

CROSS BORDER CASES WHERE JUDGMENTS ARE MADE IN ABSENTIA

RESPONSE OF THE COUNCIL OF HM CIRCUIT JUDGES

We represent the Circuit Judges in England and Wales who sit regularly in the Crown Courts. The range of work is extensive and our members have much experience on sentencing matters. Such experience extends, of course, to the consideration of enforcement of penalties imposed. Although the numbers of cases for cross border enforcement within the European Union has not impacted upon the work of the Crown Courts Judges are alert to the potential problems.

There has been much progress in judicial cooperation between European Union States in recent years including, of course, the introduction of the European Arrest Warrant replacing lengthy extradition procedures with an efficient means of bringing back criminals who have absconded abroad. The European Arrest Warrant follows an agreed a Framework Decision to which there is reference in this consultation Member States give effect to the European Arrest Warrant on the principle of mutual recognition of judicial decisions subject to respect for the provisions of the European Convention on Human Rights

We support the principle that a defendant who is subject to a penalty that is judicially imposed in one European Union State for an offence committed in that European Union State should be subject to enforcement process in his or her normal European Union State of residence. Such a principle has already been established in relation to driving disqualifications by the Convention on Driving Disqualifications of 17th June 1998, as incorporated in Part 3 of the Crime (International Cooperation) Act 2003 although this has not as yet been fully adopted.

Our support is predicated on the basis that such arrangements apply as between European Union States and are subject to proper compliance with the provisions of the European Convention on Human Rights. We would not support extension outside the European Union. We believe that the judicial system in the United Kingdom does protect the Convention rights. Our main concern is to ensure that those rights are equally protected in other European jurisdictions if there is to be mutual enforcement of judgments or orders made in absentia.

Question 1: Do you have any suggestions as to specific circumstances that should be excluded from the definition of trials in absentia?

The proposed definition in Article 1(4) might be interpreted to suggest that the defendant has to be absent for the whole of the proceedings. We believe that to be too restrictive. If a defendant attends for a part of the proceedings but goes absent before judgment then he should also fall within the definition.

If the defendant is represented by a lawyer he has instructed he should be deemed present.

Save as above we have no suggestions as to which circumstances might be excluded.

Question 2: Are the requirements for certain information to be certified as having been given to the defendant in advance of the trial both fair to the defendant and workable in terms of cross border enforcement of judgments?

If there is no right of retrial proof of personal knowledge of the proceedings and the right to be present is fundamental. As a matter of ensuring fairness and complying with the European Convention it seems to us that there has to be proof of the fact that the defendant knew of the proceedings before he can be said to have waived his right to be present. We believe that a consistent approach to this is necessary. The position in the Crown Courts in England and Wales is dealt with in *R v Hayward* [2001] QB 862 and *R v Jones* [2003] 1AC 1.

We agree that certification that certain basic requirements are fulfilled is necessary. The list of factors that the Crown Court should take into account, suitably modified, might form the basis for the information required on certification.

We do not have detailed knowledge of the systems in Scotland or Northern Ireland but we have noted that in England and Wales there is the power to re-open a case heard in absentia in the Magistrates Court set out in s142 Magistrates' Courts Act 1980 which would satisfy the requirement for "a right to retrial" in the Framework Decision. We agree that, in the present circumstances and taking account of safeguards already in place the abolition of the prohibition on custodial sentences in absentia in the Magistrates' Court is timely.

Question 3: Do you agree that the EAW FD should be modified so as to enable Member States to refuse to surrender a person who has been tried in his absence without having been properly informed of the trial, unless either he had a right to retrial that he chose not to exercise or he still has a right to retrial?

We agree.

Question 4: (a) Does Article 3 properly cater for all the circumstances where fines may be imposed in the UK in the absence of the offender?

Yes. We would add, however, that any European wide definition should provide that the enforcement of a fine imposed by a body other than a judicial body should be subject to a procedure for appeal which may be judicially reviewed. We believe that where fines might be imposed in the United Kingdom by bodies that are not judicial, for example congestion charges or Local Authority parking fines both of which would be over a 70 euro threshold, there are adequate procedures in the United Kingdom for challenge. Thus, even though such might be "a written procedure" enforcement may be possible. We would be concerned if fines imposed in

other European Union States were not subject to such safeguards but became enforceable in the United Kingdom.

Question 4: (b) Does it also allow us to refuse to execute fines imposed on our citizens abroad in their absence without sufficient safeguards?

Yes as presently drafted but that must be subject to the point raised above which, in our view, is fundamental in relation to financial penalties that are not imposed by a judicial body with proper judicial procedures.

HH Judge David Swift
Chairman
Criminal Sub Committee
Council of HM Circuit Judges

31st March 2008