

Ne bis in idem
Article 50 CFR
How fundamental is it?

Patrick Layden QC TD

Ne bis in idem

- Common law – US constitution
- United Nations – ICCPR
- European Economic Community
- Protocol 7 to European Convention on Human Rights
- Charter of Fundamental Rights
- Current problems and future solutions

1976 – International Covenant on Civil and Political Rights

- Article 14(7):
- "No-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

United Nations Human Rights Committee

"In considering State reports differing views have often been expressed as to the scope of paragraph 7 of Article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to Article 14, paragraph 7."

Gutmann v Commission of the EAEC
[1965] ECR (English Special Edn) 61
at 65.

- "However, neither in the terms of the contested decision nor in the items in the file submitted to it has the Court been able to find any assurance that the principle *non bis in idem* has been respected.-----:
- "In the light of the facts of this case the possibility cannot be excluded that two disciplinary proceedings have been initiated on the basis of the same set of facts known to the Commission at the opening of the earlier proceedings, and founded on the same complaint.

1985 – Schengen Article 54

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts ***provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.***"

Van Esbroek Case C-436/04

- "The above findings are further reinforced by the objective of Article 54 of the [Schengen Convention], which is to ensure that no one is prosecuted for the same acts in several Contracting States ***on account of his having exercised his right to freedom of movement***...[T]hat right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence."

EU – Underlying principles

1. General principle against double jeopardy (Gutmann)
2. Protection of freedom of movement (Schengen, Van Esbroek etc.)

1984 – Protocol 7 to ECHR

- “4 (1) No-one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
- (2) The provisions of the preceding paragraph shall not prevent the **reopening** of the case in accordance with the law and penal procedure of the State concerned, ***if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.***
- (3) No derogation from this Article shall be made under Article 15 of the Convention.”

Article 6(1)

- The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Article 6(1) - continued

- The rights, freedoms and principles in the Charter shall be interpreted **in accordance with** the general provisions in Title VII of the Charter governing its interpretation and application and with **due regard** to the explanations referred to in the Charter, that set out the sources of those provisions.

Charter of Fundamental Rights Article 50

“No-one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

Title 7 – Article 52(1)

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Title 7 – Article 52(3)

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. ***This provision shall not prevent Union law providing more extensive protection.***

Explanations – (2007/C 303/02)

- Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider
- ***“Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States.”***

J McB – C-400/10 PPU

53. ----”The wording of Article 8(1) (ECHR) is identical to that of Article 7 (CFR), except that it uses the expression “correspondence” instead of “communications”. That being so, it is clear that Article 7 contains rights corresponding to those guaranteed by Article 8. Article 7 CFR must therefore be given the same meaning and scope as Article 8 ECHR.”

A50 CFR & A4P7 ECHR

“No-one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

(1) No-one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

A50 CFR & A4P7 ECHR (continued)

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(2) The provisions of the proceeding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

Points of difference

A50 – applies throughout Union

P7A4 – not signed/ratified by all MS

A50 – transnational

P7A4 – limited to individual state

A50 – No limitations

P7A4(2) – retrial on new evidence

(Accession negotiations – don't include P7)

Alice in Wonderland

- “When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean -- neither more nor less.”
“The question is,” said Alice, “whether you can make words mean so many different things.”
“The question is,” said Humpty Dumpty, “which is to be master - - that’s all.”

Cases

- Heinrich Boere – Landgericht Aachen
- Case 17/10 – Toshiba
- Case 617/10 – Aklagaren v Fransson
- Case 489/10 – Bonda
- Case 571/10 – Kamberaj

Heinrich Boere

- 1944 - war crimes in NL - 3 murders
- 1949 – convicted *in absentia* – (Life imp)
- 1954 – returned to Germany
- 1980 – Extradition request by NL refused
- 2003 – NL asked Germany to impose life sentence – refused – outwith Art 6(3)

Heinrich Boere (continued)

- 4/2008 – criminal charges – Aachen
- 10/2009 – 3/2010 – 20 hearings
- Conviction – 3 murders – life imp.
- Art 54 Schengen – (no penalty enforced)
- Art 50 CFR – “Art 50 subject to limitations of Art 54 Schengen”
- **Acte Claire, so no reference to CJEU!!**

Problems

- Multiplicity of texts – ICCPR, Schengen, P7A4, Article 50, domestic legislation
- Administrative/criminal distinctions (cf tax, CAP administration) – Zolotukhin v Russia (ECtHR – Application 14939/03)
- Tension with public interest in securing convictions (Boere)

Problems (continued)

- “Member States ***only*** when they are ***implementing*** Union law”
- What about double prosecution for EU offence within single MS?
- Differing views as to limitations, if any.

Solutions?

Twin principles of protection of

- individual rights; and
- freedom of movement

will not be served by Art 54 or Art 4(2)
limitations

CJEU should say that article 50 means
what it says