CJEU says EAW mutual trust and mutual recognition doesn't apply to the UK anymore

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Introduction

Earlier this week, the Grand Chamber handed down judgment in ***Alchaster*** (C-202/24; ECLI:EU:C:2024:649) concerning surrender from EU Member States to the UK under the Trade and Cooperation Agreement 2020 ("TCA"), its first substantive decision on UK surrender post-Brexit. In early March, the Irish Supreme Court ("IESC") referred various questions in ***Minister of Justice & Equality v Seán Walsh*** [2024] IESC 9. Although these relate to the *nulla poena sine lege* principle enshrined in Article 7 ECHR, and reflected in EU law through Article 49 of the EU Charter of Fundamental Rights ("the Charter"), the CJEU's judgment sets the "mood music" for EU executing judicial authorities when deciding if surrender to the UK violates fundamental rights.

Background

In section 30(1) of the Counter-Terrorism and Sentencing Act 2021 ("CTSA"), Parliament introduced Article 20A into the Criminal Justice (Northern Ireland) Order 2008 ("the Order") which, in respect of certain specified "*terrorist offences*", alters the custodial period which must be served and requires referral to the Parole Commissioners in lieu of automatic release. Article 20A is the Northern Irish equivalent of section 247A of the Criminal Justice Act 2003 in England and Wales. In ***Morgan & Ors v Ministry of Justice*** [2023] UKSC 14; [2024] AC 130, the UK Supreme Court ("UKSC") applied ***Del Río Prado v Spain*** (42750/09, 21 October 2013) (CE:ECHR:2013:1021.JUD004275009) and drew a distinction between redefinition or modification of a penalty, which engages Article 7 ECHR, and changes to the manner of execution and enforcement of a penalty, which does not (§§105-117).

In ***Walsh***, the IESC asked the CJEU whether it could rely on the following matters: (i) the fact that the UK was a Contracting Party to the ECHR; (ii) that the UK gives effect to Article 7 ECHR in domestic law; (iii) the UKSC found the Order compatible with Article 7 ECHR; (iv) there is a right of individual petition to the European Court of Human Rights ("ECtHR"); and (v) there is no basis to suggest that the UK will not abide by a ECtHR ruling. As such, the IESC wished to rely on the UKSC's assessment of compliance with Article 7 ECHR (specifically) and the UK's adherence to the ECHR (generally).

The Facts

On 26 October 2021, an issuing judicial authority in Northern Ireland issued four Part 3 warrants, which took effect under the TCA, in respect of terrorist offences allegedly committed between 18 and 20 July 2020 in Northern Ireland (§19). In October and November 2022, the High Court of Ireland ordered the requested person's surrender on foot of each. Under the applicable legislation in Ireland, the European Arrest Warrant Act 2003, the UK must be treated as if an EU Member State. This means the principles enshrined in the EAW Framework Decision are still applied to the UK (§23). The reference detailed the effect of Article 20A of the Order and UKSC's consideration thereof (§§25-29) noting that the requested person's alleged acts took place before the statutory amendment. The IESC considered that as Article 52(3) of the Charter

required that Charter rights, including Article 49(1), are afforded the same "*meaning and scope*" as the corresponding provisions of the ECHR, it need not undertake any verification itself (§30).

The Grand Chamber's judgment

The CJEU emphasised that the EAW Framework Decision did not apply to TCA cases (§36). Instead, the TCA's introductory provisions (§39) establish that bilateral security cooperation is a central pillar of the post-Brexit relationship (§§40-42) and that the Parties (the UK, the EU and its Member States) had affirmed their "*long-standing respect [for] […] democracy, the rule of law and the protection of fundamental rights and freedoms of individuals*". Each undertook to abide by the ECHR and the Universal Declaration of Human Rights 1948 and to give effect to the "*rights and freedoms*" in their respective legal orders (§42).

The Grand Chamber described the structure of the TCA surrender provisions (§§43-45) and guided that the EU Member States may only refuse execution of an Arrest warrant based on Articles 600-604 (§46). These are the mandatory grounds of refusal (Article 600, which are the same as Article 3 of the EAW Framework Decision); the various optional grounds of refusal (Article 601, which mirrors Articles 4 and 4a of the EAW Framework Decision); the political offence exemption (Article 602); the nationality exemption (Article 603); and the required guarantees in certain cases (Article 604, which is based on Article 5 of the EAW Framework Decision). Otherwise, an EU executing judicial authority must execute an Arrest warrant (§47) (notably there is no equivalent to Article 1(2) of the EAW Framework Decision in the TCA).

The CJEU observed that Article 524 TCA requires EU Member States to ensure that surrender to the UK is compatible with the Charter (§49) and, in doing so, it was relevant that the UK was no longer bound by it (*ibid*., see section 5(4) of the European Union (Withdrawal) Act 2018). As such, the real risk of a breach of a Charter right is sufficient to enable a refusal of surrender to the UK (§51).

The Grand Chamber turned to its case-law on the EAW Framework Decision which requires a two-step analysis of the risk of Charter breach before obtaining supplementary information from the issuing Member State. This followed its seminal decision in ***Pál Aranyosi*** (C-404/15) and ***Robert Căldăraru*** (C-659/15 PPU) ECLI:EU:2016:198 in relation to prison conditions, and as confirmed in the judicial independence cases (***Minister for Justice and Equality (Deficiencies in the system of justice***), C-216/18 PPU ECLI:EU:C:2018:586) and the "other" human rights cases (e.g., ***E.D.L. (Ground for refusal based on illness)***, C-699/21 EU:C:2023:295).

The CJEU held that this analysis could not be transposed to the TCA (§55). This was because the EAW Framework Decision relies on a "*high level of trust which must exist between the Member States and on the principle of mutual recognition which […] constitutes the 'cornerstone' of judicial cooperation between Member States in criminal matters*" (§56). This is integral to the area of freedom, security and justice which requires all EU Member States to consider "*save in exceptional circumstances, […] [that] all the other Member States [are] complying with EU law and particularly with the fundamental rights recognised by EU law*" (§57). This creates a presumption of compliance with EU law and a prohibition, "*save in exceptional circumstances*", of verification of the same (§58). The "logic" stems from the Union's core values, as

conferred in Article 2 TEU, and serves as the justification for the removal of internal borders (§§62-64).

The Grand Chamber drew a parallel between the positions of Norway and the UK. Whilst Norway is an European Economic Area member and a participant in various EU programmes, including *inter alia* the Common European Asylum System and Schengen *acquis* (§§66-69), the UK is not. The "trust" afforded to the UK is thus lesser (§69): "*The arrangements established by the TCA, it is important, first of all, to note that that agreement does not establish, between the European Union and the United Kingdom, a relationship as special as the one described in [relation to Norway]. In particular, the United Kingdom is not part of the European area without internal borders, the construction of which is permitted, inter alia, by the principle of mutual trust*" (§70; NB: emphasis added). The CJEU emphasised various differences between the EAW Framework Decision and the TCA surrender provisions (§72), including the political offence exception, the nationality exception (§73) and the requirement to seek additional guarantees under Article 604(c) TCA (§74).

The Grand Chamber concluded: "*It follows that the executing judicial authority called upon to rule on an arrest warrant issued on the basis of the TCA cannot order the surrender of the requested person if it considers, following a specific and precise examination of that 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*" (§78).

EU executing judicial authorities must undertake an "*appropriate examination*" to assess where there is a real risk of a Charter violation (§79). Declarations are accessions to international treaties and long-standing respect for human rights and fundamental freedoms only go so far (§80). As such, the IESC cannot rely on the UKSC's assessment of the Order's compatibility with Article 7 ECHR; nor is the possibility of an individual application to the ECtHR an answer (§81 and §83). Instead, the Irish executing judicial authority must carry out its own assessment of the matter.

The two-step evaluation in ***Aranyosi*** etc, is thus reduced to a single step entailing a holistic evaluation of all the circumstances of a case without reliance on a presumption of compliance with the Charter and without deference to mutual trust and mutual recognition (§82). Instead, the EU executing judicial authority's assessment must consider "*the individual situation of the requested person [with] objective, reliable, specific and properly updated information*" (§85).

Nevertheless, there must be "*a sufficient factual basis*" to refuse surrender (§83) and an EU executing judicial authority must avail itself of the "judicial dialogue" measures (§§88-89), including Article 613(2) TCA (§89) and Article 604(c) (§90). A UK issuing judicial authority must furnish a response thereto as a matter of urgency (§87). It is only in the absence of a sufficient guarantees or further information that surrender can be refused (§91).

On the specific matter in issue, the CJEU considered that "*a measure relating to the execution of a sentence will be incompatible with Article 49(1) of the Charter only if it retroactively alters the actual scope of the penalty provided for on the day on which*

the offence at issue was committed, thus entailing the imposition of a heavier penalty than the one initially provided for" (§97).

Significance

Although the UK Government (who participated in the case under Article 90 of the Withdrawal Agreement) succeeded in the substantive issue, the real importance of the case is what is says about surrender to the UK. Stripping away the legalese, the Grand Chamber held that EU Member States cannot treat the UK in the same way as before. There is no longer a presumption that that the UK, including its courts, are bound the same legal obligations as the Member States and, as such, fundamental rights will receive equivalent protection.

Some of the CJEU's logic appears "shaky". Cyprus and Ireland are not participants in many aspects of the Schengen *acquis,* but the mutual trust afforded to them is greater than Norway. Moreover, The EU and Iceland/Norway Surrender Agreement 2006 contains a political offence exception (Article 6) and a nationality exception (Article 7), rather like the TCA. Equally, the inclusion of Article 604(c) TCA (the basis to seek a fundamental rights guarantee) serves as a "development following practice" which was not envisaged when the EAW Framework Decision came into force. There is a geeky point for EU law aficionados too. Whilst the Advocate General held that the TCA surrender provisions created direct effect (§56; ECLI:EU:C:2024:559), the CJEU "skipped over" his observation, presumably to avoid indicating that the TCA created directly applicable rights, whereas the EAW Framework Decision famously does not.

Some will say that ***Alchaster*** should be applied within the EU. The area of freedom, security and justice, and the principle of mutual trust and mutual recognition, operate as a convenient legal fiction to maintain the "momentum" of surrender. Instead, executing judicial authorities should analyse the information adduced before them in light of a requested person's situation without applying a "strong presumption" of compliance with the Charter together with an inclination not to "look into" matters in another Member State. Indeed, ***Alchaster*** does not favour mistrust, and gives some weight to mutual values and fundamental rights protection, but these principles are not doctrinal.

In respect of the UK, this case presents quite a conundrum. In England and Wales, we still apply the principles in ***Aranyosi*** and mutual trust and mutual recognition remain part and parcel of the post-Brexit "judicial lexicon". After all, the EU Member States remain bound by the same substantive law as beforehand. Cases like ***Krolik & Ors v Several Polish Judicial Authorities*** [2012] EWHC 2357 (Admin); [2013] 1 WLR 490 (§§4-6) exemplify the UK's approach. As a matter of fact, ***Krolik*** is based on an earlier CJEU authority anchored in the same principle (***N.S. v Secretary of State for the Home Department*** (C-411/10) ***& M.E. v Refugee Applications Commissioner*** (C-493/10) ECLI:EU:C:2011:865). Therefore, should UK executing judicial authorities trust EU issuing judicial authorities more than the latter trust them? Should they still apply ***Aranyosi*** when it does not apply to the UK? Alternatively, how can UK courts follow a CJEU judgment rooted in post-Brexit "systemic justifications" and not substantive fundamental rights? Answers on a postcard please.