
CASE NOTE

The Joined Cases *Aranyosi* and *Căldăraru*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?

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In this case, the CJEU answers the question whether Article 1(3) of the Framework Decision on the European arrest warrant must be interpreted as meaning that when there are strong indications that detention conditions in the issuing Member State infringe Article 4 of the Charter, the executing judicial authority must refuse surrender of the person against whom a European arrest warrant is issued. The CJEU rules that if, after a two-stage assessment, the executing judicial authority finds that there is a real risk of an Article 4 violation for the requested person once surrendered, the execution of the arrest warrant must initially be deferred and, where such a risk cannot be discounted, the executing judicial authority must decide whether or not to terminate the surrender procedure. This conclusion shakes the system of mutual trust upon which the principle of mutual recognition is built.

Keywords: Framework Decision 2002/584/JHA; Grounds for non-execution; Mutual recognition; Mutual trust; Article 4 Charter

I. Introduction

The Framework Decision on the European arrest warrant and the surrender procedures between Member States (FDEAW) is the first concrete measure in the field of European criminal law based on the principle of mutual recognition.¹ Mutual recognition is based on the principle of mutual trust.² The relationship between mutual recognition and mutual trust in the FDEAW is evident from Recital (10) which states that the FDEAW mechanism is based on a *high level of confidence* between Member States and that it may only be suspended in the event of a serious and persistent breach by a Member State of Article 6(1) TEU.

Mutual trust is the notion that Member States trust that other Member States keep an equal level of common values, based on their communal culture of rights.³ The common values and communal culture refer to those enumerated in Article 2 TEU, particularly the respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. Mutual trust is grounded in these values and culture,⁴ but more importantly in the *protection* thereof by the European Convention of Human Rights (ECHR), amongst others.⁵ The European Court of Justice (CJEU) presumes that Member States provide such

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¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (FDEAW) [6].

² Valsamis Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 4 *New Journal of European Criminal Law* 457.

³ Tina van den Sanden, 'Het Principe van Wederzijds Vertrouwen in de Ruimte van Vrijheid, Veiligheid en Recht' (2014) *SEW, Tijdschrift voor Europees en Economisch Recht* 232, 235.

⁴ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] OJ C12/10.

⁵ Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) arts 6(1) and 6(3). See also Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C295/1 [2].

equivalent and effective protection of fundamental rights.⁶ This presumption obliges Member States to, save in exceptional circumstances, consider other Member States to be in compliance with the fundamental rights recognised by European Union (EU) law.⁷ The presumption of mutual trust facilitates effective transnational law enforcement and the establishment of the Areas of Freedom, Security and Justice (AFSJ), and 'almost has the effect of imposing on national judges a rule of non-inquiry'.⁸ Mutual trust manifests itself in the FDEAW in various ways. Judicial authorities operate in a limited timeframe without the possibility to ask questions as the execution decision is based mainly on the standardised form annexed to the FDEAW. Also it is not permitted for executing judicial authorities to check whether the offences listed in Article 2(2) FDEAW meet the double criminality requirement.⁹ The refusal grounds are limited to those listed in Articles 3, 4, and 4a of the FDEAW.¹⁰ Moreover, there is no general refusal ground in case of fundamental rights concerns.¹¹

Notwithstanding the presumption of mutual trust, based, *inter alia*, on adequate fundamental rights protection, practice shows that fundamental rights violations do occur in the Member States.¹² Even the European Commission conceded this much.¹³ Does the fact that Member States violate fundamental rights permit judicial authorities not to execute arrest warrants in blind mutual trust? The literature has shown itself to be critical of such a notion of blind trust and has proposed to interpret Article 1(3) FDEAW as a general fundamental rights ground for non-execution of an arrest warrant.¹⁴ Article 1(3) states that the FDEAW shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. Such an interpretation would provide balance between effective law enforcement and fundamental rights protection of persons subject to FDEAW proceedings.

The joined cases of *Aranyosi* and *Căldăraru* are the first cases where the CJEU tackles this problem directly. The Advocate-General (AG) and the Court differ on how to ensure compliance with fundamental rights while, at the same time, leaving the concept of mutual trust intact. Whereas AG Bot opts for a centralised form of review by the CJEU through the preliminary reference procedure based on the concept of proportionality, the Court gives the main responsibility to the executing judicial authority and allows, in certain circumstances, for a deferral of the arrest warrant's execution. The CJEU's solution raises many questions for the notion of mutual trust in EU criminal law in particular and for the AFSJ in general.

II. Facts

In *Aranyosi*, the investigation judge of *Miskolci járásbíróság* (Sub District Court of Miskolc, Hungary) issued two European arrest warrants, on 4 November and 31 December 2014 respectively, for the surrender of Aranyosi to Hungary for the purposes of criminal prosecution.¹⁵ According to the European arrest warrants Aranyosi, a Hungarian national, was requested for two counts of burglary in Sajóhídvég, Hungary: one in a

⁶ Case C-168/13 PPU *Jeremy F v Premier minister*, EU:C:2013:358, para 50.

⁷ Opinion 2/13 of the Court on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, para 191 (Opinion 2/13).

⁸ Theodora A Christou and Karen Weis, 'The European Arrest Warrant and Fundamental Rights: An Opportunity for Clarity' (2010) 1 New Journal of European Criminal Law 31, 41.

⁹ FDEAW art 2(2).

¹⁰ The CJEU has stated on a number of occasions that the non-recognition grounds in the European arrest warrant are exhaustive. See eg Case C-388/08 PPU *Artur Leymann and Aleksei Pustovarov*, EU:C:2008:669, para 51; Case C-261/09 *Gaetano Mantello*, EU:C:2010:683, para 36; Case C-42/11 *João Pedro Lopes Da Silva Jorge*, EU:C:2012:517, para 29; *Jeremy F* (n 6) para 36.

¹¹ Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, 324.

¹² Susie Alegre and Marisa Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant' (2004) 10 European Law Journal 200; Catherine Heard and Daniel Mansell, 'The European Arrest Warrant: The Role of Judges When Human Rights Are at Risk' (2011) 2 New Journal of European Criminal Law 133; Alex Tinsley, 'Protecting Criminal Defence Rights Through EU Law: Opportunities and Challenges' (2013) 4 New Journal of European Criminal Law 461, 463; Lorena Bachmaier, 'Mutual Recognition Instruments and the Role of the CJEU: The Grounds for Non-Execution' (2015) 4 New Journal of European Criminal Law 505.

¹³ Commission, 'Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' COM (2011) 175 final, 6.

¹⁴ See eg Mitsilegas, 'Limits of Mutual Trust' (n 11); Alex Tinsley, 'The Reference in Case C-396/11 *Radu*: When does the Protection of Fundamental Rights Require Non-execution of a European Arrest Warrant?' (2012) 2 European Criminal Law Review 338; Emily Smith, 'Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security' (2013) 1 New Journal of European Criminal Law 82; Vincent Glerum, 'De Balans van Tien Jaar Europees Aanhoudingsbevel: Efficiency en Rechtsbescherming in Balans?' (2014) Nederlands Tijdschrift voor Europees Recht 332; Bachmaier (n 12); Tomasz Ostropolski, 'The CJEU as Defender of Mutual Trust' (2015) 2 New Journal of European Criminal Law 166; Sabine Swoboda, 'The Self-Perception of the European Court of Justice and Its Neglect of the Defense Perspective in Its Preliminary Rulings on Judicial Cooperation in Criminal Matters: A Small Note on a Fundamental Misunderstanding' (2015) Zeitschrift für Internationale Strafrechtsdogmatik 361.

¹⁵ Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198, para 29.

home, the other in a school.¹⁶ The *Miskolci járásbírószág* issued an alert for Aranyosi in the Schengen Information System, because his location was unknown.¹⁷

On 14 January 2015 the Bremen authorities located Aranyosi and placed him in pre-trial detention.¹⁸ The *Generalstaatsanwaltschaft Bremen* (Public Prosecutor of Bremen) asked the *Miskolci járásbírószág* in which correctional facility Aranyosi would be detained if surrendered, as detention conditions of Hungarian correctional facilities do not meet European minimum norms.¹⁹ The Public Prosecutor of the Miskolc District responded by stating that pre-trial detention or a custodial sentence were not absolutely necessary in this case and that, in any case, Hungarian judicial authorities are conferred the competence to decide on the means of sanctioning.²⁰

On 21 April 2015 the *Generalstaatsanwaltschaft Bremen* requested that surrender of Aranyosi was to be declared permissible. It pointed out that, even though the Public Prosecutor of the Miskolc District did not designate the correctional facility Aranyosi would be placed in case of surrender, there was no concrete indication that Aranyosi would be subject to torture or other cruel, inhumane or degrading treatment.²¹ Aranyosi's counsel requested to refuse the surrender of Aranyosi exactly because the Public Prosecutor did not specify a correctional facility and that, for this reason, it would be impossible to verify the detention conditions to which Aranyosi would be subjected.²²

A string of ECtHR cases and a report of the European Committee for the Prevention of Torture (CPT) convinced the *Hanseatische Oberlandesgericht Bremen* (Higher Regional Court Bremen) that there are strong indications that in case of surrender to Hungary, Aranyosi could be exposed to detention circumstances that would violate Article 3 ECHR, the fundamental rights, and general principles laid down in Article 6 TEU.²³ With regard to the decisions of the ECtHR, the court refers specially to *Varga and others v Hungary* in which the ECtHR held that Hungary violated Article 3 ECHR by placing the applicants in overcrowded prisons with living spaces that were too small.²⁴ With regard to the report of the CPT, the court refers to the CPT's findings, based on visits between 2009 and 2013, that there are concrete indications that the detention conditions in Hungary do not meet the minimum norms laid down in international law.²⁵

In *Căldăraru*, the *Judecătoria Făgăraş* (Court of Instance of Făgăraş, Romania) sentenced Căldăraru, a Romanian national, to a custodial sentence of 1 year and 8 months on 16 April 2015 for driving without a license.²⁶ On 29 October of that same year the *Judecătoria Făgăraş* issued an arrest warrant and an alert in the Schengen Information System, which led to the Bremen authorities arresting Căldăraru on 8 November

¹⁶ *ibid* paras 30–31.

¹⁷ In accordance with FDEAW art 9, the transmission of an arrest warrant must adhere to the ensuing procedural norms:

1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.
2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).
3. Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1).

¹⁸ *Aranyosi and Căldăraru* (n 15) para 32.

¹⁹ *ibid* para 34.

²⁰ *ibid* paras 35–37.

²¹ *ibid* para 38.

²² *ibid* para 39.

²³ ECHR art 3 states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' TEU art 6(1) dictates that:

[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union. (. . .) The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

Article 52(3) of the Charter, which forms part of Title VII, regulates its scope and ensures the necessary consistency between the ECHR and the Charter. When rights laid down in the Charter '(. . .) correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.' For a confirmation that Article 4 of the Charter has the same meaning and scope as Article 3 of the ECHR, see the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17, 33.

²⁴ *Aranyosi and Căldăraru* (n 15) para 43. The *Hanseatische Oberlandesgericht Bremen* refers to *Varga and Others v Hungary*, App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 March 2015) para 92.

²⁵ For the reports on the detention conditions in European correctional facilities, see European Committee for the Prevention of Torture, 'CPT Visits' <<http://www.cpt.coe.int/en/visits.htm>> accessed 14 April 2016.

²⁶ *Aranyosi and Căldăraru* (n 15) para 48.

2015.²⁷ Consequently, 12 days later, the *Generalstaatsanwaltschaft Bremen* requested that surrender of Căldăraru to the Romanian authorities was to be declared permissible, even though the *Judecătoria Făgăraș* was not able to designate the correctional facility in which Căldăraru would be detained.²⁸

In this case, just as in *Aranyosi*, the *Hanseatische Oberlandesgericht Bremen* was convinced that, given the information available to the court, there were strong indications that surrender of Căldăraru would expose him to detention conditions in violation of Article 3 ECHR, the fundamental rights, and general principles enshrined in Article 6 TEU.²⁹ The court based this strong indication on a number of cases before the ECtHR in which that court held that Romania had violated Article 3 ECHR by placing the applicants in overcrowded correctional facilities, without providing sufficient heating or warm water for showers.³⁰ In addition the court refers to the CPT's conclusion, based on visits between 5 and 17 June 2014, that correctional facilities in Romania are overcrowded.³¹

In both *Aranyosi* and *Căldăraru* the court was not able to decide whether surrender to Hungary and Romania respectively was permissible, based on Article 1(3) FDEAW.³² For this reason, the *Hanseatische Oberlandesgericht Bremen* decided to stay the proceedings and refer the following question: Must FDEAW Article 1(3) be interpreted as meaning that when there are strong indications that detention conditions in the issuing Member State infringe Article 4 of the Charter, the executing judicial authority must refuse surrender of the person against whom a European arrest warrant is issued?³³

III. Opinion of the Advocate-General

The Advocate General starts by stating that the preliminary reference requires the CJEU to balance the fundamental rights of the person to be surrendered against the EU's goal to create an AFSJ.³⁴ In the AG's search for balance he considers first whether Article 1(3) FDEAW constitutes a *ground* for non-execution of an arrest warrant.³⁵ He rejects such a notion for the following three reasons. First off, interpreting Article 1(3) as a non-execution ground would run counter to the phrasing of that Article, which due to its place and wording does not express a non-execution ground, but rather the principle of mutual trust.³⁶ Secondly, such a notion would not be in agreement with the EU legislator's intent to create a system of surrender with exhaustively enumerated non-recognition grounds, whereby, in addition to the grounds in Articles 3, 4, and 4a FDEAW, only in the exceptional circumstances described in Recitals (10) and (13) surrender can be suspended or removal, expulsion or extradition can be prohibited.³⁷ Last, a ground of non-recognition in Article 1(3) would severely damage mutual trust between judicial authorities on which the Framework Decision is based and would, as a result, make the principle of mutual recognition meaningless.³⁸

²⁷ *ibid* para 51–52.

²⁸ *ibid* para 57.

²⁹ *ibid* para 59.

³⁰ *ibid* para 60. The CJEU refers to the following cases: *Vociu v Romania*, App no 22015/10 (ECtHR, 10 June 2014); *Bujorean v Romania*, App no 13054/12 (ECtHR, 10 June 2014); *Constantin Aurelian Burlacu v Romania*, App no 51318/12 (ECtHR, 10 June 2014); and *Mihai Laurențiu Marin v Romania*, App no 79857/12 (ECtHR, 10 September 2014).

³¹ *Aranyosi and Căldăraru* (n 15) para 61. The CJEU refers to the following report: European Committee for the Prevention of Torture, 'Rapport au Gouvernement de la Roumanie Relatif à la Visite Effectuée en Roumanie par le Comité Européen pour la Prévention de la Torture et des Peines ou Traitements Inhumains ou Dégadants (CPT) du 5 au 17 Juin 2014' (24 September 2015) CPT/Inf (2015) 31.

³² *Aranyosi and Căldăraru* (n 15) paras 45 and 62.

³³ The wording in the reference procedure of the *Hanseatische Oberlandesgericht Bremen* is the following:

(i) Is Article 1(3) FDEAW to be interpreted as meaning that surrender for the purposes of prosecution or the execution of a custodial sentence or detention order is impermissible for the purposes of prosecution is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the permissibility of extradition conditional upon an assurance that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?

(ii) Are Articles 5 and 6(1) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?

³⁴ Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:140, Opinion of AG Bot, paras 5 and 68.

³⁵ *ibid* para 69.

³⁶ *ibid* paras 72–78.

³⁷ *ibid* paras 79–93.

³⁸ *ibid* para 122.

The fact that Article 1(3) FDEAW does not constitute a non-execution ground does not mean that there is no alternative in which balance between the fundamental rights of the person to be surrendered and the creation of an AFSJ can be achieved. According to the AG, the Union principle of proportionality proffers a solution. This principle obliges a judicial authority to apply the idea of ‘individualisation of punishment’.³⁹ This entails that when a judge sentences a person to a custodial sentence, he or she must take into account the circumstances in which the sentence will be executed and the possible gravity of these circumstances.⁴⁰ One of the circumstances that a judge ought to take into account is the circumstances of detention.⁴¹

This obligation rests first of all on the *issuing* judicial authority: he or she must ensure that detention of the person to be surrendered, and the condition thereof, is proportional.⁴² If the *issuing* judicial authority does not fulfil its obligation, the *executing* judicial authority serves as a safety net. If this latter authority finds that circumstances of detention in the issuing Member State are structurally deficient, based on factual and trustworthy information, this judicial authority must assess whether in the individual case before him/her, the person to be surrendered would be exposed to disproportionately grave detention (conditions).⁴³ If the executing judicial authority encounters a problem with the determination whether surrender would be proportional, it should start a preliminary reference procedure.⁴⁴

IV. Judgment of the CJEU

The CJEU opens its considerations by touching upon an issue that has plagued the FDEAW ever since its inception: the balance between effective law enforcement (through mutual recognition) and personal liberty (through fundamental rights protection).

On the one hand, the aim of the FDEAW is to replace the system of multilateral extradition with a system of surrender based on the principle of mutual recognition between Member States.⁴⁵ Mutual recognition makes surrender of persons simpler and more effective, thereby contributing to the EU’s objective to constitute an AFSJ based on a high degree of confidence between its Member States.⁴⁶ Mutual recognition is based on the mutual trust between Member States that each Member State is able to protect the fundamental rights recognised by the Union effectively and equivalently.⁴⁷ The importance of mutual trust ought not to be underestimated: it is the bedrock upon which the AFSJ is built.⁴⁸ The existence of mutual trust obliges Member States to presume that other Member States respect fundamental rights.⁴⁹ As a result of the presumption of fundamental rights protection, Member States must, in principle, execute an arrest warrant, unless one of the exhaustively listed mandatory or optional non-execution grounds applies.⁵⁰

On the other hand, the FDEAW states that it respects fundamental rights, observes the principles recognised by Article 6 TEU and reflected in the Charter, and that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU.⁵¹ As a result, the principles of mutual trust and recognition can in ‘exceptional circumstances’ be limited.⁵²

³⁹ For more information on the concept of the individualisation of punishment, see Raymond Saleilles, *L’Individualisation de la Peine: Étude de Criminologie Sociale* (Adamant Media Corporation 2003).

⁴⁰ *Aranyosi and Căldăraru* (n 35), Opinion of AG Bot, paras 137–140.

⁴¹ *ibid* paras 141–142.

⁴² *ibid* paras 8, 150–164 and 173.

⁴³ *ibid* para 167.

⁴⁴ *ibid* para 172.

⁴⁵ *Aranyosi and Căldăraru* (n 15) para 75. See also Case C-192/12 PPU *Melvin West*, EU:C:2012:404, para 54; Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, para 36; *Jeremy F* (n 6) para 34; Case C-237/15 PPU *Minister for Justice and Equality v Lanigan*, EU:C:2015:474, para 27.

⁴⁶ *Aranyosi and Căldăraru* (n 15) para 76. See also Case C-396/11 *Ciprian Vasile Radu*, EU:C:2013:39, para 34; *Melloni* (n 46) para 37; *Jeremy F* (n 6) para 35; *Lanigan* (n 46) para 28.

⁴⁷ *Aranyosi and Căldăraru* (n 15) para 77.

⁴⁸ Opinion 2/13 (n 7) para 191.

⁴⁹ *ibid* para 192.

⁵⁰ *Aranyosi and Căldăraru* (n 15) paras 79–80. The mandatory non-execution grounds are listed in FDEAW art 3. The optional non-execution grounds can be found in FDEAW art 4.

⁵¹ FDEAW [12] and art 1(3).

⁵² *Aranyosi and Căldăraru* (n 15) para 82. See also Opinion 2/13 (n 7) para 191. In a similar vein, the FDEAW [10] states that:

[t]he mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

With this precarious balance in mind, the CJEU first notes that Article 4 of the Charter, which corresponds to Article 3 ECHR,⁵³ is an absolute right and constitutes one of the fundamental values that underlie the Union and its Member States.⁵⁴ As a result, if an *executing* judicial authority has evidence which demonstrates that there is a *real risk* that detention conditions in the *issuing* Member State infringe Article 4 of the Charter, the *executing* judicial authority must assess that risk using a two-stage test.⁵⁵ First, the executing judicial authority must assess whether *general* detention circumstances in the issuing Member State constitute a real risk of an Article 4 violation.⁵⁶ Such an assessment in itself is not sufficient to render surrender impermissible.⁵⁷ During the second stage of its assessment the executing judicial authority judges whether there are substantial grounds for believing that *the requested person in question* will be subjected to a real risk of Article 4 violations.⁵⁸ If, after its two-stage assessment, the executing judicial authority finds that there is a real risk of an Article 4 violation for the requested person once surrendered, the execution of the arrest warrant must be deferred until the executing judicial authority receives the information necessary to discount the existence of such a real risk. If this risk cannot be discounted within a reasonable time the executing judicial authority must then decide whether or not to terminate the procedure.⁵⁹

V. Analysis

The CJEU clarified two issues in this judgment: (i) that mutual trust in the FDEAW is not unconditional; and (ii) that there is a convergence between the ECtHR's and the CJEU's case law on Article 3 ECHR and Article 4 of the Charter respectively. At the same time, the judgment reveals that the CJEU's answers are limited in scope and pose many more questions that are in need of answers.

First, the judgment reveals that the obligation to presume that other Member States provide effective and equivalent fundamental rights protection (*i.e.* mutual trust) is not, as was presumed in older case-law, unconditional. As a result, judicial authorities in the executing Member State are not always obliged to execute an arrest warrant in case the exhaustively enumerated non-execution grounds in FDEAW Articles 3, 4, and 4a do not apply. In cases where (i) there is a real risk that detention conditions in the issuing Member State violate Article 4 of the Charter and (ii) where there are substantial grounds to believe that the person to be surrendered will be subjected to such a real risk, execution can be deferred and, eventually, terminated.

The conclusion that the presumption of mutual trust (based on, *inter alia*, being a High Contracting Party to the ECHR) is not inviolable is a significant break with the CJEU's previous case law on the subject. In the *Melloni* case, for example, the Court ruled that the executing judicial authority was precluded from making surrender conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.⁶⁰ In *Radu* the CJEU decided that the FDEAW cannot be interpreted in such a way as to mean that the executing judicial authority can decide not to execute an arrest warrant, because the person to be surrendered was not heard prior to the arrest warrant's issuance.⁶¹ There is no doubt that in older case law, the CJEU committed itself more strongly to an effective surrender of persons regime based on mutual recognition and mutual trust.⁶²

There is a stark contrast between the solution posed by the CJEU and the one proffered by the AG. The Court, in essence, allows the executing judicial authority to assess fundamental rights protection practices in the issuing Member States and, under very strict circumstances, defer surrender of the requested person.

⁵³ See text at n 23.

⁵⁴ *Aranyosi and Căldăraru* (n 15) paras 85–87.

⁵⁵ *ibid* para 88.

⁵⁶ *ibid* para 89.

⁵⁷ *ibid* paras 91 and 93.

⁵⁸ *ibid* para 92.

⁵⁹ *ibid* para 104.

⁶⁰ See *Melloni* (n 46).

⁶¹ *Radu* (n 47) para 39. The CJEU's judgment in this case stands in stark contrast to AG Sharpston's opinion which stated that:

I do not believe that a narrow approach—which would exclude human rights consideration altogether—is supported either by the wording of the Framework Decision or by the case-law. Article 1(3) of the Framework Decision makes it clear that the decision does not affect the obligation to respect fundamental rights and fundamental principles as enshrined in Article 6 EU (now, after amendment, Article 6 TEU). It follows, in my view, that the duty to respect those rights and principles permeates the Framework Decision. It is implicit that those rights may be taken into account in founding a decision not to execute a warrant. To interpret Article 1(3) otherwise would risk its having no meaning—otherwise, possibly, than as an elegant platitude.

See Case C-396/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu*, EU:C:2012:648, Opinion of AG Sharpston, paras 69–70. See also Bachmaier (n 12) 518.

⁶² See also Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, EU:C:2007:261; Case C-123/08 *Dominic Wolzenburg*, EU:C:2009:616; Opinion 2/13 (n 7).

This approach allows the executing judicial authority to question the fundamental rights record of the issuing Member State, something which is clearly at odds with mutual trust which builds on the presumption that other Member States provide effective and equivalent fundamental rights protection. The AG leaves mutual trust intact by placing an obligation on the issuing judicial authority to conduct a proportionality test. The only way in which an executing Member State can question the issuing Member State's fundamental rights record, is by starting a preliminary reference procedure. The overall result is, as Ostropolski correctly predicted,⁶³ that the CJEU nuanced the meaning of mutual trust, as it had done before in its asylum law case law and opted for an alternative interpretation in which fundamental rights violations (can) constitute an exception to this trust.

Second, the judgment reveals the intention of the CJEU to bring its case law on Article 4 of the Charter in line with the ECtHR's case law on Article 3 ECHR. According to Article 52(3) of the Charter, the scope and meaning of the rights in the Charter must meet, at least, the same level of protection offered by their ECHR equivalents. The Explanations relating to the Charter of Fundamental Rights clarify that the meaning and scope of Article 4 of the Charter and Article 3 ECHR are indeed the same.⁶⁴

An important question that the ECtHR had to face, and which CJEU faced in this case, is when an executing State that is to surrender or extradite a person is to assess the fundamental rights protection practices in the requesting country. In its seminal *Soering* ruling, the ECtHR held that the responsibility of the requested state under Article 3 ECHR can be raised 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a *real risk* of being subjected to torture or to inhuman or degrading treatment in the requesting country'.⁶⁵ In *Vilvarajah and Others*, which followed the principles set out in *Soering*, the ECtHR held that the 'Court's examination (. . .) must focus on the foreseeable consequences of the removal of the applicants (. . .) in the light of the general situation (. . .) as well as on their personal circumstances'.⁶⁶ The two-stage test that the CJEU adopted in *Aranyosi and Căldăraru*, which required the executing judicial authority to assess both the general circumstances of detention and the situation of the person to be surrendered, is the same test adopted by the ECtHR in its case law on the interpretation of Article 3 ECHR. As a result, the ECtHR's and the CJEU's interpretation of Article 3 ECHR and Article 4 of the Charter converge ever more and more.

A host of questions still require an answer after this judgment: I will put forward three of the most pressing queries that are relevant for the notion of mutual trust.⁶⁷ First of all, does the CJEU's conclusion that an executing judicial authority defer to execute an arrest warrant if there is a real risk that detention conditions in the issuing Member State infringe Article 4 of the Charter mean that executing judicial authorities can also defer to execute when non-absolute rights are at stake? The CJEU explicitly stated that the prohibition laid down in Article 4 is absolute and is one of the fundamental values of the Union. Would the Court conclude the same if the right to be heard, as was the case in *Radu*, was at stake?

Second of all, what does the CJEU's conclusion for other EU criminal law instruments based on the principle of mutual recognition which state, just like the FDEAW, that they shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU? A good example thereof is the Council Framework Decision.⁶⁸ Can executing judicial authorities defer the recognition of judgments and the enforcement of sentences based on this instrument, which is also based on mutual trust?

The third and last question relates to convergence between the CJEU's case law on asylum law, based on the Dublin system, which is also largely based on mutual recognition, and criminal law. In the *N.S.* case the Court ruled that:

(. . .) if there are substantial grounds for believing that there are *systemic flaws* in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman

⁶³ Ostropolski (n 14) 178.

⁶⁴ See text at n 23.

⁶⁵ *Soering v the United Kingdom* (1989) Series A no 161, para 91.

⁶⁶ *Vilvarajah and Others v the United Kingdom* (1991) 14 EHRR 248, para 108.

⁶⁷ For a detailed analysis of issues on evidence and whether the judgment in this case allows for a new ground of refusal, see Szilárd Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal of Crime, Criminal Law and Criminal Justice 197.

⁶⁸ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27, art 3(4).

or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.⁶⁹

This case seemed to allow only examinations of other Member State's fundamental rights protection practices in cases of systemic flaws. In contrast, the ECtHR ruled more recently in *Tarakhel* that there rests a duty on the Member State to do a 'thorough and individualised examination'.⁷⁰ Will *Tarakhel* influence the CJEU to also opt for the two-staged test, with both a general and an individual assessment, in its asylum case law?⁷¹

Competing interests

The author declares that they have no competing interests.

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⁷¹ The AG provides a number of reasons as to why such a comparison would not hold. For a justification of such a comparison, see Fenella Billing, 'The Parallel Between Non-removal of Asylum Seekers and Non-Execution of a European Arrest Warrant on Human Rights Grounds: The CJEU Case of *N.S. v. Secretary of State for the Home Department*' (2012) 2 *European Criminal Law Review* 77.

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