

# FAIR TRIALS INTERNATIONAL

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The Charter

&

Criminal Justice

## **Purpose**

- Discuss the role of the Charter in criminal cases
- Acknowledge the shift from cross-border to national
- Discuss the value-added of the Charter for defence rights

## **Plan**

- Role of the Charter in the cross-border context (EAW)
- Role of the Charter in the post-Lisbon 'Roadmap' context
- Use concrete examples linked to tomorrow's exercises

## Background: EU law & criminal practice

- EU primary law involvement in criminal cases is not new
  - Case 8/74 *Dassonville*: criminal penalties for trading infringements v free movement law
  - Case C-403/08 *Premier League*: criminal penalties for copyright infringement v free movement law
- However, these cases concern issues of substance – the conduct of the criminal proceedings was MS competence

## EU law & criminal practice

- MS competence to regulate criminal procedure not entirely free of EU constraints, where discriminatory
  - Case C-274/96 *Franz & Bickel* rules on the use of a language in criminal proceedings ( $\neq$  interpretation) had to be extended to non-residents.
- But the Charter acquires a more concrete role as EU legislation concerning criminal process is adopted
  - (1) Mutual recognition measures (mainly third pillar)
  - (2) Roadmap Directives on defence rights (TFEU)

## Creating systems, not conferring rights

- Context of mutual recognition innovation:
  - Slow, cumbersome systems of cooperation (especially extradition and mutual legal assistance)
  - Wish to speed them up without harmonising criminal justice systems
  - So, create legislation based on equivalence of judicial systems, so that judicial decisions can be recognised

## **Creating systems, not conferring rights**

- So, primarily, framework decisions establish systems
  - European Arrest Warrant (EAW)
  - Recognition of freezing / confiscation orders
  - Transfer of prisoners
  - Recognition of probation decisions
- Exception: FD on the standing of victims in criminal cases

**In this context, Charter acts as the ‘rights’ instrument**

- European Arrest Warrant (p. 7 in the EU legislation doc)
  - Art. 1(2) obligation to execute the EAW
  - Art. 1(3) does not modify obligation to respect HRs
  - Recitals 12 and 13: references to human rights norms
- So the Charter is present in the instrument
- But substantively, what limitations does it place on execution of mutual recognition decisions?

## Inferred Charter obligations in the EAW

- Legislative picture (see EuCLR 2 (2012) 3, p. 338)
  - Different approach to implementation
    - No statutory human rights refusal ground
    - France: implemented (part of) recital 13
    - UK, IE, BE, NL: generalised human rights grounds
  - Varying recognition of HRs limitations on mutual recognition obligations
  - Case-law has developed gradually over the decade

## The applicable tests & thresholds

- ECtHR tests established long ago *Soering v. UK*:
  - « when substantial grounds have been shown for believing that the person would, if expelled, be subject to treatment contrary to Article 3 »
  - « an issue might exceptionally be raised under Article 6 where there is a risk of a **flagrant denial of justice** »
- In EU systems, strong presumptions apply that these risks do not exist, in line with the principle of mutual trust

## The applicable tests & thresholds

- Principles borrowed from asylum law (Dublin II system)
  - Reg 343/2003: also based on mutual confidence
  - Rapid transfer of asylum-seekers between MSs
  - Greek system crumbles & fails under pressure
  - *KRS v UK (ECtHR)*: presumption of compliance
  - *M.S.S v Belgium and Greece (ECtHR)*: presumption can be rebutted by strong (overwhelming) evidence

## The applicable tests & thresholds

- The approaches of national extradition courts
- Risk of physical ill-treatment (e.g. detention conditions)
  - Article 3 ECHR / Articles 4 & 19(2) Charter
  - Extradition courts mostly reject these arguments
  - This despite the ECtHR issuing ‘pilot’ judgments against destination countries for Article 3 conditions
  - Recently, some movement. Liam Campbell case.
  - FR Cass. Court: risk of onward refoulement meant undertakings had to be obtained before extraditing

## The applicable tests & thresholds

- The approaches of national extradition courts
- Risk of unfair treatment in criminal justice system (p. 10)
  - Articles 5 & 6 ECHR – Articles 6, 47 & 48 Charter
  - France: Cass. refuses to entertain these arguments
  - United Kingdom: strong presumption in accordance with *M.S.S.* and the EU case-law – never been rebutted
  - Belgium: Cass. very recently refused extradition to Spain of an ETA suspect on the basis of HRs violations
- → Approach to rebuttable presumptions variable

## The applicable tests & thresholds

- The approaches of national extradition courts
- Private & family life / rights of the child
  - UK Supreme Court in F-K (2012)
  - Article 8 ECHR read in light of UN Convention on the rights of the Child – reference to Article 24 Charter
  - Refusal of extradition where impact upon the children of the requested person exceptionally severe
- References to Charter are ornamental – textually – but the analysis should hold true for Charter purposes

## The Court of Justice in the mutual recognition context

- Effective cooperation is crucial to EU's JHA policies
- CJEU has to recognise the policy objectives pursued
- But at the same time has to ensure respect of Charter
- Case C-411/10 *N.S. (ad nauseam)*:
  - Member State cannot transfer « when it cannot be unaware that systemic deficiencies ... » amount to risk of violation of Article 4 of the Charter
  - Case currently before UK Supreme Court: did NS actually *raise* the threshold (lowering protection)?!

## The Court of Justice in the mutual recognition context

- Judgments on the EAW and the Charter
- Case C-396/11 Radu
  - Virtually no facts provided, a bit of a dodgy case
  - Court asked when Articles 6, 47 & 48 of the Charter allow refusal of EAW
  - Given divergent national approaches, some guidance would have been welcome
  - In particular regarding the « flagrant denial » test and whether this applies like for like for Charter purposes

## The Court of Justice in the mutual recognition context

- Judgments on the EAW and the Charter
- Case C-396/11 Radu
  - Advocate-General Sharpston's Opinion (see p. 9)
    - Charter can imply obligation to refuse EAW
    - « flagrant denial » test « too nebulous »
  - Judgment
    - Constrained to a narrow issue
    - Precise Charter test still remains unclear

## The Court of Justice in the mutual recognition context

- Judgments on the EAW and the Charter
- Case C-399/11 Melloni
  - Much maligned judgment – unfairly
  - Member States had agreed a specific rule which complied with the ECtHR case-law (and the Charter)
  - The more protective rule of the Spanish Court wished would create variable geometry
  - The agreed legislation decided it – not the Charter

## The Court of Justice in the mutual recognition context

- Judgments on the EAW and the Charter
- Case C-399/11 Melloni
  - Published on the same day as Akerberg Fransson
  - Akerberg paragraph 29: where Member State action is not ‘entirely determined’ by EU law, there is room for them to apply national fundamental rights norms
  - Big question: proportionality tests (eg DE, UK) – does the very blunt proportionality control in the EAW framework decision leave room for these tests?

## **New measure: the European Investigation Order**

- See EU legislation doc, p. 8
- Judicial decision ordering investigative measures
- To be executed by other MSs on mutual recognition basis
- Requires executing MS to complete investigative steps
- Lessons learned from the EAW context
  - Specific Charter-based ground to refuse execution
- Melloni issues may arise if EIO orders measures compatible with Charter but contrary to Constitution

**A few words on Article 50 – *ne bis in idem***

- Some case-law set out in EU legislation doc, p. 11
- All based on Article 54 of the Schengen Convention
  - Identity of the material acts – existence of a set of facts which are inextricably linked together
    - Covers import / export of same drugs
    - Does not cover holding / laundering of proceeds

## **A few words on Article 50 – *ne bis in idem***

- Some case-law set out in EU legislation doc, p. 11
- All based on Article 54 of the Schengen Convention
  - Principle will apply in respect of
    - Out-of-court transaction (Gozutok & Brugge)
  - Principle will not apply to
    - A decision suspending proceedings which does not finally terminate them (Turansky)
    - A decision of a prosecutor not to proceed without any assessment of the merits of the case (Miraglia)

## A few words on Article 50 – *ne bis in idem*

- Variable wording in the mutual recognition instruments
  - EAW – refusal where the person ‘finally judged’
  - Prisoner transfers – ‘ne bis in idem’ principle
  - Probation decisions – ‘ne bis in idem’ principle
- Article 50 of the Charter refers to the ‘offence’, not the acts as Article 54 of the Schengen Convention.
- Impact of Article 50 of the Charter on execution of mutual recognition decisions is not clear.



## The Roadmap Directives: background

- Member States bound by ECHR Articles 5 and 6
- Yet, mutual confidence lacking (as we have seen)
- Many ECtHR violations each year (1696 in 2007-12)
- ECtHR bearing too much of the burden
- New standards emerging, no common agreement
  - *Salduz v. Turkey*: caused big waves in Europe
- EU given power to adopt minimum rules (Art 82.2 TFEU)
- The idea is that EU law will help ensure respect for HRs

## The Roadmap Directives: overview

- Three Directives adopted (see EU legislation doc)
  - Right to interpretation and translation (p. 1)
  - Right to information (p. 3)
  - Right of access to a lawyer (p. 5)
- Mostly, they ‘codify’ and express existing ECHR principles
- Charter rights also reflects content ECHR rights
- So what is actually changing?

## **New system of criminal defence rights enforcement**

- (1) Application of secondary EU law
- (2) Charter
- (3) CJEU oversight *during the proceedings*

## **New system of criminal defence rights enforcement**

- (1) New tools: directives
  - Directive provisions directly invoked in national courts
  - Duty of conforming interpretation of national law
  - Duty to set aside provisions where conforming interpretation is not possible

## **New system of criminal defence rights enforcement**

- (2) New interlocutor: the CJEU
  - All criminal courts (including investigating judge) able to refer questions on the Roadmap Directives
    - Big change from third-pillar situation
  - PPU procedure
    - May enable quick (<2 months) answer
    - Jeremy F: « considerable influence on the length of the detention »

## **New system of criminal defence rights enforcement**

- (3) The Charter
  - Article 51(1) applies within scope of EU law
  - Where directives apply, so will Charter
  - So Articles 6, 47 and 48 can be invoked
  - Substance of Charter articulated in the Directives
  - So, what value does it add?

## **New system of criminal defence rights protection**

- Example: *Martin v. Estonia* (ECtHR, 2013)
  - Background: *Salduz v. Turkey* principles
    - Reminder: right to a lawyer at pre-trial stage
    - If the right is breached, reliance on the evidence to convict the person will in principle irretrievably prejudice the rights of the defence

## **New system of criminal defence rights enforcement**

- Example: *Martin v. Estonia* (ECtHR, 2013)
  - Young man arrested on suspicion of murder
  - ‘Waived’ representation by family-appointed lawyer
  - Appointed another lawyer suggested by authorities
  - Made incriminatory statements, later retracted
  - Trial court convicted him based on his statements
  - Appeal court excluded them, but used ‘general knowledge’ to convict him on other grounds
  - ECtHR found Article 6 violation – four years later

## **New system of criminal defence rights enforcement**

- Example: *Martin v. Estonia* – imagined as a Charter case
  - Right of Access to a Lawyer Directive (see p. 5)
    - Article 3 – Right to a lawyer
    - Article 9 – Waiver
    - Article 12 – Remedies
  - Arts. 47 + 48 of the Charter (in light of *Salduz*)
  - EU law obligations incumbent upon national court
  - Possibility for (PPU) guidance *at the national level*

## Comparing the Charter / ECHR in criminal cases

- Under ECHR
  - Procedure essentially a matter for the States
  - ECtHR asks whether proceedings as a whole fair
- Under EU law / Charter
  - Directive respects national procedural autonomy
  - But national court under a strong duty to ensure effectiveness of Directive rights + effective remedy
  - We say: **greater injunctive force**
  - CJEU involvement during the case – often pre-trial

## More enforceable pre-trial rights

- Access to the case file
  - Well established in ECtHR case-law (*Lamy v. Belgium*) that Article 5(4) requires access to essential documents
  - Patchy compliance (see Helsinki Foundation report)
    - Spain: *secreto de sumario* regime
  - Case-file access enshrined by Article 7(1) of the Right to Information Directive.
  - Leads to application of Charter (Article 6 + 47)
  - Charter + Directives produce effects pre-trial

## The added content of the Charter: remedies

- Roadmap Directives establish procedural rights
  - Right to interpretation and translation (p. 1)
    - Police station interpretation
    - Translation of essential documents (pre-trial)
  - Right to information (p. 3-4)
    - Notification of procedural rights
    - Right to information about the case
- But the remedy for breach of these is left unclear

## The added content of the Charter: remedies

- Effective judicial protection / effective remedy enshrined in Article 47 of the Charter.
- So there must be effective remedies in respect of violations of the requirements of the Directives
- The big question:
  - Whether Charter requires special treatment of the evidence obtained in breach of the Directive rights
    - Provision of poor interpretation?
    - Failure to notify right to silence?

## The added content of the Charter: remedies

- Effective judicial protection / effective remedy enshrined in Article 47 of the Charter.
- The big question:
  - Whether Charter requires special treatment of the evidence obtained in breach of the Directive rights
  - Raises big questions as to impact of Charter upon national procedural autonomy
  - Case C-67/10 *Samba Diouf*: up to Member States how to organise remedies but must ensure full respect for the substantive right guaranteed (right to asylum)

## Basic conclusions

- In the cross-border context
  - The Charter undoubtedly places limits upon operation of mutual recognition systems
  - Currently, assumed that ECtHR tests apply
  - But Charter content in need of clarification by CJEU
- In the Roadmap context
  - The Charter sits in the background behind
  - Informs interpretation of the Directives
  - May speak where Directives silent – esp. on remedies

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Thanks for listening!

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