EU Criminal Law for Defence Counsel: focus on the European Arrest Warrant

1. There is an urgent need for the Rights of an accused person in Cross-Border cases to be strengthened in a number of important respects. Many of the few safeguards that remained under the "old" Extradition era have been removed and overtaken by the rush for speedy delivery of accused persons between Countries, regardless of their Rights under the evolving regime of the European Arrest Warrant ("EAW").

2. Defence Counsel and their clients in the EU face an uphill struggle to fairly and satisfactorily put a strong case against surrender, and the following obstacles in EAW cases are some of the reasons why:

(i) under the "old" system the principle of "dual criminality" protected defendants from unfair prosecution or punishment in the State to which they had been extradited for acts which are not criminal in their home Country. Under the new system defendants have lost this protection.
On the 3rd May 2007 the European Court of Justice Ruled that "the Removal of verification of double criminality complies with the principle of legality and with the principle of equality and non-discrimination". The Court rejected the submission that the Framework Decision was seeking to harmonise criminal law in Europe. The Court ruled that the choice of the 32 categories of offences was not a "watering-down" of the clarity which had hitherto been necessary.

The Defence had maintained that the removal of verification of double criminality was even more questionable since no evidence had to be produced to clarify the matter, AND that in every EAW there was no detailed definition of the facts in respect of which surrender may be Requested. [For details of the Case see Case C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad].

As a result defendants in Cross-Border cases are vulnerable to unfair prosecution and punishment in another State for acts which are not criminal in their home country.

(ii) under the Principle of "Specialty" there is a condition included in most Extradition Treaties whereby the person being extradited can only be tried for the offences specified in the Extradition Request, and no other Offences. In this way the Executing (Requested) State is able to impose a limit on the Issuing (Requesting) State to prosecute only those Offences openly declared in the Extradition Request. It is essential in EAW cases to take your client's Instructions as to whether he/she wishes to rely on this principle, AND, if you are going to rely upon it, to ensure your Court has registered the fact, and that it forms part of your case;

(iii) another problem relates to the well-established "ne bis in idem" principle, or the prohibition of "double jeopardy", that no-one should be prosecuted or tried twice for the same acts or the same criminal behaviour. The aim has been to provide Member States with common legal rules in relation to "ne bis in idem" to ensure uniformity in both the interpretation of these rules and their practical implementation. The problem is acute where a defendant is convicted in one country of substantially the same conduct for which he faces trial in another country, and often this other country is intent on trying the defendant and getting a conviction for "their" crime.

It is true that the "ne bis in idem" principle has been established in Article 50 of the Charter of Fundamental Rights of the European Union. The reality is however that defendants are excluded from Meetings where Member States decide where a defendant will be tried i.e. which "Forum" or State will hold the trial. This is a very big question for defendants who will have no real say in the decision about where their Case is going to be tried, no choice, and no participation.

If it was an Englishman who was in this position it would be absolutely intolerable to have Spain or Greece deciding that he should be deprived of a British Jury Trial without any say in the decision. In addition, he would not get such a fair trial outside the UK, and he would face huge difficulties of expense and logistics getting his witnesses to the far distant trial.
There would also remain the risk he would be sent from country(1) where he had been tried, to country (2) and tried a second time there for essentially the same offence.

(iv) as we have seen above a defendant has no real status, or "power" to prevent injustice in the present EAW climate;

(v) in addition, despite the EU rhetoric, a defendant has now lost many of the protections he had under the old system, with no <u>new set of Rights and Rules</u> to balance this loss;

(vi) in fact, so bad is the situation, it is now essential in a Cross-Border Case for a Defendant to have both a lawyer in the Issuing State AND the Requested (Executing) State. Early access to a lawyer is vital in both States (dual representation). The EU has completely failed to address or to provide across Europe any, or any adequate, system of Legal Aid to cope with this new fast-track EAW system that hugely benefits Prosecutors and States, and which seriously undermines the Defence.

(vii) Notwithstanding the frequency with which EU Decisions or Directives call upon the need to respect Fundamental Rights and fundamental legal principles, there is no evidence that the Member States are listening, or putting it into practice.
For example, Article 1(3) of the Framework Decision on the European Arrest Warrant states that "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".

Yet when it comes to actually defending or standing up to support those "fundamental rights and principles" remedy or robust support comes there none!
Instead of "equality of arms", or "a level playing field" for the Defence, there are the continuing hollow pronouncements, empty gestures, and an inconspicuous response.

You cannot look to the European Court of Justice for help either. We noticed how the European Court of Justice dealt with the "dual criminality" principle in paragraph 2(i) above. It has been crushed and marginalised.

Two further Cases from the CJEU have demonstrated the restricted line this important Court is continuing to take on Defence Rights, and it does not bode well for Justice in the future. In Radu [Case C-396/11 29th January 2013] the CJEU was asked to deal with the question whether evidence of past or future violations of fundamental rights in the Issuing Member State in relation to pending proceedings against the requested individual and particularly in relation to the issuance of an EAW are possible grounds to refuse the execution of the EAW. The Court said NO.

In another Case, Melloni [Case C-399/11 26th February 2013], the CJEU refused to allow Spain to reject an Italian EAW on Spanish Constitutional Law principles on the basis that on the defendant's return to Italy he would have been prevented from having a retrial of his case in a full hearing where he could exercise his Defence Rights. The CJEU again adopted a narrow approach that (a) it was not a ground expressly provided for in the Framework Decision; and (b) such an approach would be incompatible with the superiority of EU law over national law.

A look "on the bright side"

It is worthy of Note that the House of Lords in the UK made totally different pronouncements to the CJEU on this issue, one in 2012 and the other in 2013.

In the House of Lords Report of the 26th April 2012 on the European Union's Policy on Criminal Procedure it expressed the view that "current EU legislation, subject as it is to the Charter of Fundamental rights, does permit the Court of a Member State to refuse mutual recognition on human rights grounds in justified cases".

A further expression of dissent by the House of Lords after the case of Radu is to be found in their 13th Report of Session 2012-2013 HL Paper 159 para 172 on EU police and criminal justice measures.
In it the House of Lords stated that "it would be a mistake to interpret the Judgement in Radu as preventing the option to decline an EAW request on human rights grounds on the basis of Section 21 of the Extradition Act 2003".

What is this but a clear Statement to the EU from such an exalted Legal Authority that EU Case-Law and all EU Framework Decisions, Directives and other Instruments must contain clauses guaranteeing fundamental rights and proportionality?
I have made the point in para 2(v) above that no new set of Rights or Rules has come into existence to give clear guidance to Courts and Lawyers in Cross-Border cases.

So we cannot leave it to the Council or the Commission; we must look to the European Parliament to look after Defence Rights, or the Courts. The House of Lords, and the European Court of Human Rights have shown some leadership, but there is little sign that the CJEU is going to assist when it is heading in the opposite direction.

In simple terms Courts in the EU should be exercising their authority to refuse to implement or execute any EU measure where there are substantial grounds to believe that the measure would result in a breach or breaches of a fundamental right of the person concerned.

Three Cases should inspire us and remind us that all is not lost. The ECHR Case of Salduz, 27 November 2008 Application Number 36391/02, and the ECHR case of Panovits v.Cyprus, 11 December 2008 Application Number 4268/04 are well-known, have been built on, and have led the way forward.

The Scottish Case of Cadder (Appellant) v Her Majesty's Advocate (Respondent) (Scotland) [Judgement given on 26 October 2010] Michaelmas Term 2010 UKSC 43 is an even more outstanding case, since it led to the entire rebuilding of the Scottish Criminal Justice System.
The case hinged on the absolute need for defendants to have access to a lawyer for obtaining legal Advice before a Police Interview, and to have the presence of that lawyer during the Interview.

The principle at stake was that it is more important for a defendant to have access to a lawyer before an Interview to be able to make a considered judgement whether to say anything at all, or if he is to say something to consider the nature and extent of it, than to end up with dubious convictions based on inadequate or ill-thought out admissions, or on admissions unfairly or unlawfully obtained.

On that Rule of Law did seven Scottish Appeal Judges make their decision, which caused the Government and the Nation to benefit from a better and a fairer Criminal Justice system.

(viii) What is "mutual recognition" and does it matter?

In 1999 the European Council decided that the principle of mutual recognition should become the "cornerstone for judicial cooperation in criminal matters". This principle is based on "the thought that, while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are acceptable as equivalent to decisions by one's own state" . "Mutual trust….(is) not only trust in the adequacy of one's partner's rules, but also trust that these rules are correctly applied" (26th July 2000; Communication 2000, 495).

The results therefore were:

(i) No longer would international relations be conducted on a case-by-case basis whether or not to render the requested assistance;
(ii) Differences in national legislation should not impede this co-operation;
(iii) Assistance should be provided to a member state whenever this is necessary for the prosecution of serious offences in another member state, or the execution of sanctions imposed in another member state.

This meant that the traditional grounds for refusal based on cherished and refined principles were abolished, or no longer followed. The result is?
A decision should be executed at the request of an EAW Issuing state, even if according to the national law of the Executing state:

a. The act underlying the decision did not constitute a criminal offence (abolition of verification of dual criminality);
b. The executing member state would not have jurisdiction in the given case;
c. The suspect or convict is not criminally liable because of his age;
d. The possibility to prosecute the offence or to execute the sanction is statute-barred;
e. The concept of criminal liability of legal persons does not exist;
f. The coercive measures necessary to execute the decision cannot be used under the given circumstances in a similar domestic case;
g. The issuing authority is not competent to issue the decision in a similar domestic case;
h. The decision could not be executed because the person concerned is protected by privileges or immunities;
i. The default judgement could not have been issued because the issuing state applied different rules on default judgements;
j. The sanction which must be executed could not have been imposed in the given circumstances in a similar domestic case.

(ix) Attempts by NGOs (like the ECBA and others) to provide a coherent European Code or Rule-Book of the necessary Criminal Procedural Rights to fill the gap left by the wholesale destruction of the "old" Defence Rights spectacularly failed, when the 2004 Framework Decision collapsed.
The fact was that the EU Council simply was not prepared to agree with what the Defence needed and called for, to ensure there was "equality of arms" in cross-border cases.

One only has to read the damaging Report on Implementation of the Hague Programme for 2007 set out in the "Communication from the Commission to the Council and the European Parliament" COM (2008) 373 final, Brussels [2-7-2008] to understand that all the high rhetoric about how important "mutual recognition" and "mutual trust" was, did not work in the real world in which European Lawyers and Judges were dealing with their cases.

3. To the "hardened" European defence practitioner it seemed that what had happened was:

(i) the Member States had secured their "fast-track" procedure with huge benefits for Prosecutors, and no reflection of the very real Rights and safeguards there had been for the Defence;

(ii) mutual recognition meant that the Member States could take account of the good decisions they were making, whilst conveniently "brushing under the carpet" all the harsh and inconvenient decisions and violations that were occurring;

(iii) and what's more, because Member States were no longer having to produce any realistic summary, let alone a detailed Schedule of the evidence, all the harsh realities and unfairness of what was happening to defendants all over Europe was no longer visible, and could not be taken into account in any Court of Law.
What a Court cannot see or know about it cannot deal with.

REMEMBER the number of EU countries that were involved in the unlawful Rendition of prisoners in and out of Guantanamo to all the torture chambers in Europe and beyond?

The post-9/11 period of European history saw the outbreak of institutionalised lawlessness by the Member States on a scale unseen since the two World Wars.

You yourselves will have to consider whether the "Road-Map" of Directives and Proposals that have arrived on the scene in the last ten years, goes anywhere close to what the European system of Human Rights, and the Charter of Fundamental Rights demands for suspects and defendants in the criminal Courts of the EU.

4. <u>Some Tips for Defence Counsel in EAW cases:</u>

(a) obtain the useful short (2 sides of A4) leaflet produced by the ECBA entitled: "How do I defend an EAW? The European Arrest Warrant: ECBA essentials for Defence Lawyers". It has a Checklist of Bullet points you must follow, and on the reverse side of one piece of paper some paragraphs about the Proceedings, together with a description of the respective roles of the Issuing and the Executing State Lawyers;

b) here are some "meaty" defence-orientated statements contained in 3 Directives that you might find useful in your Documents/Pleadings in EAW proceedings:

1. 1-6-2012 Directive 2012/13 EU of the European Parliament and of the Council (of 22 May 2012 [L 142]) on the Right to Information in Criminal Proceedings.

Please see page 6 and Article 7 the "Right of access to the materials of the Case". In short Article 7(1) states that "Where a person is arrested and detained…… Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively……..the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers".

Article 7(2) states that the material is to be supplied "whether for or against suspects or accused persons".
Article 7(3) states the material "shall be granted in due time to allow the effective exercise of the rights of the defence", and Article 7(5) states that "Access shall be provided free of charge".

2. 11-11-2009 Acts Adopted under Title 6 of the EU Treaty; Council Framework Decision 2009/829/JHA (of 23 October 2009 [L 294], on the Application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

Please see the following:
Page L 294/20 paragraphs (1) to (6);
Page L 294/21 paragraphs (7), (12), (14) to (15), (18);
Page L 294/22 Article 2, paragraph 1(b);
Page L 294/23 Articles 8 and 9(1);

3. 24-2-2007 Council Decision of 12 February 2007 establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme "Criminal Justice" (2007/126/JHA [L 58].

Please see the inclusion of phrases advancing the need "to further improve mutual trust with a view to ensuring protection of rights…….of the accused" in Article 2 paragraph 1(d) Page 14; and Article 3(a)(vi) also on page 14, which cites as one of the objectives "promoting rights of the accused".
On page 15 Article 3(a)(d) gives another objective as being "to improve information on legal systems in the member states and access to justice".

5. Trial in Absentia

In the UK there is now has a settled body of Law and a reasonably fair system for dealing with cases both within the UK and outside it.

Within the UK the Judge has a discretion to start or continue a trial in a defendant's absence. This discretion must be exercised "with the utmost care and caution and with regard to the overall fairness of the proceedings".
There is a Consolidated Practice Direction which, at paragraph 1.13 [2014] 1 Weekly Law Reports page 589, reminds Judges that a defendant has a right in general to be present and to be represented at his trial. "The overriding concern must be to ensure that such a trial is as fair as circumstances permit, and leads to a just outcome".

The Judge should also take into account fairness to the Prosecution and all the circumstances of the case, in particular:
(i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, and in particular whether the behaviour was voluntary, and so plainly waived the right to be present;
(ii) whether an adjournment would resolve the matter;
(iii) the likely length of such an adjournment;
(iv) whether the defendant, though absent, wished to be represented or had waived his right to representation;
(v) whether the defendant's representatives were able to receive instructions from him and the extent to which they could present his defence;
(vi) the extent of the disadvantage to the defendant in not being able to present his account of events;
(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;
(viii) the general public interest that a trial should take place within a reasonable time;
(ix) the effect of delay on the memories of witnesses;
(x) where there was more than one defendant, and not all had absconded, the undesirability of having separate trials.

Cross-border cases Most situations in this category are covered by legislation in the Extradition Act 2003 which obliges Judges to decide whether the fugitive's extradition would be compatible with Convention Rights. The Act has built-in protection against unfair overseas convictions in absentia. If the Judge decides the fugitive deliberately absented himself, he may go directly to consider extradition. If the Judge decides he did not deliberately absent himself, he must decide whether the person would be entitled to a retrial, or a review amounting to a retrial, which would include the right to defend himself in person or through legal assistance of his own choosing, or if he had no or no sufficient means, to be given legal assistance free when the interests of justice so required, and the right to have examined witnesses against him, and to obtain the attendance of witnesses on his behalf under the same conditions.

If the Judge decides the person would not have those rights, he must Order the person's discharge.

6. Some thoughts on the Procedural Safeguards for Defendants

(a) "Free interpretation……..in Court" Article 6(3)(e). So is there satisfactory coverage at the arrest or charging process, and at pre-trial Hearings? Is cheap poor quality interpretation acceptable?
Translation of documents, yes. What happens as in the UK when up to 50% of the Prosecution Case is not in documentary form, but is on discs?

(b) "To be informed……in detail of the nature and cause of the accusation against him" Article 6(1)(a).
What lies behind this is critical because at stake is the ability of the accused and his representatives to participate effectively in the criminal process. The defence team need to be able to actually exercise their rights, to gain access to the whole file, to read it and understand it, and to have disclosed anything that arises out of those investigations that still require to be investigated. *In reality there is a real struggle for the defence to get a timely, a full, or a satisfactory Disclosure of the Prosecution Case and all the material Documents and evidence.* Is that what you face on a daily basis?

(c) Access to a Lawyer and Legal Aid.
"Information": a positive obligation to give the defendant information about Legal Assistance and Legal Aid, not just a no doubt very useful Letter of Rights without that information in it.
REMEMBER without legal aid many of the key elements of Measure C cannot be implemented.
See also the December 2012 United Nations Principles on Legal Aid.

WHEN can the defendant have legal aid? Immediately on Arrest? Even before Arrest if there is likely to be a "significant curtailment" of freedom of action? Before, and/or during Interrogation? *Where does your country stand on this?*

(d) The Right of silence is not included in Article 6. Does it still exist intact in your country? In reality this "Right" no longer exists in the UK.

(e) Are the Directives and other EU Instructions upon Criminal Procedures being used in practice in your country?
Do you find them "practical and effective", and do your Judges put them into practice?
Sadly many National Authorities are failing to implement the Measures to safeguard suspects Rights.

7. CONCLUSIONS:

The basic concepts of the EAW process are:

No fact or evidence base
All to do with the nature of the actual Request fast through to surrender
Little or no room for Defence Arguments
No space for Proportionality
Irrelevant whether there has been Corruption or Abuse of Process
Immaterial that the Warrant stands upon a weak or non-existent case

The Impact on National Defence Practice:

A determination to give to EAW cases a set of Rules that will transform this Procedure to one that acknowledges the Charter of Fundamental Rights and the Convention of Human Rights, and that will provide Remedies for the many injustices that take place.

A sadness that the European Court of Human Rights only acts after the Case is over, and that the Court of Justice for the European Union which has the capacity for real change does not have the stomach for it.

JONATHAN STUART MITCHELL
Advisory Board of the ECBA
25 Bedford Row, London WC1R 4HD

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