

European Arrest Warrant. A solution ahead of it time? (Eds.): Susie Alegre & Marisa Leaf. London: Justice, pp. 91-96.

Implementation of the Framework Decision regarding the European Arrest Order - the Danish extradition legislation

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Introduction

Denmark was the second Member State to implement the Framework Decision on the European Arrest Warrant (EAW), completing the process by the end of May 2003¹. This necessitated the amendment of two chapters of the general Extradition Act. The amended chapters specifically concerned Danish relations with other EU Member States².

Legislation on extradition was introduced relatively late in Denmark. In 1960, an Act regarding the extradition of offenders to other Nordic countries came into force. In 1967, Denmark implemented the European Convention on Extradition 1957 by passing a general Extradition Act (DEA). Compared to the provisions in the general Act, the legislation regulating extradition relations between the Nordic countries is characterised by less restrictive conditions for extradition and more simplified procedures. This is a reflection of the mutual confidence and trust between these neighbouring countries as a result of a relatively high degree of similarity in terms of cultural and legal traditions. From a Danish perspective, relations between the Nordic countries, as well as the broader activities of the Council of

¹ By Parliamentary Decision of April 10th, 2002, *Folketinget* formally accepted the Government's assent to the then draft Framework Decision. For a more elaborate account in Danish of recent amendments to the Danish Extradition Act, see the author's article: Danish Udlevering til strafforfølgning m.v. - den europæiske arrestordre som udtryk for gensidig anerkendelse. I *Festskrift til Hans Gammeltoft-Hansen*. Red.: Arne Fliflet et al. Jurist- og Økonomforbundets Forlag 2004, s. 627-653.

² The Extradition Act (lbk.) 110, 1998, as amended by Act 433 of June 10, 2003. The bill was passed by 80 votes to 24. The opposition votes represent the left as well as the right side of Parliament. The amended Act also covers some formal changes to the Act on Extradition of offenders to Finland, Iceland, Norway and Sweden, Act 27 of February 3, 1960. The amended provisions will come into force by January 1, 2004 and will be applied to arrest warrants presented after that date. For an account of Danish law on extradition previous to the recent amendments, see Vagn Greve & Lene Ravn in Sabine Gleß (Hrsg.): *Auslieferungsrecht der Schengen-Vertragsstaaten. Neuere Entwicklungen*. Edition Iuscrim 2002, pp. 57-107.

Europe, have been important preludes to the recent efforts in judicial cooperation under the Third Pillar on the extradition of suspects and defendants.

Extradition of nationals

Extradition of Danish nationals has not generally been possible under Danish law. However, this restriction is not prescribed by the Constitution. The Nordic Extradition Act permits extradition of Danish citizens in more serious cases as well as when the person has previously lived in the requesting country for at least two years. In 2002, the general Extradition Act was amended so that it became possible for the first time to extradite a Danish national to a state outside the Nordic countries. The amendment was part of a so-called anti-terror bill presented soon after September 11th, 2001. This revision of the Extradition Act implemented the EU Extradition Convention of 1996 and allowed Denmark to withdraw a previous reservation regarding the extradition of its own nationals. The double criminality requirement was still generally maintained. At the time when the anti-terror package was presented and enacted, the negotiations on the draft Framework Decision on the European Arrest Warrant had by and large been completed and, consequently, more far-reaching amendments were anticipated. The in-between initiative, however, probably made it easier to swallow the EAW pill.

In accordance with the Framework Decision, extradition³ from Denmark to another Member State can no longer be refused for the reason that the person is a Danish national. However, Denmark has chosen to take advantage of the optional Article 5(3) EAW that makes the surrender of nationals subject to the condition that the person will be returned to the executing state to serve any custodial sentence or detention order passed in the issuing state. Furthermore, the execution of an arrest warrant in conviction cases may be refused if the judicial authority decides that the sentence should be executed in Denmark.

Political offence exception

Traditionally, extradition for political offences has not been permitted by Danish law. However, the Nordic Extradition Act 1960 limited this restriction solely to Danish nationals. The EU Convention 1996 requires that offences covered by the 1977 European Convention on Terrorism be removed from the remit of the political offence exception⁴. Consequently, the

³ Under the amended Danish Extradition Act, the legislator has chosen to use the term extradition as an equivalent to surrender, as the features of the two schemes are seen as basically identical.

⁴ Denmark had made a reservation to the 1977 Convention and thus maintained the right to refuse extradition for any kind of political offence. Furthermore, Denmark made reservations to Ch. 1 of the Additional Protocol 1975 to the European Convention

Act on Extradition was amended in 1997. As a result of the anti-terror package mentioned above, two further modifications were added in the form of references to the UN conventions on terror-bombing and terror-financing respectively.

The Framework Decision abolishes the political offence exception, as do the new provisions of the Danish Extradition Act⁵. However, execution of an arrest warrant shall continue to be refused if there is 'a serious risk that the person will be persecuted for political reasons'⁶.

Double criminality

In Denmark, extradition without the double criminality requirement was partially authorised by the provisions of the Nordic Extradition Act⁷. The general requirement under the Extradition Act was that the conduct for which extradition was requested must be punishable under Danish law by a maximum sentence of at least 4 years imprisonment. In principle, double criminality has now been abolished for the 32 offences listed in the Framework Decision⁸. The terminology of the Extradition Act nonetheless indicates that there may be grounds for refusal in a specific case - for instance on human rights, even where double criminality is not required. A maximum period of at least 3 years imprisonment under the law of the issuing state is now required. Consequently, only relatively serious offences will fall within the list, although clearly the level of sanctions in the issuing state may well be more severe than in the executing state.

For any offence not listed in the Framework Decision, double criminality remains a requirement under the Danish Extradition Act⁹. However, in accordance with the European Convention on Extradition 1957, the maximum punishment may now be as low as 1 year's imprisonment under the law of the issuing state, a threshold Danish negotiators were reluctant to accept. There is no longer a punishment threshold in domestic law.

on Extradition and so maintained the right to refuse extradition for offences covered by the Convention on Genocide and the Geneva Conventions.

⁵ Similarly, military offences are no longer considered a valid bar to extradition.

⁶ DEA § 10 h, sec. 1.

⁷ Under the Nordic Extradition Act, there is a requirement of double criminality and of a maximum punishment of at least 4 years imprisonment in the case of Danish citizens who have not for the previous two years been resident in the requesting state. In cases regarding political offences, there is also a requirement of double criminality. See § 2 and § 4.

⁸ See art. 2. In English the text is "shall ... give rise to surrender" ... "without verification of the double criminality of the act". In French it reads "donnent lieu à remise" "sans contrôle de la double incrimination du fait". In the Danish Extradition Act the wording is that extradition "may be completed on the basis of an European Arrest Warrant, even though a similar act is not punishable under Danish law" (author's translation, italics added), see § 10 a, sec. 1.

⁹ The requirement of double criminality implies that the act was considered a criminal offence under Danish law at the time of committing the act as well as at the time of trial.

In several responses to the Danish Government's consultation on the Framework Decision and the Extradition Bill, concern was expressed about the abolition of double criminality, not only from the Bar Association but also from police and prosecutors. It was maintained that such a scheme would only work after a much higher degree of harmonisation of offences. Various examples were presented regarding cases that would allegedly be covered by the Article 2(2) Framework Decision list but which it was felt ought not to give rise to extradition, at least not for Danish nationals.

It is difficult to imagine that a European Arrest Warrant will be issued in ordinary criminal cases concerning minor offences. And naturally, the executing authority will be obliged to ensure that an act is not mis-labelled in an attempt to run a smoother extradition business. Political propaganda within the usual boundaries accepted in democratic societies cannot be crudely termed as terrorism, sabotage or racism and xenophobia in order to secure extradition. Minor acts of shoplifting cannot arbitrarily be listed as organised theft.

In practice, the Framework Decision list will probably not present a major problem. This is because the Framework Decision allows extradition to be refused, even for offences that fall within the Article 2(2) list, where the arrest warrant relates to offences that have been committed in whole or in part on the territory of the executing state. Under the amended Danish Extradition Act, this optional clause has been adopted as mandatory where the act is not a criminal offence under Danish law¹⁰. In cases of this sort it will not make any difference whether or not the act is covered by the Framework Decision list, since the person cannot be extradited in either case.

Bars to extradition

The history of the Framework Decision as well as that of the amended Danish Extradition Act demonstrates that the Department of Justice fought vigorously to protect the traditional principles of Danish extradition law, while simultaneously acknowledging the need to develop good practice regarding mutual recognition. During the political negotiations, Denmark therefore argued against the initial proposal to abolish double criminality generally, preferring a positive list of specific offences. Similarly, Denmark supported the widest possible use of the reservation regarding constitutional and human rights. In the amended Extradition Act, all optional clauses in the Framework Decision have been incorporated as mandatory bars to

¹⁰ See DEA § 10 f.

extradition. The same is true of the optional provisions on guarantees to be given by the issuing state¹¹.

Human Rights

In accordance with the Framework Decision, extradition must be refused if the conduct for which the arrest warrant is issued is regarded by the Danish judicial authority as a lawful exercise of rights and freedoms of association, assembly or speech protected by the Danish constitution or the ECHR¹². By means of this “cat flap” clause, the executing authority is vested with sufficient discretionary power to avoid unreasonable classifications by the issuing authority within the Framework Decision list, for instance under the heads of organised crime, terrorism, racist and xenophobic offences. Naturally, the vague character of some of the terms included on the list may give rise to concern, and an executing authority cannot always be relied upon to activate the brake in politically sensitive cases. However, on balance, the existence of the human rights clause will minimise the risk of an arrest warrant being abused by an issuing authority or accepted by an executing authority for reasons of convenience or to maintain good international or inter-agency relations.

Under the Danish Extradition Act, therefore, the executing authority may refuse to execute an arrest warrant by reference to fundamental rights and freedoms if a case merely regards passive participation in a criminal organisation, since an offence with such a general scope does not exist in Denmark. Similarly, it is well known that the concept of terrorism is vague. Under Danish law, the definition in the Framework Decision on terrorism was adopted when enacting the earlier mentioned anti-terror package in 2002, which gave rise to fierce discussions regarding the lack of precision in the amended provisions. It might be of some consolation for those of us who are still concerned, that the Council declaration regarding respect for fundamental rights has explicitly been mentioned in the Danish *travaux préparatoires*.

Torture and other inhuman or degrading punishment or treatment

As a supplement to the draft amendment to the Extradition Act, a provision was added that explicitly states that extradition shall be refused if there is a risk that the individual will be subjected to torture or to other inhuman or degrading treatment or punishment in the issuing

¹¹ See DEA §§ 10 b ff.

¹² See art. 1(3) and preamble para. 12.

state¹³. This initiative sent an encouraging, if redundant, message since the provision does not add anything to Article 3 ECHR¹⁴.

Death penalty

In accordance with the Framework Decision, the prohibition on extradition to a state where there is a serious risk that the person would be subjected to the death penalty is upheld in the Danish Extradition Act¹⁵.

Humanitarian reasons

Humanitarian reasons as a bar to extradition have been reduced to a less prominent position in the Extradition Act. Previously, the Extradition Act included non-compliance with humanitarian considerations as general bar to extradition. Henceforth, even serious humanitarian reasons may only temporarily postpone extradition¹⁶. However, since there is no fixed time limit for the postponement, it should not be difficult to strike a reasonable balance in individual cases, for instance by deferring extradition for an indeterminate period of time if necessary. It will therefore be possible to conduct mental examinations where appropriate. If a requested individual is seriously mentally ill, extradition would be barred by virtue of humanitarian considerations.

Judicial Authority

Under the Danish Extradition Act, the role of executing judicial authority has been assigned to the Department of Justice. This might appear rather odd to someone from a country where such tasks have traditionally been a matter for the courts, or to someone who take the wording of the Framework Decision very literally. However, the Danish model is perfectly in accordance with the requirements of the Framework Decision. Furthermore, the individual in question has full access to court review and even to appellate review of an initial court decision.

Clearly, this model does not completely remove the authority from the administration and the potential influence of the Government. Still, it is presumably a scheme that will work to the benefit of the individual, as it not only ensures a certain degree of uniformity and

¹³ See DEA § 10 h, sec. 2.

¹⁴ The ECHR was specifically incorporated into Danish law in 1992.

¹⁵ See DEA § 10 j, cf. § 10, sec. 3.

accountability, but ultimately furthers legality and independency, too. The flaw of this system, if any, would probably be an inherent tendency towards reluctance towards extraditing rather than the opposite.

Conclusion

In the Danish debate regarding the European Arrest Warrant there has, naturally, been a significant amount of scepticism towards the principle of mutual recognition of legal decisions. The traditions within the field of criminal justice systems in other Member States are not equally trusted by everyone, and there is a particular concern regarding conditions in the accession candidate countries.

In my account, it is a core point that all Member States are obligated by the same basic principles. The crucial question is whether the individual is guaranteed fair access to remedies to have the legal instruments respected and enforced. In my estimation, the European Arrest Warrant might very well contribute not only to more efficiency within the field of criminal justice cooperation but also to the development of higher legal standards and better conditions for suspects and convicts. The right to be assisted by legal counsel and an interpreter will definitely contribute to such an effect. Several other initiatives point in that direction, e.g. the Commission's Green Paper on Procedural Safeguards for Suspects and Defendants.¹⁷

Quite understandably, the introduction of a European Arrest Warrant has caused profound concerns regarding the abolition of traditional principles and requirements under the law of extradition. The hectic political activities in the wake of September 11th gave good reason for worries in relation to civil rights. However, the result of the legislative efforts is fairly balanced. As far as the Danish Extradition Act is concerned, all available handles have been pulled to ensure that an arrest order will not be executed unless it is reasonably fair and just. A number of legal questions still remain in the shadows, but not in the dark. There are sufficient basis for defending the individual's relevant interests, and competent agencies and actors have been assigned the relevant tasks in safeguarding fundamental freedoms and rights properly.

¹⁶ See DEA § 10 i.

¹⁷ COM (2003) 75, see in particular sec. 6 and 7 regarding the position of a foreign citizen.