

European Union, CJEU, Radu, judgment of 29 January 2013

Deciding bodies and decisions

CJEU (Grand Chamber), judgment of 29 January 2013, Case C-396/11, *Radu*, EU:C:2013:39

The ECJ decided on a reference for preliminary ruling issued by *Curte de Apel Constanța* (Court of Appeal of Constanta, Romania), which was requested to execute four EAWs for criminal prosecution issued by Germany.

Area of law

Effective judicial protection - mutual recognition - criminal law

Subject matter

European Arrest Warrant (EAW) - grounds for refusal to execute a warrant - fundamental rights

The ECJ was asked to clarify whether the national court requested to execute an EAW has the power or the duty to check the compatibility with EU fundamental rights of such an execution, in order, eventually, to refuse it, notably with respect to fundamental rights concerns that the EU legislator took into account, to some extent, in the list of compulsory or optional grounds for non execution. In its judgement, the ECJ held that a national authority cannot refuse the execution of an EAW issued for prosecution purposes, on the ground that the person concerned was not heard before the EAW was issued. In this decision, the Charter is a parameter to review the validity of the choices made by the EU legislator as regards the power/duty of the judicial authorities of the Member States to refuse the execution of an EAW.

Summary Facts Of The Case

The question for preliminary reference that led to the CJEU's judgment in *Radu* was raised by the Court of Appeal of Constanța (Romania), which was requested to execute four EAWs for criminal prosecution issued by German authorities against Mr Radu. The man did not consent to his surrender and, in order to avoid the execution of the warrants, used two instruments.

First, he invoked the unconstitutionality of the national legislation implementing the EAW

Framework Decision, alleging its contrast with, *inter alia*, Article 24(1) (the right to a fair trial) of the Constitution. In particular, the man complained of the fact that, based on the EAW and the national legislation transposing it, European arrest warrants for prosecution purposes could be issued in absentia, i.e. without the person concerned having been summoned or having had the possibility of hiring a lawyer or presenting his defence.

Secondly, after the Constitutional Court dismissed the exception of unconstitutionality by decision nr. 1290/14.10.2010, Mr Radu claimed that the Court of Appeal of Constanta should have referred a question for preliminary reference to the CJEU, asking, in essence:

Whether the EU primary law status of the CFR implies that national courts have the right to check the conformity of the execution of an EAW with EU fundamental rights and, if this is not the case, to refuse execution, even if such a cause of refusal is neither provided by the Framework Decision 2002/584/JHA nor by the national implementing law.

Deciding on the preliminary reference in *Radu* by judgment of 29 January 2013 (C-396/11), the Grand Chamber of the CJEU held that Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute an EAW issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued.

The CJEU observed that, under Article 4a of the EAW Framework Decision, the infringement of the rights of the defence during a trial that has led to the imposition of a criminal sentence *in absentia* may, under certain conditions, constitute a ground for non-execution of an EAW issued for the purposes of giving effect to a custodial sentence or a detention order. Conversely, the fact that the EAW has been issued for the purposes of conducting a criminal prosecution, without the requested person having been heard by the issuing judicial authorities, does not feature among the grounds for (compulsory or optional) non-execution.

According to the CJEU, whilst the EAW must have a certain element of surprise, an obligation for the issuing judicial authorities to hear the requested person before the execution of the warrant would frustrate the surrender system foreseen by the Framework Decision. Moreover, the Framework Decision provides for a set of fair trial guarantees in cases such as that of Mr Radu (see Articles 8, 13, 14, 15 and 19). Before deciding on the surrender, the executing judicial authority must subject the EAW to a degree of scrutiny; the requested person has the right to legal counsel in the case where he consents to his surrender or, where he does not consent, she is entitled to be heard by the executing judicial authority, under the conditions determined by mutual agreement with the issuing judicial authorities.

In light of the foregoing, the CJEU concluded that the executing judicial authorities cannot refuse to execute an EAW warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.

The CJEU confirmed the validity of the Framework Decision under Articles 47 and 48(2) of the Charter. The CJEU referred to the ECtHR case law and concluded that the right to appear in person at the trial as not an absolute right and that the accused may waive that right, expressly or tacitly, under certain conditions.

Regarding Charter Article 53, the CJEU acknowledged that state courts may apply national standards of protection of fundamental rights in reviewing national implementing measures, as long as the level of protection provided for by the Charter, and the primacy, unity and effectiveness of EU law are not compromised.

In the resolution of the case, the Constitutional Court referred to the Charter as a hermeneutic criterion for the interpretation of Article 24(2) of the Constitution. Hence, the Charter was not directly enforced, but the Constitutional Court followed the interpretation given by the CJEU to overrule the previous constitutional interpretation of the right to a fair trial.

Relation to the scope of the Charter

- Right to an effective remedy and to a fair trial (Article 47 EU Charter)
- Presumption of innocence and right of defence (Article 48 EU Charter)

The relation with the Charter of this case is quite obvious, given that it concerned the execution of an EAW, which is an instrument of judicial cooperation in the criminal law field that is governed by EU law (notably, by the EAW Framework Decision).

As mentioned above, in this decision, the CJEU used the Charter as a parameter to review the validity of the choices made by the EU legislator as regards the power/duty of the judicial authorities of the Member States to refuse the execution of an EAW.

Relation between the Charter and EHCR

Article 47 of the EU Charter corresponds to Article 13 of the ECHR, while the second paragraph corresponds to Article 6 (1) of the ECHR. With regard to the third paragraph, the explanation of Article 52(3) points out that “Article 47(3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation”. Thus, the scope of legal aid under the Charter is

broader than under the ECHR. Article 48 of the EU Charter corresponds to Article 6, paras. 2 and 3 of the ECHR. It follows from Article 52(3) of the EU Charter and the related official explanation that Charter provisions that correspond to fundamental rights already granted by the ECHR shall be interpreted as having the same scope and meaning afforded by the ECHR to their correspondents, taking into account also the case law of the European Court of Human Rights. However, a higher level of protection can be granted under EU law (meaning that the ECHR only sets a minimum standard of protection – non-derogable *in peius* – for corresponding Charter provisions).

Impact on Jurisprudence

Impact at the national level

The Court of Appeal of Constanta disregarded the guidance provided by the CJEU and, by Decision no. 26/P/11.03.2013 of 11 March 2013 and refused execution of the four EAWs and the surrender of Mr Radu.

The State prosecutor appealed the decision of the Court of Appeal in front of the High Court. The High Court annulled the Court of Appeal's decision by Judgment no. 2372 of 17 July 2013, giving priority to the principle of mutual recognition. The High Court found that the decision of the Court of Appeal was unlawful as it did not implement correctly the guidance provided by the CJEU. Further on, the High Court decided that the limitations to the fundamental rights were necessary and proportionate, given the gravity of the offences. Based on the above findings, the High Court ordered the execution of three EAWs and the surrender of Mr Radu to the German authorities. One EAW execution was rejected, according to *ne bis in idem* principle. The surrender was authorized under the condition that, if found guilty, the requested person would be transferred to Romania for serving the sentence.

Sources - EU and national law

National Law

The case involves the national provisions through which the Romanian legislator gave effect into the domestic legal order to the EU Framework Decision on the European Arrest Warrant (see the section "EU law sources and CJEU jurisprudence" below).

The provisions in question are:

- Chapter III of Title III entitled 'Provisions on cooperation with the Member States of the European Union pursuant to [the Framework Decision]', of Law No 302/2004 on international judicial cooperation in criminal matters (*Legea nr. 302/2004 privind cooperarea judiciară internațională în materie penală*, *Monitorul Oficial al României*, Part I, No 377 of 31 May 2011; 'Law No 302/2004').

EU Law

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

Sources - CJEU Case Law

On the EAW

- C-192/12 PPU, *West*, EU:C:2012:404
- C-388/08 PPU, *Leymann and Pustovarov*, EU:C:2008:669
- C-261/09, *Mantello*, EU:C:2010:683

On mutual recognition

- C-42/11, *Lopes Da Silva Jorge*, EU:C:2012:517

Comments

Decision of 11 March 2013 no. 26/P/ 2013 delivered by the Court of Appeal of Constanta.

After the CJEU delivered its judgment in *Radu*, the Court of Appeal of Constanta disregarded the guidance provided by the CJEU and, by Decision no. 26/P/11.03.2013, rejected the execution of the four EAWs and the surrender of Mr Radu.

For one of the warrants, the Court of Appeal based its refusal on the *ne bis in idem* principle, since Mr Radu had been already sentenced for the same act by the Romanian authorities and was serving the sentence (see Article 3(2) EAW Framework Decision 2002/584/JHA, grounds for mandatory non-execution).

For the other three warrants, the Court of Appeal based its refusal on two main arguments. Firstly, it argued that the principle of mutual recognition in the context of the EAW Framework Decision is subject to the limits of the respect for the Charter. In its view, the respect of fundamental rights constitutes an exceptional ground for limiting mutual recognition, beyond the grounds for non-execution listed by the EAW Framework Decision. Secondly, the Court of Appeal held that the surrender would constitute a disproportionate interference with the right to liberty and the right to respect for family life, taking into account the long period (12 years) between the time when the offence was committed and its prosecution. Moreover, the prosecution in Romania would ensure a better exercise of the right to defence.
