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Cross-border execution of judgements involving deprivation of liberty in the EU.

Need for action to correct the operation and implications of the Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty.

Introduction and background

The adoption of mutual recognition as the cornerstone of judicial cooperation in criminal matters within the European Union has resulted in an extension of the EU *acquis* via a range of legal instruments designed to give effect to the 'area of freedom, security and justice' as envisaged by the Amsterdam Treaty. One of these instruments is the 2008 Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU, due to be fully implemented by the end of 2011.

The introduction of this Framework Decision immediately sparked discussions as to whether the operation of the instrument would be compatible with its very objective, being the enhancement of detained persons' social rehabilitation prospects.

In an important speech to the European Law Academy given in March 2010, the European Commission Vice President, Ms. Viviane Reding, highlighted a range of concerns relating to prison conditions in EU member states. Citing both the European Convention on Human Rights and the EU Charter of Fundamental Rights, the Commissioner warned that inhuman or degrading prison conditions had the potential to seriously undermine new EU rules on prisoner transfer.

However, material detention conditions are not the only factor that has to be taken into account. Transferring detainees back to their respective member state of residence and/or nationality is somewhat precarious in light of the often substantial variety of member states' legal systems with regards to sentence execution modalities and variations in member states' provisions of early/conditional release. Coupled to the fact that the Framework Decision implies a shift from a voluntary to an often obligatory transfer system where the consent of the detainee is no longer necessary, these differences could result in a deteriorated detention position for the detainee as a consequence of a transfer.

Study

In this context, and following a call for tender by the European Commission, the biggest study to date on member states' material detention conditions as well as on early/conditional release and earned remission provisions and sentence execution modalities was conducted by the Institute for International Research on Criminal Policy (IRCP).

Conclusions

The results identified often subordinate material detention conditions in most member states, which could potentially infringe on prisoners' fundamental rights under the European Convention on Human Rights. In this regard it is alarming to acknowledge that a vast number of inferior standards derive from binding European and international norms and standards and/or ECtHR's jurisprudence.

Problems were also identified with regard to the abolition of double criminality requirements, the sentencing equivalence and the sentence execution. Because of the abolition of double criminality requirements for some offences executing states are in the dark about what to do in situations where either the underlying behaviour does not constitute an offence according to their national law or the offence is not criminally actionable (anymore). Even more worrying is the fact that the Framework Decision does not provide any protecting mechanisms when a transfer would result in a detainee being subjected to a more stringent execution regime. This could lead to a *de facto* prolongation of his/her detention or to a deterioration of his/her detention position.

It also appeared that too many practitioners do not sufficiently acknowledge that social rehabilitation is the very objective of the Framework Decision and that this should be assessed on a case by case basis, taking account of all relevant information available.

In this context it is an imminent danger that member states do not take their responsibilities in respect of assessing the prospects of a prisoner's social rehabilitation seriously and choose to use the Framework Decision as a blunt instrument by which foreign prisoners with EU nationality can be routinely sent back to their country of origin. Such an interpretation may seem easier to justify from the perspective of member states who are likely to be 'net exporters' of prisoners but it remains to be seen however, whether member states who will be required to accept large numbers of prisoners will share this view. The result of a blunt application of the instrument would lead to increased legal action against transfer decisions, by prisoners as well as by member states.

Recommendations

The most important set of recommended flanking measures contains a number of specific amendments and corrections to the Framework Decision. These alterations are necessary not only for a good functioning of the instrument but even more so to protect the social rehabilitation prospects of the prisoner, thus reinforcing the main objective of the Framework Decision. These measures include the introduction of a general *lex mitior* principle (to safeguard sentencing equivalence and to support sentence execution) and the introduction of a motivational duty for issuing states, supporting that a transfer is likely to effectively enhance the social rehabilitation prospects of the detainee.

The second set of flanking measures are intended to play a supportive role for the functioning of the Framework Decision by enhancing knowledge of the implications of the Framework Decision and enhancing access to information on member states' detention conditions and sentence execution policies. Additionally, material detention conditions should be enhanced in all member states through promotion of training and best practice as well as by increasing the frequency of CPT inspections.

The third set of recommendations will need time, on the one hand because political agreement will be necessary and on the other because they imply more and thorough studying and investigation. However, the momentum should be seized to start up or to proceed and enhance work on a number of issues, including the drafting of conversion tables and severity rankings in order to moderate sentencing equivalence and the drawing up of a mapping exercise and drafting of severity rankings with regard to sentence execution modalities in order to moderate transfer decisions.

It is important to underline that it is not recommended to introduce yet another set of binding minimum detention standards by the EU, mainly because there are already sufficient binding instruments and documents setting out detention norms and standards. It is however recommended to enforce these European and international norms and standards through a motivational duty that should rest upon the issuing states' competent authorities wanting to start up the transfer process.

A motivated transfer decision should at least contain the following information:

- a well documented guarantee that the rehabilitation prospects will be enhanced as a result of the transfer decision;
- a well documented and legally underpinned determination that a transfer will not *unreasonably aggravate* the detained person's detention position following an adaptation of the original sentence in terms of nature;
- a well documented and legally underpinned determination that a transfer will not *unreasonably aggravate* the detained person's detention position following the enforcement of a different set of sentence execution modalities and/or early/conditional release and/or earned remission provisions;
- a well documented determination that the material detention conditions in the executing state's prison are sufficiently high in light of European and international norms and standards including the European Prison Rules and ECtHR's jurisprudence.

This motivational duty provides detainees the necessary guarantees that they will not be transferred to a country where detention conditions are sub-optimal. The indirect consequence of the motivational duty is that, in order for the Framework Decision to be operational, member states will experience peer pressure to raise their detention standards to a satisfactory level as otherwise other member states will not be able to transfer detainees to that member state. Hence, this mode of operation enforces the already existing - and often binding - norms and standards without creating/duplicating yet another set of obligations and entitles detainees the right to legal action before a court having jurisdiction in criminal matters when the detainee feels that the transfer decision is likely to negatively affect his/her rehabilitation prospects.