IN ABSENTIA CONVICTIONS AND THE EAW PROCESS

MAASTRICHT UNIVERSITY

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SOME INFORMAL NOTES FOR A LECTURE

NOT FOR PUBLICATION OR ATTRIBUTION*

General difficulties with the EAW system

One of the less talked about implications of Brexit among the wider public – although not, I am sure, in the world of law enforcement, police, public prosecutors and criminal lawyers – is the fact that the UK would leave the EAW system. In this situation, extradition arrangements between the EU27 and the UK would be governed by the old Council of Europe Extradition Treaty of 1957. But this in its own way the best tribute to the success of the EAW, because the general reaction is: who wants to go back to that?

While there is no doubt but that the EAW system has been a success – and, is, indeed, essential to the proper functioning of the internal market – it is equally clear that real life is perhaps more complicated than the drafters envisaged. Specifically, not enough allowance was made for the fact that in the field of criminal justice the legal systems of the 27/28 are very different indeed.

This is nowhere more obvious than in the case of *in absentia* convictions, especially as this is largely unknown in the common law systems. All of this has obliged the CJEU to adopt a series of autonomous interpretations of the Framework Decision itself.

New developments at the time of Article 4a of FD 2009/299

New emerging case-law from the ECHR regarding appeals and Article 6 ECHR: see, e.g., *Hermi v. Italy* 18 October 2006, para. 62:

> "….However, even where the court of appeal has jurisdiction to review the case both as to facts and as to law, Article 6 does not always require a right to a public hearing,

> still less a right to appear in person (see *Fejde v. Sweden*, 29 October 1991, § 31, Series A no. 212-C). In order to decide this question, regard must be had, among other considerations, to the specific features of the proceedings in question and to the manner in which the applicant's interests were actually presented and protected before the appellate court, particularly in the light of the nature of the issues to be decided by it (see *Helmers v. Sweden*, 29 October 1991, §§ 31-32, Series A no. 212-A) and of their importance to the appellant."

Here a majority of the ECHR held that the accused's rights had been waived and they also stressed that the appeal dealt with points of law, rather than fact finding.

Emerging importance of Article 47 (effective remedy) and Article 48 (right of defence).

Some of the recent case-law: two problems indirect services and appeals

Issues with indirect service: Case C-108/16 PPU *Pawel Dworzecki*.

In this case the relevant documents were left with the suspect's grandfather, but it was later claimed that he did not receive them. This is a common problem in civil cases, but perhaps slightly less so in criminal cases because the accused will often physically be present in court when the charges is read out or otherwise presented to him. But where national procedural law allows for indirect service, then experience has shown that it is very difficult in practice to disprove the defendant's argument that he never received the court papers. (How often have we found that other family members "forget" to tell us that important post arrived this morning?).

It should scarcely be a surprise, therefore, that the Court held that Article 4a(1) of the FD (as amended) constituted autonomous notions of EU law. Even though the FD did not seek to harmonise domestic procedural law, nonetheless the requirement of showing that the requested person had "in due time" been "summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision" and the requirement that he had "in due time 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", the Court held that Article 4a

> "has to be interpreted in the sense that a summons ("une citation") which was not directly notified to the person concerned, but was delivered to the address of the

latter, where an adult person belonging to his household, committed himself/herself to deliver it to the person concerned, and where the European Arrest Warrant does not allow for [the receiving court]to be sure that the adult person did effectively deliver the subpoena to the person concerned does not comply by itself with these provisions."

While *Dworzecki* does not, in and of itself exclude indirect service, the moral of the story here, surely, is that national legal systems must, where at all possible, ensure actual personal service on the accused.

Issues with appeals: Case C-270/17 Tupikas and C-271/17 PPU Zdziaszek

Concept when a judgment is effective. Note the important comments of Bobek AG in his Opinion at paragraphs 62 to 65:

"62. In the context of an appeal examining the substantive issues in their entirety, the foregoing considerations mean that where the person concerned did not appear at the proceedings at first instance but appeared at the appeal proceedings, it must be concluded that he appeared in person at the trial resulting in the decision within the meaning of Article 4a of the Framework Decision. Conversely, where the person concerned appeared at the proceedings at first instance but did not appear at the appeal proceedings, execution of the EAW may be refused if the executing judicial authority concludes that, in that particular case, the person's procedural rights were not respected, unless the situation at issue is one those described in Article 4a(a) to (d) of the Framework Decision.

63. In such a case, the situation described in Article 4a(1)(d) of the Framework Decision is relevant: the person concerned was not personally served with the decision but will be expressly informed of his or her right 'to … 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'.

64. Furthermore, it is appropriate to highlight the importance of the principle of mutual trust in that context. The judicial cooperation mechanism established by the Framework Decision would not be functional if the executing judicial authority had to carry out a lengthy examination to verify whether respect for the procedural rights of the person concerned had been guaranteed at each prior stage of the proceedings. The need to ensure that the system remains operational means, in my view, that the review of whether the rights of the defence were respected must be limited to the stage immediately preceding the moment at which it becomes possible to execute the custodial sentence. The earlier stages are, for their part, covered by the principle of mutual trust. That implies the need for the executing judicial authority to trust that the judicial system in the Member State of the issuing judicial authority is able to remedy any earlier procedural shortcomings.

65. In the light of the foregoing considerations, I consider that appeal proceedings in which the question of guilt or the question of the penalty were examined constitute a 'trial resulting in the decision' within the meaning of the introductory sentence of Article 4a(1) of the Framework Decision. It is that procedural step which determines whether the conviction underlying the EAW is enforceable. It is therefore in the light of that procedural step that the executing judicial authority must ensure that the procedural rights of the person concerned are respected with a view to implementation of an optional ground for refusal as provided for in Article 4a(1) of the Framework Decision."

Tupikas was, however, a strong case on its facts, because the EAW there contained no information at all as to whether the accused appeared in person at the appeal hearing. Note also the important conclusion of the Court at paras 85-86 that it is appeal proceedings which are decisive, at least where there is a "new examination of the merits of the case in fact and in law". As the Court observed it is "full and effective observance of the rights of the defence at that stage of the proceedings is such as to remedy a possible breach of those rights during a prior stage of the criminal proceedings."

Potential relevance of Directive 2016/343

Article 8(2) of the 2016 Directive (which does not apply to UK, DK or IRL) deals with in absentia hearings and may be thought (largely) to summarise existing law and practice:

> "Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:
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> (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance, or
>
> (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State."

Article 8(4) provides that where it is not possible to comply with the conditions laid down in Article 8(2) "because a suspect or accused person cannot be located despite reasonable efforts having been taken, Member States may provide that a decision can nevertheless be taken and enforced." But in that instance suspects when apprehended have a new trial in accordance with Article 9.

Article 9 allows for a new trial where the accused person "were not present at their trial and the conditions laid down in Article 8(2) *were not met*", they have a right to a new trial. The italicised words suggest that the suspect who had been informed in due time but who deliberately evades attending at his trial cannot avail of Article 9.

The LM problem

Fundamental issue raised by Case C-21618 PP *LM*, namely, when a national court is called upon to decide:

> "….whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for

> which he is being prosecuted and the factual context that forms the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, as amended, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State."

But how does a national court make a judgment about such matters, unless it says that the judiciary of Country A have been so compromised that a surrender order should not be made. But does that mean that County B is effectively suspending the EAW vis-à-vis Country A? Otherwise does this mean that a judge in Country B can make an individualised assessment regarding the independence of, e.g., particular judges or regional courts?

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