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Making the case for ECRIS: Post “Brexit” sharing of criminal records information between the European Union and United Kingdom

Abstract

Criminal record information has various uses including, in the detection of crime, as evidence in criminal proceedings, in consideration of an appropriate sentence after conviction and in determining the suitability of an individual for, or providing a bar to, employment. As such this information can have a high value but can also significantly interfere with a person’s right to private and family life under Article 8 of the European Convention on Human Rights. The importance of Article 8 in this area has been increasingly recognised in both domestically and in Strasbourg with such case law making clear the imperative that criminal record information is accurate, retained and disclosed only in proper circumstances and, where appropriate, is capable of being subject to proper challenge. The operation of the European Criminal Records Information System (ECRIS) for exchange of criminal records between member states is explored and the benefits and risks of exchanging criminal records information within such an automated system are identified. The compliance of ECRIS to Article 8 ECHR is considered and suggestions made for future improvements. Evidence is provided that ECRIS constitutes a singular improvement on earlier ad-hoc arrangements and should therefore be retained by the United Kingdom post-Brexit.

Keywords: Criminal records; ECRIS; criminal justice co-operation; Brexit; information sharing; Article 8 ECHR.

Introduction

The European Criminal Records Information System (ECRIS) was established in 2012 to enable Member States to exchange criminal records information for criminal justice purposes. Currently Member States send approximately 288,000 requests per year on previous criminal convictions across the EU through ECRIS¹. The European Commission is currently in the process of expanding the system to include the exchange of criminal records information of non-EU citizens.² The position of the United Kingdom within the European Union is currently the subject of major uncertainty following the result of the referendum held on the 23rd June 2016 in which the United Kingdom voted by a majority of 52% to 48% to leave the European Union (“Brexit”). The timescale and mechanism for the withdrawal of the United Kingdom from the European Union and the nature of the future relationship is, at the time of writing, unknown. What is clear is that there is likely to be a protracted series of negotiations to establish new (or retain existing) UK – EU relationships in areas such as trade, migration and criminal justice co-operation.

¹ European Commission Press Release 19th January 2016: http://europa.eu/rapid/press-release_IP-16-87_en.htm
<last accessed 18 November 2016>

² n. 1

This paper will present a case supporting the retention of ECRIS as part of post-Brexit UK – EU criminal justice co-operation and, by reviewing the operation of the system and its compliance with Article 8 ECHR seek to provide a justification for the retention of ECRIS as the fairest, most efficient and most robust mechanism of exchange available. It is clear that the sharing of information in a Union predicated on the free movement of citizens is essential to the maintenance of law and order. It is contended that due to the current high numbers of EU citizens resident in the UK (and vice versa) as well as the likelihood that any post-Brexit access to the European free market will require at least some form of free movement agreement the sharing of criminal justice information between the UK and EU will remain imperative.

As identified above, consideration will be given to the operation of ECRIS and the extent to which the current system for the automatic transmission of criminal records information allows Member States to understand and utilise the information received in a fair, reliable and lawful way. Equally any automated system has to ensure that the information which is exchanged is accurate, retained and disclosed only in proper circumstances and, where appropriate, subject to challenge. The considerable benefits offered by ECRIS will be emphasised and any continuing difficulties identified, drawing *inter alia* upon the authors' findings from a pre-ECRIS research project. Although there have been significant case law developments in relation to the

proportionality of the UK system of recording and sharing criminal records information³ there has been little review or consideration of the ECRIS system to date. The potential Article 8 implications emanating from the exchange of criminal records information via ECRIS will be explored and suggestions for appropriate changes in policy and practice will be made.

Criminal records information may be used for a number of purposes including; in evidence in criminal proceedings⁴, the determination of an appropriate sentence following conviction⁵ and in determining the suitability of an individual for, or in some instances providing a bar to, employment⁶. The European Union has set itself the objective of providing citizens with a high level of safety within the area of freedom, security and justice⁷. In a Union which facilitates the free movement of its citizens it is perhaps axiomatic that achieving this objective presupposes the exchange, between the

³ See, for example, *R (on the application of P) v Secretary of State for Justice* [2016] EWHC 89 (Admin); *Gallagher's Application for Judicial Review, Re* [2015] NIQB 63; *R. (on the application of T) v Chief Constable of Greater Manchester* [2014] UKSC 35; *MM v United Kingdom* (24029/07) ECHR; 13 November 2012; *R. (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3. See also Grace, J., *Old convictions never die, they just fade away: the permanency of convictions and cautions for criminal offences in the UK*, J. Crim. L. (2014) 78(2), 121-135

⁴ For example; in determining whether a defendant is entitled to a good character direction, see *R v Benjamin* [2015] EWCA Crim 1377; or as evidence of a defendant's bad character subject to the application of Part 11, Chapter 1 of the Criminal Justice Act 2003, see *R v Cortes Plaza* [2013] EWCA Crim 501; *R v Brooks* [2014] EWCA Crim 562; *R v Mehmedov* [2014] EWCA Crim 1523.

⁵ In England and Wales, by virtue of s.143 (2) of the Criminal Justice Act 2003, a sentencing court when determining the seriousness of an offence must consider a defendant's previous conviction(s) as an aggravating factor provided the conviction(s) can reasonably be so treated having regard, in particular, to the nature of the offence(s) and its relevance to the current offence(s) and the time that has elapsed since conviction.

⁶ See *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3.

⁷ Article 67(3) Treaty on the Functioning of the European Union 2012/C 326/01

competent authorities of the Member States, of information extracted from criminal records⁸. This is emphasised, in the context of criminal proceedings by the requirement of Article 3(1) of Council Framework Decision 2008/675/JHA that:

Each member state shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other member states, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.

The case of Michel Fourniret⁹ provides a cogent example of the need for such information exchange between Member States. In 1987 Fourniret was sentenced to 7 years imprisonment in France for sexual offences involving minors. He was released after less than one year in custody for a combination of good behaviour and due to a period of time spent in custody prior to his conviction. Following his release Fourniret

⁸ V Mitsilegas. *EU criminal law*. Bloomsbury Publishing, 2009. Chapter 5; J Monar. *The EU's approach post-September 11: global terrorism as a multidimensional law enforcement challenge*. Cambridge Review of International Affairs 20.2 (2007): 267-283.

⁹ For a discussion of the Fourniret case see SJ Leistadt, P Linkowski & X Bongaerts. *The Myth of Virginity: The Case of a Franco-Belgian Serial Killer*, (2011) *J Forensic Sci*, 56(4), 1064-1071

moved to Belgium where he was able to secure employment as a school supervisor as a result of the Belgian authorities being unaware of his convictions. In 2004 Fourniret admitted murdering nine young women and girls in the Ardennes border region between Belgium and France. In respect of the fact that Fourniret's previous convictions for sexual offences had not been shared with other Member States, the French Public Prosecutor, Yves Charpenel, commented in an interview with AFP news; "At the time there were no laws to ensure the traceability of sexual offenders, so in my view there were no failures of the system, given the judicial context at the time."¹⁰ More recently terror attacks in Paris and Brussels have again highlighted the need for effective information sharing between Member States. Věra Jourová, Commissioner for Justice, Consumers and Gender Equality stated 'the Paris attacks in November confirmed the urgent need for more robust and seamless judicial cooperation throughout the EU'.¹¹

In the United Kingdom the murder of teenager Alice Gross by Latvian national Arnis Zalkalns in August 2014 further highlights the importance of accurate and timely exchange of information between Member States. Zalkalns, who subsequently took his own life before he could be arrested and prosecuted, had a previous conviction for murder in Latvia, which the Metropolitan Police only became aware of after his disappearance and emergence as a suspect in the murder of Alice Gross. Dr Fiona Wilcox, the coroner who conducted the inquest into Alice Gross's death indicated that

¹⁰ <http://news.bbc.co.uk/1/hi/world/europe/3875987.stm> <last accessed 18 November 2016>

¹¹ n. 1

she would recommend to the Home Office that police forces should make “mandatory” criminal records checks on foreign nationals following their arrest.¹²

The operation of ECRIS

The cases of Fourniret and Zalkalns highlight the value of a system allowing the reliable exchange of criminal records information between Member States, particularly in the context of free movement across borders. The need to share such information is the basis of Council Framework Decision 2009/315/JHA which established the ECRIS. This system was designed to achieve an efficient, uniform exchange of information on criminal convictions between EU member states and to ensure that an individual’s criminal conviction was effectively communicated and stored regardless of where in the EU that person was convicted of the offence.

Council Framework Decision 2009/316/JHA implemented Council Framework Decision 2009/315/JHA in order to build and develop a computerised system of exchange of information on convictions between Member States¹³. The Framework Decision required the establishment of “a standardised format allowing information to

12 Alice Gross coroner calls for immigration checks on foreign nationals, 4th July 2016, The Independent. Available at; <http://www.independent.co.uk/news/uk/crime/alice-gross-murder-inquest-coroner-home-office-death-14-year-old-girl-a7119391.html>. <last accessed 18 November 2016>

¹³ The development of ECRIS was partially based on the results of studies previously conducted by IRCP: G Vermeulen, T Vander-Beken, E De Busser & A Dormaels. (2002). *Blueprint for an EU Criminal Records Database. Legal, politico-institutional and practical feasibility*. Antwerp - Apeldoorn, Maklu, E De Busser. (2008). *A European Criminal Records Database: An integrated model*. In C Stefanou & H Xanthaki. *Towards a European Criminal Record*. Cambridge, Cambridge University Press: 336-354.

be exchanged in a uniform, electronic and easily computer-translatable way”¹⁴. The result of this requirement was the development of ECRIS; a standardised mechanism for the sharing of criminal conviction data between Member States.

The duty to store information regarding an individual’s criminal record rests with the Member State which is the individual’s country of origin¹⁵. Where an individual is convicted of an offence within a Member State which is not that individual’s country of origin there is an obligation on the Member State within whose jurisdiction the individual has been convicted to transmit that information to the relevant Member State. Requests may then be made to the individual’s country of origin for information relating to that person’s criminal record¹⁶ and the individual’s country of origin will then transmit any relevant information to the requesting state.¹⁷ This ensures that each Member State is able to reply fully to requests for information from other Member States and can provide up to date information on the criminal records of its own nationals’ regardless of where in the EU those convictions were handed down. The

¹⁴ Council Framework Decision 2009/316/JHA, para 6. For further discussion regarding standardisation of forensic science see; TJ Wilson. *The Global Perspective*, in M Walport. (Ed) *Forensic Science and Beyond: Authenticity, Provenance and Assurance*, Chapter 8, Annual Report of the Government Chief Scientific Advisor, (2015) Government Office for Science; TJ Wilson. *Criminal Justice and Global Public Goods: The Prüm Forensic Biometric Co-operation Model*, J. Crim. L. 2016, 80(5), 303-326

¹⁵ Council Framework Decision 2009/315/JHA, Article 5(1)

¹⁶ *ibid*, Article 6

¹⁷ *ibid*, Article 7

system is decentralised which means that data is only stored on national databases and then exchanged upon the request of another Member State.¹⁸

A standardised format is used to transmit the information electronically¹⁹. Convictions are coded using two reference tables listing categories of offences and penalties. These tables facilitate automatic translation and are designed to enhance mutual understanding of the information transmitted. Theoretically, the codes of the offence and sanction should be translated into the language of the recipients enabling them to understand the nature of the conviction and relevant penalty.

The United Kingdom had previously chosen to exercise a block “opt-out” of various co-operation measures relating to criminal justice and policing. Speaking in the House of Commons on the 9th July 2013, then Home Secretary Theresa May stated that:

“For reasons of principle, policy and pragmatism, I believe that it is in the national interest to exercise the United Kingdom’s opt-out, and rejoin a much

¹⁸ *ibid*, Article 5

¹⁹ Under Article 11 of Council Framework Decision 2009/315/JHA Member States must give information on the nature of the conviction (date of conviction, name of the court, date on which the decision became final) and information on the offence giving rise to the conviction (date of the offence underlying the conviction and name or legal classification of the offence as well as reference to the applicable legal provisions) and information on the contents of the conviction (notably the sentence as well as any supplementary penalties, security measures and subsequent decisions modifying the enforcement of the sentence). There is no requirement to provide information as to the factual circumstances surrounding the conviction.

smaller set of measures that help us to cooperate with our European neighbours in the fight against serious and organised crime.”²⁰

ECRIS, along with the principle of mutual recognition (discussed below), were two of thirty-five “smaller measures” which the United Kingdom chose to implement following the use of its block opt out.²¹ By joining ECRIS, the UK was then able to replace previous “ad hoc” arrangements between the UK and other EU Member States. In respect of this change, the UK government identified that:

“Criminal Record Exchange through these measures [ECRIS] has allowed much more information to be obtained on EU offenders in the UK and on UK nationals convicted elsewhere in the EU. This has allowed the police to build a fuller picture of offending by UK nationals and allowed the courts to be aware of previous offending by EU nationals being prosecuted in the UK. The previous convictions 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.”²²

The ECRIS system was implemented in all EU Member States by April 2012 thereby allowing pan European access to criminal records information, subject only to the limitations created by national storage arrangements for this type of information.

²⁰ See the Home Secretary’s Oral Statement, HC Deb, 9 July 2013, col. 180.

²¹ House of Commons European Scrutiny Committee, *The UK’s block opt-out of pre-Lisbon criminal law and policing measures*, Twenty-first Report of Session 2013-14, (2013) HC683

²² *ibid.* at p. 68, [243]

In England and Wales, the UK government is responsible for storing and, where appropriate, transmitting to other Member States information regarding the criminal records of its citizens. An organisation created by The Association of Chief Police Officers²³ (ACPO) the ACPO Criminal Records Office (ACRO) is the body responsible for the management of all criminal records information in the United Kingdom. Foreign criminal convictions are handled under ACRO's International Criminal Conviction Exchange portfolio comprising of the Non-EU Exchange of Criminal Records (NEU-ECR) and the UK Central Authority for the Exchange of Criminal Records (UKCA-ECR). The UKCA-ECR is the designated central authority for exchanging criminal records for England and Wales and the rest of the United Kingdom with other EU member states utilising ECRIS.

By March 2016 the United Kingdom was connected to 23 out of 27 Member States using ECRIS with manual arrangements in place for the remaining 4 Member States.²⁴

In the financial year 2015/16 ACRO (through the UKCA-ECR) received 10,120 notification messages in total about UK nationals convicted overseas of which 9,223

²³ Now known as the National Police Chief's Council (NPCC)

²⁴ ACRO Criminal Records Office, Annual Report 2015/16, p.18, <https://www.acro.police.uk/uploadedFiles/Annual%20Report%20A4%202015-16%20spread.pdf> <accessed 11/01/2017>

originated from EU Member States.²⁵ In the same period the United Kingdom sent 46,680 notification messages to other countries in respect of criminal convictions handed down by a UK court. Over ¾ of the notifications sent by the UK related to EU nationals.²⁶

In England and Wales, once a notification relating to the conviction of an English or Welsh national in another EU jurisdiction is received via ECRIS, any relevant offence is matched to its equivalent offence under English and Welsh law. Once the offence has been matched it is then recorded on the Police National Computer (PNC) as a conviction for the corresponding offence under English and Welsh law. The only indication when looking at the individual's criminal record that an offence was committed in a foreign jurisdiction is the name of the convicting court. ACRO provide information to the Disclosure and Barring Service (DBS) for the purposes of criminal records checks and certificates of criminal records to the courts. In criminal proceedings in England and Wales, once it has been determined that a person's previous conviction is admissible in evidence it can be proved under s.73(1) PACE 1984 which provides:

“Where in any proceedings the fact that a person has in the United Kingdom or any other member state been convicted... of an offence... is admissible in evidence, it may be proved by producing a certificate of conviction...”

²⁵ Ibid. p.21

²⁶ Ibid. p.8

The admission of the conviction then gives rise to a rebuttable presumption that the person committed the offence of which they were convicted (s.74 PACE 1984).

Exchange of information under ECRIS requires the labelling of offences and in this regard it is linked to the concept of “approximation of laws”²⁷ (approximation). Approximation entails the adoption of measures establishing minimum rules related to the constituent elements of offences and sanctions. The aim of approximation is to overcome the significant legal differences found across the EU by establishing common ground upon which cooperation is established²⁸. Approximation of laws has also been described by Weyembergh as reducing the point between two objects in order to eliminate differences that would otherwise make cooperation difficult or even impossible²⁹. She goes on to argue that:

Approximation is a condition for smooth judicial cooperation mechanisms and especially for mutual recognition. This process must be based on mutual confidence, which becomes far more important in the context of the classic mechanisms of cooperation. As a consequence of this evolution, approximation

²⁷ Article 114(1) Treaty on the Functioning of the European Union

²⁸ W De Bondt & G Vermeulen. *Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU*, in Cools, M., *Readings On Criminal Justice, Criminal Law & Policing*. Antwerp-Apeldoorn-Portland, Maklu 4 (2010): 15-40.

²⁹ A Weyembergh. (2005). *Approximation of criminal laws, the Constitutional Treaty and the Hague Programme*. *Common Market Law Review*, 42, 1567.

also becomes more essential, as it is necessary for the realisation as well as for the legitimacy of mutual trust³⁰.

ECRIS is a tool which allows for the labelling of exchanged information in a way which, it has been argued, does not fully realise the potential of the approximation acquis³¹. The roots of ECRIS come from the Hague programme which asserted that the efficient and swift exchange of information on the criminal history of individuals constituted an important priority³². ECRIS moves the exchange of information on from a system which envisages countries sharing information to one where that information is to be taken into account in the course of new criminal proceedings, and legal effects equivalent to previous national convictions will be attached to it. In such circumstances, it becomes all the more important that the approximation acquis is used to its full potential³³. De Bondt and Vermeulen suggest that:

“Indicating that the foreign offence falls within the minimum constituent elements of offences as agreed in an approximation instrument³⁴, would not just facilitate the taking into account of the conviction in the course of new

³⁰ Ibid. p. 1574

³¹ F Geyer. *Taking stock: databases and systems of information exchange in the area of freedom, security and justice*. CEPS, 2008.

³² C Stefanou & H Xanthaki. (2008). *Towards a European Criminal Record*. Cambridge: Cambridge University Press.

³³ n. 28

³⁴ An example of a relevant approximation instrument would be terrorism as defined in the 2002 FD on combating terrorism (OJ L 164 of 22.6.2002), amended by the 2008 FD (OJ L 330 of 9.12.2008).

criminal proceedings; the lack thereof will potentially render interpretation impossible³⁵.”

Using this architecture, conviction information shared through ECRIS could be tagged to indicate whether it relates to a conviction based on an agreed minimum definition as set out in an EU instrument or not. Labelling exchanged information as to whether or not it corresponds to an approximated offence concept has the potential to considerably facilitate the comprehensibility of such information. EULOCS – the EU level offence classification system – represents the practical implementation of this approach and was developed following the success of ECRIS³⁶. Its design allows it to be used as a separate reference index. The backbone of EULOCS is based on a complex architecture which requires offence labels to be combined with reference to EU instruments which hold approximated offence definitions and the definitions themselves. The idea is to keep one separate reference index updated which can then be referred to in various legal instruments³⁷.

Information exchange prior to ECRIS: The Mutual Understanding of Criminal Records (MUCRI) Project

³⁵ n. 28, at p. 30

³⁶ Study on the development of an EU level offence classification system and an assessment of its feasibility to supporting the implementation of the Action Plan to develop an EU strategy to measure crime and criminal justice: The Crime Statistics Project available at http://ec.europa.eu/dgs/home-affairs/doc_centre/crime/docs/eulocs_en.pdf <last accessed 18 November 2016>

³⁷ V Gert & W De Bondt. *EULOCS: The EU Level Offence Classification System: a Bench-mark for Enhanced International Coherence of the EU's Criminal Policy*. Vol. 35. Maklu, 2009.

Prior to the establishment of ECRIS the exchange of criminal records between Member States still took place but such exchange was usually on a bilateral basis.³⁸ The MUCRI project was undertaken before the implementation of ECRIS and was designed to facilitate better understanding of criminal records information shared between Member States. The project received EU funding and was undertaken by the Association of Chief Police Officers Criminal Records Office (ACRO), who sought to conduct an offence equivalency exercise, which involved attempting to verify the accuracy of matches previously made by ACRO between a number of German and English / Welsh offences.

The authors were invited to consider the accuracy of matches made between over 200 German offences and the corresponding English and Welsh offences to which they had been recorded as equivalent to. Some matches had been made following notification from the German authorities that a conviction had been imposed and the authors were asked to comment upon whether the existing match was appropriate. In other cases, a match had been suggested and, again, we were asked to comment on whether that match was appropriate and to suggest alternatives where possible. Whilst there is insufficient data to offer a value on the accuracy of the matches made, a number of potential issues

³⁸ Regulated by Articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters (1959); see also, E De Busser. (2008). *A European Criminal Records Database: An integrated model*, in C.Stefanou & H Xanthaki. (Eds.), *Towards a European Criminal Record* (pp. 336-354). Cambridge: Cambridge University Press.

with the equivalency process were identified as a result of the exercise, some of which will be discussed further below.

- ***Lack of reliable translation***

Prior to the implementation of ECRIS Member States would receive notifications of foreign convictions in a variety of ways. At times the direct translation of the foreign offence into English would be inaccurate or incomplete. This made it difficult if not impossible to match the offence with an English offence with any degree of certainty as a result of the deficiencies in the translation. An example of this problem can be found in relation to German convictions matched to an offence under section 21(2)(2) of the Road Traffic Act 1988. The translation of the German code which was being used in order to achieve these matches was translated as:

“Intentionally or negligently performs a motor vehicle, although the required driver's license taken in accordance with s.94 of the Criminal Procedure Code in custody, secured or seized, or.” (*sic*)

It is clear that matching of an offence based on an incomplete or inaccurate translation would be capable of undermining the efficacy and fairness of the criminal record exchange process, potentially raising Article 8 ECHR issues. While it is possible for an

individual to challenge any entry on their criminal record as inaccurate³⁹ such inaccuracies would only become apparent to that individual in circumstances where the information falls to be disclosed

- *Difficulty defining key terms*

Significant problems could arise in the matching of offences when certain key legal terms such as ‘intention’ and ‘recklessness’ were not properly understood. An example of this would be a person convicted of the German equivalent offence of causing grievous bodily harm where the German court had found the person to have intended to cause that level of harm. This would potentially amount to an English and Welsh offence under section 18 of the Offences against the Person Act 1861 (maximum sentence life imprisonment). However if the German courts established that intent by using their principle of “conditional intention” this would be more akin to recklessness and would not be sufficient mens rea for the section 18 offence and would be more suitably matched with the less serious offence created by section 20 Offences Against the Person Act 1861 (maximum sentence of five years imprisonment). Under the pre ECRIS system it was not possible to tell which offence was the closest match.

Secondly problems in accurately translating terminology and understanding of the legal implications of a term mean that it can be impossible to say with certainty that offences

³⁹ See DBS website for details of how to appeal an error: <https://www.gov.uk/disclosure-barring-service-check/appeals-and-disputes> <last accessed on 18 November 2016>

truly match. For example, a number of German sexual offences criminalise “sexual activity”. The term “sexual” is defined in English law in s.78 Sexual Offences Act 2003 very specifically but the German criminal code has no such explanation and without access to a German lawyer or details of the exact nature of the offence it would be very difficult to ensure the foreign offence was recorded in an accurate way⁴⁰.

- *Accurately recording convictions; matching offences and offence seriousness*

The difficulties raised above concern differing definitions of offences and the difficulty in interpreting key terms. Zweigert & Kotz suggest that:

For states which are members of the European Union, the harmonisation of law by supra-national means (Community guidelines and directives) is of ever increasing significance... Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than any of the existing ones.⁴¹

There was also a fundamental difficulty in matching offences caused by the different approaches that national law may take in relation to the creation and definition of

⁴⁰ For an outline of the fundamental aspects of the German approach to criminal procedure see M Bohlander. *Principles in German Criminal Procedure* (2012) 1st Edition (Hart Publishing, Oxford)

⁴¹ K Zweigert & H Kotz. *An Introduction to Comparative Law*, (Third Edition), (2011) Oxford University Press, p. 24 & 42

criminal offences. Typically the German Code favours brevity and uses generic terms, English law, in contrast is much more detailed and specific, certainly as far as statutory offences are concerned. This creates serious problems for offence matching.

A key problem identified was that German offences were typically drafted more widely than English offences. Thus, it was possible in almost all cases to conceive of conduct that would constitute an offence under the relevant section of the German Code but would not constitute an offence under the closest corresponding English statutory or common law provision. Again, without knowing precisely the facts of the particular offence, it would therefore be impossible to say with certainty that the “matching” English offence was made out in all cases. For example, 3 sections of the German code cover insolvency offences (although there are a number of subsections to each of these). In contrast there are 69 criminal offences contained in the Insolvency Act 1986 alone. This makes the task of offence matching very complicated with a number of possible offences covering a single subsection of the German code.

Particular problems arose when attempting to match sexual offences. In English and Welsh law, the Sexual Offences Act 2003 separates sexual activity according to the nature of that activity⁴². For example, there are four key sexual offences against adults

⁴² See for discussion; K Laird and D Ormerod. *Chapter 18: Sexual Offences*, Smith & Hogan's Criminal Law, 14th Edition, (2015) Oxford University Press, Oxford; A Simester, J Spencer, G Sullivan & G Virgo. *Chapter 12: The Principal Sexual Offences*, Simester and Sullivan's Criminal Law: Theory and Doctrine, 5th Edition, (2013) Hart Publishing; Ashworth.

under the 2003 Act, namely rape⁴³, assault by penetration⁴⁴, sexual assault⁴⁵ and causing a person to engage in sexual activity⁴⁶. Under s.177 of the German Code, rape would include assault by penetration. Section 177 of the German Code also fails to separate sexual assault and causing a person to engage in sexual activity. Thus, without knowing precisely what activity took place in any particular case, it was not possible to say which of the four English and Welsh offences would be the most appropriate match.

At times there is disparity in the way in which criminal justice systems view certain criminal acts. Germany, for example, has a more liberal approach to mercy killing than England and Wales⁴⁷. Section 126 of the German Criminal Code criminalises killing at the request of the victim with a penalty of 6 months to 5 years imprisonment. Technically the closest match in England and Wales would be murder. Although we do have an offence under section 2 Suicide Act 1961 – criminal liability for complicity in another’s suicide – if the act of the defendant actually ended the life of the victim, murder, and not the offence under s.2 of the 1961 Act, would be the appropriate charge.

Simester *et al.*, identify that the “pronouncement of guilt through conviction... connotes fault on the part of the criminal” with a corresponding “public implication that she is

⁴³ Sexual Offences Act 2003, Section 1

⁴⁴ Ibid. Section 2

⁴⁵ Ibid. Section 3

⁴⁶ Ibid. Section 4

⁴⁷ n. 40

blameworthy.”⁴⁸ In relation to the recording of foreign convictions it therefore becomes important to consider two relevant legal principles. The first is whether the conduct would be sufficient to amount to a criminal offence in that person’s home jurisdiction. If the conduct would not be sufficient to amount to a crime then to record it as such would offend against the principle *nullem crimen sine lege*.⁴⁹ As Roberts and Zuckerman observe:

The symbolic sting of censure may be more painful to an offender than any hard treatment meted out to him as tangible punishment. In some cases moral condemnation may inflict lasting injury on a convict’s self-respect and standing in the community, the effects of which endure long after a fine has been paid or a prison sentence served.⁵⁰

The second potentially relevant consideration relates to how a foreign conviction is eventually recorded and whether the offence chosen falls foul of the principle of “fair labelling”.⁵¹ According to Horder “...what matters is not just that one has been convicted, but *of what* one has been convicted. If the offence in question gives too anaemic a conception of what that might be, it is fair neither to the defendant, nor to the

⁴⁸ *A Simester. et al.* n. 42 at p. 7-8

⁴⁹ “No crime without law.” See *A Simester et al.* *ibid.* at p. 22

⁵⁰ P Roberts & A Zuckerman. *Criminal Evidence (Second Edition)*, (2010) Oxford University Press, p. 13

⁵¹ See: A Ashworth. *The Elasticity of Mens Rea* in CFH Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (1981) London: Butterworth, 45 (termed “representative labelling”); G Williams. *Convictions and Fair Labelling*, (1983) CLJ 42(1), 85-95

victim.”⁵² This supports the position of Chalmers and Leverick⁵³ who suggest that fair labelling is necessary both “to describe D’s offending behaviour for the general public and to differentiate that behaviour for the purposes of those working within the criminal justice system.”⁵⁴ Whilst similar terms may be used to describe criminal offending in a number of jurisdictions, care must be taken to ensure that the defendant’s conduct warrants the recording of a particular offence in their home jurisdiction.

The potential implications of sharing criminal records information under Article 8 ECHR

It is now widely accepted by both the national courts in England and Wales and the European Court of Human Rights (ECtHR) that the storing of personal information by state agencies is capable of engaging convention rights and in particular the right to respect for private and family life under Article 8 ECHR⁵⁵. In *Leander v Sweden*, the court held that “both the storing and the release of such information... amounted to an interference with... [an individual’s]... right to respect for private life as guaranteed by Article 8(1).”⁵⁶

⁵² J Horder. *Rethinking Non-Fatal Offences*, (1994) 14 OJLS 335 at p.351, emphasis in original

⁵³ J Chalmers & F Leverick. *Fair Labelling and the Criminal Law*, (2008) 71 MLR 217

⁵⁴ A Ashworth. *Principles of Criminal Law*, (2009), 6th Edition, Oxford, p. 79

⁵⁵ See for example; *Leander v Sweden* (1987) 9 EHRR 433; *S and Marper v the United Kingdom* [2009] 48 E.H.R.R. 50; *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35.

⁵⁶ *Leander v Sweden* (1987) 9 EHRR 433 at [48]

Despite the ECtHR's decision in *Leander v Sweden* it took another twenty years and further intervention from the ECtHR before the national courts in England and Wales properly considered the implications of Article 8 in relation to the storage and use of data for criminal justice purposes. During this time there was a significant increase in the capacity of the police and other state agencies to record and store criminal justice information. This was prompted by the growth of the UK's National DNA Database (NDNAD) which was set up in 1995 and which, between 2000 and 2005, was subject to an "expansion programme"⁵⁷ making it at the time the world's largest database of its kind.⁵⁸

The application of Article 8 ECHR was established in the context of information stored for criminal justice purposes (which will be termed "criminal justice information") in the case of *S and Marper v the United Kingdom* (*S and Marper*).⁵⁹ *S*, who was 11 at the time of his arrest, was acquitted following trial for an attempted robbery. *Marper*, who had been charged with harassment of his partner, had proceedings against him discontinued. Both sought to challenge the subsequent decision of the Chief Constable of South Yorkshire Police to indefinitely retain their fingerprints and DNA. Having

⁵⁷ Forensic Science and Pathology Unit, *DNA Expansion Programme 2000-2005: Reporting Achievement*, (2006), Home Office

⁵⁸ Parliamentary Office of Science and Technology, *The National DNA Database*, (2006) Postnote No.258, POST; C Nydick, *The British Invasion (of Privacy): DNA Databases in the United Kingdom and United States in the Wake of the Marper Case* (2009) *Emory Int'l L. Rev.* 23, 609.

⁵⁹ [2009] 48 E.H.R.R. 50

been unsuccessful in the domestic courts in England and Wales⁶⁰ *S* and *Marper* applied to the ECtHR on the basis that the storage of biometric data (fingerprints and DNA profiles) engaged Article 8 ECHR. Further, *S* and *Marper* asserted that the policy in operation in England and Wales to indefinitely retain the biometric data of unconvicted persons violated Article 8 ECHR and could not be justified by the application of a ‘margin of appreciation’.

The ECtHR identified that “[t]he mere storing of data relating to the private life of an individual amounts to an interference within the meaning of art.8”.⁶¹ In respect of the statutory criteria in England and Wales for the retention and use of DNA profiles and fingerprints from unconvicted individuals⁶² the ECtHR went on to hold that the retention system in operation at that time was “blanket and indiscriminate” and “overstepped any acceptable margin of appreciation”⁶³.

Subsequent to the decision in *S and Marper*, both the ECtHR and the national courts in England and Wales, confirmed the application of Article 8 to a range of different types of criminal justice information including DNA profiles⁶⁴, fingerprints⁶⁵ and

⁶⁰ See: *R (on the application of S) v Chief Constable of South Yorkshire Police; R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39

⁶¹ *S & Marper*, n. 59, at [68]

⁶² B Hepple. *Forensic databases: implications of the cases of S and Marper*. (2009) *Medicine, Science and the Law* 49.2. 77-87.

⁶³ *S & Marper*, n. 59, at [119], [125]

⁶⁴ *S & Marper*, n. 59

⁶⁵ *S & Marper*, n. 59

photographs⁶⁶. In the case of *M.K. v. France*⁶⁷, a case concerning the retention of fingerprints, the ECHR reiterated that the protection of personal data was of fundamental importance to a person's enjoyment of his or her right to respect for private life. This applied with even greater force when such data underwent automatic processing and / or use for policing purposes⁶⁸.

Despite the fact that the court in *S and Marper* was primarily concerned with the retention of data from unconvicted persons, in the case of *R (L) v Commissioner of Police of the Metropolis*⁶⁹ (*R(L)*), it was confirmed that the storage and disclosure of criminal records information was also capable of engaging an individual's Article 8 rights. The case identified two separate bases on which the disclosure of information about convictions or cautions⁷⁰ can constitute an interference with Article 8(1). Firstly, disclosure of personal information that individuals may wish to keep private can constitute an interference; although, in one sense, criminal convictions are public as the conviction is made, and sentence imposed, in public as the conviction recedes into the past it becomes part of the individual's private life. A caution is not administered in

⁶⁶ *R (on the application of) RMC and FJ -v- Commissioner of Police of the Metropolis and Others* [2012] EWHC 1681 (Admin)

⁶⁷ *M.K. v France* [2013] Application no. 19522/09

⁶⁸ *ibid.* at [29], [35]

⁶⁹ *R(L)* n. 6

⁷⁰ A police caution (since 2005 more properly known as a simple caution) is a formal warning given by the police to an adult offender aged 18 years or over and who has admitted that they are guilty of an offence.

public and so is part of the individual's private life from the outset.⁷¹ Secondly, disclosure of historic information about convictions or cautions can lead to a person's exclusion from employment⁷², and can therefore adversely affect his or her ability to develop relations with others⁷³; the problems that this creates as regards the possibility of earning a living can have serious repercussions on enjoyment of private life.

It is clear that the disclosure of information relating to an individual's criminal record can have a powerful impact. In *R(L)* Lord Neuberger identified that an adverse criminal record certificate would be something close to a "killer blow"⁷⁴ to the hopes of a person who aspires to a post which falls within the scope of any disclosure requirements. It is therefore imperative that such information is accurate, retained and disclosed only in proper circumstances and, where appropriate, subject to challenge. In the UK wrongly recorded information can be challenged through the Disclosure and Barring Service with appeals ultimately decided by the Independent Monitor.⁷⁵ However, individuals can only appeal an incorrect entry on their criminal record if they are aware of its existence. As individuals are not routinely made aware of the inclusion of a foreign conviction on their record this may only occur at the point that access to the criminal

⁷¹ *R(L)*, n. 6, at [27]

⁷² *Ibid.* at [68]

⁷³ *Ibid.* at [70]

⁷⁴ *Ibid.* at [75]

⁷⁵ n. 39

record is required for the purposes of an application for certain types of employment or in the context of criminal proceedings.

The Supreme Court's decision in *R(L)* not only established the applicability of Article 8 ECHR in the context of criminal records disclosure but also highlighted the likelihood that indiscriminate retention and, in particular, disclosure was unlikely to be compliant with an individual's convention rights. This confirmed the departure from earlier decisions⁷⁶ in which the applicability of Article 8 ECHR in the context of criminal records disclosure was doubted. The approach of the Supreme Court in *R(L)* was subsequently followed by the ECtHR in *MM v the United Kingdom (MM)*, where the Court held that "...indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable."⁷⁷

The principle that information can be stored or shared in ways which is proportionate to the objective is set out in The Data Protection Act 1998. The Act stipulates that the processing of personal data is subject to eight data protection principles listed in Schedule 1. The third principle provides that personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed. Additionally Article 5 of the Data Protection

⁷⁶ See for example *Chief Constable of Humberside Police and others v Information Commissioner (Secretary of State for the Home Department intervening)* [2009] EWCA Civ 1079 (the "Five Constables Case")

⁷⁷ *MM v the United Kingdom* [2012] ECHR 24029/12 at [199]

Convention⁷⁸ provides that personal data undergoing automatic processing shall be:

- a. obtained and processed fairly and lawfully;
- b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes; and
- c. adequate, relevant and not excessive in relation to the purposes for which they are stored.

The Committee of Ministers adopted Recommendation No. R (87) 15 regulating the use of personal data in the police sector. Principle 2.1 of the Recommendation states that:

The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation.

Of further relevance is Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in

⁷⁸ The Council of Europe Convention of 1981 for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Treaty Number 108. In force for the United Kingdom from 1 December 1987.

criminal matters which was adopted on 27 November 2008. Its purpose is to ensure a high level of protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data in the framework of cross-border police and judicial cooperation in criminal matters while guaranteeing a high level of public safety. Notwithstanding the significant body of law in this area the case of *MM* highlighted that no real consideration had been given to proportionality within the UK's system for recording and disclosing criminal justice information.

The decisions in *R(L)*⁷⁹ and *MM*⁸⁰ highlighted a shift away from consideration of the issue of retention and disclosure of criminal records information as a data protection issue and towards an approach based on the rights of the individual under Article 8 ECHR. In determining that the disclosure of a caution constituted an unjustified interference with the applicant's Article 8 rights the ECtHR highlighted "...the absence of a clear legislative framework... the absence of an independent mechanism for independent review of a decision to retain or disclose data... [and] the limited filtering arrangements in respect of disclosures [under the regime in operation at the time]..."⁸¹ as factors which might lead to a breach. The response of the UK government was to attempt to introduce some flexibility into

⁷⁹ *R(L)*, n. 6

⁸⁰ *MM*, n. 77

⁸¹ *MM*, n. 77, at [206]

the retention and disclosure system by excluding certain convictions based on age and conviction type.

Changes to the retention regime in the UK since 2012

The rules for the retention and disclosure of criminal records information in Northern Ireland, having been successfully challenged in *MM*⁸² as being in breach of Article 8 ECHR, were substantially revised by the passing of the Protection of Freedoms Act (POFA) 2012. The POFA established the Disclosure and Barring Service to administer criminal records disclosure requests in accordance with new statutory provisions.⁸³ Despite the “filtering” rules introduced by POFA the caution that was the subject of the application in *MM* would likely have been disclosed. The defendant in *MM* had accepted a caution for child abduction and was applying for a job working with children. The role would have been exempt from the Rehabilitation of Offenders Act 1974 and her caution for child abduction, although over 6 years old, would still have been disclosed. The breach of Article 8 was upheld by the ECtHR not because they agreed that the caution should not have been disclosed in this particular case but

⁸² Ibid. n. 77

⁸³ Under the statutory regime created by the POFA convictions and cautions would not be disclosed if:

- a) eleven years have elapsed since the date of conviction or six years in the case of a caution ;
- b) it is the person’s only offence ; and
- c) the offence did not result in a custodial sentence .

Under the rules contained in the POFA conviction information would only be removed if the underlying offence was not one of the more than 1000 offences (notably including offences involving child victims) that would always fall to be disclosed.

because the system of recording and disclosing all criminal records information in all cases was disproportionate⁸⁴.

The Supreme Court considered the statutory regime in England and Wales for retention and disclosure of criminal records information in *R (on the application of T and another) v Secretary of State for the Home Department and another*⁸⁵. The case concerned the inclusion of spent convictions on Enhanced Criminal Record Certificates⁸⁶ (ECRC) issued in respect individuals seeking employment and the court held that the inclusion of a spent conviction or caution could constitute an interference with Article 8 ECHR. Affirming in part the earlier decision of the Court of Appeal⁸⁷, the court observed that:

Put shortly, legislation which requires the indiscriminate disclosure by the state of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with article 8 rights.⁸⁸

⁸⁴ *MM*, n. 77, at [206] – [207]

⁸⁵ *R (on the application of T and another) v Secretary of State for the Home Department and another* [2014] UKSC 35

⁸⁶ To be eligible for an enhanced level DBS certificate, the position must be included in both the Rehabilitation Of Offenders Act 1974 (Exceptions) Order 1975 and in the Police Act 1997 (Criminal Records) regulations. For more information see 'A guide to eligibility for DBS checks' available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/519060/Guide_to_eligibility_v8.1.pdf <last access 18 November 2016>

⁸⁷ *R. (on the application of T and others) v Secretary of State for the Home Department* [2013] EWCA Civ 25

⁸⁸ n. 85 at [113]

Prior to the decision of the Supreme Court in *R (on the application of T and another)*, the government took the pre-emptive step of amending the criminal records disclosure regime in England and Wales by passing the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013⁸⁹ and the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013.⁹⁰ The amended regime allows for non-disclosure of criminal record information on an ECRC where the conviction or caution is protected.⁹¹

Although the amended regime was described *obiter* by the Supreme Court as being more “nuanced”,⁹² a number of recent cases suggest that the government failed to sufficiently appreciate the extent to which Article 8 requires bright line rules to be tempered by recourse to adequate review mechanisms in the context of criminality information. In *R (on the applications of P, A) v Secretary of State for Justice*⁹³ the claimants sought declarations that the scheme under the Police Act 1997 as amended⁹⁴

⁸⁹ SI 2013/1198

⁹⁰ SI 2013/1200

⁹¹ A conviction is protected provided; it was imposed otherwise than for any of the listed categories; it did not result in a custodial sentence; the convicted person has not been convicted of any other offence; and at least eleven years has passed since the date of the conviction (or five and a half years in the case of a minor). A caution is protected provided; it was given otherwise than for any of a listed category of offences and at least six years have passed since the date of the caution (or two years in the case of a minor). Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975/1023, Article 4 (as amended). For listed offences see:

<https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check> <last accessed 18 November 2016>

⁹² *R (T)*, n. 85 at [13]

⁹³ *R (on the applications of P, A) v Secretary of State for Justice* [2016] EWHC 89

⁹⁴ Police Act 1997 (Criminal Record Certificates: relevant Matters) (Amendment) (England and Wales) Order 2013

was incompatible with ECHR Article 8. Under the amended provisions if a person has two or more convictions they will always fall to be disclosed. The first claimant was a former teacher who had two minor shoplifting convictions committed 16 years ago when she was suffering from mental health problems and the second claimant was a 51 year old finance director who had been convicted at the ages of 17 and 18 of theft and driving without insurance. Both of these claimants were caught under the new regime. The Court of Appeal made significant reference to the Supreme Court case of *R(T)*⁹⁵ and the ECHR case of *MM*⁹⁶ along with the Northern Irish case of *Gallagher's Application*⁹⁷. The case quoted the judgement of Girvan LJ who although accepting that the state is entitled to implement a 'bright line rule those rules cannot be at the expense of the core of the fundamental rights which the convention seeks to protect'. Any line drawn by legislation would have to be as close to the point at which criminal record information ceases to be relevant as possible. This must be the case as the disclosure of irrelevant criminal information goes further than is necessary to achieve the objective of protecting vulnerable people and must therefore breach Article 8. LJ McCombe stated that the case before him demonstrated:

that the rules can give rise to some very startling consequences. Such results are, in my judgement, properly to be described as arbitrary... [if] rules are capable

⁹⁵ *R (T)*, n. 85

⁹⁶ *MM*, n. 77

⁹⁷ *Gallagher's Application* [2015] NIQB 63

of producing such questionable results, on their margins there ought... to be some machinery for testing the proportionality of the interference if the scheme is to be “in accordance with the law” under the wider understanding of the concept that emerges from the *T* case, following the *MM* case.’⁹⁸

The court reached the conclusion that the Act in its present form fails to meet ECHR requirements. There could be no rational for thinking that the minor convictions of the two claimants bore, for the rest of the claimants’ lifetime, a rational relationship with the objects sought to be achieved by the disclosure provisions of the Act simply because there was more than one conviction. This line of reasoning has subsequently been followed in *R (on the application of G) v Chief Constable of Surrey* where the court held that the absence of any procedure enabling a decision-maker to examine all of the relevant considerations resulted in the statutory regime being incompatible with the claimant’s Article 8 right.⁹⁹

It is clear from the emerging body of case law that there are still significant problems with the system of retention and disclosure in England and Wales despite the creation of a more nuanced “bright line” system which differentiates between different types of convictions and their age. The domestic situation in the UK also raises issues relevant to the sharing of criminal records information under ECRIS on the basis that “even a

⁹⁸ *R(P,A) n. 87* at [86] – [87]

⁹⁹ *R (on the application of G) v Chief Constable of Surrey* [2016] EWHC 295 (Admin) at [51]

comparatively minor interference with a person's right to respect for private life calls for justification".¹⁰⁰ It is argued that the above case law firmly establishes the relevance of Article 8 to the retention and disclosure of criminal records information both within and between Member States. It is therefore imperative that the information that is stored and shared is done so "in accordance with the law" in a way that is proportionate, transparent and subject to appropriate challenge regardless of whether this is information which is domestic in nature or shared through the ECRIS system.

The Council Framework Decisions which established ECRIS are concerned primarily with the mechanisms enabling the sharing of information between Member States and with the construction of systems capable of facilitating that process. ECRIS gives no consideration to whether Member States store and share the information proportionately, in accordance with the law and within any relevant margin of appreciation. This approach is consistent with the principle of mutual recognition¹⁰¹ which has become the cornerstone of judicial cooperation in criminal matters within the EU since the 1999 European Council meeting in Tampere.¹⁰² This does not mean that

¹⁰⁰ *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland and another (Equality and Human Rights Commission and others intervening) & R (on the application of T) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2015] UKSC 9, per Lord Sumption at [29]

¹⁰¹ HG Nilsson. *From classical judicial cooperation to mutual recognition*. *Revue internationale de droit pénal* 77.1 (2007): 53-58.

¹⁰² Article 4(2) TEU. See also S Peers. *Mutual recognition and criminal law in the European Union: Has the Council got it wrong?* *Common Market Law Review* 41.1 (2004): 5-36 and V Mitsilegas., *The constitutional implications of*

individual Member States need not give consideration to what information they are storing and disclosing via ECRIS. This is particularly important in relation to the automated sharing of information across jurisdictions with enhanced needs for robust safeguards against error¹⁰³.

In this context any weaknesses within the ECRIS system or failures to properly safeguard information at a national level may potentially lead to breaches of an individual's Article 8 rights. Consideration will be given below to some of the difficulties that might be faced by the current operation of ECRIS and to the questions of whether more overt safeguards should be implemented both with ECRIS and at a national level. It should be noted that, as there is limited empirical data available, any weaknesses identified are largely theoretical. It is contended that further work needs to be done to collect data on the veracity of criminal records information shared through the ECRIS system and to identify where possible the extent of the use of foreign convictions, the context in which these convictions are used and the effectiveness of any safeguards in place.

As discussed above, the ECRIS system places the responsibility for the retention and storage of criminal records information on the Member State which is the country of

mutual recognition in criminal matters in the EU. Common Market Law Review 43.5 (2006): 1277-1311. V Mitsilegas. *The third wave of third pillar law: Which direction for EU criminal justice?* European Law Review 34.4 (2009).

¹⁰³ *M.K. v France*, n. 67 at [35]

origin of the convicted person. ECRIS then provides a standardised mechanism for the sharing of that information. The ECRIS system is therefore entirely reliant on the safeguarding measure put in place by Member States at a national level and the input of the Member States into the relevant non-binding coding manuals for the recording of convictions under the national criminal law of the Member State. Much of the onus will therefore be on individual Member States to ensure general compliance with the Article 8 requirements associated with the collection and sharing of criminal conviction information. This is within the context of both their national legislative frameworks and operational safeguards in the agencies engaged in the task of sharing such information. ECRIS provides the information which is to be stored on the convicted person's country of origin's national database and this should be done using a process which is open to scrutiny so that inaccurate or incorrectly disclosed conviction information is open to effective challenge.

Does ECRIS allow for the fair and reliable exchange of criminal records information?

The implementation of ECRIS can clearly be seen as a positive step from the previously ad hoc approach to the sharing of criminal conviction information between Member States. This in turn is likely to have addressed many, but not all, of the problems identified as a result of the MUCRI project. The work that was done to provide ECRIS codes to approximate offences has done much to ensure information which is

transmitted is more readily understood¹⁰⁴. There should no longer be an issue with poorly translated sections of foreign criminal codes. The coding system would allow us to know whether a conviction was coded as either ‘causing grievous bodily injury, disfigurement or permanent disability’¹⁰⁵ or ‘unintentionally causing grievous bodily injury, disfigurement or permanent disability’.¹⁰⁶ We no longer need to worry whether the definition of sexual in England and Wales and Germany are compatible as the relevant codes would distinguish between rape and sexual assault or which section of the Insolvency Act most accurately reflects a particular section of the German Criminal Code. Finally, whilst in England and Wales no distinction is drawn between murder and intentional assisted killing¹⁰⁷ the codes used would make it clear that the offence was that of “illegal euthanasia”. Article 5 of the Framework Decision would still require that the information be stored for the purposes of retransmission. As the PNC in England and Wales only allows English and Welsh offences to be added to the list of previous convictions it is uncertain how such an offence would be recorded or retransmitted.

¹⁰⁴ Eurojust, through the ECRIS Support Programme, produce a centrally held “Non-binding Manual for Practitioners” designed to provide “practical operational support” for the ECRIS user community.

¹⁰⁵ Council Decision 2009/316/JHA, code 0809 00

¹⁰⁶ Council Decision 2009/316/JHA, code 0810 00

¹⁰⁷ For example in the form of euthanasia or so called “mercy killing” (see for example *R v Inglis [2010] EWCA Crim 2637*; A Jackson. “*Thou shalt not kill; but needst not strive officiously to keep alive*”: further clarification of the law regarding mercy killing, euthanasia and assisted suicide *J. Crim. L.* 2013, 77(6), 468-475).

There still exist a number of pre ECRIS problems which would not have been resolved using ECRIS codes. For example, the German Code criminalises various activities that would not be crimes at all under English law. Examples include section 186 of the German Code which covers criminal defamation which does not exist in England and Wales. It is anticipated that such an offence would be coded as ‘insults, slander, defamation, contempt’ which would potentially have numerous English and Welsh equivalents such as section 4A of the Public Order Act 1986 which criminalises intentional harassment, alarm or distress. Section 306d of the German Code, criminalises negligent arson. Negligence is not a basis upon which an arson charge could be established in England and Wales but the only code that would be available for this offence would be arson and it is likely that this is the offence which would be recorded on the PNC.

A final, particularly illustrative, example can be found when examining how certain types of sexual offences would be coded and transmitted. Sexual offences in England and Wales require the relevant sexual activity to be carried out without the consent of the complainant (unless the complainant is a child or a person suffering from a mental disorder impeding choice)¹⁰⁸. The German Code criminalises sexual activity with various categories of person whether or not consent is absent; see for example, s.174a, b and c which criminalise sexual activity with a prisoner, a person detained by order of a

¹⁰⁸ Sexual Offences Act 2003, Part 1, Sexual Offences.

public authority, a person who the Defendant is counselling or a Defendant in criminal proceedings amongst others. All of these offences would be coded as rape. In England and Wales they would not be considered to be a sexual offence¹⁰⁹ unless the complainant had a mental disorder impeding choice.

In relation to a number of offences, knowledge of the factual basis for a conviction will be necessary in order to be confident of properly recording an offence with its equivalent in another jurisdiction. This information is not something which is automatically available within ECRIS and would significantly increase the cost and delay involved in notifying the country of origin of the conviction. Without these facts, in a significant number of cases it would be impossible to say with certainty that an equivalent offence has been recorded, or indeed whether it is appropriate to record an offence at all.

It is clear from the issues described above that there are potential difficulties in using criminal record information in the way United Kingdom Central Authority for the Exchange of Criminal Records¹¹⁰ does. All of these difficulties create the significant opportunity for offences to be incorrectly classified and then recorded on an individual's criminal record. We are unaware of whether other Member States record convictions in

¹⁰⁹ Another (non-sexual) offence may have been committed in some of these circumstances – for example a prison officer who engages in a consensual sexual relationship with an inmate is likely to commit the common law offence of misconduct in a public office.

¹¹⁰ UKCA-ECR is the designated UK central authority and is responsible for receiving and sending notifications of criminal convictions through ECRIS.

the same way as UKCA. The Framework Decision does not specify how Member States should record convictions notified to them via ECRIS. It is our understanding that because of shortcomings in the Police National Computer software only coded offences can be entered onto the record and only English and Welsh offences are coded¹¹¹.

The potential breaches of fundamental rights which could arise from recording offences in the manner conducted by UKCA are significant and extend not only to the Article 8 implications, but to potential infringement of Article 6¹¹². Offences which are recorded against an individual can be used in many ways. Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings states that in the context of new criminal proceedings, Member States must ensure that convictions handed down in another Member State are duly taken into consideration under the same conditions as a conviction imposed by the national court of an individual's country of origin. As discussed above, in England and Wales, an individual's previous criminal convictions (including foreign convictions) are potentially used for a range of purposes

¹¹¹ The statutory authority for the PNC is provided the Police and Criminal Evidence Act 1984, section 27(4), and the type of information that may be recorded is governed by regulations made under that section.

¹¹² In *MM*, n. 77, the court considered, at [209], that Article 6 could have been engaged although it was not necessary to consider those arguments as a breach of Article 8 had already been found.

including vetting for certain types of employment¹¹³ and in the context of criminal proceedings; for example as evidence of the individual's (bad) character¹¹⁴ or as an aggravating feature in the context of sentencing.¹¹⁵

Although the MUCRI project, described above, was prior to the implementation of ECRIS not all of the difficulties have been remedied as the ECRIS system makes no allowance for the automatic exchange of basic factual information relating to the offence. This lack of information provides a significant barrier to the scrutiny and challenge of the conviction information by the individual for whom the effects may be profound. Paragraph 14 of the Preamble of Council Decision 2009/316/JHA states that:

The accuracy of the codes mentioned cannot be fully guaranteed by the Member State supplying the information and it should not preclude the competent authorities in the receiving Member State from interpreting the information.

It would appear that very little independent scrutiny has been undertaken to assess the accuracy and veracity of the coded information shared through ECRIS since its

¹¹³ For information on types of employment eligible for a Disclosure and Barring Service Check see; <https://www.gov.uk/government/collections/dbs-eligibility-guidance> <last accessed 18 November 2016>

¹¹⁴ n. 4

¹¹⁵ The Criminal Justice Act 2003, s.143 was amended to by the Coroners and Justice Act 2009, s.144 to allow foreign criminal convictions to be considered as an aggravating factor during sentencing.

implementation. If the information is originally incorrect there is no ability for the translated information to be correct.

As previously discussed, it would seem that in order to be certain that you have correctly matched offences you would need the factual basis behind the conviction in many cases¹¹⁶. When we consider the number of errors which may be made through incorrect coding, or incorrect understanding of a coding the room for error is significant. It is clear from Recital 13 of the Preamble that providing information relating to the factual or legal elements of a particular offence is not envisaged as being obligatory:

In order to ensure the mutual understanding and transparency of the common categorisation, each Member State should submit the list of national offences and penalties and measures falling in each category referred to in the respective table. Member States may provide a description of offences and penalties and measures and, given the usefulness of such description, they should be encouraged to do so. Such information should be made accessible to Member States.

¹¹⁶ W De Bondt. (2012) *Overcoming offence diversities in EU policy making – Needs and feasibility assessment* (Doctoral dissertation, Ghent University).

The European Parliament did originally suggest that information exchanges should “include a short description of the constitutive elements of the offence”¹¹⁷. This was rejected as, “the proposed obligation would be excessively burdensome for Member States and could lead to a considerable delay in the commencement of operation of the ECRIS¹¹⁸.” Instead, Article 5 of the 2009/316/JHA, states that “the list of national offences... may also include a short description of the constituent elements of the offence.” This again demonstrates that such information is not obligatory nor will it be routinely exchanged. It is asserted that sharing information about the constituent elements of the key offences, perhaps held in a central document (as is the case with EULOCS), along with a brief summary of the factual basis of each conviction, although more cumbersome would drastically reduce the misunderstanding of the information being shared and would significantly reduce the possibility of incorrect or inaccurate information being entered onto national databases.

Conclusion

¹¹⁷ European Parliament, Legislative resolution on the 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, 9 October 2008, Amendment 2

¹¹⁸ Commission Position, Legislative resolution on the 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, p.1

It is clear that the implementation of the ECRIS system represents a success, allowing for uniform transfer of criminal conviction information between Member States and introducing a coding system far more nuanced and effective than any of its predecessor models. Despite these improvements, little empirical work appears to have been undertaken on the scale of the use of the ECRIS system and the accuracy of the information which is shared. Whilst it is likely that most of the information exchanged through ECRIS is accurate, the relevant Article 8 jurisprudence on this area makes clear that a failure to ensure that information is stored, and shared, in a way which is accurate, shared only when necessary and subject to sufficient safeguards (including the ability of an individual to challenge the basis of a conviction) could give rise to breaches of Article 8.¹¹⁹ The effect of the Article 8 jurisprudence must therefore also be considered by Member States in respect of the way in which they record and store criminal offence information notified to them from other jurisdictions. The fact that a conviction is codified and transmitted through an automated system, if anything, makes the need for transparent oversight an even greater necessity.

The relevant central authorities in each Member State have access to a regularly updated non-binding manual¹²⁰. It is suggested that the manual, or a similar document, which sets out the way in which convictions are received, translated and recorded, should be

¹¹⁹ *Leander v Sweden*, n. 56; *MM*, n. 77; *R (T)*, n. 85

¹²⁰ n. 104

made available for all criminal justice practitioners. The manual should clearly set out the ways in which potential problems relating to the exchange of foreign criminal convictions can be identified and resolved. It is further suggested that individuals should be routinely notified when a foreign conviction is added to their record along with details of any appropriate mechanism for verifying both the grounds for recording the conviction information and the accuracy of the information being recorded. There is currently a significant lack of information available to both criminal justice practitioners and members of the public in how to challenge the veracity of information recorded as a result of the ECRIS process. It is suggested that the lack of case law in this area is not necessarily an indication of how well ECRIS is working but rather an indication of the general ignorance of most criminal justice practitioners to the operation and significance of conviction information shared through ECRIS.

Consideration of the efficacy of ECRIS is particularly timely given the proposals of the European Commission to expand the system to include the exchange of criminal records on non-EU citizens.¹²¹ An adventitious pathway, as suggested herein, is to amend ECRIS to include the automated sharing of the factual and legal elements of the

¹²¹ European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA, COM/2016/07*, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2016:7:FIN> <last accessed 11th January 2017>

conviction along with a robust and transparent system of challenge within each Member State.

Finally, the extent to which the United Kingdom and the European Union continue to co-operate on criminal justice matters is likely to be the subject of a great deal of post Brexit debate and negotiation. It is also clear that within the rest of the European Union there is little appetite for greater harmonisation of criminal laws.¹²² It is not suggested that this would be a necessary or appropriate remedy and in any case Article 4(2) of the TEU makes it clear that maintaining law and order and national security are the responsibility of individual Member States. It is however evident that in a European Union based on the free movement of citizens the ability to share information in a quick and efficient way is important to the security of the EU in relation to crime but also potentially other areas such as illegal immigration¹²³. It is further evident that, due to the large number of UK citizens living and working in the EU and vice versa, coupled with the likelihood that trade and other negotiations between the UK and the EU will be predicated on some form of free movement of workers continued co-operation in the area of criminal justice will remain vital. Cases such as that of Fourniret,¹²⁴ the murder

¹²² G Falkner. (Ed.) *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press, 2005.

¹²³ E Colombo. *EU databases and the exchange of information to combat illegal immigration*, *European Criminal Law Review*, Volume 4, Number 3, December 2014, pp. 236-247(12)

¹²⁴ n. 9

of Alice Gross¹²⁵, and the recent terror attacks in Paris and Brussels highlight the imperative of effective criminal justice cooperation.¹²⁶ It is suggested that, in furtherance of such effective cooperation, ECRIS is both the most apposite and mutually beneficial system for the sharing of criminal records information and is a system to which the United Kingdom should retain its involvement.

This positive endorsement of ECRIS must however be tempered with a note of caution. What is now clear from the jurisprudence in this area is that Member States must question not only whether the correct information is stored and shared but whether that information is accurate, appropriately used and, where appropriate, subject to scrutiny and challenge. A failure by Member States to implement a proportionate retention system may give rise to a violation of Article 8 ECHR and, where the information is used in criminal proceedings may also have Article 6 ECHR implications. Given the way in which the ECRIS system operates this is not a criticism of the system per se. More so, it is a reminder to Member States of the importance of ensuring that their national systems of retention are fair and proportionate.

Despite potential deficiencies in national retention regimes it is clear that ECRIS represents the safest, most efficient and reliable method by which the United Kingdom can exchange criminal records information with other European Union Member States.

¹²⁵ n. 12

¹²⁶ J Jacobs & B Dimitra. *Paedophiles, Employment Disqualification, and European Integration*. UNIVERSALIS: Liber AMICORUM CYRILLE FIJNAUT (2011): 335-446.

Going forward, ECRIS may also provide an effective mechanism for accessing criminal records information from so-called “third country nationals”¹²⁷, a development that is likely to further increase its value to those states with access to the system. As the form and extent of the United Kingdom’s withdrawal from the European Union remains to be determined, so the future of criminal justice co-operation between the United Kingdom and the European Union exists in a state of some uncertainty. Against this background, it is hard to overstate the importance to the United Kingdom of retaining access to, and participation in, ECRIS as a vital criminal justice tool.

¹²⁷ Ibid. n. 121