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Free Movement and Criminal Law

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Introduction

One of the claims frequently made by critics of freedom of movement is that free movement of EU citizens is unlimited, even when these citizens have committed criminal offences. The purpose of this note is to provide an overview of the growing inter-relationship between EU free movement law and criminal law and to demonstrate the current limitations that criminal law imperatives can place on freedom of movement. At the same time, it will stress that derogations to free movement on grounds of security and criminal policy must be interpreted restrictively and applied in full compliance with fundamental rights, including the EU Charter of Fundamental Rights.

The note will focus on four main areas of intersection between free movement law and criminal law:

- the relationship between criminal law and security of residence—by looking at the extent to which Member States can expel EU citizens under the Citizens' Directive
- the avenues provided to Member States when EU citizens possessing criminal convictions move to their territory—by focusing on the operation of the EU system of exchange of information on criminal records
- the powers granted by EU law to pursue individuals who are deemed to have committed criminal offences and individuals who have fled a prison sentence under the European Arrest Warrant (EAW) system, and
- the expanding surveillance of movement and mobility into and within the European Union, by examining current proposals to establish a European Union 'PNR' (Passenger Name Record) system, under which carriers are obligated to transmit a wide range of personal data of all passengers to national authorities prior to travel.

Deporting EU citizens: criminal law as a limit to protection against expulsion and exclusion

The Citizens' Directive provides security of residence for EU citizens living in another Member State by allowing expulsion in limited and clearly defined circumstances on the grounds of public policy and public security (Article 28).

This includes a sliding scale of enhanced protection, so that EU citizens who have obtained permanent residence can only be expelled on 'serious' public security or public policy grounds, and those who have continuously resided in another Member State for the last 10 years can only be expelled from that state on 'imperative' grounds of public security.

The Citizens' Directive also allows Member States to exclude the entry of EU citizens on public policy and public security grounds, which is also subject to specific limitations (Article 27).

Whilst Member States, 'essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs' (*PI* Case C-348/09 (discussed below)), the concepts of public policy and public security have autonomous EU meanings and a key task for the Court of Justice of the EU (CJEU) has been to define them for the purposes of Articles 27 and 28.

The Court has interpreted the public policy ground to require a 'genuine and sufficiently serious threat to a fundamental interest of society' (see eg *Rutili* Case C-36/75). Member States may demonstrate that the activity in question falls within the rubric of public policy by demonstrating the existence of measures taken against their own nationals in comparable circumstances. Many criminal penalties will fall within the public policy ground of expulsion and/or exclusion, provided they are, following an individualised assessment, 'sufficiently serious'. The definition of public security is different. It has recently been described as '[a] threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests' (*Tsakouridis* Case C-145/09).

Criminal law considerations have arisen particularly in two recent cases, where the CJEU has broadened the scope of the public security ground of expulsion, thus further facilitating the expulsion of EU citizens.

In *Tsakouridis*, the Court noted that the fight against crime in connection with drug dealing as part of an organised group could fall within the concept of public security. The Court took into account the existence of a secondary EU criminal law instrument, namely Framework Decision 2004/757/JHA, which lays down minimum rules regarding the constituent elements of criminal acts and penalties in the area of illicit drug trafficking. The Court emphasised the special characteristics of this criminal activity, in particular the negative consequences of drug addiction and its extraordinary economic and operational resources and transnational links. It concluded that dealing narcotics as part of an organised criminal group could reach a level of intensity that might directly threaten the physical security of the population as a whole or a large part of it, thus making it a threat that could lead to an expulsion on imperative public security grounds (ie even following 10 or more years' residence).

In *PI*, the Court confirmed that the commission of another criminal offence, the sexual exploitation of children, could also fall within the scope of the public security exception. The Court referred to the EU competence in adopting legislation in criminal matters and particularly to Article 83(1) TFEU, which includes the sexual exploitation of children among the crimes of particularly serious nature and cross-border dimension where the EU legislature may intervene. It also made reference to Directive 2011/93/EU (on combating the sexual abuse and sexual exploitation of children and child pornography) as the outcome of the exercise of this competence. According to the Court, sexual exploitation of children as well as all of the other the criminal offences stated in Art. 83(1), TFEU may constitute a serious threat to the calm and physical security of the population and thus fall within the concept of 'imperative grounds of public security' so long as the way these acts were committed carry particularly serious characteristics. Such serious offences may constitute particularly grave threats to one of the fundamental interests of society, which in turn may directly threaten the calm and physical security of the population.

In *Tsakouridis* and *PI*, the Court expanded considerably the concept of public security to include breaches of criminal law even where these breaches (even in cases of serious crime), may not necessarily have the effect of threatening the population as a whole. Especially in *PI*, the Court has appeared to use Article 83(1) TFEU not for its intended purpose (ie as a provision determining the competence of the EU to impose criminal liability), but as symbolic criminal law enabling Member States to justify considerable inroads into security of residence for EU citizens. [i]

In addition to providing definition and content for the concepts of public policy and public security, the case law of the CJEU also establishes a number of principles, common to the consideration of both grounds of expulsion and/or exclusion. These include requirements that the decision to deport or exclude an EU citizen must be based exclusively on his/her personal conduct, that the person facing deportation must be a 'present threat', and that the decision must respect the principle of proportionality and the fundamental rights of the person facing exclusion and/or expulsion as well as those of his/her family members.

For some examples of the UK Home Office's approach, see its guidance to caseworkers: Exclusion of EEA nationals and their family members from the UK.

The issue of exclusion and expulsion of EU citizens also featured up in the renegotiated settlement agreed between the UK and EU in February 2016. The agreed measures will be implemented if the UK votes to Remain. They include the Commission revisiting the serious and imperative grounds thresholds at the time of a future revision of the Citizens' Directive, and in the meantime issuing new guidance to 'clarify':

- that Member States may take into account past conduct of an individual in determining whether their conduct poses a present threat to public policy and public security
- that Member States may act on grounds of public policy or public security even in the absence of a previous criminal conviction on preventative grounds but specific to the individual concerned, and
- the definitions of serious grounds of public policy and imperative grounds of public security

Checking EU citizens' criminal records: the EU criminal record exchange system

Another claim that is made is that free movement enables the entry into the territory of Member States of EU citizens who have been convicted of criminal offences in their Member States of nationality or residence.

However EU law has developed an extensive mechanism of exchange of information of criminal records of EU citizens, which should enable national authorities to have a full picture of the criminal record status of EU citizens who enter their territory.

There are two main elements of the EU-wide system of exchange of criminal records, which are detailed below. Note that the UK also has access to information on the Schengen Information System database in relation to policing and criminal justice matters, for which see the separate paper in this collection on the EU's borders: Schengen, Frontex and the UK.

Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States calls for the establishment of a central authority for managing criminal records in each Member State. In addition, it places the central authority of the convicting Member State under the obligation to inform the central authorities of other Member States immediately of any convictions handed down within its territory against the nationals of such other Member States, as entered in the criminal record. Information provided includes information on the nature of the criminal conviction, the offence giving rise to the conviction and the contents of the conviction.

A parallel Decision on the establishment of the European Criminal Records Information System (ECRIS) establishes ECRIS as a decentralised information technology system based on the criminal records databases in each Member State composed of interconnected software enabling the exchange of information between Member States criminal records databases and a common communication infrastructure that provides an encrypted network. These legislative instruments have provided a solid EU-wide mechanism of exchange of criminal records, which according to the European Commission has led to significant progress in improving the exchange of criminal records information within the Union.

This view is shared by the UK Government, which has noted that the EU system 'has allowed the police to build a fuller picture of offending by UK nationals and allowed the courts to be aware of the previous offending of EU nationals being prosecuted. The previous conviction information can be used for bail, bad character and sentencing, as well as by the prison and probation service when dealing with the offender once sentenced'.

After the Paris attacks, the Commission has proposed legislation extending the exchange of criminal records to third-country nationals, a move which the UK Government seems to support in principle.

Bringing to justice individuals fleeing prosecution or custody: the European Arrest Warrant system

The Framework Decision on the European Arrest Warrant is the most emblematic and widely implemented EU criminal law instrument. It aims to compensate for the freedom of movement enabled by the abolition of internal borders by ensuring that Member States' justice systems can reach extraterritorially in order to bring individuals who have taken advantage of the abolition of borders to flee the jurisdiction to face justice. The Framework Decision applies the principle of mutual recognition and has established a system which requires the recognition of EAWs and the surrender of individuals wanted for prosecution or to serve a custodial sentence with a minimum of formality, automaticity, and speed.[ii] A key innovation introduced is the in-principle abolition of the non-extradition of own nationals.

Mutual recognition is based on mutual trust, founded on the presumption that EU Member States are in principle human rights compliant. This presumption of trust has been recently highlighted by the CJEU in its Opinion 2/13 on the accession of the EU to the European Convention on Human Rights, where the Court elevated mutual trust into a principle of fundamental importance in EU law.

However critics of the EAW system have rightly pointed out that the presumption of trust is not always justified, with human rights violations being ascertained across EU Member States by the European Court of Human Rights on a regular basis. A key question related to the legitimacy of the EAW system is whether it can operate on the basis of blind trust, or whether national authorities have any leeway to examine the consequences of executing Warrants for the human rights of the requested persons.

EU law has dealt with the human rights concerns arising from the operation of the EAW system in three main ways: by allowing national authorities to consider refusing to execute warrants if there are concerns that execution would result in human rights breaches; by introducing a test of proportionality in the operation of the EAW system; and by legislating for human rights, namely adopting legally binding instruments harmonising defence rights legislation in addition to aiming to facilitate the operation of mutual recognition.[iii] In terms of taking into account human rights by the executing authorities, it is noteworthy that with the exception of a general human rights clause (Article 1 (3)) - the operative provisions of the Framework Decision do not include a ground of refusal to execute an EAW on human rights grounds. However, a number of EU Member States, including the UK in the Extradition Act 2003, have 'goldplated' transposition by expressly including human rights grounds for refusal in nationally implementing law. Significantly, the CJEU has recently confirmed that execution may be refused on human rights grounds.

Preventing the entry of individuals deemed to pose security threats: the introduction of an EU PNR system

Thus far the analysis has focused on individuals who are within the criminal justice system—either the subjects of criminal convictions or the subjects of criminal prosecutions. However, EU security law—in particular within a counter-terrorism framing—is increasingly moving to limit free movement also at stages before the criminal justice process, with the aim of not punishing, but preventing wrong-doing. The emphasis on prevention, with a focus on the surveillance of movement, has appeared prominently in the US context after 9/11. A

key example has been the introduction of US law requiring airlines flying into the USA to send to US authorities a wide range of personal data on all passengers travelling (so-called passenger name record/'PNR' data). The EU has had to comply with this request, legitimising the transfer of personal data via the signature of a number of transatlantic agreements, the last one—and currently in force—signed in 2012.

Although a number of efforts have been made by EU institutions to introduce such a system in EU law, human rights concerns and political push-back by the European Parliament has resulted in the stalling of efforts for the introduction of an 'EU' PNR model. However, this was until the Paris attacks. Since Paris, widening the net of surveillance in a catch-all basis, to also include citizens (targeting 'foreign fighters') has resulted in swift initiatives towards the internalisation of a PNR transfer model in EU law. At the time of writing, the EU PNR Directive has been agreed by the Council and the European Parliament and is awaiting publication in the Official Journal. It introduces an EU PNR system for flights flying into the EU, with Member States being given the option to apply it also to intra-EU flights. A system of generalised surveillance of movement, including the movement of EU citizens, is thus established in the EU. This development cements the move from the control of movement of third-country nationals to also the control the movement of EU nationals into and within the EU.[iv] The Directive has been welcomed by UK security professionals as a significant step towards the security of the EU and the UK.[v] However, its compatibility with both human rights and free movement law remains to be tested. In terms of human rights law, the Directive introduces a system of generalised surveillance which may fall foul of the right to privacy as defended by the CJEU in the cases of *Digital Rights Ireland* and *Schrems*. The Directive may also fall foul of free movement and Schengen law, in particular following the interpretation of the extent of the permissibility of police checks under the Schengen Borders Code by the CJEU.[vi]

References

[i] V. Mitsilegas, *EU Criminal Law After Lisbon*, Hart, 2016, chapter 8.
[ii] V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', in *Common Market Law Review*, vol.43, 2006, pp. 1277-1311.
[iii] V. Mitsilegas, 'Mutual Recognition, Mutual Trust and Fundamental Rights After Lisbon' in V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law,* Edward Elgar, 2016, pp.148-168
[iv] V. Mitsilegas, 'The Borders Paradox. The Surveillance of Movement in a Union without Internal Frontiers', in H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Faultlines of the EU's Area of Freedom, Security and Justice*, Hart, 2009, pp.33-64
See also the recent Commission proposal to amend the Schengen Borders Code which introdues in Article 7(2) of the Code an obligation for border guards to carry out systematic checks on persons enjoying the right of free movement under EU law when they cross the external border both at entry and at exit against databases on lost and stolen documents as well as in order to verify that the persons do not represent a threat to public order and internal security. COM(2015) 670 final.
[v] *'The EU can't dictate to us on security but staying in it can keep us safer'* Jonathan Evans and John Sawers (former heads of MI5 and MI6 respectively), The Sunday Times, 8 May 2016.
[vi] See N. Vavoula, Back from the Dead and Standing on Travellers' Doorstep- the Case of the EU PNR Directive, *Open Democracy,* 9 February 2016.