The Honourable Society of Lincoln's Inn

EUROPEAN LAW LECTURE SERIES

Lecture One – Monday 27 September 2010

"Jurisdiction and enforcing judgments in EU cross-border cases"
By Hugh Mercer QC, Paul Stanley QC and Tim Eicke

Arbitration exception

Case C-185/07 West Tankers [2009] ECR I-663
National Navigation Co v Endesa Generacion SA [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep 193, reversing [2009] EWHC 196, [2009] 1 Lloyd's Rep 666
Youell v La Reunion Aerienne [2009] EWCA Civ 175, [2009] 1 Lloyd's Rep 586

Public law/civil law

Case C-435/06 C [2007] ECR I-10141
Case C-523/07 A [2009] ECR I-2805

Basis of jurisdiction

Case C-168/08 Hadadi v. Mesko/Hadadi [2009] ECR I-6871
See also Bols Distilleries BV v. Superior Yacht Services Ltd [2007] 1 WLR 12 (Privy Council)

Special Jurisdiction (Brussels I, Arts 5 and 6)

Article 5 (contract)
Case C-19/09 Wood Floor Solutions [2010] ECR I-0000
Case C-381/08 Car Trim [2010] ECR I-0000
Case C-180/06 Ilsinger [2009] ECR I-3961
Commercial Marine Piling Ltd v Pierse Contracting Ltd [2009] EWHC 2241 (TCC), [2009] 2 Lloyd's Rep 699

(tort)
Case C-189/08 Zuid-Chemie [2009] ECR I-6917
Conocophillips (UK) Ltd v Partenreederei MS Jork [2010] EWHC 1214 (Comm)
Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep 123

(trust)
Gomez v Encarnacion Gomez-Monche Vives [2008] EWCA Civ 1065, [2009] Ch 245

(multiple parties)
FKI Engineering Ltd v De Wind [2008] EWCA Civ 316

Exclusive Jurisdiction (Brussels I, Art. 22)

Case C-343/04 Land Oberösterreich v ČEZ as. [2006] ECR I-4557
C-372/07 Nicole Hassett v South Eastern Health Board and Cheryl Doherty v North Western Health Board [2008] ECR I-7403
Berliner Verkehrsbetriebe (BVG) Anstalt Des Öffentlichen Rechts v JP Morgan Chase Bank N.A. & Anor [2010] EWCA Civ 390
C-144/10 Berliner Verkehrsbetriebe (BVG) Anstalt Des Öffentlichen Rechts v JP Morgan Chase Bank N.A. Frankfurt Branch (pending)
Case C-420/07 Apostolides v Orams [2009] ECR I-3571
Apostilodes v. Orams [20101] EWCA Civ 9
Appl. 27841/07 Orams v Cyprus (10 June 2010)

Prorogation of Jurisdiction (Brussels I, Art 23; Brussels II, Art 12)

(Incorporation and scope)
Africa Express Line Ltd v Socofi SA [2009] EWHC 3223 (Comm), [2010] 2 Lloyd's Rep 181
Calyon v Wytwornia Sprzetu etc [2009] EWHC 1914 (Comm)
UBS v HSH Nordbank AG [2009] EWCA Civ 585, [2009] 2 Lloyd's Rep 272
Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd [2009] EWHC 2409, [2010] 1 Lloyd's Rep 265

(Separability)
Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc [2008] EWCA Civ 1091, [2008] 2 Lloyd's Rep 619

(Entry of Appearance)
Case C-111/09 Vienna Insurance Group [2010] ECR I-0000

(Scope of Art 12 of Brussels II)
Re I [2009] UKSC 10, [2010] 1 AC 319

Service – Regulation 1348/2000 & Regulation 1393/07

Case C-14/07 Ingenieurbuero Michael Weiss v. Industrie- und Handelskammer Berlin [2008] ECR I-3367
Case C-14/2008 *Roda Golf & Beach Resort SL* [2009] ECR I-5439

Lis Alibi Pendens (Brussels I, Arts 27-28; Brussels II, Art 19)

(Arts 27 and 28)
Cooper Tire & Rubber Co Europe Ltd v Dow Deutschland Inc [2010] EWCA Civ 864
FKI Engineering Ltd v Stribog [2010] EWHC 1160 (Comm)
Secret Hotels 2 Ltd v EA Traveller Ltd [2010] EWHC 1023 (Ch)

("forum non conveniens")

Catalyst Investment Group Ltd v Lewinsohn [2009] EWHC 1964 (Ch), [2010] Ch 218
JKN v JCN [2010] EWHC 843 (Fam)

Provisional Measures (Brussels I, Art. 31; Brussels II, Art 20)

Case C-211/10 PPU Povse v. Alpago [2010] ECR I-0000
Case C-403/09 PPU Deticek v. Sgueglia [2009] ECR I-0000

Recognition (Brussels I, Arts 33-37; Brussels II, Arts 21-27)

Case C-195/08 PPU Inga Rinau [2008] ECR I-5271
Case C-256/09 Bianca Purrucker v Guillermo Vallés Pérez (15 July 2010)
Case C-420/07 Apostolides v Orams [2009] ECR I-3571
Apostilodes v. Orams [20101] EWCA Civ 9
Appl. 27841/07 Orams v Cyprus (10 June 2010)

Other EU instruments

Regulation 805/04 creating a European Enforcement Order for uncontested claims

Regulation 1896/2006 creating a European order for payment procedure

Regulation 861/07 establishing a European Small Claims Procedure

Enforcement of Authentic Instruments

Brussels I, Articles 57-58
Brussels II, Article 46

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Essex Court Chambers

27 September 2010

The Honourable Society of Lincoln's Inn

EUROPEAN LAW LECTURE SERIES

Lecture Two – Monday 4 October 2010

""EU immigration, asylum and free movement post Lisbon"
By Tim Eicke and Andrew Byass

Recent development in EU Free Movement law

Cases

Articles 20 and 21 TFEU

1. Citizenship/nationality: Case C-135/08 *Rottmann v Freistaat Bayern* (2 March 2010)
2. Name:
    a. Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Wien* (pending)
    b. Case C-391/09 *Runevič-Vardyn and Wardyn v City of Vilnius* (pending)

3. Wholly internal to Member State: Case C-34/09 *Zambrano* - AG 30 September 2010

4. Nationality Quota on student places: Case C-73/08 *Bressol et al v Gouvernement de la Communauté Française* (13 April 2010)

5. Right to vote and/or stand in regional elections: Case C-535/08 *Pignataro v Ufficio centrale circoscrizionale presso il Tribunale di Catania and others* (Order 26 March 2009)

Regulation 1612/68

6. Article 12:
    a. Case C-310/08 *London Borough of Harrow v Ibrahim* (23 February 2010)
    b. Case C-480/08 *Teixeira v London Borough of Lambeth* (23 February 2010)

Citizens' Directive 2004/38

7. Articles 2 and 3 "beneficiary":
    a. Case C-434/09 *McCarthy v Secretary of State for the Home Department* (pending)
    b. *Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358

8. Article 7 - definition of "worker" - Joined Case C-22/08 and C-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft Nürnberg* (AG - 12 March 2009; Court - 4 June 2009)

9. *Chen*: *ECO (Dubai) v M (Ivory Coast)* [2010] UKUT 277 (IAC)

10. Article 16 - right to permanent residence:
    a. "legal residence"
        i. Case C-434/09 *McCarthy*
        ii. Case C-162/09 *Secretary of State for Work and Pensions v Lassal* ([2009] EWCA Civ 157) - AG 11 May 2010;
        iii. Case C-325/09 *Secretary of State for the Home Department v Dias* ([2009] EWCA Civ 807)
        iv. *HR(Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371
    b. *LG and CC (EEA Regs: residence; imprisonment; removal) Italy* [2009] UKAIT 00024

11. Article 24(2) - derogation from equal treatment in relation to social assistance:
    a. Joined Case C-22/08 and C-23/08 *Vatsouras*
    b. Case C-578/08 *Chakroun v Minister van Buitenlandse Zaken* (4 March 2010)

12. Article 27(2) - *Bouchereau* test: *R v Kluxen* [2010] EWCA Crim 1081

13. Article 28(3)
    a. *HR(Portugal)*
    b. Case C-145/09 *Tsakouridis* - AG 8 June 2010
    c. Case C-348/09 *Infusino v Oberbürgermeisterin der Stadt Remscheid* (pending)
    d. *LG and CC (EEA Regs: residence; imprisonment; removal) Italy* [2009] UKAIT 00024
    e. *Maslov v Austria* GC, ECtHR [2009] I.N.L.R. 47

Tim Eicke
4 October 2010

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EUROPEAN LAW LECTURE SERIES

Lecture Two – Monday 4 October 2010

""EU immigration, asylum and free movement post Lisbon"
By Tim Eicke and Andrew Byass

Refugee Law post Lisbon

STRUCTURAL CHANGES

- Lisbon Treaty entered into force on 1 December 2009.

- FCO: "A Comparative Table of the Current EC and EU Treaties as Amended by the Treaty of Lisbon".

- Provisions to note in the Treaty on European Union:-
  - Charter's place in EU law (see also treatment in case law discussed below)
    Article 6.1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

    The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties…
  - The Charter Protocol
    HMG position is that: (a) the Charter does not contain any new rights or principles, (b) (consistently) the Lisbon Treaty does not extend the circumstances in which individuals can rely on fundamental rights to challenge MS actions, (c) the Charter can, however, be referred to as the binding source of an obligation to respect the right (a convenient shorthand), (d) there continues to be a distinction between rights and principles in the Charter, (e) the Charter does not confer EU legislative competence.
  - Party to ECHR (in due course; ECHR requires amendment first)
    Article 6.2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

- Provisions to note in the Treaty on the Functioning of the European Union
  - Article 78 TFEU
    (ex Articles 63, points 1 and 2, and 64(2) TEC)
    The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties…

- Article 267 TFEU (which replaces Article 234 EC), which:
  - Extends the jurisdiction of the Court of Justice to give preliminary rulings in relation to acts not only of the EU institutions, but also EU bodies, offices and agencies.
  - Allows a reference from any court or tribunal of a Member State.
  - This includes Justice and Home Affairs, i.e. asylum, cf the position previously under Article 68 EC in which a reference was available only from a court or tribunal against whose decision there was no further right of appeal.

SUBSTANTIVE LAW DEVELOPMENTS (PRINCIPALLY QD RELATED)

- JS (Sri Lanka) v SSHD
  - Considered meaning of Article 1F(a)[1] of the Refugee Convention.
  - Court affirmed that there can be only one true interpretation: "an autonomous meaning to be found in international rather than domestic law."
  - Why? Domestic intent was to transpose the meaning of the Convention. This intent underpinned by the QD which "provides a common standard for the application of the Refugee Convention's requirements across the EU's 27 Member States" (per Lord Brown).
  - Recall Article 78 TFEU – "must be in accordance with the [Refugee] Convention".
  - The test was stated by Lord Brown at paragraph 38: A person is disqualified under article 1F if there are serious reasons for considering him
    - voluntarily to have contributed
    - in a significant way
    - to the organisation's ability to pursue its purpose of committing war crimes
    - aware this his assistance will in fact further that purpose.
  - This drew back on the wider formulation of exclusion that had previously applied following the case of Gurung [2002] UKAIT 4870.

- B and D - Joined cases C-57/09 and C/101-09; AG Mengozzi's Opinion, 1 June 2010
  - Concerned instead with Articles 1F(b) and 1F(c). Importance is that there will shortly be a Court of Justice decision on when remaining exclusions will apply.
  - B and D were respectively former members of Dev Sol (now DHKP/C) and the PKK. Both organisations are listed in the Annex to the Common Position 2001/931 from 2 May 2002.
  - AG's opinion:

[1] As transposed in the Qualification Directive, Article 12:

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

- adopts a similar approach in assessing exclusion, i.e. mere membership of a terrorist organisation will not be sufficient[2]
- suggests that there will be some margin of appreciation in defining relevant crimes / acts of terrorism
- affirms that any assessment of current risk is irrelevant (these after all can be caught by other areas of the Convention – see Articles 32 and 33)
- an assessment of whether exclusion is proportionate may be appropriate - AG considered that "proportionality is central to the protection of fundamental rights and, in general, in applying the instruments of international humanitarian law" (per Google Translate) – however, where protection against removal exist by Article 3 ECHR, it won't be relevant.

- SS v SSHD – Appeal No. SC/56/2009 (30 July 2010)
  - Interesting since it considers meaning of Article 1F(c) in light of the AG's opinion.
  - SS was a member of LIFG – a Libyan terrorist organisation. He was excluded from a grant of asylum but granted discretionary leave. He appealed under s.83 of the NIAA 2002, meaning the only issue in his appeal was whether or not 1F(c) applied.
  - In considering how and whether terrorism is included within the autonomous meaning of 1F(c) (which excludes from protection a person in respect of whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the UN), regard was had to the domestic interpretation of terrorism, which was compared to a definition provided by the European Council in a common position since terrorism was in turn defined by the UN as being contrary to its principles and purposes[3]
  - While differences were found, it was concluded that overall the definitions were mainly similar. The importance for our purposes is that detailed reference was made to European materials, as informing the necessary autonomous meaning of 1F(c).
  - Endorsed the AG's opinion in B about required acts; consonant with Lord Brown in JS. Disagreed, however, that any margin of appreciation existed in relation to what constituted terrorist acts – there is only one autonomous meaning in the Tribunal's view.

- Aydin Salahadin Abdulla Case C-175/08 (2 March 2010)
  - Another example of determination of key Convention provision – this time cessation of refugee status under Article 1C(5) by which a person "can no longer, because the circumstances in connection with which he has been

[2] A three stage approach was posited: 1. Examine the nature, structure, organisation, activities and methods of the group in question at the time when the individual belonged to it; 2. Ascertain the actual role played by the individual in it; and 3. Determine whether the acts for which responsibility is established are among the acts envisaged in Article 12(2)(c) of the QD.

[3] The preamble to the QD states:

> (22) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that "acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations" and that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".

recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality".

- QD adopts this definition but also affirms the UNHCR approach in Article 11(2) that the change of circumstances must be of a 'significant and non-temporary' nature.
- It has been a point of contention whether this requires an absence of the factors that were previously present to warrant a grant of refugee status (the mirror argument), or whether a more substantive change was required.
- The Court upheld the mirror argument, as evidenced by a permanent eradication of the previous factors.

- Nawras Bolpol Case C-31/09 (17 June 2010)
  - Concerned the interpretation of Article 1D of the Refugee Convention / Article 12(1)(a) of the QD, which states, inter alia:
    This Convention shall not apply to persons who are **at present** receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
    When such protection or assistance has ceased for any reason … these persons shall ipso facto be entitled to the benefits of this Convention.
  - The Court of Appeal in El-Ali [2002] EWCA Civ 1103 had determined that this provision meant that this was a reference to those receiving protection or assistance at the time that the Refugee Convention was concluded in 1951.
  - This interpretation was rejected and thus greatly expanded the persons who now fall within Article 1D. The direct consequence, then, of a reference on the meaning of a provision in the Refugee Convention made by another member State was to overturn a line of binding domestic authority (in 3 short paragraphs).

PROCEDURAL LAW DEVELOPMENTS (PRINCIPALLY PD AND RD RELATED)

- ZO (Somalia) v SSHD [2010] UKSC 36
  - Right to work as an asylum seeker; eventual damages claims?
  - Repeat asylum applicants sought permission to work in the UK pending the outcome of their applications. The right to seek permission to work is provided for in the Reception Directive, which provides for the possibility if an asylum application has been pending for more than one year.
  - The SSHD argued that the relevant provisions in the RD applied only to initial asylum claims. Govt position said to be based on preventing abuse of the system through unmeritorious repeat claims that serve only to further delay consideration of all claims.
  - This was reflected in the Immigration Rules making provision for seeking permission to work (rules 360 and 360A).
  - The Supreme Court upheld the CoA's determination and found against the SSHD. The SSHD's concerns about abusive applications being made, leading to administrative delays, were dismissed as being irrelevant to the question of interpreting the Directive.
  - Since ZO found that there had been an unlawful fetter on access to employment, with arguably definable economic losses, the judgment gives rise to the possibility of a damages claim under EU law. As a reminder, it would need to be established that:
    1) Was the rule of law infringed intended to confer rights on individuals?

2) Was the breach sufficiently serious?
3) Was there a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.

- The decisive test for finding that a breach is sufficiently serious is whether the Member State "manifestly and gravely disregarded the limits of its discretion": Brasserie du Pecheur v Germany (ECJ) [1996] QB 404. When considering this issue, it was held at paragraph 56 that:
  The factors which the competent court may take into consideration include the clarity and precision of the rule breached; the measure of discretion left by that rule to the national or Community authorities; whether the infringement and the damage caused was intentional or involuntary; whether any error of law was excusable or inexcusable; the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

- MK (Iran) v SSHD [2010] EWHC Civ 115
  - Damages sought for delay in processing asylum claim: the SSHD delayed between 09/2004 and after 04/2008 in deciding, and refusing, MK's asylum claim. This was said to have exacerbated his mental illness and resulted in him being unable to lucidly present his claim before his mental health deteriorated.
  - Liability for damages was said to arise under EU law.
  - First, the PD at Article 23 states that applications should be concluded "as soon as possible without prejudice to an adequate and complete examination." Where a decision cannot be taken within six months, the applicant must be informed of the time by which the decision is expected to be given. But, "[s]uch information shall not constitute an obligation for the MS towards the applicant concerned to take a decision within that time frame." The SSHD argued that this shows that no liability in damages is said to arise for the time taken to consider a claim. The Court did not need to resolve the issue since the PD came into force only after this application was made.
  - Second, and more interestingly, an argument was made that the QD had elevated the right to claim asylum to a civil right for the purposes of Article 6 of the ECHR. ECtHR authority has previously dismissed such arguments, e.g. Maaouia v France (2000) 33 EHRR 1037, relying on a distinction broadly speaking between public law rights on the one hand and private law rights on the other, with asylum falling within the former. It was argued that since the QD confirms the declaratory nature of a grant of asylum, and confers personal and economic rights, it has been elevated from being a discretionary public law right. This argument was dismissed, but principally in deference to existing authority than by reference to the merits of the submissions.
  - Part of the deference related to not moving ahead of Strasbourg authority. Query whether an argument framed also be reference to the Charter might produce a different result, i.e. Article 18, Right to Asylum, with Article 47, Right to an Effective Remedy. And if a reference was generated, how would Strasbourg authorities be reconciled?

- FA (Iraq) v SSHD [2010] EWCA Civ 696
  - If a person makes a claim for international protection (asylum, HP or human rights) and that claim is rejected but the person is still granted leave to remain in the UK for more than 12 months, the person cannot appeal under s.82 of the

2002 Act, which is the normal appeal enabling provision. An appeal lies under s.83, but only against the refusal of asylum.

- FA asserted that provision was also needed to appeal the refusal of HP, which FA had sought on the basis of the conflict in Iraq. He relied, inter alia, on the EU law principle of equivalence: = rules governing actions intended to ensure the protection of rights confirmed by EU law must not be less favourable than the rule governing similar domestic actions.
- Since domestic law provided a right of appeal for asylum claims, the court held that the principle of equivalence required the same right should be given to HP claims. This is not without problems:
    1. The right to asylum is now an EU law right. A question arises as to whether it can be classified as a domestic action. It previously was; but has it now acquired the status of a right conferred by EU law?
    2. If it is not a domestic action, then what is the correct comparator? The SSHD is appealing on the basis that the proper comparative domestic law is ECHR claims, and the absence of any appeal for these claims.
    3. Also, what relevance is the Procedures Directive, which only in respect of asylum claims states that an effective remedy must be provided (but so does the Charter, which after all will bite with subsidiary protection).
    4. The QD guarantees higher protection to asylum; including that 3 years leave is the minimum v 1 year for HP. Asylum is a declaratory act, also... But are they sufficiently similar, being dealt with in the same instrument, as to require the same rules to be applied to the appeal procedures? Would for example, the principle of effectiveness require similar treatment of similar EU law rights (issue is whether having to appeal one decision in AIT and JR the other decision in the Admin Court is excessively difficult)?

SCOPE FOR FUNDAMENTAL RIGHTS

- NS v SSHD [2010] EWHC 705 (Admin), before Cranston J
    - Claim related to returns to Greece under the Dublin Regulation, Council Regulation (EC) No 343/2003. It was asserted that return to Greece would breach Article 3 ECHR and EU law due to a risk on onward unlawful refoulement, and also due to treatment of asylum seekers within Greece.
    - The EU law argument was that the SSHD was obliged to exercise her discretion under Article 3(2) to consider asylum claims rather than returning applicants to Greece since Greece will not abide by its obligations which EU law imposes regarding asylum seekers.
    - Cranston J held that "the Charter cannot be directly relied on as against the United Kingdom although it is an indirect influence as an aid to interpretation" (at para 155). Further, while a "transfer under the Dublin Regulation cannot be challenged on the basis that it is not compatible with the right to human dignity or the right to asylum, or will be in breach of Article 19(2) [which equates to A3 ECHR] ... the Secretary of State must exercise his discretion under Article 3(2) of the Dublin Regulation taking into account these rights. That follows because the rights have a binding, interpretive quality through their recognition in the recitals" (at para 156).
    - Claim dismissed since consideration of these matters captured by the Article 3 ECHR consideration that had been undertaken.

- NS v SSHD [2010] EWCA Civ 990
  - On appeal, a reference was made without further substantive consideration.
  - The SSHD expressly accepted, however, and it was recorded by the Court of Appeal, that:
    Contrary to the Judge's holding, the Secretary of State accepts, in principle, that fundamental rights set out in the Charter can be relied on as against the United Kingdom, and submits that the Judge erred in holding otherwise (judgment, paragraphs 155 and 157, first sentence). The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom, but to explain its effect
  - The reference includes questions relating to whether:
    - The Dublin II Regulations can operate with a conclusive presumption that other MS will respect their asylum obligations;
    - The rights set out in Articles 1 (human dignity), 18 (asylum), and 47 (effective remedy) of the Charter are wider than the protection conferred by Article 3 ECHR;
    - The Court's answers to the questions posed are qualified in any respect so as to take account of the Protocol (No. 30) on the application of the Charter to Poland and to the United Kingdom.

- Implications:
  - Affirms (in so far as it needed to be) a different legal base for human rights.
  - Since the route is EU law, inconsistent primary legislation cannot be sustained, and a (different) basis for damages may arise.
  - Charter rights may be wider than ECHR rights and/or may provide a basis for cross-fertilisation, e.g. MK (Iran) and possibility for Charter to influence whether a civil right has arisen for the purposes of Article 6 ECHR (in addition, of course, to possible reliance on the similarly worded Article 47 of the Charter).

FUTURE DEVELOPMENTS

- Impact of the Charter; cross-fertilisation of ECtHR and Court of Justice determinations.
- Proposals to recast the QD, PD, and RD – broadly to address concerns that the existing instruments are vague and ambiguous such that:
  - They are insufficient to ensure full compatibility with evolving human rights and refugee law standards;
  - They have not achieved a sufficient level of harmonisation;
  - They impact negatively on the quality and efficiency of decision making. (See, e.g. the proposal for the new QD at EUR-Lex – 52009PC0551, 21.10.2009.)
- If adopted, will see, e.g., a greater specificity regarding the entitlement to international protection, a collapsing together of asylum and subsidiary protection status, and additional humanitarian elements such as the need to assess whether compelling reasons exist to extend status even if cessation provisions apply.
- Note that Article 4a(1) of the Title V Protocol confirms that the UK is free to choose whether or not it wishes to opt into any measure amending existing JHA instruments. If it does not opt-in, the existing unamended measure ceases to apply to the UK, unless the UK reapplies to opt into it.

Andrew Byass
4 October 2010

The Honourable Society of Lincoln's Inn

EUROPEAN LAW LECTURE SERIES

Lecture Three – Monday 11 October 2010

"The EU and Criminal Law post Lisbon"
By David Perry QC and Tim Eicke

The Development of the European Communities

- The European Coal and Steel Community 1952
- The European Economic Community 1957
- The European Atomic Energy Committee 1957

The New Member States

- United Kingdom 1973
- Denmark 1973
- Ireland 1973
- Greece 1981
- Spain and Portugal 1986

Further Developments

- The Schengen Agreement 1985 (Belgium, France, Germany, Luxembourg and the Netherlands)
- The Single European Act 1987
- The Convention Implementing the Schengen Agreement 1990
- The Treaty on European Union 1992 (The Maastricht Treaty). (Introduced provisions on cooperation in the fields of Justice and Home Affairs in Title VI (the Third Pillar). The Third Pillar functioned on the basis of unanimity in the Council and other institutions had only a very limited role.)

European Union and Criminal Law

European Union criminal law is part of the area of freedom, security and justice and comprises three key competences:

- judicial cooperation (Articles 82-86)
- the establishment of minimum rules concerning the definition of criminal offences / sanctions (Article 83)
- police cooperation (Articles 87-89)

Historical Background

Historically, cooperation between Member States in the field of criminal law began in the 1970s within the framework of European Political Cooperation. Enhanced police and judicial cooperation was seen as a compensatory measure designed to balance the effects of the complete free movement of persons within the Community.

The Single European Act inserted Article 8a into the EC Treaty: "*the internal market shall comprise an area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty*".

Provisions on cooperation in the field of "*Justice and Home Affairs*" found their way into the Maastricht Treaty. The European Union was for the first time structured into Pillars. The First Pillar contained the traditional EC subject matters. The Second Pillar contained provisions dealing with the Union's Common Foreign and Security Policy and the Third Pillar, Cooperation in Justice and Home Affairs.

The Treaty of Amsterdam moved immigration and asylum matters into the First Pillar leaving only criminal justice in the Third Pillar. Although criminal justice had become a matter of EU law its supranational reach was limited.

European Arrest Warrant

The most controversial Framework Decision to date concerns the European Arrest Warrant (set out in Framework Decision 2002/584/JHA on the European Arrest Warrant and surrender procedures between Member States [2002] OJ L190/1.)

The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

The EAW was intended to replace traditional extradition procedures. The surrender procedures under the EAW:

- involve an EAW issued by a judicial authority directed to the judicial authorities in the executing state (so it is sent from one judicial authority to another. It is a wholly jurisdictional process with no involvement of the executive).
- should be concluded within 60 days of arrest
- involve the partial abolition of double criminality (in respect of 32 listed offences).
- involve the almost complete abolition of any nationality exception to extradition
- The purpose of the EAW is to facilitate the prosecution of crime across national borders on the basis of mutual recognition of judicial decisions as if the EU constituted a single judicial area: a wanted person is treated in the same way irrespective of his or her location in the EU.

The EAW has prompted more challenges before the domestic courts than any other EU measure. The criticisms of the EAW system really come down to three essential points:

(i) The list of 32 offences for which double criminality is not required is overly generic and not precise;
(ii) A Member State may be required to surrender a fugitive for an offence which the Member State does not itself regard as criminal
(iii) More harmonisation of criminal law is necessary before mutual recognition can really solve the problem of differences between Member States.

- C-105/03 *Pupino* [2005] ECRI-5285.
- *Dabas (Appellant) v High Court of Justice, Madrid (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)* [2007] UKHL 6
- *Re The Constitutionalyt of German Law Implementing the EAW* [2006] 1 CHLR 16
- Case C-303/05 *Advocalen voor de Wereld* [2007] ECR 1-3633
- *Re Enforcement of an EAW* (Polish Constitutional Tribunal) [2006] 1 CHLR 36
- *Re Constitutionality of FD on the EAW* (Czech Constitutional Court) [2007] 3 CHLR 25

The Treaty of Lisbon

Under the Treaty of Lisbon, Framework Decisions no longer exist. The Protocol on Transitional Provisions, Article 10 provides that acts of the Union in the field of police cooperation and judicial cooperation which were adopted before the entry into force of the Lisbon Treaty shall remain in force for five years.

Article 67 is a key provision. It refers to the Union as constituting an area of freedom, security and justice. Article 67(3) provides that *"the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime... and through measures for... cooperation between police and judicial authorities"*.

Unlike under the Third Pillar, there is now provision for qualified majority voting in the Council; the ordinary legislative procedures of the European Parliament apply and the Court of Justice has full jurisdiction. However, there is an *"emergency brake procedure"* in relation to law making in this sensitive area so that legislative proposals can be referred to the European Council.

The German Constitutional Court has stated that Union measures concerning criminal law must be examined with care and the foundations of competence in the Treaties must be interpreted strictly and their use requires particular justification*: 2 B v E 2/08 Gauweiler v Treaty of Lisbon*, Judgment 30 June 2009.

The Lisbon Provisions

Measures designed to reinforce a state's own national security and protect the single Union area are contained in:

Article 71 (A standing committee is to be set up within the Council to ensure that cooperation on internal security is promoted and strengthened).

Article 73 (Member States are free to organise other arrangements between themselves as they see fit).

The Position of the United Kingdom

The United Kingdom has decided not to participate in the legislative procedures and is not bound by measures adopted by the European Union in this field. The exception to this general rule is where the United Kingdom notifies the Council of its intention to participate in the adoption of a measure. (Protocol on the Position of the United Kingdom and Ireland.)

Judicial Cooperation and The Principle of Mutual Recognition

The principle of mutual recognition is now given effect by Article 82:

> *(i) Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.*

Article 54 of the Schengen Implementing Convention (1990) provides:

> *"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of sentencing Contracting Party."*

This provision seems on its face to be very narrow: it appears to prohibit a second trial. But this narrow interpretation has been rejected by the ECJ

- *Gözütok and Brugge* [2003] ECR 1-1345
- *Gaspirini* [2006] ECR 1-9199
- *Bourquain* Judgment 11 December 2004
- *Turansky* Judgment of 22 December 2008
- *Miraglia* [2005] ECR 1-2009
- *Van Esbrock* [2006] ECR 1-2333
- *Van Stratten* [2006] ECR 1-9321
- *Kraijenbrink* [2009] ECR 1-6619

Article 54 has been relied on in extradition proceedings in the High Court: *Fofana and Belise* [2006] EWHC 744 (Admin). The Crown Prosecution Service disposed of criminal proceedings against F and B. The French judicial authorities did not consider that the charges reflected the defendants' criminality. F and B relied on Article 54 as a bar to their extradition.

Substantive Criminal Law

Here the key provision is Article 83.

Article 83(1) provides that the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat on a common basis. (The areas of crime are: terrorism, human trafficking, sexual exploitation, drug trafficking, arms trafficking, money laundering, corruption, counterfeiting, computer and organised crime.

Article 83 also provides (Article 83(2)) for the approximation of criminal laws to ensure effective implementation of Union policy in an area subject to harmonisation.

- (Case C-176/03 *Commission v Council (Environmental Crimes)* [2005] ECR 1-7879
- (Case C-440/05 *Commission v. Council (Ship-Source Pollution)* [2007] ECR1-9097)

Both Article 83(1) and (2) are subject to the emergency brake procedure.

Police Cooperation

The key provision is Article 87:

> *"1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.*

The essential points to note are:

- Article 87 is concerned with establishing data or information networks
- Article 87 is concerned with exchange of relevant information

The availability of information is a central aim of the European Union. Information held by the law enforcement authorities in one Member State is to be made available to the authorities in another Member State.

- 2008/165/JHA
- 2006/960/JHA

Concerns over the possible misuse of personal date led to the Framework Decision 2008/977/JHA

- 2008/165/JHA

Intelligence Databases

- The Schengen Information System
- The Europol Information System
- The Customs Information System

Institutions

- Europol
- Eurojust
- The European Public Prosecutor

Defence Rights

The Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings (2003)

The Rights:

- Access to legal representation
- Access to interpretation
- Notification of rights
- The entitlement of vulnerable suspects to special protection

The entitlement to consular assistance

The Future

- Spillover effect (i.e. an even greater need to deal with crime at the supranational level)
- Differentiated integration (the ability of states to adopt measures without the participation of the United Kingdom)
- Mutual trust or harmonisation?