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R.O. V Minister for Justice and Equality: Brexit Means Nothing Has Changed... Yet

Abstract

This case note analyses the judgment delivered by the ECJ in *R.O. v Minister for Justice and Equality* (C-327/18), which examines the possibility of executing European arrest warrants (EAW) issued by the UK after giving notice of its withdrawal according to art. 50 TEU. In this case, the Court prioritises the functioning of the EAW despite the uncertainty surrounding the fundamental rights and legal framework governing the relationship of this country with the EU after Brexit. This judgement is interesting as it clarifies issues such as whether mutual trust continues to apply to a Member State after the triggering of art. 50 TEU or the implications of the loss of access to the ECJ for current EAWs. However, it also leaves questions unanswered, such as what happens if the UK unilaterally modifies the rights assisting those surrendered prior to Brexit or what happens to EAWs which have not been executed before Brexit.

Introduction

On 19 September 2018, the European Court of Justice delivered its first judgment on Brexit.¹ This ruling is the first of many others to come, including a very similar request for a preliminary judgment launched by the Irish Supreme Court on 16 March 2018.² In both cases, the Courts ask whether EU Member States are obliged to execute European arrest warrants (hereinafter “EAW”) issued by the UK after this country has notified the Council of its intention to withdraw from the EU according to art. 50 TEU.

In this case, the main issues raised by the referring court, the High Court of Ireland, concern the tensions between the need to protect the fundamental rights of those surrendered prior to Brexit who are likely to serve prison sentences beyond this date and how the principle of mutual trust that underpins all mutual recognition measures in the AFSJ applies to these cases. After the ECJ’s rulings in *N.S. and M.E. and others* that applies to other asylum and immigration cases³ and *Aranyosi and Căldăraru* concerning EU criminal law measures,⁴ it is clear that mutual trust is not equivalent to ‘blind trust’ and that the existence of a significant risk for the protection of fundamental rights in a Member State, under exceptional circumstances, can reverse the presumption of mutual trust.⁵

¹ *R.O. v Minister for Justice and Equality* (C-327/18) ECLI:EU:C:2018:733; [2018].

² *K.N. v Minister for Justice and Equality* (C-191/18) Order of the Court ECLI:EU:C:2018:38; [2018].

³ *Joined Cases N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (C-411/10 and C-493/10) ECLI:EU:C:2011:865; [2011].

⁴ *Joined cases Aranyosi and Căldăraru* (C-404/15 and C-659/15) ECLI:EU:C:2016:198; [2016].

⁵ On the nature of mutual trust and its analysis in *Aranyosi and Căldăraru*: G. Anagnostaras, “Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldaru” (2016) 53 C.M.L.R 1675; S. 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.

In *R.O. v Minister of Justice and Equality*, the Court had to decide whether the announced withdrawal of the UK is enough to question the existence of mutual trust insofar as those surrendered to the UK will serve their sentences after Brexit despite the uncertainty surrounding the legal framework governing their rights. The answer of the Court and the AG to this concerns is rather clear: “mere notification by a Member State of its intention to withdraw from the European Union [...] does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of the law that will be applicable”.⁶

The goal of this short article is to analyse the impact of this decision on the operability of the EAW and on the relationship between the EU and the UK before Brexit day, during the transitional period, and even afterwards. For this purpose, the first section will summarise the facts of the case while sections two and three will examine the Advocate General and the Court’s decisions. The last section will critically analyse the different points raised by the Court and the Advocate General as they are virtually the same, their impact, and their applicability to similar situations in the process coming up to Brexit day.

Facts of the case

The UK issued two European arrest warrants against Mr R.O. for the purpose of conducting prosecutions for the charges of murder, arson, and rape on 27 January and 16 May 2016. Mr R.O. was then arrested in the Republic of Ireland on 3 February 2016, and he was put in pre-trial detention in Ireland while awaiting for the Court’s decision. Due to his ill health, his case could not be heard in Ireland until 27 July 2017.

During his hearing, Mr R.O. objected to his surrender to the UK due to the withdrawal of the UK from the EU after the triggering of art. 50 TEU.⁷ He also alleged that his rights under art. 3 ECHR (art. 4 of the Charter) would be violated if the Court authorised his surrender to Northern Ireland and imprisoned in Maghaberry Prison due to the detention conditions in this centre. The Irish High Court initially considered that there were reports and information that gave rise to concerns about possible art. 3 ECHR violations, and requested additional information from the UK about the prison conditions that would apply to R.O. if surrendered to Northern Ireland.⁸ On 16 April 2018, the issuing Court sent additional information explaining how the Northern Irish authorities would minimise the risk of R.O. being subjected to inhuman or degrading treatment, and the Irish High Court ruled against Mr R.O.

⁶ See *R.O. v Minister for Justice and Equality* (C-327/18), Reference for a preliminary ruling from the High Court (Ireland) [2018], para 63.

⁷ *Minister for Justice and Equality v R.O* [2017] High Court of Ireland 663, para. 15.

⁸ *Ibid*, paras 53-61.

accepting these guarantees.⁹ At this point, the only issue that the Court had to examine in order to rule on the surrender of Mr R.O. was whether the activation of art. 50 TEU and the withdrawal of the UK from the EU while the defendant is in prison has an impact on the execution of the EAW.

This so-called “Brexit point” can be divided in different issues that would be affected by the UK’s withdrawal. First of all, Mr R.O. was concerned about whether the time served in pre-trial detention in Ireland would be deducted from his total sentence in the UK once art. 26 of the Framework Decision on the European arrest warrant and the surrender procedures between Member States (hereinafter “FD on the EAW”) no longer applies to the UK.¹⁰ He also questioned the applicability of the rule of speciality protected under art. 27 FD on the EAW according to which a person surrendered may not be prosecuted, sentenced, or otherwise deprived of his or her liberty other than that for which the person was surrendered.¹¹ Additionally, he raised the issue of the uncertainty surrounding the rules that would govern possible extradition requests from third states once the UK is no longer part of the EU and the human rights protections applicable after Brexit once the Charter of Fundamental Rights and the rights associated to the FD on the EAW are repealed.¹²

Having heard the concerns raised by Mr R.O., the Irish High Court decided to refer, by Order of 17 May 2018, three questions to the ECJ for a preliminary ruling.¹³ Essentially, these questions concerned whether, in light of the uncertainty surrounding the future relationship between the UK and the EU in matters concerning EU criminal law, a Member State is required to reject the surrender of a person wanted by the UK. Furthermore, the Court asked for clarifications as to whether this should be the practice in all EAW issued by the UK, in some of them, or in none. The High Court of Ireland also asked what should be the criteria applied to decide whether the execution of an EAW is prohibited or should be postponed to await for further clarity about the legal regime applicable after Brexit.¹⁴

⁹ Ibid, para 63.

¹⁰ *R.O. v Minister for Justice and Equality* (n 1), para. 24.

¹¹ Ibid.

¹² Ibid.

¹³ *R.O. v Minister for Justice and Equality* (C-327/18), Reference for a preliminary ruling from the High Court (Ireland) (n 6).

¹⁴ The questions asked by the Irish High Court are: ‘Is a requested Member State required by European Union Law to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be required under the national law of the Member State,

(i) In all cases? (ii) In some cases, having regard to the particular circumstances of the case? (iii) In no cases?

If the answer to Question 1 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether surrender is prohibited?

In the context of Question 2 is the court of the requested Member State required to postpone the final decision on the execution of the European arrest warrant to await greater clarity about the relevant legal regime which is to be put in place after the withdrawal of the relevant requesting Member State from the Union

(i) in all cases? (ii) In some cases, having regard to the particular circumstances of the case? (iii) In no cases?

Virtually identical questions were referred by the Irish Supreme Court concerning the execution of another EAW on 12 March 2018,¹⁵ but this one has not been heard by the Court as it is being processed via the ordinary procedure because Mr K.N. is not being held in custody pending the decision of the ECJ.¹⁶

What does Brexit mean? The Advocate General's Point of View

In a rather rhetorical Opinion, Advocate General Spuznar starts by acknowledging that we know next to nothing about the future relationship of the UK and the EU, but that such uncertainty should not interfere with the execution of EAWs.¹⁷ As a consequence, he notes that EAWs issued by the UK should be executed in the same manner as before this country began the withdrawal process of art. 50 TEU.¹⁸

In order to answer the questions referred by the Irish Court, AG Spuznar divides his Opinion in four issues that he goes on addressing. He starts his analysis by reminding that the EAW and the principle of mutual recognition that underpins it are based on the principle of mutual trust between Member States.¹⁹ But AG Spuznar also acknowledges that mutual trust cannot be equated to 'blind trust', and examines the two-stage test set by the ECJ in the joined cases of *Aranyosi and Căldăraru* to assess the existence of a substantial risk to the rights protected by art. 4 of the Charter. After examining the basics of this test, AG Spuznar comes to the conclusion that this case does not fulfil the requirements of the first stage of the test as there is no systematic or generalised failure in the detention conditions of the issuing state that put the rights of Mr R.O. at risk.²⁰

Then, AG Spuznar goes on to examine the implications of the notification given by the UK pursuant to art. 50 TEU and concludes that it would be arbitrary for the ECJ to treat this situation any different from that of an EAW issued before the UK notified the Council of the activation of art. 50. AG Spuznar considers that a unilateral suspension of the execution of EAWs due to the triggering of art. 50 would run counter to the text of the Framework Decision which only authorises this solution when there is a

If the answer to Question 3 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether it is required to postpone the final decision on the execution of the European arrest warrant?'

¹⁵ *K.N. v Minister for Justice and Equality* (C-191/18), Reference for a preliminary ruling from the Supreme Court (Ireland) [2018] OJ C 190/9.

¹⁶ *K.N. v Minister for Justice and Equality* (n 2).

¹⁷ *R.O. v Minister for Justice and Equality* (C-327/18), Opinion of Advocate General Spuznar ECLI:EU:C:2018:644;; [2018] paras 1-2.

¹⁸ *Ibid*, para. 2.

¹⁹ *Ibid*, paras 38-42.

²⁰ *Ibid*, para. 44.

“in the event of a serious and persistent breach by one of the Member States of the principles set out in Art. 6(1) TEU [now art. 2 TEU], determined by the Council pursuant to Article 7(1) TEU”.²¹

Thirdly, he analyses the consequences of the non-applicability of certain rules derived from the FD on the EAW after Brexit. These issues concern the rule of speciality, the entitlement to credit from the time already served in pre-trial detention in Ireland, the prohibition of surrender to a third state, compliance with fundamental rights protections, and access to the ECJ after Brexit.²² With regard, to the loss of privileges emanating from the FD on the EAW (rule of speciality, prohibition of surrender to a third state, and credit for time already served), AG Spuznar claims that “Brexit means Brexit”, and that the rights and privileges stemming from EU law can no longer be invoked after the Member State withdraws from the EU.²³ He does not consider this situation to question mutual trust or the automaticity of the surrender mechanism that largely relies on the existence of equivalent protections.

As to the protection of fundamental rights, AG Spuznar states that there is no basis to question the continuing commitment of the UK to fundamental rights or the rule of law because the UK will remain bound by the ECHR after withdrawal. In that regard, the AG introduces a new test applicable to Brexit situations, according to which the executing authorities will have to surrender the individuals if the requesting Member State is expected to abide by the same substantive rules that apply at the time of surrender, namely the international treaties and conventions protecting fundamental rights.²⁴ AG Spuznar here fails to explain how this expectation is going to be measured or what is the evidence needed to question it.

The last issue examined in this Opinion is the issue of the end of the jurisdiction of the ECJ after Brexit. He considers that the loss of access to the ECJ does not significantly imperils the protection of fundamental rights or the rule of law.²⁵ In his analysis, he notes that before the entry into force of the Treaty of Lisbon, issues relating to third pillar measures did not have access to the Court, and this did not challenge the compromise of the EU or the individual Member States with fundamental rights and the rule of law.²⁶ Although this is a valid point, AG Spuznar fails to acknowledge that access to the Court was one of the measures demanded in order to improve the fundamental rights concerns that arose from the implementation of the EAW in its early years.²⁷

²¹ Ibid, para. 55.

²² Ibid, para. 57.

²³ Ibid, para. 59.

²⁴ Ibid, para. 70.

²⁵ Ibid, para. 75.

²⁶ Ibid.

²⁷ On the extension of the Court’s jurisdiction to third pillar measures: S. Peers, “Finally ‘Fit for Purpose’? The Treaty of Lisbon and the End of the Third Pillar Legal Order” (2008) 27 Yearbook of European Law 47.

AG Spuznar concludes that, while the future relationship of the UK with the EU is “*terra incognita*” judicial cooperation with the UK has to be treated as “business as usual”.²⁸ Despite this apparently contradictory statement, the AG sees no reason why the assessment carried out when executing EAWs issued by a Member State that has started a withdrawal process should be any different to that carried out in any other case.²⁹

Effectiveness and Mutual Trust Prevail: The Opinion of the Court

The ECJ reproduces, to a large extent, the arguments put forward by AG Spuznar. The Court starts its analysis by acknowledging the importance of mutual trust and its impact on the execution of EAWs within the AFSJ. More particularly, the ECJ refers to *L.M. v Minister for Justice and Equality*, which dealt with the deficiencies in the Polish System of Justice and their impact on mutual trust and the execution of EAWs issued by Poland in order to highlight the exceptionality of the non-execution of EAWs due to fundamental rights concerns.³⁰

Following the AG’s structure, but going a step forward, the Court examines two possibilities to refuse the execution of an EAW. In the first place, the ECJ examines the possibility of a generalised disapplication of the FD on the EAW with respect to the UK. In this case, the ECJ following AG Spuznar’s Opinion rules that this solution would run counter to the literal meaning of the Framework Decision.³¹ In other words, the ECJ considers that accepting a unilateral suspension of executions of EAWs issued by the UK would violate recital 10 of the FD on the EAW, which establishes the conditions for a general suspension in the execution of EAWs.³² To this regard, the Court refers to *L.M. v Minister for Justice and Equality*, in which the Court reminds that a general suspension of the surrender mechanism of the EAW requires that the European Council decides that there is a breach of the principles set out in art. 2 TEU according to the procedure in art. 7(1) TEU.³³ Without such decision, the activation of art. 50 cannot be considered sufficient grounds to unilaterally suspend the execution of EAWs issued by the UK.³⁴

The alternative to a general suspension of the surrender mechanism consists in acknowledging that, under exceptional circumstances, “limitations may be placed on the principles of mutual recognition and mutual trust between Member States”.³⁵ To illustrate this exceptionality, the Court refers, as the AG also does, to the joined cases of *Aranyosi and Căldăraru* in which the Court introduced a two step

²⁸ Ibid, para. 79.

²⁹ Ibid, para. 87.

³⁰ *R.O. v Minister for Justice and Equality* (n 1), para. 35.

³¹ Ibid, para 47; Case C-327/18 *RO v Minister for Justice and Equality*, Opinion of Advocate General Spuznar (n 17), para 55.

³² Ibid.

³³ *L.M. v Minister of Justice and Equality* (C-216/18) ECLI:EU:C:2018:578; [2018], para 71.

³⁴ *R.O. v Minister for Justice and Equality* (n 1), paras 47-48.

³⁵ Ibid, para 39.

test to determine whether there was a substantial risk of a violation of art. 4 rights.³⁶ The Court also refers to *L.M. v Minister for Justice and Equality*, which extended the doctrine of *Aranyosi and Căldăraru* to potential breaches of art. 47 of the Charter.³⁷ This judgment applied a similar two-stage test, but considered that the first leg of this test, which aims at assessing the existence of general or systematic deficiencies in the protections provided in the issuing Member States, is satisfied with the reasoned proposal addressed by the Commission to the Council on the basis of art. 7 TEU and the concerns expressed by a number of international and European organisations.³⁸ Thus, the second step would require that the executing Court assesses whether there is a real risk that the individual sought for surrender will suffer an art. 47 violation due to the generalised fundamental rights deficiencies in the issuing state.³⁹

But when applying this standard to *R.O. v Minister of Justice and Equality*, the Court considers that the withdrawal of the UK from the EU is not sufficient grounds to justify a generalised and systematic risk for the protection of fundamental rights.⁴⁰ The basis for this assessment is that the UK remains party to the ECHR which is independent from membership to the EU. In this area, the Court forgets that withdrawal from the EU makes it easier for the UK to unilaterally withdraw from the Convention fulfilling a long-term promise of the Conservative party.⁴¹ The ECJ considers that this risk does not exist and that, since the UK is party to the ECHR and has incorporated it into UK law via the Human Rights Act 1998, the risk of modifying the fundamental rights protections applicable is minimal.

With regard to the other questions, the Court adopts a different approach to the AG and considers examining possible violations of the rule of speciality and its protection under art. 27 of the FD on the EAW unnecessary as there is “no evidence to suggest that legal proceedings on that subject are contemplated”.⁴² The Court applies a similar standard with regard to the prohibition of surrender to a third state under art. 28 FD on the EAW, and it rules that the fact that both provisions have been incorporated into national law via the Extradition Act 2003 is a guarantee of future compliance.⁴³ The ECJ also relies on the incorporation into national law of the obligation to deduct time already served in another Member State to deem this concern is unsubstantiated.⁴⁴ The Court regards this as a guarantee

³⁶ *Joined cases Aranyosi and Căldăraru* (n 4), para 82.

³⁷ *L.M. v Minister for Justice and Equality* (n 33), para 44.

³⁸ *Ibid*, paras 61 and 69.

³⁹ *Ibid*, para. 60.

⁴⁰ *R.O. v Minister for Justice and Equality* (n 30), paras 51-52.

⁴¹ On the relationship between the EU and the ECHR and the future of the former after Brexit: T. Lock, “Human Rights Law in the UK after Brexit” (2017) 1 Public Law 117; A. Williams, “The European Convention on Human Rights, the EU and the UK: Confronting a Heresy” (2013) 24 The European Journal of International Law 1157.

⁴² *R.O. v Minister for Justice and Equality* (n 30), para. 55.

⁴³ *Ibid*, para. 57.

⁴⁴ *Ibid*, para. 58.

despite the possibility of repealing national legislation implementing EU law following the adoption of the European Union Withdrawal Act 2018. This issue is given no consideration in either the AG's Opinion or the judgment.

The last issue that the Court addresses is the loss of access to the ECJ. In this case, the Court reproduces the arguments posed by the AG when arguing that recourse to the ECJ was not possible before the Lisbon treaty and that the courts of the Member States were still interpreting and applying the Framework Decision.⁴⁵ Additionally, the Court notes that, despite Brexit, individuals surrendered to the UK will be able to rely on the rights conferred by the FD on the EAW and the ECHR before a national Court.⁴⁶ The reasoning of the Court presumes, again, that UK is not going to unilaterally repeal or modify these compromises after Brexit.

All in all, the Court is not satisfied that the notification of withdrawal under art. 50 is sufficient grounds for the non-execution of an EAW.⁴⁷ To this regard, the standard set by the Court to postpone or decline the surrender of an individual is the existence of "substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter and the Framework Decision following the withdrawal from the European Union".⁴⁸ The Court deems the incorporation of most EU and ECHR safeguards into UK law as enough evidence to discount this risk and to determine that EAWs should continue being executed until, at least, Brexit day.⁴⁹

Commentary

Does Brexit means business as usual?

Overall, the approach of the Court favours the effectiveness of the EAW by allowing the continuing operation of one of the flagship measures of the AFSJ. The ECJ describes Brexit an uncertain process that will put an end to the participation of this country in EU criminal law and policing measures while future arrangements between the two parties are, at the moment, uncertain. Nevertheless, it does not consider that this uncertainty impairs the execution of EAWs insofar as most of the current fundamental rights protections apply.

When deciding the consequences of this uncertainty, the ECJ refers to the implementation of the ECHR and the FD on the EAW into British law via the Human Rights Act 1998 and the Extradition Act 2003 respectively. But, implicitly, it seems to be thinking of the European Union Withdrawal Act 2018, which

⁴⁵ Ibid, para 60.

⁴⁶ Ibid.

⁴⁷ Ibid, para. 61.

⁴⁸ Ibid, para. 62.

⁴⁹ Ibid, para. 61.

ensures the incorporation of all EU legislation into UK law.⁵⁰ The goal of this piece of legislation is to incorporate all EU law into UK law before Brexit day in order to avoid any uncertainty, giving time to the national legislator to modify or repeal retained EU legislation.⁵¹ So far, the UK has not started the process of repealing EU law (other than the Charter) and has not even clearly stated the EU legislation that will be kept and repealed.

In the so-called “Chequers speech”, the Prime Minister stated that the UK will aim at keeping the EU as aligned as possible with EU legislation to facilitate future agreements and cooperation in the area of free movement of goods and services and customs.⁵² Similar compromises can be found in the Government’s White Paper on the Future Relationship between the UK and the EU, also known as “Chequers Agreement”, in which the UK Government reiterates its compromise with the ECHR after Brexit and its willingness to maintain high fundamental rights’ standards post-Brexit.⁵³ Arguably, future changes to the functioning of the EAW and fundamental rights’ safeguards will depend upon the bilateral negotiations with the EU. And any eventual change to this regard should modify the assessment of the Court as it will no longer be able to rely on mutual trust once the UK modifies the legal framework applicable. Such changes, if announced soon, should impact on the Court’s case-law when ruling in as *K.N. v Minister for Justice and Equality*.

What Fundamental Rights Standards?

Besides the so-called “Brexit Point”, this judgment is very interesting insofar as it summarises the different tests available to reverse the presumption of mutual trust that underpins mutual recognition in the field of EU criminal law. In the first place, both AG Spuznar and the Court talk about the possibility of a unilateral suspension of the operation of the EAW according recital 10 of the FD on the EAW, which is the only provision that authorises a full suspension of the FD on the EAW.

⁵⁰ On the European Union Withdrawal Act 2018: C. Pigott, “Making a new UK: Legislating for Brexit; a brief overview of the EU Withdrawal Act” (2018) 168 *New Law Journal* 16.

⁵¹ On the Brexit process in the UK: P. Craig, “The Process: Brexit and the Anatomy of Article 50” in Federico Fabbrini (ed.), *The Law & Politics of Brexit* (OUP 2017).

⁵² See Statement from HM Government delivered on 6 July 2018 at Chequers. Available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF

⁵³ HM Government, *White Paper on the Future Relationship between the United Kingdom and the European Union* (July 2018), para 2.3.19. Available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf. A critical analysis of this document can be found in: E. Baker, “Criminal Justice and the “New, Deep and Special Partnership” between the EU and the UK: A Critical Test for the Area of Freedom, Security and Justice?” (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice* 1.

Conversely, the Court accepts the suspension or postponement of the execution of EAWs in cases in which there is a situation of general and systematic deficiencies in the system of protection of fundamental rights (first stage of the test) and the rights of the person sought will be at risk as a consequence of such deficiencies (second stage of the test).⁵⁴ This test was set by the Court in *Aranyosi and Căldăraru* and recovered in *L.M. v Minister of Justice and Equality* with regard to the issue of the deficiencies in the Polish judicial system and their impact on the right to a fair trial and, then, re-applied to this case when assessing the protection of fundamental rights after Brexit. What these judgments clarify is that this two-stage test and the possibility of non-execution of an EAW extends to non-absolute rights, such as the right to a fair trial, which solves some of the doubts generated with *Aranyosi and Căldăraru* in which the Court only talked about absolute rights.⁵⁵ In other words, this judgment implies that, when the rights of the accused are at risk, then this two-stage test needs to be carried out regardless of the nature of such rights.

Nonetheless, what this ruling does not clarify is the consequence of this test if the Court has sufficient evidence that the individual will be at risk of suffering a fundamental rights' violation. This controversy stems from the lack of clarity as to whether this is only a ground for postponement or a ground for non-execution.⁵⁶ *Aranyosi and Căldăraru* seem to provide a ground for postponement rather than an absolute ground for refusal that will only bring the proceedings to an end if the "risk cannot be discounted within a reasonable time".⁵⁷ This means that if the executing authority receives sufficient evidence from the issuing Member State as to the protection of the defendant's rights, then the execution of the EAW can be "re-started".⁵⁸ The main problem with this mechanism, besides the problems that it generates with regards to legal certainty or the lack of clarity as to what "reasonable time" means, is that the reverse situation is not possible in the case of Brexit. In other words, the fact that the Court is satisfied with the UK keeping its fundamental rights protections until Brexit and some public declarations as to the Government's compromise with EU fundamental rights does not include any mechanism whereby the EAW can be overturned if the UK decides to modify its protections unilaterally. This danger is even greater in the event of a no-deal scenario, in which the UK has less incentives to stay closely aligned with the EU in human rights matters.

⁵⁴ Joined Cases *Căldăraru and Aranyosi* (n 36), paras 89-92.

⁵⁵ On the consequences of *Căldăraru and Aranyosi*: 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* 194, 219.

⁵⁶ *Ibid.*

⁵⁷ Joined Cases *Căldăraru and Aranyosi* (n 36), para 104.

⁵⁸ Szilárd Gáspár-Szilágyi (n 55).

Did The Court Have Any Alternatives?

But besides these two options, the Court had a third alternative which was never explored that refers to the possibility of requesting assurances as a pre-condition for surrender. The issuing of assurances is a common practice in extradition proceedings and even in the functioning of the EAW as numerous Member States, including the UK, request them in their day-to-day practice.⁵⁹ The goal of these guarantees is to ensure that the person surrendered will not be subject to conditions that will breach his or her human rights. These assurances can be used, for instance, in order to guarantee that the person surrendered will not be put in a prison that suffers from chronic overcrowding amounting to an art. 4 violation.⁶⁰ The referring Court together with France and Germany considered, in *Aranyosi and Căldăraru*, that the request of additional guarantees regarding the prison conditions could be a solution to ensure the protection of the rights of the accused.⁶¹ Indeed, in this case, the ECJ ruled that the provision of assurances by the Member State is essential in order to discount the risk of a possible fundamental rights' violation during the second leg of the test.⁶²

Arguably, the case of the withdrawal of the UK from the EU creates enough uncertainties about the future legal framework governing these surrenders so as to justify the request of assurances before granting a leave to all EAWs. But the Court overly relied on the fact that the UK has transposed all EU legislation into UK law, despite this offering no guarantees about the future protection of fundamental rights. The goal of this incorporation of EU law is to avoid the uncertainty that would be created by a blanket repeal of EU legislation on Brexit day, but the long-term aim is still to repeal some of these laws and replace them with UK legislation.⁶³ This has already happened with the Charter of Fundamental Rights, which the European Union Withdrawal Act 2018 repealed despite the efforts of some MPs.⁶⁴ It is obvious that this is evidence that the withdrawal of the UK from the EU is not just a hypothesis or even a future event with uncertain consequences, but rather a future event with consequences that are already taking shape in the form of domestic legislation. Requesting, at least, assurances regarding the

⁵⁹ On the issue of assurances in the EAW and extradition law: A. Izumo, "Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence" (2010) 43 Columbia Human Rights Law Review 233; M. Jones, "Lies, damned lies and diplomatic assurances: The misuse of diplomatic assurances in removal proceedings" (2006) 8 European Journal of Migration and Law 9.

⁶⁰ The use of assurances is common practice in the UK and it has been used in EAW cases to guarantee that the person surrender will not suffer the consequences of deficient prison conditions in, for instance, *Elashmawy v Italy* [2015] EWHC 28 (Admin). The criteria to assess these guarantees were set by the ECtHR in *Othman (Abu Qatada) v United Kingdom* [2012] 55 EHRR 1, 189.

⁶¹ *Pál Aranyosi (C-404/15)*, Request for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen (Germany) lodged on 24 July 2015 [2015] OJ C 320/18.

⁶² *Joined cases Căldăraru and Aranyosi* (n 36), para. 45.

⁶³ See C. Pigott (n 50).

⁶⁴ European Union Withdrawal Act 2018, S 5(4).

laws and protections afforded to those surrendered after the UK has given notice of its intention to abandon the EU seems a minor inconvenience in order to guarantee the correct functioning of the EAW.

The other key issue is mutual trust and whether this principle should continue to apply in relation with a Member State which is soon not going to be bound by EU law. The Court has repeatedly argued that this principle implies a presumption according to which Member States must be considered in compliance with EU law and fundamental rights unless exceptional circumstances apply.⁶⁵ Although the UK remains part of the EU until 29 March 2019, it can hardly be argued that a compromise with EU rules and values characterises the present and future of the UK's relationship with the EU. More precisely, the non-incorporation of the Charter into UK law with the European Union Withdrawal Act 2018 is, at least, a sign that should be taken into account when analysing whether this mutual trust in the shared values and fundamental rights still applies to the UK. As Peers claims, "the rantings of an angry backbencher should not be enough evidence"⁶⁶ but specific actions, such as the withdrawal from the EU, the repeal of EU fundamental rights protections, and the reiterated promises of repealing the Human Rights Act 1998 should, at least, serve to question the existence of mutual trust with regards to the UK.⁶⁷

Conclusion

With this judgment, the Court has avoided or, at least, delayed the chaos that a full halt in the execution of EAWs prior to Brexit day would create. The message seems clear; unless the UK starts unilaterally modifies its obligations before Brexit, EAWs will be executed as if nothing had happened.

The Court also addressed the issue of fundamental rights and the compromise of the UK with the rule of law. In this sense, the ECJ did not consider the repeal of the Charter as significant as the focus has been put on the compromise of the UK with human rights as a party to the ECHR. From a different point of view, this assumption is not at all unfounded insofar as the UK has opt-outs that cover several directives that develop ECHR rights and add protections, such as Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings or Directive

⁶⁵ *L.M. v Minister for Justice and Equality* (n 33), para 35; *R.O. v Minister for Justice and Equality* (n 30), para 34; *Slowakische Republik (Slovak Republic) v Achmea BV* (C-284/16) ECLI:EU:C:2018:158; [2018], para 34.

⁶⁶ S. Peers, *Brexit means... No legal changes yet: the CJEU on the execution of European arrest warrants issued by the UK prior to Brexit Day* (EU Law Analysis Blog 19 September 2018). Available online at <http://eulawanalysis.blogspot.com/2018/09/brexit-meansno-legal-changes-yet-cjeu.html> Accessed on 1 October 2018.

⁶⁷ Conservative Party, *The Conservative and Unionist Manifesto* (2017), p 37: 'We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes'

2016/343/EU on the strengthening of certain aspects of the presumption of innocence.⁶⁸ In other words, most of the fundamental rights protections that apply to those surrendered under the EAW derive from the ECHR due to the exceptional position of the UK in European criminal law where it enjoys a blank opt-out and selective opt-ins.⁶⁹

Nevertheless, this judgment does not solve other questions. For instance, it does not address whether the UK would be able to keep this opt-outs if concluding a bilateral justice and police cooperation agreement, or if it will be required to comply with the full body of defence rights protections in order to secure a cooperation agreement with the EU. This would put the UK in a paradoxical situation, as Mitsilegas describes it, in which it will be forced to accept more EU law as an outsider than as an EU Member State.⁷⁰ Other unanswered questions concern what will happen to all the EAWs issued before Brexit on or after Brexit day, how will the principle of mutual trust be assessed during the transitional period, or what is the announcement that needs to be made in order to consider that there is a systematic and generalised risk for the rights of those surrendered to the UK.

The Court may solve some of these questions in *K.M. v Minister of Justice and Equality*, which is pending in front of the Court and will not be dealt with via the urgent procedure.⁷¹ If this case reaches the Court at all, it is very likely to do so after Brexit, and might provide interesting answers to all these questions. That is, if the Court considers that it still has jurisdiction over these disputes after Brexit or during the transitional period, or if the UK and the EU decide that this will be the case via the agreement governing the transitional period or any other ad hoc agreement.

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⁶⁹ On the issue of the UK's position in the AFSJ generally and, more specifically, in the field of EU criminal law see: V. Mitsilegas, "The uneasy relationship between the UK and European criminal law; from opt-outs to Brexit?" (2016) 8 Criminal Law Review 519.

⁷⁰ Ibid.

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