

Differences In Material Detention Conditions & Sentence Execution – A Threat To The Area Of Freedom, Security & Justice ?

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Abstract

The adoption of Mutual Recognition as the cornerstone of judicial co-operation in both criminal and civil matters within the European Union has resulted in an extension of the EU acquis via a range of legal instruments designed to give effect to the 'area of freedom, security and justice' as envisaged by the Treaty of Amsterdam. Two of these instruments - the Framework Decisions on the European Arrest Warrant and the Surrender of Persons between Member States and, the Mutual Recognition of Decisions involving Custodial Sentences and the Deprivation of Liberty – raise important questions concerning sentence execution, material detention conditions and the treatment of convicted detainees within the European Union's prison systems as well as for the wider application of the Mutual Recognition process itself. Beginning with an overview of the activities of the Council of Europe in the field of detention conditions, an illustration of practical and legal concerns raised by European institutions in this area is subsequently provided. The specific problems faced by foreign detainees in European prisons are then analysed alongside an assessment of their numbers. Thereafter, the development of EU legal instruments which impact on material detention conditions for convicted prisoners within the European Union is described with particular attention paid to the two Framework Decisions specified above. Against this backdrop, the article concludes by highlighting that differences in EU member states material detention conditions and modalities in sentence execution pose a range of potential problems for the operationalisation of these instruments – problems which have a legal, practical and political dimension.

1 Introduction

The adoption of Mutual Recognition as the cornerstone of judicial co-operation in both criminal and civil matters within the European Union has resulted in an extension of the EU acquis via a range of legal instruments designed to give effect to the 'area of freedom, security and justice' as envisaged by the Treaty of Amsterdam. Two of these

instruments - the Framework Decisions on the European Arrest Warrant and the Surrender of Persons between Member States and, the Mutual Recognition of Decisions involving Custodial Sentences and the Deprivation of Liberty – raise a number of important questions concerning sentence execution, material detention conditions and the treatment of convicted detainees within the European Union’s prison systems. The FD on the European Arrest Warrant introduced a simplified system for the surrender of sentenced or suspected persons between EU member states for the purposes of execution or prosecution of criminal sentences. For its part, the FD on the mutual recognition of custodial sentences allows for “foreign” prisoners convicted and sentenced in one EU member state to be transferred to serve their sentence in another EU country (normally their own member state).

Recognising the prominent role historically played by the Council of Europe in detention conditions and prisoner transfer, the article begins with a brief overview of the COE’s activities in this area. Subsequently, an illustration of on-going concerns raised by both the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the European Court of Human Rights regarding material detention conditions in European prisons is provided. The specific problems faced by foreign detainees in European prisons are then analysed alongside an assessment of their numbers thereby providing a template against which the content of the two Framework Decisions and the scope of those potentially affected can be assessed. Thereafter, the principles underpinning the development of Mutual Recognition are highlighted alongside the extension of the MR process to encompass the transfer and rehabilitation of prisoners. Particular attention is paid to the content of the two Framework Decisions specified above as they relate to issues concerning sentence execution, material detention conditions and the position of convicted detainees.

Against this backdrop, the article concludes by highlighting that differences in EU member states material detention conditions and modalities in sentence execution pose a range of potential problems for the operationalisation of these instruments – problems which have a legal, practical and political dimension and which may impact on the wider application of the Mutual Recognition process itself.

2 The Council of Europe & Detention Conditions

In a European context, questions relating to imprisonment, detention and prisoner transfer have historically been articulated through

jurisprudence from the European Court of Human Rights alongside treaties and legal instruments developed by the Council of Europe.¹

The European Convention on Human Rights and Fundamental Freedoms (ECHR) and its associated protocols affords a range of rights and freedoms to all those within the jurisdiction of a contracting party (member state). Of particular significance with regards to detention conditions are the provisions of article 3 (prohibition of torture, inhuman or degrading treatment), article 5 (right to liberty and security), article 6 (right to a fair trial) and article 8 (right to respect for privacy and private life). Additional protocol 6 to the Convention, furthermore, requires contracting parties to restrict the use of the death penalty to times of war or imminent threat of war. For the enforcement of the ECHR, the Convention established the European Court of Human Rights whose decisions are legally binding on contracting parties. As we shall see, the Court has been active in recent years in issuing jurisprudence concerning material detention conditions. All European Union member states have signed and ratified both the ECHR and additional protocol 6.

The following Council of Europe legal instruments are also noteworthy in the context of this article: the 1987 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the 1984 Recommendation concerning Foreign Prisoners, the 1983 Convention on the Transfer of Sentenced Prisoners and the 2006 European Prison rules.

The 1987 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provided for the creation of a committee (the CPT) empowered to visit places of detention to ensure compliance with the Convention's provisions. The CPT has unlimited access to penal institutions within signatory COE member states and can communicate in private with detainees and others whom it believes to be able to furnish it with relevant information. Following a visit, the CPT initiates a confidential dialogue with the state concerned with a view to resolving any problems identified. Member states are thereafter required to report back to the CPT outlining what remedial actions have been undertaken. The CPT publishes annual general reports highlighting the substantive issues which it has addressed during its county visits. In certain circumstances, reports relating to countries visited are also published. The 1987 Convention has been signed and ratified by all European Union member states.

The 1984 Recommendation concerning foreign prisoners was designed to alleviate problems arising from isolation, language, customs and culture with a view to aiding social resettlement. The recommendation

¹ Professor Dirk Van Zyl Smit, a co-drafter of the 2006 European Prison Rules, provides a description of the manner in which the European Convention on the Prevention of Torture, European Convention on Human Rights and recent jurisprudence from the European Court of Human Rights has contributed to the development of prisoners rights in Council of Europe countries. He also describes the manner in which these developments flowed from international instruments developed by the United Nations. From – *The 2006 European Prison Rules* – paper presented to the International Penal Congress, Barcelona, 2006.

contains a range of measures relating *inter alia* to prison regimes, equal access to education and vocational training, visiting arrangements, home leave, assistance by consular authorities and assistance from community agencies working in the field of resettlement of prisoners.

The 1983 Convention on the Transfer of Sentenced Persons was designed to provide foreigners deprived of their liberty as a result of conviction for a criminal offence with the opportunity to serve their sentence within their own society normally by having them transferred to their country of origin. Such transfers can be initiated by the sentencing state, the administering state or the prisoner themselves. The Convention contains important safeguards concerning dual criminality and restrictions on the ability of an administering state to aggravate a sentence during the sentence conversion process. Significantly, transfers cannot proceed without the consent of the prisoner concerned. The consent of both the sentencing state and administering state is also required. The 1997 additional protocol to this convention allows for the transfer of prisoners without their consent in cases where expulsion or deportation is included as a component of sentence. Provision is also made for the execution of sentence to be transferred where the sentenced person has fled to their own state of nationality from the state in which the sentence has been passed. The 1983 Convention has been signed and ratified by all European Union member states. Its additional protocol has, however, only been signed and ratified by 22 EU member states.

The most recent of these instruments, the 2006 European Prison Rules updated a previous version which was issued in 1987. Importantly, the rules were also drafted with the needs of new European member states in mind.² The Rules are significant in that they provide a clearly articulated set of benchmarks – derived from the philosophy of human rights – against which the reality of imprisonment can be assessed. Recognising the inherently detrimental impact of imprisonment, the Rules go further than merely asserting the rights of prisoners to be protected from mistreatment: they also imply that states possess (and must exercise) ‘positive’ obligations to reduce the negative consequences of custody for prisoners within their care. There is, moreover, no escape route for non-compliance on the grounds of inadequate resources. The Rules contain specific stipulations concerning treatment of prisoners in respect of:- accommodation, health and hygiene, contacts with the outside world, work, education, safety/security and criminal acts, discipline & punishment and inspection and monitoring. Whilst the content of the European Prison Rules may be praiseworthy, it is important to recognise that they remain advisory in nature and are not directly binding on Council of Europe (or European Union) member states.

² D. Van Zyl Smit, *The 2006 European Prison Rules* – paper presented to the International Penal Congress, Barcelona, 2006.

3 Concerns regarding European Detention Conditions highlighted by the CPT and the European Court of Human Rights

Despite (or perhaps because of) the legal and institutional framework highlighted above, concerns continue to be raised about European prison conditions in respect of matters such as overcrowding, interpersonal violence, health and the treatment of pre-trial detainees. For example, the CPT in its 2001 annual report found that ‘the phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and seriously undermines attempts to improve conditions of detention.’³ More recently, the committee has continued to highlight concerns regarding prison overcrowding in its various country reports across Council of Europe/European Union member states.⁴ The CPT has also drawn attention to shortcomings in European prison regimes noting that long term prisoners ‘should have access to a wide range of purposeful activities of a varied nature (work preferably with vocational value, education, sport, recreation/association).’⁵ This position was contrasted with the actual conditions in which some of these prisoners were held which ‘left much to be desired in terms of material conditions, activities and the possibility for human contact.’⁶ Finally, it is noteworthy that the CPT has taken a continuing interest in prison health care facilities devoting dedicated sections of its country reports to assessing the quality and shortcomings of health care arrangements.⁷ Basing its assessments on the principle of “normalisation”, the Committee considers that ‘prison health facilities should offer medical services and nursing care...in conditions comparable to those enjoyed by patients in the outside community’⁸ and has consistently highlighted examples where it considers such standards have been breached.⁹

Concerns relating to the physical conditions in which prisoners are held have not been confined to the CPT. For example, in the cases of *Kalashnikov v. Russia* (ECHR(2003)) and *Peers v. Greece* (ECHR) (2001)), the European Court of Human Rights has recognised that overcrowding could create prison conditions that constitute inhuman and degrading

³ 11th General Report on the CPT’s activities, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2001 – pages 14

⁴ See for example CPT country reports on Spain 2005, Bulgaria 2006 & Greece 2007

⁵ 11th General Report on the CPT’s activities – page 17

⁶ Ibid

⁷ See for example CPT country reports on Bulgaria 2006 & Greece 2007

⁸ Rod Morgan & Malcolm D Evans in *Protecting Prisoners – The Standards of the European Committee for the Prevention of Torture in Context*, Oxford University Press, Oxford 1999– page 68. The shortcomings of normalisation as a concept to improve standards in custodial institutions are also highlighted by Morgan and Evans. They note the practical difficulties faced by the CPT in determining the quality of community based health care and note that where such standards of community care are low, the normalisation approach risks legitimising the reproduction of such standards in the custodial arena

⁹ CPT country reports on Bulgaria 2006 & Greece 2007

treatment under the terms of article 3 ECHR despite the absence of intent on behalf of a member state to humiliate or debase a detainee.¹⁰ The Court's interest has, moreover, extended to other aspects of prison conditions. In *Messina v. Italy* (ECHR (2000)), it ruled that a regime which greatly restricted visits and any meaningful contact during them could violate article 8 of the Convention unless there were clear justifications for such restrictions.¹¹ The influence of the European Convention on Human Rights has also been manifest at member state level as demonstrated, for example, by the case of *Napier v. The Scottish Ministers* (2004), whereby the Scottish Court of Session (Appeal Court) upheld a complaint brought by a prisoner that lack of access to in-cell sanitation constituted an infringement of his human right not to be subjected to inhumane and degrading treatment under article 3 of the Convention.¹²

4 How many foreigners are there in European Prisons ?

Having highlighted the existence of a range of practical and legal concerns relating to generic prison conditions in Europe, the following paragraphs will focus specifically on two broad issues concerning "foreigners" in European prisons: how many "foreign" detainees are there within Europe's prison estate and the particular problems that such detainees face.

Establishing the precise number of foreigners within Europe's prison systems is not straightforward. Writing for the Council of Europe in 2001, Dünkel and Snacken found that foreign prisoners comprised a significant proportion of the prison population within the Council of Europe area albeit that they were not evenly distributed across member states and that a precise estimation of their numbers was impeded by differences in definitions and shortcomings in consistent data collection.¹³ With regards to the European Union, statistics published in the European Sourcebook of Crime and Criminal Justice Statistics indicate that some 18% of prisoners held within the European Union's prison systems were classified as 'aliens' by their country of detention. Again, the precision of this estimate is undermined by the differing

¹⁰ Chamber Judgements in the case of *Kalashnikov v. Russia* (ECHR (2003)) and *Peers v. Greece* (ECHR (2001)).

¹¹ Chamber Judgement in the case of *Messina v. Italy* (ECHR (2000))

¹² Scottish Courts website <http://www.scotcourts.gov.uk/opinions/P739.html>. The Scottish Government was liable on two grounds. First, the 1998 Human Rights Act made the government (and its constituent authorities) liable for breaches of the provisions of ECHR and, the provisions of the Scotland Act (the legislation which re-established devolved government in Scotland) stipulated that members of the Scottish Government had no power to act in a manner which was incompatible with Convention rights.

¹³ F. Dünkel and S. Snacken, *Prisons in Europe in: Crime & Criminal Justice In Europe*, Council of Europe Publishing, Strasbourg, 2001, page 147. The authors identify three broad categories which taken together comprise the total numbers of foreigners in European Prisons : non-residents detained for international crimes, ethnic minorities (including legal residents and national citizens and, illegal aliens and asylum seekers.

definitions deployed by member states and the fact that not all countries were able to supply information in this area.¹⁴ More precise information can be gleaned from research undertaken by van Kalmthout, Hofstee-van der Meulen and Dünkel (2007) which concluded that the proportion of foreigners in prisons within the European Union, defined as those without the citizenship of the state in which they were detained, had increased rapidly – both in absolute and relative terms. It was estimated that during the research period (2005-06), there were more than 100,000 foreign prisoners in European Union countries. This figure was comprised of those remanded in custody by a judicial authority, deprived of their liberty following conviction alongside those detained under administrative law such as (rejected) asylum seekers or irregular migrants detained in advance of deportation. The total also included non-EU citizens detained within the EU.¹⁵

An attempt was also made within the study also to collate information on EU nationals detained in countries other than their own both within the EU and further afield. Of the (then) 25 EU member states, only 18 countries were able to furnish such information.¹⁶ These shortcomings notwithstanding, the authors concluded that the total number of EU nationals detained abroad was in the region of 23,000 with the vast majority being held in the prison systems of fellow European Union member states more often than not in one of the countries bordering their own.¹⁷ Interestingly, nearly all EU citizens held abroad during the duration of the research were detained under criminal law provisions rather than being held under administrative or immigration law. It is not possible to ascertain from the statistics, however, what proportion of the detainees were convicted prisoners and what proportion was comprised of pre-trial detainees. In most countries, the majority of prisoners had been arrested for crimes related to the smuggling, trafficking and possession of drugs. Almost half the detainees were citizens of four EU member states: Germany, Italy, the Netherlands and the UK. A large majority of detainees were male, had a limited educational background and were without an official job.¹⁸

¹⁴ European Sourcebook of Crime and Criminal Justice Statistics, WODC, Den Haag, 2006, pages 133 and 139

¹⁵ A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen, F. Dünkel eds, *Foreigners In European Prisons Volume 1*, Wolf Legal Publishers, Nijmegen, 2007, page 7

¹⁶ Ibid – page 71. The countries providing information were:- Austria, Belgium, Denmark, France, Germany, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the UK.

¹⁷ Ibid – page 70. The authors conclude that the actual number of detainees is likely to be higher given that some EU citizens will be reluctant to inform their diplomatic mission about their detention or are unaware that they have the right to do so.

¹⁸ Ibid – pages 70-77

5 What problems do foreigners in European Prisons face ?

The negative psychological and practical impact of prisons upon their inmates, families outside and even the staff who work there has long been recognised.¹⁹ For example, studies have noted that the transition from freedom to deprivation of liberty is often extremely distressing for prisoners leading to a heightened risk of suicide or self harm.²⁰ Short term imprisonment has been found to have a negative impact on social and family relationships and can result in enhanced levels of aggression whether internally or externally directed.²¹ Other studies have noted the effects of institutionalisation on long term prisoners characterised by psychological and emotional regression, instability, passivity and apathy.²² Whilst a full exploration of these phenomena lies beyond the scope of this contribution, it is important to stress that inmates' experience of imprisonment is almost entirely negative.

It has moreover been highlighted that those incarcerated in countries other than their own are likely to face additional difficulties which can compound the generic effects of imprisonment. In their study of foreigners in European prisons, van Kalmthout et al. (2007) found that despite the nominal existence of non-discrimination principles in many penal codes and prison regulations, foreign prisoners were disadvantaged in a range of areas in comparison with detainees imprisoned in their country of origin. By way of example, the authors pointed out that inflexible visiting hours and the distances involved entailed that foreign prisoners received far fewer visits than national prisoners and sometimes even none. The high cost of international telephone calls often impeded their ability to maintain frequent contact with family and friends. In some member states, written and verbal external communication was only permitted in the national language or in a language which prison officers or management can understand: this, of course, also disproportionately impacted on foreign prisoners.

Emphasising the importance of work both as a way of mitigating the detrimental effects of prison and as a means of assisting rehabilitation, the authors found that in practice most types of prison work required knowledge of the national language: as a result, foreign prisoners were often excluded and frequently ended up at the bottom of the waiting list for work assignments. Similarly, access to education and training was frequently curtailed owing to language barriers.

The study also stressed that foreign prisoners were frequently dissatisfied with the legal support they received and were often unable

¹⁹ D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy- Penology & Human Rights*, Oxford University Press, 2009, pages 38-54

²⁰ J. Harvey, *Crossing the boundary: the transition of young adults into prison*, in A. Liebling and S. Maruna, *Effects of Imprisonment*, Willan Publishing, Devon, 2005, pages 232-354

²¹ P. Gendreau, M. Gibson, C.T. Sturridge, and J.J. Hugg, *Self-esteem changes associated with six months imprisonment*, *Proceedings of the Canadian Congress of Criminology and Corrections*, Ottawa, 1973, pages 81-89

²² N. Walker, *Side effects of incarceration*, *British Journal of Criminology*, Vol. 23, 1983, 61-71

to understand legal proceedings even in respect of their own case. Contact with consular authorities was, furthermore, intermittent and of variable quality.

Although most foreign prisoners were in principle eligible for placement in reintegration activities, they tended to be excluded from such activities in practice. The main reason was that reintegration activities were frequently in short supply and accordingly, foreign prisoners were afforded lower priority because it was assumed they would not be returning to society in the country of their detention. Similarly, differences in the likelihood of being granted home leave or parole or, being eligible for a transfer to more open prison regimes between were identified. This situation often arose because foreign prisoners were unable to fulfil the preconditions for such measures (e.g. a secure home address or supportive family ties in the country of detention) or because they were considered to constitute a high escape risk particularly in cases where expulsion following the conclusion of sentence was a possibility.

The study highlighted a range of difficulties in respect of aftercare in the run up to or following discharge. The authors found that contact with social welfare or probation agencies in the country of detention was problematic because of language barriers or lack of investment in specific programmes for foreign prisoners. Moreover, most EU countries made no specific aftercare provision for their nationals who returned to their home country after being detained abroad.

Importantly in the context of this discussion, the authors found that despite the existence of bi-lateral and European transfer arrangements, only a limited number of foreign prisoners were enabled to serve the remainder of their sentence in their home country. A key reason for this state of affairs was the difference in sentencing practices within the EU which fostered a reluctance to initiate the sentence transfer process on behalf of member states. These difficulties notwithstanding, the authors recommended that in view of the particular problems encountered by foreign prisoners, such transfers provided the most appropriate method by which rehabilitation and resettlement of foreign prisoners could be effected.²³

The preceding paragraphs provide a graphic illustration of the particular difficulties faced by those imprisoned outside their country of origin. They appear to constitute a cogent case for a more proactive approach on the part of European law and policy makers to ensure that increased opportunities are afforded to convicted prisoners to serve their sentence in their country of origin. The relatively low usage of the 1983 Council of Europe Convention on the Transfer of Sentenced Persons identified by van Kalmthout et al. would, furthermore, tend to suggest that the development of an EU locus in the area of prisoner transfer– as

²³ van Kalmthout et al. – pages 7 - 78

evidenced by the Framework Decisions on the European Arrest Warrant and Mutual Recognition of Custodial Sentences - may not have been entirely misplaced. The number of prisoners potentially eligible for such provisions, although difficult to precisely estimate, also appears significant enough to warrant action at European Union level. The critical question in this discussion is, however, whether these new instruments will prove effective in resolving some of the problems we have identified. It is to this question which we will now turn.

6 The development of an EU Acquis - Mutual Recognition, Sentence Execution & Detention Conditions

1999 saw the entry into force of the 1997 Amsterdam Treaty which established *inter alia* an 'Area of Freedom, Security and Justice' alongside the creation of a Directorate-General for Justice and Home Affairs within the European Commission. In the same year, the European Council held a special meeting in Tampere which agreed a number of policy orientations and priorities designed to make the Area of Freedom, Security and Justice a reality. As part of this portfolio, the Council endorsed the principle of mutual recognition as the bedrock of judicial co-operation in both civil and criminal matters within the European Union. Aiming to eliminate all intermediate exequatur measures for the recognition of judicial decisions among the member states of the European Union, MR was designed to create a situation whereby judicial decisions would no longer be treated differently or be subject to additional procedures because they were handed down in another member state.

The 2000 European Council programme of measures to implement the principle of mutual recognition in criminal matters emphasised the benefits of MR by asserting that "mutual recognition is designed to strengthen co-operation between Member States but also to enhance the protection of individual rights. It can ease the process of rehabilitating offenders. Moreover, by ensuring that a ruling delivered in one member state is not open to challenge in another, the mutual recognition of decisions contributes to legal certainty in the European Union."²⁴ The report also highlighted that implementing the principle of mutual recognition "presupposes that Member States have trust in each others' criminal justice systems"²⁵ 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."²⁶ The programme also recognised the importance of developing mechanisms to safeguard the rights of suspects and included references

²⁴ Programme of measures of 30 November 2000 to implement the principle of mutual recognition in criminal matters

²⁵ Ibid

²⁶ Ibid

to issues concerning sentence execution for the first time. As such it was emphasised that measures which would enable a Member State's residents to serve a sentence in their own State of residence could act in the interests of the offender's social rehabilitation. More recently, the 2004, Hague Programme developed these themes emphasising that in an enlarged European Union, there was a need for mutual confidence to be "based on the certainty that all European citizens have access to a judicial system meeting high standards of quality".²⁷

The above mentioned criteria were considered essential preconditions for the successful implementation of the 2002 Framework Decision on the European arrest warrant and the surrender procedures between Member States which was the first concrete measure in the field of criminal law implementing the principle of mutual recognition.²⁸ Latterly, the Hague Programme reaffirmed the priority to be afforded to measures concerning the execution of final sentences of imprisonment or other (alternative) sanctions within the context of MR.²⁹ This process ultimately culminated in the adoption of two further Framework Decisions in November 2008 concerning the Mutual Recognition of judgements in criminal matters imposing custodial sentences or the deprivation of liberty and, probation decisions and alternative sanctions.

7 The Framework Decisions

In the following paragraphs, an assessment of key aspects of the Framework Decisions on the European Arrest Warrant and the Mutual Recognition of Judgements involving Custodial Sentences and Deprivation of Liberty as they relate to issues concerning material detention conditions, sentence execution and convicted prisoners is provided.

7.1 European Arrest Warrant & The Surrender Of Persons Between Member States

Essentially intended to replace lengthy extradition procedures, the 2002 Framework Decision on the European Arrest Warrant and the Surrender of Persons between Member States was designed to introduce a simplified system for the surrender (between judicial authorities of EU member states) of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences. An EAW can be issued by a national court in respect of individuals suspected of acts punishable by the law of the issuing member state of at least 12 months or, where sentence has been passed or a detention order made, for sentences of

²⁷ Presidency conclusions, The Hague European Council of 4-5 November 2004

²⁸ Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.

²⁹ Presidency conclusions, The Hague European Council of 4-5 November 2004

at least four months duration. The warrant is subsequently sent to the relevant judicial authority in which the suspected or convicted person currently resides. Executing states are, thereafter, required to execute the warrant, trace and arrest the person to whom it refers and return them to the issuing state for prosecution or sentence.

Departing from the principles enshrined in the 1983 COE Convention on the Transfer of Sentenced Persons and 1970 COE Convention on the International Validity of Criminal Judgments, article 3.2 of the decision contains a list of 32 offences for which the establishment of dual criminality by an executing state will no longer be required.

The Framework Decision subsequently sets out a number of provisos relating to sentencing equivalence or modality (e.g. articles 2.4, 4.4, 5.2, 26.1, 26.2). These provisos include the ability of an executing state, in cases where the EAW relates to offences punishable by a custodial life sentence or life time detention order, to establish that the issuing state has provisions in its legal system for a review of the penalty either upon request or after 20 years (article 5.2). Requirements are also placed on both for the issuing and executing state concerning the provision and assessment of information upon which a decision to surrender will be based (e.g. articles 8, 15.1, 15.2).

Clause 12 in the preamble to the FD highlights that its provisions should respect fundamental rights and observe the principles recognised by Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union (this principle is further emphasised in article 3.1). It allows, moreover, for the refusal to surrender a person where objective grounds exist to believe that a warrant was issued for the purposes of prosecuting or punishing a person on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. Refusal to surrender can also take place if the detainee's position may be prejudiced on any of these grounds. Significantly in light of judgements emanating from the ECtHR, express mention is also made in clause 13 that no person should be removed 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.

7.2 Mutual Recognition of Judgments involving Custodial Sentences/Deprivation of Liberty

The 2008 Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty allows for the transfer of sentence execution from one EU member state to another provided that certain procedural safeguards are satisfied. The framework decision defines a sentence as any custodial sentence or any

measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings (article 1b).

Subject to certain provisos (see below), the decision empowers an issuing state (i.e. the state in which the criminal conviction occurred) to forward a judgement to an executing state for enforcement of the sentence passed on a given individual. Executing states are defined as: the member state of nationality of the sentenced person in which he or she lives, the member state of nationality to which the sentenced person will be deported once he or she has completed the sentence or, any other member state which consents to the acceptance of the judgement (article 4.1).

Mirroring the provisions of the Framework Decision on the European Arrest Warrant, article 7 sets out a list of 32 offences for which the establishment of dual criminality by an executing state is no longer required.

Clause 9 of the Framework Decision's preamble affirms the principle that 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. That the principle purpose of the Framework Decision is the rehabilitation of the sentenced person is subsequently re-asserted in article 3.1. Thereafter, articles 4.2 and 4.6 establish a requirement on Member States to adopt measures by which their competent authorities will take decisions as to whether the forwarding of a judgement will in fact facilitate social rehabilitation of the sentenced person.

The significance of issues relating to the quality of a prisoner's care would appear to be demonstrated by the ability of an executing state to refuse to recognise or enforce the sentence if it involves measures of psychiatric or health care which cannot be executed in accordance with its legal system (article 9.1.k). Similarly, an executing state is permitted to adapt a punishment where the original sentence is incompatible with its laws albeit that that the adapted sentence must still correspond as closely as possible to that imposed in the issuing State (articles 8.2, 8.3 and 8.4). Interestingly, article 17.3 of the Framework also allows an issuing state to request information from an executing state regarding the applicable provisions concerning early or conditional release and, permits to issuing state to withdraw the certificate underpinning sentence transfer (presumably on the basis of concerns relating to these early release provisions).

Broadly mirroring the provisions of the EAW, clause 13 in the Framework Decision's preamble emphasises that its provisions should respect fundamental rights and observe the principles recognised by Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the European Union. It allows, moreover, for the refusal to execute a decision where objective grounds exist to believe that a sentence was

imposed for the purposes of punishing a person on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. Refusal to execute a decision can also take place if the detainee's position may be prejudiced on any of these grounds. The protection afforded by the FD EAW in respect of debarring removal or extradition to a State where there is a serious risk that the detainee would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment is not, however, replicated.

Whilst the Framework Decision affords prisoners the right to initiate the sentence transfer process, the issuing state is not obliged to accede to such a request. Potential executing states can also initiate the transfer process again with the proviso that the issuing state is not obliged to accede to such a request (article 4.5). The transfer of sentence execution can, moreover, take place irrespective of whether the sentenced person is in the issuing state or the executing state.

Article 6.1 of the instrument stipulates that a judgement may only be forwarded to the executing state with the consent of sentenced person. Somewhat confusingly however, article 6.2 substantially qualifies this proviso by stating that the sentence transfer process *can* proceed without the consent of a sentenced person when the judgement is forwarded for execution to: the member state of nationality in which the convicted person lives, will be deported following completion of their sentence or has fled in view of the criminal proceedings pending against them in the issuing state. In these circumstances, the prisoner must be provided with the opportunity to state his or her opinion which will be taken into account when deciding whether a sentence transfer will proceed (articles 6.2 and 6.3).

Article 8.1 in effect requires executing states to recognise a forwarded judgement provided that procedural safeguards have been adhered to and that none of the discretionary grounds for non-recognition and non-enforcement apply.

These are, of course, highly significant departures from the voluntarist principles which underpin the 1983 Council of Europe Convention on the Transfer of Sentenced Persons. That these provisos were considered important from a policy perspective by the EU is apparent from clause 4 of the Framework Decision's preamble which articulates the perceived shortcomings of the 1983 Council of Europe Convention in respect of the necessity to secure the consent of both the prisoner and the states concerned prior to the initiation of any transfer process. Clause 5 of the preamble asserts, furthermore, that 'notwithstanding the need to provide the sentenced person with adequate safeguards, his or her involvement in the proceedings should no longer be dominant by requiring in all cases his or her consent to the forwarding of a judgement

to another Member State for the purpose of its recognition and enforcement of the sentence imposed.³⁰

8 Discussion

What should be apparent from the above is that taken together, the effective working of both these Framework Decisions will require legal practitioners to be equipped with knowledge of both legislation and practice concerning detention conditions and sentence execution in the respective EU Member States. In addition, some objective criteria around which decisions to initiate (or object) to decisions concerning the transfer of prisoners or sentence execution are also likely to be required. In practice, it would seem that a number of potential difficulties with the operations of these Framework Decisions may become apparent. These difficulties are multi-dimensional and concern: legal practitioners, prisoners or sentenced persons and, policy makers at both member state and EU level. We will deal with each of these constituencies in turn.

Issues for legal practitioners and prisoners

Despite the existence of European Union legal instruments designed to harmonise aspects of member states substantive criminal law, considerable differences continue to exist in member states' domestic legislation in respect of sentences involving deprivation of liberty.³¹ Such differences relate, for example, to the legal position of detainees in the broadest sense including rules concerning early or conditional release, access to medical assistance, modalities of sentence execution, living conditions within custodial institutions etc. By way of example, Belgian prisoners (whether foreign or Belgian nationals) are technically eligible for conditional early release after serving one third and a minimum three months of their sentences with life sentence prisoners becoming eligible after serving ten years (in both instances these ceilings are heightened for recidivist offenders). This situation can be contrasted with the position of the United Kingdom (England & Wales) where specific provisions concerning foreign prisoners apply allowing for the removal of such prisoners up to four and a half months before the half way point of their sentence with the specific period being dependent on

³⁰ Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement on the European Union – clause 5

³¹ See for example the Framework Decisions on money laundering, the identification, tracing freezing, seizing and confiscation of instrumentalities and proceeds of crime (2001), combating terrorism (2002), combating trafficking in human beings (2002) and combating the sexual exploitation of children and child pornography (2003). All of these instruments require member states to criminalise certain behaviours and introduce minimum sentences relating to the same. The instruments remain mute, however, on the modalities of these respective penalties.

the length of sentence imposed by the court and any decision granted by a prison governor in respect of parole.³²

These types of variances may make it difficult for executing states to accurately define sentence equivalence as required by articles 8.2 and 8.3 of the FD on mutual recognition of custodial sentences. This difficulty may well be exacerbated in light of the abolition of dual criminality in some cases.

As we have seen, articles 4.2 and 4.6 of the FD on custodial sentences establish a requirement on member states to adopt measures by which their competent authorities will take decisions as to whether the forwarding of a judgement to an executing state will facilitate the social rehabilitation of the sentenced person. Two problems may arise with regards to this proviso: member states may have insufficient information concerning an executing state's criminal justice system on which to base a decision concerning transfer or, sufficient information may exist but this merely serves to highlight concerns over the executing states' prison regime to which a transfer may occur. These shortcomings may be perceived as undermining both the object of re-socialisation of the convicted person and, the stated commitment to human rights which underpins the mutual recognition process and which is repeatedly articulated within the two Framework Decisions. In this regard, the on-going concerns raised by the CPT concerning prison conditions alongside ECtHR jurisprudence become highly significant in that both are likely to influence the decision making process concerning prisoner or sentence execution transfer.

Contemplation of these problems is not, of course, likely to be confined to those involved in making determinations concerning sentence equivalence in executing states: they will also exercise the minds of legal practitioners representing sentenced persons to whom the provisions will ultimately apply.

Issues for policy makers

The benefits of Mutual Recognition, as articulated within European Union policy documents, are fourfold: to strengthen co-operation between Member States, to enhance the protection of individual rights, to ease the process of rehabilitating offenders and to contribute to legal certainty in the European Union. Underpinning these objectives is the need for mutual trust between member states in the workings of each other's criminal justice system alongside a related commitment to the principles of human rights. In each of these areas, certain aspects of the two Framework Decisions we have examined appear to give cause for concern.

Despite the commitments provided in each of the Framework Decisions relating to the protection of human rights, provisions allowing for a

³² van Kalmthout et al. – pages 147 and 837

prisoner's transfer without their consent can hardly be viewed as consistent with the stated objective of *enhanced* protection of individual rights. In this regard, the absence of any restriction debarring removal or extradition to a State where there is a serious risk that the detainee would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment within the FD on custodial sentences is particularly disappointing. Viewed in tandem with the explicit policy intention of weakening the prisoner's position in respect of sentence transfer proceedings (clause 5 preamble), these shortcomings become all the more apparent.

In light of the considerable difficulties faced by prisoners detained abroad, it would seem reasonable to assume that sentence transfer will indeed assist with rehabilitation arrangements in some cases. For such a process to be successful however, information concerning an executing states' prison regime and aftercare arrangements will be required. Such information will allow both issuing states and prisoners themselves to make informed judgements about whether the rehabilitation test contained in the FD on custodial sentences can be effectively met. At present, no such systematic information provision is available. This shortcoming also has implications for a prisoner's ability to effectively exercise their human rights.

We should also note that certain aspects of the FD on custodial sentences do not seem entirely consistent with the principle of mutual recognition at least in its purest sense. The ability of executing states to adapt an issuing states' penalty coupled with an issuing state's ability to withdraw a transfer certificate if dissatisfied with the early release provisions of an executing state are noteworthy in this regard as, in both instances, exequatur procedures remain firmly in place.

Finally, it would seem likely that the significant variances in both sentencing modality and material detention conditions (coupled with ECtHR jurisprudence) may impact on judicial confidence in these two instruments and therefore, on the establishment of judicial certainty in the European Union. This in turn, may eventually have implications for the wider mutual recognition process itself.

9 Conclusion

In the preceding paragraphs we have traced how the traditional pre-eminence of the Council of Europe's activities in regulating material detention conditions and the stipulations governing prisoner and sentence transfer has been overtaken by new European Union legal instruments developed under the auspices of the mutual recognition programme. In spite of the undoubted potential for EU activity in these areas, the effective operation of two of these instruments – the Framework Decisions on the European Arrest Warrant and the Mutual

Recognition of Custodial Sentences – is threatened by a combination of variances in material detention conditions, the laws governing sentence execution in EU member states and shortcomings in content when measured against the EU’s own objectives for the mutual recognition programme. Interestingly, the European Commission’s evaluation of the Hague Programme itself reflected some of these concerns in recognising that differences in areas ‘such as substantive criminal law, the level of sanctions imposed in practice or prison conditions’³³ could pose problems for the mutual recognition process. In this regard, the somewhat sparse attention given to issues relating to detention conditions within the recently published Stockholm Programme can only be viewed as a missed opportunity. The solutions envisaged by the Programme – a combination of best practice exchange, the promotion of alternatives to custody and encouraging member states to implement the European Prison Rules are not without value but are unlikely in themselves to prove sufficient in addressing the difficulties this article has identified.³⁴ Rather, what is required is a robust analysis of the legal basis for, and extent of differences in, both material detention conditions and sentence execution throughout EU member states alongside consultation with legal practitioners as what additional measures may be needed to make the effective functioning of the Framework Decisions a reality. Such an exercise would allow the EU to make an evidence based assessment of which flanking measures – be they hard law, soft law or infrastructure based – it will need to implement. The smooth functioning of the area of freedom, security and justice is potentially at stake.

10 Bibliography

10.1 Legal and political documents (in alphabetical order)

Additional Protocol to the European Convention on the Transfer of Sentenced Persons, Council of Europe, 1997

Communication From The Commission To The European Parliament & The Council – An area of freedom, security and justice serving the citizen – Wider freedom in a safer environment, 2009

Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950

Convention on the Transfer of Sentenced Persons, Council of Europe, 1983

³³ Communication From The Commission To The European Parliament & The Council – An area of freedom, security and justice serving the citizen – Wider freedom in a safer environment

³⁴ The Stockholm Programme – An open and secure Europe serving and protecting the citizen

Council Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement on the European Union, 2008

Council Framework Decision on combating the sexual exploitation of children and child pornography (2003)

Council Framework Decision on combating terrorism (2002)

Council Framework Decision on combating trafficking in human beings (2002)

Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, 2002

Council Framework Decision on money laundering, the identification, tracing freezing, seizing and confiscation of instrumentalities and proceeds of crime, 2001

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe, 1987

European Convention on the International Validity of Criminal Judgements, Council of Europe, 1970

Presidency conclusions, The Hague European Council of 4-5 November 2004

Programme of measures of 30 November 2000 to implement the principle of mutual recognition in criminal matters

Protocol number 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1983

Recommendation of the Committee of Ministers to member states concerning foreign prisoners, Council of Europe, 1984

The Stockholm Programme – An open and secure Europe serving and protecting the citizen, Council of the European Union, 2009

10.2 Case law

Chamber Judgement in the case of Kalashnikov v. Russia (ECHR (2003))

Chamber Judgement in the case of Messina v. Italy (ECHR (2000))

Chamber Judgement in the case of Peers v. Greece (ECHR (2001))

Court of Session Judgement in the case of Napier v. Scottish Ministers (2004)

10.3 Literature

F. Dünkel and S. Snacken, *Prisons in Europe in: Crime & Criminal Justice In Europe*, Council of Europe Publishing, Strasbourg, 2001

11th General Report on the CPT's activities, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2001

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Country report on Bulgaria, 2006

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Country report on Greece 2007

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Country report on Spain 2005

European Sourcebook of Crime and Criminal Justice Statistics, WODC, Den Haag, 2006

P. Gendreau, M. Gibson, C.T. Sturridge, and J.J. Hugg, *Self-esteem changes associated with six months imprisonment, Proceedings of the Canadian Congress of Criminology and Corrections*, Ottawa, 1973

J. Harvey, *Crossing the boundary: the transition of young adults into prison*, in A. Liebling and S. Maruna, *Effects of Imprisonment*, Willan Publishing, Devon, 2005

Rod Morgan & Malcolm D Evans, *Protecting Prisoners – The Standards of the European Committee for the Prevention of Torture in Context*, Oxford University Press, Oxford, 1999

A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen, F. Dünkel eds, *Foreigners In European Prisons Volume 1*, Wolf Legal Publishers, Nijmegen, 2007

D. Van Zyl Smit, *The 2006 European Prison Rules – paper presented to the International Penal Congress, Barcelona, 2006.*

D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy- Penology & Human Rights*, Oxford University Press, 2009

N. Walker, *Side effects of incarceration*, *British Journal of Criminology*, Vol. 23, 1983, 61-711983