ECBA Spring Conference
Pre-trial detention Issues and the Need for Minimum Standards throughout Europe

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Pre-trial detention – the basic tenet

"Due to its intrusive nature and bearing in mind the principle of presumption of innocence, the basic tenet is that remand detention should only be used as a measure of last resort (*ultima ratio*). It should be imposed for the shortest time possible and should be based on a case-by-case evaluation of the risks of committing a new crime, of absconding, or of tampering with evidence or witnesses or otherwise interfering with the course of justice."

Extract from the 26th General Report of the CPT, published in 2017

Pre-trial detention - The European Instruments

- Article 4 EU Charter: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*
- Article 3 ECHR, unacceptable detention conditions can constitute a violation of Article 3

The beginning of European interest [1/2]

Stockholm Programme 2010:

"*efforts should be undertaken to strengthen mutual trust and render more efficient the principle of mutual recognition in the area of detention. Efforts to promote the exchange of best practices should be pursued and implementation of the European Prison Rules, approved by the Council of Europe, supported. Issues such as alternatives to imprisonment, pilot projects on detention and best practices in prison management could also be addressed. The European Commission is invited to reflect on this issue further within the possibilities offered by the Lisbon Treaty."*

The beginning of European interest [2/2]

Article 47 EU Charter: *"Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law"*

Article 6 ECHR, long pre-trial detention periods can constitute a violation of Article 6

Article 19(2) EU Charter: no one may be handed over to a State where there is a serious risk that the person concerned would be subject to inhuman or degrading treatment

Prison conditions and mutual cooperation

When prison conditions in a Member States entail a serious risk of violating Article 3 ECHR or Article 4 EU Charter, the proper functioning of mutual recognition and criminal law cooperation is put at risk, in particular when judges are obliged to refuse a transfer under Article 19 (2) EU Charter.

Judgment in joined cases Aranyosi and Căldăraru (C-404/15 and C-659/15 PPU)

- **FOLLOW UP TO ARANYOSI**

- Poor detention conditions can hamper the efficient operation of EU mutual recognition instruments, such as the European arrest warrant (EAW) - as expressly recognised by the CJEU in the *Aranyosi and Căldăraru* judgment. The CJEU held that the execution of an EAW must be deferred or eventually brought to an end if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued.

Eurojust and the CJEU ruling in *Aranyosi/Caldararu*

Eurojust has reported that one of the situations where it has been involved as regards EAWs is whenever delays occur in the process of recognition and execution of EAWs due to exceptional circumstances (article 17.7 FD EAW).

Following the ECJ Ruling in *Aranyosi/Caldararu* several cases have been brought to the attention of Eurojust and, although in most cases the surrender has been eventually granted, in over 15% of the cases the final result was not to surrender the requested person.

FOLLOW UP TO ARANYOSI

- The requests for additional information on detention conditions in the context of Article 15(2) FD EAW may lead to considerable delays in the execution of EAWs (and periods of remand in detention) .
- As the number of such cases has seriously increased over the last year, a common EU approach is needed to reduce those delays.

FOLLOW UP TO ARANYOSI – SUGGESTED STEPS

- MS need to develop **a common questionnaire** to be used in the context of requests for additional information under Article 15(2) FD EAW in order to enhance the smooth operation of the EAW.
- There is a need for a standard questionnaire with requests for additional information on detention conditions in a concrete case. This could relate to individual space of the cell, hygiene or healthcare or the existence of any national or international mechanisms for monitoring detention conditions.
- In addition, **a common database on detention conditions** within the EU should be maintained by Member States.
- To make the information comparable and measurable, common indicators would need to be developed, which could be similar to the ones used in the standard questionnaire.
- The database could also contain judgments of international courts, such as the European Court of Human Rights, courts of the issuing Member State, as well as decisions, reports and other documents produced by bodies of the Council of Europe (CoE) or under the aegis of the UN.

Eurojust and the CJEU ruling in *Aranyosi/Caldararu* – the UK dimension

Prison conditions in the UK are now very close to amounting to a violation of Article 4 EU Charter / Art 3 ECHR (and even possibly Art 2 ECHR)

CHARTER:

Art 1 – human dignity

Art 2 – right right to respect for physical and mental integrity

Art 4 – inhuman or degrading treatment

The latest report of HM Inspector of Prisons (next slide)

Annual Report 2016–17 HM Chief Inspector of Prisons for England and Wales - Growing concerns on safety

"Annual Safety had declined in 15 prisons inspected with just five prisons showing improvement.

We continued to find gaps in the identification of risk for new prisoners at a time when they were at their most vulnerable.

Levels of self-harm and the number of deaths in custody continued to rise at an alarming rate. Lack of activity, mental illness, illicit substances and growing debt all contributed to prisoner self-harm.

Violence continued to escalate at an unacceptable rate, and significantly more prisoners than before told us that they felt unsafe.

We identified major concerns about the governance and oversight of use of force and segregation."

Suicide and self harm in UK prisons

- There were 324 deaths in male prisons in England and Wales in 2016–17, an increase of 44 from the previous year.
- These included:
  - 103 self-inflicted deaths (a rise of 10% from the 94 recorded in 2015–16)
  - 194 deaths from natural causes (up from 162 in 2015–16)
  - three apparent homicides (down from six in 2015–16)
  - 24 other deaths, 21 of which were yet to be classified.
  - Levels of self-harm had also risen, from 32,313 reported incidents in 2015 to 40,161 in 2016 – an increase of 24%.
- Earlier this year, one prisoner was stabbed to death in Pentonville Prison

Treatment of children in detention

- The UK Joint Committee on Human Rights has launched an inquiry into the treatment of children in detention, following reports that unlawful restraint and solitary confinement are routinely inflicted on children.
- In 2017, routine violations led the Chief Inspector of Prisons for England and Wales to conclude that, “there was not a single establishment that we inspected in England... in which it was safe to hold children and young people.”

Remand prisoners are not separated in the England and Wales

- Most countries make provision for separating remand and sentenced prisoners, as stipulated in the European Prison Rules (Rule 18.8) and other international instruments.
- However, this is not the case in England and Wales
- In the CPT's opinion, allowing remand prisoners to participate in organised activities together with sentenced prisoners is undoubtedly better than confining remand prisoners to their cells for up to 23 hours a day for prolonged periods as is currently the case in many Council of Europe member states. However, efforts should be made to accommodate remand prisoners separately from sentenced prisoners. In fact, the CPT has a preference for remand prisoners having a satisfactory programme of activities whilst always being separated from sentenced prisoners, in full respect for the principle of presumption of innocence. Such separation also protects remand prisoners who enter the prison environment for the first time and who may be innocent from the potential criminal influence of sentenced prisoners. In this connection, the importance of a risk and needs assessment of all persons entering prison, as described in paragraph 54, cannot be over-emphasised, as it may not be appropriate to mix first-time remand prisoners with the large numbers of persons re-entering prison for a second time or more.

So, what is the position of the judges who are sending these people to such prison conditions?

Well, in my view they are committing an unlawful act.

S.6 Human Rights Act 1998 - Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

….

(3) In this section “public authority” includes— a court or tribunal

So what effect is all of this going to have on Mutual recognition after Brexit?

- Mutual recognition is predicted on mutual trust that the requesting Member State will honour its commitments regarding procedural rights and minimum standards of detention etc.
- Post Lisbon the CJEU has been the supervisory organ to ensure that minimum standards do exist in the requesting Member State.
- It is just unrealistic to consider that we go back to pre-Lisbon position, taking the CJEU out of the equation of mutual recognition – we cannot put the genie back into the bottle.
- If the supervisory jurisdiction of the CJEU is not acceptable to the UK then what alternative can we come up with.

So we do need a supervisory organ?

Whatever supervisory organ that we establish it has to do the following:

- Have adequate jurisdiction
- Have adequate remedies to ensure effective legal protection
- Be acceptable to both the UK and the EU27

What viable alternatives are there to the supervisory jurisdiction of the CJEU?

- The resistance on the part of the UK government to continued supervision by the CJEU is going to present the biggest obstacle to continued mutual recognition.
- The starting point must be a substitute supervisory organ which is acceptable to both the UK and the EU27
- What are the minimum requirements of such an alternative supervisory organ?
- Jurisdiction + an effective remedy where Member States fail to meet their obligations under the Charter.

Is it possible that the UK may accept some form of supervision by the CJEU?

- It appears that the UK government is sufficiently pragmatic to accept some form of supervision by the CJEU in other fields, for example in relation to our continued membership of Europol.
- House of Commons Home Affairs CommitteeUK-EU security cooperation after BrexitFourth Report of Session 2017–19
- Para 53

House of Commons Home Affairs CommitteeUK-EU security cooperation after BrexitFourth Report of Session 2017–19

- 53. The UK Government should do all it can to achieve the negotiating objective of a future relationship with Europol that maintains the operational status quo in full. It is therefore welcome that the Prime Minister has indicated willingness to accept the remit of the CJEU in this area. The commitments she has given suggest that if the UK and Europol are in dispute in future, the CJEU would be the ultimate arbiter. We welcome this flexibility in the Prime Minister's approach, as a way of ensuring continued security cooperation, which is in the interests of both the UK and the EU. For the operational status quo to be maintained, the future relationship must provide for more than Europol's operational partnership with Denmark, including:

Obligation on the EU27 to provide sufficient remedies

- Art 19TFEU – obligation on Member States to provide remedies sufficient to ensure effective legal protection in fields covered by EU law."
- Irish Supreme Court – Thomas O'Connor v Minister of Justice

Thomas O'Connor v Minister of Justice

5.9 In that context, the essential argument made on behalf of Mr. O'Connor is that Ireland is being asked to surrender a citizen of the European Union in circumstances where the legal framework within which that citizen may come to be governed in the United Kingdom is at least at significant risk of being no longer subject to European law but will be dependent on the law of the United Kingdom, subject only to the relevant departure arrangements establishing that the United Kingdom will, to a greater or lesser extent, be bound by European law in this area, either generally or in the particular circumstances of persons already surrendered on foot of the European arrest warrant regime. In particular, it is said that any rights which might accrue to Mr. O'Connor under the Charter will not necessarily be capable of enforcement.

Proposal for discussion

- The establishment of a Court of Justice for the European Criminal Justice Area (CJECJA)
- In effect it would have the powers of a special chamber of the CJEU (but we need to avoid any reference to that fact)
- It's jurisdiction would be specifically limited (by Treaty perhaps) to matters concerned with mutual trust and mutual recognition in the fields of criminal justice.
- The jurisprudence of the this CJECA would have to given a special status, rather as we have to the jurisprudence of the ECtHR
- It's judgments would have to be enforceable by some means: non binding judgments would not be sufficient (see O'Connor v MOJ Ireland)

Non binding decisions are not going to be sufficient

Look at the Irish case of O’Connor

Extradition from the UK to the EU27 – The Extradition Act would not be sufficient to assuage the concerns of the EU27

Thank you very much for your attention.