Mutual recognition before the European Court of Human Rights

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*All views expressed are strictly personal

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

The principle: mutual recognition is not outside the scope of the Convention

- EU law does not displace the Convention, because:
  - The Convention predates EU law
  - The EU Member States did not pull out of the Convention (*Bosphorus v. Ireland*, 30.6.2005, 45036/98).

- Consequently, EU law must be applied in compliance with the Convention (*Bivolaru and Moldovan v. France, 25.3.2021, 40324/16 and 12623/17*, § 103*)*

- Subject to certain conditions, the Bosphorus presumption may apply (*Bivolaru and Moldovan v. France,* § 116) → violation only in the event of a manifest deficiency

Application in the field of mutual recognition: Avotiņš v. Latvia
A. Approval in principle

*"The Court is **mindful of the importance of the mutual recognition mechanisms** for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. … The Court has repeatedly asserted its commitment to international and European cooperation ... Hence, it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be **wholly legitimate in principle from the standpoint of the Convention.**"* (Avotiņš v. Latvia, 17502/07, § 113)

Application in the field of mutual recognition: Avotiņš v. Latvia
B. Limits

"*Nevertheless, the methods used to create that area* ***must not infringe the fundamental rights*** *of the persons affected by the resulting mechanisms … However, it is apparent that* ***the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited****. …*

Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which ***the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin****, in order to ensure that the protection of those rights is not manifestly deficient."* (§ 114)

Application in the field of mutual recognition: Avotiņš v. Latvia
C. Instructions for use

"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***" (§ 116)

Illustration: the European arrest warrant

Illustration: *Bivolaru and Moldovan v. France* (40324/16 and 12623/17, 25.3.2021)

Facts and complaints:

- Two Romanian applicants contesting their transfer to Romania, following an EAW issued to enforce their prison sentences

- They invoke the highly problematic conditions of detention in Romanian prisons, which the ECtHR and the CJEU already found to be in breach of Article 3 of the Convention in previous cases = Art. 4 of the Charter.

Bivolaru and Moldovan v. France

Judgment of the ECtHR:

- Breach of Art. 3 (as regards Moldovan): the French courts had sufficient factual elements indicating a real risk of inhuman and degrading treatment in the event of the transfer; they nevertheless authorised it.

- The Court's first finding of a manifest deficiency following the rebuttal of the Bosphorus presumption

Bivolaru and Moldovan v. France

Methodological impact (§ 114):

- The ECtHR takes note of the **two-step methodology** of the CJEU → not called in question as such

- It reaffirms its own methodology: "which place[s] the national authorities under a duty to ascertain whether there is **a real risk, specifically assessed, to the individual concerned**, of treatment contrary to Article 3 in the same circumstances"

- It notes the **convergence** between the two approaches "regarding the establishment of a **real risk to the individual**"

Two-step approach of the CJEU: latest developments

In the absence of proof of systemic or generalized deficiencies, the CJEU imposes a formal ban on:

- applying the **individual test** → assigning to it an ancillary function
- **requesting information** from the judicial authorities of the issuing State about the treatment awaiting the person concerned

See, to that effect:

- *Puig Gordi*, C-158/21;
- *GN*, C-261/22;
- Mutatis mutandis: *Staatsanwaltschaft Aachen*, C-819/21

Two-step approach: latest developments

Impact:

- Replacement of the **individual test** by the **general test** → fundamental rights assessed collectively
  - Adequate? How about e.g. a Julian Assange-type of complaint (biographical ?
  - Fundamental rights are in essence **individual rights**
  - The scrutiny by the ECtHR necessarily leads to an individual assessment, as illustrated in *Bivolaru and Moldovan* (cfr. right of individual petition) → structural elements used as **evidence**, not as a **preliminary and autonomous test**
- Division of fundamental rights into **two categories**: those arising from systemic deficiencies and the others

Procedure: heavy **burden of proof**: when is a deficiency "systemic" or "generalised"?

- Practical risk: national courts not equipped to assess → difficulties in finding systemic or generalised deficiencies → end of story, without application of any individual test

Two-step approach: latest developments

Relationship with the Convention:

- It is doubtful whether national judges can be precluded by EU law from applying the Convention as legally required, which includes an assessment of the individual risks incurred by the person concerned in the issuing Member State

- Final *ex post* review of compliance with fundamental rights by national courts is carried out in Strasbourg, using the sole Convention as yardstick (cfr. *Bivolaru and Moldovan*)

Application in respect of alleged risks regarding the rule of law

- High degree of **convergence** between the ECtHR and the CJEU as regards the **substance** of the requirements of **judicial independence** and the **rule of law**
  - Dolinska-Ficek and Ozimek v. Poland (49868/19 and 57511/19, 8.11.2021)
  - W.Ż. (C-487/19, 6.10.2021)
  - L.G. (C-718/21, 21.12.2023)

- As regards the **methodology**? See: Knihinicki v. Norway (36356/22, pending)
  - EAW issued by a Polish District Court for the purpose of the prosecution of drug-related offences
  - Norway bound to apply the same rules as the EU Member States pursuant to an agreement with the EU
  - Supreme Court of Norway authorised surrender, after applying the two-step test: existence of systemic deficiencies in Poland but no impact on the applicant, given the nature of his complaints (Art. 6 of the Convention)

Thank you!

For more information: www.johan-callewaert.eu

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