



The Court clarifies the conditions for application of the presumption of equivalent protection in disputes concerning execution of a European arrest warrant

In today's **Chamber judgment**¹ in the case of **Bivolaru and Moldovan v. France** (applications nos. 40324/16 and 12623/17) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights in application no. 12623/17, lodged by Mr Moldovan, and

no violation of Article 3 in application no. 40324/16, lodged by Mr Bivolaru.

The case concerned the applicants' surrender by France to the Romanian authorities under European arrest warrants (EAWs) for the purpose of execution of their prison sentences. The case prompted the Court to clarify the conditions for application of the presumption of equivalent protection in such circumstances.

The Court held that the presumption of equivalent protection applied in Mr Moldovan's case in so far as the two conditions for its application, namely the absence of any margin of manoeuvre on the part of the national authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union (EU) law, were met. The Court therefore confined itself to ascertaining whether or not the protection of the rights guaranteed by the Convention had been manifestly deficient in the present case, such that this presumption was rebutted. To that end it sought to determine whether there had been a sufficiently solid factual basis requiring the executing judicial authority to find that execution of the EAW would entail a real and individual risk to the applicant of being subjected to treatment contrary to Article 3 on account of his conditions of detention in Romania.

The Court noted that Mr Moldovan had provided evidence of the alleged risk that was sufficiently substantiated to require the executing judicial authority to request additional information and assurances from the issuing State regarding his future conditions of detention in Romania. The Court found a violation of Article 3 in so far as it appeared that the executing judicial authorities, in exercising their powers of discretion, had not drawn the proper inferences from the information obtained, although that information had provided a sufficiently solid factual basis for refusing execution of the EAW in question.

In Mr Bivolaru's case the Court considered that, owing to its decision not to request a preliminary ruling from the Court of Justice of the European Union (CJEU) on the implications for the execution of an EAW of the granting of refugee status by a member State to a national of a third country which subsequently also became a member State, the Court of Cassation had ruled without the full potential of the relevant international machinery for supervising fundamental rights having been deployed. The presumption of equivalent protection was therefore not applicable.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

There were two aspects to Mr Bivolaru's complaint: the first concerning the implications of his refugee status, and the second concerning conditions of detention in Romania.

There was nothing in the file before the executing judicial authority or the evidence adduced by the applicant before the Court to suggest that he would still face a risk of persecution on religious grounds in Romania in the event of his surrender. The Court considered that the executing judicial authority, following a full and in-depth examination of the applicant's individual situation which demonstrated that it had taken account of his refugee status, had not had a sufficiently solid factual basis to establish the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on that ground.

The Court also considered that the description of conditions of detention in Romanian prisons provided by the applicant to the executing judicial authority in support of his request not to execute the EAW had not been sufficiently detailed or substantiated to constitute *prima facie* evidence of a real risk of treatment contrary to Article 3 in the event of his surrender to the Romanian authorities. In the Court's view, the executing judicial authority had not been obliged to request additional information from the Romanian authorities. Accordingly, it held that there had not been a solid factual basis for the executing judicial authority to establish the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on those grounds.

Principal facts

The applicants, Gregorian Bivolaru and Codrut Moldovan, are two Romanian nationals.

In June 2015 Mr Moldovan was sentenced by the Mures District Court (Romania) to seven years and six months' imprisonment for human trafficking offences committed in 2010 in Romania and France. He returned to France after his trial. On 29 April 2016 the Romanian authorities issued a European arrest warrant (EAW) in respect of Mr Moldovan for the purpose of enforcing that prison sentence.

In June 2016 the applicant, who had been placed under court supervision requiring him to report once a week to the Clermont-Ferrand police, was arrested and the EAW was served on him. In proceedings before the Investigation Division of the Riom Court of Appeal he argued that his surrender could not take place until the Investigation Division had requested and obtained additional information about his future conditions of detention in Romania. The Investigation Division made the relevant request in order to assess whether there existed a real risk of inhuman or degrading treatment. After obtaining the information it held, in a judgment of 5 July 2016, that there was no obstacle to Mr Moldovan's surrender.

The applicant lodged an appeal on points of law against that judgment which was dismissed on 10 August 2016. On 26 August 2016 he was surrendered to the Romanian authorities pursuant to the EAW.

Mr Bivolaru, the leader of a spiritual yoga movement since the 1990s, was the subject of criminal proceedings in Romania in 2004. In 2005 he travelled to Sweden, where he applied for political asylum and was issued with a refugee's permanent residence permit, with which he was allowed to travel as from 2007. In a judgment of 14 June 2013 the Romanian High Court of Cassation and Justice sentenced him *in absentia* to six years' imprisonment on charges of sexual relations with a minor. On 17 June 2013 the Sibiu County Court issued an EAW with a view to the enforcement of that sentence.

In February 2016 Mr Bivolaru was arrested in Paris while travelling under an assumed identity using false Bulgarian identity papers. In proceedings before the Investigation Division of the Paris Court of Appeal he challenged the execution of the EAW, arguing that the fact that he had been granted refugee status by Sweden, and the political and religious grounds for his conviction in Romania, placed him at risk of inhuman and degrading treatment and thus constituted an absolute bar to his

surrender. The Investigation Division ordered further enquiries. The Swedish authorities provided more detailed information, specifying, among other things, that they had not instituted proceedings to have Mr Bivolaru's refugee status withdrawn.

On 8 June 2016 the Investigation Division ordered Mr Bivolaru's surrender to the Romanian judicial authorities. It found, in particular, that the applicant's surrender had been requested for the purpose of his serving a sentence for an ordinary offence, and it inferred from the Court's case-law that the applicant's assertion that he had been convicted on account of his political views was merely an allegation. It also found that it was not its task to determine whether the applicant faced a real risk of inhuman or degrading treatment on account of the conditions of detention in Romania.

Mr Bivolaru lodged an appeal on points of law against that judgment. The Court of Cassation dismissed his appeal on 12 July 2016, ruling that the fact that he had been granted refugee status by Sweden did not preclude execution of the EAW.

On 13 July 2016, under Rule 39 of the Rules of Court, Mr Bivolaru requested a stay of execution of his surrender to the Romanian authorities. On 15 July 2016 the Court refused the request. One week later Mr Bivolaru was transferred to Romania pursuant to the EAW and was imprisoned. He was granted conditional release on 13 September 2017.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment) of the Convention, the applicants submitted that their surrender to the Romanian authorities under the EAWs placed them at risk of treatment in breach of the Convention.

The application was lodged with the European Court of Human Rights on 12 August 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
Jovan **Ilievski** (North Macedonia),
Lado **Chanturia** (Georgia),
Arnfinn **Bårdsen** (Norway),
Mattias **Guyomar** (France),

and also Martina **Keller**, *Deputy Section Registrar*.

Decision of the Court

Article 3

When applying international law the Contracting States remained bound by the obligations they had entered into on acceding to the European Convention on Human Rights. A measure taken for the purposes of fulfilling international legal obligations had to be deemed justified where the organisation in question conferred on fundamental rights at least an equivalent or comparable level of protection to that guaranteed by the Convention. If the organisation was considered to provide equivalent protection, the presumption would be that a State had not departed from the requirements of the Convention when it had done no more than implement legal obligations flowing from its membership of the organisation.

The Court had to verify whether the conditions for application of the presumption of equivalent protection were met in the circumstances of the case before it. If so, it had to be satisfied that the

authority executing the EAW had established that the latter would not render the protection of the rights guaranteed by the Convention manifestly deficient. If this was not established and the conditions for application of the presumption of equivalent protection were not fully met, the Court had to review the manner in which the executing judicial authority had sought to ascertain whether there was a real and individualised risk of a breach of the rights protected by the Convention in the event of execution of the EAW. It had to determine the issue whether the applicant's surrender was contrary to Article 3.

Mr Moldovan

With regard to the first condition of application of the presumption of equivalent protection, namely the absence of any margin of manoeuvre on the part of the national authorities, the Court noted that the legal obligation on the judicial authority executing the EAW stemmed from the relevant provisions of Framework Decision 2002/584/JHA, as interpreted by the CJEU since its judgment in *Aranyosi and Căldăraru*. As the CJEU's case-law currently stood, the executing judicial authority was permitted to derogate, in exceptional circumstances, from the principles of mutual trust and mutual recognition between member States by postponing or even, where appropriate, refusing execution of the EAW. In ruling on the applicant's challenge to execution of the EAW on the grounds that it would expose him to a risk of being detained in Romania in conditions contrary to Article 4 of the Charter of Fundamental Rights, the executing judicial authority had been required to assess the existence of the systemic shortcomings in the issuing member State alleged by the applicant and then, as appropriate, to carry out a specific and detailed examination of the individual risk of inhuman and degrading treatment which the applicant would face in the event of his surrender.

The Court noted the convergence between the requirements laid down by the CJEU and those arising out of its own case-law with regard to the establishment of a real and individual risk. It followed that the Investigation Division should have refused execution of the EAW if, after carrying out the aforementioned assessment, it found that substantial grounds had been shown for believing that the applicant, if surrendered, would in fact face a risk of inhuman and degrading treatment on account of his conditions of detention.

However, this discretionary power on the part of the judicial authority to assess the facts and circumstances and the legal consequences which they entailed had to be exercised within the framework strictly delineated by the CJEU's case-law and in order to ensure the execution of a legal obligation in full compliance with European Union law, namely Article 4 of the Charter of Fundamental Rights, which guaranteed equivalent protection to that provided by Article 3 of the Convention. In those circumstances the executing judicial authority could not be said to enjoy an autonomous margin of manoeuvre in deciding whether or not to execute a European arrest warrant, such as to result in non-application of the presumption of equivalent protection.

As to the second condition for application, namely deployment of the full potential of the supervisory mechanism provided for by EU law, the Court noted that no serious difficulty arose, in the light of the CJEU's case-law, with regard to the interpretation of the Framework Decision, and its compatibility with fundamental rights, capable of leading to the conclusion that a preliminary ruling should have been requested from the CJEU. The second condition for application of the presumption of equivalent protection should therefore be considered to have been satisfied. In view of the foregoing, the Court held that the presumption of equivalent protection was applicable in the present case.

Accordingly, the Court had to ascertain whether the protection of the rights guaranteed by the Convention had been manifestly deficient in the present case, such that this presumption was rebutted. If that were the case, the interest of international cooperation would be outweighed by observance of the Convention as a "constitutional instrument of European public order" in the field of human rights. To that end the Court would seek to determine whether or not there had been a sufficiently solid factual basis requiring the executing judicial authority to find that execution of the

EAW would entail a real and individual risk to the applicant of being subjected to treatment contrary to Article 3 on account of his conditions of detention in Romania.

The Court observed at the outset that in the proceedings before the domestic courts the applicant had produced evidence of systemic or generalised failings in the prisons of the issuing State. It noted the weighty and detailed nature of the evidence adduced before the Investigation Division and subsequently before the Court of Cassation, pointing to shortcomings in the Romanian prison system and in particular in Gherla Prison, where the Romanian authorities intended to place the applicant. The Court also noted the measures taken by the domestic judicial authority, which had requested additional information from the Romanian authorities. In the light of the details obtained in the course of that exchange of information, the executing judicial authority had taken the view that execution of the EAW would not entail a risk of a breach of Article 3 in the applicant's case. For its part the Court considered that there had been a sufficient factual basis for the authority in question to find that such a risk existed.

Firstly, the Court considered that the information provided by the issuing State had not been placed sufficiently within the context of the Court's case-law, in particular with regard to the situation in Gherla Prison, where the applicant was reportedly to be detained. The Court reiterated that, according to its case-law, 3 sq. m of floor surface per prisoner in a multi-occupancy cell was the applicable minimum standard for the purposes of Article 3 of the Convention. The Court held that the information available to the executing judicial authority concerning the personal space that would be allocated to the applicant had given rise to a strong presumption of a breach of Article 3.

Secondly, the Court observed that the assurances provided by the Romanian authorities concerning the other aspects of the conditions of detention in Gherla Prison, which were allegedly capable of discounting the existence of a real risk of a breach of Article 3, had been described in stereotypical fashion and had not been included in the executing judicial authority's assessment of the risk.

Thirdly, the Court considered that, even though the Romanian authorities had not ruled out the possibility that the applicant might be held in a prison other than Gherla Prison, the precautions taken by the executing judicial authority in that regard, in the form of a recommendation that the applicant should be held in a prison that provided identical if not better conditions, were inadequate to guard against a real risk of inhuman and degrading treatment.

Consequently, the Court held that there had been a sufficiently solid factual basis, deriving in particular from the Court's own case-law, for the executing judicial authority to establish the existence of a real risk to the applicant of being exposed to inhuman and degrading treatment on account of his conditions of detention in Romania, such that it could not simply defer to the statements made by the Romanian authorities. The Court inferred from this that in the specific circumstances of this case the protection of fundamental rights had been manifestly deficient, with the result that the presumption of equivalent protection was rebutted.

The Court found a violation of Article 3 of the Convention.

Mr Bivolaru

Mr Bivolaru's complaint under Article 3 comprised two aspects: the first concerning the implications of his refugee status, and the second concerning conditions of detention in Romania.

With regard to the application of the presumption of equivalent protection, the Court noted that the Court of Cassation had rejected the applicant's request to seek a preliminary ruling from the CJEU on the implications for the execution of a European arrest warrant of the granting of refugee status by a member State to a national of a third country which subsequently also became a member State. This was a genuine and serious issue with regard to the protection of fundamental rights by EU law and its relationship with the protection afforded by the 1951 Geneva Convention, an issue which the CJEU had never previously examined.

The Court considered that, owing to its decision not to refer the matter to the CJEU, the Court of Cassation had ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In view of that decision and of the importance of the issues at stake, the presumption of equivalent protection did not apply.

Accordingly, it fell to the Court to review the manner in which the executing judicial authority had sought to ascertain whether there existed a real risk that the applicant would be subjected to persecution on account of his political and religious beliefs if the EAW were to be executed. It had to determine whether there had been a sufficiently solid factual basis requiring the executing judicial authority to find that execution of the EAW would entail a real and individual risk to the applicant of being subjected to treatment contrary to Article 3 and to refuse execution of the EAW on that ground.

The Court observed that in the domestic proceedings the applicant, in seeking to demonstrate the existence of a real risk of inhuman and degrading treatment in the event of execution of the EAW, had relied primarily on his refugee status under the Geneva Convention and on the prohibition of *refoulement* laid down in Article 33 of that Convention. In reviewing the observance of Article 3 the Court noted that the Framework Decision on the European arrest warrant did not include any grounds for non-execution relating to the refugee status of the person whose surrender was sought. It stressed the fact that, in granting the applicant refugee status, the Swedish authorities had apparently taken the view that there was sufficient evidence at that time that he was at risk of being persecuted in his country of origin. In carrying out its review, the executing judicial authority had considered that this status was a factor of which it had to take particular account. The Investigation Division had exchanged information with the Swedish authorities seeking further details about the applicant's refugee status. The Swedish authorities had replied that they proposed to maintain the applicant's refugee status, but without examining whether the risk of persecution in his country of origin persisted, ten years after that status had been granted.

There was nothing in the file before the executing judicial authority or in the evidence adduced by the applicant before the Court to suggest that he would still face a risk of persecution on religious grounds in Romania in the event of his surrender. The Court also noted that the executing judicial authorities had verified that the request for execution of the EAW had not pursued a discriminatory purpose, in particular on account of the applicant's political views.

The Court therefore considered that the executing judicial authority, following a full and in-depth examination of the applicant's individual situation which demonstrated that it had taken account of his refugee status, had not had a sufficient factual basis to establish the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on that ground.

Regarding the issue of conditions of detention in Romania, the Court observed that in the proceedings before the domestic courts the applicant had merely complained in very general terms about the treatment of political opponents in Romania, including in prison, and not about the conditions of detention in Romanian prisons; as a result, the executing judicial authority had had insufficient information in that regard.

Accordingly, the Court considered that the description of conditions of detention in Romanian prisons provided by the applicant to the executing judicial authority in support of his request not to execute the EAW had not been sufficiently detailed or substantiated to constitute *prima facie* evidence of a real risk of treatment contrary to Article 3 in the event of his surrender to the Romanian authorities.

The Court also noted that, in view of the role of the Court of Cassation, it had served no purpose to rely for the first time before that court on the judgment in *Aranyosi and Căldăraru* in an attempt to demonstrate the existence of the alleged structural shortcomings. In the Court's view, there had

been no obligation for the executing judicial authority to request additional information from the Romanian authorities on the applicant's future place of detention, the conditions of detention and the prison regime, for the purpose of identifying the existence of a real risk that he would be subjected to inhuman and degrading treatment on account of his conditions of detention.

In these circumstances the Court held that there had not been a solid factual basis for the executing judicial authority to identify the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on that ground.

Accordingly, the execution of the European arrest warrant had not entailed a violation of Article 3 of the Convention.

Just satisfaction (Article 41)

The Court held that France was to pay Mr Moldovan 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,520 in respect of costs and expenses.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.