Prisoner Transfer, Material Detention Conditions & Sentence Execution In The European Union – A Journey Bound For Choppy Waters?

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11 September 2010
Key Themes

› **Background** – extension of EU acquis, principle of Mutual Recognition, Treaty of Lisbon

› **Key EU Framework Decisions**

› **Council of Europe & Material Detention Conditions**

› **Foreign prisoners in the EU** – numbers and specific problems

› **EU Prisoner Transfer** – problems & potential solutions
Mutual Recognition (MR)

- 1999 – EC Tampere – adopted principle of MR as the bedrock of judicial co-operation in both civil and criminal matters within the EU

- 2000 – MR Implementation Programme in Criminal Matters emphasised that MR would:
  - strengthen co-operation between Member States
  - enhance protection of individual rights
  - ease the process of rehabilitating offenders
  - contribute to enhanced legal certainty across the EU
Mutual Recognition (MR)

- MR presupposes that Member States have trust in each others criminal justice system and that such trust is grounded on their “shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law”

- 2004 – Hague Programme
  - priority afforded within the general MR programme to measures concerning prison sentences and other alternative sanctions
Key EU Framework Decisions

- FD on the European arrest warrant and the surrender procedures between Member States (2002)

- FD 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 EU (2008)

- FD 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 (2008)

- FD on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to pre-trial detention (2009)
Treaty of Lisbon

- Principle of Mutual Recognition given formal treaty locus – article 82

- EU Charter of Fundamental Rights is now legally binding on Member States

- EU will accede to the European Convention for Human Rights & Fundamental Freedoms – article 6.2
EU Charter of Fundamental Rights

- No one shall be subjected to torture or to inhuman or degrading treatment or punishment – article 4

- No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment – article 19.2
FD European Arrest Warrant

- Designed to replace lengthy extradition procedures by abolishing most exequitur procedures

- Can be issued by a national court in respect of:
  - Individuals suspected of a crime punishable by a prison sentence of more than 12 months
  - Individuals convicted and sentenced to more than 4 months in prison - article 2.1

- For 32 specific offence types the double criminality requirement no longer applies in decisions as to whether someone can be surrendered – article 2.2
FD European Arrest Warrant

› Individuals can be sent back to their state of origin for either prosecution or punishment - preamble, clause 5

› Mechanism is based on a high level of mutual trust between Member States - preamble, clause 10

› “no-one shall be removed or extradited to a state where there is a serious risk of (...) the death penalty, torture or other inhuman or degrading treatment or punishment” – preamble, clause 13
FD Mutual Recognition – Custodial Sentences

› Allows for the transfer of sentence execution from one EU member state to another provided that certain procedural safeguards are satisfied

› Includes the same list of 32 offences to which the principle of double criminality no longer applies (as FD EAW)

› Key buzzwords: - social rehabilitation and reintegration of the offender
FD Mutual Recognition – Custodial Sentences

Therefore:-

› the enforcement of a sentence in the executing state should enhance the possibility of the social rehabilitation of the sentenced person and that the issuing state can satisfy themselves that this is the case - clause 9, article 3.1

› Member States are required to adopt measures by which their competent authorities will take decisions as to whether the forwarding of a judgment will in fact facilitate social rehabilitation of the sentenced person – article 4.2/4.6
FD Mutual Recognition – Custodial Sentences

- Executing state (ES) can adapt a punishment or refuse to recognise or execute a judgment if it contains aspects which are incompatible with its legal system - articles 8.2/8.3 en 9.1 (k)...

- Sentence duration: sentence > permissible penalty in ES = Adapted sentence = maximum possible ES penalty

- Sentence nature: adaption to normal punishment in ES for similar offence

- Psychiatric/Health care measures
FD Mutual Recognition – Custodial Sentences

- Transfer can proceed without the consent of the sentenced person - article 6.2. – new policy choice and significant departure from “voluntarist” principles of previous legal instruments governing prisoner transfer

- Conditional or early release – issuing state can request information on executing state’s con/early release arrangements – can stop transfer process if not satisfied – article 17.3
Council of Europe – Material Detention Conditions & Sentence Execution

- Convention for the protection of human rights and fundamental freedoms – articles 3, 5, 6 en 8 (1950)

- Convention for the prevention of torture and inhuman or degrading treatment or punishment - (1987) – CPT, country visits & reports


- Convention on the transfer of sentenced persons (1983) – in most cases the consent of the prisoner, issuing state and executing state is required

Material Detention Conditions - Concerns

- CPT country reports – overcrowding, lack of work opportunities, education, rehabilitation, health care etc.
- ECtHR jurisprudence
  - Dybeka v. Albania (2007), Keenan v. UK (2001), health provision, article 3
  - Szabó v. Sweden – early release, article 5
  - Napier v. Scottish ministers – access to in-cell sanitation/article 3
  - Dickson v. UK – rehabilitation principles
How Many “Foreign” Prisoners Are There in The EU?

- European Sourcebook of Crime and Criminal Justice Statistics (2006) – 18% of prisoners within the EU

- Van Kalmthout et al (2007) – 100,000 “foreign” prisoners within the EU (including: EU + non EU citizens, untried and convicted prisoners, asylum seekers and illegal immigrants)

- 23,000 EU citizens in foreign prisons

- Significant majority detained in other EU Member States
Foreign Prisoners – Specific Problems

› Less or even no visits in comparison with “national prisoners”
› Legal restrictions on language use – letters, telephone etc.
› Restricted access to work, education and rehabilitation services
› Poor quality of legal advice
› Absence of aftercare
› Low usage of existing international legal instruments concerning prisoner transfer
EU Prisoner Transfer—what’s required to make it work?

> Successful operation of these framework decisions requires:

- in-depth knowledge of both prison regimes & sentence execution in EU Member States
- objective criteria to base decisions around rehabilitation

> In practice a number of problems are likely to become apparent:
EU Prisoner Transfer - problems...

1. Considerable differences exist in law concerning custodial sentences in EU Member States

- Sentence execution modalities - *electronic monitoring:* – independent “stand-alone” sanction or a component of a wider sanction – e.g. conditional release, alternative to custody etc, weekend prison

- Material Detention Conditions – *legal position and rights of prisoners, access and quality of health care, disciplinary procedures and the handling of offences committed in prison, access to visits etc.*
EU Prisoner Transfer - problems...

- Regulations governing conditional or early release

- Determination of sentencing equivalence - by an executing state is likely to be problematic particularly in light of the abolition of double criminality determination in many cases

- Harsher sentences are not permitted (is a “standard punishment tariff” therefore required?)
EU Prisoner Transfer - problems...

2. Issuing states may have insufficient information concerning the criminal justice and prisons systems in an executing state on which to base decisions concerning transfer

3. Sufficient information may be obtained but this only serves to highlight concerns relating to – for example – material detention conditions in the executing state.

4. These concerns undermine rehabilitation and the commitment to respect human rights underpinning the FD’s and the general MR process
EU Prisoner Transfer - problems...

5. Differing interpretations of MS requirements to assess social rehabilitation – generically/case by case – competent authorities not specified

6. Absence of communication safeguards, legal representation, right to be heard

7. Transfer of prisoners without their consent increases the importance of observance with international human rights norms – ECHR, EU Charter of Fundamental Rights etc.
EU Prisoner Transfer – solutions...

- Significant variances in material detention conditions and laws governing sentence execution in EU Member States

- Thorough research is necessary to establish the extent and nature of these differences and the degree of compliance (paper/actual) with international legal instruments concerning prison conditions and prisoner transfer
EU Prisoner Transfer – solutions...

Research Model

› International legal analysis – UN, COE, EU hard and soft law instruments – detention conditions and prisoner transfer – content and strength

› Member State analysis – transposition and compliance in practice

› Practitioner’s perspectives – what’s required to make it work?

› Valorisation – European Judicial Bodies
EU Prisoner Transfer – solutions...

Potential Flanking Measures

- Member State “help desk” – information on prison system, sentencing modality, early release provisions (E-justice?)

- EU portal – CPT, national prison inspection reports, ECtHR jurisprudence

- Standard EU punishment tariff

- Authorised translations – key legal texts
EU Prisoner Transfer – solutions...

› Increased CPT inspections, investment in and co-ordination of national preventative bodies under auspices of OPCAT

› Binding EU minimum standards – cell occupancy, health care etc.

› EU measures to harmonise conditional release

› EU measures to harmonise sentence execution modalities
EU Prisoner Transfer – solutions...

Importance laid on the concept of rehabilitation or re-socialisation – but what does that mean?