and Asylum Act 2002 (see Annex L); only support for the children can be provided. There have been no cases of which the Interveners are aware dealing with the lawfulness of this refusal of social assistance

List of Annexes

Annex A: Theodora Christou, *European Cross Border Justice: A Case Study of the EAW* (The AIRE Centre, 2010)

Annex B: EU Framework Decision 2002/584/JHA

Annex C: Relevant Provisions of the Treaty on European Union

Annex D: Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the [EAW Framework Decision], COM(2011) 175 final, 11 April 2011

Annex E: FRENCH CONSEIL D'ETAT NON RETURN CASE (TURKISH NATIONAL TO GERMANY)

Annex F: Fair Trials International, *The European Arrest Warrant seven years on – the case for reform* (May 2011)

Annex G: Provisions of the Treaty on the Functioning of the European Union

Annex H: EU Directive 2004/38

Annex I: All Court of Justice cases about the European Arrest Warrant

Annex J: Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform*

Annex K: Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles*

Annex L: The Social Security (Persons from Abroad) (Amendment) Regulations 2006; Nationality, Immigration and Asylum Act 2002, Schedule 3

Annex M: *SO (imprisonment breaks continuity of residence) Nigeria* [2011] UKUT 00164 (IAC)

Annex N: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/110740.pdf

Annex O: EU Framework Decision 2008/909/JHA

Annex P : Overuse of the European Arrest Warrant- a threat to human rights