THE CLASH BETWEEN MUTUAL RECOGNITION, FUNDAMENTAL RIGHTS AND PUBLIC SECURITY

RECENT DEVELOPMENTS IN THE CJEU'S CASE-LAW IN THE AFSJ

Elena Emilia Popa (LLB Graduate, LLM Candidate)
The Hague University of Applied Sciences
(emiliapopa10@gmail.com)

Dr. Luca Pantaleo (Thesis Supervisor)
The Hague University of Applied Sciences
(L.Pantaleo@hhs.nl)

ABSTRACT

This article focuses on the recent judgment of the Court of Justice, *Aranyosi and Caldararu*. After conducting a legal analysis on this case, three issues are identified and they are separately discussed in three sections. The aim of this paper is to show the impact of this judgment on public order and public security in Europe on the one hand and on the individual's fundamental rights, on the other hand. It is going to be argued that even though there are limits to the principle of mutual recognition, this new exception based on fundamental rights establishes a new procedure for non-surrender. Therefore, the Court of Justice creates a non-execution ground which the EU legislator did not intend to include in the Framework Decision on the European arrest warrant. This is explained by looking at the three interconnected notions of Freedom, Security and Justice.

Keywords
mutual recognition, fundamental rights, public security, AFSJ, detention conditions, overcrowding prisons, European arrest warrant

INTRODUCTION

The aim of this paper is to offer the reader an assessment of the *Aranyosi and Căldăraru*[1] judgment by analysing its impact on public order and public security in Europe on the one hand and on the individual's fundamental rights, on the other hand. In this case, the Court of Justice of the European Union(CJEU) looked at how to reconcile the reality, that in some Member States prison conditions fall short of the required standards, with the requirement, that states shall execute requests on the basis of the principle of mutual recognition as laid down in the Council Framework Decision on the European Arrest Warrant(FD EAW).[2]In essence, the Court allowed the executing authority to assess the standards of fundamental rights protection in the issuing Member State according to a two-tier test and, under certain circumstances, refuse to surrender the requested person. Moreover, CJEU's conclusion that the presumption of mutual trust is not inviolable is a significant shift in approach since the Court has been strongly committed in its previous case-law to an effective surrender regime based on mutual recognition and mutual trust.[3]

SECTIONS

Preliminary Analysis of the Judgment

On the 5th of April, the CJEU delivered the *Aranyosi and Caldararu* judgment. The central development concerned the interplay between the principles of mutual recognition and mutual trust, on the one hand, and the protection of fundamental rights, on the other hand. The Court was confronted with two (nearly identical) preliminary references in two cases concerning a Hungarian and Romanian national. The main issue in this case was whether Article 1(3) of the Framework Decision on the European Arrest Warrant must be interpreted as meaning that a surrender is inadmissible if there is a 'real risk' that the requested individual's fundamental rights will be infringed due to the issuing State's poor detention conditions.

According to the two European arrest warrants, Mr. Aranyosi forced entry into a dwelling house in Hungary and he was also accused of entering a school. Mr. Caldararu was convicted and sentenced to an overall period of one year and eight months' imprisonment for driving without a driving licence. Both individuals were eventually arrested in Bremen, but they did not consent to a simplified surrender procedure. In these circumstances, the Bremen Court observed that in a number of ECtHR's judgments, both Romania and Hungary were found in violation of their ECHR obligations due to the overcrowding in their prisons. As a result, the Court had no other choice (in the absence of an explicit fundamental rights-based refusal ground in the FD EAW) than to refer to the CJEU for a preliminary ruling.

First, the Court begins its analysis by pointing out the importance of the mutual recognition principle in the 'new simplified and more effective system for surrender of persons […]' which has the aim 'to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of confidence which should exist between the Member States'. The central role of mutual recognition principle was that its application should be possible at all stages of the proceedings: pre-trial, at trial and when enforcing the sentence. This has been realised by adopting the so-called framework decisions.

However, it has to be pointed out that its application provides fragmentation of the Member States' national legal systems. Mutual recognition allows not only for enhanced cooperation, but it also allows the EU Member States to keep their own national criminal law systems. That is why this principle has gained the 'cornerstone' title since it enables different legal systems to coexist. Now it is important to see how the CJEU

[1] Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15, PPU *Pál Aranyosi* and *Robert Căldăraru*.

[2] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[3] Court of Justice, judgment of 3 May 2007, case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad;* See also Court of Justice, judgment of 6 October 2009, case C-123/08 *Dominic Wolzenburg*; Court of Justice, opinion 2/13 of 18 December 2014.

changes its approach by moving from mutual recognition and mutual trust to the centrality of fundamental rights.

Secondly, after reiterating the essential character of mutual recognition and mutual trust, the Court proceeds by referring to the 'exhaustively listed' grounds for non-execution of an EAW. It argues that, 'in principle', mutual recognition obliges Member States to act on an EAW and they must only refuse to execute it under the circumstance laid down in Article 3 and Article 4 of the FD EAW.
The Court further notes that the EAW mechanism can be suspended only in the event of 'serious and persistent breach' by one of the EU Member States of the principles enshrined in Article 2 Treaty on the European Union(TEU) and in accordance with the procedure laid down in Article 7 TEU. In this context, it is important to observe that the Court, by pointing out that the mechanism of the EAW can be refused if there is a breach of the principles provided for in the TEU, sets the stage for a new addition to the non-execution grounds stated in the FD EAW.
The Framework Decision does not have an explicit fundamental rights clause that enables the executing state to refuse a person's surrender in case there are serious doubts regarding the conformity with fundamental rights. This can be clearly deduced from the FD's text since in Article 1(3) there is only a vague statement which reads as follows: "[FD EAW] shall not have the effect of modifying the obligation to respect fundamental rights […]". Hence, the Court tried to introduce this obligation (i.e. compliance with fundamental rights) by drawing on the recitals of the FD EAW, even though the preamble itself does not directly refer to a specific fundamental rights duty on the part of the executing state when it enforces an EAW.

Thirdly, the Court further addresses the issue of fundamental rights, when it brings its two-tier 'systematic deficiencies' test closer to the standards used by the ECtHR. This part, which may well be the most significant section in the Court's reasoning, starts by reiterating the importance of Article 1(3) and the EU Member States' obligation to comply with the EU Charter when implementing EU law. It is here where the Grand Chamber stresses the need for its Member States to respect Article 4 of the Charter on the prohibition of torture and inhuman or degrading treatment (which is closely linked to the right to human dignity). The absolute character of this provision is also confirmed by Article 3 ECHR.
From this, the Court stressed that whenever there is a 'real risk' of inhuman or degrading treatment for the individual in the issuing Member State, the executing authority is required to assess the existence of this risk before deciding whether to surrender the requested person.

Structure of the Paper

The first chapter offers the reader an insight into the legal implications of the two notions, mutual recognition and mutual trust, which constitute the basis for the efficient functioning of the Area of Freedom, Security and Justice(AFSJ). This chapter examines these concepts in light of the Court's new decision in *Aranyosi and Căldăraru* case. Particularly, the analysis illustrates that the CJEU, drawing on its previous case-law, tried to answer the uncertainties concerning fundamental rights in the European area. It has done so by giving more weight to fundamental rights and limiting the automaticity of the EAW mechanism. However, this approach might give the relevant competent authorities a reason to doubt the system of its neighbor Member State.

The first section of this article reiterates that the application of mutual recognition based on presumed mutual trust in the field of European criminal law was designed to achieve quasi-automaticity in law enforcement cooperation across EU. However, due to a number of questions related to the 'moral' side of the mutual recognition system (i.e. the lack of attention to fundamental rights during this process), the Court of Justice has changed its approach when dealing with European Arrest Warrant cases.

One way in which the Court tried to cope with the issue of fundamental rights during a surrender procedure was to set limits to the automaticity of recognition. This was done according to a two-tier test which allowed the executing authorities to proceed with a substantive examination (on a case-by-case basis) of fundamental rights impact. Given the limited space that I am given here it is not possible to go too much into details on this issue. Suffice it to say that the application of the two-tier test by national courts is likely to give rise to diverging interpretations due to various discrepancies in the national laws of the Member States.

For instance, there is the issue of assurances provided by the issuing Member State. This newly established test gives rise to multiple questions on whether the information delivered is precise enough or whether it is in accordance with the executing authority's national standards. As a consequence, these diverging interpretations might reinforce and perpetuate distrust among Member States since the assurances provided by the issuing authorities are not legally binding, thus the executing authorities might be skeptical in accepting them.

It would therefore go against not only the Union legislature's intention of stipulating (exhaustively and for reasons of legal certainty) the cases in which the EAW may not be executed, but also against the case-law of the Court which applies a very strict interpretation of the FD and particularly of the grounds for refusal provided for in Article 3 and Article 4 thereof. The next chapter is going to discuss the implications of this new decision in the context of fundamental rights and the focus is on the prohibition of inhuman or degrading treatment and here I offer an in-depth analysis of the impact of creating a new ground for non-execution.

The second chapter focuses on the issue of fundamental rights in the context of European prison conditions. It is argued that the reasoning of the Court leads to a "balancing" approach whereby one value is necessarily given priority at the expense of the other. For this reason, it is noted that a "reconciliation" of the two interests at stake, namely mutual recognition and human rights, can constitute a better possible scenario for judicial cooperation. Furthermore, the newly established ground for non-execution based on unsatisfactory detention conditions leads to a difficult assessment of what constitutes inhuman or degrading treatment. In fact, the effective challenge to and monitoring of inhuman or degrading treatment in European prisons is limited and it appears that prison condition have not improved to a level that would satisfy the relevant standards which are laid down in the European Convention on Human Rights(ECHR) and Charter of Fundamental Rights(CFR). The focus of this article will then shift on the consequence of having a non-execution ground by using the Court's reasoning in the N.S. case.

This chapter aims at emphasizing that the recent cases of the CJEU brought about a potential conflict between the recognition of judicial decisions (based on trust) on the one hand and the use of fundamental rights considerations as a ground for non-execution of an EAW, on the other hand. Nevertheless, I supported the views of several scholars who

advocated for a 'reconciliation' between these two competing values, rather than employing a 'balancing' approach whereby one interest is given priority at the expense of the other.

Furthermore, it is shown that the problem of prison overcrowding is not a new one, in fact the same issue was approached by the Court in its previous case-law. The CJEU did not give priority to fundamental rights (particularly article 4 of the Charter) until recently. Moreover, the Court's desire to offer more value to human rights was recognized in the *N.S.* case and later on in *Aranyosi and Caldararu* case. Hence, by trying to expand the non-execution grounds to fundamental rights (via the use of a two-tier test), the CJEU risked affecting the EU secondary legislation at stake. Another consequence was that it also touched upon core aspects of Member States' sovereignty.

The third chapter returns to the discussion of the two cornerstone principles of the AFSJ, namely mutual recognition and mutual trust. However, this discussion differs from the one in the first chapter because these two concepts are analysed from a security perspective. In light of the recent judgment, the practical effects of having a non-execution ground is discussed. As a result, it is argued that the unevenness of the EAW system is accentuated (especially in relation to the issue of prison conditions) because of the new refusal ground based on fundamental rights. Lastly, in order to offer the reader a better understanding of the security concerns at stake, the three interlinked notions of freedom, security and justice are described and then an explanation is provided as to how these concepts relate to the aforementioned issues.

The main conclusion of this chapter is that the introduction of mutual recognition as a principle for international cooperation has met severe opposition. This is mostly because mutual recognition by definition takes away some discretion to refuse to cooperate. Beside this obvious challenge, there are also concerns as to whether the other Member State with whom one should cooperate can be trusted. According to Andre Klip, mutual trust as a broad notion, and as a consequence of mutual recognition, can be seriously handicapped by disparities among the Member States. I agreed with his view because this issue can only be resolved by raising the standards of those Member States that do not perform so well on certain matters.

As a result, there must be trust in the judicial decisions of the other Member State in order for cooperation in criminal matters to work properly. This should be done instead of relying on the reciprocity principle. However, this trust is undermined not only due to the recent decision of the CJEU but because of the recent changes observed in the post-Lisbon period. Some of these issues were: the transitional period as regards the enforcement powers of the European Commission, the jurisdiction of the Court and the more permanent possibilities to opt in or engage in enhanced cooperation. This has led to an uneven development of the AFSJ for citizens and judicial cooperation measures and parts of the acquis which were not applicable in certain Member States' (due to their choice not to opt in).

Moreover, as I shown previously, there might be a risk of conflict between the three interlinked notions of freedom, security and justice due to this recent judgment, however I do not believe that the idea of balancing these three concepts is the proper way to proceed. This is because such an approach is problematic in the criminal justice area as it fails to appreciate that security interests need to present necessary and proportionate deviation from a fundamental right, as it becomes clear from Article 52(1) of the EU Charter.

Hence, I strongly believe that under these circumstances the Union needs to find a way of reconciling these three notions rather than favoring one over the other, thus taking a more coherent approach to these issues. Accordingly, mutual recognition can only make sure that the extra national security interest is indeed recognized, but without additional harmonization, that is as far as it can go.

CONCLUSION

The implications of a "genuine system of mutual recognition" would mean an abolition of all grounds for refusal in judicial cooperation and "full faith and credit" would constitutes the basis for the functioning of the European arrest warrant mechanism. If these statements were true, then mutual recognition would have similar significance in criminal law as it had already achieved in the internal market. However, this is not the case. As it has been argued, the mutual recognition principle is rather difficult to apply in the AFSJ since its achievement is based on blind trust. Some scholars have even gone as far as arguing that this principle is incompatible with national sovereignty and fundamental rights.

In contrast, the application of mutual recognition based on presumed mutual trust in the field of European criminal law was designed to achieve quasi-automaticity in law enforcement cooperation across EU. It is also true that mutual recognition based on trust is grounded in particular on Member States shard commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law. Nevertheless, several scholars have noted that an AFSJ based on this notion fails to take into account that such a European area requires that a citizen and his/her legal interests should not only be protected by the criminal justice system but also 'from dangers of a criminal justice system operated in a reckless manner'.

One way in which the Court tried to cope with the issue of fundamental rights, as a ground for non-execution of EAW during a surrender procedure, was to set limits to the automaticity of recognition. This was done by allowing the executing authorities to proceed with an extensive examination of fundamental rights impact (via the use of a two-tier test). Such assessment does not only increase the workload of the relevant competent authorities but it gives them a reason to doubt the system of its neighbor Member State. As it has been see, this runs counter to the aim which mutual recognition and mutual trust pursue.

Furthermore, the change in the Court's approach in *Aranyosi and Căldăraru*, which was discuss in the first two Chapters, does not only impact the relevant competent authorities, but also the citizens' security since there is a clear and obvious risk that the offence would remain unpunished and that its perpetrator would reoffend (hence infringing the rights and freedoms of other EU citizens). It would therefore go against not only the Union legislature's intention of stipulating, exhaustively and for reasons of legal certainty, the cases in which the EAW may not be executed, but also against the case-law of the Court which applies a very strict interpretation of the FD and particularly of the grounds for refusal provided for in Article 3 and Article 4 thereof.

The recent cases of the CJEU brought about a potential conflict between the recognition of judicial decisions (based on trust) on the one hand and the use of fundamental rights considerations (such as unsatisfactory prison conditions) as a ground for non-execution of an EAW, on the other hand. The Court's idea of balancing competing interests like mutual recognition and fundamental rights is, in general, problematic in the criminal justice area since it fails to appreciate that security interests need to present a necessary and proportionate deviation from a fundamental right, as it becomes clear from Article 52(1) of the Charter.

For this reason, one needs to take into consideration the views of those scholars who advocated for a reconciliation of these two values, rather than employing a "balancing" approach whereby one interest is given priority at the expense of the other. Accordingly, mutual recognition can only make sure that the extra national security interest is indeed recognized, but without additional harmonization, that is as far as it can go.

Moreover, it has been observed that current policies seek to achieve a high level of security by relying on mutual trust instead of common norms. This leads to individuals no longer feeling safe in their relationship with the State. Hence, one might argue for a 'more European approach' which would establish criteria under which it would be irrelevant in which Member State a certain offence was dealt with, the prevailing notion being that the interest of everyone involved should be taken into account. Under this approach, 'a high level of safety' would be offered to citizens of the Union and would not serve the interests of a particular Member State alone.

ROLE OF THE STUDENT

a. Researcher's Background

This excerpt is part of a longer publication which has been written for my Thesis (March, 2017). My experience at Eurojust coupled with my education at The Hague University (LLB International and European Law Program) offered me the chance to write this paper due to the guidance offered firstly, from legal professionals at Eurojust, who enabled me to see the issues pertaining to the case I analyzed in my Thesis, and also from my Thesis supervisor, who offered me valuable feedback.

b. Topic Background & Methodology

After my internship, I started by researching this case and I realized that because the Court's decision was relatively new, there were few authors that discussed (in detail) this judgment. However, by reading the case again and again, I realized that I could analyze it from another perspective, a perspective that was not adopted by other authors. I started thinking of the impact this decision might have in the Area of Freedom, Security and Justice. This has led me to approach the subject from a security perspective by putting the individual/the EU citizen at the heart of the debate. Having established the path, I continued my research and I dived into more procedural aspects, in particular the European Arrest warrant system. Spending most of the days at the Peace Palace Library, I finally got the information needed to start on the structure. As a result, I identified three main issues and thought that such a complex subject should be discussed in three chapters. Each chapter aimed at analyzing each of these issues.

The methodology/ approach: I started by conducting a legal analysis on the main case and as a result, I spotted the main difficulties that may have a practical impact in the AFSJ. I developed my arguments based on the existing issues and I supported my claims with academic literature, interpretations of primary and secondary legislation, different legal and policy documents delivered by EU institutions and different statistical data(Eurobarometer). The paper has also a normative dimension, in the sense that it tries to address the need for legal change in the EAW system. The overall study has been conducted by using empirical data to observe the internal impact that this judgment has.

SRC 2016, November 30, 2016, The Netherlands.

MAIN REFERENCES

LITERATURE/BOOKS

1. Andre Klip, 'European Criminal Law: An Integrative Approach' (2011) Ius Communitatis II, 2nd edition, Intersentia
2. Weyembergh, 'Approximation of Criminal Law, the Constitutional Treaty and The Hague Programme', 42 CMLRev. (2005)
3. Acosta Arcarazo and Murphy, "EU Security and Justice Law" [2013], Modern Studies in European Law
4. B. Dickson, 'Human Rights and the European Convention' (London, Sweet and Maxwell, 1997)
5. Barbara Hudson, Synnove Ugelvik, 'Justice and Security in the 21st Century: Risks, rights and the rule of law' (2012), Routledge Studies in Liberty and Security
6. D. Kostakopoulou, "The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue" in C. Barnard (ed), The Fundamentals of EU Law Revisited (Oxford, Oxford University Press, 2007)
7. Francesca Ippolito and Sara Iglesias Sanchez 'Protecting Vulnerable Groups: The European Human Rights Framework', Volume 51 in the series Modern Studies in European Law, Hart Publishing, Oxford and Portland, Oregon [2015]
8. J. Dugard and C. Van den Wyngaert, 'Reconciling Extradition with Human Rights', 92 AJIL (1998)
9. N. Keijzer, 'Extradition and Human Rights: A Dutch Perspective', in R. Blekxtoon and W. van Ballegooij (eds.), Handbook on the European Arrest Warrant, The Hague, T.M.C Asser Press 2005
10. Nico Keijzer and Elies van Sliedregt, 'The European Arrest Warrant in Practice' (2009) T.M.C. Asser Press
11. P. Twomey, "Constructing a Secure Space: The Area of Freedom, Security and Justice" in D O'Keefe and P. Twomey (eds), Legal Issues of the Amsterdam Treaty (Oxford, Hart Publishing,1999).
12. Steve Peers, Angela Ward, "The EU Charter of Fundamental Rights: Politics, Law and Policy" [2004] Essays in European Law, Oxford and Portland Oregon.
13. Valsamis Mitsilegas, 'EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe' (2016) published by Hart Studies in European Criminal Law, Volume 1, Oxford and Portland, Oregon
14. Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' [2012] 31 YEL 319
15. Wouter van Ballegooij, 'The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area' (2015) Intersentia

(ONLINE) JOURNALS/ARTICLES

1. Bruno de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue', Maastricht Journal of European and Comparative Law 8 (2001)
2. Coppel and O'Neil, "The European Court of Justice: Taking rights seriously?" [1992] 29 CML Rev European Commission Service Juridique-Quality of Legislation Team, 19th Quality of Legislation Seminar, "EU Legislative Drafting: Views from those applying EU law in the Member States", Brussels, 3 July 2014
3. Francesca Ferraro and Jesús Carmona, 'Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty', European Parliamentary Research Service, March 2015.
4. Hemme Battj, Evelien Brouwer, Paulien de Morree and Jannemieke Ouwerkerk, 'The principle of Mutual Trust in European Asylum, Migration and Criminal Law Reconciling Trust and Fundamental Rights', Meijers Committee (standing committee of experts on international immigration, refugee and criminal law), published by FORUM, Institute for Multicultural affairs, December 2011, Utrecht, the Netherlands.
5. Iris Canor, 'My Brother's Keeper? Horizontal Solange: "An ever closer Distrust among the People of Europe"' [2013], Common Market Law Review 50, Kluwer Law International
6. Kenner, 'The Court of Justice of the European Union and human rights in 2010: Entering a post-Lisbon age of maturity' [2011], European Yearbook on Human Rights.
7. Koen Lenaerts and Jose A. Gutierrez-Fons, 'The European Court of Justice and fundamental rights in the field of criminal law', Research handbook on EU criminal law
8. K. Nicolaidis, G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 Law and Contemporary Problems, pp. 263-317;
9. K. Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 Journal of European Public Policy
10. Rebecka Kronmark, 'Limits of Mutual Recognition in Criminal Matters', Faculty of Law Lund University, Christoffer Wong, European Criminal Law, Autumn 2010
11. Rebecca Niblock, 'Mutual Recognition, Mutual Trust? Detention conditions and deferring an EAW', 13 April 2016.
12. Steve Foster, 'Prison Conditions and Human Rights' [2008], Web Journal of Legal Studies
13. Szilard Gaspar-Szilagyi, 'Joined Cases Aranyosi and Caldararu: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant', European Journal of Crime, Criminal Law and Criminal Justice, Volume 24, Issue 2-3, [2016]
14. Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review
15. Weiß, W., 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011)
16. William A. Schabas, 'The European Convention on Human Rights: A Commentary' [2015], Oxford Public International Law