TWO-STEP EXAMINATION OF POTENTIAL VIOLATIONS OF FUNDAMENTAL RIGHTS IN THE ISSUING MEMBER STATE: TOWARDS "SYSTEMIC OR GENERALISED" DIFFERENCES WITH STRASBOURG?

Some considerations on the Opinion of Advocate General de la Tour in the case of Puig Gordi and Others (C-158/21)[1]

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In his very interesting and comprehensive Opinion in the case of Puig Gordi and Others (C-158/21), Advocate General de la Tour usefully addresses *inter alia* an issue which so far has not been directly answered by the Court of Justice of the European Union (CJEU) but which is of some importance from a Strasbourg point of view and will therefore be the focus of this paper. The issue is about whether, in the context of the execution of a European arrest warrant (EAW), the two-step methodology prescribed by the CJEU for the evaluation of any risk of violation of a person's fundamental rights in the issuing Member State should be understood as precluding the assessment of any individualised risks if, prior to that assessment, no relevant "systemic and generalised deficiencies" in the protection of the fundamental rights at stake have been found to exist in that same Member State. In other words, can the prescribed general test become autonomous to the point of replacing a complementary individual test?

The question arose because in the main proceedings, which concern criminal prosecutions of former Catalan leaders, Belgian courts had refused to execute an EAW on account of, *inter alia*, a risk of breach of an accused's right to a fair trial in Spain. In so doing, they had focussed on the individual situation of the accused without first assessing whether these risks stemmed from any "systemic or generalised deficiencies" in the country.

Towards an autonomisation of the general test?

The Advocate General answers the above question in the affirmative, considering that "the two stages of the examination to be carried out by the executing judicial authority are cumulative, one following on from the other in a sequence of analyses that that authority must adhere to" (§ 120). In his view, "in the absence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, there is no reason for an executing judicial authority to carry out a review which would be an expression of a lack of trust in the courts of the issuing Member State." (§ 125)

Yet, this approach could well raise some concerns when confronted with the requirements flowing from the European Convention on Human Rights (Convention). These concerns should perhaps not be underestimated, as they seem to touch upon fundamental methodological issues with serious implications for national judges who are indeed also answerable under the Convention for their application of EU law (see, most recently, Bivolaru and Moldovan v. France).

Under the Convention the general situation in the country of destination is always the starting point in cases concerning deportation, but it is never the end of the story. Unless the general test operates already to the benefit of the applicant, as e.g. in Sufi and Elmi v. the United Kingdom, if generalised risks of ill-treatment cannot be shown to exist in the country of destination, the European Court of Human Rights (ECtHR) nonetheless allows applicants to demonstrate the existence of relevant individual circumstances putting them at risk of such a treatment (Khasanov and Rakhmanov v. Russia,

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§ 100). Thus, while evidence of widespread deficiencies in a country can be very useful background information in examining an individual application of that kind, the absence of such evidence or its lacunae cannot dispense a judge called on to apply the Convention from nonetheless examining any serious allegations about a risk of individual violations in that same country. In other words, and in contrast with the suggestion of the Advocate General as to the consequence of the two-step examination, the assessment to be made under the Convention cannot stop after the finding that an alleged risk is not sufficiently systemic or generalised.

In the recent case of Bivolaru and Moldovan v. France, which concerned the execution by France of two EAWs issued by Romanian courts for the service of custodial sentences, the ECtHR, while taking note of the situation in some Romanian prisons, indeed confined itself to making its own individualised assessment of the risks incurred by the applicants, following the examination carried out by the national courts pursuant to EU law. This approach conceptually flows from the right of individual petition (Art. 34 of the Convention) which underpins the whole Convention system and requires any individual application to be made the subject of an individual determination, which cannot be replaced by a collective one. The Convention is about individual, not collective rights. Consequently, while a collective test can facilitate the application of an individual test, it cannot be allowed to replace the latter, which necessarily is the final decisive test. From this perspective, an autonomisation of the general test would indeed result in a change of paradigm.

Admittedly, Bivolaru and Moldovan was about a possible violation of the prohibition of ill-treatment (Art. 3 of the Convention and 4 of the EU-Charter) which, contrary to the right to a fair trial (Art. 6 of the Convention and 47(2) of the EU-Charter), at stake in the proceedings before the referring court, is an absolute right not subject to any limitations. According to the Advocate General, situations concerning a possible violation of the right to a fair trial, and notably the right to a "tribunal established by law", should therefore be treated differently, by tipping the balance in favour of mutual trust rather than the protection of the right to a fair trial, so as to "ensure the effectiveness of the system of judicial cooperation between the Member States, of which the European arrest warrant is an essential component" (§§ 112 and 115).

Reference is made in this connection to the existence of judicial remedies in the issuing Member State, which should allow any infringement of the right to a fair trial to be rectified in that same Member State (§ 117). This suggests that under this approach, it is only where systemic or generalised deficiencies are of a magnitude such as to involve all available remedies in a country that an individual could qualify for being personally at risk of suffering a breach of his or her right to a fair trial in the issuing country.

In response, one should first note that, as shown by Aranyosi and Căldăraru, the CJEU did not refrain from also applying the two-step examination to a possible violation of the prohibition of ill-treatment, though it has to date not gone so far as to autonomise the general test and let it operate alone, i.e. without complementary individual test, in this field.

Moreover, while many risks of a breach of the right to a fair trial may indeed have an institutional origin (e.g. in case of lack of independence of a court) and while the assessment of the risks in a foreign country normally requires some information about the general situation in that country, it would be wrong to categorically infer from such methodological considerations that only such potential violations of the right to a fair trial can be relevant in a deportation context which flow from "systemic or generalised deficiencies" in the country of destination. Some violations of procedural fundamental rights are indeed of a different nature, being less institutional and more related to the status of a person or stemming from arbitrariness up to the highest level of the judicial system, as in Muhammad and Muhammad v. Romania. Such risks could hardly be denied any relevance in a deportation context.

At any rate, in Othman (Abu Qatada) v. the United Kingdom, the only case so far where a risk of a "flagrant denial of justice" (Art. 6 of the Convention) in the event of a deportation was found to exist, the ECtHR did take note of the widespread use of torture evidence in the country of destination

(Jordan) but without making any formal determination on the scale which that phenomenon should have reached in order to become relevant. Its only finding on this issue was about the fact that in view of all the relevant general and personal circumstances of the case, the applicant had discharged the burden of proof concerning his individual risk (§ 282).

Convention-based concerns

Against this background, the main concern from a Convention point of view in respect of the approach suggested by the Advocate General is the scale which a risk must have reached to become relevant under that scheme – when is a deficiency "systemic or generalised"? – and, even more important, whether a failure to reach that scale should preclude any assessment of the individual situation of the person concerned. For the Advocate General, the bar should be placed very high in this respect, such risks having to remain exceptional for the sake of preserving the efficiency of the EAW mechanism (§§ 113 and 117).

Thus, in that logic the scale which deficiencies must reach to become relevant under the general test would appear to be of a magnitude which is seldom reached in practice and which, in the rare cases where it could be reached, is difficult to evaluate and even more difficult to prove. It can therefore be assumed that in most cases the assessment by the executing judicial authority will stop, out of convenience, after the first general step, leaving out the second individual step altogether. This would bring us back, *de facto*, to the much criticised single collective test used in NS and Others.

The Advocate General nonetheless argues that the standard of protection of the right to a fair trial being promoted by him is "comparable to the standard which emerges from the case-law of the ECtHR" (§ 130). He refers in this connection notably to Guðmundur Andri Ástráðsson v. Iceland. While it is true that this judgment sets a high standard for the assessment of irregularities in the appointment of judges, it does not concern a situation of deportation or extradition. Neither does it contain any suggestion that the high threshold thus set could be assessed by applying a general rather than an individual test.

On the contrary, the ECtHR followed the exact opposite sequence in this case, by first making a detailed and individualised assessment of the shortcomings of the criminal proceedings against the applicant, and only afterwards noting, by way of confirmation of its findings *in concreto*, that the flaws of the review by the Icelandic Supreme Court had not been specific to the instant case but had been that Court's settled practice. Thus, it would appear that this jurisprudence can hardly be invoked in support of the two-step methodology promoted by the Advocate General. The threshold set by a provision and the methodology to be used in assessing compliance with it are indeed two different things.

From an applicant's point of view, the Strasbourg standard applicable in this field would therefore appear more protective, because it imposes a single – individual – rather than a double – general and individual – burden of proof and does not automatically preclude the assessment of the personal situation of an applicant for the sole reason that his or her problem is not sufficiently general or that he or she would have judicial remedies at their disposal in the country of destination. Since, however, the Convention standard is a mandatory minimum protection level (Art. 53 of the Convention) and since national judges remain answerable in Strasbourg for their application of EU law, these judges would therefore incur Convention liability, in a Bivolaru-type scenario, in case they would dispense with assessing an individual's complaints only by reference to the fact that the problem has not reached systemic or generalised dimensions. This would indeed be tantamount to *de facto* autonomising the EU's general test and allowing it to replace the Convention individual test. Yet, the ECtHR recently stated in Avotiņš v. Latvia, § 116:

"Where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU

law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law"

In sum, one can say that the potential conflict with the Convention described above would not arise from the two-step examination as such, which has indeed been acknowledged in Bivolaru and Moldovan v. France (§ 114), but only in case the general assessment carried out under the first step – though not required by the Convention – would not be complemented by an assessment *in concreto*, meeting the Convention standards, of the individual risk incurred by the person whose transfer is requested. It can be assumed that such a second individualised step would also be compliant with Article 52(3) of the EU-Charter on fundamental rights which in essence, as recalled by the Advocate General (§ 99), provides that the protection of fundamental rights under EU law should not fall below the Convention protection level.

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