Coroners and Justice Bill Part 5

Briefing and suggested amendments for Committee Stage House of Commons

February 2009

For further information contact

Jodie Blackstock, Senior Legal Officer (EU)
Email: jblackstock@justice.org.uk Tel: 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100
Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction and summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. This briefing raises our concerns as to the sweeping amendments that are proposed by Clause 124 - Treatment of convictions in other member States etc, the content of which is contained in Schedule 15. The Schedule amends domestic legislation pertaining to the consideration of criminal convictions pre-trial (bail), during trial (character) and post conviction (sentence) by imposing a mandatory requirement upon a tribunal to include convictions from other Member States in this consideration.

Schedule 15 - *Treatment of convictions in other member States etc*

3. The purpose of the amendments is to transpose the *Council Framework Decision of 24 July 2008 (2008/675/JHA) on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings*[1] ("the Framework Decision") into UK law. The Proposal for the Framework Decision explained[2] that currently there is no consensus between Member States as to how convictions from other Member States are considered, which is contrary to the mutual recognition principle and puts the citizens of Europe on an unequal footing.

4. The Proposal follows a White Paper[3] which sets out that the current system under Articles 13 and 22 of the 1959 *European Convention on Mutual Assistance in Criminal Matters*[4] has three problem areas: the difficulty in rapidly identifying the Member States in which individuals have already been convicted; the difficulty in obtaining information quickly and by a simple procedure; and the difficulty in

---

[11] O.J. L 220, 15.8.2008, P. 32

[2] Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings Brussels, 17.03.2005 COM(2005)91 final, p 2.

[3] White Paper on exchanges of information on convictions and the effect of such convictions in the European Union, COM(2005) 10 final.

[4] And supplemented by Article 4 of the Additional Protocol dated 17 March 1978

understanding the information provided. To this end, two stages were proposed, the first in which recognition of convictions is established, and the second where the means by which the convictions can be obtained is created. Although both stages were proposed and scrutinised, it is only the Framework Decision on taking account of convictions that has been adopted so far. Member States must implement this Framework Decision by 15th August 2010.

5. Whilst we agreed overall with the Explanatory Notes to the Bill that the amendments do not change the existing provisions and simply extend the ambit of a court's consideration to include foreign convictions, without a comprehensive and regulated system in place, there is no way of *effectively* recognising convictions from other Member States. We consider the following examples, amongst others, highlight the practical problems tribunals will face in giving effect to the amendments whilst continuing to fulfill their obligations to act in the interests of justice:

- Proposed section 73(2)(c) provides that a certificate, signed by the proper officer of the court where the conviction took place, giving details of the offence, conviction, and sentence will be proof of conviction. This presumes that the type of offence, conviction and sentence are equivalent to that of the UK. In the context of 27 countries with different cultural and historical premises upon which their punitive systems are based, and resulting different legal systems, this will not be the case.

- Where a particular type of offence or repeat offending results in a particular sentence under UK law, the non-UK conviction would have a significant bearing upon the outcome.

- No mechanism is included in the Bill to indicate how a tribunal might take account of the information received to conclude a decision on bail, character, or sentence.

- There are no provisions by which explanatory information as to the penal or sentencing system(s) in the other Member State(s) may be requested by the tribunal, upon which an attempt to equate the conviction(s) with the UK counterpart can be made.

- No procedure is constructed in the Bill to deal with *obtaining* those foreign convictions. Should adjournments be granted where full convictions are not to hand or are not understood, thereby extending the period during which a Defendant is remanded in custody?

- No mechanism is proposed to consider the trial procedure that gave rise to the conviction(s) and whether that should have an effect on its application. For example, how is the tribunal to know whether the conviction is as a result of a trial in absentia which does not comply with UK law? Was evidence accepted that would be excluded in a UK case? Did the trial comply with UK standards with respect to representation and/or interpretation?

- No consideration is given to what happens to the information once it has been provided. Is there an obligation upon the UK to retain that information and incorporate it into the PNC on that person? How does that accord with data protection considerations? If not incorporated, what measures are to be taken to explain why the sentence passed was imposed?

- The Framework Decision requires the provision of convictions to other Member States. No proposal deals with how this would be effected.

- Spent convictions are not protected in the Framework Decision. The Select Committee on European Scrutiny in its Second Report of 2005 whilst considering the Framework decision raised this issue. The then Parliamentary Under-Secretary of State at the Home Office (Andrew Burnham) in his Explanatory Memorandum of 23 May 2005 explained that a spent conviction was not a concept commonly found in other Member States and whilst acting within the atmosphere of mutual recognition,

> *we would wish to ensure that UK nationals do not receive unfair treatment on account of spent convictions. It may be that we will seek to include a reference to spent convictions not being taken into account by an overseas court, if that*

spent conviction would not be taken into account by a United Kingdom court[5]

This was not achieved and the result is that each Member State is to take account of convictions in accordance with their national law. It follows therefore that where a conviction is spent for the purposes of criminal proceedings in the UK and would not be relied upon in a UK court, the conviction may be used in another Member State to impose more onerous conditions upon a Defendant's treatment. There is no proposal to prevent this.

6. The *Proposal for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States*[6] goes some way to dealing with the practical sharing of convictions, but by no means considers all of the above issues. It is anticipated that the Proposal in its final form will be adopted by the Council at the end of February, and will then have to be implemented within three years of its entry into force.

7. Article 11 states that a standardised format shall be adopted for the transmission of convictions. To this end, *Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA*[7], envisages the creation of a system based on decentralised information technology, where criminal records data will be stored solely in databases operated by Member States and are transferable. A uniform format for transmission is proposed which adopts a numerical code to identify each crime and method of involvement. A Committee is envisaged to oversee the technical development of the programme. Pilot projects are currently being undertaken as to the use of such a system. The Council is also expected to adopt this Decision towards the end of February.

---

[5] Select Committee on European Scrutiny, Chap. 6, *Taking previous convictions into account in new criminal proceedings* , HC, 13.07.05 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-ii/3408.htm, para 6.21

[6] COM(2005) 690 final

[7] COM(2008) 332 final

8. The European Data Protection Supervisor, Peter Hustinx, offered an opinion on the Proposal on 16th September 2008[8] in which he voiced the following concerns, with which we concur,

> *The processing of personal data relating to criminal convictions is of a sensitive nature, and the confidentiality and integrity of criminal records data sent to other Member States must be guaranteed. It is therefore paramount that high standards of data protection be applied to the functioning of the system, which should ensure a solid technical infrastructure, a high quality of information and an effective supervision.*

9. We also share the EDPS' views that the use of automatic translations**,** as proposed in the Decisions, should be clearly defined and circumscribed, so as to favour mutual understanding of criminal offences without affecting the quality of the information transmitted. Clearly much work is needed to create a system in which convictions can be exchanged with confidence and understanding.

10. No mention is made in the proposed amendments of these two equally important instruments, which provide the practical construct upon which the principal of recognition rests. Whilst we acknowledge that there is an obligation to implement the Framework Decision within a finite period, passing that obligation on to the criminal justice system by means of amendments proposed in the 15th Schedule to an already heavily burdened Bill, is an inappropriate means of giving effect to the instrument's intentions and affording sufficient time to its consideration.

11. **We consider that the wide ranging effect of Schedule 15 should not be taken forward until the mechanisms for mutual recognition have been adopted. No benefit lies in imposing a mandatory obligation upon UK criminal tribunals and practitioners to take into consideration convictions from other Member States when the implementing system by which to do so is not yet available. We therefore oppose the Schedule in its entirety.**

---

[8] http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2008/08-09-16_ECRIS_EN.pdf

Amendment

Notwithstanding our position, we note that paragraphs 1 and 2 of Schedule 15 refer to where '*a defendant has been convicted of an offence under the law of* ***any country****…*' throughout. The amendments should clearly be restricted to European Union Members States.

JUSTICE

February 2009