The Recognition of Foreign Convictions From Member States of the European Union in Criminal Trials in the United Kingdom: Emerging Issues

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Foreign convictions are admissible in criminal proceedings in the United Kingdom to, inter alia, show that the accused is not a first offender or to impeach the credibility of a witness. Convictions from member states of the European Union are governed by sections 73 and 74 of the Police and Criminal Evidence Act and convictions from non-member states of the European Union are governed by section 7 of the Evidence Act of 1851. Courts have developed jurisprudence on proving and admitting foreign convictions especially from member states of the European Union. Courts have drawn a distinction between proving and admitting a foreign conviction. They have held that a foreign conviction which was a result of an unfair trial may not be admitted in evidence. However, most courts have admitted foreign convictions even where there were serious concerns about the fairness of the trials resulting in those convictions. This article highlights the above jurisprudence and recommends, inter alia, that courts have to develop criteria to be followed in deciding whether or not to admit foreign convictions.

I. Introduction

The issue of whether or not to recognise foreign judgements has been debated in the United Kingdom and other countries for many years. However, most of the debate has focused on the recognition of foreign civil judgements.[2] Very little has been written on the recognition of foreign criminal convictions in the United Kingdom. In the United Kingdom, courts have always considered previous convictions for purposes, such as, sentencing and impeaching the credibility of a witness. Legislation, guidelines and case law exist on the issue of the use of domestic previous convictions for purposes, such as, sentencing[3] and showing that the witness

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[2] See for example, Jonathan Harris 'Recognition of Foreign Judgements at Common Law – The Anti-Suit Injunction Link' (1997) 17(3) *Oxford Journal of Legal Studies* 477 – 498.

[3] See, for example, Julian V. Roberts and Andrew Von Hirsch, *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (2010); Thomas O'Malley, *The Criminal Process* (2009) at 889 – 892; P.J. Richardson (ed) *Archbold Criminal Pleading, Evidence and Practice* (2014) at 581 (para 5-70); Barbara Barnes (ed), *Archbold Magistrates' Courts Criminal Practice* (2014) at 1555 – 1556; Anthony Edwards and Joanne Savage, *Sentencing Handbook: Sentencing Guidelines in the Criminal Trials* (2009) at 14; and Martin Wasik, *A Practical Approach to Sentencing*, 5thed (2014) at 6.

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is of bad character.[4] However, cases dealing with the issue of foreign previous convictions are not in abundance. This could explain why the topic does not feature in some British textbooks on evidence[5] and sentencing[6] and where it is dealt with the discussion is very brief.[7] European countries, including the United Kingdom, have for many years recognised foreign convictions in issues such as extradition and the transfer of offenders. The result is that legislation has been enacted and treaties signed to regulate these two issues in international co-operation in criminal matters. The above issues have been studied by scholars for many years and hundreds of cases have been decided to address the challenges that have arisen. The question of the recognition of foreign criminal convictions in criminal trials is increasingly attracting the attention of legislators, policy makers and judges. In Europe, some countries now share criminal records information.[8] Some international treaties, which have been ratified by many European countries, empower states parties to consider convictions from other countries for the purpose of sentencing offenders convicted of certain crimes.[9] The purpose of this article is to highlight the issues that have emerged in the recognition of foreign previous convictions, mostly from countries in the European Union, in the United Kingdom. This article has five parts. Part one is the introduction; part two deals with the legal framework on governing foreign convictions in the United Kingdom; part three deals with the issue of proving foreign convictions in the United Kingdom; part four deals with cases where the validity of foreign convictions have been challenged in courts in the United Kingdom; and the last part is the conclusion.

II. The legal framework on foreign previous convictions in the United Kingdom

Different pieces of legislation apply to previous convictions from different parts of the world. Convictions from member states of the European Union are governed

[4] See Richardson, supra note 2, at 1499 – 1562; Richard Taylor et al, *Blackstone's Guide to the Criminal Justice Act 2003* (2004) at 123 – 141; Barbara Barnes (ed), *Archbold Magistrates' Courts Criminal Practice* (2014) at 621 – 632; and Liz Heffernan and Una Ni Raifeartaigh, *Evidence in Criminal Trials* (2014) at 59 – 60.

[5] See for example, Christopher Allen, *Practical Guide to Evidence*, 3rd Ed (2004) at 292 (section 73(1) is discussed but no mention is made of foreign convictions); Michael Zander, *The Police and Criminal Evidence Act 1984*, 6th Ed (2013) at 437, where the author deals with section 73(1) but does not mention that it is also applicable to foreign convictions;

[6] In Richardson, supra note 2, at 581 (para 5-71) the authors briefly deal with the issue of previous convictions but they do not mention foreign previous convictions;

[7] As is the case in Richardson, supra note 2; Richard May and Steven Powles, *Criminal Evidence*, 5th Ed (2004) at 51 – 52 (where section 73(1) is mentioned and one case, R v Mancini [2002] 2 Cr. App.R. 377, discussed); John Andrews and Michael Hirst, *Andrews and Hirst on Criminal Evidence*, 4thed (2001) at 657 (where the authors mention that section 7 of the Evidence Act of 1851 governs the admissibility of evidence of foreign convictions); Paul Ozin, Heather Norton, and Perry Spivey, *PACE: A Practical Guide to the Police and Criminal Evidence Act 1984*, 3rd Ed (2013) at 201 (the authors mention that section 73 is also applicable to convictions from EU member states).

[8] See Constantin Stefanou and Helen Xanthaki (editors) *Towards a European Criminal Record* (2012).

[9] See for example, Article 41 of the United Nations against Corruption which provides that 'Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.' See also Article 22 of the United Nations Convention against Transnational Organized Crime.

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by a different piece of legislation and those from countries which are not member states of the European Union are governed by a different piece of legislation. The law governing the use of foreign previous convictions from member states of the European Union in the United Kingdom is section 73 of the Police and Criminal Evidence Act[10] which provides that:

' (1) Where in any proceedings the fact that a person has in…any other member State been convicted…of an offence otherwise than by a Service court is admissible in evidence, it may be proved by producing a certificate of conviction…relating to that offence, and proving that the person named in the certificate as having been convicted…of the offence is the person whose conviction…of the offence is to be proved.

(2) For the purposes of this section a certificate of conviction…(c) shall, as regards a conviction…by a court in a member State…, consist of a certificate, signed by the proper officer of the court where the conviction…took place, giving details of the offence, of the conviction…, and of any sentence; and a document purporting to be a duly signed certificate of conviction…under this section shall be taken to be such a certificate unless the contrary is proved.

(3) In subsection (2) above "proper officer" means— … (c) in relation to any court in another member State ("the EU court"), a person who would be the proper officer of the EU court if that court were in the United Kingdom.

(4) The method of proving a conviction…authorised by this section shall be in addition to and not to the exclusion of any other authorised manner of proving a conviction…'

Another important provision is section 74 of the same Act which provides that:

'(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in…any other member State or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.

(2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in… any other member State or by a Service court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved.

(3) In any proceedings where evidence is admissible of the fact that the accused has committed an offence, if the accused is proved to have been convicted of the offence—(a) by or before any court in …any other member State; or (b) by a Service court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved.

(4) Nothing in this section shall prejudice—(a) the admissibility in evidence of any conviction which would be admissible apart from this section; or (b) the operation of any enactment whereby a conviction or a finding of fact in any

[10] Police and Criminal Evidence Act of 1984.

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proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.'

The following issues should be noted about the above two provisions. One, section 73 regulates the proof of foreign convictions of any person – this could be the accused or any witness. Two, section 74(1) is applicable to the foreign previous conviction of any person other than the accused and section 74(3) is applicable to foreign previous convictions of an accused. Three, the evidence of a foreign previous conviction referred to in both sections is that of a court in 'any other member State.' It has been observed that section 73(1) does not define 'a member state' and that 'it denotes a state that is party to the treaties of the European Union.'[11] This means that sections 73 and 74 are not applicable to previous convictions from courts outside the European Union. The drafting history of the amendments to section 74 shows that it was amended 'so that convictions for offences in other European Union member States are treated in the same way as UK convictions.'[12] Convictions by courts in countries which are not member states of the European Union are governed by section 7 of the Evidence Act of 1851 which provides that:

'All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as herein-after mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as herein-before respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature

[11] Ozin, Norton, and Spivey, supra note 6, at 201.

[12] House of Lords, Explanatory Notes on the Coroners and Justice Bill, para 623. Available at http://www.publications.parliament.uk/pa/ld200809/ldbills/033/en/09033x-j.htm (accessed 14 September 2014).

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and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.'

It is now imperative to have a look at how a previous foreign conviction is proved in criminal proceedings in the United Kingdom.

III. Proving a foreign previous conviction

Different authors have expressed different views on which law is applicable to proving previous foreign convictions in the United Kingdom. Richardson *et al* have stated that '[f]oreign convictions are provable under section 7 of the Evidence Act 1851…together with appropriate evidence of the identity of the person said to have to have been convicted as the person who was convicted.'[13] This observation seems to imply that section 7 of the Evidence Act of 1851 is applicable to all previous foreign convictions – those from member states of the European Union and those from courts in countries not members of the European Union. May and Powles have argued that '[s]ection 73 of the 1984 Act…apply only to convictions in the UK. Foreign convictions must be proved under s.7 of the Evidence Act 1851.'[14] Andrews and Hirst have argued that '[t]he judgement of a foreign court (whether civil or criminal) may be proved by an examined copy of the judgement, in accordance with s 7 of the Evidence Act 1851 or by a copy authenticated under a special procedure laid down in that Act.'[15] The observations by Andrews and Hirst on the one hand and May and Powles on the other hand were made before section 73 was amended in 2010 by the Coroner and Justice Act[16] and therefore do not deal with the current legal position under section 73. Unlike Richardson and May, and Powles, who support their statements by referring to case law, Andrews and Hirst do not refer to case law. This could be explained by the fact that, at the time the book was published, the two cases that the others refer to had not been decided. Ozin, Norton and Spivey argued that 'section 73 is not the only way' by which a previous conviction or acquittal from the UK or any other member state may be proved.[17] However, the authors focus on convictions from the UK and other member states of the European Union. They do not address the issue of convictions from non-European Union member states.

A literal application of sections 73 of Police and Criminal Evidence Act and section 7 of the Evidence Act of 1851 leads to the conclusion that a conviction from a member state of the European Union has to be proved on the basis of section 73 of the Police and Criminal Evidence Act, and a conviction from a country which is not a member state of the European Union has to be proved on the basis of section 7 of the Evidence Act of 1851.However, section 73(4) could still be interpreted as

[13] Richardson, supra note 2, at 1388 (para 9-97), the authors refer to the case of R v Mauricia [2002] 2 Cr. App. R.27 CA.

[14] May and Powles, supra note 6, at 51. The authors cite the case of R v Mancini [2002] 2 Cr. App.R.377.

[15] Andrews and Hirst, supra note 6, at 657.

[16] Coroner and Justice Act 2009 (c 25). This amendment came into force on 15 August 2010.

[17] Ozin, Norton, and Spivey, supra note 6, at 201.

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empowering a prosecutor to invoke section 7 of the Evidence Act of 1851 to prove evidence of a previous conviction from a member state of the European Union. This is because it provides that '[t]he method of proving a conviction…authorised by this section shall be in addition to and not to the exclusion of any other authorised manner of proving a conviction.' Section 7 of the Evidence Act of 1851 is one of such authorised manners. It is submitted that although section 73 of the Police and Criminal Evidence Act does not expressly exclude the application of section 7 of the Evidence Act of 1851, the best approach would be to invoke section 73 of the Police and Criminal Evidence Act when dealing with convictions from a member state of the European Union. This is due to the fact that section 73 of the Police and Criminal Evidence Act was specifically amended to address the issue of evidence of previous convictions from member states of the European Union. This would be in line with the intentions of the legislators.[18] Richardson *et al* have demonstrated that section 7 of the Evidence Act of 1851 does not apply to convictions handed down by courts in Scotland and Ireland 'nor, it would seem, to those of the Isle of Man or Channel Islands.'[19]

It is necessary to have a look at some of the cases in which sections 7 of the Evidence Act of 1851 and 73 of the Police and Criminal Evidence Act have been invoked. In *Charles A'Court Beadon*[20] the appellant was prosecuted for making an untrue statement for the purpose of procuring a passport. In particular, he had not stated that he had lost his British citizenship when he acquired American citizenship. In order to prove that the accused was an American citizen, the prosecution 'sought to adduce in evidence a photostatic copy of an American certificate of naturalization.'[21] The appellant objected to the admission of the copy in evidence on the ground that the prosecution:

'[H]ad failed to comply with section 7 of the Evidence Act, 1851, in that, although the document was authenticated by the Seal of the United States of America, nevertheless the copy did not purport to be sealed with the seal of a Court or to be signed by a Judge.'[22]

His objection was dismissed by the Commissioner and he appealed. The Court of Appeal held that the document in question should not have been admitted in evidence as it did not meet the requirements of section 7 of the Evidence Act of 1851.[23] His conviction was set aside. It is therefore necessary for the prosecution to

[18] 'Section 73 of the Police and Criminal Evidence Act 1984 enables convictions (or acquittals) for offences in the UK to be proved by means of a certificate of conviction (or acquittal) signed by the proper officer of the court. At present, overseas convictions are proved under section 7 of the Evidence Act 1851, which requires that the judgment either be sealed by the foreign court or signed by the judge of the foreign court. Paragraph 12 of Schedule 15 amends section 73 of the Police and Criminal Evidence Act 1984 so as to extend the procedures for proving convictions or acquittals in other member States of the European Union by way of certificates signed by the proper officer of the court.' See House of Commons, Explanatory Notes on the Coroners and Justice Bill, para 603. Available at http://www.publications.parliament.uk/pa/cm200809/cmbills/009/en/09009x-i.htm (accessed 14 September 2014).

[19] Richardson, supra note 2, at 1388 (para 9-97).

[20] Charles A'CourtBeadon (1934) 24 Cr. App. R. 59.

[21] *Id*. at 60.

[22] *Id*. at 60.

[23] *Id*. at 62 – 63.

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follow the requirements under section 7 of the Evidence Act of 1851 strictly. In *Director of Assets Recovery Agency v Virtosu and another*[24] the first respondent was, in 2005, convicted in France 'of an offence of facilitating or attempting to facilitate the illegal entry, movement or residence in France of foreign nationals.'[25] When he was released from prison in France, he returned to England where he was a citizen. The applicant brought an application under the Proceeds of Crime Act in 'respect of property belonging to the defendants…and his wife…on the grounds that the property was, or represented, property obtained through unlawful conduct.'[26] The conduct in question was people trafficking in France and England, money laundering and mortgage fraud in England.[27] The defendant was convicted in France of people trafficking.[28] This was also an offence under English law.[29] The Court, in admitting evidence of the defendant's French conviction as proof of unlawful conduct, held that:

'The procedure for proving foreign judgments is provided by section 7 of the Evidence Act 1851 (14 & 15 Vict c 99), although other means are possible…In the circumstances of the present case the conviction did not have to be formally proved at the trial…because it was by admitted by the first defendant in his witness statement of 4 August 2007. The first defendant had little choice but to admit it in this case, since, from the commencement of these English proceedings until a month before the trial, he was imprisoned in France, serving the eight-year sentence imposed following that conviction.'[30]

It should be recalled that this case was decided before section 73 of the Police and Criminal Evidence Act was amended to include convictions from member states of the European Union. However, in the light of the fact that section 73(4) is broad enough to empower a prosecutor to invoke section 7 of the Evidence Act of 1851, it is unlikely that the court would have come to a different conclusion had the case been decided after section 73 of the Police and Criminal Evidence Act had been amended to include convictions by courts in member states of the European Union. In *R. v Kordasinski*[31] the appellant was convicted of rape, false imprisonment and assault. The judge allowed the prosecution to adduce evidence of the accused's bad character in the form of his previous Polish convictions. The prosecution had acquired the details of the accused's conviction 'in accordance with the "letter of request" procedure under s.7 and 8 of the Crime (International Co-operation) Act 2003.'[32] The documents 'were far more extensive than a certificate or memoran-

[24] Director of Assets Recovery Agency v Virtosu and another [2008] EWHC 149 (QB); [2009] 1 W.L.R. 2808.
[25] *Id.* at para 21 – 22.
[26] *Id.* at 2809.
[27] *Id.* at para 10.
[28] *Id.* at para 21 – 22.
[29] *Id.* at para 23 – 25.
[30] *Id.* at para 26.
[31] R. v Kordasinski [2006] EWCA Crim 2984; [2007] 1 Cr. App. R. 17. For a summary of the principle in this case see P.J. Richardson (editor) Archbold Criminal Pleading, Evidence and Practice (Sweet and Maxwell, 2014) at 1499 (para 13-1);
[32] R. v Kordasinski, supra note 30, at para 35.

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dum of conviction that might be produce under s.73 of the Police and Criminal Evidence Act 1984.'[33] The defence objected to the admissibility of the Polish convictions on grounds, *inter alia*, that 'the previous convictions were not properly proved',[34] that the prosecution 'failed to produce evidence proving the compatibility of Polish and English law',[35] and that:

'[T]here was no trial by jury in Poland; the prosecution had not demonstrated that the Polish court applied an acceptable burden and standard of proof; and generally that these matters could only properly be dealt with by expert evidence of Polish law and procedure and there was no such evidence.'[36]

The judge rejected all the above submissions and admitted the evidence in question. The appellate court held that the Polish criminal system guaranteed the accused a fair trial and concluded that the evidence of the Polish convictions was admissible under section 7 of the Evidence Act of 1851.[37] The above holding shows that for a foreign conviction to be admitted under section 7 of the Evidence Act of 1851, the foreign judicial system does not have to be similar to that of the United Kingdom. What matters is that there is evidence that there were safeguards in the criminal justice system to ensure that the accused's trial was fair.

Section 73(1) of the Police and Criminal Evidence Act provides that the accused's foreign previous conviction 'may be proved by producing a certificate of conviction.' In *Erhan M v Regina*[38] the appellant, a Bulgarian national, was convicted of the murder of his partner and sentenced to imprisonment for life. Among the evidence admitted by the trial court was that of the appellant's Bulgarian convictions for offences of violence. This evidence 'was relevant…to the issue as to whether the appellant stabbed the deceased having lost his self-control or had killed her as an act of revenge.'[39] In proving the appellant's Bulgarian convictions, the prosecution produced 'a certificated copy of the proceedings in the district court for the city of Shumen on 12 February 1991.'[40] The certificate showed that the appellant had been convicted of attempted murder, robbery and rape and sentenced to various prison terms.[41] The trial 'judge accepted that the appellant's previous behaviour, if proved, established a propensity for violence, including violence towards women.'[42] Although the certificate showed the evidence accepted by the Bulgarian court to convict the appellant, it did not refer to any evidence from the appellant. At his trial the accused argued, *inter alia*, that the evidence of the Bulgaria convictions should not be admitted because the trial had not been fair. He argued that 'no oral

[33] *Id*. at para 35.
[34] *Id*. at para 39.
[35] *Id*. at para 40.
[36] *Id*. at para 41.
[37] *Id*. at 66. See also R. v Mauricia [2002] EWCA Crim 676; [2002] 2 Cr. App. R. 27 in which the Court of Appeal invoked section 7 of the Evidence Act of 1851 to admit evidence of previous convictions imposed by Dutch courts.
[38] Erhan M v Regina [2014] EWCA Crim 1523; 2014 WL 3387866.
[39] *Id*. at para 6.
[40] *Id*. at para 7.
[41] *Id*. at para 7.
[42] *Id*. at para 8.

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evidence was adduced during the hearing. The hearing was completed in one day. [And]… that the verdicts in Bulgaria were biased against a man of Turkish ethnicity.'[43] Based on the accused's submissions, the judge refused the prosecution's application. However, during his testimony, the accused put his character into issue by attacking the character of the deceased.[44] On that basis the judge permitted the prosecutor to cross-examine the accused on his character based on the Bulgarian convictions. Before allowing the accused to be cross-examined,

'The judge reminded himself of the need to ensure that the trial was fair. Although the appellant's trial in Bulgaria had not been conducted to contemporary domestic standards, the proceedings were held in public, the appellant's guilt had to be proved beyond reasonable doubt, the appellant had been entitled to legal representation whether he instructed a lawyer or not, and the evidence upon which the court convicted him was contained in the certificate. The judge concluded that the jury should be made aware of the character of the man making the attack upon the deceased's character.'[45]

The Judge 'approved the terms of a formal admission by the prosecution as to the state of the Bulgarian criminal justice system in 1991' and during cross-examination:

'The appellant admitted that in 1991 in Bulgaria he had been convicted of attempted murder, robbery and violence to a female. He was released from his sentence of imprisonment in 2000. He denied that he was guilty of those offences but in re-examination he gave an explanation only in respect of the conviction for attempted murder. He said that he had been attacked by three Bulgarian men who had taken exception to his use of the Turkish language. The appellant said that he had acted in self-defence. The court proceedings had lasted less than one day and no oral evidence had been received. The appellant said that he had not received a fair trial.'[46]

Evidence on the nature of the criminal justice system in Bulgaria in 1991 was obtained from the internet and from an academic expert.[47] The evidence of the accused's previous convictions in Bulgaria was considered by the jury in deciding whether or not he was of good character.[48] His two grounds of appeal were that '[t]he trial judge wrongly admitted evidence of the appellant's previous convictions [by a court in Bulgaria]' and that '[t]he convictions were not susceptible to proof under section 73 of the Police and Criminal Evidence Act 1984.'[49] The defence argued that the previous Bulgarian convictions could not be proved on the basis of a certificate under section 73 of the Police and Criminal Evidence Act because:

[43] *Id.* at para 8.
[44] *Id.* at para 10.
[45] *Id.* at para 11.
[46] *Id.* at para 11.
[47] *Id.* at para 12.
[48] *Id.* at para 13.
[49] *Id.* at para 2.

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'[T]he certificate related to convictions that took place during a period of time before Bulgaria's accession to the Treaty of the European Union…[T]hat there should be read into section 73 a requirement that the conviction should have taken place while Bulgaria was a member state, namely in and after 2006.'[50]

The defence argued further that 'section 73 should be held not to apply to any conviction that took place under a regime which failed to guarantee a fair trial by the standards of Article 6 of the' European Convention on Human Rights.[51] The Court referred to the rationale behind the introduction of the words 'any other member state' in section 73 of the Police and Criminal Evidence Act[52] and held that the appellant's lawyer's submissions were 'misconceived.'[53] The Court underlined the:

'[I]mportance of distinguishing between (i) proof of a conviction and (ii) the admission in evidence of that conviction in criminal proceedings in the United Kingdom. There was no issue between the prosecution and the defence that the appellant had been convicted as the certificate stated. His argument was that the evidence of his conviction should not be received having regard to the unfairness of the proceedings in which the conviction had taken place. There are, it seems to us, two ways in which courts in England and Wales will ensure that the treatment of a conviction in a member state will be the same as the treatment of a conviction by a national court. First, by section 74(2) proof of the conviction will constitute a rebuttable presumption that the offence was committed "unless the contrary is proved". Accordingly, whether the conviction was by a national court or the court of a member state, it will be open to the defendant to challenge the correctness of the conviction. Secondly, if there is evidence that the conviction was the result of a trial which failed to reach appropriate standards of fairness, it would be open to the court to decline to admit the evidence in the exercise of its discretion, either under section 101(3) of the Criminal Justice Act 2003…or pursuant to section 78 of the Police and Criminal Evidence Act 1984. There is, we consider, no occasion to qualify the express terms of section 73 in order to ensure compliance with the Framework Decision because the law of England and Wales is already compliant.'[54]

The Court draws a distinction between proof of a conviction on the one hand, and the admission in evidence on that conviction on the other hand. The mere fact that there is evidence from a foreign state showing that the accused was convicted of an offence in that state does not necessarily mean that the fact of the conviction will be admissible in evidence. The person against whom the conviction is adduced can challenge its admissibility and a court still has discretion to exclude that evidence if it is of the view that the conviction was as a result of an unfair trial. This is the case whether or not the country from which the certificate of conviction originated is a member state of the European Union. Convictions from countries in the European

[50] *Id.* at para 14.
[51] *Id.* at para 15.
[52] *Id.* at para 15.
[53] *Id.* at para 16.
[54] *Id.* at para 16.

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Union could still be inadmissible. In *Regina v John Alan Brooks* where the accused's previous conviction from France was adduced in evidence at his trial, the Court, in admitting it, held that the 'conviction in France (it being a Member State) was properly adduced as evidence of his being convicted under the provisions of section 74(3) of the 1984 Act.'[55] The Court added that the accused could still argue that 'he had been wrongly convicted.'[56] The Court emphasises the point that there is a difference between proving a conviction on the one hand, and admitting that conviction on the other hand. Any conviction from a member state of the EU could be proved on the basis of section 73 of the Police and Criminal Evidence Act. However, the accused could challenge the admissibility of that conviction. It is argued that had the law prevented the accused from challenging the admissibility of a conviction from a member state of the European Union or any foreign country, that law would have been contrary to Article 6 of the European Convention of Human Rights which guarantees the accused the right to a fair trial that includes the right to challenge evidence.

IV. Disputing convictions from EU member states and a few other countries: courts' general reluctance to exclude evidence of foreign convictions

One of the issues emerging from cases in which courts have had to deal with foreign convictions is that of whether or not courts in the United Kingdom should accept the fact that the offender was validly convicted. Some accused have challenged the validity of their convictions in foreign countries on the basis that had they been tried in the United Kingdom or had the courts in the foreign countries applied principles similar to those applied by courts in the United Kingdom, they would not have been convicted of the offences in question. The author will now demonstrate, in a chorological order, the trend that is emerging from cases and how courts have dealt with the arguments. In *R v Zakaria Ramadan El-Delbi*[57] the appellant was convicted of drug dealing-related offences. At his trial, he had not informed his lawyer that he had been convicted of money laundering in the Netherlands.[58] The appellant had filed an appeal against his Dutch conviction and having filed an appeal against his conviction, his Dutch lawyer informed his UK lawyer that the appellant did not have a previous conviction in the Netherlands.[59] His Dutch lawyer added that in Dutch law, a person only gets a criminal record

[55] Regina v John Alan Brooks [2014] EWCA Crim 562; 2014 WL 1097093 para 27.
[56] *Id*. at para 27.
[57] R v Zakaria Ramadan El-Delbi[2003] EWCA Crim 1767; 2003 WL 21353253. For a summary of the principle in this case see Richardson, supra note 2, at 1541 (para 13-99). For a discussion of the circumstances in which a previous foreign convictions may be admitted in courts in the United States of America, see, for example, JeniaIontcheva Turner, 'Interstate Conflict and Cooperation in Criminal Cases: An American Perspective' (2014) 4 *European Criminal Law Review* 114, at 140 – 145.
[58] R v ZakariaRamadan, supra note 56, at para 29.
[59] *Id*. at para 31.

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when his sentence is 'irrevocable.'[60] His UK lawyer argued that in the light of the explanation given by his Dutch lawyer, the UK court should consider him a first offender. The prosecution argued that had he been convicted by a court in the UK, he would have had a criminal record notwithstanding the fact that he had appealed against the conviction.[61] Because of the disagreements between the judge, the defence lawyer and the prosecution on whether or not the accused should be considered as having a criminal record from the Netherlands, the judge decided not to give instructions to the jury on the question of the accused's good character.[62] On appeal, the appellant submitted that 'the Judge was wrong in declining to allow the Appellant to be presented as a man of good character without qualification' and that 'he should have given a full good character direction or in the alternative a good character direction restricted to its relevance to credibility.'[63] The appeal court held that it would have been wrong for the judge to hold that the appellant 'was a man of no previous convictions in the circumstances without any reference being made to the Dutch finding of guilt.'[64] The Court added that the 'judge was right not to give a good character direction.'[65] The Court considered expert evidence from a Dutch professor of criminal law on whether or not a person who has been convicted of an offence and appeals against his conviction gets a criminal record. The expert's opinion was that under Dutch law a person does not get a criminal record until his conviction is confirmed by a higher court.[66] Against that background, the appellant's lawyer submitted that:

'[I]f the conviction is not to be treated as a conviction in the country where it is recorded until the appeal is heard, it should not be treated as one in this country. The status of a foreign conviction must be assessed by reference to the applicable foreign law. Thus since the finding of the Dutch court, which was the subject of appeal, did not rank as "a conviction", the appellant should have been entitled to refer to himself as a person with no previous convictions without exposing himself to any reference to the Dutch proceedings. Once he had been established as a person "with no previous convictions", he was entitled to a good character direction, although…the judge may have been entitled to limit the direction, perhaps only giving the credibility limb of such a direction and not the propensity limb.'[67]

The appellant's lawyer 'submitted that direct authority on the relevance of foreign criminal proceedings to good character is surprisingly sparse.'[68] He added that the court should appreciate the differences between English law and Dutch law because 'in English law the finding of guilt [by a lower court] stands as a conviction unless and until it is overturned on appeal whereas in Dutch law the situation is quite

[60] *Id.* at para 31.
[61] *Id.* at paras 32 – 33.
[62] *Id.* at paras 40 – 43.
[63] *Id.* at para 44.
[64] *Id.* at para 45.
[65] *Id.* at para 46.
[66] *Id.* at paras 49 – 50.
[67] *Id.* at para 51.
[68] *Id.* at para 54.

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different.'[69] He concluded that 'since there was no irrevocable conviction recorded in Holland, the appellant ought to have been able to assert that he had no previous convictions…'[70] The prosecution argued that in terms of English law the appellant could not be considered as a person without a criminal conviction and that he should at least have been cross-examined on it.[71] The Court in dismissing the appeal held that 'if the outstanding appeal enabled concealment from the jury of these facts so as to lead to a direction as if they did not exist, it would…be an "insult to common sense".'[72] This judgment shows the challenges associated with admitting convictions from a country with a legal system different from that of the United Kingdom. It is the present author's opinion that the issue of whether or not a person has a conviction from a foreign country should be resolved by looking at the law of the foreign country. If a person is not considered to have a criminal record in the country in which he was tried, it is doubtful that he should be considered to have a criminal record in another country. Otherwise courts in the United Kingdom would be indirectly questioning the logic behind the law of the foreign state which issue is beyond their mandate. They would also in practice be creating a conviction where it does not exist. It is also important to note that in this case the appellant did not challenge the fairness of the Dutch trial. His argument was that he did not have a conviction.

In *Regina v Shaun Peter Sanders*[73] the applicant was convicted of several offences and sentenced to automatic life imprisonment.[74] He had four previous convictions and one of them, which the sentencing judge emphasised in sentencing him to life imprisonment,[75] was that 'in December 1998 at a Court Martial in Germany he was sentenced to 20 months' detention in a young offender institution for an offence of wounding with intent to cause grievous bodily harm committed whilst he was a serving member of the armed forces in Germany.'[76] On appeal, the appellant argued that the trial judge had erred in considering the German Court Martial conviction for the purpose of sentencing in terms of the applicable legislation.[77] He added that the relevant legislation did not recognise sentences imposed by military courts outside the United Kingdom.[78] In allowing the appellant's appeal, the Court held that the trial court lacked jurisdiction to consider the German Court Martial conviction for the purpose of sentencing. This is because the relevant pieces of legislation were not applicable to convictions by foreign military courts.[79] It should be noted that in this case the appellant did not question the correctness of the Court

[69] *Id*. at para 55.
[70] *Id*. at para 56.
[71] *Id*. at paras 57 – 62.
[72] *Id*. at para 68.
[73] Regina v Shaun Peter Sanders [2006] EWCA Crim 1842; 2006 WL 1994771.
[74] This was in terms of section 109 of the Powers of Criminal Courts (Sentencing) Act 2000.
[75] Regina v Shaun Peter Sanders, supra note 72, at para 11.
[76] *Id*. at para 10.
[77] *Id*. at para 12.
[78] *Id*. at paras 14 – 17.
[79] *Id*. at para 19.

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Martial decision. There is a possibility that in the future, prosecutors could, on the basis of section 7 of the Evidence Act of 1851, also consider invoking convictions by Court Martials from other countries to prove, for example, that the accused is not a first offender. If this is to happen, courts should admit that evidence with caution in the light of the fact that military courts, at least in some countries, are known not be as rigorous as civilian courts when it comes to upholding the rights of the accused.[80] However, for such evidence to be admissible, courts in the UK would have to be convinced that the court martial is a 'court of justice' within the meaning of section 7 of the Evidence Act of 1851.[81] If such a conviction were handed down by a court martial in a member state of the European Union, it would still be admissible on the basis of section 74 of the Police and Criminal Evidence Act. It should be recalled that section 82(1) of the Police and Criminal Evidence Act defines a service court to mean 'the Court Martial or the Service Civilian Court.'

In *Regina v Desmond Donnelly*[82] the appellant was convicted of importing drugs into the United Kingdom. The trial court admitted, as evidence of bad character, the accused's conviction in France for importing drugs.[83] The appellant had pleaded guilty and sentenced to five years' imprisonment and banned from entering France for 10 years. The appellant indirectly challenged the validity of the French conviction. He argued that it should not be admitted to show propensity to commit the offence of which he was being prosecuted.[84] He argued that he had pleaded guilty in France not because he had committed the offence in question but because:

'[O]n the occasion in question, he had no knowledge of the contraband and had entered a plea of guilty to the offence against the background of inhumane levels of bullying whilst on remand for the offence and in the light of poor advice and ineffectual representation. [And]…that examination of the documents in support of the conviction showed the offence to be one of strict liability under French law, insofar as the requirements of the offence there simply dealt with the physical control of the contraband in question at the time of entry and the corresponding lack of any official permission to import it'.[85]

According to the research carried out by the appellant's lawyer on the issue of French law, 'the French offence was committed negligently and it was therefore unsafe to allow evidence of the conviction to be adduced, because it does not represent anything like the same type of offence as the English charge.'[86] However, no evidence was led to show that he had been treated inhumanely.[87] He argued that

[80] Human Rights Committee, General Comment No 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial' CCPR/C/GC/32, 23 August 2007, para22.

[81] This is unlikely, though, in the light of the fact that courts of justice have always been understood as civilian courts as opposed to military courts. See, for example, Proceedings in Courts of Justice Act 1730; The Courts of Justice Act, No. 10 of 1924 (Ireland); Courts of Justice Act R. S. O. 1990, Chapter C.43 (Ontario).

[82] Regina v Desmond Donnelly [2007] EWCA Crim 3360; 2007 WL 4735507.

[83] *Id*. at para 2.

[84] *Id*. at para 3.

[85] *Id*. at paras 4 – 5.

[86] *Id*. at para 6.

[87] *Id*. at para 7.

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the guilty plea he had entered in France did not meet the requirements of a guilty plea 'because of the absence of any formal arraignment in France…there was no actual plea of guilty'[88] and that 'he accepted his conviction as a matter of French law.'[89] The Court held that there was evidence from the French authorities, based on the information before the court, that the appellant had pleaded guilty in France and that the evidence was admissible to show propensity to commit the offence of which he had been convicted in England.[90] The Court did not cast doubt on the French conviction and accepted the fact that the appellant had entered a valid plea of guilty. The court did not assess French law against English principles and laws applicable to guilty pleas. It took it that the appellant had entered a valid guilty plea. However, this would shortly change in another case and in another court dealing with another country outside of the EU.

In *R v Zhang*,[91] the accused was prosecuted for murder and the prosecution sought to lead evidence of his bad character by proving that he had been convicted of rape in China. The evidence in question was introduced on the basis of section 7 of the Evidence Act of 1851 and the court stated that the documents tendered by the prosecution were 'plainly sufficient to comply with the procedural requirements of section 7 of the Evidence Act of 1851.'[92] The accused argued that the evidence of the Chinese conviction was inadmissible because 'he had been tortured and had made a false confession.'[93] The Court in declining to admit the evidence of the Chinese conviction held that the prosecution had failed to prove beyond a reasonable doubt that the accused's allegations were incorrect. The Court added that admitting evidence of the Chinese conviction 'would have…an adverse effect on the fairness of the proceedings.'[94] This was the first case, as far as the author is aware, in which the court declined to accept a foreign conviction in evidence on the basis that its admission would affect the accused's right to a fair trial. It also shows the standard of proof that the prosecution has to meet when it comes to the issue of proving foreign previous convictions – beyond a reasonable doubt. Could this be an indication that the court did not have faith in the Chinese criminal justice system? Would the court's approach have been different had the accused been convicted in a country which the court regarded as upholding human rights? These are questions that are not directly answered in the case. If courts continue to cast doubt on the validity of convictions from China, this could raise tensions between Chinese courts and English courts.

In *Regina v David Baxendale*[95], the appellant was convicted of murder. At his trial, and by 'agreement, the appellant's previous conviction in Spain for murder was before the jury.'[96] The appellant admitted that conviction and relied on it to explain

[88] *Id*. at para 7.
[89] *Id*. at para 8.
[90] *Id*. at paras 12 – 14.
[91] R v Zhang [2008] NICC 4 (13 March 2008).
[92] *Id*. atpara 8.
[93] *Id*. atpara 33.
[94] *Id*. atpara 33.
[95] Regina v David Baxendale [2012] EWCA Crim 174; 2012 WL 382690.
[96] *Id*. at para 31.

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the circumstances in which the murder in the UK of which he had been convicted had been committed.[97] The prosecution's evidence showed that the appellant had been convicted of murder in Spain and 'served a prison sentence in Spain and was sent back to the UK in September 2008 to serve the remainder of his sentence.'[98] This case was decided after the amendments to section 73 had come into effect. It is not clear, however, why sections 73 of the Police and Criminal Evidence Act was not invoked to introduce the evidence in question. This could be justifiable in the light of the fact that the appellant had been transferred to serve his sentence in the UK and the authenticity of his conviction and sentence had been confirmed before the transfer. Another issue that arose in this case was whether a foreign conviction could be considered in determining the minimum term in relation to mandatory life sentence in the light of paragraph 4 of schedule 21 to the Criminal Justice Act of 2003. One of the factors a court is empowered to consider in determining whether to impose a whole life sentence is 'a murder by an offender previously convicted of murder.'[99] The schedule is silent on whether the murder in question should have been committed in the United Kingdom. The Court held that 'whether or not the Spanish conviction was properly treated by the judge as coming within paragraph 4(2)(d) matters not, unless as a matter of law, the judge was prohibited from taking it into account.'[100] The Court added that:

It would be remarkable if a schedule concerned with the imposition of minimum terms for the protection of the public precluded, as a matter of law, a judge taking into account a foreign conviction — if, as a matter of fact, that conviction had been sufficiently proved and was relevant and germane. There are no doubt some cases where a foreign conviction may be difficult to prove or the circumstances may be wholly uncertain or indeed the legal test (in the foreign court) may be uncertain.[101]

What emerges from the above ruling are the following three principles: one, legislation empowering a judge to consider a previous conviction for the purpose of sentencing should be interpreted as permitting him to consider previous foreign convictions; two, for such previous foreign convictions to be admissible they have to be sufficiently proved and relevant; and three, where there is uncertainty about the circumstances surrounding a foreign conviction including uncertainty about the legal test in a foreign country, such a conviction may not be admitted. One of the implications for this ruling is that the court will have to scrutinise the legal system of a given country before it admits a foreign conviction into evidence. It is doubtful that a court will disregard a foreign conviction on the basis that it could have been unsafe when the offender was transferred to the United Kingdom to serve a sentence based on that conviction. If the offender's conviction was not disputed before he was transferred to serve his sentence in the United Kingdom, it would be difficult to argue that it should be disregarded for the purpose of sentencing on the ground that the trial

[97] *Id.* at para 31.
[98] *Id.* at para 37.
[99] Para 4(2)(d).
[100] Regina v David Baxendale, supra note 94, at para 72.
[101] *Id.* at para 72.

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was unfair. However, some courts are unwilling to cast doubt on convictions from foreign countries even when those countries are not member states of the European Union. For example, in *R. (on the application of Grant) v Kingston Crown Court*[102] the applicant was convicted of sexual assault and in imposing the sentence the court considered the fact that he had a previous conviction from India. The applicant argued that the conviction he had received had not been 'safe.' In support of his case, '[h]e adduced witness statements from both a major complainant, stating that he had been pressured to make the complaints, and a lawyer working for Fair Trials Abroad, stating that there had been a lack of due process.'[103] The Court held that 'it was not concerned with whether the foreign conviction had been fairly obtained…[as] it was not bound to look behind the judgment of the Indian Supreme Court.'[104] And '[i]n the alternative' the court held that 'there had been proper regard to due process' despite the fact that the Indian court 'had not expressly referred to the witness statements, it was not appropriate to conclude that they had been overlooked.'[105] It would appear that whether or not there had been proper regard to due process, the court would have admitted the evidence of the Indian conviction as it was not willing to look behind the judgement of the Indian court.

In *Regina v Antonio Cortes Plaza*[106] the appellant was convicted of conspiracy to supply cocaine. He had been arrested in October 2011 and part of the evidence that the prosecution adduced at his trial was that 'on 10 December 2010 the appellant had been convicted…of importing almost 4 kg of cocaine…into the Netherlands…'.[107] The trial judge held that the evidence of the Dutch conviction was admissible as it 'had powerful probative force.'[108] On appeal he argued, *inter alia*, that the judge was wrong in admitting the Dutch conviction in evidence hence resulting in his trial being unsafe.[109] He added that the admission of the Dutch conviction had an adverse effect on the fairness of his trial.[110] The appeal court observed that the appellant's

'[C]onviction in the Netherlands was adduced in evidence under section 101(1)(d) of the Criminal Justice Act 2003 which provides that evidence of a defendant's bad character is admissible if it is relevant to an important matter in issue between the defendant and the prosecution. It was and is accepted in this case that the conviction was relevant in that sense because it was relevant to establish a propensity on the part of the appellant to become involved in the importation and distribution of cocaine and was also relevant to his defence of innocent association.'[111]

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[102] R. (on the application of Grant) v Kingston Crown Court (Queen's Bench Division) (Administrative Court) (31 October 2013)(Case Analysis).
[103] *Id*. at para 1.
[104] *Id*. at para 2.
[105] *Id*. at para 2.
[106] Regina v Antonio Cortes Plaza [2013] EWCA Crim 501; 2013 WL 1563124.
[107] *Id*. at para 7.
[108] *Id*. at para 8.
[109] *Id*. at para 11.
[110] *Id*. at para 13.
[111] *Id*. at para 12.

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The appellant made a formal admission of the conviction in the Netherlands and explained why he was convicted 'despite the fact that…he had not in fact committed the offence in question.'[112] In dismissing the appellant's appeal and concluding that the trial judge had correctly admitted the conviction in the Netherlands, the Court held that:

'The judge dealt with the Dutch conviction in an entirely appropriate manner in his summing-up. He made it clear to the jury that they had to be sure that the appellant had in fact committed the offence before they could take it into consideration at all. He also explained its potential relevance to the issues of innocent association and propensity while making it clear that whether the conviction did in fact assist on either of those questions was entirely a matter for them.'[113]

In this case, the facts are silent on whether section 73 of the Police and Criminal Evidence Act was invoked by the prosecution in adducing the Dutch conviction into evidence. This creates the impression that this conviction was admitted in evidence as if it were a conviction by a court in the United Kingdom. The decision also indicates that the jury will only admit as evidence a previous foreign conviction if the jurors are 'sure' that the offender was correctly convicted. This means that there could be cases where a foreign conviction could be disregarded because the jury is not sure that the trial was fair. In fact, as shown above, this is in line with the principle in *Erhan M v Regina* where the appellant argued that he had been wrongly convicted in Bulgaria, the Court held that 'if there is evidence that the conviction was the result of a trial which failed to reach appropriate standards of fairness, it would be open to the court to decline to admit the evidence in the exercise of its discretion…'.[114]

In *Regina v John Alan Brooks*[115] the appellant was convicted of conspiracy to import cocaine. The prosecution sought to adduce evidence of his bad character by, *inter alia*, proving that he had previous drugs smuggling convictions from France (1996), Spain (1989), and Morocco (1997). This was on the basis of section 101(1)(d) of the Criminal Justice Act 2003. The French conviction had been 'entered in [the accused's] absence, arising from the illicit importation… of drugs.'[116] In Spain, he was present at his trial after his arrest. The details of the French and the Spanish judgements were adduced in evidence. However, with regards to the Moroccan conviction, the only information before the trial court and the appellate court was that the appellant had been convicted of drug trafficking and '[n]o other details were available to the prosecution.'[117] At his trial, the appellant argued that:

'[H]e had been wrongly convicted on each of these three previous occasions. He said that he had known nothing at the time of the French proceedings, although he

[112] *Id.* at para 21.It has been argued that '[a] conviction may be proved by admission even in the absence of a certificate [referred to under section 73(1)].' See May and Powles, supra note 6, at 51. The authors refer to a case dealing with a British as opposed to a foreign conviction.

[113] Regina v Antonio Cortes Plaza, supra note 105, at para 28.

[114] Erhan M v Regina, supra note 37, at para 16.

[115] Regina v John Alan Brooks, supra note 54.

[116] *Id.* at para 14.

[117] *Id.* at para 16.

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had subsequently become aware of them when a European Arrest Warrant had been issued. He was highly critical of the Moroccan trial process. Amongst other things, he stated that the trial lasted only a minute or so, that there was no interpreter and that he was only informed of the outcome a while later. He was less critical of the Spanish trial procedure.'[118]

On appeal, the appellant's lawyer argued that his French conviction should not have been admitted in evidence because he 'had been convicted primarily on the word of one of those apprehended.'[119] He examined the French judgement and submitted that 'in effect, the French proceedings permitted conviction on the basis that would not have been in accordance with English procedural rules relating to criminal trials.'[120] The Court of Appeal agreed with him on this point but held that:

'It is, however, to be pointed out that that conviction in France (it being a Member State) was properly adduced as evidence of his being convicted under the provisions of section 74(3) of the 1984 Act; albeit, of course, it was open nevertheless to the appellant to seek to argue thereafter that he had been wrongly convicted.'[121]

The appellant's lawyer 'conceded that he could have no procedural or substantive complaint about the Spanish conviction and its admission.'[122] He was very critical of the Moroccan conviction and the Recorder himself had reservations about the Moroccan conviction.[123] Despite that, the Court held that:

'There was no dispute that the appellant had indeed been convicted in Morocco for trafficking narcotics; and that was in the agreed facts before the jury. But no other details were available. [The accused's lawyer] strongly criticises the absence of such detail and he says it was wrong to leave the matter before the jury when so little was known about the conviction. It is true that lack of detail is a factor to be taken into account. As the well-known case of *R v Hanson* [2005] EWCA Crim 824 makes clear, however, lack of detail is not necessarily of itself a bar to permitting previous convictions to be adduced in evidence.'[124]

The appellant's lawyer adduced evidence from the Foreign Office showing that criminal trials in Morocco generally do not meet international standards. The Court observed that 'it can indeed be safe to infer the position would have been no different, let alone better, some years earlier.'[125] However, this evidence was held inadmissible because it had been filed late.[126] The Court concluded that the convictions had been correctly admitted into evidence.[127] There are at least two problems with the court's holding. One, the facts in *Hanson* are distinguishable

[118] *Id*. at para 17.
[119] *Id*. at para 27.
[120] *Id*. at para 27.
[121] *Id*. at para 27.
[122] *Id*. at para 28.
[123] *Id*. at para 28.
[124] *Id*. at para 39.
[125] *Id*. at para 32.
[126] *Id*. at para 33.
[127] *Id*. at paras 34 – 37.

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from those in the present case because in *Hanson* the court dealt with the issue of the lack of information about convictions that had taken place in the United Kingdom. This case was about a conviction that had been handed down by a foreign court in a country with a criminal justice system which is radically different from that of the United Kingdom and there was evidence that it could have been as a result of an unfair trial. Second, the court did not require the prosecution to prove beyond a reasonable doubt that the appellant had been convicted in Morocco. Even the court itself admitted that there was not enough information for it to come to the conclusion that the Moroccan conviction had been safe. What complicates the matter further was that there was evidence that trials in Morocco often fall below internationally accepted standards and that at the time the appellant was convicted, the human rights situation in that country was poor. One would have expected the court to follow the example set by other courts and decline to admit the Moroccan conviction as there was evidence that the fairness of the trial was highly doubtful.

V. Conclusion

The author has demonstrated the emerging issues in the use of foreign previous convictions in criminal trials in the United Kingdom. It has been demonstrated that previous convictions from member states of the European Union are governed by sections 73 and 74 of the Police and Criminal Evidence Act and that those from countries outside the European Union are governed by section 7 of the Evidence Act of 1851. It has also been shown that courts have distinguished between proving a foreign conviction on the one hand, and admitting a foreign conviction in evidence on the other. There has been one case where a court refused to admit a foreign conviction in evidence. This was because the prosecution had failed to prove beyond reasonable doubt that the accused's trial in the foreign country had been fair. However, although courts have left open the possibility of not admitting in evidence foreign convictions which were a result of unfair trials, most of the judges have been reluctant to take that bold step. This is especially disturbing when there is a high possibility that the trial in the foreign country was unfair. It is recommended that there is a need for courts to establish criteria that have to be followed in determining whether or not it is safe to admit a foreign conviction in evidence. These criteria should be applicable to convictions from all countries irrespective of whether or not they are member states of the European Union. However, in doing so, courts should be mindful of the international law principle of comity which is invoked by states to, *inter alia*, recognise and enforce judgements of the courts of other states.[128] It should be mentioned that in the United Kingdom, a foreign conviction is recognised to uphold the accused's right not to be put into double

[128] For a detailed discussion of the principle of comity in international law, see for example, Joel R. Paul, 'Comity in International Law' (1991) 32(1) Harvard International Law Journal 1 – 79.

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jeopardy.[129] If a foreign conviction is to be invoked to attack a witness's credibility, it has to be relevant to the issue before court and evidence should be led to show that it has not been set aside on appeal.[130] It should be mentioned that foreign convictions are also recognised by courts in the United Kingdom for the purpose of extradition. For example, in *B v The District Court in Trutnov, The District Court in Liberec (Two Czech Judicial Authorities)*[131] in which the appellant challenged her extradition to Czech Republic to serve a sentence which was imposed in her absence, the Court in dismissing her appeal held that:

[I]t has to be recognised that other countries have different legal process from those in this country but the main principle in approaching foreign convictions is that:— "A trial is a legal process whereby guilt or innocence is to be decided…[T]hat must mean the process which results in a final determination. Thus 'trial' in section 20(3) of the [Extradition] Act should be construed accordingly and it will be necessary to investigate the system in the requesting State."[132]

Just as in the case of using foreign convictions for the purpose of sentencing and impeaching the credibility of a witness, it is critical that people whose extradition is being sought from the United Kingdom should not be extradited if there is evidence that the trial leading to the conviction in question was unfair. There may also be a need for guidelines to be established stipulating details that should be included in documents submitted on the basis of section 7 of the Evidence Act of 1981. In *R v Zhang* the Court expressed concern that '[t]he document containing the conviction is quite unlike a certificate of conviction of the type familiar in this jurisdiction. It comprises two pages of narrative, describing the defendant's age, address, date of arrest and remand status. It also refers to his legal representative, together with a description of the course of the proceedings.'[133] The Court in *Regina v John Alan Brooks*[134] was faced with a similar challenge with regards to information relating to the Moroccan conviction. The lack of sufficient information makes it impossible for the court to determine whether or not the accused's trial in a foreign state was fair.

[129] R. v Keith William Thomas (1984) 79 Cr. App. R. 200. For a discussion of the cases on the plea of autrefois based on foreign convictions, see Richardson, supra note 2, at 423 – 424 (para 4-209)

[130] Tamara Ecclestone v Omar Khyami, Elite Performance Cars Limited, Ansol Trading Limited (trading as Four Seasons Autos)[2014] EWHC 29 (QB);2014 WL 16492 at para 42.

[131] B v The District Court in Trutnov, The District Court in Liberec (Two Czech Judicial Authorities) [2011] EWHC 963 (Admin); 2011 WL 1151332.

[132] B v The District Court in Trutnov, The District Court in Liberec (Two Czech Judicial Authorities) [2011] EWHC 963 (Admin); 2011 WL 1151332 para 48. References omitted.

[133] R v Zhang, supra note 90, at para 9.

[134] Regina v John Alan Brooks, supra note 54.

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