

ECJ Ruled on Fundamental Rights Test for Surrenders to the United Kingdom

Thomas Wahl

On 29 July 2024, the ECJ, sitting as Grand Chamber, [delivered an important judgment](#) on the conditions under which surrender of a person can be granted by a EU Member State to the United Kingdom (UK). The Court interpreted the fundamental rights clause enshrined in the Trade and Cooperation Agreement (TCA) between the European Union and the United Kingdom and held that the surrender mechanism under the TCA differs from the one provided by the EU's Framework Decision on the European Arrest Warrant (EAW).

Background of the case and question referred

The case at issue ([Case C-202/24, *Alchaster*](#)) concerns the execution of arrest warrants by Irish courts against a person suspected of having committed terrorist offences. The arrest warrants were issued by a district judge of the Magistrate Court of Northern Ireland (United Kingdom). The person concerned argued that his surrender would be incompatible with the principle that offences and penalties must be defined by law because the UK unfavourably changed the system of release on licence. While at the date of the alleged commission of the offences the system in place granted automatic release on licence after half of the sentence had been served, the new regime provides that release on licence is approved by a specialised authority after having served two thirds of the sentence.

The referring Supreme Court of Ireland stated that the Supreme Court of the UK found that the change of the system of release on licence does not infringe the legality principle enshrined in the European Convention on Human Rights (Art. 7 ECHR). In addition, also the Irish Supreme Court denied that a risk of violation of the ECHR by the new UK system could be a reason not to surrender.

However, the Irish Supreme Court wondered whether the same conclusion can be drawn if the legality principle enshrined in the Charter of Fundamental Rights of the European Union ("the Charter") is applied. In this context, the Irish Supreme Court also sought guidance on how an examination of a potential fundamental rights risk in the requesting/issuing State (UK) is to be carried out.

Different fundamental rights test in UK cases than European Arrest Warrant cases

As a consequence, the judges in Luxembourg had to rule whether the same test applies for the TCA as for the FD EAW if a person submitted that he/she will run a real risk of a breach of fundamental right in the requesting/issuing State. For the FD EAW, the ECJ applies a very stringent two step-test as established in [in](#)

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Aranyosi and Căldăraru (→ eucrim 1/2016, p. 16). It has also repeatedly stressed that refusal of executing an EAW for fundamental rights reasons can only happen in exceptional circumstances.

The judges in Luxembourg denied a transfer of the rules applicable to the FD EAW to the TCA surrender mechanism. They point out essential differences between the two extradition schemes. They argue that the TCA does not establish a special relationship between the UK and the EU which is characteristic for the EAW, especially since the UK is not part of the European area without internal borders. The TCA does also not present cooperation as being based on the preservation of mutual trust. And finally, the provisions on surrender in the TCA substantially differ from those in the FD EAW, e.g., with regard to political offences and the surrender of nationals. Similarly, in contrast to the FD EAW, the TCA includes a fundamental rights clause in Art. 604(c): if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.

Manner of the test

As regards the manner of the test, the ECJ clarified that the executing judicial authority must carry out a specific and precise examination of the person's situation, that there are valid reasons for believing that that person would run a real risk to the protection of his or her fundamental rights if that person were surrendered to the United Kingdom. In determining such a real risk, the executing authority must take into account the following:

- Examining all the relevant factors in order to assess the foreseeable situation of the requested person if he/she is surrendered to the UK;
- Unlike the two-step examination for European Arrest Warrants (see above), the examination takes into account simultaneously the rules and practices that are generally in place in the issuing country, and the specific features of the person's individual situation;
- Carrying out an independent assessment in the light of the provisions of the Charter (without merely taking into account the case-law of the UK Supreme Court of the United Kingdom, or the general guarantees provided by the judicial system of that State);
- The finding of a real risk must be based on objective, reliable, specific and properly updated information;
- Making full use of the instruments provided for in the TCA in order to foster cooperation, i.e., before taking the decision on surrender, the executing authority must seek supplementary information from the issuing State as well as request additional guarantees that may rule out a possible fundamental rights breach.

Breach of the legality principle?

With regard to a potential breach of the legality principle in Art. 49(1) of the Charter, the ECJ points out that, in parallel to Art. 7 ECHR, a distinction must be made between "penalty" and "execution/enforcement" of the penalty. In the case of "execution" retroactive measures do not infringe the fundamental rights.

The retroactive imposition of a heavier penalty (which would be incompatible with the legality principle) is regularly not the case if the measure merely delays the eligibility threshold for release on licence. The position may be different, however, if the measure essentially repeals the possibility of release on licence or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for. It is for the referring court to examine the situation in the UK and decide, on

this basis, on a possible refusal of surrender because of a violation of the fundamental right in Art. 49(1) of the Charter.

Put in focus

The judgment in *Alchaster* marks the beginning of a new chapter in the lengthy debate on the extent to which extraditions can be denied if the requesting state does not uphold certain fundamental rights standards (debate on the *ordre public* refusal ground). Case law by both the ECJ and ECtHR has established very strict conditions for the member states in the respective blocs and allows non-surrender only in exceptional circumstances of fundamental rights violations.

In this latest ruling, the ECJ seems to lower the threshold for judicial cooperation between EU Member States and the United Kingdom. It clearly states that the principles developed for the EU's surrender system based on the European Arrest Warrant and the underlying principles of mutual trust and mutual recognition should definitively not apply to other surrender agreements. This appears to pave the way for a "simple" test assessing whether a UK measure complies with the fundamental rights of the Charter.

In consequence, the judgment raises the following questions:

- Is the threshold for extraditions from the EU to the UK even lower than stipulated by the flagrant denial test that the ECtHR applies, for instance, for extraditions from a Council of Europe party to the USA?
- Will the ECJ test applied in *Alchaster* have an impact on other similar surrender arrangements, in particular the EU's surrender agreement with Norway and Iceland that follows a similar model than the one with the UK (though Norway and Iceland are members of the Schengen free-travel zone)?

Either way, it is already clear that the ECJ's new judgment on extradition and fundamental rights will spark further debate.

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