

CENTRAL AND EASTERN EUROPEAN MOOT COURT PROBLEM 2013

1. Sheldon is an 18 year old national of Nitpo (a Member State of the European Union). At a young age Sheldon was diagnosed as suffering from an extreme form of autism, causing him to prefer his own company whilst growing up and resulting in him developing few social skills. He did however demonstrate extraordinary computer skills from an early age which his parents were happy to encourage by enrolling him on a computer programming course.
2. In January 2012 Sheldon was required to design a user-friendly software programme as one of the practical tasks for his computer course. The task requirement was for a programme that would assist regular registered users of web sites to gain quicker and easier access by inserting required information for secure password entry automatically, thus by-passing repetitive security measures. However, the actual software designed by Sheldon proved to be much more advanced. It enables a plug-in to be installed automatically on any site, through a pen/usb device, which would not only by-pass the normal password protection required for repeat users to obtain FTTP access to design / editing elements of a web site but, in addition, would access these elements of any web-site, thus avoiding the need to use a registered user password at all. The programme leaves no obvious access trace behind and makes it extremely difficult to identify the original point of access.
3. Sheldon's course lecturer, a national of Tuotpo (also a Member State of the EU), was so impressed that he mentioned Sheldon and his programme to his brother Lacidar who was staying with him for a few days. Lacidar is known for his radical views and for being deeply disillusioned with the government in Tuotpo which he thinks is much too closely linked with, and friendly towards, the private banking sector. He believes that legislation the government plans to introduce is designed solely to assist the banking sector to become much less transparent and so further increase banking profits at the expense of consumers. He sees an opportunity to use Sheldon's software programme to create an incident which might "open the eyes of ordinary Tuotpo citizens".
4. Lacidar therefore introduces himself to Sheldon and, expressing interest in the software programme, asks for a copy of the software, having first checked with Sheldon that the software should work on all types of web sites however sophisticated their security measures. It never occurs to Sheldon to ask Lacidar why he wants the software. He is simply pleased and proud that he seems to have completed his course task so successfully; and he readily supplies Lacidar with the software programme on a usb stick.
5. Upon his return to Tuotpo, Lacidar uses a computer terminal at the public information section of the Tuotpo National Banking Regulatory Authority (NBRA) to access the NBRA's web site. Having installed Sheldon's software plug-in, Lacidar manages to gain full FTTP editorial access rights to the web site, which includes access to the full statistical data provided to the Regulatory Authority by all banks operating in Tuotpo.
6. Lacidar duly copies the detailed data, which cast doubt on the accuracy of banking information disclosed by the Tuotpo banking sector to date. He sends the copied data anonymously to a national newspaper, which publishes the data in its next edition. The next day the story is headline news throughout Tuotpo, leading to questions in parliament as regards the government's economic policies in relation to banks. The official investigation that follows is so rigorous and exhaustive that it succeeds in identifying the source of the leak and leads the Tuotpo police to Lacidar, who is duly arrested and questioned. He immediately accepts full responsibility. At the same time he implicates Sheldon as the designer of the computer software programme he used. The Police Commissioner gives an interview to the national press in which he states "*My main priority in 2012 will be to ensure that each and every person involved in these disastrous events will be prosecuted to the fullest extent allowed by the law, whoever and wherever they may be, irrespective of their level of involvement!*"
7. An awareness of the increasing threat of cyber and white collar crime had led Tuotpo to create the following criminal offence in December 2011:-

Protection of Information Act 2011 (POI)

"s 1(1)-A person/corporation commits an offence if he/she/it publishes, divulges, discloses or causes the publication or disclosure of any information/ material data which comes into his/her/its possession unlawfully or without appropriate authorisation, where such information is known to be privileged or confidential and relates to trade secrets, processes, operations, style of work, identity, confidential statistical data, the amount or source of any income, profits, loss or

expenditure of any person, firm, corporation, partnership (whether public or private) and where such information is obtained from any one of the government departments, ministries or national agencies set out in section 2 hereof,

.....

s2. National bodies referred to in s 1 (1) include the following:-

....(d) the Tuotpo National Banking Regulatory Authority

s3any person who actively supports, encourages support for, facilitates, aids, abets, promotes or furthers the activities of any person satisfying the definition in s.1(1) above shall also be guilty of an offence under this section.

(2)- a person guilty of an offence under s 1(1) shall be liable on conviction to imprisonment for a maximum of 7 years and/ or fine.

(3)- a person guilty of an offence under s 1(3) shall be liable on conviction to imprisonment for a maximum of 5 years and/ or fine.

8. Lacidar is duly charged with an offence contrary to s 1(1) Protection of Information Act 2011. He is remanded in custody pending a full trial. At the same time the national authorities of Tuotpo contact the police in Nipto to ask them to identify the whereabouts and details of Sheldon. The Nipto police duly visit Sheldon and his parents (Sheldon lives in a self-contained flat in his parent's house as he is still dependent upon his parents for much of his every day needs, given his severe autistic condition).
9. The Nipto police prepare a report on their visit to Sheldon which, as well as indicating his version of events, also contain details of Sheldon's autism. The report states that, since no apparent criminal offence had been committed in Nipto where all Sheldon's activities took place, the police did not intend to take any further action. This report is also sent to the Tuotpo police authority where a copy is passed to the Police Commissioner who releases the following press statement:-
"The software was designed by a national of Nitpo and appears to have been a deliberate attempt by a foreign national to destabilise the banking system in Tuotpo. Rest assured that his nationality will not protect him from facing justice in Tuotpo and a warrant will be issued for his arrest".
10. Since Sheldon is an EU citizen resident in another Member State, the arrest warrant issued by the Toutpo police is passed to the Toutpo Department for Extraditions [DfE] (a special department set up within the Toutpo police force and based at Central Police headquarters, pursuant to the (fictional) Extradition Act 2003, which was enacted by Toutpo to implement the provisions of the European Framework Decision 2002/584 [EFD 2002]
11. The Tuotpo Criminal Code makes no special provisions for the protection of persons with limited mental capacity who are placed on remand. Nor do the majority of its prisons have suitable facilities to accommodate such persons if found guilty and sentenced to a custodial sentence. Indeed, a report by Amnesty International in 2011 had condemned the lack of appropriate facilities for prisoners in Tuotpo prisons who suffer from mental health conditions, whether on remand or following conviction and had called for immediate action to remedy the situation. The report cited evidence of two violent assaults and one death involving remand prisoners with limited mental capacity which occurred between January and June 2011 and noted that concerns had been expressed at the remand hearings in each case, but that the lack of appropriate facilities was not a factor that the Tuotpo courts were permitted to take into account at remand hearings. Similar concerns were raised as to the methods used by the police during interrogations of suspects with limited mental capacity. Two judgments rendered by the European Court of Human Rights (ECtHR) against Tuotpo in 2004 and 2011 were also cited, where the ECtHR had found that such suspects were subjected by the police to inhuman and degrading treatment in violation of Art 3 ECHR.
12. Despite the clear statement in the Nitpo police report indicating that Sheldon's autism would have prevented him forming the mental intent required to commit the crime, DfE decided to proceed to issue an EAW against Sheldon in light of the public statements made by its Police Commissioner. The application stated that the offence to be investigated fell within a number of headings set out in Article 2(2) of the EFD, in particular the following:
 - fraud affecting financial interests
 - sabotage; and
 - computer related crimes

Accordingly, the requirement of “double criminality” was inapplicable and it was irrelevant that the facts alleged to constitute a crime in Tuotpo would not have led to any criminal prosecution in Nitpo, where the suspect was resident.

13. The procedure leading to the issue of an EAW in Tuotpo requires the application first to be processed by the DfE, following which the EAW is confirmed and issued by the Tuotpo High Court after a purely formal check. The procedure will only be reviewed by the Tuotpo High Court if there is a challenge based upon a procedural defect.
14. Despite the limited background information provided to accompany the application to issue the EWA, it was immediately endorsed by the High Court.
15. The Nitpo Criminal Code contains no offence similar to that proscribed in s 1(1) of the Provision of Information Act. Nor does the Nitpo Criminal Code have a category of offences entitled either ‘sabotage’ or ‘computer related crimes’, although Section IV of the NCCode is entitled Fraud and Theft.
16. On receiving the approved EAW, the Nitpo police immediately arrested Sheldon but, following representations as to his health and wellbeing were he to be remanded in custody, decided to leave him at his home under the responsibility of his parents pending a court hearing in his case. The police also reported the matter to the Nitpo Ministry for Constitutional Affairs. The Minister, concerned as to the constitutional implications of the EAW that had been issued, draws the matter to the attention of the the Nitpo Autistic Protection Society (NAPS), which agree to take up and fund Sheldon’s case and engage a specialist lawyer to represent him.
17. Sheldon’s lawyer takes immediate action seeking an order from the Nitpo High Court preventing the execution of the EAW and delivery of Sheldon to Tuotpo for trial. He argues that an execution of the warrant would constitute a breach of Sheldon’s fundamental rights as protected by the Nitpo Constitution and, in particular, would be contrary to the following constitutional provisions:

“Preamble

Nitpo recognises the rights, freedoms and principles set out in both the European Convention on Human Rights and the EU Charter of Fundamental Freedoms and shall guarantee its citizens an equivalent level of protection in the national legal system.

Article 99: The European Arrest Warrant created by acts of the European Union has been adopted on the basis that it both respects and guarantees the minimum protection of individual fundamental rights and freedoms as set out in the Preamble”

18. In fact, there had been an extended debate in Nitpo about the merits of the EFD and the Parliament had only approved its adoption in January 2010, following the entry into force of the Lisbon Treaty (TEU) and the adoption of the revised Article 6 TEU which took place at that time. Prior to that, the Nitpo Parliament had taken the view that adoption of the EFD would have been unconstitutional. Therefore, implementation of the EFD in Nitpo simply transposed the wording of the EFD into domestic legislation, whilst adding an additional ground to justify refusal to execute an EAW.

European Arrest Warrant Act 2010

s 4 Grounds for optional non-execution of an EAW....

8. if the execution of the EAW would be manifestly contrary to the individual’s fundamental rights

19. Sheldon’s lawyers made the following submissions on his behalf:
 - i. The Tutpo Police Act merely requires the prosecution to demonstrate that the defendant carried out an unlawful act and takes no account of the accused’s intentions or his ability to recognise the consequences and context of the act, or whether it was unlawful. That allowed no consideration to be given to Sheldon’s autism and thus failed to secure protection of his human rights, contrary to Article 52 of the Charter.
 - ii. The absence, in the European Framework Decision (EFD), of any ground for refusing execution of an EAW in cases such as Sheldon’s, renders the EFD incompatible with the requirements of the ECHR and/or the Charter and therefore infringes the obligation to respect fundamental rights, freedoms and principles resulting from these documents, as enshrined in Article 6 TEU and the preamble to the EFD.

- iii. The possibility that Sheldon might be remanded in custody in conditions that would not guarantee his health and protection from the risk of violence from other remand prisoners in Tuotpo constitutes a fundamental interference with the rights and guarantees laid down in Articles 3 and 5(1), read in conjunction with Article 5(3) and (4) and Article 6(2) and (3) of the ECHR and in Articles 4 and 6, read in conjunction with Articles 48 and 52, of the Charter, since it fails to satisfy the requirements of “being necessary in a democratic society and proportionate to the objective actually pursued”.
- iv. In exercising its discretion as to whether to seek a EAW against Sheldon, Tuotpo had failed to pay due consideration to the rights of the accused, as protected by the ECHR and the Charter, in particular by failing:-
- a) to give individual consideration to the knowledge and activities of Sheldon and the nature of the charges brought against him, in order to apply the principle of proportionality prior to seeking the issue of a EAW and furthermore:-
 - b) because Tuotpo law enables a EAW pursuant to article 2 (2) EFD to be issued at the discretion of the Tuotpo police, the EAW issued against Sheldon was not a “judicial decision” of the kind required by Article 1 of the EFD, since Tuotpo procedures failed to ensure the judicial overview necessary to guarantee full protection of an individual’s fundamental rights, which is an essential prerequisite of the mutual recognition and trust between Member States that underpins the enactment and adoption of the EFD.
 - c) the surrender of Sheldon should also be refused on the basis that all his activities took place within the territory and jurisdiction of Nitpo, pursuant to Article 4 point 7(a) EFD.
 - d) the crime under s 1(3) of the Protection of Information Act of which Sheldon is accused in Tuotpo does not manifestly come within the notions of fraud, sabotage or computer related crimes, contrary to what is indicated in the EAW. Consequently, surrender should be refused on the basis of Art 2(4) EFD.
20. The Nitpo High Court appeared sympathetic to the arguments and concerns raised by Sheldon’s lawyers. However , rather than ruling immediately, it decided to adjourn the matter for 14 days so as to enable Sheldon’s lawyers to seek the discharge of the EAW before the Tuotpo High Court.
21. Sheldon’s lawyers duly made such an application repeating the arguments set out in points (a)-(d). They also suggested that any uncertainty surrounding terms used in the EFD should be resolved by the Court of Justice of the European Union (CJEU) via the preliminary ruling procedure laid down in Article 267 TFEU, since only the CJEU is competent to give an authoritative ruling on the interpretation of European Union legislation.
22. The Tuotpo High Court dismissed Sheldon’s application and upheld the decision to issue the EAW. It concluded that no procedural breaches had been taken place in Tuotpo and refused to consider the submission that it should review the national procedure. The court’s judgment essentially accepted the arguments put forward by counsel instructed for the DfE when opposing the application, namely that:-
- i. Tuotpo, as a Member State which had not accepted the jurisdiction of the CJEU on issues relating to third pillar matters, could not make a preliminary reference to the Court, until the expiry of the transitional period granted by Protocol No 36 on Transitional provisions of the Treaty of Lisbon, prior to December 2014 (see extract below);
 - ii. That the risk of breaching Sheldon’s fundamental rights was not established;

Extract from Protocol 36 Article 10 (fictional)

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, Tuotpo may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. If Tuotpo makes such a notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to Tuotpo as referred to in paragraph 2

23. When the Nitpo High court resumed hearing Sheldon’s case, that court invited both sides to make further submissions on the issue of fundamental rights before it handed down its judgment.

24. Sheldon's lawyers submitted that the transfer of the police and security measures from the third pillar of the TEU to the main body of EU law, which took place following the entry into force of the Lisbon Treaty, not only entitled but absolutely required all Member States to ensure that an EAW did not actually or potentially infringe fundamental human rights.
25. They further submitted:-
- i. that review of the legality of an EAW was particularly essential
 - a) when the EAW was issued in a Member State that had refused to allow any review of its actions by the CJEU and
 - b) where the executing Member State had a constitutional duty to protect its' citizens fundamental rights
 - c) where Article 10 of the Transitional Protocol allowed Tuotpo to elect to "opt out" of Title V of the Union in the field of police cooperation and judicial cooperation in criminal matters prior to June 2014 and
 - d) the Tuotpo government had already indicated its intention to exercise its right to opt out of Title V within that time.
 - ii. that the principle of mutual recognition and trust between the judiciary in EU Member States should not apply in the situation set out in point a) above,
 - iii. that there had been a manifest breach of, alternatively that there was a manifest risk of, breaching Sheldon's fundamental rights in Tuotpo, and that Nitpo was therefore entitled to refuse to surrender Sheldon to Tuotpo pursuant to the optional ground contained in section 4 point 8 of Nitpo's national legislation implementing the EFD, in view of the overwhelming evidence of deficiencies in fundamental rights protection in Tuotpo. In the alternative, they argued that Art 8 of s4 of the European Arrest Warrant Act 2010 breaches the Charter of Fundamental Rights and Art 1(3) of the EFD, insofar as only "manifest" breaches of fundamental rights are covered.
 - iv. that the total failure of the Tuotpo administrative and judicial authorities to take account of incapacity caused by mental health grounds such as autism entitled the Nitpo High Court to refuse to surrender Sheldon under the mandatory ground contained in Article 3(3) of the EFD and that this article should be interpreted accordingly,
26. Counsel instructed by the Tuotpo DfE, admitted as interveners by the Nitpo High Court argued that:-
- i. The decision as to whether an offence falls within one of the categories of Article 2(2) of the EAW is solely a matter for the issuing Member State and is not capable of:-
 - a) challenge by the suspect (Sheldon) who is the subject of the EAW, or
 - b) review by the courts of the executing Member State (Nitpo)
 - ii. The procedure leading to the issue of the EAW in Tuotpo was a matter within the sole competence of Tuotpo and therefore
 - a) not susceptible to review in the executing Member State on the basis that it did not constitute a "judicial decision" within the meaning of Article 1(1) EFD or that it could or could not be qualified as one of the categories enumerated in Article 2(2) EFD; and
 - b) not susceptible to challenge on grounds other than those explicitly contained in the EFD itself.
27. Considering that a number of difficult issues of EU law were raised by the case, the Nitpo High Court decided to refer the following questions to the CJEU, pursuant to Article 267 TFEU:

1. ***Where the competent judicial authority in an issuing Member State has not conducted a review on the merits of a European Arrest Warrant, should Article 1(1) of Council Framework Decision 2002/584/JHA (hereinafter EFD) be interpreted as allowing the judicial authorities in the executing Member State to review whether that EAW constitutes a "judicial decision" within the meaning of that Article, and, if they conclude that it does not, enable them to refuse to give effect to it?***
2. ***Should Article 2(2) EFD be interpreted as meaning that the authorities of the executing Member State may assess whether the offence in respect of which the EAW was issued is reasonably capable of being categorised as one of the offences listed in Article 2 (2) EFD and/ or whether the issuing Member State has manifestly exceeded the proper interpretation of the offences listed in the aforementioned Article by categorising the offence as one which falls outside the "double criminality" rule in Article 2(1)?***
3. ***Should Article 3(3) EFD be interpreted broadly so as to cover not only persons who may not be held criminally responsible owing to their age, but also persons who lack the mental capacity,***

regardless of their age, to conceive the necessary criminal intent to commit an offence, in application of the general principle of equal treatment in EU law? Alternatively, is Article 3(3) EFD invalid in the light of the aforementioned principle?

4. a. Is the EFD invalid in the light of Article 6 TEU and/or the EU Charter of Fundamental Rights in so far as it fails to ensure that the executing Member State is able to refuse to execute a European arrest warrant where the suspect's fundamental rights have been, or risk being, breached in the issuing Member State?

b. If the answer to 4a) is in the negative, should Article 1(3) EFD be interpreted as allowing the executing Member State to refuse to execute a EAW where the suspect's fundamental rights have been, or risk being, breached in the issuing Member State, even though such a ground for non-execution is not expressly provided for under Articles 3 and 4 of the EFD?

c. If the answer to question 4b) is in the affirmative, should Articles 1(3), 3 and 4 EFD, read in conjunction with Article 51(1) and 52(4) of the EU Charter of Fundamental Right, be interpreted as imposing an obligation on Member States to provide in their national law, which transposes the EFD, a mandatory ground for non-execution pertaining to the breach of, or a risk of breaching a suspect's fundamental rights in the issuing Member State, alternatively, should those Articles be construed as conferring upon Member States the option of including in their national law such a ground for non-execution?

5. Should the principles of mutual recognition and mutual trust, enshrined in Article 82 TFEU and in recitals 2, 6, 10 and Article 1(2) EFD be interpreted:-

a) in the light of Articles 4, 6 and 51(1) of the EU Charter of Fundamental Rights, as allowing a Member State to provide in its national law, which transposes the EFD, that the execution of a European arrest warrant shall be refused where there has been a manifest breach of, or a manifest risk of breaching, the suspect's fundamental rights in the issuing Member State and if so, on the basis of what criteria should the manifest character of the breach be assessed?

b) as being applicable with regard to a Member State which has not accepted the powers of the Court of Justice of the EU under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon and which has indicated its intention to exercise its right under Article 10(4) Protocol No 36, following which all acts of the Union in the field of police cooperation and judicial cooperation in criminal matters cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 2 of the same Article?

28. The lawyers for the Tuotpo DfE raised a further issue alleging that such a reference would be inadmissible.. They argued that any review of a Member State's decision to issue an EAW would constitute "a review of the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" within the meaning of Article 276 TFEU and would, accordingly, fall out of the jurisdiction of the CJEU. They reserved the right to raise the argument before the CJEU.