CONSEJO GENERAL DEL PODER JUDICIAL

Región de Murcia

FUNDACIÓN CAJAMURCIA

FORO DE ESTUDIOS JURÍDICOS RUIZ-JARABO

Driving Judicial Performance in the European Area of Justice: Mutual Assistance in Civil Matters that Produces Results

Criminal Proceedings in the UK & Wales

San Pedro del Pinatar, 28 May - 1 June 2012

TEXTS & EXERCISES

OBJECTIVES & TEACHING METHODOLOGY

1. OBJECTIVES

a) The analysis of the English legal system

The teachers will acquaint participants with the English legal system, particularly with civil and criminal proceedings. Where appropriate, a comparison will be made with continental systems.

b) The study of English legal language

The teachers will help students to learn the major English legal terms both through texts and in systematic linguistic arrangements such as definitions, synonyms, collocations, phraseology, etc.

c) The improvement of communicative English

This will focus on three aspects: (1) choice of words and arrangement of sentences, especially with regard to correctness, clearness and effectiveness; (2) correct pronunciation, and (3) effective oral communication in social intercourse.

2. TEACHING METHODOLOGY

a) Seminars

Some of these seminars will be devoted to the analysis of the English legal system (objective a) and others will deal the linguistic aspects of English legal language (objectives b and c). Active participation of students in these seminars is essential.

b) Workshops

Students will be requested to discuss specific issues in groups; sometimes they will also have to debate some topics.

EXERCISES

Give the appropriate term / expression for each definition.

a) Law derived from custom and from precedent rather than from written, codified statutes:
b) Each of the parts of a court, depending on its jurisdiction:
c) Previous case or legal decision, taken as a guide for future cases:
d) Judicial order establishing some kind of remedy, either compelling somebody to do something or restraining him from doing something:
e) To become approved by a legislature or body empowered to sanction or reject:
f) To establish by legal and authoritative act; specifically: to make a bill into law:
g) To revoke or abrogate (an act) by legislative enactment:
h) To end the observance or effect of something:
i) To put off a legal hearing to a later date:

Match Latinisms with the appropriate definition

After the event
Of sound mind
Guilty mind
In good faith
In private
Guilty act
In the capacity of
Beyond somebody's power

a) It was said that the agents had acted *ultra vires*.
b) The witness was held to be *compos mentis* at the time of the event.
c) He represented himself as a *bona fide* purchaser.
d) There were allegations of negligence by the expert acting *qua* expert.
e) Some crimes require proof of both *actus reus* and *mens rea*.
f) *Ex post facto* laws are prohibited in many constitutions.
g) The documents were submitted for *in camera* inspection by the court.

Complete the following sentences with the appropriate word.

a) The agreement was declared _____ and void.
b) A bona _____ purchaser is a purchaser for value in good faith.
c) _____ and entering has become a common crime in residential areas.
d) To the best of my knowledge and _____, the information I have given is true.
e) The expression “Mareva injunction” has now been replaced by “_____ order.”
f) The right to a fair and speedy _____ is recognized by most constitutions.

Complete the following sentences with the correct word. Most of the answers are grammatically correct, but only one occurs naturally in Legal English.

a. The Tribunal may, on its own _____ ,or on the application of either party ...
a) motion b) desire c) discretion d) authority

b. I solemnly declare that I shall give evidence to the best of my _____ and belief.
a) wisdom b) capacity c) knowledge d) awareness

c. These Rules shall come into _____ on 1 February 2004.
a) force b) vigour c) strength d) validity

d. The defendant, while in police _____, was questioned by police officers.
a) custody b) wardship c) protection d) imprisonment

e. The confession was admitted into evidence despite the _____ of defense counsel.
a) protest b) objection c) complaint d) opposition

f. You have the right to remain _____, and anything you say will be used against you in court.
a) mute b) dumb c) quiet d) silent

g. This Court has _____ over the subject matter of this action.
a) power b) competence c) jurisdiction d) authority

Give the appropriate term/expression for each definition (from *Peter Collin's English Law Dictionary*).

a) Act of setting a person free because s/he has been found not guilty:
b) Finding that a person accused of a crime is guilty:
c) When criminals are not sent to prison provided that they continue to behave well under the supervision of an officer:
d) Release of a defendant from custody until his next appearance in court (sometimes subject to security being given):
e) A defendant's reply to a charge put to him:

Fill in the gaps with the appropriate term. Sometimes there is a clue to help you, sometimes there isn't:

When an _____ [*criminal*] is sentenced, they can get one of four main types of _____:

- discharges
- court fines
- community sentences
- prison sentences

There may also be other requirements for the offender known as court orders.

When the court decides someone is _____, but decides not to punish them at this time, they will be given a _____. These are given for minor _____.

There are two types of discharges:

- an _____ discharge means that no more action will be taken
- a _____ discharge means that the offender will not be punished unless they commit another offence within a set period of time

Court fines

Most sentences are for minor offences. The majority of these will get a court fine. Fines are given for offences like:

- driving and road traffic offences, eg _____ [*driving too fast*] or not having insurance
- minor offences of theft or criminal damage
- not having a TV licence

The fine amount depends on how _____ a crime is and the offender's _____ to pay. An offender may also have to pay _____ to the victim and an extra payment called the 'victims' surcharge'.

COLLOCATIONS – ENFORCEMENT OF FOREIGN CRIMINAL JUDGMENTS

The following are collocations frequent in the field of cooperation in criminal matters. Provide the missing word/s. In most cases there is a prompt for you:

custody, enforcement, indefinite, provisional, rendered, sentencing, supporting

1. At the request of the _____ (adjective: imposing a sentence) State
2. Prior to the arrival of the documents _____ (adjective: giving support to) request
3. Requests for _____ (adjective: not final, temporary) measures shall include the information mentioned in paragraph 3...
4. The penal position of the person shall not be aggravated as a results of any period spent in _____ (noun: deprivation of liberty)
5. If you have been granted _____ (adjective: of no specified duration) leave to remain on asylum or family grounds
6. A state may refuse _____ (noun: application of the law), if it considers that the sentence relates to a fiscal or religious offence.

7. A person in respect of whom a European criminal judgment has been _____ (verb: pass, give) may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State….

INTRODUCTION TO THE VOCABULARY OF THE ENFORCEMENT OF CRIMINAL JUDGMENTS

Insert the correct prepositions in the spaces provided:

by, for, for, into, to

The administering state may opt _____ one of these methods: it either converts the foreign judgment _____ one of its own judgments, _____ means of a judicial or administrative decision, or continues ____ enforce the sentence imposed abroad, which is the system Spain has opted _____.

about, at, after, for, from, in

In Spain the National Criminal Court (Audiencia Nacional) –Article 65.3 LOPJ– is responsible _____ enforcement of foreign sentences. Where the situation is reversed, i.e., transfer _____ Spain, there is a void in the law, meaning that the practice followed by the Ministry of Justice consists _____ informing the sentencing court _____ the existence of the request; if no report (_____ least no negative report) is issued _____ a reasonable period of time has passed, the Council of Ministers takes the decision.

Article 2 – Persons having fled from the sentencing State

before, by, in, of, of, over, to

1. Where a national _____ a Party who is the subject _____ a sentence imposed _____ the territory of another Party as a part of a final judgment, seeks _____ avoid the execution or further execution of the sentence in the sentencing State _____ fleeing to the territory of the former Party _____ having served the sentence, the sentencing State may request the other Party to take _____ the execution of the sentence.

INTRODUCTION TO THE VOCABULARY OF THE ENFORCEMENT OF CRIMINAL JUDGMENTS

Replace the underlined words with the appropriate legal vocabulary

applied, committed, consents, country, declaration, discharge, enforcement, leave, country, offence, prior to, requested, restricted, sentenced, submitted, surrender, under

A condemned person detained in the requesting State who has been given to the requested State for the purpose of application shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence done before his surrender other than that for which the sentence to be applied was imposed, nor shall he for any other reason be limited in his personal freedom, except in the following cases:

a when the State which surrendered him agrees. A request for consent shall be sent, accompanied by all relevant documents and a legal record of any declaration made by the convicted person in respect of the wrongdoing concerned. Consent shall be given when the offence for which it is requested would itself be subject to extradition according to the law of the State asking for enforcement or when extradition would be excluded only by reason of the amount of the punishment;

b when the sentenced person, having had an opportunity to go out of the territory of the nation to which he has been surrendered, has not done so within 45 days of his final release, or if he has returned to that territory after leaving it.

LEGAL TEXTS

Criminal proceedings in England and Wales

Categories of offences

Criminal offences are split into three categories as follows:

i) *Triable only on indictment*

These offences are the most serious breaches of the criminal law and must be tried at the Crown Court. These 'indictable-only' offences include murder, manslaughter, rape and robbery**.**

ii) *Triable either way*

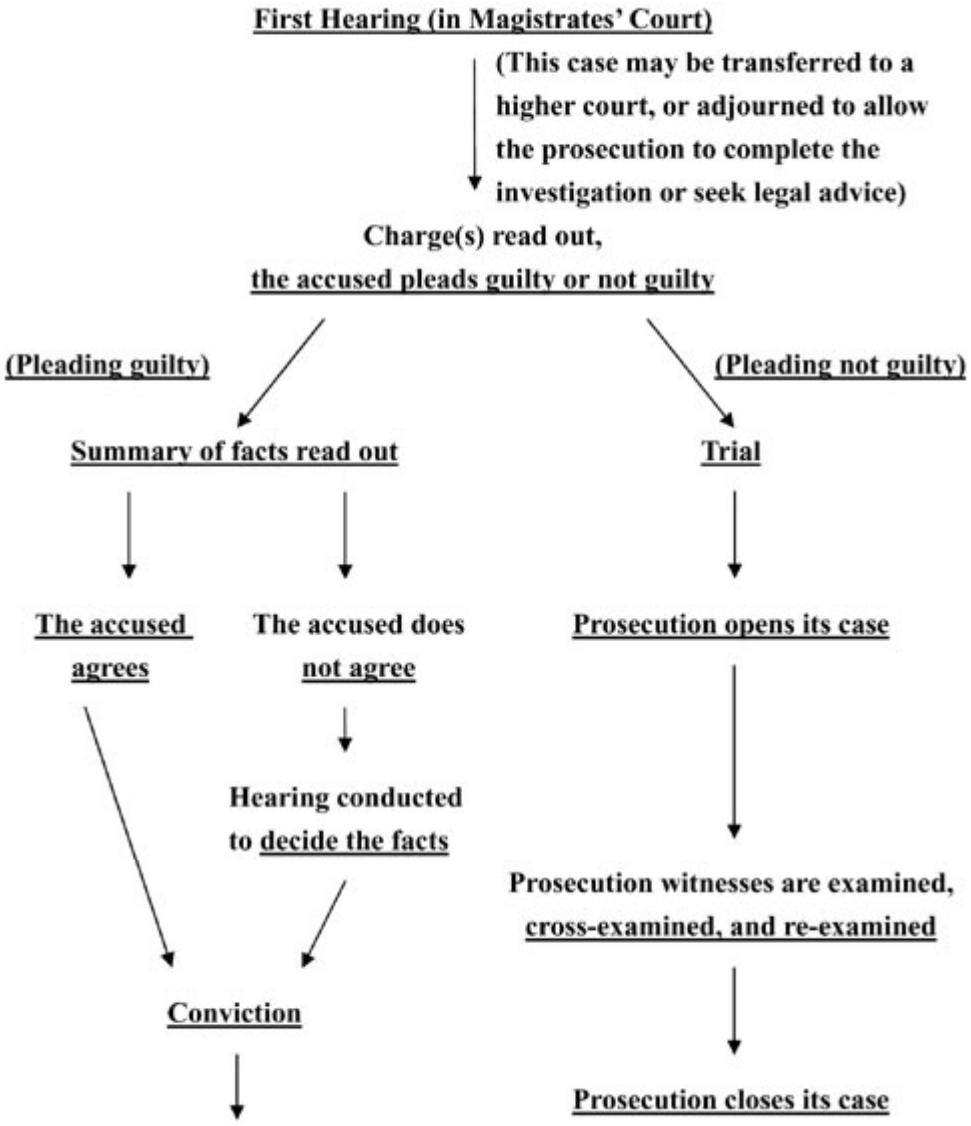
These offences may be tried either at the Crown Court or at a magistrates' court. These offences include criminal damage where the value is £5,000 or greater, theft and burglary.

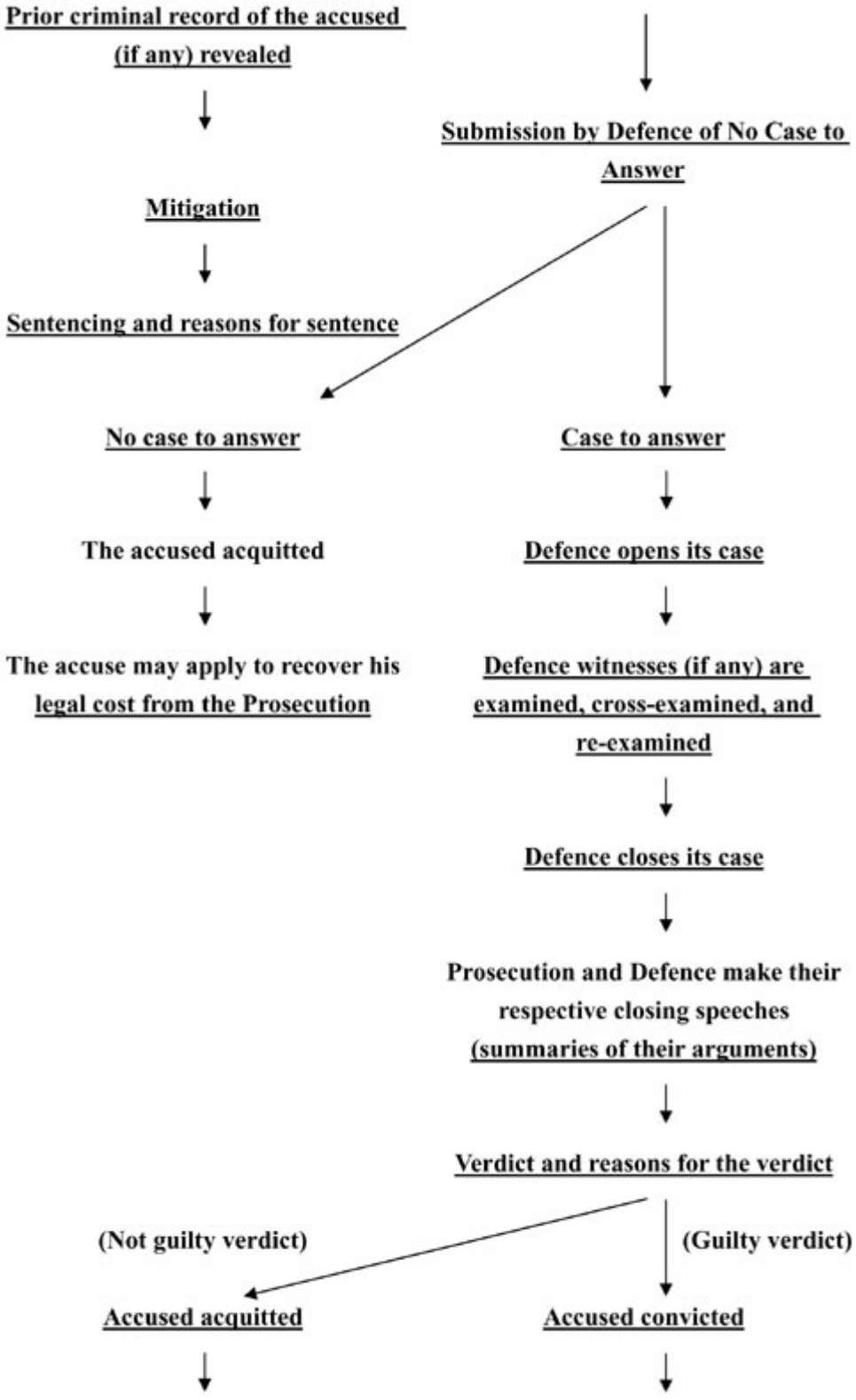
iii) *Summary*

These offences are triable only by a magistrates' court. This group is dominated by motoring offences for some of which fixed penalties can be issued, but also includes such offences as common assault and criminal damage up to £5,000**.**

A criminal trial

CHART: CRIMINAL TRIAL




Prior criminal record of the accused (if any) revealed
Submission by Defence of No Case to Answer
Mitigation
Sentencing and reasons for sentence
No case to answer
Case to answer
The accused acquitted
Defence opens its case
The accuse may apply to recover his legal cost from the Prosecution
Defence witnesses (if any) are examined, cross-examined, and re-examined
Defence closes its case
Prosecution and Defence make their respective closing speeches (summaries of their arguments)
Verdict and reasons for the verdict
(Not guilty verdict)
(Guilty verdict)
Accused acquitted
Accused convicted

Accused may apply to recover his legal costs from the Prosecution

Prior criminal record of the accused (if any) revealed

↓

Mitigation

↓

Sentencing and reasons for sentence

Judge’s role in a Crown Court criminal case

Before the criminal trial starts the judges familiarise themselves with the details of the case by reading the relevant case papers. These include the indictment which sets out the charges on which the defendant is to be tried, witness statements, exhibits and documentation on applications to be made by any party concerning the admissibility of evidence in the trial.

The judge supervises the selection and swearing in of the jury, giving the jurors a direction about their special place in the trial in deciding the facts and warning them not to discuss the case with anyone else.

Once the trial has commenced the judge ensures that all parties involved are given the opportunity for their case to be presented and considered as fully and fairly as possible. The judge plays an active role during the trial, controlling the way the case is conducted in accordance with relevant law and practice. As the case progresses the judge makes notes of the evidence and decides on legal issues, for example, whether evidence is admissible.

Once all evidence in the case has been heard the judge's summing up takes place. The judge sets out for the jury the law on each of the charges made and what the prosecution must prove to make the jury sure of the case. At this stage the judge refers to notes made during the course of the trial and reminds the jury of the key points of the case, highlighting the strengths and weaknesses of each side's argument. The judge then gives directions about the duties of the jury before they retire to the jury deliberation room to consider the verdict.

If the jury find the defendant guilty then the judge will decide on an appropriate sentence. The sentence will be influenced by a number of factors: principally the circumstances of the case, the impact that the crime has had on the victim, relevant law especially guideline cases from the Court of Appeal. The judge will equally take into account the mitigation and any reports and references on the defendant. Only once the judge has considered all of these factors will the appropriate sentence or punishment be pronounced.

Magistrates' role in court

Magistrates hear less serious criminal cases including motoring offences, commit serious cases such as rape and murder to the higher courts, consider bail applications, deal with fine enforcement and grant search warrant and right of entry applications. They may also consider cases where people have not paid their council tax, their vehicle excise licence or TV licences.

All magistrates sit in adult criminal courts as panels of three, mixed in gender, age, ethnicity etc whenever possible to bring a broad experience of life to the bench. All three have equal decision making powers but only one, the chairman will speak in court and preside over the proceedings. The two magistrates sitting either side are referred to as wingers.

Most of the cases are brought to court by the Crown Prosecution Service but there are other agencies that prosecute more unusual cases such as RSPCA, Environment Agency, Department of Work and Pensions, English Nature etc. There is a huge breadth of legislation and although there may be many similar cases of the same offence, the details of both the individual offence and the offender can vary considerably.

Where a defendant pleads not guilty a trial will be held where the magistrates listen to, and sometimes see, evidence presented by both the prosecution and defence, decide on agreed facts and facts in dispute, decide which evidence they believe is the truth and consider whether the case has been proved beyond reasonable doubt.

Having found someone guilty or when someone has pleaded, the magistrates proceed to sentence using a structured decision making process and sentencing guidelines which set out the expected penalty for typical offences. They will also take note of case law and any practice directions from the higher courts and are advised in court by a legally qualified adviser.

Magistrates undergo basic training before they sit in court for the first time, have mentors for their first two years and are fully appraised. Training and appraisal are continuous throughout every magistrate's career to keep abreast of new legislation, new sentencing policy and new developments.

Cruelty to a child – factors to take into consideration

This guideline and accompanying notes are taken from the Sentencing Guidelines Council's definitive guidelines *Overarching Principles: Assaults on children* and *Cruelty to a child*, published 20 February 2008

Key factors

(a) The same starting point and sentencing range is proposed for offences which might fall into the four categories (assault; ill-treatment or neglect; abandonment; and failure to protect). These are designed to take into account the fact that the victim is particularly vulnerable, assuming an abuse of trust or power and the likelihood of psychological harm, and designed to reflect the seriousness with which society as a whole regards these offences.

(b) As noted above, the starting points have been calculated to reflect the likelihood of psychological harm and this cannot be treated as an aggravating factor. Where there is an especially serious physical or psychological effect on the victim, even if unintended, this should increase sentence.

(c) The normal sentencing starting point for an offence of child cruelty should be a custodial sentence. The length of that sentence will be influenced by the circumstances in which the offence took place.

(d) However, in considering whether a custodial sentence is the most appropriate disposal, the court should take into account any available information concerning the future care of the child.

(e) Where the offender is the sole or primary carer of the victim or other dependants, this potentially should be taken into account for sentencing purposes, regardless of whether the offender is male or female. In such cases, an immediate custodial sentence may not be appropriate.

(f) The most relevant areas of personal mitigation are likely to be:

- Mental illness/depression
- Inability to cope with the pressures of parenthood
- Lack of support
- Sleep deprivation
- Offender dominated by an abusive or stronger partner
- Extreme behavioural difficulties in the child, often coupled with a lack of support
- Inability to secure assistance or support services in spite of every effort having been made by the offender.

Some of the factors identified above, in particular sleep deprivation, lack of support and an inability to cope, could be regarded as an inherent part of caring for children, especially when a child is very young and could be put forward as mitigation by most carers charged with an offence of child cruelty. It follows that, before being accepted as mitigation, there must be evidence that these factors were present to a high degree and had an identifiable and significant impact on the offender's behaviour.

Children and Young Persons Act 1933, s.1(1)

Cruelty to a child

Triable either way:
Maximum when tried summarily: Level 5 fine and/or 6 months
Maximum when tried on indictment: 10 years

Identify dangerous offenders
This is a serious offence for the purposes of the public protection provisions in the Criminal Justice Act 2003 – refer to page 187 and consult legal adviser for guidance

Offence seriousness (culpability and harm)
A. Identify the appropriate starting point
Starting points based on first time offender pleading not guilty

Examples of nature of activity	Starting point	Range
(i) Short term neglect or ill-treatment (ii) Single incident of short-term abandonment (iii) Failure to protect a child from any of the above	12 weeks custody	Low level community order to 26 weeks custody
(i) Assault(s) resulting in injuries consistent with ABH (ii) More than one incident of neglect or ill-treatment (but not amounting to long-term behaviour) (iii) Single incident of long-term abandonment OR regular incidents of short-term abandonment (the longer the period of long-term abandonment or the greater the number of incidents of short-term abandonment, the more serious the offence) (iv) Failure to protect a child from any of the above	Crown Court	26 weeks custody to Crown Court
(i) Series of assaults (ii) Protracted neglect or ill-treatment (iii) Serious cruelty over a period of time (iv) Failure to protect a child from any of the above	Crown Court	Crown Court

Offence seriousness (culpability and harm)
B. Consider the effect of aggravating and mitigating factors (other than those within examples above)
Common aggravating and mitigating factors are identified in the pullout card – the following may be particularly relevant but **these lists are not exhaustive**

1. Targeting one particular child from the family 2. Sadistic behaviour 3. Threats to prevent the victim from reporting the offence 4. Deliberate concealment of the victim from the authorities 5. Failure to seek medical help	1. Seeking medical help or bringing the situation to the notice of the authorities

Form a preliminary view of the appropriate sentence, then consider offender mitigation
Common factors are identified in the pullout card – see also note (f) opposite

Consider a reduction for a guilty plea

Consider ancillary orders, including compensation
Refer to pages 168-174 for guidance on available ancillary orders

Decide sentence
Give reasons

Law Reports

WEEKLY LAW REPORTS

Abbreviation	Court	Neutral Citations
HL(E)	House of Lords - England & Wales	These are references that, since 2001, have been given to Court of Appeal and High Court cases to identify them. They are constructed as follows:[Year] [Court] [Division] [Case No] example: **R v Jones [2007] EWCA Crim 10** **EW** stands for England and Wales
PC	Privy Council	
CA Civ	Court of Appeal - Civil Division	
CA Crim	Court of Appeal – Criminal Division	
QBD	Queen's Bench Division	
Ch	Chancery Division	
Fam	Family Division	
ECJ	European Court of Justice	
SC	Supreme Court	
TC	Technology Court	
WLR D 1	The Weekly Law Reports Daily: the new name for The Daily Law Notes. ICLR's own referencing system to indicate cases that have not gone on to be published as a Weekly Law Report yet.	

SALE OF GOODS — Theft of goods — Measure of damages — Manufacturer and seller of goods losing goods to fraudsters before it could make delivery and earn price— Carrier admitting liability — Whether price recoverable as damages for loss — Whether amount recoverable limited to lower manufacturing cost of replacing goods — Whether for manufacturer and seller to prove inability to make good lost sale to buyer

Sony Computer Entertainment UK Ltd and another v Cinram Logistics UK Ltd [2008] EWCA Civ 955; [2008] WLR (D) 289

CA: Rix, Wilson and Rimer LJJ.: 8 August 2008

A manufacturer and seller of goods who lost them through the fault of another before he could make delivery and earn the price could recover that price as damages for their loss.

The Court of Appeal so stated in a reserved judgment when dismissing the appeal of the defendant, Cinram Logistics UK Europe Ltd, against a decision by Judge Knight QC who, sitting as a judge of the Queen's Bench Division in the Commercial Court on 11 January 2008, had allowed the claim of the claimants, Sony Computer Entertainment UK Ltd and Sony Computer Entertainment Europe Ltd, in contract, bailment and negligence against the defendant.

An order of memory cards for computer games sent by the claimants to the defendant's warehouse for onward delivery to the purchaser had been stolen and diverted into the possession of fraudsters. The defendant admitted liability for the losses and the trial assessed damages. The judge found that on the balance of probabilities the claimants had proved their claimed loss by showing that the sales in question had not been replaced, and that they were entitled to recover the price at which the goods were sold to the purchaser, i e the wholesale value of the lost goods.

RIX LJ said that the issue was: if a manufacturer and seller of goods lost them through the fault of another before he could make delivery and earn the price, could he recover that price as damages for their loss, or was he limited to the lower manufacturing cost of replacing those goods, at any rate, unless he proved that he could not make good the lost sale to his buyer? In his Lordship's judgment, asking what an owner of goods had lost by reason of having his goods lost or converted by a bailee, in breach of contract, there being no problem on the ground of remoteness or lack of knowledge of the profit in question, the answer must be that prima facie the owner was entitled to the value of his goods. If the defendant wished to say that the loss was less because the profit could have been earned in any event by a substitute or replacement sale, at the cost only of the expenditure of a lesser sum for the purpose of manufacturing or buying in further goods, then the defendant bore the burden of proving that case. It was not for the claimant to prove a negative, that he had not recouped the profit by a substitute sale, but for the defendant to prove a positive, that the profit had been recouped and thus the loss of profit had not been suffered at all.

WILSON and RIMER LJJ agreed.

Appearances: *Alexander Hill-Smith* (Brookstreet Des Roches LLP, Abingdon) for the defendant;. *Timothy Marland* (Waltons & Morse LLP) for the claimants.

Reported by: Alison Sylvester, barrister

Case C-105/03
Criminal proceedings against Maria Pupino
(Reference for a preliminary ruling by the judge in charge of preliminary enquiries at the Tribunale di Firenze)
(Police and judicial cooperation in criminal matters – Articles 34 EU and 35 EU – Framework Decision 2001/220/JHA – Standing of victims in criminal proceedings – Protection of vulnerable persons – Hearing of minors as witnesses – Effects of a framework decision)
Opinion of Advocate General Kokott delivered on 11 November 2004
Judgment of the Court (Grand Chamber), 16 June 2005

Summary of the Judgment

1. Preliminary rulings — Reference to the Court of Justice — National court or tribunal for the purposes of Article 35 EU — Definition — Judge in charge of preliminary enquiries — Included (Art. 35 EU)

2. Preliminary rulings — Jurisdiction of the Court of Justice — Police and judicial cooperation in criminal matters — Framework decision for the approximation of laws — Request for interpretation involving the principle of interpretation in conformity with national law — Jurisdiction to provide that interpretation
(Art. 234 EC; Arts 35 EU and 46(b) EU)

3. European Union — Police and judicial cooperation in criminal matters — Member States — Obligations — Duty of loyal cooperation with the institutions

4. European Union — Police and judicial cooperation in criminal matters — Framework decisions for the approximation of national laws — Implementation by Member States — Duty to interpret in conformity with national law — Limits — Compliance with general principles of law — Interpretation of national law *contra legem* — Not permissible
(Art. 249(3) EC; Art. 34(2)(b) EU)

5. European Union — Police and judicial cooperation in criminal matters — Status of victims in criminal proceedings — Framework Decision 2001/220 — Protection of particularly vulnerable victims — Arrangements — Conditions for hearing evidence of young children — Hearing outside the trial and before it takes place — Whether permissible — Limits
(Council Framework Decision 2001/220/JHA, Arts 2, 3 and 8(4))

1. Where a Member State has indicated that it accepts the jurisdiction of the Court of Justice to rule on the validity and interpretation of the acts referred to in Article 35 EU, the Court of Justice has jurisdiction to give a preliminary ruling on a question from a judge in charge of preliminary enquiries. Where acting in criminal proceedings, that judge acts in a judicial capacity, so that he must be regarded as a ‘court or tribunal of a Member State’ within the meaning of Article 35 EU.

2. Under Article 46(b) EU, the system under Article 234 EC is capable of being applied to Article 35 EU, subject to the conditions laid down by that provision. Like Article 234 EC, Article 35 EU makes reference to the Court of Justice for a preliminary ruling subject to the condition that the national court 'considers that a decision on the question is necessary in order to enable it to give judgment', so that the case-law of the Court of Justice on the admissibility of references under Article 234 EC is, in principle, transposable to references for a preliminary ruling submitted to the Court of Justice under Article 35 EU.

It follows that the presumption of relevance attaching to questions referred by national courts for a preliminary ruling may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. Save for such cases, the Court is, in principle, required to give a ruling on questions concerning the interpretation of the acts referred to in Article 35(1) EU.

In that context, irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, dealing with police and judicial cooperation in criminal matters, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives. The jurisdiction of the Court of Justice to give preliminary rulings under Article 35 EU would be deprived of most of its useful effect if individuals were not entitled to invoke framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States.

3. It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters under Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions.

4. The binding nature of framework decisions adopted on the basis of Title VI of the Treaty on European Union, dealing with police and judicial cooperation in criminal matters, is formulated in terms identical with those in the third paragraph of Article 249 EC, concerning directives. It involves an obligation on the part of the national authorities to interpret in conformity with national law. Thus, when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.

The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is, however, limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles

prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law.

Similarly, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision.

5. Articles 2, 3 and 8(4) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings set out a number of objectives, including ensuring that particularly vulnerable victims receive specific treatment best suited to their circumstances. Those provisions must be interpreted as allowing the competent national court to authorise young children, who claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The arrangements for taking evidence used must not, however, be incompatible with the basic legal principles of the Member State concerned, as Article 8(4) of that framework decision provides. Nor may they deprive the accused person of the right to a fair trial under Article 6 of the European Convention on Human Rights.

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States

1. INTRODUCTION

1. The mutual recognition (MR) principle was presented at the Tampere European Council in 1999 as the “cornerstone” of the European judicial area and confirmed in the draft Constitution, and its vital importance is recognised in the Hague Programme, which links its development to enhanced mutual trust between the Member States.

2. Nearly five years after the Council and the Commission adopted the MR programme to give effect to the conclusions of the Tampere European Council, this communication sets out to present the Commission’s thinking on further work to give effect to the MR principle in the light of initial experience to date and on possible items for inclusion in a programme of action to enhance mutual trust between Member States.

3. This communication is part of the Commission’s general process of drawing up a plan of action to give effect to the Hague Programme. It maps the general prospects for the five years ahead (cf . SEC(2005) 641), though it specifically stresses the initial implementation period (2005-07), given that there will have to be a mid-term review when the Constitution comes into force. And as the Hague Programme emphasised the importance of evaluating the implementation of policies, the results of the evaluation undertaken here will have to be taken into account and may even inspire changes to the agreed priorities.

2. CONTINUING THE IMPLEMENTATION OF THE MUTUAL RECOGNITION PRINCIPLE

4. For some years now the implementation of the MR principle has been one of the main areas of European Union activity regarding criminal justice, and is probably one of the most promising. After more than four years of operation of the programme adopted in December 2000, about half the planned measures have been converted into legislative instruments, either adopted already or in the pipeline. Of these, the Framework Decision on the European arrest warrant and surrender procedures[1] is the only one for which the time allowed for transposal into national legislation is up.

5. This communication focuses on aspects of the MR programme not yet implemented so as to lay down priorities for the years ahead in the light of the Hague Programme and the analysis of initial achievements.

2.1. Mutual recognition at the pre-trial stages

2.1.1. The MR principle and gathering evidence[2]

6. The Hague Programme calls on the Council to adopt the proposal on the European evidence warrant by the end of 2005. After the adoption of the Framework Decision on the freezing of assets[3], this is a major step forwards in the application of the MR principle at the pre-trial evidence-gathering stage. But the evidence warrant will not be a universal instrument. Investigation measures such as questioning suspects, witnesses and experts or bank account surveillance or telephone-tapping orders will also have to be covered by MR instruments. The ultimate objective is to adopt a single legislative instrument to facilitate the gathering of evidence of all kinds in criminal cases throughout the Union. In the Commission's view, the effect of applying the MR principle here should be to leave the investigations to be run by the issuing State, as the decision to seek this or that piece of evidence cannot be reopened in the executing Member State. That is one of the reasons why the Commission wants the double criminality principle to be dropped in all matters related to gathering evidence. As regards the rules governing the manner in which evidence is gathered, the national rules applicable in each Member State for the relevant type of investigation should be respected, subject to the application of certain formalities or procedures specified by the issuing State in the executing Member State, already provided for by Article 4(1) of the Convention of 29 May 2000. And the adoption of minimum harmonisation rules on the gathering of evidence (cf. infra 3.1.1.2.) should help to ensure that evidence lawfully gathered in one Member State can be used in the courts of another.

7. Extending the MR principle to the entire range of matters relating to the gathering of evidence will raise questions as to the future of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union[4] and the Protocol of 2001[5], which, incidentally, are not yet in force as the right number of ratifications has not been reached. In addition to establishing a general MR instrument on evidence, the remaining provisions of the two instruments will have to be reformatted as a European Law or European Framework Law after the Constitution comes into force.

8. One of the difficulties that have been identified is that there are differences between the respective powers of the judicial authorities and the police in the Member States. The limits to each of these types of cooperation are thus blurred, for although they complement each other they are subject to different rules. The Commission will make proposals in connection with the implementation of the principle that information in criminal matters must be made available.

2.1.2. Mutual recognition of non-custodial pre-trial supervision measures

9. In August 2004 the Commission published a Green Paper on mutual recognition of non-custodial pre-trial supervision measures[6]. The Green Paper observes that excessive use of pre-trial detention is one of the causes of prison overcrowding and that the alternatives available in national law are often impossible to use where the person resides in another Member State, and suggests a number of solutions. In 2005, once the consultations are over, the Commission will make legislative proposals.

2.2. Mutual recognition of final judgments

10. The effect of the MR principle is that, where there is a final judgment in one Member State, it must have a series of consequences in the others. Apart from the European Arrest Warrant, two specific aspects of the question have been covered by proposals for Framework Decisions on the application of the MR principle to financial penalties[7] and to confiscation orders[8]. But a number of fundamental aspects remain to be considered.

2.2.1. Mutual information on convictions

11. Mutual recognition of convictions depends on information on convictions being able to circulate freely between Member States. Taking up an idea already formulated in the conclusions of the European Council of 25 and 26 March 2004, the Hague Programme calls on the Commission to "present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular of sex offenders, with a view to its adoption by the Council by the end of 2005". In January 2005 the Commission presented a White Paper analysing the main difficulties in exchanging information on convictions and making proposals for a computerised information exchange system. Proposals will be presented in 2005 following initial discussion in Council on the subject.

2.2.2. The ne bis in idem principle

12. Article 50 of the Charter of Fundamental Rights of the European Union provides: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law". The Charter broadens the territorial scope of the ne bis in idem principle to cover the entire Union, which is progress compared with Protocol 7 to the European Human Rights Convention (ECHR), which provided for it to apply only in each contracting State's territory.

13. This principle underlies two major judgments given by the European Court of Justice[9], specifying its scope in terms of the Schengen Implementing Convention, Articles 54 to 58 of which affirm and adapt the ne bis in idem principle. Initial work on the application of the ne bis in idem principle began on the basis of an initiative from Greece[10]. It was suspended on account of the close link with the problem of conflicts of jurisdiction (cf. infra). There will be a Commission Green Paper on the two issues in 2005, followed by a legislative proposal in 2006.

2.2.3. Taking account of convictions in the Member States in the course of criminal proceedings

14. In most Member States, the existence of previous convictions can have effects at the time of fresh criminal proceedings: repeat offending, for instance, can influence the procedural rules that apply, the type of offence charged or, more often, the nature and quantum of the sentence. The Commission recently presented a proposal for a Framework Decision on taking account of convictions in the Member States of the European Union, which establishes a general principle whereby each Member State is to attach the same effects to convictions handed down in the other Member States as to national convictions and sets out a series of rules for the application of the principle. A principle of recognition of repeat offending along these lines was in the Framework Decision of 6 December 2001 on the protection of the Euro[11]. The new instrument will be a major contribution to the MR of final judgments.

2.2.4. The enforcement of criminal penalties

15. It must be possible for a sentence handed down in a Member State to be enforced anywhere in the Union. In April 2004 the Commission launched a consultation on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union on the basis of a Green Paper[12]. Austria, Sweden and Finland have presented an initiative to permit enforcement in the Member State of nationality or residence of a prison sentence ordered in another Member State. This instrument should also make it easier to apply certain provisions on the European arrest warrant that allow a surrender request to be refused where the sentence is executed in the executing State.

16. But it is silent on the question of the enforcement of non-custodial measures, on suspended sentences and the conditions for it to be overridden by a penalty ordered in another Member State. The Commission will present legislative proposals on these topics in 2007.

2.2.5. The mutual recognition of disqualifications

17. Convicted offenders are often subject to disqualifications (from working with children, tendering for public contracts, driving or whatever), and depending on the Member State these disqualifications may flow from statutory provisions, court decisions or administrative instruments. This is a particularly delicate question both because such disqualifications vary widely in nature and because there are difficulties in the exchange of information about them. Major initial progress will be achievable once information on convictions can be exchanged via the computerised system. Generally speaking the Commission recommends a sector-by-sector approach here, taking each type of sentence in turn, and will present a communication in 2005. In November 2004 Belgium presented an initiative relating to the MR of disqualifications from working with children following convictions for child pornography offences. Sector-by-sector work will continue in 2006 with a proposal for the MR of driving disqualifications.

3. REINFORCING MUTUAL TRUST

18. Reinforcing mutual trust is the key to making MR operate smoothly. This is one of the important messages in the Hague Programme and involves both legislative action to ensure a high degree of

protection for personal rights in the EU and a series of practical measures to give legal practitioners a stronger sense of belonging to a common judicial culture.

3.1. Reinforcing mutual trust by legislative measures

19. The first endeavours to apply the MR principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation. This can revolve around two axes: ensuring that mutually recognised judgments meet high standards in terms of securing personal rights and also ensuring that the courts giving the judgments really were the best placed to do so. Taking MR a stage further might imply giving further consideration to certain measures to approximate legislation on substantive criminal law.

3.1.1. Harmonising the law of criminal procedure

3.1.1.1. Improving guarantees in criminal proceedings

20. In April 2004, the Commission presented a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union[13]. It seeks to ensure that suspects and defendants in criminal proceedings enjoy the minimum rights secured in all the Union Member States as regards access to lawyers, interpreters and translators, the right to communicate with consular and other authorities, information on one's rights and the protection of vulnerable categories. The European Council has asked that this Decision be adopted by the end of 2005.

21. But this is only a first stage. Work must continue in the years ahead to provide permanent back-up for MR. There are three areas in particular where work needs doing: the presumption of innocence, gathering evidence in criminal cases and decisions in absentia [14] . In each of them there will have to be extensive analysis and consultation with the 25 Member States and criminal-law practitioners to identify the difficulties and potential solutions in the light of each Member State's legal traditions.

3.1.1.2. Reinforcing the presumption of innocence.

22. The presumption of innocence is one of the foremost foundations of the criminal law. It is asserted by Article 6 of the ECHR and taken over in Article 48 of the Charter of Fundamental Rights of the European Union; it exists in all the Member States but the concept is not universally co-extensive. In 2005 the Commission will issue a Green Paper to spell out the scope of the concept, consider ways of reinforcing it and determine the limits to it, if any .

3.1.1.3. Minimum standards on the gathering of evidence

23. Cross-border court actions entail the possibility for evidence gathered in one Member State to be used in another. But respect for defence rights entails certain minimum rules on the gathering of evidence being observed throughout the Union. The Commission will issue a Green Paper in 2006 on

the basis of a study[15], proposing a minimum harmonisation exercise regarding standards for the gathering and disclosure of evidence, admissibility criteria and possible exceptions.

24. Following in-depth consultation on the basis of these two Green Papers, the Commission will present a proposal for a Framework Decision on the presumption of innocence and minimum standards on the gathering of evidence.

3.1.1.4. Judgments in absentia

25. The question of judgments in absentia has often been raised in the EU and regularly re-appears in instruments that have been adopted. In practice the matter has been much discussed, and both experience and the decisions of the European Court of Human Rights have clearly shown that there are difficulties. In 2006 the Commission will issue a Green Paper, possibly to be followed by legislative proposals to resolve the difficulties and bring about greater certainty as to the law.

3.1.1.5. Transparency in the choice of court

26. In criminal matters, where the courts of several Member States have jurisdiction over the same case, investigations and prosecutions may be commenced simultaneously in both. Such multiple proceedings can be seriously detrimental both to personal rights and to procedural efficiency. A procedure to determine the most appropriate place for conducting a prosecution is more and more necessary and will be a major factor in facilitating the application of the mutual recognition principle. It should make it easier to gather evidence at the pre-trial stage (once the Member States have agreed on where the trial is to take place, on which the applicable law is predicated) and to enforce the final judgment (once the Member States have acknowledged in advance that the case has been tried at the most appropriate place). It should also help to avoid cases in which the ne bis in idem principle applies.

27. In 2005 the Commission will present a Green Paper on conflicts of jurisdiction and the ne bis in idem principle, which, without interfering with the national machinery for determining jurisdiction, will propose solutions to settle conflicts of jurisdiction in the European Union on the basis of, among other things, the role of Eurojust under Article III-273 of the Constitution and the calls made in the Hague Programme.

3.1.2. Further approximation of substantive criminal law

28. Considerable approximation work has been done here in recent years. It must be continued, with consideration being given to the value of promoting more diversified forms of punishment in the Union and not focusing simply on prison sentences. The accent should be on evaluating the implementation of such instruments as have been adopted, initial results being disappointing, and on the operation of the mechanism of the positive list of offences for which there is no check as to double criminality in MR instruments so that the difficulties that have been identified can be remedied wherever possible.

29. Initial reflections on the need for a Union-wide definition of concepts such as the liability of bodies corporate or the approximation of fines were set out in the Green Paper on penalties. The Commission will make a proposal for a Framework Decision in 2007 following a Green Paper.

3.2. Reinforcing mutual trust by practical flanking measures

3.2.1. Reinforcing evaluation mechanisms

30. The European Council stated that "Evaluation of the implementation as well as of the effects of all measures is ... essential to the effectiveness of Union action". Future developments in the MR principle in criminal matters will have to be accompanied by evaluation mechanisms. These must be capable of meeting two methodological objectives that are separate from the job of verifying whether Union instruments have been correctly transposed into national law within the time allowed:

- Evaluating the practical needs of the justice system, and particularly identifying potential barriers before new instruments are adopted; and

- Evaluating the specific practical conditions for implementing Union instruments, in particular best practices and how they can meet the needs identified at the first stage.

These two objectives will have to be applied in relation to all instruments. They are predicated on stronger tools for analysing judicial practice being available to the Commission.

31. A third objective, of undertaking a more general evaluation of the conditions in which judgments are produced in order to ensure that they meet high quality standards enabling mutual trust between judicial systems to be reinforced, without which MR will not be able to work, depends on broader-based and longer-term action. The Hague Programme states as a matter of principle that "mutual confidence [must] be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality" and calls for "a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary" to be established. In the context of boosting mutual trust by the certainty that judicial systems producing judgments that are eligible for Union-wide enforcement meet high quality standards, this evaluation must provide a fully comprehensive view of national systems. The credibility and efficiency of a judicial system need to be assessed in overall terms, covering both institutional mechanisms and procedural aspects. This will be tricky, and the subsidiarity and proportionality principles and the independence of the judiciary must be respected. The object of the exercise is to produce regular rapports based strictly on criteria of independence and transparency, highlighting best practices.

32. In February 2005 the European Parliament adopted a recommendation[16], and in 2006, after close consultations with judicial organisations and institutions, the Commission will produce a communication on evaluation of the quality of justice .

3.2.2. Promoting networking among practitioners of justice and developing judicial training

33. The Hague Programme emphasises the importance of improving mutual understanding between judicial authorities and legal systems. It calls for the development of networks of judicial organisations and institutions, such as the Network of Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, with which the Commission wishes to develop close relations. By bringing professionals together more often and promoting reflection on the implementation of Union instruments and on matters of horizontal interest such as the quality of justice, such networks, which should include advocates, should play a key role in gradually building up a common judicial culture.

34. Second, the Hague Programme emphasises the importance of training as a means of promoting mutual trust. Since 2004, at the European Parliament's request the Commission has been operating a judicial exchanges scheme as a pilot project alongside the AGIS programme. This is to continue in 2005 and will be evaluated in 2006 before final proposals are made.

35. The effect of developing the MR principle is to give judgments an impact that extends well beyond national borders. Consequently, the European dimension of the judicial function must be fully integrated into syllabuses at all stages of the careers of judges and prosecutors. The training of judicial authorities is based on national entities responsible for organising it and determining the content. Training is now grouped in a network currently operating on an association basis. The Hague Programme emphasises the importance of boosting the network to make it into an effective structure for meetings and cooperation between judicial authorities. At the end of 2005, after consultations, the Commission will present a communication on judicial training in the European Union.

3.2.3. Support for the development of quality justice

36. In the new financial perspective 2007-12, the Commission presented three proposals for action programmes including a specific criminal justice programme. This programme will increase the support that the Union can give for judicial cooperation, the development of MR and the reinforcement of mutual trust between Member States. Its objectives are in particular to promote contacts and exchanges between practitioners, strengthen judicial training and improve access to justice.

[1] OJ L 190, 18.7.2002, p. 1.

[2] See Commission Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor: COM (2001) 715 final, 11.12.2001.

[3] OJ L 196, 2.3.2003, p 45; deadline for transposal 2 August 2005.

[4] OJ C 197, 12.7.2000.

[5] OJ C 326, 21.11.2001.

[6] COM(2004) 562 final.

[7] OJ L76, 22.3.2005 p.16.

[8] OJ C 184, 2.8.2002.

[9] Cases C-187/01 and C-385/01 Gozütok and Brugge (judgment given on 11 February 2003) and Case C-469/03 Miraglia (judgement given on 10 March 2005).

[10] OJ C 100, 26.4.2003, p. 24.

[11] OJ L 329, 14.12.2001, p.3.

[12] COM (2004) 334 final.

[13] COM (2004) 328 final.

[14] See Commission Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor: COM (2001) 715 final, 11.12.2001.

[15] Study of the laws of evidence in criminal proceedings throughout the EU, October 2004.

[16] Recommendation from the European Parliament to the Council on the quality of criminal justice and the harmonisation of criminal law in the Member States: A6-0036/2005.

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (b) of the second subparagraph of Article 82(2) thereof,

Having regard to the initiative of the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden [1],

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency Conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights.

(2) On 29 November 2000, the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters [3]. The introduction to the programme states that mutual recognition is "designed to strengthen cooperation between Member States but also to enhance the protection of individual rights".

(3) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other’s criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

(4) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the

judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied.

(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the right of defence. This Directive respects those rights and should be implemented accordingly.

(6) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(7) Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.

(8) Article 82(2) of the Treaty on the Functioning of the European Union provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Point (b) of the second subparagraph of Article 82(2) refers to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established.

(9) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the fields of interpretation and translation in criminal proceedings.

(10) On 30 November 2009, the Council adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [4]. Taking a step-by-step approach, the Roadmap called for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), and special safeguards for suspected or accused persons who are vulnerable (measure E).

(11) In the Stockholm programme, adopted on 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.

(12) This Directive relates to measure A of the Roadmap. It lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States.

(13) This Directive draws on the Commission proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings of 8 July 2009, and on the Commission proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings of 9 March 2010.

(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.

(15) The rights provided for in this Directive should also apply, as necessary accompanying measures, to the execution of a European arrest warrant [5] within the limits provided for by this Directive. Executing Members States should provide, and bear the costs of, interpretation and translation for the benefit of the requested persons who do not speak or understand the language of the proceedings.

(16) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal.

(17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.

(18) Interpretation for the benefit of the suspected or accused persons should be provided without delay. However, where a certain period of time elapses before interpretation is provided, that should not constitute an infringement of the requirement that interpretation be provided without delay, as long as that period of time is reasonable in the circumstances.

(19) Communication between suspected or accused persons and their legal counsel should be interpreted in accordance with this Directive. Suspected or accused persons should be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence.

(20) For the purposes of the preparation of the defence, communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings, or with the lodging of an appeal or other procedural applications, such as an application for bail, should be interpreted where necessary in order to safeguard the fairness of the proceedings.

(21) Member States should ensure that there is a procedure or mechanism in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter. Such procedure or mechanism implies that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons concerned, whether they speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

(22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings.

(23) The respect for the right to interpretation and translation contained in this Directive should not compromise any other procedural right provided under national law.

(24) Member States should ensure that control can be exercised over the adequacy of the interpretation and translation provided when the competent authorities have been put on notice in a given case.

(25) The suspected or accused persons or the persons subject to proceedings for the execution of a European arrest warrant should have the right to challenge the finding that there is no need for interpretation, in accordance with procedures in national law. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged and should not prejudice the time limits applicable to the execution of a European arrest warrant.

(26) When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointed interpreter.

(27) The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.

(28) When using videoconferencing for the purpose of remote interpretation, the competent

authorities should be able to rely on the tools that are being developed in the context of European e-Justice (e.g. information on courts with videoconferencing equipment or manuals).

(29) This Directive should be evaluated in the light of the practical experience gained. If appropriate, it should be amended so as to improve the safeguards which it lays down.

(30) Safeguarding the fairness of the proceedings requires that essential documents, or at least the relevant passages of such documents, be translated for the benefit of suspected or accused persons in accordance with this Directive. Certain documents should always be considered essential for that purpose and should therefore be translated, such as any decision depriving a person of his liberty, any charge or indictment, and any judgment. It is for the competent authorities of the Member States to decide, on their own motion or upon a request of suspected or accused persons or of their legal counsel, which other documents are essential to safeguard the fairness of the proceedings and should therefore be translated as well.

(31) Member States should facilitate access to national databases of legal translators and interpreters where such databases exist. In that context, particular attention should be paid to the aim of providing access to existing databases through the e-Justice portal, as planned in the multiannual European e-Justice action plan 2009-2013 of 27 November 2008 [6].

(32) This Directive should set minimum rules. Member States should be able to extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the European Court of Human Rights or the Court of Justice of the European Union.

(33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union.

(34) Since the objective of this Directive, namely establishing common minimum rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(35) In accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to take part in the adoption and application of this Directive.

(36) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union,

Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

4. This Directive does not affect national law concerning the presence of legal counsel during any stage of the criminal proceedings, nor does it affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings.

Article 2

Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.

4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

6. Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.

7. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 3

Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the

possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.

7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.

9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 4

Costs of interpretation and translation

Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.

Article 5

Quality of the interpretation and translation

1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.

Article 6

Training

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication.

Article 7

Record-keeping

Member States shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter pursuant to Article 2, when an oral translation or oral summary of essential documents has been provided in the presence of such an authority pursuant to Article 3(7), or when a person has waived the right to translation pursuant to Article 3(8), it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.

Article 8

Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 October 2013.

2. Member States shall transmit the text of those measures to the Commission.

3. When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 10

Report

The Commission shall, by 27 October 2014, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Article 11

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 12

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 20 October 2010.

For the European Parliament

The President

J. Buzek

For the Council

The President

O. Chastel

[1] OJ C 69, 18.3.2010, p. 1.

[2] Position of the European Parliament of 16 June 2010 (not yet published in the Official Journal) and decision of the Council of 7 October 2010.

[3] OJ C 12, 15.1.2001, p. 10.

[4] OJ C 295, 4.12.2009, p. 1.

[5] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and

the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

[6] OJ C 75, 31.3.2009, p. 1.

guardian.co.uk

Cameras in court: trial by boredom?

TV should be allowed to show trials. But broadcasters, and viewers, will only be interested in the high-profile cases

Thursday 2 June 2011
David Banks

The OJ Simpson trial had television audiences rapt worldwide. But TV companies in the UK will find most domestic trials too dull to make appealing to viewers. Photograph: Sam Mircovich/AP

The director of public prosecution's call to allow cameras into the courtroom is to be welcomed if it will have the effect of re-engaging the public in the judicial process.

Open justice should not mean that the media are allowed into court but have one hand tied behind their backs, able to report words, but not images.

And as Gavin Millar pointed out earlier this week, it is odd that we can see on TV our MPs debating court cases, but we can see no footage of the cases themselves.

However, those rushing to welcome Keir Starmer's words – and Sky has been very vocal in pushing the case for greater openness – should just pause to contemplate the challenge they face if this is allowed.

While the OJ Simpson trial has been cited as an example of the over-dramatisation of TV court coverage, one can find much less drama closer to home.

The experiment in Scotland of allowing cameras into court amply demonstrated the judicial system's capacity for extreme dullness.

Any court reporter who has sat on the press bench waiting for a trial to go ahead will tell you that court reporting can often be long periods of boredom, interspersed with periods of high excitement. The court reporter distills out the boredom and presents just the drama. For TV to do the same will require editing of heroic speed and proportion.

There is little doubt that there is a need for better and more comprehensive coverage of the courts. The regional media, for whom it was once one of the three Cs that filled their pages – court, crime and council – have pulled out of the courts, leaving a vacuum in coverage. They often cite changes in reader demands, but one suspects it has more to do with cuts in staff and expenditure that regional news groups have been making in recent years, than a genuine lack of public interest in court proceedings.

While Starmer says that most solicitors are in favour of the move, I wonder if so many in the court system itself will be so enthusiastic.

When a couple of years ago I was one of the very few journalists at a debate on opening up the family courts (Joshua Rozenberg, Bob Satchwell of the Society of Editors and Radio 4's Sanchia Berg were the only others) the lawyers, social workers and judges were queuing up to accuse the media of sensationalism. We were, they said, not interested in the day-to-day, we would only be there for the high-profile cases.

The fact is they were probably right.

The broadcasters will not provide the level of coverage that the regional newspapers once did. They simply do not have the resources to staff and then edit footage from all the crown courts and magistrates courts in the country, never mind the civil courts.

They will not cover the 90%-plus of criminal business dealt with by magistrates courts; the legions of petty acquisitive criminals motivated by a need to buy drugs.

They will cherry-pick the big cases, just as they always have done.

This is not an argument not to allow the cameras in. It is not claimed that local newspapers produced perfect comprehensive coverage of the courts – but some of them got close. Some regional papers gave, and still give, a very good idea of just what goes on in the judicial system.

Allowing in TV cameras will no doubt make some of the higher courts more open in some of the most newsworthy cases. Whether it gives viewers an accurate view of the judicial system in action is another matter entirely.

The DPP on cameras in court:

0:15:25 – 0:22:30

http://www.bbc.co.uk/iplayer/console/b011jv83

Press release

Lord Chief Justice pays tribute to Lord Bingham Including his interview on the Today Programme on Radio 4

16/09/2010

Lord Judge said in a statement:

"On behalf of the judiciary of England and Wales, I would like to express my sorrow at the death of Tom Bingham, the most respected, distinguished and admired Judge of our times. His contributions to our understanding of the significance of the rule of law, and the principled development of the common law, have been unequalled in our generation. Judges throughout the world will recognise Tom Bingham as one of the great jurists of this generation and one of the great common law judges."

The Lord Chief Justice, Lord Judge, was invited by the Today Programme on Radio 4 to examine the legacy of Lord Bingham, who died at the weekend.

Lord Bingham the first judge to hold all three top legal posts in this country: Master of the Rolls, Lord Chief Justice and Senior Law Lord.

Lord Judge said: " We've lost the man that I believe was the most universally respected and admired judge of his generation. And the admiration and respect was not confined to this country; the reputation that he enjoyed was international. He was a master of the common law.

His entire judicial career was dedicated to the practical application of the rule of law in the individual case, particularly when the citizen was taking on, or being taken on by the organs of the state. That's very broad and very general, but the application of the rule of law in each individual case was what seems to me to have motivated all his thinking. You will then have to consider the way he wrote his judgements.

He always explained why he was rejecting the arguments of one side that he was rejecting. He did it in language which was always clear. The reasons for his decisions stand up to analysis and reanalysis and further analysis. He was always seeking the relevant legal principle. You will never find a single incoherent word in any of his judgements. You'll never find him using three words where one word would do, and he never uses language which obscures his meaning. From the point of view of the public, we've lost a great judge.

But I want to add this, and I want to emphasise it: the greatest judge of our generation was an utterly modest and unassuming man. He had no side to him at all, and he would be surprised to hear me saying these things about him. He did not for one moment appreciate how very special he was."

The Lord Chief Justice pays tribute to Lord Bingham:
http://news.bbc.co.uk/today/hi/today/newsid_8992000/8992981.stm

International Cooperation in Criminal Matters

1. Do the following listening exercise:

Gerard Batten, MP (UK), European Parliament.

The Enrico Mariotti case.

http://www.youtube.com/watch?v=oEn7XEEQU7k&feature=results_main&playnext=1&list=PL492174CFFEA96B62

Fill in the missing words from the transcript of the video:

Thank you Mr. President.

The dangers posed by the European Arrest Warrant are clearly illustrated by the case of Enrico Mariotti. Mr. Mariotti was granted _____ in England in 1998 after being accused of crimes _____ committed in Italy more than 30 years previously. The _____ evidence presented against him would never have been _____ in an English court and, let alone, resulted in a _____ and a prison sentence. Despite the support of many people in sections of the British media he was recently _____ to Italy by means of a European Arrest Warrant. He now languishes in a remote prison facing a 26-year prison _____. Mr. Mariotti is an Italian, but the same rules apply for British citizens. The European Arrest Warrant means that our traditional _____ against arbitrary arrest and extradition have been _____. People can now be transported to foreign courts with as much ceremony as posting a parcel.

2. Do the following listening exercise:

Gerard Batten, MP (UK), European Parliament.
European Arrest Warrant. Procedural rights in criminal proceedings.
http://www.youtube.com/watch?v=_Ar3T2QfR_A&feature=related

Fill in the missing words from the transcript of the video:

President: Mr. Batten. One and a half minutes.

Mr. Batten:
The Committee calls for the Council to continue work in introducing common European _____ rights in criminal matters. An existing common procedure in the form of a European Arrest Warrant has removed the centuries-old safeguards against _____ arrest and _____ imprisonment that the English used to enjoy. This isn't an academic argument. The _____ is destroying innocent people's lives. My constituent, Andrew Symeou, is just one of a growing number of people _____ without an English court having the power to consider the _____ evidence against them and to prevent unjust extradition. Extradition has now been reduced to a _____ formality.

Give a definition of the following in your words, trying to use legal terms:

1. mutual assistance:
2. legal classification of an offence
3. enforcement:
4. supervision measures:
5. execution of requests:
6. covert investigation:
7. surveillance:
8. dual criminality:
9. acknowledgment of service:
10. judicial records:
11. statement of consent:
12. alias:
13. bail:
14. bars to extradition:
15. freezing order:
16. custodial sentence:
17. venue of a hearing:

Extradition

http://www.cps.gov.uk/news/fact_sheets/extradition/

What is extradition?

This is a simple introduction to a complex subject. It is not a definitive statement of the law and does not cover every aspect of extradition.

Extradition is the formal procedure for requesting the surrender of persons from one territory to another for the following purposes:

to be prosecuted

to be sentenced for an offence for which the person has already been convicted

to carry out of a sentence that has already been imposed.

The relevant primary legislation is the Extradition Act 2003. For a full understanding of extradition proceedings with any given state, one must also consult any applicable extradition instrument (treaty, convention or scheme).

What are 'export' and 'import' extradition requests?

An 'export' extradition request is made by another state to the United Kingdom, for the extradition of someone from the UK. It is sometimes known as an 'incoming' request as it is made to the United Kingdom.

An 'import' extradition request is made by the United Kingdom to another state, for the extradition of someone to the UK. It is sometimes known as an 'outgoing' request as it is made by the United Kingdom.

What offences can people be extradited for?

This depends on the terms of the Extradition Act, and any applicable treaty or convention governing extradition proceedings with the state in question.

Export extradition to category 1 territories

Part 1 of the Extradition Act regulates export extradition from the United Kingdom to category 1 territories. These territories are the other 26 Member States of the European Union, and also Gibraltar. This part of the Act implements the European Union's Framework Decision of 13th June 2002 on the European Arrest Warrant and the surrender procedures between Member States. The framework decision has been implemented in all EU Member States.

The Serious Organised Crime Agency is the designated authority for the receipt of European arrest warrants (EAWs) and has an administrative function in certifying warrants that satisfy the requirements of the Extradition Act; for example the warrant must contain specified information relating to the alleged offence in accusation cases, or the sentence in conviction cases.

The CPS acts as the representative of the requesting judicial authority in the extradition proceedings. All export extradition cases where the person is arrested in England and Wales are dealt with at City of Westminster Magistrates Court in London.

After the EAW has been certified the wanted person can be arrested by a constable who must bring the person to City of Westminster Magistrates' Court as soon as practicable. In certain circumstances a provisional arrest is possible before the EAW has been issued. Where this happens

the person must be produced at court within 48 hours of the arrest, by which time the EAW must have been issued and certified.

At the Initial Hearing the district judge carries out several steps. The judge decides whether the person arrested is the person named on the warrant; fixes a date for the start of the extradition hearing within 21 days of the date of arrest; informs the person about the content of the EAW; explains to the person that he may consent to his surrender; and decides whether to grant bail or remand the person in custody pending the extradition hearing.

At the Extradition Hearing the district judge must decide a number of issues including: is the offence an extraditable offence? Are there any bars to the extradition? Is the extradition compatible with the person's rights under the European Convention on Human Rights? If there are no statutory grounds to refuse the request, an order is made for the person's surrender.

The meaning of extradition offence is given in sections 64 to 66 of the Act. In simple terms, in cases where a person is wanted for prosecution the offence must usually be one that could lead to a prison sentence of at least 12 months in the requesting state. For certain offences that are listed in the framework decision and which could lead to a prison sentence of at least 3 years in the requesting state, there is no requirement that a parallel offence exists in UK law. Otherwise the conduct complained of in the EAW must also be an offence in the United Kingdom. Where the person is wanted to serve a sentence, whether or not the offence is deemed an extradition offence depends on various factors including the length of sentence imposed in the other state.

The Extradition Act gives either the wanted person or the requesting state a right of appeal against the decision of the district judge. Appeals are to the High Court and timeframes are set out in the Act. Notice of the appeal must be given within 7 days of the decision of the judge at City of Westminster Magistrates Court. It is possible to appeal from the High Court to the Supreme Court provided that the former certifies that the appeal involves a point of law of general public importance, and either court gives leave for the appeal to be made.

If extradition is ordered by the judge at City of Westminster Magistrates Court and there is no appeal, the person must be surrendered within 10 days of the extradition order. Otherwise, if the appeal does not affect the extradition order, surrender must take place within 10 days of the conclusion of the appeal proceedings.

If before conclusion of the extradition hearing at City of Westminster Magistrates Court the wanted person is charged with an offence in England or Wales, the court must adjourn the extradition proceedings until the domestic matter is concluded. If the person is already serving a sentence of imprisonment in the UK, extradition proceedings may either be postponed until he has completed his sentence or, if the purpose of the request is to prosecute the person in the other state, he can be temporarily surrendered on the undertaking that he will be remanded in custody in the other state and returned to complete his UK sentence at the conclusion of the foreign trial.

Export extradition to category 2 territories

Part 2 of the Extradition Act, in conjunction with any applicable extradition instrument, regulates export extradition from the United Kingdom to category 2 territories. These are states outside the European Union. At present there are almost 100 states designated as category 2 territories.

Upon receipt of a an extradition request from a category 2 territory the Secretary of State for the Home Department, acting on the advice of the Home Offices Judicial Co-operation Unit, must decide whether or not to certify the extradition request.

Requirements for certification are similar but not identical to those imposed for category 1 territories. Having certified the request, documents are sent from the Home Office to City of Westminster Magistrates Court.

The CPS acts as the representative of the requesting state in category 2 cases (as for category 1 territories), and all proceedings are heard at City of Westminster Magistrates Court.

On receipt of papers a district judge at this court decides whether or not to issue an arrest warrant for the wanted person. The judge must have reasonable grounds to believe that the offence is an extraditable offence, which is defined in sections 137 and 138 of the Act and is similar to the provisions for category 1 territories. A second requirement in accordance with section 71 of the Act is, in simple terms, that depending on the state concerned, the judge must also have reasonable grounds for believing that evidence or information contained in the request would in an analogous domestic case justify the issue of a warrant for the persons arrest.

If the judge issues a warrant, the person may be arrested by a constable who does not need to have the warrant with him at the time of arrest. After arrest the person is brought to City of Westminster Magistrates Court as soon as practicable.

At the first court hearing the district judge informs the person about the content of the extradition request; explains to the person that he may consent to his extradition; fixes a date for the start of the extradition hearing, within 2 months from the date of the first appearance; and decides whether to bail the person or remand him in custody till the extradition hearing.

As with category 1 territories, provisional arrest is also possible with requests from category 2 territories, in accordance with sections 73 and 74 of the Act.

At the extradition hearing the judge must decide a number of issues: whether the documentation sent to the court by the Secretary of State complies with the Act; whether the individual arrested is the person named on the warrant; whether the offence detailed in the request is an extradition offence; be satisfied that the person has been given the necessary documentation including copies of the request and the Secretary of States certificate; whether any of the bars to extradition apply; and, whether the extradition would be compatible with the person's rights under the European Convention on Human Rights.

Additionally, and for certain states only, section 84 of the Act requires the judge to decide if there is sufficient evidence which would make a case requiring an answer by the person if the proceedings were the summary trial of an information against him. Section 84 does not apply for a number of states that have been designated by the Secretary of State, including the following: Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, Montenegro, New Zealand, Norway, Russian Federation, Serbia, South Africa, Switzerland, Turkey, Ukraine and the United States of America.

If the district judge is satisfied on all the above issues at the extradition hearing, the judge must send the case to the Secretary of State.

The Secretary of State must then consider a number of issues including the following: the possible imposition of the death penalty, in which case extradition cannot be ordered; the rule of specialty, which prohibits a person being dealt with in the requesting state for matters other than those referenced in the extradition request; and whether or not the person was in the UK following extradition from another state, in which case that states permission must be obtained before extraditing to a third state. If these factors do not prevent extradition, the Secretary of State must order extradition within 2 months of the appropriate day, defined in section 102 and in most cases the day on which the district judge referred his decision to the Secretary of State.

The Extradition Act gives both the wanted person and the requesting state a right of appeal against the decision of the district judge, or the Secretary of State. Appeals are to the High Court with timeframes set out in the Act. It is also possible to appeal to the Supreme Court but as with category 1 territories this is only possible if the High Court certifies that the appeal involves a point of law of general public importance, and either the High Court or the Supreme Court gives leave for the appeal to be made.

Similar provisions apply as for category 1 territories if the wanted person is either charged with, or serving a sentence in respect of, a domestic offence.

Export extradition to non category 1 or 2 territories

Many states are not designated as either category 1 or 2 territories. For these states export extradition from the United Kingdom may still be possible pursuant to section 193 of the Extradition Act, Parties to international conventions (and related secondary legislation), or section 194 on Special extradition arrangements. Such extraditions however are rare.

Reasons for refusing an extradition request

Reasons for refusing an extradition request, bars to extradition, are set out in both Parts1 and 2 of the Act, and also within multi and bilateral extradition instruments, and include the following (this list is not exhaustive):

'Double jeopardy'; a person must not be prosecuted or sentenced in respect of an offence that he has already been convicted or acquitted of.

Extraneous considerations; the request will be refused if the purpose of the request is deemed to be to prosecute or punish the person on account of race, religion, nationality, gender, sexual orientation or political opinions, or if extradited the person might be prejudiced at his trial or punished unfairly for any of these reasons.

Passage of time; the request will be refused if it would be oppressive to prosecute or punish the person for the extradition offence due to the age of the alleged offence.

Age of wanted person; extradition is not possible if due to his age the person could not be convicted of the offence in the United Kingdom.

Absence of speciality provisions; specialty is the principle that a person may only be dealt with in the requesting state for the conduct in respect of which extradition was ordered. Extradition instruments invariably include specialty provisions.

Earlier extradition of the wanted person to the United Kingdom; in order to permit extradition to the requesting state in this situation the United Kingdom must first obtain permission from the state that extradited the person to the UK.

Human rights; extradition will be refused if it would not be compatible with the person's rights under the European Convention on Human Rights within the meaning of the Human Rights Act.

Death penalty; a person must not be extradited if there is a possibility that the person will be sentenced to death. Extradition may be possible if the requesting state gives an undertaking that the death penalty will not be imposed.

Physical or mental condition; if it would be unjust or oppressive to extradite the wanted person on these grounds the extradition request will either be refused or adjourned until the condition improves.

Import extradition

Import extradition essentially falls into two broad categories; extradition from category 1 or category 2 territories.

Category 1 territories are the other Member States of the European Union, and also Gibraltar. For these territories the EAW is the mechanism used to request surrender. Part 3 of the Extradition Act regulates operation of the EAW scheme with regard to import extradition. Crown Prosecutors throughout England and Wales are responsible both for drafting EAWs in their own cases and then applying to the court for their issue. EAWs are issued and processed by judicial authorities without state involvement. In England and Wales, an EAW may be issued by a District Judge (Magistrates' Courts), a justice of the peace, or a judge entitled to exercise the jurisdiction of the Crown Court.

Once issued, the prosecutor sends the EAW to the Fugitives Unit of the Serious Organised Crime Agency which is responsible for transmitting the warrant to the state where the wanted person is believed to be. An EAW is not country specific and is applicable in all category 1 territories.

The second category of import extradition cases concerns requests to category 2 territories which are designated states outside the European Union. In these cases Crown Prosecutors throughout England and Wales are responsible for collating the necessary information for the specialist Extradition Unit of CPSs Special Crime Division in London, which then drafts the extradition request. The papers are then passed to the Judicial Co-operation Unit of the Home Office before being sent to the other territory under authority of the Secretary of State, as extradition requests to territories outside the European Union are made on a state-to-state basis. Part 3 of the Extradition Act contains some provisions relating to import extradition from category 2 territories. Additionally for any given category 2 territory one must also consider any applicable extradition instrument.

For requests to both category 1 and 2 territories CPS lawyers only prepare an extradition request after considering the Code Tests (see the Code for Crown Prosecutors in the Legal Resources section). A request can be made for any of the following three purposes: to prosecute the wanted person for offences stated in the request; to sentence the person for offences noted in the request that the person has already been convicted of; and, to carry out a sentence on the person that has already been imposed in respect of offences noted in the request.

Upon arrest in the requested state, the foreign court will conduct the extradition hearing in accordance with their legislation. The foreign authority, usually the national prosecution service, will represent the United Kingdom during proceedings. If extradition is ordered United Kingdom police officers travel to the requested state to collect the person and return him to the UK. The person will be brought to the relevant court or, if the request was issued for the person to complete an existing custodial sentence, to the relevant prison.

As noted some states are not designated as either a category 1 or 2 territory. It may still be possible to make an extradition request in these circumstances, pursuant to section 193 of the Extradition Act, Parties to international conventions (and related secondary legislation). Such requests however are rare. Another alternative, also rarely used, is for the United Kingdom to seek an ad-hoc arrangement with the other state, to permit a request to be made.

Further details on extradition can be found on the Home Office website, www.homeoffice.gov.uk, following the links, The police and then Extradition.

The Extradition Act can be seen at www.legislation.gov.uk.

THE JULIAN ASSANGE CASE

Read the texts below.

Julian Assange arrest: How the extradition process works

WikiLeaks founder could face detention upon his return to Sweden after activation of European Arrest Warrant

Julian Assanges's arrest by police this morning will kickstart the fast-tracked extradition process, using the European Arrest Warrant system, to attempt to return him to Sweden, where he is wanted for questioning regarding a rape charge.

Swedish criminal law experts said this morning that little was known about the allegations Assange is facing in the country, in line with legal requirements to protect anonymity and preserve confidentiality for sex crimes.

The activation of a European Arrest Warrant (EAW) by UK police suggests Assange has been formally charged by Swedish prosecutors and could face a period of detention upon his return.

Assange's legal team is determined to fight his extradition on grounds including the failure of authorities to provide details of the warrant issued by Sweden. They will also claim human rights reasons, including the arguments that the WikiLeaks founder may be unfairly deprived of his liberty in Sweden and that he risks not facing a fair trial.

……..

If extradited to Sweden under the EAW – a process that could be concluded quickly under the fast-track procedure – Assange will be vulnerable to other extradition requests from countries including the US.

The US has an extradition treaty with Sweden since the 1960s. […] Extradition under the treaty is likely to face a number of obstacles, not least the fact that the likely charges facing Assange in the US – under the Espionage Act or other legislation protecting national security – are not included in the exhaustive list of offences set out in the law.

……..

Even if Assange's case falls outside the remit of Sweden's treaty with the US, there is scope for the country to agree to his extradition to the US.

Swedish law permits extradition more generally to countries outside Europe, although the process is subject to safeguards, including a ban on extradition for "political offences" or where the suspect has reasons to fear persecution on account of their membership of a social group or political beliefs.

Any extradition from Sweden to other countries could take place only after the current rape proceedings have been concluded. With Assange's lawyers confirming their intention to dispute those proceedings on all grounds, it seems the prospect of any extradition to the US remains some way away.

(from *The Guardian*, 7 December 2010)

The Julian Assange case: a mockery of extradition?

The European Arrest Warrant is being used to have thousands of people flown out to face charges that wouldn't stick in the UK

There may be many unintended consequences of the race to prosecute Julian Assange, the WikiLeaks founder. But as he faces extradition to Sweden, where he is accused of rape, one of the more eccentric side effects has already become clear: the rise to prominence of the European Arrest Warrant.

This legal instrument has been controversial since it was introduced in 2003, creating everyday injustices; but rarely has anyone outside the small group of lawyers that handles cases really cared. Now followers of the WikiLeaks story wonder how Assange could be extradited with so few questions asked. Why, for example, can our prisons detain someone (Assange is currently on remand in Wandsworth prison) for an offence under Swedish law that does not exist in British law? And how can a judge agree to an extradition without having seen enough evidence to make out a prima facie case?

The 2003 Extradition Act originated in an EU decision agreed just one week after 9/11. It was sold to voters as a way of ensuring cross-border cohesion in prosecuting suspects wanted across Europe for terrorism and serious crime. The level of cohesion in criminal justice systems across Europe, the argument went, and their common obligations under the European Convention on Human Rights, provided a sufficient basis of trust that an arrest warrant by an EU country could be agreed by the UK with little scrutiny.

It's been downhill from there. Around three people per day are now extradited from the UK, and there is little to suggest that the majority are terrorists or serious criminals. In fact those involved in the process agree that many of the cases are "trivial".

This month I watched proceedings in Westminster magistrates' court as Jacek Jaskolski, a disabled 58-year-old science teacher, fought an EAW issued against him by his native Poland. Jaskolski – also the primary carer for his disabled wife – has been in the UK since 2004. His crime? Ten years ago, when he still lived in Poland, Jaskolski went over his bank overdraft limit.

There are instances when unauthorized bank borrowing can have criminal elements, but this is not one of them. The bank recovered the money, and there is no allegation of dishonesty. A similar case in Britain would be a civil, not a criminal, matter.

But it is a criminal offence in Poland, where every criminal offence has to be investigated and prosecuted, no matter how trivial. As a result Poland requested 5,000 extraditions last year alone, accounting for 40% of all those dealt with by Britain. By contrast the UK made just 220 requests.

In 2008 a Polish man was extradited for theft of a dessert from a restaurant, using a European Arrest Warrant containing a list of the ingredients. People are being flown to Poland in specially chartered planes to answer charges that would not be thought worthy of an arrest in the UK, while we pick up the tab for police, court, experts' and lawyers' time to process a thousand cases a year. This whole costly system is based on the assumption that the criminal justice systems of countries such as Poland are reasonable enough that it is worth complying with all their requests.

The level of frustration with the failure of this assumption is now beyond question. Even David Blunkett, who as home secretary presided over the introduction of the system, has regrets. “There is room for improvement with the EAW”, Blunkett told the Commons home affairs committee this month. “When we agreed to the system we believed that people would act rationally.” The government is now conducting a review into extraditions, with a panel led by a former court of appeal judge and senior extradition barristers.

But the EAW is not a stand-alone measure – it was intended as part of a much more ambitious agenda for the harmonization of criminal justice systems across the EU. In January the European evidence warrant is meant to come into effect. Like the EAW, this would require Britain to give automatic recognition to search warrants issued by member states.

By next December the UK is supposed to have adopted mutual recognition of other states’ decisions on probation, bail, the transfer of prisoners, and the suspending of individuals’ finances. The Lisbon treaty, should the UK opt in, would take things even further. Opting out would still mean implementing the measures already agreed, and prevent negotiation of measures being applied in the rest of Europe.

In both the Assange and Jaskloski cases the EAW is set on a collision course where the labyrinthine world of EU mutual recognition meets the reality of defendants’ rights. And suddenly the mutual confidence that the public are meant to have in the criminal justice systems of other EU states – in Sweden’s immunity from pursuing a politically motivated rape claim, or Poland’s ability to be reasonable – does not seem to exist after all.

(The Guardian, December 10th, 2010)

1. Decide whether the following statements are true or false.

a. Julian Assange has been charged with rape by the Swedish prosecutors.

b. Assange’s lawyers do not intend to fight his extradition.

c. Sweden does not have an extradition treaty with the US.

d. Sweden may agree to Assange’s extradition to the US.

e. Assange’s extradition to the US is imminent.

f. The author of the two texts is a supporter of the European Arrest Warrant.

g. The European Arrest Warrant was intended for prosecuting “trivial” offences.

h. The EAW was aimed at enhancing the harmonization of criminal justice systems across the EU.

i. Lots of people were extradited by the UK for offences that do not exist in British law.

j. The EAW was intended and designed as a means of violating defendants’ rights.

2. Fill in the blanks with synonyms of the words in brackets.

a. The British authorities …… (try) to return Assange to Sweden, using the EAW system.

b. The …… (probable) charges facing Assange in the US are not included in the exhaustive list of offences set out in the law.

c. Swedish law …… (allows) extradition more generally to countries outside Europe.

d. One of the important safeguards is the …… (prohibition) on extradition for "political offences".

e. Assange's lawyers confirmed their intention to …… (challenge) the proceedings on all grounds.

f. Assange faces extradition to Sweden, where he is …… (charged with) rape.

g. Many of the offences for which extradition is requested are …… (minor).

h. Member States are meant to have mutual …… (trust) in the criminal justice systems of other EU States.

i. Assange wants to challenge the …… (accusations) against him.

3. Fill in the gaps with **little, a little, few, a few, much, many**.

a. Swedish criminal law experts said that …… was known about the allegations Assange is facing in the country.

b. There are …… core principles that the States must respect.

c. The UK made …… extradition requests.

d. There is …… to suggest that the majority of the extradited persons are terrorists or serious criminals.

e. The Commission encourages Member States to take …… more measures in order to enhance procedural safeguards.

f. …… people have requested legal aid so far.

g. Poland requested …… extraditions last year.

h. The Swedish judicial authorities don't say …… about the Assange case.

i. …… people challenged the extradition decisions against them.

j. In the field of procedural rights there is still …… to be done.

k. The …… knowledge he has and the …… things he knows about the extradition process are quite enough for him to be able to defend his rights.

l. Authorities should pay …… more attention to defendants' rights.

4. Complete the sentences below.

a. Julian Assange was charged with …….

b. Sweden requested Assange's …….

c. Assange's lawyers are determined to …….

d. Swedish law permits ……

e. The extradition process is subject to safeguards, including a ban on extradition for ……

f. The EAW was intended ……

5. a. Find arguments in the texts against the EAW.

b. Comment upon the author's position regarding the EAW.

c. Can the EAW affect defendants' rights? Bring arguments in favour of your answer.

Sweden followed normal procedure over Julian Assange arrest, court told

UK supreme court hears it is normal in Europe for prosecutors, rather than judges, to issue arrest warrants

Robert Booth

guardian.co.uk, Thursday 2 February 2012

Julian Assange and Sweden's QC, Clare Montgomery, at the supreme court on 2 February 2012. Photograph: Sky News

Sweden was right to allow its public prosecutor to demand the arrest of Julian Assange, the Wikileaks founder wanted in connection with allegations including rape, the UK's supreme court has been told.

The court heard that it was normal in Europe for prosecutors, rather than judges, to issue European arrest warrants.

The claim came on the second day of Assange's two-day appeal to the highest court in the UK against being sent to Sweden to face allegations relating to sexual encounters he had with two women in Stockholm in August 2010.

Clare Montgomery QC, appearing for the Swedish Judicial Authority, told the panel of seven senior judges that there was no obligation of impartiality on the authority that requests extradition.

She told them this had never been the case and that Sweden was acting within European law. She told the judges that to rule otherwise "would be a remarkable departure as a matter of history from all that had gone before".

The day began with Dinah Rose QC, acting for Assange, concluding her case by saying that the warrant was invalid because it breached "natural justice".

She argued that the Swedish prosecutor was a party in the Assange case and therefore not independent and impartial, breaching the principle that "no one should be judge in their own cause".

Montgomery said public prosecutors were allowed to request extradition through European arrest warrants as a "judicial authority". She mounted a detailed examination of the drafting of the European extradition law and its requirement of an "authorité judiciaire" to issue arrest warrants.

"It is quite clear that included in the natural, continental meaning [of authorité judiciaire is] public prosecutor," she said.

Montgomery attacked "all this rhetoric" by Assange's legal team "that suggests our construction makes the issuing of an arrest warrant a judge-free zone because in each case there will be an underlying court decision".

She said 11 European states had decreed that prosecutors would issue arrest warrants and that nine had said they would only use prosecutors to do so. She argued that prosecutors were more likely than a court to take into account whether a European arrest warrant was proportional.

Montgomery said it was clear that different countries defined authorities capable of requesting arrest warrants differently. In Finland it included the ministry of justice, in Denmark "public prosecution authorities", in Germany "competent judicial authorities" and in Sweden the "prosecutor general or any other prosecutor".

Montgomery commented that the Europe-wide agreement was "done at great speed, coming as it did on the heels of 9/11".

The judges asked what human rights protections flowed from her interpretation. "Arrest normally starts with a partial decision," Montgomery said.

"The English arrest warrant issued by a court is very much the exception. The protection [of human rights] lies in the requirement thereafter to provide him with an impartial tribunal. There is nothing to suggest a human rights construct requires you to impose impartiality on anybody seeking arrest."

Montgomery insisted that the term judicial authority "has a wide meaning". "It requires that because it serves the international purpose of being capable of allowing a system that does not have harmonious practices and procedures."

Rose was given just over an hour to make a final response. She said that far from each country seeing the concept of judicial authority differently, it was a "core term" in Europe that had been defined in the convention on human rights and had been tested in the courts.

It had to mean "independent of the executive" and independent of parties to the case, she said.

The conclusion of submissions represented the end of a series of legal hearings since Assange was arrested in December 2010 and could be the last time his case is heard in a British court.

The supreme court judges retired to consider their judgment, which will be reserved for what is expected to be several weeks. If they decide to uphold the high court ruling, Assange could be sent to Sweden for questioning within days.

REGINA v. BILL SMITH

At 14.10 hours on 15th December 2010 three man wearing black baseball caps and white sky jackets entered Barclays Bank King Street, London SW1.

As soon as they got inside the bank they each pulled black handkerchiefs up over the lower part of their faces and approached Jean West, one of the three cashiers on duty at that time.

One of the men (Male 1) pulled out a revolver, pointed it at Ms West and said "Get all the money from the three tills and give it to me. Do exactly as you are told or you will be shot." Ms West complied.

Meanwhile, the other two men had also produced guns, which they were pointing at the other cashiers and two customers who where in the bank in the time and who had been told to face the wall.

They put the money handed over by Ms West into two large holdalls and the three men put away their guns, pulled down the handkerchiefs that had been covering the lower part of their faces and left the bank. They ran straight to a black Ford Focus motor car that was parked immediately outside the Bank on double yellow lines (no parking at any time). The driver of the car was also wearing a black baseball cap.

Male 1 got into the front seat of the car and was heard by a young man, David Jones (a solicitor's clerk on his lunch break), who was at the cash point outside the bank and about 5 metres from the car to say to the driver "Let's go Wheels. Get us out of here". The car moved off with its wheels spinning but, about 100 metres from the bank, it was prevented from leaving King's Street by a passing police car that had been alerted by the emergency call from the bank and had driven across the road to prevent the car from getting away. The driver attempted to reverse the Ford Focus but could not do so because of the presence of other vehicles behind it.

Two police officers got out of the police car, approached the Ford Focus and arrested the four occupants on suspicion of robbery. The four men were cautioned and made no reply. By this time other police vehicles had arrived on the scene and they were taken away. The money from the bank was recovered from the holdalls found on the laps of the two men in the rear of the car. Each of the three passengers was found to be in possession of an imitation revolver. All four men were taken to Paddington Green Police Station where they were interviewed (questioned by police) and the interviews were tape recorded. The three passengers answered all the questions that were put to them and admitted their parts in the bank robbery. The driver declined to answer any of the questions he was asked. All four men were charged with robbery and appeared the following day at Westminster City Magistrates' Court. They were sent for trial to Inner London Crown Court where they appeared the following week. At a Plea and Case Management Hearing held subsequently the three passengers pleaded guilty to robbery and were later sentenced to lengthy terms of imprisonment. The driver, Bill Smith, pleaded not guilty and the case was adjourned for trial. The prosecution having served on Bill Smith's solicitors copies of the statements of all the prosecution witnesses, the Judge directed the defendant to serve a Defence Statement within 14 days. In it the defendant denied any involvement in the robbery and said that he had driven into London that day with his nephew, Tony Hughes, but had got lost and had stopped near a small tobacconist's shop where the nephew got out in order to ask for directions. He had kept his engine running in case the police came along as he realised that he had parked illegally. He was taken completely by surprise when the three men got into his car. The one who got into the front seat was holding a gun which he pointed at him and told him to drive off and get them out of there. He was very relieved when the police car blocked his path as he thought that the men were going to shoot him.

The prosecution decided to call the following witnesses at the trial:-

Jane West- the bank cashier.
David Jones- the young man who had been at the cash point.
Police Constable Holmes-the arresting officer. (Who had also interviewed the defendant).

The defence decided to call the defendant and his nephew Tony Hughes.
The dramatis personae for the trial are as follows:
His Honour Judge Jeffreys. Trial Judge.
Miss Carol Clegg. Court Clerk.
Fred Soames. Court Usher.
Bill Smith. Defendant.
Steven Sharp. Prosecuting Counsel.
Norman Wise. Defence Counsel.
Jane West.
David Jones.
Police Constable Holmes.
Three Jury members.

What is plain English?

Plain English is presenting information so that in a single reading, the intended audience can read, understand and act upon it. Plain English means writing with the audience in mind and presenting information clearly and accurately.

How do courts interpret laws?

Courts originally used a literal approach, meaning that the words in a law were interpreted exactly as they appeared, however ridiculous the effect. The legal system now more commonly uses a purposive approach, meaning the intended purpose of the law is taken into account. The legal rule 'noscitur a sociis' (literally, a thing is known by its associates) means that laws should be interpreted in their intended context.

What does this mean for drafting in plain English?

The experience of courts shows that attempts to make Acts of Parliament totally comprehensive with no room for different interpretations have failed. Trying to cover every eventuality does not work, and is not necessary when courts use their discretion. The argument that clarity should be sacrificed for a document to be comprehensive does not stand up.

Why are laws written in legalese?

- Laws were originally written in Latin or French, and many of the common terms are still being used.
- Drafters were once paid by the word, rather than by the job.
- Drafters prefer to use tried and tested clauses rather than risk using alternative language.
- Many laws were originally written by humble court clerks rather than skilled lawyers.

What are the main features of legalese and why do they cause problems?

Long sentences, often trying to cover several points

This may be because of a tradition of making each part of a bill or legal document only one sentence long. Experience shows that shorter sentences, each dealing with only one main point, are more effective. This does not have to mean using an over-simplified writing style, rather making a conscious effort to make each sentence serve one precise purpose.

Verbiage (using more words than are necessary)

As well as obscuring the message, this can be risky. Courts will usually assume that every word in an act is there for a reason, and unnecessary words may be interpreted in a way that the writer had not intended.

Too many double negatives

If double negatives are used, the reader has to perform mental gymnastics to understand the meaning of a sentence.

Being overly formal

This often includes using unfamiliar words where common ones would do just as well, although there is a minority of legal expressions, called 'terms of art', that have a precise meaning which cannot be achieved in plain English. A reader confronted with an overly formal, unfamiliar term will usually try to work out the difference between that term and the everyday alternative. When there is no difference, the reader will be on a fruitless task, which will harm their understanding of the text. If you have to use such expressions, it is best to provide the reader with a glossary explaining these terms at the beginning of the document.

What do other countries say?

United States

The National Conference of Commissioners on Uniform State Laws says: 'The essentials of good bill drafting are accuracy, brevity, clarity and simplicity. Choose words that are plain and commonly understood. Use language that conveys the intended meaning to every reader. Omit unnecessary words.'

Canada

The Uniform Law Conference's drafting conventions say: 'An Act should be written simply, clearly and concisely, with the required degree of precision, and as much as possible in ordinary language'.

European Union

EU guidelines say that 'the wording of (an) Act should be clear, simple, concise and unambiguous; unnecessary abbreviations, "community jargon" and excessively long sentences should be avoided'.

What are the arguments against plain English drafting, and are they valid?

'Plain English is simple, restrictive language, and takes away the skills of the drafter.'

Drafting a document in plain English takes a lot of skill. Communicating your points clearly so that the reader can accurately interpret your meaning is the most important task in writing. The draftsman's job is to communicate precise ideas, not produce a work of literature.

'There is no need to make legislation easy to read. It's not meant to be the same as a newspaper. People who want to read laws should educate themselves.'

Using plain English does not mean writing everything in the style of a tabloid newspaper. It means writing documents in a way that is appropriate for the audience. If a law affects people (for example, an employment law affecting small business), those people should have a fighting chance of understanding it. The language used in a law should depend on who the law affects, taking account of how familiar they are with the subject. Saying it is impossible to produce laws that everybody understands is no reason not to make it understandable to as

many people as possible. Plain English is not dumbing down.

'Plain English is not legally accurate or precise.'

This myth has been steadily and repeatedly shattered. In the United States, 44 of the 50 states have some form of requirement for insurance contracts to be written in plain English. Contrary to lawyers' expectations, there has never been a case where a contract has been declared less legally valid though being written in plain English.

Attempts to make text legally accurate through excessive (and impenetrable) detail are often flawed. For example, trying to define an organisation's powers through a comprehensive list will inevitably lead to problems. Eventually a situation that the drafter had not foreseen will arise. A perfect example is when new technology arises, such as when courts have to decide if a law applying to a posted letter also applies to an e-mail. Courts can use their discretion to settle such disputes, taking account of the law's intended purpose as well as its exact content.

In any case, this argument is based on the idea that existing legalese is perfectly accurate. If this were true, there would be far less need for lawyers to debate conflicting interpretations of a law or document. Drafters should aim for clarity and precision rather than choosing between the two.

'Plain-English drafting is too expensive and time-consuming.'

Our experience shows that rewriting legalese into plain English can take time, but this can be avoided by using clearer drafting in the first place. Even if the drafting takes longer, the new law or document will take less time to understand, and there will be less need for its meaning to be debated and explained. Studies in the Australian state of Victoria, which uses plain-English drafting, show that lawyers can understand and use a plain-English version of an act in between a half and a third of the time it takes with the traditional version.

What use would a purpose clause serve?

Given that English courts take into account the intention behind an Act, the purpose clause would be an extremely useful way for the drafter to give guidance for future disputes. The purpose clause would give a clear explanation of what a law should achieve, overriding any interpretation of its contents that appeared to contradict this aim. The purpose clause would also help the drafter, as a writer who starts with a clear outline of his message is far more likely to write that message clearly.

Is plain English drafting really possible?

Realistically, the idea of producing legal documents that everyone can understand on a single reading is unlikely, but not impossible. The law is the most important example of how words affect people's lives. If we cannot understand our rights, we have no rights.

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