C- 216/18

IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

AND IN THE MATTER OF A PRELIMINARY REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

Between

THE MINISTER FOR JUSTICE & EQUALITY (IRELAND)

and

LM

OBSERVATIONS ON BEHALF OF LM

Introduction

> "*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.*"
>
> The Schumann Declaration, 9 May 1950

1. In perhaps no other area of Union law is the cautious and incremental approach to institutional and substantive development, as expressed in the Schumann Declaration, more evident than in the area of Justice and Home Affairs. Even so, from modest and informal intergovernmental origins that approach has now

> "*culminated in the application (to a large degree) of the 'Community' approach to decision-making, legal instruments and the jurisdiction of the Court of Justice with the entry into force of the Treaty of Lisbon.*"[1]

2. The greatest concrete achievement of European integration in the field of justice and home affairs, and in particular the field of criminal law, is the extension of the

[1] Peers, *EU Justice and Home Affairs Law (Non-Civil)* in Craig and de Búrca, *The Evolution of EU Law* (Oxford, 2nd ed., 2011), p.269

application of the principle of mutual recognition to an area far removed from its original field of application in the development of the internal market.

3. In this case, the Court is presented with the challenge of reconciling the application of the principle of mutual recognition, in particular as it is expressed in the Framework Decision on the European Arrest Warrant, with the undermining of the de facto solidarity which should have been created by that achievement.

Mutual Recognition and the EAW

4. The application of the principle of mutual recognition in criminal law presents substantial difficulties.

> "*[T]he extent to which one can successfully 'borrow' the mutual recognition principle from its internal market framework and transplant it to the criminal law sphere is a contested issue.*"[2]

5. The reason for such difficulty is plainly stated.

> "*In the context of the internal market, ... [mutual recognition] ... supports freedom. In the context of the area of freedom, security and justice, however, where the free movement not of individuals, but of judicial decisions is at stake, things are the other way round. . . . Mutual recognition thus threatens freedom.*"[3]

6. The protection necessary in the face of this threat is that the

> "*principle of mutual recognition is ... necessarily bound to certain preconditions and limits. In particular, any application of the principle presupposes a sufficient degree of functional equivalence or approximation of standards.*"[4]

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[2] Mitsilegas, *EU Criminal Law* (Hart, 2009) p.117
[3] Möstl, *Preconditions and Limits of Mutual Recognition* (2010) 47 CMLRev 405 at p.409
[4] ibid. p.435

7. Mutual recognition in the AFSJ presupposes mutual trust between the national judiciaries of the Member States when it comes to complying with fundamental rights.[5] Indeed, such an assumption is, ordinarily, a requirement of EU law:

> "*[T]he principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard 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 with EU law and particularly with the fundamental rights recognised by EU law. . . . Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but,* ***save in exceptional cases****, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.*"[6] [Emphasis added.]

The terms of the Framework Decision on the EAW

8. The EAW Framework Decision expresses that same approach in Article 1(2), while at the same time noting in Article 1(3) that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. In so doing, the Council acknowledged in general terms the existence of "preconditions and limits" to the application of the principal of mutual recognition, as Möstl argued.

9. The EAW Framework decision, however, contains a further provision which may appear to diminish substantially the effectiveness of such preconditions and limits. Recital 10, on one view, would have the effect that the principal of mutual recognition takes priority over the protection of fundamental rights and fundamental legal principles of the EU, save in the case where the procedural condition of a Council decision

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[5] Larsen, *Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice*, in Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart, 2012) at 148

[6] *Opinion 2/13*, EU:C:2014:2454, paras. 191-192.

pursuant to Article 7(1) TEU is satisfied. If that is the correct interpretation of Recital 10 and of the Framework Decision as a whole, it would fail, it is submitted, to strike a "responsible balance" "between respect for freedoms and rights of the individual, on the one hand, and the legitimate pursuit of public interests on the other".[7] It is submitted that any such rule of law must be invalid having regard to the provisions of Articles 2, 6 and 19 TEU and Articles 47, 51 and 52 of the Charter.

The Aronyosi Test

10. The acknowledgement in Opinion 2/13 of the application of the principle of mutual recognition in the AFSJ has been confirmed in the specific area of the EAW.[8] But it remains, properly, subject to qualification in exceptional cases. The test to be applied heretofore in such exceptional cases is that outlined by this Court in *Aronyosi and Calderaru*[9], in particular at para. 104. The test envisages the executing judicial authority engaging in a determination, specific and precise to the individual person named in the EAW, of the risk of breach of fundamental rights, and then seeking further information from the issuing judicial authority with a view to discounting that risk. The determination of the existence of such risk requires "*objective, reliable, specific and properly updated evidence*".

11. Such a risk may arise from systemic deficiencies giving rise to substantial grounds for believing there is a risk of mistreatment amounting to a breach of fundamental rights.[10]

12. It must be understood, however, that even in the presence of such a risk, the existing test in *Aronyosi* assumes a certain minimum adherence to fundamental legal principles, in that a decision to order surrender is "without prejudice to the opportunity of the individual concerned, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable him to [assert protected fundamental rights]".[11]

13. Thus, even if there are exceptional grounds for questioning the mutual recognition of standards of protection of specific fundamental rights, such as the prohibition on

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[7] Möstl, *op. cit.*, p.407
[8] *Radu,* C-396/11, EU:C:2013:39 and *Melloni,* C-399/11, EU:C:2013:107
[9] *Aronyosi and Calderaru,* C-404-15 and C-659/15 PPU, EU:C:2016:198
[10] *N.S.*, C-411/10 and C-493/10, EU:C:2011:865
[11] *supra*, fn. 9, para. 103

inhumane and degrading treatment, there remains in the *Aronyosi* test an underlying assumption of mutual trust in other Member States' legal systems as a means of asserting and protecting such rights. This assumption has been acknowledged by the ECtHR.[12]

14. The present case, however, challenges that underlying assumption of mutual trust.

The challenge in the present case

15. The first thing to be said of the judgment of the referring court is that it is not one which seeks to protect or advance a narrow national interest at the expense of a European public policy interest. In that respect this case must be distinguished from the leading authorities on the principle of mutual recognition in the internal market context. On the contrary, the concern which animates the referring Court is a European public policy concern and one which finds expression in the Treaties and in the outcome of the political process at EU level, in Article 1(3) of the Framework Decision.

16. The Court has already, in a somewhat different context, acknowledged the importance of protecting individuals from a systemic risk of breach of fundamental rights. In the context of the Common European Asylum System, the Court held in the case of *N.S.* that:

> *"Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."*[13]

17. In this case, the European public policy at stake is not just the protection of fundamental rights; at stake also is respect for fundamental legal principles, indeed the most fundamental legal principle of all, the rule of law.

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[12] For example, *Povse v. Austria,* (dec.) - 3890/11, 18 June 2013
[13] *supra.* fn. *10*

18. What must be understood, it is submitted, is that the present proceedings simply do not fit into the *Aronyosi* scheme of analysis for refusal of surrender on fundamental rights grounds. The Respondent is not seeking to establish that he would suffer the consequences of an exceptional breach of fundamental rights standards that are ordinarily established and respected in the Issuing State. On the contrary, the Respondent asserts that the entire legal and factual basis for the existence of a relationship of mutual trust between judicial authorities in different Member States has been undermined in the case of the Issuing State. This is not a case of exception from the norm; the norms simply do not exist.

Rule of Law

> *"It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. . . . But let there be no change by usurpation; . . . it is the customary weapon by which free governments are destroyed."*
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> George Washington, *Farewell Address*, 1796.

19. This Court has recently acknowledged that "*mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU*".[14]

20. The rule of law, the essence of which is the right to an effective judicial remedy, which itself can only be secured by the existence of an independent judiciary, is the most fundamental of those common values; indeed, it is the very basis of the European Union itself.

21. There is no area of EU competence which can survive the collapse of the rule of law. It must be understood, however, that the threat which arises is not merely a threat to the

[14] *Associação Sindical dos Juízes Portugueses,* C-64/16, EU:C:2018:117, para. 30

purposes of European integration, whether in respect of specific competences or more generally; it is a threat to the nature or essence of the European Union.

The Decision of the Referring Court

22. The referring Court has acted on evidence of the highest quality, which is unquestionably objective, reliable, specific and properly updated. In particular, the referring court's reliance on the Commission's Rule of Law Opinion and Recommendations, which are the fruits of the 2014 Rule of Law Framework,[15] respects the role of the Commission as guardian of the Treaties and demonstrates the European public policy interest at stake.

23. The weight of that evidence speaks for itself and is in any event, carefully summarised in the judgment of the referring court. In the Order for Reference, it is noted that:

> "*The referring Court has determined that there is a real risk of the respondent being subjected to arbitrariness in the course of his trial because the system's wide and unchecked powers is inconsistent with a democratic state subject to the rule of law. The Court determined that where fundamental values such as independence of the judiciary and respect for the Constitution are no longer upheld, those systemic breaches of the rule of law are, by their nature, fundamental defects in the system of justice.*"[16]

24. No more need be said of that finding than that it establishes beyond question the systemic deficiencies in the rule of law in the Issuing State which endanger the respondent individual's fundamental rights. The interference in the independence of the judiciary in the Issuing State imperils the Respondent's fair trial rights,[17] and imperils in a substantial way his ability to seek and obtain an effective remedy for that or any other breach of fundamental rights.

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[15] COM(2014) 158 final/2, 19 March 2014

[16] Order for Reference, para. 29

[17] Whether expressed as a risk of breach of Article 47 of the Charter or Article 6 of the Convention is immaterial.

Consequences

25. It is acknowledged that, as in *Aranyosi*, it may be necessary to give a Member State an opportunity to rectify problems that have been identified; and to propose an individualised solution if that is at all possible. In the context of concerns about prison conditions, such a solution is eminently possible even where systemic problems are identified. But, the decision of this Court in *N.S.* demonstrates that it may not always be possible to seek an individualised solution to systemic problems affecting fundamental rights.

26. In the context of the systemic problems at issue in N.S., (deficiencies in the hearing of asylum claims, the lack of effective judicial remedy and hopelessly inadequate conditions of accommodation), it was unrealistic to expect that the Member State concerned could address such problems sufficiently to allay human rights concerns. In the current context, the problems affecting the justice system in the Issuing State are similarly pervasive and multi-faceted. As a result, the Issuing State is simply not capable of giving the type of assurances which could allay the fears of an Executing Judicial Authority. Even if all assurances could be considered in a spirit of mutual trust, it remains unrealistic that any individualised solution could be offered.

27. The Referring Court, has queried 'how precise and concrete those guarantees must be. Must they include guarantees as to who will conduct the prosecution of the trial and the particular judges who will hear the case and any appeal? Or a guarantee to respect any ruling by a lawfully constituted Constitutional Tribunal as to the unconstitutionality of any laws or rules of procedure that might impact on the individual's trial?' The Referring Court concluded by querying whether 'the type of guarantee required is one that demonstrates systemic compliance with the rule of law in the issuing state'.

28. Stated in this way, it becomes clear that what is required is systemic change which must originate in the Issuing State. There appears to be little prospect of such fundamental change occurring in the immediate short term. Unless and until such fundamental change occurs, the only way to give *effet util* to the Treaty guarantee of protection of the Respondent's right to a fair trial and of the fundamental legal principles of the European Union is to decline surrender.

Answers to Questions

29. It is submitted that the Court should answer the questions referred as follows:

    a. Where a national court determines, in light of the contents of a Rule of Law Opinion and Recommendations issued by the Commission acting in the Rule of Law Framework, that there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, it is unnecessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial.

    b. In light of the answer to (a) above, this question does not arise. For the avoidance of doubt, in the circumstances identified at (a) above, the executing judicial authority is not obliged to revert to the issuing judicial authority for any further necessary information.

30. Finally, it is submitted that if an Executing Judicial Authority has concluded that surrender is prohibited due to systemic problems in the Issuing State, it would not be appropriate to countenance the postponement of surrender to await a time when mutual trust has been restored, the Executive respects the rule of law and confidence in the independence of the Judiciary is once again assured. A requested person is entitled to finality in the proceedings, particularly having regard to the fact that the European Arrest Warrant mechanism permits restraint on their liberty.

31. As noted by the Court in the case of *Lanigan*[18] (at para 58), the on-going restraint of liberty of the requested person is only justifiable where due diligence has been exercised by the State parties and this is a particularly acute consideration once the time limits for surrender under Article 17 of the Framework Decision have expired. In the context of a finding that surrender is prohibited having regard to systemic problems in the Issuing State, it is submitted that it would amount to a breach of Article 5 ECHR and Article 6 of the Charter to impose any further measure of restraint on the liberty of the requested person, including their provisional release.

[18] *Lanigan* C-237/15 PPU, EU:C:2015:474

32. In conclusion, it is submitted that the Executing Judicial Authority should not embark on such a protracted and uncertain process, with disproportionate consequences for the requested person. The alternative procedure is preferable. In the event that there is a change of circumstances in the Issuing State, a fresh European Arrest Warrant can issue, subject to considerations of proportionality being addressed prior to issue.

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Ciarán Ó Maolchallann, Solicitor

Dublin, 2 May 2018

APPENDIX – AUTHORITIES

Peers, *EU Justice and Home Affairs Law (Non-Civil)* in Craig and de Búrca, *The Evolution of EU Law* (Oxford, 2nd ed., 2011), p.269

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