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HUMAN RIGHTS IN THE CONTEXT OF EXTRADITION OBSTACLES

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Abstract

Extradition is certainly an area which is particularly sensitive in terms of human rights under international law. The violation of the right to liberty must always be justified, even more so the violation of the right to liberty and the surrender of a person to another country, another legal system. The surrendering country must be assured that, in addition to the fulfilment of human rights formalities, the same standards and guarantees will be provided in the country requesting surrender. This thesis identifies areas that, due to legal and cultural differences between countries, constitute weak links in the extradition process. It addresses not only the legal aspects of human rights regulation, but also criminal procedures related to extradition. In conclusion, the author identifies areas in need of international efforts to enhance human rights guarantees in the procedure under study.

Keywords: *extradition, human rights, diplomatic guarantees, criminal trial, Interpol red note*

Introduction

Extradition and the European Arrest Warrant are very specific forms of international cooperation, elements of which include depriving a person of their liberty if he/she is arrested, and it is this element that most often initiates the procedure. A procedure which aims to surrender a person in one country to a requesting country.

Already in this field of action, it is possible to take attention to the basic problems that will be encountered in connection with international cooperation. For the sake of scientific consideration, let us go beyond the European Union, which seems to be standardised in terms of EAW cooperation, we are talking about international cooperation between sometimes extremely different countries, located very far from each other, so we are talking about political and cultural differences, but above all about different legal systems.

Can we therefore say that human rights will be similarly understood in every legal jurisdiction? After all, they are timeless and, as is always emphasised,

rise above borders. What is standard for Europeans or highly developed countries, for example, may not be so obvious in other countries.

Extradition is related to the search for a person in connection with a final court judgment in order to serve a custodial sentence or in connection with criminal proceedings against a person in which a conviction may be handed down[1].

International human rights and extradition regulations

In terms of the European Union, a document such as the Charter of Fundamental Rights of the European Union (2016/C 202/02)[2] serves to protect the fundamental rights of people in the European Union (EU) and is seen as a modern and comprehensive instrument of EU law ensuring the protection and promotion of human rights and freedoms in the context of changing society[3], social progress and scientific and technological developments. The scope of this act indicates that it should be applied in conjunction with international and national systems for the protection of fundamental rights, such as the European Convention on Human Rights (ECHR)[4].

A foundational value when conducting scholarly deliberations on extradition is the term 'human rights' commonly used in international law to refer to the rights belonging to every human being regardless of nationality, race, caste, creed, gender, etc. The EU usually uses the term 'human rights' in the context of its external relations and development cooperation policies[5]. These rights also include protection in the event of removal, expulsion or extradition,

[1] C. Nicholls, C. Montgomery, J.B. Knowles, *The Law of Extradition and Mutual Assistance*, Oxford 2007, p. 3–4.

[2] L.J. C 202 from 7.6.2016, p. 389—405.

[3] M. Kożuch, *The EU Charter of Fundamental Rights – a self-contained source of law or a set of interpretative principles*? European Judicial Review 2015/10, p. 30-36.

[4] Signed in 1950 by the Council of Europe, the ECHR is an international treaty designed to protect human rights and fundamental freedoms in Europe.

[5] https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=LEGISSUM:fundamental_rights [access: 18.07.2024 r.].

i.e. the regulation in Article 19(2) of the Charter of Fundamental Rights of the European Union indicating that: *No one shall be removed from the territory of the State, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*.

This regulation is particular in the field of human rights, as it prescribes a broad view of the circumstances of a given case, not only through the prism of the extradition request, but the totality resulting from, one might say, the geopolitical conditions in the country requesting surrender.It is therefore a kind of reference to the difference, already mentioned at the outset, related to the differences between countries in terms of the perception of different values. European jurisprudence also reminds us of this, prescribing a comprehensive analysis of the circumstances of the case, not only in terms of strictly criminal grounds. *The assessment of whether a person, if extradited, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention must begin with an examination of the overall situation in the country of destination.*

Should be underlined that it is the ECHR in the aforementioned article three that indicates that: No one shall be subjected to torture or to inhuman or degrading treatment or punishment. However, in spite of the initial obviousness of these provisions, the European Court of Human Rights continues to settle disputes that are brought against European countries which seems particularly worrying. For example, one can only cite the case of LIU v. Poland, concerning extradition to China[6], in which the Court recalled that the assessment of whether a person, if extradited, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention must begin with an examination of the overall situation in the State of destination. Similarly, in another judgment – A.M.A. v. Netherlands – concerning deportation to Bahrain and the authorities' handling of a last-minute asylum application lacking a proper assessment of the risk of ill-treatment in that country[7].

[6] Complaint no. 37610/18.o.

[7] Complaint no. 23048/19.

Human rights were once again put on a pedestal and it was emphasised that: *Given that Article 3 enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment, the assessment required of national authorities of the existence of a real risk must of necessity be rigorous. The authorities are required to take into account not only the evidence presented by the complainant, but also all other relevant facts. In asylum cases, the burden of proof is distributed in such a way that it is the responsibility of both the asylum seeker and the immigration authorities to establish and assess all relevant facts.* It is therefore a question of asserting a kind of subjectivity by virtue of participation in international legal proceedings[8].

The role of diplomatic assurances in extradition

Looking at the above fundamental remarks, the question arises as to the diplomatic value of extradition requests, a kind of cooperation between the state requesting a person's surrender and the surrendering state, after all, behind every legal system – whose authorities are the originators of the extradition request – there is a whole state apparatus that should be the guarantor of fundamental human rights and freedoms, the guarantor of procedural rights[9], otherwise, an extradition request should not be treated as an instrument of international law. The expectation that, if a prosecuted person is surrendered, the authorities of that State will respect the guaranteed rights and freedoms of the prosecuted person is linked to diplomatic assurances, which must also be subject to verification.

[8] E. Cała-Wacinkiewicz (ed.), I*nternational law subjectivity. Its contemporary aspects,*, C.H. Beck, Warsaw 2020, p. 42.

[9] *I. Kraśnicka* (ed.), *International Law. Theory and practice*, C.H. Beck, Warsaw 2020, p. 373.

Diplomatic assurances must accompany extradition requests and must contain very relevant information for the prosecuted person. These are statements by the requesting State for surrender that:

- extradition is not to prosecute for political reasons, race, religion, nationality or political opinion,
- the person prosecuted will be given a fair trial,
- the person prosecuted will not be subjected to torture or to cruel or degrading treatment or punishment,
- the conditions under which the prosecuted person will be detained will be appropriate,
- the authorities of the State of nationality of the prosecuted person will be able to control the observance of these guarantees.

This must also be reliable information for the State called upon to surrender the accused, in order to be absolutely certain that human rights will be respected. This is the theory, which seems to prioritise human rights, but what is the practice? Where does extradition begin and where should it be noted that human rights must prevail over harsh and even callous procedures. The extradition request shall be accompanied by:

1. an order for provisional arrest, containing a description of all the acts charged against the prosecuted person, together with the legal qualification,
2. a copy of the letter of arrest and an extract from the applicable provisions (provisions on legal qualification and statute of limitations),
3. materials identifying the prosecuted person.

As a rule, the extradition request is not accompanied by copies of the evidence – which already means that the authority verifying the request in the country of detention must give credence to the information obtained, without verifying the evidence. It does not assess the original material, but only the records in the application itself.

Here, then, we already have important elements where different legal jurisdictions will be specifically obliged to verify respect for human rights,

all the more so since, as we can already see, the issuing country relies on the principle of trust in the documents sent by the requesting country.[10]. The question that needs to be asked is whether the rights of the individual and the action of an authority in the country called upon to surrender a fugitive will prevail over the principle of correct political cooperation between countries – I am talking about economic and military relations – which will want to explore the value of diplomatic assurances beyond all doubt? As we can unfortunately see in the ECtHR rulings cited – unfortunately this is not always the case and the problem starts already at the stage of detention of a person, where the international tool of the Interpol Red Note will be helpful[11]. It is from it that international searches begin and this is an element that must also take human rights into account. Thanks to the information contained in it, the law enforcement officers of each Interpol member country have a factual basis for apprehending the person being prosecuted, which may later result in his or her extradition. However, the momentousness of this tool is only evidenced by its scope, in fact it is a mere document printed from the system which is called i24/7, limited to often one page of laconic description which often:

- does not provide an accurate description of the case,
- does not contain information on evidence,
- there is no real possibility for the country in question to examine the grounds for applying precautionary measures.

Are we still talking about fair procedures? Looking at the regulations in force in Poland, one can point to a situation which is problematic for human rights, connected with the fact that after arresting a wanted person, which will only result from his/her being listed on the Interpol database, and before submitting an application to the Republic of Poland for the temporary arrest

[10] D. Czerniak, J. Skorupka (ed.), *European guarantees of proper administration of justice in criminal matters*, C.H. Beck, Warsaw 2021, p. 49-50.
[11] A. Sakowicz (ed.), *Code of Criminal Procedure. Commentary,* Ed. 10, C.H. Beck, Warsaw 2023, p. 1710-1728.

of a prosecuted person, the court may apply temporary arrest to that person [12] for a maximum period of seven days, does so only on the basis of a request contained in the Interpol database. This means that a record in the system, will result in the Polish authorities considering a temporary arrest procedure, for a period of seven days still without official documents [13]. During this time, the requesting country is supposed to send an official request for pre-trial detention, if this is not done the person is released from detention. Let us look at it from the man's perspective, the state will deprive him of his liberty for 7 days without evidence, without the materials of the case and without even an official request for provisional arrest, just on the basis of a one-sentence formulation in which the requesting country asks for provisional arrest and undertakes to send the request. With these considerations in mind, it is worth adding that Interpol members include China, Iran, South Sudan, North Korea, Nicaragua and Venezuela – will these countries' inclusion of only a *phrase* in the Interpol Red Note for provisional arrest, even before the official request, cause the Polish authorities to opt for the first element, i.e. a seven-day provisional arrest? Unfortunately, yes, although one can only hope that the legitimacy of such wording of some of the countries mentioned, due to their very high ranking in Amnesty International's ranking of human rights violations, will be examined by law enforcement agencies and courts with particular scrutiny.

Let us assume, however, that it will happen – as practice shows there are such cases – that the person who is the subject of the extradition request is not provisionally arrested, after being detained by the police, and by the decision of the public prosecutor's office or the court he or she will wait at liberty for the final decision on his or her surrender to the requesting state. In such a case, she will usually be subject to other preventive measures provided by law, such as a ban on leaving the country, passport seizure and police supervision, which means that she will have to be at the disposal of law enforcement authorities.

[12] M. Olężałek (ed.), *Criminal procedural law for judges, prosecutors, defence lawyers and attorneys*, C.H. Beck Warsaw 2024, pp. 247.

[13] S. Steinborn, L.K. Paprzycki (ed.*), Code of Criminal Procedure. Volume II. Commentary* to Articles 425-673, Lex/el. 2015.

According to information from the Polish Ministry of Justice, today's extradition proceedings are anachronistic due to their length – on average they last about 300 days. In view of this, can we invoke another important regulation here, namely Article 6 of the ECHR, i.e. the right of everyone to a fair and public hearing within a reasonable time? Definitely yes. It is worth emphasising that, in the case of custodial measures of a custodial nature, the person for whom extradition is requested cannot rely on state assistance. Often it is a tourist, a business traveller, a poor person, unfortunately, they cannot count on the support of the state in which they are detained. We are not just discussing money for daily needs, we are talking about the need for rented accommodation, the cost of medical care, the cost of a trial. Does the state called upon to surrender a person worry about this even if the lengthy and anachronistic procedure is, after all, an organisational fault on the part of the authorities of that state? Definitely not. Can we therefore conclude that human rights are duly safeguarded in this procedure – we can already see that they are not.

Mutual recognition of extradition decisions

The decision to surrender a person subject to an extradition request is a key element of the whole procedure. It is worth emphasising that in Poland, it can be said to be of a legal-political nature. The court proceedings are two-instance; once the court's decision becomes final, regardless of its content, the court sends the case file to the Minister of Justice in order to issue a decision on surrender. If the court has ruled on the inadmissibility of surrender, this ruling is binding on the Minister . In contrast, a positive decision of the court is not binding on the Minister of Justice and he may refuse to surrender the prosecuted person [14], e.g. for political reasons. The decision of the Minister of Justice is final and not

[14] J. Skorupka (ed.), *Code of Criminal Procedure. Commentary*, C.H. Beck, Ed. 6, Warsaw 2023, p. 1803-1820.

subject to appeal. A copy of it shall be served by the Ministry of Justice on the person prosecuted and on the authority of the requesting State.

The Convention of 19.6.1990 implementing the Schengen Agreement of 14.6.1985, according to the principle *ne bis in idem* cited in Article 54, states: *A person whose trial has ended with a final judgment in the territory of one Contracting Party may not be prosecuted in the territory of another Contracting Party for the same act, provided that a penalty has been imposed and enforced or is in the process of being enforced or can no longer be enforced under the laws of the convicting Contracting Party*.

It would seem, therefore, that when a final extradition decision is issued, the situation of the requested person is self-evident in the European Union, but this is unfortunately not the case, as the scope *of ne bis in idem* does not apply to extradition orders. This means that a decision to refuse extradition is only binding in the country of surrender. That is, a final decision by a court or the Minister of Justice means that only in Poland will the person be 'safe', in any even EU country, if the wanted person is arrested, the extradition procedure will start again depending on the agreement that binds the country in question with the requesting country. Thus, it may turn out that arguments that were sufficient in one country not to extradite a person, for example human rights violations, may not be sufficient in another country and extradition will take place.

So what about the guarantee function of human rights? They should be across national borders and understood in the same way, which, however, as we can see from the examples above, is not happening.

Summary

Human Rights Watch, among others, has commented on the fictitiousness and lack of credibility of the guarantee assurances coming from some countries[15], pointing out that there is an obvious danger in treating diplomatic assurances as a safeguard against torture. This is therefore the first element where the rights of the individual suffer, in the case of automatism and lack of thoroughness in examining the totality of the circumstances that prevail in the country requesting surrender, instead focusing by the authorities only on the criminal procedure. Many times, as can be seen from the ECtHR's rulings, the burden of this proof is shifted to the prosecuted person and his or her defence counsel, who demonstrate the existence of a legal premise of inadmissibility of extradition through the unreliability of diplomatic assurances.In addition to this element, the lengthy procedures constitute a violation of the right to a speedy trial, the lack of mutual recognition, even by EU Member States, of non-extradition decisions, with the result that, if a person leaves the territory of a country, he or she may still be detained on the basis of a note or diffusion by the authorities of another country, which will feel obliged to reopen the extradition case and execute the arrest.

In conclusion, there are many things we need to do in an extradition procedure to ensure that human rights are properly protected and, as lawyers, we have a moral duty to discuss these elements.

[15] https://www.hrw.org/legacy/backgrounder/eca/canada/arar/5.htm [access: 18.07.2024 r.].