ECtHR: EAW Cannot be Automatically Executed

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On 25 March 2021, the European Court of Human Rights (ECtHR) delivered a landmark judgment on the relationship between the European Convention on Human Rights (ECHR) and the EU's mutual recognition instruments in criminal matters, i.e., the European Arrest Warrant. The judgment was handed down in the cases *Bivolaru and Moldovan v. France* (Application Nos. 40324/16 and 12623/17). The full judgment is (currently) only available in French; a press release in English has been provided.

Recapitulation of principles

First, the ECtHR recapitulated its doctrine as to when the fundamental guarantees of the ECHR apply in relation to Union acts:

- When entering into international obligations, Contracting States remain bound by their obligations as set out in the ECHR;
- If the international organisation in question (here: the European Union) conferred on fundamental rights an equivalent or comparable level of fundamental rights protection to that guaranteed by the ECHR, measures for fulfilling these international obligations are deemed justified;
- The applicability of this presumption of equivalent protection has two prerequisites: (1) the national authorities have no margin of manoeuvre in relation to the international obligation; (2) the case at issue satisfies "the deployment of the full potential of the supervisory mechanism provided for by the legal order of the organisation";
- The principle of mutual recognition of judicial decisions in the EU may not be applied in an automatic and mechanical manner to the detriment of fundamental rights;
- If the presumption of equivalent protection applies, the ECtHR will ascertain whether the application of the mutual recognition instrument renders the protection of Convention rights manifestly deficient or not;
- The principles not only apply to the European Arrest Warrant but also to all EU mechanisms of mutual recognition.

In the two cases at issue, both complaints concerned the surrender of Romanian nationals from France to Romania. Both complainants argued that the French courts executing the respective Romanian EAWs had not taken account of their individual risks of being exposed to inhuman and degrading treatment in Romania, as a result of which Art. 3 ECHR was breached.

Application of the protection principles in the first case

In the case of Mr. Moldovan, in which poor prison conditions in Romania were at issue, the ECtHR stated that the French judicial authorities had to assess the facts and circumstances within the framework strictly delineated by the CJEU's case law in *Aranyosi and Căldăraru* on Art. 4 of the Charter of Fundamental Rights (eucrim 1/2016, 16). According to the ECtHR, this jurisprudence provides protection equivalent to that provided by Art. 3 ECHR. The executing judicial authority had no autonomous margin of manoeuvre, so that the presumption of equivalent protection applied. However, this presumption was rebutted in the present case. The ECtHR found that there had been a sufficient factual basis for the French authorities to find that Mr. Moldovan would be exposed to a real risk of inhuman and degrading treatment in the Romanian prison cells after his surrender. In particular, information given to the French authorities on the personal space to be allocated to Mr. Moldovan in the Romanian prison centre should have given rise to a strong presumption of a breach of Art. 3 ECHR. The assurances provided by the Romanian authorities were stereotypical descriptions of the detention conditions. Therefore, the ECtHR determined a breach of Art. 3 ECHR and ordered France to pay him €5000 just satisfaction in compensation.

Application of the principles in the second case

In addition to detention conditions, the case of Mr. Bivolaru also concerned the implications of his refugee status in Sweden. The ECtHR noted that the French Cour de Cassation had declined to seek a preliminary ruling before the CJEU in this latter question. This failure to make a referral led to the second condition for the presumption of equivalent protection (involving deployment of the full potential of the relevant supervisory machinery provided for by EU law) not having been fulfilled. Accordingly, the ECtHR reviewed the manner in which the executing French authorities had examined breaches of Art. 3 ECHR in the light of potential persecution of the defendant on account of his political and religious beliefs in Romania. The ECtHR concluded that the French authorities had examined Mr. Bivolaru's individual situation in depth but had no sufficient factual basis to establish the existence of a real risk of a breach of Art. 3 ECHR and to refuse the execution of the EAW on that ground. Similarly, there was no solid factual basis for the French authorities to doubt a breach of Art. 3 ECHR because of inhuman detention conditions, since the applicant had not provided sufficiently detailed or substantiated *prima facie* evidence on this risk. As a result, a violation of Mr. Bivolaru's Convention rights could not be established.

Put in focus

The ECtHR clarified that the EU Member States must comply with the guarantees of the ECHR when applying EU mutual recognition instruments. It equally confirmed that the ECtHR will assess this conformity. Although the door for accepting breaches of the ECHR is only slightly ajar, the ECtHR outlined ways in which successful complaints could be filed by individuals subject to surrender on the basis of EAWs. For the first time, the ECtHR acknowledged a rebuttal of the presumption of equivalent protection because of a manifest deficiency in applying the EAW as mutual recognition instrument.

As regards the assessment of whether poor prison conditions can lead to a refusal of extradition, the ECtHR concurred with the CJEU approach only insofar as both courts require a real, individualised risk of breach of the fundamental right to human and non-degrading treatment to have been incurred by the requested person. Read between the lines, the ECtHR clarified that it applies a different methodology than the CJEU: the ECtHR does not follow a two-step approach requiring **(1)** evidence of systemic and generalised deficiencies in the issuing State before **(2)** any individual risk is identified (cf. the CJEU in *Aranyosi and Căldăraru,* cited above).

In addition, the Convention serves as the benchmark if the complaint is not covered by the presumption of equivalent protection (here: failure to make a referral for preliminary ruling to the CJEU). Although the

complaint was not successful in the end, the ECtHR vehemently blamed the French Cour de Cassation for not having sought guidance from the CJEU on questions that have not yet been decided and that were decisive in the present case (here: implications of asylum granted by another EU Member State on the execution of EAWs). In such cases, the yardstick of "manifest deficiency" is irrelevant.

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