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Extradition of European Union Citizens anywhere except the Russian Federation: The Case of I.N.

Abstract: In its recent practice, the Court of Justice of the European Union has held that European Free Trade Association (EFTA) nationals enjoy the same level of protection against extradition to a third state as EU citizens. This article analyses the reasoning of the Court and establishes a link with previous decisions on extradition matters. The author concludes that the test for extradition is still forming and its application lacks clarity and consistency.
Keywords: Extradition, EU citizenship, mutual recognition

Introduction

The question of the possibility of extraditing an EU citizen to a third country is under close consideration by the Court of Justice of the European Union (CJEU). Its recent practice has shown several attempts to establish a complete and reliable test in such cases. The first attempt was made by the Court of Justice (CJ or the Court) in the Petruhhin case in 2016, then in the Adelsmayr case in 2017, then in the Pisciotti judgement of 2018 and, finally, in the most recent case of I.N. in April 2020. Although there are numerous other cases dealing with various aspects of the expulsion of EU citizens, these selected cases are compatible by their background and, more importantly, by the continuing attempt of the CJ to formulate the test for a legitimate extradition.

1. Background

According to the facts of the case C897/19 PPU[1],I.N. is a citizen of the Russian Federation who also obtained Icelandic citizenship on 19 June 2019. Since 20 May 2015 he was the subject of a notice for international wanted persons issued by Interpol's bureau in Moscow. The Russian authorities were seeking I.N.'s extradition on corruption charges. In 2015, I.N. escaped to Iceland, applied for asylum protection and was granted refugee protection in that country. After his attempt on 30 June 2019 to cross the border between Croatia and Slovenia as a tourist, he was arrested by the Croatian authorities. Later, under the request of the Russian authorities and the subsequent decision of the Croatian court, he was supposed to be extradited to the Russian Federation for further prosecution there. However, due to his appeal on the matter of the application of EU law to the case as a reason precluding his extradition, and referring to the Petruhhin case[2], the national court suspended proceedings and referred to the CJ.

2. The Judgement of the Court

In its decision, the CJ dealt with several questions, such as the general application of EU law to the matter, EU–Iceland relations and international treaties governing them, the principle *aut dedere aut iudicare* (extradite or prosecute) and human rights protection. Since I.N. did not possess EU citizenship, the Court found it impossible to apply the same line of argumentation as in the Petruhhin case, namely Art. 18 TFEU and Art. 21 TFEU. At the same time, they found it is possible to apply EU Law through the direct application of the Agreement on the European Economic Area[3] (the EEA Agreement), which belongs to the body of EU Law. Some other international treaties and "special relations" between the EU and Iceland have also been considered as crucial for the application of EU law, such as the implementation of the Schengen acquis by Iceland and the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure[4], as well as its participation in the European asylum system.

1 Judgment of the Court of 2 April 2020 on the case of criminal proceedings against I.N., C 897/19 PPU.

2 Judgment of the Court of 6 September 2016 on the case of proceedings relating to the extradition of Aleksei Petruhhin, C 182/15.

3 Agreement on the European Economic Area (O.J. L 1, 3.01.1994, p. 3–522).

4 Council Decision (EU) No.2014/835 of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (O.J. 2014 L 343, 28.11.2014, p. 1–2).

Despite numerous systems being applicable simultaneously to the present case, the decision of the Court is based primarily on the question of legitimate restrictions on the freedom to provide services. The starting point for the Court here was the identical interpretation of Art. 56 TFEU and Art. 36 of the EEA Agreement, both of which provide for the freedom to provide and receive services. According to the Court's opinion, I.N. had been enjoying this right to travel and receive tourist services during his family trip to Croatia. Moreover, the nationality of the EFTA state (Iceland in this case) has been interpreted as similar to EU citizenship in terms of an area of freedom, security and justice. This way of interpretation allowed the Court to focus its attention on the legitimate restrictions on the freedom to provide services, which are objective considerations, and proportionality to the legitimate objective[5].

Following the reasoning in the Petruhhin case, the Court confirmed prevention of the risk of impunity as being a legitimate objective. However, the requirement for less restrictive measures and their necessity has been interpreted in a narrow matter. Since I.N. was granted asylum by Iceland in relation to the criminal offence committed in Russia, it was perceived by the Court as an impossibility to return him for prosecution to the requesting third state. Thus, the only remaining and less restrictive option was to inform Icelandic authorities about the case and extradite I.N. there on the basis of the Agreement on the surrender procedure[6]. The Court has put cooperation and mutual assistance between the EU and Iceland, as well as the lack of an extradition treaty between the EU and Russia, as a basis for the implementation of the Petruhhin case by analogy with EFTA nationals, even though they do not possess EU citizenship. In conclusion, the Court formulated the rule of the obligation of the Member State to inform the EFTA state about the extradition request from the third state towards its nationals. And if the EFTA state confirms its jurisdiction to prosecute that person for the offences outside its territory (in the present case, on Russian territory), he must be surrendered there[7].

3. Opinion of the Advocate General

It is worth mentioning that the reasoning expressed by the advocate general in his opinion differs from the one delivered by the CJ. Providing the broad picture of the legal systems at stake, the advocate general mentioned in particular national (Iceland, Croatia, Russia), transnational (EU, Council of Europe, European Economic Area) and international (Geneva Convention on the status of refugees) legal systems. However, none of them prevails over another; rather, all of them create a complicated

5 Judgment of the Court of 2 April 2020, *op. cit*., point 59.
6 Council Decision (EU) No, 2014/835, *op. cit*.
7 Judgment of the Court of 2 April 2020, *op. cit*., point 76.

net of legal regulation[8]. Still, EU law applies here since I.N.'s right to receive services was restricted and in such cases there is no uncertainty about the application of EU law.

The part from the reasoning of the advocate general which is missing in the Court decision is the application of the law of refugees to the case. According to the opinion, there is a less restrictive measure to prevent impunity than extradition to Russia. It is called mutual trust, and although the advocate general did not find it in the law of the European Economic Area, he did find it in the European Asylum System represented by the Dublin III Regulation[9] and its correct application by Iceland (Iceland is the participating state responsible under Chapter III of the Dublin Regulation)[10].

Despite the differences in legal argumentation, the advocate general comes to the same conclusion on the existence of an obligation on the Croatian side (as the EU Member State) to inform Iceland (EFTA State) about the case of I.N. and, should Iceland issue an arrest warrant, to extradite I.N. to Iceland rather than to Russia.

4. Comment

The decision on the Petruhhin case was delivered by the CJ on 6 September 2016 and it has established a test for the surrender of EU citizens to third states under the extradition procedure. Aleksei Petruhhin was an Estonian national who was arrested on Latvian territory and was expected to be extradited to Russia on its request and on the basis of the Agreement between the Republic of Latvia and the Russian Federation on Judicial Assistance[11]. In his home country (Russia), he was accused of large-scale, organized drug-trafficking. However, the CJ decided on the impossibility of his extradition from the territory of the EU because of the potential violation of freedom of movement under Art. 21 TFEU. Restrictions on freedom of movement are interpreted by the CJ widely and in fact cover any situation where an EU citizen has been put in a disadvantaged position while exercising his or her right to move freely within the Union[12]. And as has been correctly pointed out, in such cases the

8 Opinion of Advocate General Tanchev of 27 February 2020 on the case of Ruska Federacija v I.N., C 897/19 PPU, points 78–79.

9 Regulation (EU) No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (O.J. L 180, 29.06.2013, p. 31–59).

10 Opinion of Advocate General Tanchev, *op. cit*., points 97, 105.

11 Договор между Российской Федерацией и Латвийской Республикой о правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам от 03.02.1993. (Dogovor miezdu Rossiiskoi Fiedieraciei i Latviiskoi Respublikoi o pravovoi pomoszczi i pravovych otnoszeniach po grazdanskim, siemieinym i ugolovnym dielam ot 03.02.1993)

12 M. Böse, Mutual recognition, extradition to third countries and Union citizenship: Petruhhin, "Common Market Law Review" 2017, vol. 54, no. 6, p. 1786.

lack of protection against extradition to a third state will always trigger violation of freedom of movement[13]. Thus, in the Petruhhin case, requirements for his extradition have also become connected with justification of the restriction of economic freedom. These criteria are the legitimate objective[14] and proportionality[15]. The objective of preventing the risk of impunity was considered by the Court as a legitimate objective. In the case of Petruhhin, the Latvian courts lacked the jurisdiction to prosecute him, since the crime was committed on the territory of the third state (Russia) and Petruhhin himself was an Estonian national. However, to escape the risk of impunity the Court found a less restrictive measure than extradition to Russia, which is extradition to Estonia for prosecution. Thus, the Court formulated a complete test for national courts in the cases of extradition of EU citizens to third states based on the existence of a legitimate objective and the proportionality of a measure, which must be the least harmful alternative.

While a legitimate objective seems a clear and established criterion, the requirement of a "less restrictive alternative" is not that clear at all. It obviously leaves open questions: firstly, to whom it must be the least prejudicial (to the EU citizen or to the EU Member State) and, secondly, which criteria justify such a measure. In the Petruhhin case, the "less prejudicial alternative" and "equally effective" measure have been seen through the sincere cooperation principle (Art. 4 (3) TEU) and mutual recognition, which is enshrined in the Framework Decision 2002/584[16] in the form of facilitation of judicial cooperation between Member States[17]. The second argument in line with the "less restrictive measure" has been discovered by the Court in the protection of EU citizens in EU relations with the wider world in the form of extradition agreements between the EU and third countries (Art. 3 (5) TEU).[18]

In substance, the complete test offers to apply the European arrest warrant mechanism if the case concerns the EU citizen being requested by the third state or, alternatively, to extradite the EU citizen in the case of the existence of an extradition agreement between the EU and a third state. Although it was not stated by the Court which criterion should be applied earlier (the extradition agreement or the issuance of the EAW), the reasoning is based primarily on the significance of the judicial cooperation between the Member States on criminal matters, which leaves to the extradition agreement between the EU and a third country the position of the background criterion for a general consideration of the possibility of extraditing a person there.

13 *Ibidem*, p. 1787.
14 Judgment of the Court of 6 September 2016, *op. cit*., point 34.
15 *Ibidem*, point 38.
16 Council Framework Decision (JHA) 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. L 190, 18.7.2002, p. 1–20), Art. 1 (2).
17 Judgment of the Court of 6 September 2016, *op. cit*., points 42–43.
18 *Ibidem*, points 44–45.

This line of argumentation was extended by the Court in the Pisciotti case[19]. This case concerned an Italian national who was arrested in Frankfurt am Main airport on his way from Nigeria to Italy because of the arrest warrant issued against him by the United States back in 2010. As a matter of the preliminary ruling request, the case went to the CJ with the main question of whether Romano Pisciotti is eligible for the same level of protection against expulsion as German nationals. This case differs from the Petruhhin case because of the existence of the EU–USA extradition agreement[20], whereas in the Petruhhin case there was only the bilateral agreement between Russia and Latvia. And although the Court mentioned the EU–USA extradition agreement in its decision, the criterion of a "less restrictive measure" was not evaluated on its basis, which leaves an open question on the real significance of such agreements in the two-step test for the extradition of EU citizens to third states.

The Court came to the same conclusion as in the Petruhhin case that absence of the possibility to prosecute Pisciotti in Germany creates the risk of impunity and thus there is a legitimate objective to extradite him. The only question was the place of extradition. According to the logic of the Petruhhin case, the priority must be given to the less restrictive measure, i.e. informing the Italian authorities and the extradition of Pisciotti to Italy upon issuance of the European arrest warrant. However, the EU–US extradition agreement corrected this logic. Firstly, the Court mentioned that this agreement does not address the question of different treatment between nationals of the requested Member State (Germany in our case) and nationals of other Member States (Italy in our case)[21]. Secondly, the Court referred to Art. 17 of the EU–US extradition treaty which allows a Member State to prohibit extradition of its own citizens on the basis of either the bilateral treaty or rules of its constitutional law[22]. However, the Court still concluded that neither the EU–US agreement nor the bilateral agreement between Germany and the US nor the constitutional law of Germany can overrule the EU norms. Thus, despite the existence of the extradition agreement concluded between the EU and a third state, this fact has been treated by the Court not as a criterion for a "less restrictive measure," as in the Petruhhin case, but as a preliminary question, which has still been set aside by the norms of EU law. Stating this, the Court further referred to the Petruhhin test, but the requirements of an alternative and less restrictive measure were diminished significantly. The Court briefly mentioned that the Italian authorities had been informed about the Pisciotti case and they expressed no interest in the issuance of the European arrest warrant.

19 Judgment of the Court of 10April 2018 on the case of Romano Pisciotti v Bundesrepublik Deutschland, C 191/16.

20 Agreement on extradition between the European Union and the United States of America of 25 June 2003 (O.J. 2003 L 181, 19.07.2003, p. 27–33).

21 Judgment of the Court of 10 April 2018, *op. cit*., point 38.

22 *Ibidem*, point 41.

This fact alone was considered by the Court as a sufficient reason to allow extradition of the Italian national to the US, where he served the remaining term of imprisonment calculated after consideration of the time spent in Germany.

This case, compared to the Petruhhin judgement, does not contain one of the core elements of the analysis of the "mutual trust" and "sincere cooperation" questions on which the CJ based its decision in the Petruhhin case, giving the priority to extradite to Estonia rather than to Russia. This shifts the benefit of the "less restrictive measure" criterion to the Member State side rather than the side of the EU citizen. But this approach does not provide more clarity to the two-step test, since human rights have also been considered by the CJ as one of the elements precluding extradition.

In the case C473/15[23], the Court based the reasoning of its order on another idea– human rights protection. The case concerned Eugen Adelsmayr, a national of Austria who was sentenced in the United Arab Emirates to life imprisonment for alleged murder and manslaughter as a result of an unsuccessful medical operation. He moved to Austria to escape imprisonment and potential death penalty; however, he was unsure if his travel to Germany would trigger the extradition procedure to the United Arab Emirates. In this case, the logic of the Court was based on human rights protection and the possibility of the exposure of Adelsmayr to the death penalty. One might argue that the reasoning in the order of the Court was justified by the wording of the preliminary questions formulated by the referring court. However, it was the decision of the CJ to deal with the second question on human rights protection, and not the first one on the potential discrimination between German nationals and nationals of other Member States in extradition cases, which could have been based on the Petruhhin two-step test. Moreover, in the Petruhhin judgement, the CJ referred to human rights protection as a separate issue and not as a matter within the proportionality of the "less restrictive measure"[24]. This lack of stability in the application of the two-step Petruhhin test by the CJ creates an uncertainty for future cases and, more importantly, puts the requesting third state and the requested person in a disadvantaged position.

In the case of I.N., the Petruhhin test was applied partially and in far from its complete form. After the CJ made EFTA nationals "objectively comparable"[25] to EU citizens, it allowed evaluation of the case of I.N. in the same manner as Petruhhin and Pisciotti, even though the case concerned a non-EU Member State national. And while the risk of impunity was still in place as a legitimate objective to extradite I.N., consideration of the "less restrictive measures" was reduced to human rights protection, namely Art. 19 (2) of the Charter. This, however, does not meet the

23 Order of the Court of 6 September 2017 on the case of Peter Schotthöfer and Florian Steiner GbR v Eugen Adelsmayr, C473/15.

24 Judgment of the Court of 6 September 2016, *op. cit*., point 51.

25 Judgment of the Court of 2 April 2020, *op. cit*., point 58.

criteria for the Petruhhin test, while only half of it has been applied. The reason for this shift towards human rights protection rather than the strict proportionality test can be found in the lack of "mutual trust" in EEA Law and the inapplicability of the Framework Decision 2002/584 to Iceland not being a Member State[26]. In his opinion, the advocate general offered another source for the "mutual trust" obligation arising from the Common European Asylum System[27], but this opportunity went unnoticed by the CJ. Thus, the only option left for the Court was to substitute "mutual trust" and "sincere cooperation" as a basis for a "less restrictive measure" with human rights protection.

However, the justification of the "less restrictive" and "equally effective" measure through the human rights protection mechanism is also controversial. As has been correctly pointed out after the Petruhhin and Pisciotti cases, surrendering a person to a state other than the requesting one can potentially create more issues than benefits: it is time-consuming and most of the evidence is available at the place where the crime was committed, also justice will be better served there[28]. In the I.N. case, his surrender to Iceland rather than to Russia will require the establishment of a whole new criminal procedure. Apart from that, I.N. was present on the territory of Iceland before his travel to and arrest in Croatia, and Iceland showed no interest in arresting or investigating his case, despite the active international wanted person notice issued by Interpol's bureau in Moscow[29]. Moreover, he had been granted asylum by the Icelandic authorities specifically on the basis of the criminal investigation in Russia and, according to the oral hearings, "Iceland stated it might have jurisdiction to try I.N. under the Icelandic Criminal Code, but this is a matter for the decision of the independent public prosecutor"[30]. The Pisciotti case, however, provides a different example of a lack of obligation for a Member State to issue an arrest warrant. And while the Petruhhin case offered protection of EU citizens' rights against third states, the Pisciotti case diminished this protection and supported Member States' right to either protect the rights of their nationals being requested by the third state or decline such protection[31]. In relation to the Italian national in the Pisciotti case, the Court came to the conclusion that the second-best option was to surrender him to the US, while in the I.N. case, surrender to Russia was never an option. And as has been shown above, the absence of an EU–Russia extradition agreement is not the main obstacle, since even the existence of the EU–US extradition agreement in the

26 Opinion of Advocate General Tanchev, *op. cit.*, points 97–98.
27 *Ibidem*, point 104.
28 M. Böse, *op. cit.*, p. 1791.
29 Judgment of the Court of 2 April 2020, *op. cit.*, point 18.
30 Opinion of Advocate General Tanchev, *op. cit.*, point 54.
31 S. Coutts, From Union citizens to national subjects: Pisciotti, "Common Market Law Review" 2019, vol. 56, no. 2, p. 527.

Pisciotti case was not the core element in the "less restrictive measure" consideration part of the decision.

Another question is the complicated layer of international and bilateral (Member State–third country or the EU–third country) extradition agreements. In the Petruhhin case, Latvia's decision to extradite the Estonian national to Russia was based on the bilateral Agreement on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters. However, the CJ did not consider this agreement, despite the fact of its ratification before Latvia acceded to the EU and the fact that obligations under this agreement must be respected in the first place[32]. In the Pisciotti case, both agreements were in place (the EU–US extradition agreement and the Germany–US extradition agreement), but the CJ did not connect these agreements with the "less restrictive measure" criterion. In the I.N. case, Croatia's decision to extradite the Russian and Icelandic national to Russia was not based on the bilateral extradition agreement. However, the European Convention on Extradition[33] was still in place. And while this Convention in Art. 28 (3) allows deviation from its provisions in certain cases, contracting parties are obliged to provide notifications about it. The Czech Republic has made such a declaration on the applicability of the legislation implementing the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure. However, Croatia has not made an analogous statement, thus even in the absence of a Croatia–Russia extradition agreement, the norms of the European Convention on Extradition are still applicable to the case.

Conclusion

It has been pointed out that recent practice of the Court of Justice on extradition cases is marking the emergence of an EU extradition law[34]. However, this practice implies different applications of the established test even to comparable cases. For the moment, it seems that the Court is trying to protect EU citizens from extradition to third states, but some states enjoy more trust from the EU side than others. This reasoning is not based on the existence of extradition agreements between the EU and a third state, since the CJ still opines on the superiority of EU law. And while the interests of the EU Member States are protected in all cases, third states and even EU citizens themselves are left in a situation of uncertainty.

32 M. Böse, *op. cit*., p. 1790.

33 European Convention on Extradition, signed in Paris on 13 December 1957.

34 M.J. Costa, The emerging EU extradition law: Petruhhin and beyond, "New Journal of European Criminal Law" 2017, vol. 8, no. 2, p. 213.

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