Mutual Trust – Blind Trust or General Trust with Exceptions? The CJEU Hears Key Cases on the European Arrest Warrant[1]

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Monday 15 February was a busy day in Luxembourg. The Court held a hearing in C-404/15, Aranyosi,[2] which was lodged at the Court in July 2015. But the Court also received C-659/15, Caldararu[3], at 9 December 2015 under the 'emergency' PPU-procedure. The Court decided to join the two cases as they were submitted by the same court - Hanseatisches Oberlandesgericht in Bremen, Germany – and concerned the same issue – should surrender on a European Arrest Warrant be refused if there is reason to fear the wanted person will be exposed to inhumane prison conditions in the requesting state? So the hearing concerned both cases and it turned out to be a busy but also interesting day because the two cases touch upon the application of the principle of mutual recognition as the cornerstone of EU criminal law as recognized by recital 6 of the Framework Decision[4] establishing the European Arrest Warrant.

During the day, the Court heard the submissions from the lawyers of Aranyosi and Caldararu, the referring judge from Bremen, 9 Member States (Germany, Ireland, Spain, France, Lithuania, Hungary, The Netherlands, Romania and UK) and of course the Commission. But what was all the fuss about? Well, let us have a look at the two cases first. Then we will turn to the submissions of the Member States and the Commission.

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1. The Cases

Aranyosi is a young man, living with his parents in Bremen. He has a girlfriend in Germany, with whom he has a child. He was arrested in Bremen 14 January 2015 as Hungary had requested his surrender on a European Arrest Warrant. Aranyosi is suspected for two accounts of burglary. However, Aranyosi resisted the surrender, referring to reports from the Committee on the Prevention of Torture (CPT) and case law from the European Court of the Human Rights, which documented a massive over-crowding

[1] This paper is an unchanged republication of the article first published at http://eulawanalysis.blogspot.hu/2016/02/mutual-trust-blind-trust-or-general.html on 18 February 2016.
[2] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-404/15 (20 March 2016).
[3] http://curia.europa.eu/juris/fiche.jsf?id=C%3B659%3B15%3BRP%3B1%3BP%3B1%3BC2015%2F0659%2FP&pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=659%252F15&td=%3BALL&pcs=Oor&avg=&mat=or&jge=&for=&cid=874772 (20 March 2016).
[4] http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32002F0584 (20 March 2016).

in Hungarian prisons to an extent that could be considered a violation of ECHR art. 3 (corresponding to Article 4 of the EU Charter of Fundamental Rights). The Bremen Court decided to ask the Luxembourg Court if it was possible to read article 1(3) of the EAW Framework Decision (the 'human rights' clause) as an opportunity to refuse the surrender in case of strong indications of detention conditions insufficient to satisfy ECHR art. 3. The Bremen Court also asked if it was possible to request assurances concerning the prison conditions from the requesting state before surrender was allowed. Due to Aranyosi's connections with Bremen, the judge decided to release Aranyosi while the case was pending.

Caldararu is also a young man. He was sentenced to 8 months in prison by a court in Romania for driving without a driver's license. The case was heard *in absentia*. However, Caldararu left Romania before the sentenced time could be served and Romania issued a European Arrest Warrant for Caldararu. He was arrested in Bremen, Germany, on 8 November 2015, and his surrender to Romania was then allowed on 20 November 2015. He refused however to consent to the surrender with reference to the detention conditions in Romania. The Bremen Court decided to keep Caldararu in custody as the Bremen Court also sent a request for a preliminary ruling in this case. The request was sent on 9 December 2015.

So, two cases from the same court, basically concerning the same question: Can a judge refuse surrender if it is feared that detention facilities in the requesting state are inadequate?

But the reply to these questions touches upon a number of arguments, and the day turned out to be very intense as these arguments involves fundamental rights, the principle of mutual recognition, the relationship between Member States and not least what to do if surrender is denied. The parties were far from a common understanding of how these arguments should be used, and the hearing turned out to be a very interesting and well-spent day in Luxembourg.

Let us have a look at some of the major arguments.

2. The First Argument – Mutual Trust Means Blind Trust!

One could argue that mutual trust means blind trust to such a degree that the executing Member State must execute the European Arrest Warrant without any checks for anything else other than the grounds for refusal to execute an EAW mentioned in Articles 3 and 4 of the Framework Decision (such as double jeopardy, or age of a child).

The Bremen judge of course opposed this view as this would make his request for a preliminary ruling obsolete.

Especially Spain supported this argument, saying that the evaluation of the protection of fundamental rights is a privilege for the court in the issuing State as the court in the executing State is not empowered to make abstract evaluations of the prison conditions in another Member State. The prior CJEU judgment in *Melloni*[5] was mentioned as an example of a situation, where Spain was denied the possibility to make the surrender conditional upon specific guarantees. Spain had difficulties aligning the conclusions of *Melloni* with a possibility to make evaluations of foreign prison systems prior to deciding surrender and then perhaps condition the surrender on guarantees regarding detention conditions. Spain therefore held, that the executing State had to surrender unless Article 3 or 4 of the Framework Decision were applicable

5 http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&parties=melloni&jge=&for=&cid=874772 (20 March 2016).

and it would then be for the courts of the requesting state to evaluate whether prison conditions would amount to a violation of ECHR Art. 3/Charter Art. 4.

Lithuania presented a similar argument, arguing that the principle of mutual trust would fall apart if Member States were given the power to check each other in regard to prison conditions. Lithuania further referred to TEU art 7 (on the possible suspension of a Member State from the EU on human rights grounds) as the procedure prescribed by the treaties in case a Member State is found not to respect fundamental rights. Lithuania also expressed concern whether the issuing State would be able to make its arguments before the court in the executing State deemed the prison conditions in the issuing State insufficient in regards to fundamental rights, and it could lead to a situation where the issuing State would be denied the possibility to use the EAW as such. This would make it impossible to prosecute absconded criminals and would thus threaten the idea of AFSJ as such.

The remaining States together with the Commission were in opposition to Spain and Lithuania. The parties argued in general in favor of understanding mutual trust as a general trust in opposition to a blind trust. The Bremen judge reported his difficulties when reading about the prison conditions in Hungary, and how he had asked the German Government in vain to obtain guarantees concerning the prison conditions for Aranyosi. He argued that it would be unacceptable to demand that a judge should ignore obvious reasons to fear for violations of fundamental rights and the possibility of denying the execution of the EAW had to be present in such a situation. Being a judge himself, he called upon the Luxembourg judges not to put this burden on him.

The German Government along with Ireland, France, Hungary, The Netherlands, Romania, UK and the Commission presented various arguments in favor of understanding mutual trust as a general trust which only is rebuttable in very exceptional circumstances.

Germany argued that the executing state cannot be making assessments of the respect for fundamental rights in other Member States, except when under very exceptional circumstances. Such circumstances could be several reports from the Council of Europe, CPT, judgments from the ECtHR, reports from NGOs and even from the American Secretary of State. Germany further read recital 13 in the preamble together with art. 1(3) of the EU Framework Decision in such a way that a risk of violation of fundamental rights is a general reason for denying execution of the EAW in supplement to the specific reasons mentioned in Articles 3 and 4 of the law. Ireland supported this argument with a reference to recital 12, while Hungary supported the argument with reference to recital 10. The UK also argued in favor of reference also to recitals 5 and 6, together with recital 10, 12 and 13 and Article 1(2) and 1(3).

The Commission argued for the need of a balance between mutual trust and the protection of fundamental rights, requiring Member States to have a general trust in each other with a possibility to test the protection of fundamental rights if there seems to be a real risk for a violation of fundamental rights. The Commission found support for this in Art. 19(2) of the Charter (non-removal from a Member State to face torture et al), as the Commission supported the Bremen judge by finding it unacceptable to force a Member State to surrender to a known risk of violation of fundamental rights without taking action to protect fundamental rights. The Commission further stressed that if the principle of mutual recognition would prevail over the protection of fundamental rights, then a principle had been given more weight than fundamental rights. Fundamental rights, being a part of primary law and the reason for the Union as such, could not be set aside by a general principle within EU law.

3. When is the Obligation to Examine a Potential Risk Triggered?

If detention facilities in the requesting Member State may be examined prior to the decision of surrender, then how much is needed for triggering such an examination?

The main question was whether an examination should be accepted only in case of systemic failures in the requesting state or whether an individual risk concerning the specific person should be enough. The first situation, where an examination only is acceptable in cases of systemic failures, correspond to the conclusions of the Luxembourg Court in the cases of *N.S.* (on the Dublin system[6] in Greece) and *Melloni*, and also paragraphs 191-194 of *Opinion 2/13*[7] (on ECHR accession). The second situation corresponds to the conclusion of ECtHR in *Soering* (on extradition to 'death row' in the USA).

Germany, UK and The Netherlands argued in favor of the individual approach, exemplified by a person who may be kept under harsh detention conditions due to religion or sexual orientation. Ireland argued together with France, Romania and Hungary in favor of the systemic approach, and also stressing that the threshold that has to be met had to be set rather high in respect for the principle of mutual trust. Spain argued against both approaches, as Spain found the examination to be directed against the detention facilities of the requesting state and as such not covered by any of the terms. Lithuania referred to art 7 TEU as the correct method to handle suspicions concerning violation of fundamental rights in a Member State, and concluded on this basis that the examination conducted in the executing Member State should be limited to an examination of whether or not art. 7 had been activated in regards to the issuing Member State.

The Commission found it relevant to initiate an investigation if an individual risk were present.

The parties were thus split in half on the question of whether an examination was allowed only in case of systemic failures or whether the examination should be allowed based on the individual risk of the person wanted for surrender. The submissions of the Member States were however also influenced by the question of what to do if the examination leads to the conclusion of a present and relevant risk in case of surrender – should the requesting state be given the opportunity to eliminate the found risk through guarantees or should the surrender be conditioned upon guarantees? The position of the Member States on this issue will be reported below. First, we must turn our attention to how the Member States would examine a real and present danger of a violation of a fundamental right in case surrender is allowed.

6 http://curia.europa.eu/juris/liste.jsf?pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&parties=N.S.&jge=&for=&cid= (20 March 2016).

7 http://curia.europa.eu/juris/liste.jsf?pro=&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=2%252F13&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=874772 (20 March 2016).

4. How will the Member States Examine a Claimed Risk of Violation of Fundamental Rights?

The problem of how a court in one Member State can obtain information on the detention system in another Member State in order to establish whether or not these detention facilities may be seen as a violation of fundamental rights were also included in the submissions of the parties.

Germany referred to reports from the CPT and the Council of Europe, together with the case law of the ECtHR, reports from NGOs and even the American Secretary of State. Germany stressed that these sources had to be published within a reasonably short time before the national court was to decide on the question of surrender. The UK also supported the use of reports from international organs, the case law of the ECtHR, individual claims and testimonies and reports from national experts. Ireland and The Netherlands also argued for the use of reports from the CPT and the case law of the ECtHR, while France considered especially the case law of the ECtHR as relevant. Hungary elaborated on the fact that reports from the CPT are at least one year underway, while a judgment of the ECtHR refer to facts as they were at the time of the claimed violation. That could be several years prior to the judgment were handed down. These sources thus had to be used with great care.

Romania did not elaborate on the question of how to make an examination. Also Spain and Lithuania opposed the general idea of letting foreign courts examine domestic prison conditions, but did not elaborate on how this may be done in case the Luxembourg Court would allow it.

The Commission supported the use of the case law of ECtHR, reports from international organizations, statistics on the over-crowding of prisons in the requesting State and even any other relevant source. The Commission was thus in line with especially Germany and UK.

5. The Importance of Dialogue between Member States – the Concept of Guarantees

Several parties stressed the importance of dialogue between the requesting Member State and the executing Member States.

The Bremen judge, Germany and France argued in favor of giving the judge of the court in the executing Member State the possibility to call for guarantees from the issuing Member State. The guarantees would be able to remove the fear for a violation of fundamental rights, and the surrender should therefore be denied if the required guarantees were not provided.

Ireland and The Netherlands found no basis for refusing to surrender due to the lack of diplomatic guarantees. The executing Member State had to make its mind up whether or not there would be a real and present risk for a violation of fundamental rights and handle the request for surrender in accordance with this.

Spain argued against the use of guarantees, as the judge calling for the guarantees may be setting the criteria that have to be met before he or she will allow surrender. This would generate a risk of huge variations in the way the Member States use this possibility, and would therefore threaten the uniformity of Union Law. Lithuania also argued against the use of guarantees by elaborating on the fact that the guarantee is not worth much if the requesting Member State decides not to fulfill its obligations in accordance with the guarantee after the surrender has taken place.

Especially Hungary stressed the importance of Article 15(2) of the Framework Decision. If a Member State is afraid of surrendering due to the fear of violation of fundamental rights, then the two involved states must engage in a dialogue for the purpose of removing the reasons for this fear. Hungary saw the risk of violations as a specific and concrete problem, which could be handled with specific and concrete solutions. Such solutions could be alternative detention measures, a decision to keep the surrendered person in custody in another prison or perhaps show the executing court that the reasons are obsolete due to for instance the constructions of new prisons following e.g. a judgment from the ECtHR. This line of arguments was supported by the UK as well as Ireland and The Netherlands. These arguments were also supported by Romania by stating that the risk for a violation of fundamental rights may be real and present but nevertheless possible to eliminate in the specific case. The Commission also supported this view.

Especially Romania also raised another issue concerning equal treatment, as Romania mentioned that if certain inmates where kept under custody under more beneficial conditions due to guarantees while other inmates were kept in custody under normal conditions. Romania pointed to the simple fact that if prisoners with guarantees were to be given more space, then the remaining prisoners would have even less space. This motivated the referring judge to ask Romania, Germany and France to elaborate on this risk concerning unequal treatment. Romania found this risk to be non-acceptable, while France argued that the risk of unequal treatment were a less evil than the risk of violating fundamental rights. Germany stated, that Germany did not want unequal treatment, but appropriate prison conditions. The risk of unequal treatment was however the only way to respect the *Soering* judgment of the ECtHR.

Thus, there were different views on whether surrender could be conditioned upon guarantees or whether guarantees should be seen more as a dialogue comforting the executing judge in the removal of a risk of violation of fundamental rights. However, there seemed to be general consensus when it came to how guaranties should be issued, as the parties found this should be regulated in national law of the specific Member State.

6. The Consequence of Denying Surrender

The last major issue touched upon by the parties was the question of what should happen if surrender were refused.

The Bremen judge explained how German law made it possible to let Germany continue the criminal proceedings if surrender was denied, but practical problems in regards to witnesses etc. made this theoretical possibility an illusion in real life. In regards to Aranyosi, a decision not to surrender would therefore in real life also be decision to discontinue the criminal proceedings. In regards to Caldararu, who was sentenced in Romania, a decision to not surrender could provide the basis for letting Caldararu serve the sentence in Germany, but this would also result in a number of practical problems as Caldararu only had stayed a very short time in Germany. He therefore does not speak the language nor would any initiatives to rehabilitate him into the German society have any likelihood for success. So it was also questionable whether it would be relevant to transfer the sentence to Germany in the present case. The Bremen judge made it clear that it would not be satisfactory if a denial to surrender the sought person would mean crimes would go unpunished.

The German government shared this view, while France noted that it was for each Member State to decide whether they would let their courts have jurisdiction in cases in which surrender had been denied. Romania also made it clear, that it would be unacceptable if criminal activities were going un-punished

because of a decision to deny surrender. If the executing Member State denies surrender, then the executing Member State must bear the responsibility to see justice fulfilled. Lithuania pointed to the fact that a decision not to surrender due to unsatisfactory detention facilities would in practice create areas within the AFSJ it which it would be impossible to punish crimes as the criminals would be able to commit their crimes in such areas and then flee to other parts of the AFSJ without risking surrendering afterwards.

A number of parties also underscored this as the major difference between asylum law and the test used in the *N.S.* case against criminal law and the test that may be used in the present cases. If the return of an asylum seeker is impossible, then the Member State in which the asylum seeker is at the moment will be able to process the application for asylum. It is of lesser importance for the asylum seeker whether one or the other Member State processes the application for asylum as asylum law is almost fully harmonized. The consequence of not surrendering a suspect in a criminal case could very well be that crimes would go unpunished, which is a rather different result and of course not acceptable.

7. What Next?

The Advocate General promised to announce within 24 hours when his opinion will be submitted to the Court. The cases were heard on 15 February 2016 but the Curia-webpage still do not contain any new information by the end of the 17 February 2016. Nonetheless, Caldararu is a PPU-case as Caldararu is kept in custody, and we must therefore expect the opinion of the general advocate within few days. The decision of the Court will then be expected within a few weeks or perhaps a month, so the excitement will soon be released.

It seems apparent that especially Spain and Lithuania were very skeptical as to whether one Member State should be allowed to examine the detention facilities in another Member State at all. The other seven Member States seemed to find it appropriate to have the possibility in very exceptional circumstances. France, Romania and Hungary seemed to limit the possibility to cases with systemic problems, while the remaining Member States also wanted to be able to conduct an examination in cases with individual problems. Germany wanted to let the executing Member State demand guarantees from the issuing Member State so surrender could be denied if the requested guarantees were not delivered. The remaining Member States seemed to agree that the two Member States had to engage in a dialogue to establish whether there was a problem in the specific case at all and whether a problem could be solved by for instance alternative detention measures. It is also worth noticing the position of the Commission as a rather pragmatic approach, where the Commission supported the need to make investigations in even individual cases, using a variety of sources.