Procedural rights and mutual co-operation

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1. Introduction

In order to provide a context for the presentations by Jago Russell and Jodie Blackstock, and for our discussions this afternoon, I want to say something about the EU procedural rights programme, and why the EU thought it necessary to legislate in this area.

In 1999 the Tampere European Council concluded that work should be commenced on those aspects of procedural law on which common minimum standards were considered necessary in order to facilitate the application of the principle of mutual recognition. This was reinforced in the Hague Programme of 2004, which stated that further realisation of mutual recognition as the cornerstone of judicial co-operation implied the development of equivalent standards of procedural rights in criminal proceedings. However, for almost a decade, attempts to give effect to these aims were thwarted by the actions of a minority of Member States, including the United Kingdom, that objected to the principle of standards set by the EU.

A renewed effort to adopt EU-wide standards was prompted, and facilitated, by two key developments. First, in the landmark decision in *Salduz v Turkey* in 2008, the Grand Chamber of the ECtHR held that suspects arrested by the police are entitled, under the ECHR Article 6(3), to access to a lawyer before the first interrogation. Second, the adoption of the Lisbon Treaty, which came into force in December 2009 five months after the roadmap was adopted, and which introduced qualified majority voting for legislation in this field, meant that opposition by a minority of Member States could not prevent the adoption of legislation on procedural rights.

2. The EU procedural rights programme

The procedural rights roadmap, which was adopted by resolution of the Council in November 2009, instituted a five year programme of legislation designed to establish minimum standards in respect of five key procedural rights: translation and interpretation (Measure A); information on rights and information about the charges (Measure B); legal advice and legal aid (Measure C); communication with relatives, employers and consular authorities (Measure D); and special safeguards for suspected or accused persons who are vulnerable (Measure E).

The rationale for the roadmap built on, and developed, the rationale for EU-wide standards expressed by the Tampere Council and the Hague Programme. The EU had successfully established an area of freedom of movement and residence, but this had been accompanied by an increase in cross-border criminal activity. The EU had responded to this by developing an extensive range of laws and initiatives designed to enhance police, prosecutorial and judicial co-operation, and this needed to be 'balanced' by actions designed to protect the procedural rights of individuals. This would have the effect of reinforcing mutual recognition and co-operation, and would also reassure citizens that the EU would guarantee their rights There would, in effect, be a virtuous circle which would build confidence in the ability of the EU to enhance law enforcement and respect for rights in a context of increasing movement of citizens and goods between Member States.

3. Why the ECHR was not sufficient

One objection put forward by a number of governments to EU involvement in guaranteeing minimum procedural rights was that there already existed a mechanism for doing so in the form of the ECHR. The right to fair trial and the presumption of innocence are guaranteed by the ECHR, article 6(1) and (2), and a number of specific procedural guarantees are set out in article 6(3). In addition, article 5 sets out certain guarantees for persons arrested or detained. The contribution of the ECHR, and the jurisprudence of the ECtHR, to establishing minimum procedural rights was recognised by the EU in adopting the roadmap, but whilst its importance in this regard was acknowledged, the EU maintained that further action was

necessary ‘to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards’.

Whilst it is difficult to over-state the influence of the ECHR, its contribution to establishing a rational scheme of procedural safeguards that are applied consistently across EU jurisdictions is limited by a number of systemic factors. ECtHR jurisprudence is essentially reactive, being dependent on the cases that are brought before it. Decisions of the court are based on the particular facts of those cases and, broadly, the court is concerned with whether, having regard to those particular facts, the right to fair trial has been respected overall, rather than whether the applicant has been able to enjoy particular procedural rights. Furthermore, an application cannot be made to the court unless and until domestic remedies have been exhausted, and enforcement mechanisms in respect of recalcitrant states are relatively weak.

4. The advantages of EU legislation

By contrast to the position regarding the ECHR, any national court to which a dispute in which the application of a rule of European Union law raises questions has been submitted can decide to refer the matter to the Court of Justice of the European Union (CJEU) to resolve these questions. Although the reference decision is a matter for the national court, a party to the proceedings may request such a reference, and the reference can be made during the proceedings, without having to wait for a final determination. Where such a question is raised in relation to a person who is in custody, the CJEU has developed a procedure for hearing applications on an urgent basis. Thus, the court can be asked to resolve a dispute about the correct interpretation of a provision of a Directive issued under the procedural rights roadmap whilst the case is still proceeding. In addition, the Commission may bring a case against a Member State if it considers that it has failed to fulfil its obligations regarding transposition of a Directive.

However, perhaps more important than the legal remedies for non-compliance with European standards are the advantages resulting from the timescale for implementation or compliance with the EU Directives compared to ECtHR judgements. A good example is

provided by the reluctance of the governments of a number of countries to introduce a right of suspects arrested and detained by the police to consult with a lawyer following the *Salduz* judgement of the ECtHR, and the consequent tardy, unplanned and haphazard response. In Scotland, a failure to introduce a right to a lawyer for suspects detained by the police resulted in an adverse Supreme Court decision in 2010 which, in turn, saw the adoption of legislation introducing such a right just three days later. In France, the Constitutional Council gave the government one year to give effect to the *Salduz* judgement, but the consequent legislation was pre-empted by a decision of the Grand Chamber of the *Cour de Cassation* requiring the right of access to a lawyer to be implemented immediately, two months before the legislation was due to come into effect. The consequence of the hurried introduction of legislation and schemes to give effect to these decisions was that the reforms were poorly implemented and, to an extent, ineffective.

The EU Directives, on the other hand, provide governments, legal aid authorities, bar associations, and other interested parties with the opportunity to establish rational, coherent and measured schemes to ensure that the procedural rights covered by the EU Directives are 'practical and effective'. Each of the Directives has given Member States a number of years to plan and take the action necessary to transpose their provisions into domestic law and practice.

5. Which law enforcement mechanisms did the procedural rights programme underwrite?

The EU has instituted a large number of schemes designed to aid crime investigation and law enforcement, and also directed at the mutual recognition of court judgements and effective support for the victims of crime. It is not necessary to examine them in detail – and Jago will be talking about one of them, the European Arrest Warrant, in a moment – but I will briefly outline some of the major schemes.

- The European Arrest Warrant – which requires the authorities in one member state to surrender a person to another member state to face prosecution or to serve a sentence.
- The European Investigation Order – which regulates and facilitates the exchange of evidence between authorities in different member states.

- The Prüm measure – which enable the collection and exchange of a wide range of personal data for the purposes of crime investigation and law enforcement.
- The facility to establish cross-border joint investigation teams – in which the UK currently participates extensively.
- Participation in Europol and Eurojust – the former having developed into an important source of criminal intelligence, and the latter being concerned with co-ordination.
- A series of measures designed to protect the victims of crime, including a Directive on minimum standards regarding the rights, support and protection of victims of crime.

The government has indicated that it wishes to agree new arrangements that enable continued co-operation across a wide range of these, and other, structures and measures (see *Security, law enforcement and criminal justice: A future partnership paper*, September 2017, available at https://www.gov.uk/government/publications/security-law-enforcement-and-criminal-justice-a-future-partnership-paper). However, apart from general bromides about how the UK and the EU both draw 'on long-standing shared traditions of respect for the rule of law and the protection of human rights' (at p2), it has said nothing about the other side of the coin, procedural rights and guarantees for suspects and accused persons. Nor has it given any indication that it understands the integral role played by procedural rights in relation to the law enforcement mechanisms and related measures.

6. What does the EU procedural rights programme cover?

There are currently six EU Directives, giving effect to the 2009 decision regarding the procedural rights roadmap.

- The right to interpretation and translation, which had to be implemented by October 2013
- The right to information, including information about procedural rights, the grounds of arrest and detention, and information about the alleged crime, which had to be implemented by June 2014
- The right of access to a lawyer, which had to be implemented by November 2016

- A directive strengthening certain aspects of the presumption of innocence and of the right to be present in criminal proceedings, which must be implemented by 1 April 2018
- A right to legal aid for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings, which must be implemented by 25 May 2019
- Procedural safeguards for children who are suspected or accused of crime, which must be implemented by 11 June 2019.

7. The position in the UK

The New Labour government negotiated a special position for the UK (in common with Ireland), so that the Directives adopted under the procedural rights roadmap are only binding if the UK government opts-in to them. The government did opt-in to the first two and, broadly, they were given effect; although it should be noted that this did require action to be taken, such as amendment of the Police and Criminal Evidence Act 1984 Codes of Practice (and, arguably, the amendments did not go far enough to ensure full compliance).

However, as Valsamis Mitsilegas has recognised (in *The UK after Brexit: Legal and Policy Challenges*, Intersentia, 2017) withdrawal from the EU leads to a paradox.

> '[T]he United Kingdom's willingness to continue to reap the security benefits of EU co-operation after Brexit can be accommodated only if the UK complies fully with the EU *acquis*, including the *acquis* on the protection of fundamental rights, part of which it is currently at liberty to disregard under its "opt-outs" as an EU Member State. Brexit will thus bring the United Kingdom in the paradoxical position of having to accept *more* EU law than it currently does as an EU member State.' (p221)