

What are the limits of mutual trust in extradition relations?

A degree of trust is built into all extradition relations, as without it there can be no cooperation between States. Trust requires more than confidence in or familiarity with another State's criminal justice system. As Fichera put it: "*trust emerges when there is distance to be filled, a risk to be taken, and thus a gap of knowledge.*"¹ Absolute trust in extradition relations, if possible, would mean executing an extradition request with no knowledge of the surrounding circumstances. The strongest example may exist between two closely aligned States, such as the 'backing of warrants' system in New Zealand and Australia. The greater the trust, the less knowledge required before extraditing. Some might hope that mutual trust would always be limited by respect for the fundamental rights of a requested person. On closer inspection, however, human rights considerations do not dampen the impact of mutual trust. This paper will demonstrate this by considering how courts in Europe approach inevitable gaps of knowledge around prison conditions and the right to a fair trial. It will then briefly compare how extradition operates outside the parameters of the European Union and the European Convention on Human Rights ('ECHR'), to show that the real limit on mutual trust is political circumstance.

1. PRISON CONDITONS IN THE EU

The European Arrest Warrant ('EAW') was created on the basis that EU Member States could apply minimal scrutiny to each other's judicial decisions. Framework Decision 2002/584/JHA does not refer to mutual trust, but recital (10) relies on the "*high level of confidence between Member States*" and in *Criminal proceedings against Gözütok* [2003] 2 CMLR 2 at [33], the Court of Justice of the European Union ('CJEU') asserted that "*Member States have mutual trust in their criminal justice systems*". As Lord Bingham noted in *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6 at [4], the underlying assumption is that "*Member States can and should trust the integrity and fairness of each other's judicial institutions*".

They can trust not only the validity of judicial decisions, but also the requesting State's compliance with human rights obligations. But when is it possible to displace that trust? *Criminal proceedings against Aranyosi* [2016] QB 921 concerned a claim by requested persons that if extradited to Hungary or Romania they would be subject to detention that amounted to inhuman or degrading treatment, contrary to Article 4 of the Charter of Fundamental Rights of

¹ M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Intersentia, Cambridge 2011), p. 210.

the European Union. The CJEU recognised that “*limitations of the principles of mutual recognition and mutual trust between member states can be made in exceptional circumstances*” and noted that Article 1(3) of the Framework Decision states that it does not modify the obligations to respect fundamental rights (at [82-3]). Thus, where a requested person can show that they would be subject to a breach of their fundamental rights, mutual trust may subside.

The two-part test laid down in *Aranyosi* (at [104]), however, emphasises the exceptional nature of this limitation. Firstly, there must be “*objective, reliable, specific and properly updated evidence...that demonstrates that there are deficiencies*”; secondly, the executing judicial authority (‘EJA’) must determine “*specifically and precisely whether there are substantial grounds to believe that the individual concerned...will be exposed to a real risk of inhuman or degrading treatment*”.

It can be difficult to prove the second limb, particularly as the CJEU subsequently found in *Criminal proceedings against ML* [2019] 1 WLR 1052 that in light of the mutual trust between Member States, the EJA need only consider prisons in which they have been told the requested person is likely to be held, not other prisons to which they may subsequently be transferred. The consequence is that mutual trust may allow someone to be extradited on the basis of Article 4 compliant detention and then transferred to a prison that will breach their fundamental rights.

Even where the requesting State is shown to have breached previous assurances on prison conditions, the presumption arising out of mutual trust is difficult to displace. In *Georgiev v Bulgaria* [2018] EWHC 359 (Admin) at [8(vii)], the High Court made clear that the analysis of such assurances must “*be conducted in the light of the principle of mutual recognition and trust*” and “*there is a strong presumption that [a requesting State] is willing and able to fulfil its human rights obligations and any assurances given in support of those obligations*”. Accordingly, extradition to Bulgaria was permitted in light of new assurances, despite a Strasbourg judgment that Bulgarian prison conditions were in breach of Article 3 ECHR and evidence of Bulgaria having breached its previous assurances on prison conditions. Similarly, in *Szalai v Hungary* [2019] EWHC 934 (Admin), at [74], evidence of Hungary breaching its previous assurances was considered insufficient, as it “*did not undermine the mutual trust upon which the system of assurances is based*”.

This approach to prison conditions in EAW cases demonstrates that fundamental rights are far from guaranteed to put a limit on the reaches of mutual trust. Where Article 3 ECHR arguments

are successfully raised they often only achieve delay due to the weight given to subsequent assurances, as was most recently seen in the Amsterdam Court’s decision to lift its prohibition on extradition to HMP Liverpool.²

2. RIGHT TO A FAIR TRIAL

The other area in which trust is required is in a State’s ability to give the requested person a fair trial, which can become critical when the independence of that State’s judiciary is in doubt. This was the case in Poland after the European Commission made a proposal under Article 7(1) of the Treaty on European Union, inviting the European Council to find that recent reforms to the Polish justice system meant there was a clear risk of Poland breaching the rule of law. In *Criminal proceedings against LM* [2019] 1 WLR 1004, the CJEU considered a reference from Ireland on this issue and relied upon *Aranyosi*, which it said showed that “*mutual trust does not constitute blind trust*” [55]. At [79], it set out a two-part test analogous to that of *Aranyosi*, namely that where there is evidence of systemic or generalised deficiencies giving rise to a real risk of a breach of the right to a fair trial (as in the Article 7(1) material), the EJA must determine, specifically and precisely, whether there are substantial grounds for believing that the requested person will run such a risk.

Mutual trust may not be blind, but *Aranyosi* and *LM* do invite the courts to shut one eye. Even where there is evidence that a State is breaching fundamental rights – and so may not be trustworthy – the presumption remains that the State will comply with its human rights obligations, unless something specific is known about the individual’s case. In fact, those obligations only strengthen the trust extended to that State. Keene LJ said in *Lisowski v Regional Court of Bialystok (Poland)* [2006] EWHC 3227 (Admin) at [26] that “*The fact that the requesting state is a signatory to the ECHR is a relevant factor, but I do not myself see it as being determinative of this issue in the absence of other evidence about the legal processes in that state.*” This was explicitly overruled by the House of Lords in *Gomes v Government of the Republic of Trinidad and Tobago* [2009] UKHL 21. At [35], Lord Brown said that all Council of Europe countries should be “*assumed capable of protecting an accused against an unjust trial*” and extended this trust to Trinidad & Tobago on the basis that the Privy Council is its final court of appeal.

² See <https://www.liverpoolecho.co.uk/news/liverpool-news/foreign-judges-rule-walton-jail-16615413>

This underlines the strength of mutual trust as applied in *Aranyosi* and *LM*. Trust in a State's compliance is naturally greater where more is known of their justice system, so when that State is a signatory of the ECHR or comes under the jurisdiction of the Privy Council, one might expect more trust to be extended in the absence of clear evidence of human rights breaches. Yet when there is such evidence, mutual trust allows courts to disregard that further knowledge. If fundamental rights were a real limit on mutual trust, one might at least expect the burden to shift to the requesting State to prove in the second limb that the individual will be protected. Instead, as the High Court said in *Lis v Poland* [2018] EWHC 2848 (Admin) at [71], the requested person only gets the “*opportunity to advance reasons*” why theirs is an exceptional case. That opportunity, coupled with the potential recourse to Strasbourg after their fundamental rights have been breached, is barely a limit at all.

3. POLITICAL REALITY OUTSIDE EUROPE

The real limit lies in the political circumstances that define the trust that can be permissibly extended to another State. If a State is not part of the Council of Europe, for example, then a court cannot rely on those structural safeguards to justify trusting that State to respect the requested person's rights. For an example of political context outside Europe, Section 4 of Hong Kong's controversial *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019* would allow extradition of individuals to countries with which Hong Kong does not have an extradition agreement, including mainland China. The provision is analogous to section 194 of the Extradition Act 2003 in the UK. The key difference is that the Hong Kong courts would not be empowered to examine whether a requested person would receive basic human rights protection (see statement of the Hong Kong Bar Association at [18-20]).³ The only limit on the trust Hong Kong extends to China is political. Politics will determine whether the bill is passed and, if it is passed, whether the executive's discretion in considering each request from China would be any limit at all.

Although it concerns mutual legal assistance, the case of *R (El Gizouli) v Home Secretary* [2019] 1 WLR 3463 further demonstrates the political nature of mutual trust in UK extradition relations. At [60], the High Court noted that the ECHR has no direct application to an individual held in Syria. It found that although the ECHR prohibits the death penalty, there was nothing to prevent the UK sharing information that may be used by the US to prosecute and then

³<https://www.hkba.org/sites/default/files/HKBA%20Observations%20on%20FOMLACM%20Bill%202019%20%28Final%29.pdf>

execute that individual (although this is subject to an appeal). Outside the framework of the ECHR, the UK government was willing to provide the information without any assurances that it would not be used in a death penalty trial. The case makes clear that this decision was motivated by international and domestic politics. It is these factors that truly define the mutual trust between two States.

CONCLUSION

Human rights considerations have done little if anything to put a limit on mutual trust, as the principle is shaped by internal and external political factors. As the UK redefines its relationship with the world, this will provide scant reassurance to requested persons in this jurisdiction. That said, although much will depend on the UK's future relationship with the EU, Brexit is unlikely to have much impact upon the situation. *Aranyosi* and *LM* may not bind the UK in the future, but the courts will continue to place trust in parties to the ECHR, as was made clear in *Gomes*. If the UK were to withdraw from the ECHR, however, the consequences could be drastic. Although the UK might still rely on a requesting State's obligations under the ECHR to justify trusting them to comply, it would not be bound to consider potential human rights breaches by that State, unless the common law or other domestic legislation provides similar protection. The nature of mutual trust would then be all too clear, as a product of international relations the limits of which will be, more than likely, only those that political circumstances impose.