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**7TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP
(“ 4 7 ON THE ACCESSION OF THE EUROPEAN UNION TO
THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**C o m p i l a t i o n o f c a s e s i n t h e a r e a o f B a s k e t
E U m e m b e r s t a t e s ”)**

Tuesday 24 November 2020 (10:00 a.m.) – Thursday 26 November 2020 (4:30 p.m.)

Due to the COVID-19 situation, the meeting will be held through the KUDO videoconferencing system

Council of Europe

Compilation of cases in the area of Basket between the EU member states")

I. Introduction

At its 6th meeting (29 September – 1 October 2020), the CDDH *ad hoc* negotiation Group on the accession of the European Union to the European Convention on Human Rights (ECHR) (Introduction by the Secretariat on the principle of mutual trust between the EU member states and the objections raised by the Court of Justice of the European Union (CJEU) in Opinion 2/13 of 18 December 2014.

During the subsequent discussion, the Group took note of the fact that there had been increased convergence between the case-law of the European Court of Human Rights (ECtHR) and the CJEU in the past years in this area. As a next step, it decided to establish in more detail this convergence which would facilitate the finding of any necessary solution. To that effect, it tasked the Secretariat to prepare a respective compilation for the next negotiation meeting. The present document responds to this request.

The document deals under II. with selected case-law by the ECtHR, and under III. with selected case-law of the CJEU. Judgments since 2014 have been taken into consideration for this compilation and are reproduced in chronological order. A short note by the Secretariat for each case aims at introducing the excerpt which follows.

II. Recent case-law of the ECtHR regarding the principle of mutual trust

***Tarakhel v. Switzerland*, application no. 29217/12, judgment of 4 November 2014 [Grand Chamber]**

Note by the Secretariat: The applicants were an Afghan couple and their five children. The Swiss authorities had rejected their application for asylum and ordered their deportation to Italy. The ECtHR held that there would be a violation of Article 3 of the European Convention on Human Rights if the Swiss authorities were to send the applicants back to Italy under the "Dublin system" (which determines forward asylum state application within the EU and four additional states¹) without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together. The ECtHR found in particular that, in view of the then situation regarding the reception system in Italy, and in the absence of detailed and reliable information concerning the specific facility of destination, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.

Excerpt from the judgment:

" 10 The applicants argued in substance that if they were returned to Italy " in the absence of individual guarantees concerning they would be subjected to inhuman and degrading treatment linked to the existence of " systemic deficiencies for asylum seekers.

101. In order to examine this complaint the Court considers it necessary to follow an approach similar to that which it adopted in the *M.S.S.* judgment, cited above, in which it examined the

¹ Note that Switzerland, which is not a member state of the EU, has an association agreement with the EU.

a p p l i individual situation in the light of the overall situation prevailing in Greece at the relevant time.

102. It first reiterates its well-established case-law according to which the expulsion of an asylum seeker by a Contracting State may give rise to an issue which has been shown for believing that there is a "real risk" of being subjected to inhuman or degrading treatment or punishment in the receiving country (see paragraph 93 above).

103. It is also clear from the M.S.S. judgment that the presumption that a State participating in the "Dublin system" will respect the fundamental rights laid down by the Convention is not irrebuttable. For its part, the Court of Justice of the European Union has ruled that the presumption that a Dublin State complies with its obligations under Article 4 of the Charter of Fundamental Rights of the European Union is rebutted in the event of "systemic flaws in the asylum system and procedures of the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State" (see paragraph 33 above).

104. In the case of "Dublin returns," the presumption that a Contracting State which is also the "receiving country" will comply with Article 3 of the Convention can therefore validly be rebutted where "substantial grounds have been shown for believing that the applicant concerned faces a 'real risk' of being subjected to inhuman or degrading treatment contrary to Article 3 of the Convention if removed to the receiving country. The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligation removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established. The Court also notes that this approach was followed by the United Kingdom Supreme Court in its judgment of 19 February 2014 (see paragraph 52 above).

105. In the present case the Court must therefore ascertain whether, in view of the overall situation with regard to the reception arrangements for asylum seekers in the receiving country and the situation, substantial grounds have been shown for believing that the applicants would be at risk of being subjected to inhuman or degrading treatment contrary to Article 3 if they were returned to their country of origin.

Avotins v. Latvia, application no. 17502/07, judgment of 23 May 2016 [Grand Chamber]

Note by the Secretariat: The case concerned the enforcement in Latvia of a judgment delivered in Cyprus with regard to the repayment of a debt. The applicant complained that the Latvian courts had authorised the enforcement of the Cypriot judgment which, in his opinion, had been delivered in breach of his defence rights and had thus been clearly unlawful. Before the Latvian courts he had claimed in particular that the recognition and enforcement of the Cypriot judgment in Latvia infringed a provision of the EU's Brussels I Regulation (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). The case, in which the ECtHR did not find a violation of Article 6 ECHR, is considered as a landmark judgment by the ECtHR on the issue of mutual recognition and mutual trust.

Excerpt from the judgment:

" 113 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. As stated in Articles 81 § 1 and 82 § 1 of the TFEU, the mutual recognition of judgments is designed in particular to facilitate effective judicial cooperation in civil and criminal matters. The Court has repeatedly asserted its commitment to international and European cooperation (...). Hence, it considers the creation of the area of freedom, security and justice and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention.

114. Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67 § 1 of the TFEU.

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. Hence, the CJEU stated recently in Opinion 2/13 that “ when implementing EU law, the EU law, be required to presume that fundamental rights have been observed by the other Member States, so that ..., save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed (t.) Limiting to n d a m e n t 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.

115. Moreover, the Court observes that where the domestic authorities give effect to European Union law and have no discretion in that regard, the Bosphorus presumption is applicable. This is the case where the mutual-recognition mechanisms require the court to presume that the observance of fundamental rights by another member State has been sufficient. The domestic court is thus deprived of its discretion in the matter, leading to automatic application of the Bosphorus presumption. The Court emphasises that this results, paradoxically, in a t w o observance of fundamental rights, due to the combined effect of the presumption on which mutual recognition is founded and the Bosphorus presumption.

116. In the Bosphorus judgment the Court reiterated that the Conv of European publ i c o r d § 156). Accordingly, the Court must satisfy itself that, where the conditions for application of the Bosphorus presumption are met (see paragraphs 105-06 above), the mutual-recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient. In doing so it takes into account, in a spirit of complementarity, the manner in which these mechanisms operate and in particular the aim of effectiveness which they pursue. Nevertheless, it must verify that the principle of mutual recognition is not applied automatically and mechanically (see, mutatis mutandis, X v. Latvia [GC], no. 27853/09, §§ 98 and 107, ECHR 2013) to the detriment of fundamental rights – which, the CJEU has also stressed, must be observed in this context (see, for instance, its judgment in Alpha Bank Cyprus Ltd v. Dau Si Senh and Others, paragraph 48 above). In this spirit, 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. ”

Royer v. Hungary, application no. 9114/16, judgment of 6 March 2018

Note by the Secretariat: The case concerns a complaint under Article 8 ECHR about the Hungarian authorities' refusal to or The ECtHR, here r e t u which did not find a violation of Article 8 ECHR in this case, confirmed its approach taken and its methodology used in Avotins with regard to the principle of mutual trust also regarding the E U ' Bussels II bis Regulation (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters).

Excerpt from the judgment:

“50. In addition, in relations between EU member States the rules on child abduction contained in the Brussels II bis Regulation supplement those already laid down in the Hague Convention. Both instruments are based on the philosophy that in all decisions concerning children, their best interests must be paramount. Under the Brussels II bis Regulation, which builds on the Hague Convention and is based on the principle of mutual trust between EU member States, the competency to assess whether non-return would be in the child's best interest is d i s t r i b u t e e been wrongfully removed can oppose his or her return in justified cases. However, under Article 11 § 8

of the Brussels II bis Regulation, the State in which the child had its habitual residence prior to the wrongful removal can override a decision refusing to enforce the Hague Convention. If such a decision is accompanied by a certificate of enforceability, pursuant to Article 42 of the Regulation, the requested State has to enforce it. Under Article 47 of the Regulation, the law of the State of enforcement applies to any enforcement proceedings (see *M.A. v. Austria*, no. 4097/13, §§ 112 and 114, 15 January 2015). As the Court has previously held, it must verify that the principle of mutual recognition is not applied automatically and mechanically (see, *Avotiņš v. Latvia* [GC], no. 17502/07, § 116, ECHR 2016).”

Pirozzi v. Belgium, application no. 21055/11, judgment of 17 April 2018

Note by the Secretariat: This case concerned the applicant’s authorities and his surrender to the Italian authorities under a European arrest warrant with a view to enforcing a criminal conviction imposed in Belgium. The applicant alleged that his arrest by the Belgian authorities had been unlawful. He also considered that the Belgian authorities had surrendered him to the Italian authorities without reviewing the lawfulness and propriety of the European arrest warrant, although it had been based on a conviction resulting from a trial *in absentia*. The ECtHR held that there had been no violation of Article 5, paragraph 1 and Article 6, paragraph 1 ECHR. The ECtHR confirmed its approach taken and its methodology used in *Avotins* also with regard to the European arrest warrant scheme.

Excerpt from the judgment (only available in French, translation provided by the Secretariat):

“ 59 The Court is aware of the importance of mutual-recognition mechanisms for the construction of the area of freedom, security and justice and of the mutual trust they require. The EAW provided for by the Framework Decision is a concrete expression of this principle of mutual recognition in the domain whose objective is to ensure the free movement of judicial decisions in criminal matters in the area of freedom, security and justice. The EAW is an arrest warrant resulting from a judicial decision issued by the competent judicial authority of an EU Member State, with a view to the arrest and surrender by the competent judicial authority of another Member State of a person wanted for the purpose of conducting a criminal prosecution or for the execution of a custodial sentence or detention order.

60. The Court asserted its commitment to international and European cooperation. It considers that the creation of an area of freedom, security and justice in Europe and the adoption of the necessary means to that end are entirely legitimate in principle under the Convention (see *Avotiņš v. Latvia* [GC], no. 17502/07, § 113, ECHR 2016). Accordingly, it considers that the EAW system does not in itself conflict with the Convention.

61. That said, the Court has also made it clear that the modalities for creating such a space must not conflict with the fundamental rights of the persons concerned (*idem*, § 114).

62. In this respect, the Court recalled that when domestic authorities implement EU law without having a discretionary power, the presumption of equivalent protection established in the judgment *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* developed in the *Michaud v. France* judgment (no. 12323/11, ECHR 2012) applies. This is the case where mutual recognition mechanisms oblige the judge to presume that observance of fundamental rights by another Member State has been sufficient. As provided for in the Framework Decision on the EAW, the national judge would then be deprived of his or her discretion, which would lead to an automatic application of the presumption of equivalent protection. This presumption may be reversed in the context of a given case (*Bosphorus*, *supra*, § 456, and *Michaud*, *supra*, § 103). Even if it intends to take into account, in a spirit of complementarity, the way in which mutual recognition systems operate and in particular their objective of effectiveness, the Court must verify that the principle of mutual recognition is not applied automatically and mechanically, to the detriment of fundamental rights (*Avotiņš*, cited above).

63. In this spirit, when the courts of States that are both parties to the Convention and members of the EU are called upon to apply a mutual recognition mechanism established by EU law, such as that provided for the execution of an EAW issued by another European State, it is in the absence of any manifest deficiency of the protection of the Convention rights that they give this mechanism its full effect (*idem*, § 116).

64. On the other hand, if they are presented with a serious and substantiated claim that there is a manifest deficiency in the protection of a Convention right and that EU law does not provide a remedy for that deficiency, they cannot refrain from examining that claim solely on the basis of their application of EU law (*idem*, § 116). In this case, it is for them to interpret and apply the rules of EU law in accordance with the Convention.”

Romeo Castaño v. Belgium, application no. 8351/17, judgment of 9 July 2019

Note by the Secretariat: In this case the applicants complained that their right to an effective investigation under Article 2 ECHR had been breached as a result of the Belgian authorities' refusal to execute the European arrest warrants issued by Spain in respect of an individual (referred to in the judgment as "the suspect") who was suspected of shooting his father in 1981 by a commando unit claiming to belong to the terrorist organisation ETA. The Belgian courts had held that the suspects' extradition would infringe their rights. The ECtHR found a violation of Article 2 ECHR due to the lack of sufficient factual support for the refusal to surrender the suspect. What is noteworthy is the particular constellation in the present case, i.e. that the ECtHR finds a violation of the ECHR in the instance that a High Contracting Party did not execute a European arrest warrant on account of existing third-party rights.

Excerpt from the judgment:

“82. In the present case the mechanism under which Spain sought Belgian cooperation was the system put in place within the EU by the Framework Decision on the European arrest warrant (see paragraphs 23-24 above). Applying the principles set out above, the Court must therefore first examine whether, in this context, the Belgian authorities responded properly to the request for cooperation. It must then verify whether the refusal to cooperate was based on legitimate grounds.

83. As regards the first question, the Court observes that the Belgian authorities provided their Spanish counterparts with a properly reasoned response. As the Belgian Court of Cassation pointed out in its judgment of 19 November 2013, the mechanism in question is based on a high degree of trust between member States which entails a presumption of observance of fundamental rights by the issuing State. In view of this principle, any refusal to surrender an individual must be supported by detailed evidence of a clear threat to his or her fundamental rights capable of rebutting the presumption in question. In the present case the Court of Cassation found that the Indictments Division of the Ghent Court of Appeal, in its judgment of 31 October 2013, had provided legal justification, on the basis of section 4(5) of the Belgian European Arrest Warrant Act, for its decision to refuse execution of the European arrest warrants issued by the Spanish investigating judge, on account of the risk of a violation of fundamental rights in the event of her surrender to Spain, and in particular the risk that she would be detained there in conditions contrary to Article 3 of the Convention (see paragraph 12 above). In its judgment of 14 July 2016 the Indictments Division essentially referred to its previous judgment, taking the view that the fresh information referred to in the new European arrest warrant did not call for a different assessment and that the previous assessment was in fact confirmed by the observations made by the Human Rights Committee in 2015 (see paragraph 20 above).

84. The Court notes that the approach taken by the Belgian courts is compatible with the principles it has set out in its case-law (see *Pirozzi*, cited above, §§ 57-64, which echoes the methodology advocated in *Avotiņš* [GC], no. 17502/07, §§ 105-27, 23 May 2016). According to that case-law, in the context of execution of a European arrest warrant by an EU member State, the mutual recognition mechanism should not be applied automatically and mechanically to the detriment of fundamental rights.

85. As to the second question the Court emphasises that, from the standpoint of the Convention, a risk to the person whose surrender is sought of being subjected to inhuman and degrading treatment on account of the conditions of detention in Spain may constitute a legitimate ground for refusing execution of the European arrest warrant and thus for refusing cooperation with Spain. Nevertheless, given the presence of third-party rights, the finding that such a risk exists must have a sufficient factual basis.”

O.C.I. and others v. Romania, application no. 49450/17, judgment of 21 May 2019

Note by the Secretariat: In this judgment, the ECtHR found that the Romanian courts had failed to give enough consideration to the grave risk of the applicant children being subjected to domestic violence when ordering their return to their father in Italy, which was one of the exceptions to the principle under the “Hague Convention on the Civil Aspects of International Child Abduction” that children should be returned to their habitual place of residence. The ECtHR noted that any mutual trust -protection authorities Romania a under the Brussels II bis Regulation (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters) did not mean that the State to which the children had been wrongfully removed was obliged to send them back to an environment where they ran a grave risk of domestic violence solely because it was their habitual place of residence and the authorities there were capable of dealing with any abuse. Hence the ECtHR, deciding by a Committee of three judges, found a violation of Article 8 ECHR.

Excerpt from the judgment:

“43. The Court must reiterate that the best interests of the children, which unquestionably include respect for their rights and dignity, are the cornerstone of the protection afforded to children from corporal punishment (*ibid.*). Corporal punishment against children cannot be tolerated and States should strive to expressly and comprehensively prohibit it in law and practice (see *D.M.D. v. Romania*, cited above, §§ 50-51). In this context, the risk of domestic violence against children cannot pass as a mere inconvenience necessarily linked to the experience of return, but concerns a situation which goes beyond what a child might reasonably bear (see, *mutatis mutandis*, *X v. Latvia*, cited above, § 116).

44. Furthermore, there is no decisions that leads the Court to believe that c c o u r t they considered that the children were no longer at risk of being violently disciplined by their father if returned to his care. In fact, it can be inferred from the reasoning of the Bucharest Court of Appeal that that court accepted that if such a risk reoccurred, the Italian authorities would be able to react and to protect the children from any abuse brought to their attention and i g h t s , supported by evidence” (see paragraph 14 above) .

45. On this point, the Court notes that as member State are parties to the Brussels II bis Regulation, which is thus applicable in the case (see *K.J. v. Poland*, cited above, § 58). That Regulation, which builds on the Hague Convention, is based on the principle of mutual trust between EU member States (see *Royer v. Hungary*, no. 9114/16, § 50, 6 March 2018). However, in the Court’s view, the protection authorities does f mu t u a not mean that the State to which children have been wrongfully removed is obliged to send them back to an environment where they will incur a grave risk of domestic violence solely because the authorities in the State in which the child had its habitual residence are capable of dealing with cases of domestic child abuse. Nothing in the Hague Convention or in the Brussels II bis Regulation allows the Court to reach a different conclusion.

46. In this connection, and bearing in mind that a c h i mechanically when the Hague Convention is applicable (see *Neulinger and Shuruk v. Switzerland [GC]*, no. 41615/07, § 138, ECHR2010, and *M.K. v. Greece*, no. 51312/16, § 75, 1 February 2018), the Court considers that the domestic courts should have given more consideration to the potential risk of ill-treatment for the children if they were returned to Italy. They should have at least ensured that specific arrangements were made in order to safeguard the children.

47. In the light of the above, and notwithstanding the principle of subsidiarity, the Court concludes that the domestic courts failed to examine the allegation children's best interests within the scope of the pro

48. There has accordingly been a violation of Article 8 of the Convention."

III. Recent case-law of the Court of Justice of the European Union (CJEU)

Joined cases Aranyosi (C-404/15) and C-659/15 PPU), judgment of the CJEU of 5 April 2016 [Grand Chamber]

Note by the Secretariat: In this judgment - delivered on a request by a German court for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU) in the context of the execution of European arrest warrants (established by the EU Framework Decision 2002/584/JHA of 13 June 2002) - the CJEU confronted the question whether Germany's obligations treaties could be overruled by a u s t u n o claim that the individual would suffer inhuman and degrading treatment in the prisons of the requesting state. The judgment received considerable attention because the CJEU did no longer limit the "exceptional circumstances" (i whether another EU member state has observed fundamental rights in a specific case) to situations of "systemic or grossly deficient detention conditions" (i a w s " people or certain places of detention, and required the national courts to inquire about the personal situation of the persons concerned. In doing so, the CJEU appeared to have adopted a two-step analysis (paragraph 94) which consists of a collective (paragraphs 89-91) and an individual (paragraphs 92-93) component.

Excerpt from the judgment:

“77. The principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter (see, to that effect, judgment in F., C-168/13 PPU, EU:C:2013:358, paragraph 50, and, by analogy, with respect to judicial cooperation in civil matters, the judgment in Aguirre Zarraga, C-491/10 PPU, EU:C:2010:828, paragraph 70).

78. Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191).

(...)

82. However, first, the Court has recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made

83. Second, as is stated in Article 1(3) thereof, the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in, inter alia, the Charter.

(...)

88. *It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in Melloni, C-399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13, EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.*

89. *To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.*

90. *In that regard, it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in Torreggiani and Others v. Italy, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, of 8 January 2013, § 65).*

91. *Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant.*

92. *Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.*

93. *The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.*

94. *Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.”*

Case of C.K. and others (C-578/16 PPU), judgment of the CJEU of 16 February 2017

Note by the Secretariat: The case concerned a request for a preliminary ruling under Article 267 TFEU from the Slovenian Supreme Court. It dealt with the asylum application in Slovenia of a couple with a new-born child. According to the Dublin system, Croatia would have been responsible for the examination of the application. Noting the absence of systemic flaws in

that state, but observing that the mother of the child was in a very bad state of health, the Slovenian Supreme Court asked the CJEU whether transfers under the Dublin system were only prohibited in case of the existence of systematic deficiencies in the responsible state, or whether a transfer also had to be precluded when such a risk was faced due to the specific and individual situation of a particular asylum seeker. In its judgment, the CJEU confirmed the principles laid out in the *Aranyosi and Căldăraru* judgment at also with regard to the Dublin system. Note that the decision was rendered by a Chamber of the CJEU (composed of five judges).

Excerpt from the judgment:

“73. (...) it cannot be ruled out that the transfer of an asylum seeker whose state of health is particularly serious may, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, irrespective of the quality of the reception and the care available in the Member State responsible for examining his application.

74. In that context, it must be held that, in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, that transfer would constitute inhuman and degrading treatment, within the meaning of that article.

75. Consequently, where an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person (see, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-659/15 PPU, EU:C:2016:198, paragraph 88).”

***Piotrowski* (C-367/16), judgment of the CJEU of 23 January 2018 [Grand Chamber]**

Note by the Secretariat: In this case, a European arrest warrant had been issued by a Polish court with regard to a juvenile offender for the service of a six-month custodial sentence following the theft of a bicycle. Upon request for a preliminary ruling under Article 267 TFEU by the Belgium court which had received the European arrest warrant, the Grand Chamber of the CJEU found that the court receiving a warrant should not assess the personal circumstances of the juvenile offender (notably the rights of the children under Article 24 of the EU Fundamental Rights Charter). Observance of those rights would primarily be the responsibility of the issuing EU member state. It is however noteworthy that the Belgian court merely inquired whether it was allowed to examine the personal situation of the juvenile, without stating whether any allegations of a serious violation of a fundamental right had been made in the light of the European arrest warrant.

Excerpt from the judgment:

“49. Admittedly, the Court has previously accepted that exceptions may be made to the principles of mutual recognition and mutual trust between Member States in exceptional circumstances. Moreover, as is apparent from Article 1(3) of Framework Decision 2002/584, that decision cannot have the effect of modifying the obligation to respect fundamental rights, as enshrined in, *inter alia*, the Charter (see, to that effect, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-659/15 PPU, EU:C:2016:198, paragraphs 82 and 83), and, in the present case, in particular, in Article 24 of the

Charter, concerning the rights of children, which Member States are required to observe when implementing the framework decision.

50. Nevertheless, in so far as proceedings relating to a European arrest warrant are concerned, observance of those rights falls primarily within the responsibility of the issuing Member State, which must be presumed to be complying with EU law, in particular the fundamental rights conferred by that law (see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 191 and the case-law cited).”

Minister for Justice and Equality (LM) (C-216/18 PPU), judgment of the CJEU of 25 July 2018 [Grand Chamber]

Note by the Secretariat: In the present case, the authorities of an EU member state had issued several European arrest warrants to Ireland for the surrender of a person for the purpose of conducting criminal proceedings, *inter alia*, for drug trafficking. The person concerned submitted to the Irish authorities that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 ECHR, due to the recent legislative reforms of the system of justice in that state which in his view fundamentally undermined the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority. The person concerned relied in particular on the European Commission’s reasoned proposal of December 2017 submitted in accordance with Article 7, paragraph 1 of the Treaty on European Union regarding the rule of law in that state (COM(2017) 835 final). Upon request for a preliminary ruling under Article 267 TFEU by the Irish court, the Grand Chamber of the CJEU considered that the “exceptional other circumstances” presumption required under the principle of mutual trust with regard to the European arrest warrant scheme also included challenges under Article 47, paragraph 2 of the EU Fundamental Rights Charter (the right to a fair trial).

Excerpt from the judgment:

“79. In the light of the foregoing considerations, the interpretation of Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary, determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the framework decision, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.”

Generalstaatsanwaltschaft (Case 2018:589), judgment of the CJEU of 25 July 2018

Note by the Secretariat: Upon a request under Article 267 TFEU from a German court, the CJEU confirmed its jurisprudence on the limits of mutual trust in the European arrest warrant scheme. The judgment is noteworthy because it considered that subsequent judicial review of detention conditions in the issuing EU member state was not in itself capable of averting the risk that the surrendered persons could be subjected to treatment contrary to Article 4 of the

EU Charter of Fundamental Rights and Article 3 ECHR (see in particular paragraph 74 of the judgment).

Excerpt from the judgment:

“ 73. As all the interested persons who have participated although a remedy of that kind can constitute an effective judicial remedy for the purposes of Article 47 of the Charter, it cannot, on its own, suffice to rule out a real risk that the individual concerned will be subject in the issuing Member State to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

74. Such subsequent judicial review of detention conditions in the issuing Member State is an important development, which may act as an incentive to the authorities of that State to improve detention conditions and which may therefore be taken into account by the executing judicial authorities when, for the purpose of deciding on whether a person who is the subject of a European arrest warrant should be surrendered, they make an overall assessment of the conditions in which it is intended that a person will be held. However, such review is not, as such, capable of averting the risk that that person will, following his surrender, be subjected to treatment that is incompatible with Article 4 of the Charter on account of the conditions of his detention.

75. Therefore, even if the issuing Member State provides 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 person will not expose him, on account of those conditions, to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.”

Case of Abubacarr Jawo (Case C-163/17), judgment of the CJEU of 19 March 2019 [Grand Chamber]

Note by the Secretariat: The applicant, a Gambian national, had applied for asylum in Italy and Germany. The German authorities rejected the application as inadmissible and ordered the applicant's transfer to Italy. *Inter alia*, that Court could not be transferred to Italy due to the systemic deficiencies in that country. Upon receipt of a request for a preliminary ruling under Article 267 TFEU from the competent German court, the Grand Chamber of the CJEU elaborated in this judgment on the limits of the principle of mutual trust in the context of the EU's Dublin paragraph 87, in which the CJEU makes express reference to its approach of going beyond the previous case-law established in the 2011 judgment of *N. S. and Others (C-411/10 and C-493/10)*, which had hitherto often been referred to as an example of a difference in approach by the ECtHR and the CJEU.

Excerpt from the judgment:

“81. The principle of mutual trust between the Member States is, in EU law, of fundamental importance given that it allows an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments of 5 April 2015, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 36).

82. Accordingly, in the context of the Common European Asylum System, and in particular the Dublin III Regulation, which is based on the principle of mutual trust and which aims, by streamlining

applications for international protection, to accelerate their processing in the interest both of applicants and participating States, it must be presumed that the treatment of applicants for international protection in all Member States complies with the requirements of the Charter, the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)), and the ECHR (see, to that effect, judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80).

83. It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that applicants for international protection may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights (judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 81).

84. In those circumstances, the application of an irrebuttable presumption that the fundamental rights of the applicant for international protection are observed in the Member State which, pursuant to the Dublin III Regulation, is designated as responsible for examining the application is incompatible with the duty to interpret and apply that regulation in a manner consistent with fundamental rights (see, to that effect, judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 99, 100 and 105).

85. Thus, the Court has previously held that, pursuant to Article 4 of the Charter, the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of the Dublin II Regulation, the predecessor to the Dublin III Regulation, where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment, within the meaning of that provision (judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraph 106).

(...)

87. Although the second subparagraph of Article 3(2) of the Dublin III Regulation envisages only the situation underlying the judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), namely that in which the real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, stems from systemic flaws in the asylum procedure and the reception conditions of applicants for international protection in the Member State which, pursuant to that regulation, is designated as responsible for examining the application, it is nevertheless apparent from paragraphs 83 and 84 of the present judgment and from the general and absolute nature of the prohibition laid down in Article 4 of the Charter that the transfer of an applicant to that Member State is ruled out in any situation in which there are substantial grounds for believing that the applicant runs such a risk during his transfer or thereafter.

(...)

90. In that regard, where the court or tribunal hearing an action challenging a transfer decision has available to it evidence provided by the person concerned for the purposes of establishing the existence of such a risk, that court or tribunal is obliged to assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people (see, by analogy, judgment of 5 April 2016, *Aranyosi and Căldăreanu*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89).

91. As regards, in the third place, the question of what criteria should guide the competent national authorities in carrying out that assessment, it must be noted that, in order to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 ECHR, and of which the meaning and scope are therefore, in accordance with Article 52(3) of the Charter, the same as those laid down by the ECHR, the deficiencies referred to in the preceding paragraph of the present judgment must attain a particularly high level of severity, which depends on all the circumstances of the case (ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, CE:ECHR:2011:0121JUD003069609, paragraph 254).

92. That particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, *inter alia*, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity (see, to that effect, ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, CE:ECHR:2011:0121JUD003069609, paragraphs 252 to 263).”

Case of Dumitru-Tudor Dorobantu (C-128/18), judgment of the CJEU of 15 October 2019 [Grand Chamber]

Note by the Secretariat: Upon a request for a preliminary ruling under Article 267 TFEU by a German court, a Grand Chamber of the CJEU further elaborated on the principle of mutual trust with regard to the European arrest warrant scheme, taking into consideration the ECtHR’s case-law. The CJEU confirmed and specified its case-law on the execution of a European arrest warrant in the face of a real risk of inhuman or degrading treatment, in this case a risk arising out of the conditions of detention in the issuing member state. It also referred to the judgment of *Mursic v. Croatia* by the ECtHR (application no. 7334/13, judgment of 20 October 2016) for the assessment of the level of severity of conditions of detention. In paragraph 57, the CJEU also relied on the *Romeo Castaño*-jurisprudence of the ECtHR (see page 6 of the present document), holding that under the ECHR, the refusal by a member state to execute a European arrest warrant by reason of a risk of ill-treatment in the issuing state had to be based on an up-to-date and detailed examination of the situation as it existed at the time of the decision not to execute the warrant.

Excerpt from the judgment:

“46. Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 36, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 49).

47. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union (judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 37 and the case-law cited, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 50).

(...)

53. In the present case, as the documents available to the Court show, the referring court found, on the basis of decisions of the European Court of Human Rights concerning Romania, decisions of the German courts and a report from the Federal Ministry of Justice and Consumer Protection, that there was specific evidence of systemic and generalised deficiencies in detention conditions in Romania. Its questions are thus based on the premiss that such deficiencies exist, the accuracy of which it is for the referring court to verify by taking account of properly updated information (see, to that effect, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 71).

54. In any event, the mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State (judgments of 5 April 2016, *Aranyosi and Căldăreanu*, C-404/15, and C-659/15 PPU, EU:C:2016:198, paragraphs 91 and 93, and of 25 July 2018, *Generalstaatsanwaltschaft* (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 61).
55. Thus, in order to ensure observance of Article 4 of the Charter in the particular circumstances of a person who is the subject of a European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is then bound to determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, because of the conditions for his detention envisaged in the issuing Member State (see, to that effect, judgments of 5 April 2016, *Aranyosi and Căldăreanu*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 92 and 94, and of 25 July 2018, *Generalstaatsanwaltschaft* (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589, paragraph 62).
56. The interpretation of Article 4 of the Charter referred to in paragraphs 50 to 55 of the present judgment corresponds, in essence, to the meaning conferred on Article 3 of the ECHR by the European Court of Human Rights.
57. The European Court of Human Rights has ruled that a court of a Member State party to the ECHR could not refuse to execute a European arrest warrant on the ground that the requested person was exposed to a risk of being subjected, in the issuing State, to detention conditions involving inhuman or degrading treatment if that court had not first carried out an up-to-date and detailed examination of the situation as it stood at the time of its decision and had not sought to identify structural deficiencies in relation to detention conditions and a risk that is both real, and specific to the individual, of infringement of Article 3 of the ECHR in that State (ECtHR, 9 July 2019, *Romeo Castaño v. Belgium*, CE:ECHR:2019:0709JUD000835117, § 86)."

Centraal Justitiele Incassobureau (C-671/18), judgment of the CJEU of 5 December 2019

Note by the Secretariat: In this case, the Dutch Central Fine Collection Agency delivered a decision requiring the addressee (referred to as "Z" in the judgment) to pay a financial penalty in respect of a road traffic offence committed by the driver of a vehicle registered in Poland in his name. The addressee claimed that on the date of the contested offence he had sold the vehicle in question but had failed to inform the authority responsible for the registration of the vehicle. On the basis of a preliminary request under Article 267 TFEU by a Polish court, the CJEU ruled on this case which concerned the mutual recognition of the financial penalty. It based its decision on the jurisprudence of the ECtHR under Article 6, paragraph 2 ECHR (presumption of innocence).

"37. It must be noted that, in accordance with Article 3 of the Framework Decision, that decision may not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU, which is why Article 20(3) of the Framework Decision also provides that the competent authority of the Member State of execution may refuse to recognise and execute a decision requiring payment of a financial penalty in the event of infringement of fundamental rights or fundamental legal principles defined by Article 6 of the Treaty.

(...)

52. In the present case, under the Netherlands legal system, according to Article 5 of the Highway Code, if the offence has been committed using a motor vehicle that has been assigned a registration number, and it is not possible to determine immediately the identity of the driver of that vehicle, the

administrative penalty is imposed on the person in whose name that registration number was listed in the register at the time of the offending conduct.

53. *The referring court is uncertain whether that provision is compatible with the principle of the presumption of innocence enshrined in Article 48 of the Charter of Fundamental Rights, which corresponds to Article 6(2) of the ECHR.*
54. *In that regard, it follows from the case-law of the European Court of Human Rights concerning Article 6(2) of the ECHR, case-law which the Court of Justice takes into consideration pursuant to Article 52(3) of the Charter of Fundamental Rights, for the purposes of interpreting Article 48 of that Charter, that a person's right in a criminal prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the ECHR, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence (decision of the ECtHR of 19 October 2004, Falk v. the Netherlands, CE:ECHR:2004:1019DEC006627301).*
55. *In that decision, the European Court of Human Rights held that Article 5 of the Netherlands Highway Code is compatible with the presumption of innocence, in so far as a person who is fined under that article can challenge the fine before a trial court with full competence in the matter and that, in any such proceedings, the person concerned is not left without any means of defence in that he or she can raise arguments based on Article 8 of the Highway Code.*
56. *In the present case, it is apparent from the file before the Court that, according to Article 8 of the Netherlands Highway Code, the decision imposing an administrative penalty must be annulled if the holder of the registration number of the vehicle in question proves, inter alia, that a third party used that vehicle against his or her will and that the holder could not reasonably have prevented that person from doing so or if the holder presents a certificate demonstrating that he or she was not the owner of the vehicle or was not in possession of the vehicle on the date of the offending conduct.*
57. *Since the presumption of liability laid down in the Netherlands Highway Code may be rebutted and it is established that Z.P. did in fact have a legal basis under Netherlands law for having the financial penalty at issue in the main proceedings annulled, Article 5 of the Code cannot impede recognition and execution of that decision."*