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GERMANY: Prosecutors can't issue European arrest warrants

According to the Court of Justice of the European Union, German public prosecutors are not independent when prosecuting cases. As a result, they will no longer be allowed to issue European arrest warrants, which could considerably increase the work of German courts.

By Florence Schulz

EURACTIV (29.05.2019) - https://bit.ly/2QMgkV3 - A European arrest warrant may only be issued by a judicial authority that is deemed to be completely independent of the executive.

However, the Court of Justice of the European Union (CJEU) ruled on Monday (27 May) that this is not the case for German public prosecutors as they have to report to the Ministry of Justice before starting investigations.

Therefore, according to the judges in the Luxembourg-based court, it cannot be ruled out that instructions from the minister of justice could influence the work of investigators in some cases.

In other words, when investigations by the respective state governments fall flat, the Ministry of Justice could try to prevent the public prosecutor's office from carrying out investigations. This could be the case in a potential affair where party donations are at play.

In most other EU member states, the public prosecutor's office is independent of the ministries of justice. An inglorious example is Poland, where the rule of law has been weakened by several judicial reforms, severely limiting judicial independence and putting Warsaw on a collision course with Brussels.

But the German system has also been criticised for some time. In 2009, a resolution passed by the Council of Europe's Parliamentary Assembly in response to a report drafted

by the Committee on Legal Affairs and Human Rights called on Germany to strengthen the independence of its prosecutors and judges.

The consequence of the CJEU ruling is likely to be that only German courts will be allowed to issue European arrest warrants in the future. Currently, it's public prosecutors who are in charge of issuing European arrest warrants.

For the courts, this would mean a lot more work, even if the public prosecutor's offices did the preparatory work.

According to research conducted by the Legal Tribune Online, additional questions are in need of clarification, including which courts would be responsible for examining and issuing European arrest warrants, and whether existing arrest warrants need to be reissued.

According to the German Federal Police Office, there are currently around 5,600 European arrest warrants, the Legal Tribune Online reported.

The international NGO Transparency International has long been pressing for the reform of the German justice system.

The CJEU ruling now gives another urgent reason for such a reform, according to Reiner Hüper, director of the working group for criminal law.

"The possibility of the executive branch exerting this influence damages the national and international reputation of the German criminal justice system and undermines confidence in the rule of law," he told EURACTIV.

POLAND: Arrest warrant case highlights broader issues

By Laure Baudrihaye-Gerard

EU Observer (31.07.2018) - https://euobserver.com/opinion/142491 - Last week, the EU Court of Justice (CJEU), took a significant step towards protecting against human rights violations in the operation of the European Arrest Warrant.

The ruling comes in response to an Irish Court refusing extradition to Poland because of concerns that attacks on judicial independence in the country, which have been at the centre of the rule of law procedure triggered by the European Commission against Poland in January 2016.

The Polish government had sought the extradition of Arthur Celmer - a Polish national - from Ireland, for alleged drugs violations. Because independence of the judiciary is an essential component of the fundamental right to a fair trial, the Irish court said it could not presume that Poland would uphold Celmer's right to a fair trial.

The law governing the European Arrest Warrant does not explicitly permit a member state to refuse to extradite a person if there is a risk of a human rights violation. And practice had long been for most EU member states to turn a blind eye and surrender persons even if such a risk existed.

In 2016, the CJEU took a first step by ruling that a person could not be extradited if there was a risk that the person would be subject to torture, cruel, inhuman or degrading treatment, for example because of prison conditions.

Last week's judgment is a step further which places human rights at the heart of the European Arrest Warrant system.

The CJEU affirmed the right of the Irish court to refuse to extradite if it finds a "real risk" to the person's right to a fair trial because of attacks on judicial independence.

And if the EU finds Poland in violation of their obligations to respect the rule of law, then extraditions under the European Arrest Warrant must cease altogether.

Two steps

Until that time, national courts must apply the two-step test that the CJEU created in 2016 – first, assess whether systemic deficiencies in the requesting state threaten the right to a fair trial in general; and second, assess whether these deficiencies impact both the court overseeing the case, and the case itself.

The CJEU took the opportunity to state that an independent judiciary is a core EU value, and that the judiciary must be protected against "external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions".

This represents a clear warning to the Polish government to cease its attacks on the judiciary – and takes a stance against a pervasive trend across the EU towards curbing the independence of the judiciary.

But the implications of the ruling are broader even than this critical issue.

In June Fair Trials launched a report showing the extent to which the European Arrest Warrant, the EU's fast-track extradition system, is being abused by EU member states, putting at risk the lives and rights of ordinary people.

Adopted in the wake of the 9/11 attacks, the European Arrest Warrant was designed to help tackle complex, cross-border crimes by speeding up the process of bringing fugitives to trial or, if already convicted, to prison.

But, as our work has consistently shown, it is all-too-often inappropriately used for small offences or to investigate people rather than to bring them to trial, resulting in people being unfairly dislocated from their families, jobs and lives.

The Celmer judgment asserted that it is the responsibility of courts across the EU to assess the human rights situation in countries requesting extradition.

Before this, many courts argued that they were bound to apply the principle of "mutual trust", which is a presumption that fundamental rights are being observed by other EU member states.

But the CJEU made clear that this presumption is rebuttable, and courts must make an assessment where there is evidence that human rights are not being respected in countries seeking extradition under the European Arrest Warrant.

The judgment also has significant implications for the EU's legislative agenda.

Reform of the European Arrest Warrant legislative framework, which the European Commission has resisted despite repeated calls from the European Parliament, is now needed to ensure that EU member states all take steps to implement the CJEU's judgment consistently.

Beyond the European Arrest Warrant, the judgment casts a shadow over the legitimacy of the recent proposals of the EU commission to create a new judicial cooperation tool, the "European Production Order", intended to give prosecutors and judges the power to get hold of electronic data (both metadata and content data) held by companies, even if that data or the company is located in another member state – with no assessment by the judicial authorities of that other country.

The CJEU firmly stated that judicial cooperation means judicial review on both sides.
The future of this new tool, due to be debated in the European Parliament, now looks to be more uncertain than ever.

UK/ROMANIA: The UK's decision to leave the EU should not affect the execution of a European arrest warrant

EU law applies as long as the UK is a Member State

Court of Justice of the European Union/PRESS RELEASE No 124/18 (07.08.2018) - https://bit.ly/2vPxPtx - In 2016, the UK issued two European arrest warrants ('EAWs') in respect of RO (the first in January 2016 and the second in May 2016) for the purposes of conducting prosecutions of the offences of murder, arson and rape. RO was arrested in Ireland on the basis of these arrest warrants and has been in custody since 3 February 2016. RO raised objections to his surrender to the UK on the basis, amongst other things, of issues related to the UK's withdrawal from the EU.

The High Court (Ireland) has ruled against RO on all of his points of objection, other than the issues of the consequences of Brexit. It therefore asks the Court of Justice whether, in light of the UK on 29 March 2017 having given notice of its intention to withdraw from the EU, and the uncertainty as to the arrangements which will be put in place after the UK's withdrawal, it is required to decline to surrender to the UK a person subject to a EAW whose surrender would otherwise be required.

In today's Opinion, Advocate General Maciej Szpunar proposes that the Court of Justice find that the EAW system should continue to apply for as long as the UK is a Member State. He comments that, from the information submitted by the High Court, there appears to be no reason not to execute the EAW in question.

The Advocate General first reiterates that the principle of mutual recognition, which is based on mutual trust, between the Member States means that the execution of a EAW constitutes the rule and a refusal to execute is an exception which must be interpreted strictly. The Advocate General notes that none of the mandatory or optional grounds for non-execution of the EAW are present in the case at issue. Specifically, the Irish court has concluded that, with the exception of the consequences of Brexit, there is no separate issue of potential inhuman or degrading treatment in respect of RO's surrender to the UK.

Next, the Advocate General examines whether the UK's notification of its intention to leave the EU has any bearing on the legal assessment to be carried out in relation to the execution of the EAW. He rejects RO's argument that the UK's withdrawal notice constitutes an exceptional circumstance which requires non-execution of an EAW. In his view, **as long as a State is still a Member of the EU, EU law applies, including the provisions of the Framework Decision on the European arrest warrant(1) and the duty to surrender.**

In addition, according to the Advocate General, there are no tangible indications that the political circumstances preceding, giving rise to, or succeeding the withdrawal notification

are such as to not respect the substantive content of the Framework Decision and the fundamental rights enshrined by the Charter of Fundamental Rights of the European Union. He agrees with the argument that **the UK has decided to withdraw from the EU, not to abandon the rule of law or the protection of fundamental rights.** Consequently, in the Advocate General's view, **there is no basis to question the UK's continued commitment to fundamental rights.** Moreover, the UK will continue to remain subject to rules of domestic and international law which impose obligations on the UK in the context of extradition.

On this basis **the Advocate General proposes that the executing judicial authorities can expect, at the moment of executing the EAW, the issuing Member State to abide by the substantive content of the Framework Decision, including for post surrender situations after the issuing Member State has left the EU.** This presumption can be made if other international instruments will continue to apply to the Member State that has left the EU. **Only if there is tangible evidence to the contrary can the judicial authorities of a Member State decide not to execute the arrest warrant.**

Finally, **the Advocate General considers that the fact that Court of Justice will no longer have jurisdiction after 29 March 2019 is not an obstacle to RO's surrender to the UK.** The Advocate General notes, in particular, that the Framework Decision was adopted in 2002, but the Court of Justice only obtained full jurisdiction with regards to the interpretation of the Framework Decision on 1 December 2014, that is to say five years after the entry into force of the Treaty of Lisbon in 2009. Consequently it was neither possible, before that time, for a case such as this to have reached the Court, nor could a UK court have submitted a request for a preliminary ruling to the Court before that time, despite the fact that the EU was firmly anchored on the rule of law, including access to justice.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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(1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

POLAND: ECJ ruling, a stark warning to Poland

MEP Philippe Lamberts says that a ruling by the European Court of Justice (ECJ) should serve as a "stark warning" to Poland as the country still finds itself at the centre of controversy over changes to its national legislation.

Written by Martin Banks on 30 July 2018 in News

The Parliament Magazine - This comes after the ECJ ruled that Ireland is not required to extradite a Polish citizen to Poland under the European arrest warrant (EAW).

The court, the EU's highest legal authority, said that the Polish government's reforms to the judicial system, which include the removal of judges and an increased role of the executive in judicial appointments, constitute a clear risk of a serious breach of the rule of law in the country.

This poses a real possibility that the accused would not receive a fair trial if the extradition demand were met, according to the ECJ.

Belgian MEP Philippe Lamberts, co-leader of the Greens/EFA group in the European Parliament, commented, "This should be a stark warning for the Polish government that its path away from European democratic values is undermining its role in Europe and the world."

Speaking on Friday, the deputy added, "The erosion of the rule of law weakens mutual trust between EU member states, which is clear by the fact that the ECJ refuses to uphold the European Arrest Warrant for requests from countries where an independent judicial system is under attack. The Polish government must reverse its recent changes to the court system and guarantee fundamental rights such as the right to a fair trial for all."

The case also casts the spotlight once again on the EAW which some MEPs and campaign groups have called into question.

These include Human Rights Without Frontiers International (HRWF), a Brussels-based NGO, which has urged the EU to look again at the European arrest warrant scheme, designed to counter cross-border crime.

Willy Fautre, director of the NGO, said, "We are calling for a review of the scheme. This should be an absolute necessity for the EU."

He added, "Despite the efforts of some MEPs there has been no response from the European Commission to calls for reform."

The arrest warrant scheme was established to ease the extradition of criminal suspects between EU member states.

Fautre, in illustrating the scheme's alleged shortcomings, cited the example of Romania which he says is "one reason for its failings."

He said there had been "obvious abuses" the European arrest warrant.

"For example, in 2015-16, there were 1508 requests of extradition addressed by Romania to the UK while London had only addressed six requests to Bucharest."

HRWF is also recommending to the Commission that anyone subject to an arrest warrant must have access to a lawyer in two countries: his own and the one issuing the warrant.

HRWF and another group, Fair Trials Abroad, also want improvements to detention conditions for suspects held under a European arrest warrant.

Speaking recently, the EU's chief Brexit negotiator Michel Barnier said that the EU and the UK will "cooperate strongly" on security post-Brexit.

But Barnier also rejected the approach of the British government, which he argued wants "to maintain all the benefits from EU membership without being in the EU."

He warned that the UK will lose the right to participate in the European arrest warrant, and that new procedures for "effective" information exchange will need to be agreed.

About the author
Martin Banks is a senior reporter for the Parliament Magazine

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CROATIA/ HUNGARY: About the execution of a European Arrest Warrant

Judgment in Case C-268/17

PRESS RELEASE No 118/18 (25.07.2018) - The execution of a European arrest warrant cannot be refused on the ground that a decision of the Public Prosecutor's Office has closed a criminal investigation when, during that investigation, the requested person was interviewed as a witness only.

Judicial authorities of the Member States are required to adopt a decision on any European arrest warrant communicated to them

AY, a Hungarian national, is the chairman of the board of directors of a Hungarian company against whom criminal proceedings have been initiated in Croatia. AY is suspected of having agreed to pay a considerable amount of money to a holder of a high office in Croatia, in return for the conclusion of an agreement between the Hungarian company and the Croatian Government.

Upon, and subsequent to, the opening of an investigation in Croatia against AY for active corruption, the Croatian authorities asked their Hungarian counterparts on several occasions (for the first time on 10 June 2011) to provide them with international legal assistance by interviewing AY as a suspect and delivering a summons to him. Although the Hungarian authorities did not execute these requests, they opened an investigation in order to verify whether a criminal offence prejudicing the integrity of public life in the form of active corruption at international level under the Hungarian Criminal Code had been committed. This investigation was closed by decision of the Hungarian National Bureau of Investigation of 20 January 2012 on the ground that the acts committed did not constitute a criminal offence. However, the investigation of the Hungarian authorities was not opened against AY as a suspect, but only in connection with the alleged criminal offence, AY having been interviewed as a witness only during the investigation.

On 1 October 2013, following Croatia's accession to the EU, the Croatian authorities issued a European arrest warrant against AY. However, the Hungarian judicial authorities refused to execute the warrant on the ground that criminal proceedings had already been closed in Hungary in respect of the same acts as those on which the arrest warrant was based.

On 15 December 2015, the Županijski Sud u Zagrebu (County Court, Zagreb, Croatia), before which the criminal proceedings against AY are in progress, issued a new European arrest warrant against AY, in respect of which the Hungarian authorities refused to adopt any formal decision on the ground that it was not legally possible in Hungary to arrest AY or to initiate a new procedure for the execution of the warrant.

In these circumstances, the Croatian court has, in essence, asked the Court of Justice whether the framework decision on the European arrest warrant1 enables an authority of

a Member State not to execute such a warrant on the grounds that criminal proceedings had already been closed in that State for the same acts as those specified in the warrant, even if the person against whom the warrant has been issued had the status of a witness only rather than that of a suspect or an accused in those proceedings. The Croatian court also wishes to know whether a national authority is required to adopt a decision on any European arrest warrant communicated to it, even where it has already made a decision in respect of a previous arrest warrant relating to the same person and the same criminal proceedings.

In his Opinion of 16 May 2018, Advocate General Szpunar proposed that the Court of Justice should declare that it is not competent to answer questions asked by the issuing judicial authority of a European arrest warrant on whether the executing authority can refuse to execute that warrant.

However, in today's judgment, the Court states, first of all, that the admissibility of the request for a preliminary ruling is not called into question by the fact that the questions asked concern the obligations of the executing judicial authority, even though the referring court is the judicial authority that issued the European arrest warrant. As the issue of a European arrest warrant affects the individual freedom of the requested person, and the observance of fundamental rights, according to the Court's case-law, falls primarily within the responsibility of the issuing Member State, the issuing judicial authority must be able to refer questions to the Court for a preliminary ruling.

Next, the Court recalls that, except in exceptional circumstances, the executing judicial authorities may refuse to execute a European arrest warrant only in the exhaustively listed cases of non-execution provided for by the framework decision. Consequently, an executing judicial authority which does not reply following the issue of a European arrest warrant and thus does not communicate any decision to the judicial authority which issued the warrant is in breach of its obligations under the framework decision.

The Court goes on to examine whether the ground for obligatory non-execution set out in Article 3(2) of the framework decision applies in the present case. That ground for non-execution concerns the case where the executing judicial authority is informed that the requested person has been finally judged in a Member State in respect of the same acts. The Court observes in that regard that the delivery of a final judgment implies that criminal proceedings had previously been instituted against the requested person. Accordingly, in the present case, as no criminal proceedings were brought against him, AY cannot be considered to have been 'finally judged' within the meaning of the framework decision. Consequently, the decision which closed the investigation during which AY was interviewed as a witness only may not be relied on for the purpose of refusing to execute the warrant pursuant to that ground for non-execution.

Finally, the Court analyses whether one of the three grounds for optional non-execution provided for in Article 4(3) of the framework decision applies in the present case. Those grounds relate to (i) the decision of the executing judicial authority not to prosecute for the offence on which the European arrest warrant is based, (ii) the fact that, in the executing Member State, the judicial authorities have decided to halt proceedings in respect of the offence on which the warrant is based, and (iii) the fact that a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings. The Court finds that the first and third grounds set out above are irrelevant in the present case. With regard to the second ground, the Court observes that an interpretation according to which the execution of a European arrest warrant could be refused where that warrant concerns the same acts as those that have already been the subject of a previous decision, without the identity of the person against whom criminal proceedings are brought being considered relevant, would be manifestly too broad and would entail a risk that the obligation to execute the warrant could be circumvented. As that ground for non-execution constitutes an

exception, it must be interpreted strictly and in the light of the need to promote the prevention of crime. In the present case, the investigation by the Hungarian authorities was conducted, not against AY, but against an unknown person, and the decision that closed that investigation was not taken in respect of AY. The Court concludes from this that the second ground for non-execution set out above does not apply either.

Consequently, the Court finds that the execution of a European arrest warrant cannot be refused on the basis of a decision of the Public Prosecutor's Office, which closed an investigation opened against an unknown person, during which the person who is the subject of that arrest warrant was interviewed as a witness only, without criminal proceedings having been brought against that person and where the decision was not taken in respect of that person.

Full text of the Judgment: http://curia.europa.eu/juris/documents.jsf?num=C-268/17

GERMANY/ HUNGARY: Prison conditions and European Arrest Warrant

Judgment in Case C-220/18 PPU Generalstaatsanwaltschaft (Conditions of detention in Hungary)

PRESS RELEASE No 114/18 (25.07.2018) - An assessment of detention conditions in the issuing Member State made prior to the execution of a European arrest warrant must be limited to the prisons in which it is actually intended that the person concerned will be held

The fact that the person concerned can challenge the conditions of his detention in the issuing Member State is not sufficient to rule out a real risk of inhuman treatment.

ML, a Hungarian national, was prosecuted in Hungary for offences of bodily harm, criminal damage, fraud and burglary. He was sentenced in absentia to a custodial sentence of 1 year and 8 months and the Nyíregyházi Járásbíróság (District Court, Nyíregyháza, Hungary) issued a European arrest warrant against him so that he might serve that sentence in Hungary. ML has been in detention in Germany pending extradition since 23 November 2017.

The Hanseatisches Oberlandesgericht in Bremen ('OLG Bremen') (Higher Regional Court, Bremen, Germany) is nevertheless uncertain, in view of the general conditions of detention in Hungary, whether ML may be surrendered to the Hungarian authorities. That court considers that it has information showing there to be systemic or generalised deficiencies in detention conditions in Hungary,(1) with the result that ML might be exposed there to a risk of inhuman or degrading treatment.(2) Having regard to the judgment of the Court of Justice in the cases of Aranyosi and Căldăraru,(3) OLG Bremen therefore considers it necessary to obtain additional information concerning the conditions in which ML might be detained in Hungary. It asks the Court for other clarification concerning the steps to be taken in that connection.

In today's judgment, the Court makes clear at the outset that it is not being asked about the existence of systemic or generalised deficiencies in detention conditions in Hungary. Although it replies to OLG Bremen on the premiss that such deficiencies exist, that premiss is a matter for OLG Bremen alone, which must ascertain whether it is accurate by taking account of properly updated information.

The Court goes on to state, first, that, even if the issuing Member State provides –– as Hungary has done since the start of 2017,(4) –– for legal remedies that make it possible to review the legality of detention conditions from the perspective of the fundamental rights, the executing judicial authorities are still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy themselves that their decision on the surrender of that individual will not expose him to a real risk of inhuman or degrading treatment on account of those conditions.

Secondly, the Court recalls that the executing judicial authorities responsible for deciding whether a person in respect of whom a European arrest warrant has been issued should be surrendered must determine, specifically and precisely, whether, in the circumstances of a particular case, there is a real risk that that person will be subjected in the issuing Member State to inhuman or degrading treatment.

The Court makes clear in that regard that those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is specifically intended that the person concerned will be detained, including on a temporary or transitional basis. The compatibility with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State.

Thirdly, the Court holds that the executing judicial authority must review solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment. Thus, matters such as opportunities for religious worship, whether it is possible to smoke, arrangements for washing inmates' clothing and whether there are bars or slatted shutters on cell windows are, as a rule, aspects of detention that are of no obvious relevance.

In any event, an executing judicial authority which considers it necessary to request that the issuing judicial authority provide it, as a matter of urgency, with supplementary information on conditions of detention must ensure that its questions do not, because of their number and scope, result in the operation of the European arrest warrant being brought to a standstill, as the purpose of that warrant is specifically to accelerate and facilitate surrenders in the common area of freedom, security and justice.

Fourthly, when the issuing judicial authority gives an assurance (5) that the person concerned, irrespective of the prison he is detained in, will not be subjected to inhuman or degrading treatment on account of the actual and precise conditions of his detention, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of the prohibition of inhuman or degrading treatment.

When, as in the present case, such an assurance is not given by a judicial authority, the safeguard that it represents must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority.

In the present case, the Court considers that ML's surrender to the Hungarian authorities would appear to be permitted without any breach of his fundamental right not to be subjected to inhuman or degrading treatment, a matter which must, however, be verified by OLG Bremen.

In fact, OLG Bremen itself is of the opinion that the information available to it concerning detention conditions at Szombathely prison, in which it is accepted that ML should serve

the majority of his custodial sentence, rules out the existence of a real risk of him being subjected to inhuman or degrading treatment. In addition, as regards Budapest prison, in which ML will be detained for the first three weeks before being transferred to Szombathely, an assurance given by the Hungarian Ministry of Justice and the information available to the Bremen Public Prosecutor's Office appear to support the view that detention conditions within that prison, through which every person who is the subject of a European arrest warrant transits, are likewise not in breach of that fundamental right.

(1) The OLG Bremen relies in that regard on, inter alia, the judgment of the European Court of Human Rights of 10 March 2015, Varga and Others v. Hungary.
(2) Within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.
(3) Case: C-404/15 and C-659/15 PPU Aranyosi and Caldararu, see also Press Release No. 36/16, which was given in response to a request for a preliminary ruling from the same German court.
(4) Detainees in Hungary have, since 1 January 2017, been able to challenge, before the courts, the legality of the conditions of their detention from the perspective of the fundamental rights.
(5) That assurance must be given by the issuing judicial authority itself or at least be endorsed by it, if need be after requesting the assistance of the central authority, or one of the central authorities, of the issuing Member State.

The full text of the judgment is available at
http://curia.europa.eu/juris/documents.jsf?num=C-220/18

EU*: Fair Trials* research lifts the lid on mistreatment of European citizens subjected to European Arrest Warrant

EU Observer (25.06.2018) - https://bit.ly/2OY4Tsc - Fair Trials, the global criminal justice watchdog, is calling for new EU human rights safeguards in order to stem the misuse of the European Arrest Warrant system, the EU's flagship crimefighting tool, by EU member states

In a comprehensive investigation into what happens to individuals after they are surrendered following a European Arrest Warrant, a fast track extradition system, Fair Trials and its partners in Spain, Poland, Lithuania and Romania have uncovered evidence that shows how ordinary people are being swept into the system ruining their lives and those of their family members.

Cases documented during investigation indicate that, far from being used to apprehend fugitives to be tried for participation in complex cross-border crimes, such as terrorism and organized crime, the purpose for which it was designed, the EAW is too often being used for small offenses or to investigate people. Families are being ripped apart and jobs lost as a result. And people are being surrendered even when there are reasonable reasons to believe that they will not be given a fair trial or will be placed in prolonged pre-trial detention or in prison conditions that fail to meet even the most basic standards of decency.

In one case, for example, a woman was extradited from the Netherlands to Poland while heavily pregnant, and was forced to give birth and care for her new-born baby in a cramped cell with four other mothers and their children, while awaiting trial. In another,

a Portuguese man was separated from his family and surrendered to Spain to be interviewed and has been held in pre-trial detention for a year with no trial date set.

The investigation also uncovered numerous instances where people were surrendered after the country requesting the surrender has provided guarantees to the surrendering country regarding how they will be treated after surrender, only for those guarantees to breached as soon as the person arrives, resulting in people being denied the trial that they were promised or put in inhuman conditions that they thought they were protected from.

These cases include a case of surrender to Portugal from the Netherlands with guarantees that the person will not be held in the notorious Lisbon prison, which were immediately breached on arrival, with the person spending the first 21 days in the country there. They also include the surrender of a person from the UK to Romania with guarantees of a retrial, immediately rescinded upon arrival.

These problems are eroding the trust that EU countries place in each other and are preventing the EAW from operating as the fast-track crimefighting tool that it is meant to be. Between 2004 and 2015, the number of European Arrest Warrants issued boomed from 6,894 to 16,144, and while the number also executed rose (from 836 to 5,304) the gap between issuance and execution has stayed persistently wide. New EU human rights safeguards are needed to resolve this problem.

Fair Trials' European Regional Director, Ralph Bunche, commented: "The European Arrest Warrant is a valuable tool for fighting serious crime in Europe. But it is undermined when it is used inappropriately, often against people who have committed only minor offences."

"If a commitment to human rights is really a defining feature of the EU, we must stop treating people like commodities to be shipped across borders no matter how they'll be treated when they get there. These people can find themselves in unsuitable, even unsanitary conditions, without access to appropriate healthcare, while awaiting trial."

On 28 June 2018, the day the report and film will be launched, the EU Court of Justice Advocate General will release his opinion in Opinion in Case C-216/18 *Minister for Justice and Equality PPU*. In this case, the Irish High Court refused to surrender a suspect to Poland because of the attacks to judicial independence in the country. "The Celmer case shows that there are real concerns about the disparity between systems in Europe and the urgent need for human rights reforms – very much in line with our own findings" said Mr. Bunche.

Notes to Editors:

The film and report, "Beyond Surrender: Putting Human Rights at the European Arrest Warrant," produced following this investigation will be launched by Fair Trials on 28 June 2018.

The Beyond Surrender report also contains analysis of the *Celmer* case reference above. A separate video will also be launched by Fair Trials on June 28 with an interview with the Dean of the Warsaw Bar, Mikolaj Pietrzak, explaining why those attacks prevent such a major threat to rule of law in Europe.

For an embargoed copy of the report or for access to the films or case studies including interviews with people who have been subject to European Arrest Warrants, please contact gianluca.cesaro@fairtrials.net.

Pre-recorded interview films are also available on request.

Ralph Bunche is available for comment.

ROMANIA: Same-sex marriage and freedom of residence

Judgment in Case C-673/16 Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others

The term 'spouse' within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex

Although the Member States have the freedom whether or not to authorise marriage between persons of the same sex, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse, a national of a country that is not an EU Member State, a derived right of residence in their territory

PRESS RELEASE No 80/18 (05.06.2018) = Mr Relu Adrian Coman, a Romanian national and Mr Robert Clabourn Hamilton, an American national, lived together in the United States for four years before getting married in Brussels in 2010. In December 2012, Mr Coman and his husband contacted the Romanian authorities to request information on the procedure and conditions under which Mr Hamilton, in his capacity as a member of Mr Coman's family, could obtain the right to reside lawfully in Romania for more than three months. That request was based on the directive on the exercise of freedom of movement,(1) which allows the spouse of an EU citizen who has exercised that freedom to join his husband in the Member State in which the husband is living.

In response to that request, the Romanian authorities informed Mr Coman and Mr Hamilton that the latter only had a right of residence for three months, on the ground, in particular, that he could not be classified in Romania as a 'spouse' of an EU citizen as that Member State does not recognise marriage between persons of the same sex ('homosexual marriage').

Mr Coman and Mr Hamilton therefore brought an action before the Romanian courts seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement within the EU. Asked to rule on an objection of unconstitutionality, raised in those proceedings, the Curtea Constituţională (Constitutional Court, Romania) has asked the Court of Justice whether Mr Hamilton may be regarded as the 'spouse' of an EU citizen who has exercised his right to freedom of movement, and must therefore be granted a permanent right of residence in Romania.

By today's judgment, the Court observes, first of all, that the directive on the exercise of freedom of movement governs only the conditions determining whether an EU citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on nationals of a non-EU State who are family members of an EU citizen in the Member State of which that citizen is a national. The directive cannot therefore confer a derived right of residence on Mr Hamilton in the Member State of which Mr Coman is a national, namely Romania. The Court nonetheless observes that, in certain cases, nationals of non-EU states, family members of an EU citizen, who are not eligible, on the basis of the directive, for a derived right of residence in the Member State of which that citizen is a national, could be accorded such a right on the basis of Article 21(1) of the Treaty on the Functioning of the EU (a

provision which confers directly on EU citizens the primary and individual right to move and reside freely within the territory of the Member States).

The Court goes on to state that the conditions under which such a derived right of residence may be granted must not be stricter than those laid down by the directive for the grant of a derived right of residence to a national of a non-EU state who is a family member of an EU citizen having exercised his right of freedom of movement by settling in a Member State other than that of which he is a national. The directive must be applied, by analogy, to that situation.

The Court notes that, in the directive on the exercise of freedom of movement the term 'spouse', which refers to a person joined to another person by the bonds of marriage, is gender-neutral and may therefore cover the same-sex spouse of an EU citizen. Nevertheless, the Court states that a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States, and EU law does not detract from that competence, the Member States being free to decide whether or not to allow homosexual marriage. The Court also observes that the EU respects the national identity of the Member States, inherent in their fundamental structures, both political and constitutional.

The Court nonetheless considers that the refusal by a Member State to recognise, for the sole purpose of granting a derived right of residence to a national of a non-EU state, the marriage of that national to an EU citizen of the same sex lawfully concluded in another Member State may interfere with the exercise of that citizen's right to move and reside freely within the territory of the Member States. That could have the effect that freedom of movement from one Member State to another would vary depending on whether or not provisions of national law allow marriage between persons of the same sex.

That said, the Court notes that freedom of movement for persons may be subject to restrictions independently of the nationality of the persons concerned, if the restrictions are based on objective public-interest considerations and are proportionate to a legitimate objective pursued by national law.

In that regard, public policy, which is put forward in the present case as justification for restricting the right to freedom of movement, must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. The obligation for a Member State to recognise a homosexual marriage concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a national of a non-EU state, does not undermine the institution of marriage in the first Member State. In particular, that obligation does not require that Member State to provide, in its national law, for the institution of homosexual marriage. Moreover, an obligation to recognise such marriages, for the sole purpose of granting a derived right of residence to a national of a non-EU state, does not undermine the national identity or pose a threat to the public policy of the Member State concerned.

Lastly, the Court observes that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union. The fundamental right to respect for family and private life being guaranteed by Article 7 of the Charter, the Court notes that it is also apparent from the case-law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as a relationship of a heterosexual couple in the same situation.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court

of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

(1) Directive 2004/38/ EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).
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The full text of the judgment is available at
http://curia.europa.eu/juris/documents.jsf?num=C-673/16

ROMANIA: European Court of Justice recognises freedom of movement for same-sex couples

Judgment : https://bit.ly/2xSBvyO

EP Intergroup on LGBT Rights (05.06.2018) - https://bit.ly/2HogStQ - In a ground-breaking judgement, today the Court of Justice of the European Union recognised freedom of movement for same-sex couples.

"The term 'spouse' within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex" says the Luxembourg Court in a press release published today.

The case was brought to the Luxembourg court by Adrian Coman, a Romanian-American national who married his partner in Belgium. After several years of living abroad, Adrian Coman moved back to Romania with his spouse. However, Clai Hamilton was denied a residence permit on the ground of family reunion, because Romanian law does not recognised same-sex marriages or partnership contracted abroad.

According to the European Court of Justice, a EU citizen who used their right to freedom of movement, moved to another Member State and established their family life there, should be able to return to their home country with their partner – including their same-sex partner they married in another EU state. Article 21(1) of the Treaty on the Functioning of the EU guarantees the right to freedom of movement for all EU citizens, and EU national cannot be subjected to stricter conditions than those laid in the Directive 2004/38. Since the term 'spouse' is gender-neutral in the Directive 2004/38, this therefore applies to same-sex couples.

Daniele Viotti, co-chair of the LGBTI Intergroup, said: "Today is a historic day. All families should benefit from the right to freedom of movement, guaranteed by the treaties of the European Union.

Adrian Coman and Clai Hamilton are only one of the many couples that have suffered from this discrimination based on sexual orientation. It is now clear: when a marriage is

contracted in one EU state, it should be recognised in all other Member States. Same-sex marriage is no exception."

The Coman case makes clear that freedom of movement may be restricted by a Member States, but under control of the EU institutions. The measures must be proportional and compatible with the fundamental rights guaranteed by the Charter of fundamental rights of the European Union. However with regards to the Coman case, "the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, [...] does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex, [...] and does not undermine the national identity or pose a threat to the public policy of the Member State concerned." (para. 45-46).

Sophie in't Veld, vice-president of the LGBTI Intergroup, said "While this calls for celebration, we must stress that much remains to be done for Rainbow Families in the European Union. Too few countries allow same-sex couples to enter registered partnerships, let alone marriage. These families remain unrecognised and unprotected by law.

It is now up to politicians to take the matter in their hands and introduce marriage equality soon".

The LGBTI Intergroup will organise an event in the European Parliament on 20 June to discuss the aftermath of the Coman case.