Scientia Moralitas International Journal of Multidisciplinary Research
ISSN 2472-5331 (Print) | ISSN 2472-5358 (Online) | Vol. 8, No. 1, 2023
DOI: 10.5281/zenodo.8127751

Interference and Effects of European Court of Human Rights Judgments in Extradition Proceedings between Romania and the United States of America

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ABSTRACT: Each state decides on the modalities and conditions under which it grants extradition, even if the general rules are laid down in bilateral Conventions and/or Treaties. In Europe, particularly within the Member States of the European Union, extradition has been replaced by the institution of the European Arrest Warrant as a simplified form of extradition. What is characteristic in this geographical area is respect for and application of the European Convention on Human Rights and Fundamental Freedoms, just as in the United States of America, a country with a long democratic tradition, human rights are protected and guaranteed by the Constitution, in particular the Bill of Rights. The judgments of the European Court of Human Rights are mandatory for these states, which are under an obligation to put an end to the violation found and to make reparation for the consequences of the violation, not

only in terms of paying the amount ordered by compensation, but also in terms of taking measures in their legal system, including legislative amendments, to put an end to the violation and make reparation for all the effects of the violation.
KEYWORDS: international judicial cooperation, extradition, duration of arrest in extradition proceedings, respect for the rights of the extraditable person, European Convention on Human Rights and Fundamental Freedoms, provisional measure, risk of impunity, judicial practice

Introduction

Extradition is one of the oldest forms of cooperation that has undergone profound changes over time. Legal practitioners have revealed the need to simplify it, given the rigid concepts of national sovereignty specific to any system of law (Jegouzo apud Cartier 2005, 33), as it is an institution specific to international law rather than domestic law, although it is regulated in both branches. From the perspective of international law, the institution of extradition is "an attribute of the sovereignty of the state which grants it" (Bešteliu 1999, 156), in the sense that each state decides on the terms and conditions under which it grants extradition, even if the general rules are laid down in bilateral Conventions and/or Treaties, and for this reason it was desired to remove it from the political decision and make it, as far as possible, a judicial decision.

In Europe, and particularly in the Member States of the European Union, extradition has been replaced by the institution of the European Arrest Warrant as a simplified form of extradition. What is characteristic in this geographical area is respect for and application of the European Convention on Human Rights and Fundamental Freedoms, just as in the United States of America, a country with a long democratic tradition, human rights are protected and guaranteed by the Constitution, in particular the Bill of Rights. Both the United States and the Member States provide in their legal systems guarantees of the need to respect and guarantee human rights and the rule of law, the right of the extradited person to a fair trial, including the right to be tried by an impartial court established by law, as generic rights.

The subject of this study is the atypical situation in which the extraditable person, a European or third country national, opposes the extradition requested by the United States of America and applies to the

European Court of Human Rights, given that this state is not a contracting party and the judgment delivered by the European Court is not enforceable against it, but only against the requested state.

Brief considerations on the effects of judgments of the European Court of Human Rights

Judgments delivered by the European Court of Human Rights are binding on all Contracting States which have accepted its jurisdiction and, moreover, an important feature of the European Convention on Human Rights and Fundamental Freedoms is that it provides a mechanism for reviewing the manner in which its provisions are applied, according to Article 46 par. 1. This mechanism is dealt with by the Council of Ministers, and the following paragraphs set out the procedural modalities by which it "assesses the measures taken by a state to fulfil its obligation" (Council of Europe 2021).

This means that the Contracting State against which the ECHR has found a violation of a right or freedom is under an obligation not only to put an end to the violation found, but also to make reparation for the consequences of the violation, not only in the sense of paying the amount ordered by way of reparation, but also in the sense of taking measures in its legal system, e.g. legislative amendments, to put an end to the violation and to make reparation for all the effects of the violation (*Case of Ilgar Mammadov v. Azerbaijan* - CTM, 2019, para. 147).

Consequently, even persons requested in extradition proceedings, if they consider that their rights or freedoms guaranteed by the European Convention on Human Rights and Fundamental Freedoms have been violated, may lodge a complaint with the European Court against the requested state, which orders the extradition, and is obliged to take all necessary measures to put an end to the violation.

The factual and procedural background to extradition requested by the United States of America

The US authorities requested by verbal notes in the course of 2021 the extradition of three persons, one a Romanian citizen and the other two persons having different foreign citizenships, for trial in the United States of America for the following facts:

Count 1: Conspiracy to commit racketeering in violation of Title 18, United States Code, Section 1962(d), which carries a maximum penalty of life imprisonment;

Count 2: Conspiracy to import and export cocaine and to manufacture and distribute cocaine with the intent, and knowing, and having reason to believe that such cocaine will be imported into the United States, in violation of the provisions of Title 18, United States Code, Sections 960(b)(1)(B) and 963, which provide for a maximum penalty of life imprisonment; and

Count 3: Conspiracy to commit money laundering in violation of the provisions of Title 18, United States Code , Sections 1956(a)(2)(A) and 1956(h), which provide for a maximum penalty of 20 years imprisonment.

The Bucharest Court of Appeals, Criminal Division I, decided in separate criminal judgments (Criminal sentence no. 55/F of 5 March 2021, criminal sentence no. 51/F of 1 March 2021, criminal sentence no. 50/F of 1 March 2021, pronounced by the Bucharest Court of Appeal, https://rejust.ro/juris/3g38d232) to grant the extradition request made by the United States Department of Justice and ordered the extradition and surrender to the requesting judicial authorities of the three individuals. The criminal judgments of the Bucharest Court of Appeal became final with the dismissal by the High Court of Cassation and Justice of the appeals lodged by the extraditable persons as unfounded (Criminal Decision No 260 of 25 March 2021 of the High Court of Cassation and Justice, Criminal Division, https://rejust.ro/juris/e9673d75).

The Court found that the provisions of Law No 111/2008 on the ratification of the Extradition Treaty between Romania and the United States of America, signed in Bucharest on 10 September 2007, are applicable to the case, and that, according to Article 5 of Law No 302/2004 on international judicial cooperation in criminal matters, republished (the Framework Law), the provisions contained in that legal act constitute common law for the Romanian judicial authorities. Also, according to Article 4, the Framework Law supplements international legal instruments to which Romania is a party in situations not covered by them.

In essence, the court noted that the requested persons and others known and unknown to the Grand Jury, were members and associates of the H.A. club or Motorcycle Club or "HAMC" a transnational outlaw motorcycle gang whose members and associates engage in criminal activity, including drug trafficking, money laundering, illegal arms trafficking, and acts of violence, including murder. During the same period, members of the organization operated throughout the United States, including the Eastern District of State X as well as in other countries.

For the purpose of perpetuating the conspiracy, as a party to and in furtherance of its purpose, the defendants and others committed various specific acts in the Eastern District of State X and elsewhere, including but not limited to: repeatedly purchasing large quantities of drugs (hundreds of kilograms. of cocaine); the leaders of the City Y branch asked Person 1 (whom they also knew to be using the city as a base of operations) to arrange for the murder of three people, including Victim 1 and Victim 2, both rival drug dealers and members of a rival motorcycle club; they discussed details of the planned murders of Victim 1 by a hit man and their intention to carry out the murder of Victim 2 if she "didn't get the message" after Victim 1 was murdered. During these discussions, they also negotiated the purchase of 10 kilograms of cocaine to be exported for distribution by them and others; discussed the importance and possible methods of laundering the proceeds from the sale of the 400-kilogram shipment of cocaine; discussed various topics including (1) methamphetamine shortages in a particular remote state, (2) the role of H. and rival gangs in the drug trade in that state, (3) H.'s bribery of police officers in that state, and (4) H.'s policy of "shoot or stab on sight" rival gang members who "kill our brothers all over the world." One of the extraditable persons gave a "gift" consisting of approximately 100 grams of cocaine and a pistol with the serial number obliterated to a person with the intent that the items would be mailed to Person 1 of the Y in support of the plot to assassinate Victim 1 and offered to procure additional assault weapons including several AK-47 automatic rifles; provided two "binders" of documents containing identifying information and photographs of Victim 1 and Victim 2 with the intent that this information would be forwarded to Y for use by the hit man who was to locate and kill Victim 1 and Victim 2; a member of the conspiracy conducted three transactions resulting in a deposit totaling $629,182 to a bank account in a bank located in the State of ..., which amount was to be withdrawn to the Y. and of that amount, allocated $10,000 as payment for the planned murder of Victim 1 and the remainder as partial payment for the planned shipment of 400 kilograms of cocaine; negotiated the purchase of weapons, including grenades and an AK-47 automatic rifle, to be delivered to the United States and requested the purchase of handguns to address the "major shortage of handguns" in another state; discussed being able to purchase weapons and tactical equipment from other countries, including the recent purchase of 50 pieces of bulletproof vests for members of the H.. branch; offered to assist in the purchase of armored vehicles for use in the Y.; provided details and prices for AK-47s, M26 grenades, Zastava pistols, Zastava rifles and various armored vehicles, including other activities in support of the criminal activities described.

Thus, the offences for which the extraditable persons are being investigated on the territory of the United States of America, as described above, are punishable by the maximum penalty of life imprisonment (count one of the indictment), imprisonment for 10 years to life imprisonment (count two of the indictment), and imprisonment for up to 20 years (count three of the indictment), respectively.

Among other defenses, the requested persons referred to alleged discriminatory treatment of Club members on the territory of the American State, submitted press articles (concerning the way in which the Club came into being and expanded, and the conflicts with the law which some Club members have had over the years, which have allegedly aroused the opprobrium of society), a society from which, naturally, the members of the Grand Jury which issued the indictment were elected.

It was also argued in their defense that their extradition to the United States of America would expose them to treatment incompatible with Article 3 of the European Convention on Human Rights, according to which "No one shall be subjected to torture or to inhuman or degrading treatment or punishment", since the life sentence to which they could be sentenced is an irreducible punishment, as well as the *Trabelsi v. Belgium Judgment* of 4 September (2014). This case (we summarize the Trabelsi case as carried out by the High Court of Cassation and Justice in its decision rejecting the extraditable person's appeal, as cited above) concerned the extradition, notwithstanding the indication of a provisional measure under Rule 39 of the Rules of Court, of a Tunisian national who was surrendered to the United States, where he was on trial for terrorist offences and was liable to be sentenced to life imprisonment. The applicant complained in particular that his extradition to the United States would expose him to treatment incompatible with Article 3 of the Convention. He argued in this regard that for some of the offences for which extradition had been approved the penalty of life imprisonment with a maximum term applied, which was a de facto irreducible sentence, and that if he were convicted he would never have any hope of release. The Court held that the life sentence to which the applicant was liable in the United States could not be reduced, as US law did not provide an adequate mechanism for the review of such a sentence, which meant that his extradition to the United States constituted a violation of Article 3 of the Convention. In particular, the Court reiterated that the imposition of life imprisonment on an adult offender was not in itself prohibited by any provision of the Convention, provided that the penalty was not disproportionate.

On the other hand, in order to be compatible with Article 3 of the Convention, such a penalty should not be irreducible de jure and de facto. In order to assess this requirement, the Court had to determine whether a person sentenced to life imprisonment could be regarded as having any perspective of release and whether national law offered the possibility of reviewing the life sentence with a view to commutation/reduction/termination of the sentence or conditional release of the sentenced person. In addition, the prisoner had to be informed of the conditions of this possibility of review at the time of sentencing. The Court also reiterated that Article 3 imposed an obligation on Contracting States not to remove a person to a state where there was a real risk that he or she would be subjected to prohibited ill-treatment, but also that the fact that the ill-treatment was inflicted by a state not party to the Convention was irrelevant. In this case, the Court held that, given the seriousness of the terrorist offences for which the applicant was charged and the fact that the sentence could only be imposed after the trial court had taken into account all the relevant mitigating and aggravating circumstances, the discretionary sentence of life imprisonment would not be excessively disproportionate. However, the Court held that the US authorities had given no concrete assurance that the applicant would not be sentenced to the irreducible penalty of life imprisonment. In addition, the Court concluded that the life sentence applicable to the applicant was de facto irreducible (the US authorities having indicated that they were not aware of any terrorist offenders who had been pardoned or whose sentences had been commuted).

The Court also noted that, in addition to the assurances given, although the US legislation provided for various possibilities for reducing life sentences (including by presidential pardon), which offered the applicant some prospect of release, it did not provide for any procedure equivalent to a mechanism for review of such sentences within the meaning of Article 3 of the Convention. In the case under consideration, information was submitted by the American authorities showing that the penalty of life imprisonment that could be imposed on extraditable persons in the event of conviction on counts one and two of the indictment is a "discretionary" penalty in the sense that a less severe penalty may be imposed by ordering a certain number of years' imprisonment, a point which was taken into account by the Romanian courts which decided on their extradition.

The Romanian court also referred to other judgments delivered by the ECHR to the contrary, finding that there are no violations of the European Convention on Human Rights and Fundamental Freedoms in the case of extradition of these persons to the United States: for example, among others, the case of *Harkins v. United Kingdom* (17 January 2012) was invoked - both applicants faced extradition from the United Kingdom to the United States where, they claimed, they risked the death penalty or life imprisonment without the possibility of parole. The US authorities gave assurances that the death penalty would not be applied in their case and that the maximum sentence they faced was life imprisonment. As regards the risk of life imprisonment without possibility of parole, the Court held that there would be no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention if either applicant were extradited to the United States, finding that neither applicant had demonstrated a real risk of treatment reaching the Article 3 threshold as a result of their sentence. In the case of the first applicant, the Court was not persuaded that it would be excessively disproportionate to impose on him the mandatory sentence of life imprisonment in the United States. He was over 18 at the time of the alleged crime, had not been diagnosed with a psychiatric disorder, and the murder was part of an attempted aggravated robbery - an aggravating circumstance. Moreover, he had not yet been convicted and - even if he were convicted and received the mandatory sentence of life imprisonment - his continued detention could still be justified for the rest of his life. Otherwise, the state governor had the possibility of executive clemency (Board of Executive Clemency) and could, in principle, decide to reduce his sentence. The second applicant risked, at most, the discretionary sentence of life imprisonment without the possibility of parole, bearing in mind that this could only be imposed after the trial court had examined all the relevant factors and only if the applicant was convicted of aggravated murder, so the Court concluded that this sentence would not be excessively disproportionate.

The High Court of Cassation and Justice of Romania also noted that the provisions of the Agreement on Extradition signed between the European Union and the United States of America, as well as those of the Treaty between Romania and the United States of America, signed in Bucharest on 10 September 2007 (ratified by Romania by Law No 111 of 15 May 2008, published in the Official Gazette of Romania No 387 of 21 May 2008), were applicable to the case and that, unlike the Trabelsi case, the Court had not found that the applicant had been convicted of a criminal offence, the case of extraditable persons is not the same, as presidential pardons and sentence reductions have been granted on several occasions, and statistics are provided in support of this, including statistics on pardons and sentence reductions granted, as life sentences are also de facto reducible.

The Court found that all the conditions for extradition were met, that neither the mandatory nor the optional grounds for refusing extradition were applicable and ordered, giving reasons and in the light of all the defences put forward by the requested persons, their extradition to the United States of America, noting that the extraditable persons were in provisional detention.

Applications by extraditable persons to the European Court of Human Rights

The three extraditable persons lodged complaints with the European Court of Human Rights on similar grounds (http://hudoc.echr.coe.int/#{%22fulltext%22:[%2220183/21%22]}). In essence, they argued that if they were extradited to the United States of America, they would be liable to life imprisonment, a penalty which is irreducible de jure and de facto, in breach of Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which establishes absolute protection, but also that the system under which such a sentence may be imposed must not contravene the Convention, that the mechanisms for reviewing such a sentence under US federal law do not meet this requirement, and that these principles apply equally to the institution of extradition.

The European Court of Human Rights (2021) asked the Romanian Government the following questions :

"a. If the applicants were extradited to the United States of America ("USA"), would there be a real risk that they would be subjected to inhuman and degrading punishment by the imposition of an "irreducible" life sentence? In this regard, have the national courts or the government considered the sentencing practice in the US for the crimes of which the applicants were accused? Do the applicants risk, under US criminal law, in respect of the relevant charges, the imposition of a maximum sentence of life imprisonment which excludes early release and/or de jure and de facto parole and, if so, would this comply with the requirements of Article 3 of the Convention (Harkins and Edwards v. United Kingdom, no. 9146/07 and 32650/07, 17 January 2012; Vinter and Others v. United Kingdom [GC], no. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts); Trabelsi v. Belgium, no. 140/10, ECHR 2014 (extracts); and López Elorza v. Spain, no. 30614/15, 12 December 2017)? What are the concrete legal mechanisms, if any, under which the applicants might be entitled to seek a review of their possible final life sentence? Has the Government of Romania sought or received any assurances from the United States that the complainants may obtain a review of their possible final sentence of life imprisonment?

b. *Were the applicants deprived of their liberty in violation of Article 5 § 1 of the Convention? In particular, was their detention pending extradition justified within the meaning of Article 5 § 1 (f) of the Convention? Moreover, is the existing Romanian legal framework sufficiently clear, specific and predictable to protect the applicants from arbitrariness in relation to their detention pending extradition, especially after the High Court of Cassation and Justice allowed their extradition (Azimov v. Russia, no. 67474/11, § 161, 18 April 2013, and K.F. v. Cyprus, no. 41858/10, §§ 130-131 and 134, 21 July 2015)?*

c. Did the applicants have access to a procedure allowing judicial control of their continued detention as required by Article 5 § 4 of the Convention (see Azimov v. Russia, no. 67474/11, §§ 149-74, 18 April 2013)?"

The European Court also asked the Romanian government and the parties to provide documentary evidence on relevant sentencing practices of US courts in similar proceedings.

The European Court of Human Rights also ordered on 5 May 2021, in accordance with the provisions of Article 39 of the Rules of Procedure of the Court, that the applicants should not be removed from the territory of Romania, namely not be extradited, as a provisional measure.

To date, the European Court of Justice has not ruled on the case, the three applications being joined under number 19124/21 (Ibidem).

Theoretical and practical analysis of the solutions ordered by the Romanian court from the perspective of the judicial practice of the European Court of Human Rights

As a preliminary remark, it is necessary to specify that in the present scientific study, we do not intend to offer arguments, one way or the other, to the European Court that is going to rule on the case, all the more so as the complaint formulated by the extraditable persons is directed against the Romanian State (the documentation of this article has been carried out from open sources only, as indicated in the related footnotes). Our theoretical approach is intended to be a brief and effective comparative analysis of the applicable legal provisions, based on the fact that this is a procedure specific to the field of international judicial cooperation and not a common procedure in which the court is called upon to rule on the guilt or innocence of persons, a procedure conducted with a third State, namely the United States of America.

First of all, it should be noted that the extradition procedure in Romania is eminently judicial, and the grounds for opposing extradition are limited, according to Article 52 of the Framework Law. Accordingly, the aspects invoked by extraditable persons before the Romanian (as they result from reading the published judgments -www.rejust.ro) courts relating to matters concerning the merits of the case, such as the loyalty of the obtaining and administration of evidence by the United States prosecution authorities or the fact that the person is part of the H.A. gang, are not covered by Article 52(2)(b), or the manner in which the DEA agent allegedly carried out investigations on Romanian territory, including that the extradition decision was based on facts which would not be proven (issues raised before the supreme court) exceed the extradition procedure, just as the same issues exceed the procedure for the execution of the European arrest warrant, applicable in relations between Member States, as a simplified form of extradition, based on the principle of mutual trust in judgments, as a principle which is the foundation of loyal cooperation, applicable also in relations with third countries, in particular in relations with States which have a long tradition of democracy, such as the United States of America.

The extradition procedure is characterized by the fact that it is dealt with on the basis of bilateral cooperation treaties (mentioned above), the provisions of which are supplemented by those of the Framework Law on Cooperation and the Code of Criminal Procedure.

Another particularity is the speed with which the procedure is carried out, and sometimes even the urgency, in particular when the requesting state makes an urgent request for provisional arrest of the extraditable person; the speed of the procedure has been expressed by the Legislator by providing for short deadlines, the possibility of obtaining additional information, where appropriate, through the central authorities (in this case, the Romanian Ministry of Justice and the Department of Justice).

Last but not least, in the extradition procedure, questions concerning the substantive resolution of the criminal case cannot be examined, because in such a case, the judge of the executing State of the request for cooperation would substitute himself for the judge of the merits of another State, which is unacceptable and would violate the principle of loyal cooperation, among other things, or would proceed to an evaluation of the conviction, acting as a real appeal, which is also unacceptable.

As has often been pointed out in the legal literature and is clear from a reading of the bilateral treaties on extradition (European arrest warrant in the Member States), the courts dealing with the extradition request do not have jurisdiction to rule on the merits or necessity of the prosecution or conviction in the requesting State, but only on whether the formal and substantive conditions for extradition have been met, in accordance with the legal provisions governing them (conventions, treaties and national law). Otherwise, the very institution of international judicial cooperation, including with regard to combating cross-border crime, would be rendered meaningless, with reference to serious crime, and the Treaties concluded in this area, including the Agreement on extradition concluded between the European Union and the United States of America, would be rendered meaningless.

Following this line of reasoning, we note that the first question posed to the government concerns the possibility that extraditable persons may be sentenced in the US to an irreducible sentence of life imprisonment. It is well known that the way in which each state understands how to design the system of penalties is a matter of criminal policy of that state and is subject to the principle of sovereignty, according to its legislative and judicial competence (Pradel 1995, 4-6; Gross 1979, 8-9 and 375-379), as understood under public international law. This argument is valid and is the reason why the extradition agreement between the European Union and the United States of America regulates the hypothesis in which the requested person may be or has been sentenced to the death penalty (Article 13 of the Agreement), even though no Member State is aware of this penalty, because it is contrary to the principles on which the Union is based.

Without entering into a debate on public international law, we shall confine ourselves to examining this first question from the perspective of Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which is binding on each contracting state as a matter of national law. We would also point out that the rights and freedoms enshrined in this act are also laid down in the Charter of Fundamental Rights of the European Union, which has the same value as the Treaties and is therefore directly applicable when the institutions implement EU law (Article 51 of the Charter of Fundamental Rights of the European Union).

In addition, from the perspective of the possible violations complained of by the extraditable persons, we also recall the case of *Findikoglu v. Germany* (7 June 2016) (decision on admissibility): "the applicant was extradited to the United States of America, where he was wanted in connection with the establishment of an international criminal group as its alleged leader, the group's aim being to attack the computer networks of financial service providers for financial gain. The plaintiff complained that for the offences for which he had been extradited, the maximum sentence was a total of 247.5 years imprisonment, which meant that if convicted he would have no prospect of release. In particular, the Court held that the risk of life imprisonment could not be assumed in the applicant's case, and the question of whether or not the applicant would have any prospect of release if convicted was irrelevant. The Court therefore declared the application inadmissible as manifestly groundless, finding that the applicant had not shown that his extradition to the United States would expose him to a real risk of treatment reaching the threshold provided for in Article 3 of the Convention as a result of the probable penalty."

Conclusions

Therefore, we consider that only the US central authority can provide the answer to the Court's first question regarding whether there is a real risk that they would be subjected to inhuman and degrading punishment by the imposition of a de jure and de facto "irreducible" life sentence, since no one can substitute himself for the US judge who will pronounce sentence against the extraditable persons in the event that they are found guilty of the offences for which they have been prosecuted, or part of them. From our perspective, the US authority has answered this question, as can be seen from the judgment granting the extradition request mentioned above. Nevertheless, the European Court of Human Rights will decide on the matter, but we can say that the science of criminal law and its application reflect to the highest degree the moral side of criminal law.

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