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European and International Criminal Cooperation: A Matter of Trust?

Cecilia Rizcallah

A low-angle photograph of a modern building with a grid-like facade, partially obscured by a large European Union flag waving in the foreground. The image has a red tint.

DEPARTMENT OF
EUROPEAN LEGAL STUDIES

Case Notes

01 / 2017



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European Legal Studies
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CJEU (Grand Chamber), Aranyosi and Căldăraru, 5 April 2016, Joined Cases C 404/15 and C 659/15 PPU

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The year 2016 offered two additional opportunities to the ECJ to pronounce itself on the crucial and tricky tension between the preservation of the criminal policy's effectiveness on the one hand and the concrete protection of Human Rights on the other. In its first judgment *Aranyosi and Căldăraru*², rendered in April and already widely discussed³, the Court had to rule on the protection of the principle of human dignity and the prohibition of inhuman and degrading treatments in the field of EU criminal cooperation. The question submitted to the ECJ was whether solid evidence, showing that the detention conditions in a Member State issuing a European arrest warrant (hereafter: EAW) were incompatible with fundamental rights, could allow or oblige the executing judicial authority of a requested Member State to refuse the execution of that arrest warrant. A few months later, a similar question was raised but this time in the field of International cooperation. More specifically the ECJ was asked under which conditions in terms of protection of fundamental rights Mr. *Petruhhin*, an Estonian citizen who had made use of his right to move freely within the EU, could be surrendered upon an extradition request by Latvia to a third country, Russia⁴.

These two cases, pointing out the same dilemma (preventing the risk of impunity *versus* guaranteeing the protection of human rights) in distinct spheres (European *versus* International criminal cooperation), shed some light on the main feature differentiating both domains; i.e.) the assumption of (in)existence of a high level of mutual trust between the actors involved.

Indeed, on the one hand, the *Aranyosi and Căldăraru* case concerns criminal cooperation in the EU, namely between Germany and Hungary (*Aranyosi*) and Germany and Romania (*Căldăraru*). More precisely, it is related to the EAW mechanism, which is founded on the high level of confidence between Member States and allows for the establishment of a simplified and accelerated system for the surrender of convicted or suspected persons⁵. As Member States ('authorities') (must) trust each other, the refusal of execution of a EAW may or must only take place in a few specific situations exhaustively foreseen by the Framework-Decision

¹ Research Fellow of the Belgian National Fund for Scientific Research (F.R.S-FNRS) affiliated to the Free University of Brussels (ULB) and the University Saint-Louis of Brussels (USL-B).

² CJEU (Grand Chamber), *Aranyosi and Căldăraru*, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

³ See, among others, E. BRIBOSIA and A. WEYEMBERGH, « Arrêt Aranyosi et Căldăraru : imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale », *JDE*, 2016, pp. 225 – 227 and M. HONG, « Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts : Solange III and Aranyosi », *EUconst.*, 2016, pp. 549 – 563.

⁴ CJEU (Grand Chamber), *Petruhhin*, 6 September 2016, Case C-182/5, ECLI:EU:C:2016:630.

⁵ CJEU (Grand Chamber), *Aranyosi and Căldăraru*, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, §§ 76 à 78.

on the EAW⁶. In all other cases, national authorities have to automatically pursue the transfer of the person concerned by the arrest warrant.

On the other hand, the *Petruhhin* scenario is related to the implementation of an international convention on extradition between a Member State and a third country, whereby the former is asked by the latter to transfer a EU citizen for the purposes of criminal proceedings. Like any other instrument of international collaboration, an extradition agreement relies upon a certain degree of trust⁷, loyalty and cooperation⁸. This degree of trust, however, cannot be compared to the level of confidence which is supposed to exist between Member States of the EU. The difference is attested, for instance by the fact that the bilateral extradition treaty at issue contained the principle of non-extradition of contracting parties' nationals⁹. This principle, included in the majority of such treaties¹⁰ and rooted in the sovereignty of states *vis-à-vis* their nationals, precisely constitutes an expression of the lack of confidence towards other states' legal systems to satisfactorily and impartially try foreigners¹¹. It is, therefore, in principle rejected by EU "trust-based" criminal cooperation instruments¹².

Hence, while a certain degree of trust does underlie both the EAW system and the international treaties on extradition in so far as they enable cooperation, the intensity of trust fundamentally differs, setting distinctive limits to mutual assistance and hierarchizing both mechanisms. Indeed, the different degree of trust between, on the one hand, Member States and between, on the other, Member States and third countries, is key to understanding the distinct approach adopted by the Court in cases concerning purely EU cooperation *versus* international cooperation.

I. Verification of the Risk Encountered by the Individual Subject to a EAW or an Extradition Request in the Process of Transfer to the Requesting State

In both cases, the Court had to rule on the behavior that had to be adopted by national judges before transferring a convicted or suspected EU citizen to another State for the purpose of criminal proceedings in the presence of a risk of inhuman and degrading treatment or punishment of individuals detained in that State.

Regarding EU internal criminal cooperation, the Grand Chamber of the ECJ considered, in the *Aranyosi and Căldăraru* case, after having analysed the wording and the objective of the EAW Framework Decision¹³, that the national judge must do a two-step analysis before refusing the execution of a EAW with the aim of protecting

⁶ CJEU (Grand Chamber), *Aranyosi and Căldăraru*, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, §80; see art. 3 and 4 of the Framework-Decision.

⁷ See also CIJ, *France c. Nouvelle Zélande - Essais nucléaires*, 20 December 1974, § 49: « Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential ».

⁸ R. KOLB, "La bonne foi en droit international public", *Revue belge de droit international*, 1998/2, p. 672.

⁹ Art. 62 of the agreement provides: 'Extradition shall not be granted if ... the person whose extradition is requested is a national of the Contracting Party to which the request is addressed or if he has obtained refugee status in that State'.

¹⁰ J.-M. THOUVENIN, « Le principe de non extradition des nationaux », *Droit international et nationalité*, Colloque de Poitiers de la Société française pour le droit international, Pedone, Paris, 2012, p. 125.

¹¹ Opinion of AG BOT in *Petruhhin*, 10 May 2016, C-182/15, ECLI:EU:C:2016:330, § 53. See also J.-M. THOUVENIN, *op. cit.*, p. 133.

¹² See however art. 4(6) and (7) and art. 5(3) of the Framework Decision 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States which constitute limited grounds for refusal related to nationality. V. 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", *Yearbook of European Law*, 2012, p. 324.

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

fundamental rights. The national judge must first assess whether there are “deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention” in the requesting Member State¹⁴, notably on the basis of information provided by judgments of international courts such as the ECtHR or decisions, reports, or other documents produced by bodies of the Council of Europe or under the aegis of the UN (§89). Nonetheless, as underlined by the Court, “a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant” (§90). Indeed, after the identification of such a risk, the national judge has to, moreover, “make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State” (§92). This individualized analysis must be carried out by means of a request to the issuing authority for “all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State” on the basis of Article 15(2) of the Framework Decision (§95). A high threshold for rebutting the trust in other Member States’ capability to ensure the protection of fundamental rights, by refusing the execution of a EAW, was thus set by the ECJ. As a matter of fact, it is only if both conditions are fulfilled that the executing authority will have to postpone the execution of the EAW.

In the *Petruhhin* case, the ECJ first found the EU protection of fundamental rights to be applicable, as the Estonian person subject to the request of extradition had used its freedom of movement by moving to Latvia. More specifically, the Court relied its analysis upon art. 19 of the Charter of fundamental rights¹⁵, according to which “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”, in conjunction with art. 1 and 4¹⁶. The Court however did not impose the same duty upon national judges pursuing an extradition request from a third country. Indeed, even if the ECJ, relying on the *Aranyosi* and *Căldăraru* ruling, also required from national authorities to examine whether “a real risk of inhuman or degrading treatment of individuals in the requesting third State” (§58) existed, it did not require from the national authority to, additionally, make the specific and precise assessment of the risks faced *in concreto* by the individual concerned in case of surrender. In the *Petruhhin* scenario, the national judge thus seems prevented from transferring a EU citizen once the competent authority of the requested Member State has established the existence of a real risk of inhuman or degrading treatment of individuals in the requesting third State (§58) without however having assessed the specific risk encountered by the convicted or suspected person.

The distinctive level of trust governing both sorts of cooperation can undoubtedly explain the different approach of the ECJ. Indeed, the EU principle of mutual trust between Member States, on which the EAW is based, “requires, particularly with regards to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying

¹⁴ CJUE (Grand Chamber), *Aranyosi and Căldăraru*, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, §89.

¹⁵ According to the AG BOT, this provision is not applicable in connection with the EAW system (in EU internal cooperation), but only in the framework of international criminal cooperation, see Opinion of AG BOT in *Aranyosi and Căldăraru*, 3 March 2016, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:140, § 46. The Court moreover did not rely upon art. 19 in its judgement on that case, but on art. 1 and 4 of the Charter.

¹⁶ Art. 1 provides the right to human dignity and art. 4 prohibits torture and inhuman or degrading treatment or punishment.

with EU law and particularly with the fundamental rights recognised by [it]¹⁷. Member States are thus required, when implementing the EAW, “to presume that fundamental rights have been observed by the other Member States”¹⁸ and the threshold allowing the refusal of a EAW, expressing distrust in another Member State, is thus high. Moreover, mechanisms provided by the Framework-Decision, supporting confidence between Member States, such as the direct exchange of information, have to be mobilized before making exception to EU criminal cooperation.

Conversely, International criminal assistance, which is not supported by such cooperative tools, nor by a framework for addressing threats to human rights as provided by EU law¹⁹, does not seem to be underlined by a sufficiently high degree of trust justifying a presumption of the respect of fundamental rights by other countries. The “simple” evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State thus prevents the surrender of a EU citizen to that state, even in the absence of an indication that the person concerned will concretely be subject to inhuman or degrading treatment in the event of a transfer to the third state.

II. Precedence taken by European Trust-Based Mechanisms on International Cooperation

On top of justifying a distinct examination of the risks encountered in terms of fundamental rights depending on whether EU or international cooperation is concerned, the principle of mutual trust also entails the recognition of supremacy of one system *vis-à-vis* the other. Indeed, the Court was also asked in the *Petruhhin* case whether the fact that Mr. Petruhhin, an Estonian national, could not benefit from the same protection against extradition from Latvia to that of Latvian nationals, constituted a discrimination on the ground of nationality, prohibited by art. 18 of the TEU. The Court first recalled, on the basis of its previous case law²⁰, that although the rules on extradition fall within the competence of Member states in the absence of an international agreement binding the EU, they had to respect EU law and, notably, the principle of non-discrimination on the basis of nationality applicable to situations falling within the scope of application of the Treaties such as situations where EU citizens have exercised their freedom to move in the European territory (§30). It noted that the unequal treatment allowing the extradition of a Union citizen who is the national of another Member State constituted a restriction to the right of freedom of movement, within the meaning of art. 21 TFEU²¹. By means of this observation, the Court acknowledged the fact that a person transferred to a third-country, pursuing an international extradition agreement, could possibly be disadvantaged compared to individuals surrendered, on the basis of a EAW, to a “trustful” Member State. This restriction was however, in the Court’s view, motivated by the legitimate objective of preventing the risk of impunity for persons who have committed an offence, since the requested Member State has in general no jurisdiction to try cases when neither the perpetrator nor the victim of the alleged offence is one of its national. Nevertheless, the ECJ found that the application of EU rules on criminal cooperation and notably the mechanism of EAW with the view to surrender the person to the member state of which he or she is a national for the purposes of prosecution was a less intrusive measure in the right of free movement.

¹⁷ Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454, §191.

¹⁸ Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454, §194.

¹⁹ Such as, *inter alia*, the competence of the ECJ to control the respect of the Charter of Fundamental Rights in the scope of EU law and art. 7 of the TEU.

²⁰ CJUE, *Rottmann*, 2 March 2010, C-135/08, ECLI :EU:C:2010:104, §41.

²¹ CJEU (Grand Chamber), *Petruhhin*, 6 September 2016, Case C-182/5, ECLI:EU:C:2016:630, §33.

As a matter of fact, the EAW system equally enables the achievement of the goal of preventing the risk of impunity when the Member State of the suspected or convicted person has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory. Therefore, the Court considered that Member States must, before transferring a EU citizen to a third country, first mobilize EU criminal cooperation and try to surrender the person to the Member State of which he or she is a national for the purposes of its prosecution. It is only if EU criminal cooperation cannot satisfactorily prevent impunity that a national judge could, after having assessed the possible risks in terms of fundamental rights protection, surrender a EU citizen to a third-country. In the name of the rights of free movement, the judgment in the *Petruhhin* case thus entails precedence of EU criminal cooperation over International criminal assistance²², as far as both could enable the prosecution of the alleged offender, encompassing therefore a “Europeanisation” of the principle “*aut dedere, aut judicare*”. The Member State receiving a request for extradition from a third State concerning a non national EU citizen must therefore first inform the Member State of which the citizen is a national so that it can, if it has jurisdiction pursuant its national law to prosecute that person, issue a EAW in order to obtain the surrendering of that person. This new judicial obligation, based on the principle of non-discrimination, seems yet in contradiction with art. 16 (3) of the Framework Decision which states that, “in the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention”.

Conclusion

The joint reading of the judgments rendered by the ECJ in cases *Aranyosi and Căldăraru* in April and in *Petruhhin* in September 2016, both related to criminal mutual assistance, illustrate the major role played by the principle of mutual trust in EU criminal cooperation. Indeed, by having to answer a similar question in the field of a purely EU situation on the one hand and, a question in connection with the relationship between a Member State and a third country on the other, the Court of Justice took the opportunity to implicitly highlight the feature differencing both domains and, also, to specify their interaction. The questions referred to the Court concerned, among others, the reconciliation of the prevention of impunity by transferring EU citizens convicted or suspected of having infringed criminal law to another country and the protection of their fundamental rights when evidence exist that persons detained in the requesting state face a risk of inhuman and degrading treatment. Because of the mutual trust Member States should have in each other as regards the protection of fundamental rights, it is only after a specific and precise assessment of the risks faced by the individual in case of surrender that a national authority may postpone the execution of a EAW to a Member State whose places of detention are considered as being deficient in terms of fundamental freedoms. Conversely, in the framework of International criminal cooperation, the transferal of a EU citizen to a third country must, in the view of the Court, be abandoned once there exist evidence of practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the European Convention on Human Rights in the requesting third country. Moreover, the transfer may only take place in case EU criminal cooperation could not, in itself, prevent impunity.

²² CJEU (Grand Chamber), *Petruhhin*, 6 September 2016, Case C-182/15, ECLI:EU:C:2016:630, §47.

The principle of mutual trust, founded on the premise “that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”²³, thus seems to justify a more severe ground of refusal of cooperation within the EU than in the field of collaboration with third countries and, also, the fact that precedence should be granted to the former over the latter, when both can equally assure the prosecution of criminal offences.

²³ Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454, §191.



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