Croatia, Supreme Court of the Republic of Croatia, Case no. I Kz 52/14-6, Judgement of 17 February 2014

Deciding bodies and decisions

- Supreme Court of the Republic of Croatia (Vrhovni sud Republike Hrvatske)

Area of law

- Asylum and immigration

Subject matter

Extradition – non-refoulement – relationship between non-refoulement and extradition – asylum – relationship between asylum applications and extradition

The applicant is a Ukrainian national wanted for criminal fraud investigation in his country of origin. After his arrest, the Croatian authorities commenced the proceedings for his extradition. The first instance court decided that all legal requirements for extradition were fulfilled, and that the file should be handed over to the Ministry of Justice for a final discretionary decision on whether to extradite him to his country of origin. The applicant appealed to the Supreme Court, claiming that this judgment failed to examine the necessary legal requirements for denying extradition, namely his right to non-refoulement and his asylum application in Croatia.

Summary Facts Of The Case

The applicant is a Ukrainian national against whom the Ukrainian authorities issued an extradition request due to an investigation for criminal fraud with substantial material damages. Responding to the international search request, the Croatian authorities arrested the applicant, determined his identity and conducted the extradition procedure. The Zagreb County Court as the competent court of first instance issued a judgment determining that all legal requirements for extradition have been fulfilled. The applicant appealed to the Supreme Court, claiming the County Court reached a wrong conclusion on the merits of the request for extradition.

The Supreme Court then turned its analysis towards the real issue in the case - the relationship between the extradition, on one side, and the institutes of non-refoulement and asylum applications as the potential limitations for extradition, on the other.

It observed that the County Court failed to examine the applicant's right to non-refoulement based on his claim that he would be deprived of a fair trial in Ukraine. In other words, it failed to examine whether there are circumstances indicating *with great certainty* that his right to a fair trial would be blatantly violated in the Ukrainian proceedings. The Supreme Court admitted that ECtHR judgments on Art 6 ECHR fair trial violations by the Ukrainian courts invoked by the applicant should in themselves be respected; and recognized that extremely bad prison conditions suffice to establish a violation of the prohibition of Art 3 ECHR torture and inhuman and degrading treatment. Moreover, it recognized that the applicant did "bring into question the existence of a reasonable doubt" that his rights to a fair trial will be blatantly violated in Ukraine by submitting a number of evidence to that extent (such as the letter from his lawyer in the Ukraine claiming his home was searched without her presence being approved, newspaper extracts on the applicant as a member of the Ukrainian parliament, and requests from humanitarian organizations not to extradite him).

However, the Supreme Court then questioned whether such an assessment of non-refoulement should even be conducted in extradition proceedings by a court of law and concluded that not examining non-refoulement does not make the County Court's judgment invalid. Furthermore, the Supreme Court stated, even the applicant's asylum application is not a ground for denying the extradition request.

The Supreme Court noted that assessment of non-refoulement (as well as the submitted asylum application) is nowhere mentioned in the International Cooperation in Legal Matters Act as a limitation to extradition, nor is it required by the European Convention on Extradition.

It concluded that the County Court was right in not assessing these circumstances – as the right to non-refoulement is not a legal limitation for extradition to be assessed by a court of law. It is a limitation for extradition that is to be decided upon by the Minister of Justice in using his discretion. The County Court's decision on extradition was thus considered as valid and was confirmed.

Relation to the scope of the Charter

The Charter was completely disregarded in this case, although the Charter was applicable pursuant to Article 51(1) therein. The following Charter articles are relevant:

- Art 19.2 Charter - principle of non-refoulement (not explicitly)
- Art 18 Charter - right to asylum (not explicitly)

Sources - EU and national law

National law

- International Cooperation in Legal Matters Act (OJ 178/04) Arts 35, 37, 56

Sources - ECHR

- Article 6 ECHR - right to fair trial
- Article 3 ECHR - prohibition of torture and inhuman and degrading treatment

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Comments

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The following few paragraphs will very shortly reflect on the two most important holdings of the Supreme Court in this judgment.

1) Non-refoulement as a limitation of extradition is not part of the judicial examination of legal requirements for extradition. The Minister of Justice, as the one giving a final decision on extradition, should be the one to decide about the right to non-refoulement.

This reasoning is a result of the judicial interpretations of the applicable legislation, and is not specifically derived from its exact wording. Generally, provisions of the Croatian International Cooperation in Legal Matters Act (ICLMA) proscribe a two-step extradition procedure. First, a court of law decides on merits by examining the 'legal requirements' for extradition of a third country national – to this extent, ICLMA lists criminality of the conduct for which the extradition is sought, no expiry of the temporal limitation for criminal prosecution or violation of the *ne bis in idem* principle, determining the identity of the person, and finally, reasonable doubt that the person committed a crime for which it is accused. However, the wording of ICLMA does not specify that solely those conditions should be taken into account, but merely states that 'legal requirements are to be assessed by a court' – which creates doubt that courts may also be required to assess all other legal requirements for extradition in the Croatian legal system, such as the non-refoulement or asylum application obstacles which are not explicitly listed in ICLMA. After a court's decision on allowing extradition due to the existence of legal requirements, the file then goes to the Minister of Justice who brings the final decision by using his discretion. In other words, it is within his discretion not to extradite a person despite the decision of a court that legal requirements for extradition have been fulfilled. Pursuant to the reasoning of the Supreme Court in the present case, this discretion would also include examination of the right to non-refoulement.

Although setting up the extradition procedure should be considered as falling within the procedural autonomy of a state, in the present circumstances one would surely welcome a more comprehensive analysis on whether Minister's discretionary assessments of non-refoulement comply with the requirements of an effective legal remedy. Especially since, pursuant to ICLMA's provisions, Minister's decision on extradition ICLMA is final and is not subject to an appeal.

2) The applicant's asylum application is not a ground for denying the extradition request, as it is nowhere mentioned in ICLMA, nor required by the European Convention on Extradition.

Similarly to the right to non-refoulement, the Supreme Court considered that relevance of asylum

applications are not to be considered by courts as legal requirements for denying extradition. In making such an assessment, the Supreme Court undoubtedly relied on its previous case-law stating that relevance of asylum (and asylum applications) is to be assessed in the extradition procedure by a Minister of Justice using his discretion – the same as the assessments of non-refoulement (for example in judgment of 18 January 2012, I Kz 1030/11-4).

Although Article 9 of the Procedures Directive 2013/32/EU allows Member States discretion to extradite asylum applicants (but this Directive was not even mentioned in the judgment), the Supreme Court failed to recognize that Croatia has decided to use this discretion in a way not to allow extradition of asylum applicants until the decision on asylum application comes into force if the extradition request comes from their country of origin.

The present Supreme Court's decision of 17 February 2014 came out more than two and a half months after the new Asylum Act came into force on 30 November 2013, and provided for retroactive application of the rule in question. Nonetheless, the Supreme Court completely disregarded this provision and relied solely on the ICLA and the European Convention on Extradition that indeed do not make such requirements. The Supreme Court thus also did not reflect on the question whether the new obligation of disallowing extradition of asylum applicants to their countries of origin could fall within the scope of 'legal requirements' to extradition as provided in ICLMA. It also remained silent on how to reconcile the Minister's *discretion* on extradition with the newly established and self-imposed *obligation* not to extradite asylum applicants to their countries of origin.