

## **Briefing note: EU strengthens trials in absentia - Framework Decision could lead to miscarriages of justice**

### **(1) Executive Summary**

On 6 June 2008 EU Ministers of Justice reached an agreement on rules that would enable judgments reached in trials in absentia to be recognised across the EU.<sup>1</sup>

The UK Government is currently backing the proposal, and the European Parliament endorsed it yesterday. It will now go to the Council of Ministers for final approval in the next three months.

In some member states defendants are frequently tried in their absence. But this is banned in other member states, thus posing problems for the mutual recognition of such judicial decisions. For example, there is a problem if a country wants to use a European Arrest Warrant to get hold of a person who that country has tried in their absence.

At present, the executing member state has a degree of discretion and does not have to automatically execute a European Arrest Warrant (i.e. extradite someone) if the country making the request has tried that person in their absence.

The draft Framework Decision would alter five pieces of existing EU legislation which, it is argued, are not working properly owing to uncertainty in some countries about whether to recognise in absentia judgements. The most significant one is the European Arrest Warrant, but the same changes are being made to the Framework Decisions on mutual recognition of financial penalties; confiscation orders; custodial sentences; and probation measures.<sup>2</sup>

The proposal would make it compulsory to hand over people who have been tried in their absence, perhaps without even knowing they were being tried. This would be a big change in the UK. In the UK there were no trials in absentia until 2001, and they are still not usually permitted. They can only be allowed under very strict circumstances.

But the conditions which need to be fulfilled to hand over someone to another member state after they have been tried in their absence would be very weak. Crucially, under the proposal, it is no longer up to the executing country to decide whether the conditions are met. The country issuing the arrest warrant simply fills in the relevant section of the form. If the right box is ticked, the person must be handed over.

For example, people who have been tried in their absence must be handed over if the country which wants them says that the defendant was “informed” of the trial (though not necessarily in person) or if they have failed to request an appeal in time. This is alarming given recent miscarriages of justice in some member states, which we explore in this paper. For example, one British man only found out that he had been tried and convicted of grievous bodily harm in Germany when he was later subject to a Criminal Records Bureau check by a new employer. Other cases involve the summons being sent to the wrong address.

Alternatively if the member state which has issued the arrest warrant promises that the defendant can have an “appeal”, then he or she would have to be extradited. This would

mean the defendant would only have one proper chance to mount a defence. The charity Fair Trials International argue that in such situations an appeal can be biased toward simply following the court's previous decision: "We know such re-trials can lack substance and merely act to legitimize previous court action."

The German Federal Bar Association has said that it "is against the Draft's inherent 'strengthening' of in absentia judgments, in which the person concerned was neither summoned in person nor otherwise informed of the hearing that led to the in absentia judgment." They warn that "it will become harder for member states to resist unjustified requests for their nationals to be extradited to other EU countries:"<sup>3</sup>

**Pieter Cleppe, a European lawyer working at Open Europe, said:**

"We believe that mutual recognition instruments, such as the European Arrest Warrant, must not be allowed to undermine long established traditions of fundamental rights."

"This proposal could open the door to serious miscarriages of justice and ministers should not be supporting it."

## **(2) The current situation: member states do not have to recognise foreign judicial decisions rendered in absentia**

At present Article 5.1 of the European Arrest Warrant<sup>4</sup> allows the executing member state not to have to automatically execute a European Arrest Warrant (i.e. extradite someone) if the country making the request has tried someone in their absence:

### *Article 5*

*Guarantees to be given by the issuing member state in particular cases*

*The execution of the European Arrest Warrant by the executing judicial authority may, by the law of the executing member state, be subject to the following conditions:*

*1. where the European Arrest Warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European Arrest Warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing member state and to be present at the judgment;(...)"*

So surrender is not automatic, but can be made subject to an assurance that the defendant will have an opportunity to apply for a retrial and to be present at the judgment. Crucially, at present it is up to the member state to which the arrest warrant has been sent to *decide for itself* whether it accepts such "assurances".

In its 2007 status report on the European Arrest Warrant system<sup>5</sup> the Commission complained about "*certain countries such as the Netherlands that systematically demand*

*guarantees for executing in absentia judgments, thereby causing problems for the executing countries*". The Netherlands has written this possibility explicitly into their legislation adopting the European Arrest Warrant.

Belgian MPs complained last year about the refusal by Dutch authorities to give consequence to any request by Belgium to extradite Dutch nationals that had been convicted in absentia. As Belgian MP Tony Van Parys said: *"This makes clear that the European Arrest Warrant does not work, as it doesn't even work between Belgium and the Netherlands"*.<sup>6</sup>

The Commission also expresses concerns towards *"certain countries"*, while mentioning the UK and Ireland in particular, which grant themselves too much time to extradite, *"something the Commission very much regrets"*.

The Irish implementation act does not allow Ireland to hand over subjects that have not been charged yet, and if the defendant would be tried as a result of not being handed over, the Irish refusal to recognize trials in absentia would block extradition.

The Irish act does say that the right to a retrial might justify extradition, but legal analysis suggests that even in that case the strict Irish judicial protection rules would most likely block extradition.<sup>7</sup>

### **(3) How the proposed law aims to change the current situation**

The draft Council Framework Decision aims to restrict the exceptions that member states have been using as grounds to refuse to comply with arrest warrant requests.

Its sets out four conditions for recognising trials in absentia, and if any are met, the executing country must hand over the suspect.

Crucially, it is no longer up to the executing country to decide whether the conditions are met. The country issuing the arrest warrant simply fills in the relevant section of the form:

*"The issuing authority, by completing the corresponding section of the European Arrest Warrant (...) gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition."*

The draft Council Framework Decision inserts the following article to the European Arrest Warrant act and deletes the old article 5 above. Below, we reproduce the text of the proposal and what it means. The more controversial options are the later ones, but all of them are potentially problematic.

### **(4) Conditions under which trials in absentia will have to be recognised:**

#### **(a) If the person is said to have been aware of the trial**

*"(...)Article 4a*

*Decisions rendered following a trial at which the person did not appear in person*

1. *The executing judicial authority may also refuse to execute the European Arrest Warrant issued for the purpose of executing a custodial sentence or a detention order, if the person did not appear in person at the trial resulting in the decision, unless the European Arrest Warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing State:*

*a) in due time*

*(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and*

*(ii) was informed that a decision may be handed down if he or she does not appear for the trial (...);”*

In other words, it would be up to the issuing member state to decide that it has “unequivocally” shown that a person was aware of their trial. But in many such cases, this is exactly the point which is disputed. Alarming, the suspect doesn’t have to be informed in person, so they might just have received information which they didn’t understand.

The European Criminal Bar Association conference<sup>8</sup> found that this was in breach of article 6 paragraph 3 of the European Convention of Human Rights, as the European Court of Human Rights considers that a suspect has to unequivocally waive his right to appear at his trial, which is not the case when a person was informed but could not be present at the hearing due to reasons beyond his or her control, for example in the case of an unexpected hospitalisation.

#### **(b) If a counsellor took their place at the trial**

Article 4(b)

*being aware of the scheduled trial had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; (...)”*

This can be seen as even more controversial. It has been implemented on request of countries where one can be represented by a lawyer without having been present, which leads then to a judgement which is not then regarded as an “in absentia judgment”. Under the proposed law, every country would have to consider this to be a valid trial, on the condition that the defendant was aware of the trial and had given a mandate to a counsellor.

However, it is common in some countries (for example in Italy and Portugal) to be granted a lawyer without being aware of this.<sup>9</sup> Although strictly forbidden under the wording of the text, one might wonder how the application of this would happen in countries with problematic application of all internal judicial procedures. As the local

situations might not always be properly investigated, this will open the door to illegal extraditions.

**(c) If they do not request an appeal in time**

*Article 4(c)*

*[The convicted person] after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:*

*(i) expressly stated that he or she does not contest the decision;*

*or*

*(ii) did not request a retrial or appeal within the applicable timeframe;*

It is not required that the convicted person has to be informed about the deadline to request a retrial when being served with the court decision finding them guilty.<sup>10</sup>

The German Federal Bar has said that in this way execution of the original decision can easily take place merely because the person concerned remains passive or does not request a retrial in time – again perhaps because they fail to understand the decision, or are badly informed about how much time they have to request an appeal.

The charity Fair Trials International notes on its website that it deals “with many cases where defendants are simply not notified of charges against them in another country, and therefore have no opportunity to attend trial and defend themselves”.

For example, in one of FTI’s current cases a British man only found out that he had been charged, tried, and convicted of grievous bodily harm in Germany when he was subject to a Criminal Records Bureau check by a new employer.

He had not been informed either that charges were being brought, nor of the date for trial, nor of his conviction and sentence to 10 months in prison and two years probation. Although German criminal law allows conviction without an oral hearing for some minor offences, a prison sentence may only be given if the accused is represented by defence counsel and on the condition that the sentence is to be suspended. The defence lawyer assigned to this case failed to obtain direct instructions from the accused, denying him the opportunity to defend himself against the charges.<sup>11</sup>

**(d) If they are to be offered an appeal**

*Article 4(d)*

*[The convicted person] was not personally served with the decision but:*

*(i) will be personally served with it without delay after the surrender and will be expressly informed of his/her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;*

and

(ii) will be informed of the timeframe within which he or she has to request such a retrial or appeal, as mentioned in the relevant European Arrest Warrant.(...)"

In this case, the suspect may not have received any indication that they have been convicted in their absence.

The right to a "retrial" was enshrined in the former regulation. What is new is that an appeal will now be sufficient.

In other words: the defendant will lose one instance of appeal and will only have one proper chance to mount a defence.

The Charity Fair Trials International also argues that in such situations an appeal can be biased towards simply following the court's previous decision:

*"There can be many reasons why a defendant is not present at trial. For example, cross-border notification procedures are frequently deficient or defendants may have well-founded fears of mistreatment or persecution. This proposal does nothing to address these issues. Instead it proposes a system of inadequate safeguards following post-sentencing extradition, such as a right to request a re-trial. We know such re-trials can lack substance and merely act to legitimize previous court action."*

#### **(5) Why recognising trials in absentia would be dangerous - a case study**

The case of "Mr. X", as discussed by Fair Trials International, makes clear what is already possible under the current rules:<sup>12</sup>

*In July 2004 Mr X was on holiday in Romania when he was approached by a beggar. Mr X gave the young man a small amount of money. Shortly afterwards Mr X was arrested and charged with having had a sexual encounter with a minor. He was subsequently detained in difficult conditions for nearly three months. During this time a number of hearings took place, many of which were postponed because of missing files or because Mr X was taken to the wrong court. While Mr X was detained on remand the alleged victim could not be traced and did not appear at any of the court hearings. Mr X was released in November 2004. His lawyer advised him that the arrest had been illegal and that there was no evidence he had committed a crime.*

*A further hearing was postponed, and the Romanian authorities issued Mr X with an exit visa which required him to leave the country within five days. He returned to the UK leaving his full contact details with the Romanian authorities. In March 2007 Mr X received an email informing him that the British Embassy in Romania had established that the first instance trial had been held, and that he had been convicted to seven years imprisonment. He was also informed that an appeal had been submitted on his behalf by his lawyer, at which the sentence was reduced to four years. At a final appeal hearing the original 7 years sentenced had been reinstated. All this had taken place in his absence, without his knowledge, and without him instructing his lawyer.*

*Within days of hearing this news, while working in Tenerife, Mr X was arrested on a EAW issued by Romania. He was taken to Madrid, where he was held for two months pending an appeal against the extradition request. The lower Spanish courts granted the extradition request on the basis that Mr X had been legally represented at the court hearings in Romania. Mr X appealed his case all the way up to the Spanish Constitutional Court, which decided that he should not be extradited on the grounds that he had been tried, convicted and sentenced in absentia. However, the Spanish authorities did not wait until the decision of the Constitutional Court was published and extradited Mr X to Romania.*

*Within three days of arriving in Romania Mr X filed an appeal against his sentence. He was taken to court in July 2007 where a state appointed lawyer whom he had never met, and who could not speak English, represented him. There was no interpreter present and the only information that Mr X was able to understand was that there would be another court hearing the following month. At this point FTI was able to secure a lawyer to represent Mr X in his further hearings. The lawyer was successful in securing a re-trial for Mr X on the basis that he had not been given the opportunity to attend any of the previous hearings as the summons was sent to the wrong address. Although the details held by the Romanian authorities were correct, the wrong street name and postcode were used in the summons.*

*The re-trial took place in December 2007 and was attended by an FTI observer who judged that the trial was not conducted in a manner to ensure that Mr X could defend himself against the charges. The alleged victim, although summoned, did not attend. Mr X was prevented from speaking in his defence by the judge and the hearing was closed after less than one hour. Three days later the judge confirmed the original seven-year sentence. To date, no written judgement has been issued and under Romanian law there is no possibility of appeal against the sentence given in a re-trial.*

With this case in mind it is worth looking at what the options for recognising trials in absentia could mean. The provisions set forth in the new proposed law are not cumulative, which means that country which issued the arrest warrant just has to tick any one of four boxes.

- *Option 1: Has the suspect been informed of the trial?* In the case of Mr X, the Romanian authorities might well have ticked the box to indicate he had “by other means actually received” the summons - even though in fact they had sent it to the wrong address.
- *Option 2: Did the suspect give a mandate to a lawyer?* This doesn’t really apply in the case of Mr X, but the fact that he was later given a state appointed lawyer who could not speak English shows why this is potentially dangerous.
- *Option 3: Did the suspect receive the judgment but fail to ask for a retrial in time?* Again, while this is not directly applicable to the case of Mr X, the Spanish courts’ extreme haste in extraditing him before the judgment of its Supreme Court shows how dangerous such time limits might be.

- *Option 4: Will the suspect be offered an “appeal”?* This would have applied to Mr X. As long as Romania offered him an appeal or retrial, the UK would have had to extradite him. However, his unfair and hasty re-trial shows that courts in some countries may be biased towards simply confirming their previous decisions.

It is not clear what would have happened if “Mr. X” had remained in the UK under the current rules. However, as discussed above, it is quite possible that in the circumstances the UK would have used the exception to not have to recognise foreign judicial decisions that have been rendered in absentia.<sup>13</sup>

However, even under the current rules, it is not certain that the UK would not extradite him. Arguably the rules are already dangerously lax, as made clear by the following case relating to Michael Tonge and Lee Yarrow, who were tried in their absence in 2005. Amnesty International reports that:

*In August 1999 two British citizens, Michael Tonge and Lee Yarrow, went on holiday to Crete. They were returning to their villa one night when Michael alleges he was attacked by a group of local youths. During the struggle members of the gang sustained minor injuries and Michael was stabbed.*

*The pair managed to get away and returned to their apartment. Police arrived shortly after with about 20 local youths. Michael and Lee were arrested while the youths ransacked their apartment and allegedly took several of their belongings. The police stood by and watched. During a five to six hour police interrogation Michael and Lee were punched, slapped and threatened with death unless they admitted their guilt. They were told to sign statements in Greek (a language they did not understand), no lawyer was present and they were not allowed access to a doctor despite their injuries and Michael needing stitches.*

*After four days Lee was released on bail, but Michael was kept in custody where he claims that he suffered further ill treatment at the hands of the Greek police. Michael reported that he was beaten, kicked, flogged with a rope, and denied food and medical treatment for his injuries.*

*Michael’s allegations led Amnesty International to call for a ‘prompt, thorough and impartial investigation’ into the mistreatment.<sup>14</sup> Despite this international concern it appears that no such investigation took place.*

*Michael and Lee were both charged with attempted murder. After four months on remand Michael was released on bail and returned to the UK. In January 2001 Michael and Lee were summoned to stand trial for attempted murder and lesser charges relating to the incident. With the summons they received a letter from the Home Office stating that under UK law they were not obliged to comply with the warrant. Michael and Lee sought legal advice and decided not to return to Crete, fearful that if they did so they would be subjected to further ill treatment and not be afforded a fair trial. Michael and Lee were tried and convicted in their absence for the lesser offences in June 2005.*

*On the 21st June 2005, 6 years after the original incident, the Greek government issued a European Arrest Warrant seeking the extradition of Michael and Lee to Greece to stand trial for the outstanding attempted murder charges. The matter*

was heard at City of Westminster Magistrates' Court<sup>15</sup> on the 4th October 2006 and granted the extradition request despite the evidence of police abuse at the time of the original incident and the pair's fears that they would suffer similar abuse if returned to stand trial. An appeal to the Court of Appeal was unsuccessful, and within ten days Michael and Lee were handed over by the British authorities to the Greek police in December 2006.

Following a trial in May 2007, Michael was found guilty of a "misdemeanour" and sentenced to three-and-a-half years. Lee had charges against him dropped, and was able to return home. After an appeal, and with time spent on remand taken into consideration, also Michael was to be released some months later.<sup>16</sup>

#### **(6) Conclusion: the proposed law makes recognition of trials in absentia easier and could lead to miscarriages of justice**

The German Federal Bar commented on the proposal and warned that:

*"The German Federal Bar is against the Draft's inherent "strengthening" of in absentia judgments, in which the person concerned was neither summoned in person nor otherwise informed of the hearing that led to the in absentia judgment.*

*In view of the rule expressly stated in Article 14.3.d. ICCPR as well as the ECPHR's guarantee of the accused person's right to be present during hearings, one of the European Union's aims on its way towards an area of freedom, security and justice must be to make it clear that in absentia judgments rendered in criminal matters are not acceptable, and to induce the Member States to dispense with in absentia judgments accordingly.*

*The present proposal, which makes the (mutual) recognition of in absentia judgments easier, contravenes this aim."<sup>17</sup>*

One might argue that the situation would not be so dangerous if every member state currently maintained acceptable standards of judicial protection, but as the above cases show, this is far from the case.

**The key problem with the proposal is that once any of the above checkboxes are ticked, the UK (or any other member state) will have no legal argument to refuse recognition. There is no margin of discretion for the executing member state.**

Citizens from countries with high legal protection will be even more exposed to the shortcomings and dangers of the judicial system of countries such as Romania, which was described in the following way in a 2007 report by Transparency International<sup>18</sup>:

*"Corruption and lack of transparency in relations between court users and court personnel are also systemic. Existing legislation on judicial standards is sufficient to penalize corruption by judges and prosecutors, but implementation suffers from delay... The two most frequent charges were 'failure to consider evidence' and 'violation of court procedures', and many clients attributed these actions to conflicts of interest."*

This report stresses the fact that even if stringent standards had been agreed by EU Ministers of Justice to allow for recognition, the basic problem would remain – legal protections that exist on paper are not applied in practice. To use an example from a slightly different area, Bulgaria is the only member state to report that it has implemented 100 % of all EU directives.<sup>19</sup> The situation on paper looks good, but as a report for the WWF notes, “laws on paper still clearly mean little in practice”, because of “Lack of capacity, will or even corruption on the part of authorities.”<sup>20</sup>

Nor is the situation getting better quickly. The *Economist* recently reported on a study on corruption in Romania by a European Union adviser, who concluded in his report that “if the Romanian anti-corruption effort keeps evaporating at the present pace, in an estimated six months time Romania will be back were it was in 2003”<sup>21</sup>

Therefore the concern expressed by Fair Trials International seems very justified:

*“Defendants should not have to fear attending trial because of concerns about poor levels of procedural safeguards and non-compliance with European Court of Human Rights standards.”*<sup>22</sup>

We believe that mutual recognition instruments, such as the European Arrest Warrant, must not be allowed to undermine long established traditions of fundamental procedural rights.

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1 See: <http://register.consilium.europa.eu/pdf/en/08/st11/st11309.en08.pdf>

2 “- Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member states (the so-called “European Arrest Warrant”);

- Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties;

- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders;

- Framework Decision 2008/.../JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union;

- Framework Decision 2008/.../JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;”

3 “Lawyers object to EU proposals on in absentia trials”, European Voice, 06 June 2008

4 See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML>

5 See: <http://register.consilium.europa.eu/pdf/en/07/st11/st11788.en07.pdf>

6 “Nederland laat in België gestrafte onderdanen ongemoeid”, *Gazet van Antwerpen*, 7 February 2007

7 See: [http://www.eurowarrant.net/documents/cms\\_eaw\\_215\\_1\\_ConwayEAW2005Article.pdf](http://www.eurowarrant.net/documents/cms_eaw_215_1_ConwayEAW2005Article.pdf)

8 See: [http://www.ecba.org/cms/index.php?option=com\\_content&task=view&id=191&Itemid=33](http://www.ecba.org/cms/index.php?option=com_content&task=view&id=191&Itemid=33) and <http://www.ecba.org/extdocserv/conferences/ams2008/iaj-3.pdf>

9 See: [http://www.ecba.org/cms/index.php?option=com\\_content&task=view&id=191&Itemid=33](http://www.ecba.org/cms/index.php?option=com_content&task=view&id=191&Itemid=33) and <http://www.ecba.org/extdocserv/conferences/ams2008/iaj-3.pdf>

10 See: [http://www.ecba.org/cms/index.php?option=com\\_content&task=view&id=191&Itemid=33](http://www.ecba.org/cms/index.php?option=com_content&task=view&id=191&Itemid=33) and <http://www.ecba.org/extdocserv/conferences/ams2008/iaj-3.pdf>

11 See: [http://www.fairtrials.net/index.php/news/article/trials\\_in\\_absentia\\_fti\\_submission\\_to\\_ministry\\_of\\_justice/](http://www.fairtrials.net/index.php/news/article/trials_in_absentia_fti_submission_to_ministry_of_justice/) and A. Cumberland, “Procedural rights and the enforcement of judgments in absentia:

A case of the Emperor’s New Clothes?”, Fair Trials International, 2008.

12 See: [http://www.fairtrials.net/index.php/news/article/trials\\_in\\_absentia\\_fti\\_submission\\_to\\_ministry\\_of\\_justice/](http://www.fairtrials.net/index.php/news/article/trials_in_absentia_fti_submission_to_ministry_of_justice/)

13 It should also be mentioned that under the current system European Arrest Warrants have been in breach of EU law, more in particular the EU enshrined principle of proportionality, as European Arrest Warrants have been issued in such minor cases as theft of a piglet,

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acknowledged by the Council of the European Union; see: <http://www.telegraph.co.uk/news/worldnews/1557607/EU-arrest-warrants-'used-for-trivia'.html>

14 See: <http://www.amnesty.org/en/library/asset/EUR25/011/1999/en/dom-EUR250111999en.html>

15 In Accordance with art. 35 of the European Arrest Warrant:

Article 35 - Judgments in absentia

1. If the European Arrest Warrant has been issued on the basis of a judgment in absentia, a new hearing of the case shall take place in the issuing Member State after the surrender.

The executing judicial authority shall inform the arrested person of his or her right to lodge an opposition to the judgment and on the procedure for lodging it.

2. Each Member State shall enable its judicial authorities to receive the opposition lodged by a person subject to a judgment in absentia and to inform the issuing judicial authority of this opposition.

The UK Extradition Act 2003 further outlines this:

20 Case where person has been convicted (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.

(2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.

(3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.

(4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.

(5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

(6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.

(7) If the judge decides that question in the negative he must order the person's discharge.

(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—

(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

(b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

It should be remarked that by granting these safeguards for a retrial, the UK is already in breach with the original Framework Decision, as the report by the House of Lords states (HOUSE OF LORDS, European Union Committee, 30th Report of Session 2005–06, European Arrest Warrant) in p. 3 of the minutes of the Sub-Committee, see:

<http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/156/156.pdf>

16 All according to the reporting by <http://asiapacific.amnesty.org/library/Index/ENGEUR250111999?open&of=ENG-GRC> and A.

Cumberland, "Procedural rights and the enforcement of judgments in absentia: A case of the Emperor's New Clothes?", Fair Trials International, 2008

17 See: [http://www.brak.de/seiten/pdf/Stellungnahmen/2008/Stn06\\_engl.pdf](http://www.brak.de/seiten/pdf/Stellungnahmen/2008/Stn06_engl.pdf)

18 See:

[http://www.transparency.org.ro/politici\\_si\\_studii/studii/global\\_coruptie/2007/Coruptie%20si%20deficiente%20in%20sistemul%20judiciar%20romanescen.pdf](http://www.transparency.org.ro/politici_si_studii/studii/global_coruptie/2007/Coruptie%20si%20deficiente%20in%20sistemul%20judiciar%20romanescen.pdf)

19 See: [http://www.bnr.bg/RadioBulgaria/Emission\\_English/News/en1407dkB9.htm](http://www.bnr.bg/RadioBulgaria/Emission_English/News/en1407dkB9.htm) and <http://www.euractiv.com/en/euro/commission-lauds-best-internal-market-score/article-161392>

20 See: [http://www.panda.org/news\\_facts/newsroom/features/index.cfm?uNewsID=88660](http://www.panda.org/news_facts/newsroom/features/index.cfm?uNewsID=88660)

21 See: [http://www.economist.com/world/europe/displaystory.cfm?story\\_id=11670671](http://www.economist.com/world/europe/displaystory.cfm?story_id=11670671)

22 See: [http://www.fairtrials.net/index.php/news/article/trials\\_in\\_absentia\\_fti\\_submission\\_to\\_ministry\\_of\\_justice/](http://www.fairtrials.net/index.php/news/article/trials_in_absentia_fti_submission_to_ministry_of_justice/)