Human Rights Standards as a Bar to Extradition from the European Union to the United Kingdom

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Received 4 July 2023 | Accepted 19 October 2023 | Published online 20 March 2024

Abstract

Since 1 January 2021, the Trade and Cooperation Agreement between the United Kingdom and the European Union has regulated extradition to and from the United Kingdom and Member States of the European Union. A recent judgment of a German court denying extradition of a suspect to the United Kingdom illustrates the subtle differences between the terms and operation of the Trade and Cooperation Agreement Warrant and those of the European Arrest Warrant that had applied previously. This paper notes the absence of mutual trust as an underlying principle in the Trade and Cooperation Agreement, and the failure of the British authorities to grasp and respond to the changed criteria. At the same time, it highlights the implications of a judgment that finds that the treatment of prisoners in British prisons might be so inhuman and degrading that persons should not be extradited to face imprisonment in the United Kingdom.

Keywords
O wad some Power the giftie gie us
To see oursels as ithers see us!
It wad frae monie a blunder free us ...

1 Introduction

On 10 March 2023 a German court, the Karlsruhe Higher Regional Court\(^2\) (the Karlsruhe Court), ordered the immediate release of a prisoner, known, according to the German practice, only as me, who had been detained pending a decision on whether to extradite him to the United Kingdom (UK) to stand trial and, if convicted, serve a sentence in England.\(^3\) By that date, formal extradition procedures, initiated by a Trade and Cooperation Agreement Warrant, were well advanced in what was otherwise a somewhat routine, if serious, case involving allegations of drug dealing: if convicted in the UK, me, an Albanian national arrested in Germany, would face a long term in prison, potentially a life sentence. The primary reason for this decision was that the Karlsruhe Court held that, if me were to be extradited and sent to stand trial, most probably in London, there was a real risk that he could be subject to inhuman or degrading conditions of detention. This would offend against his fundamental right, guaranteed by Article 3 of the European Convention on Human Rights (ECHR) and by the identically worded Article 4 of the Charter of Fundamental Rights of the European Union (Charter), not to be subject to such treatment.

In order to describe the wider context of this case, we sketch the current framework for extradition from European Union (EU) Member States to the

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1 Robert Burns, ‘Ode to a Louse’ (1786).
2 Higher Regional Courts (Oberlandesgerichte) have a special jurisdiction for state protection matters (section 120 of the German Courts Constitution Act (Gerichtsverfassungsgesetz), but otherwise are essentially regionally based appellate courts within the hierarchy of the German federal courts (section 121 of the German Courts Constitution Act). However, in matters of international law, including extradition, they have primary jurisdiction according to sections 13 and 14 of the German Act on International Mutual Assistance in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen). The decisions of Higher Regional Courts on whether to allow or refuse extradition are not subject to appeal on the merits (section 13 I of the Act on International Mutual Assistance in Criminal Matters). They can be reviewed on broad constitutional grounds, however, by the Federal Constitutional Court (Bundesverfassungsgericht).
3 Karlsruhe Higher Regional Court, decision of 10 March 2023 – 301 OAus 1/23. Quotations from this decision below are our own translations.
UK in terms of a Trade and Cooperation Agreement Warrant, which, since the UK is no longer a member of the EU, has replaced the European Arrest Warrant (EAW) as the extradition instrument that the UK must use. In this regard, we pay particular attention to changes introduced by the new instrument, which moves away from the assumptions about mutual trust between States that underpin the EAW, but which seeks to incorporate human rights protection into the application of the new Trade and Cooperation Agreement Warrant in other ways.

We then turn to the information that was made available to the Karlsruhe Court to determine whether these standards would be met if ME were to be extradited to the UK. In this regard we focus on the attempts of the Karlsruhe Court to gain further information from the UK authorities about how ME would be treated if he were sent to the UK, and then examine the responses of the UK authorities to the requests for guarantees in this regard. We also analyse more closely the legal sources on which the Karlsruhe Court drew in coming to its decision.

We conclude that, if it is to succeed in extraditing individuals to face serious criminal charges before its domestic courts, the UK will have to improve its responses to questions from courts in EU Member States, as it is operating in the face of claims that its prisons do not routinely comply with basic human rights standards. Importantly, these claims are being made in a new legal context where mutual trust is not the key underpinning concept. This is not to disregard the wider context to which we return at the end, namely, the fundamental shortcomings of the overcrowded British prison systems and their contribution to their inability to meet basic human rights standards.

2 Extradition from EU Member States to the UK

Since 1 January 2021, extradition between EU Member States and the UK has been conducted in terms of the omnibus Trade and Cooperation Agreement.4

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4 The Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community of the other part (TCA) was subject to final revision and being republished in an edited form. See https://www.gov.uk/government/publications/ukeu-and-eaec-trade-and-cooperation-agreement-ts-no82021. This edited version became the final text as from 1 May 2021: UK Treaty Series No.8 (2021); OJ 2021, L 149. The changes included a different numbering system but were largely cosmetic. References to Articles of the TCA below are to the final text.
Prior to that date, extradition between EU countries and the UK had been conducted according to the EAW Framework Decision. When the UK left the EU on 31 January 2020, the EAW remained in place for a transitional period, which ended when the Trade and Cooperation Agreement came into force. Like the EAW Framework Decision, Title 7 of Part 3 of the Trade and Cooperation Agreement creates the possibility for extradition to be initiated by an arrest warrant from the issuing State. If the Trade and Cooperation Agreement Warrant meets certain prescribed requirements, it must be acted upon by an executing State that is a party to the Trade and Cooperation Agreement. The advantage of an arrest warrant based system is that it cuts out many of the formalities and delays that are inherent to more traditional bilateral or multilateral treaty-based systems of extradition.

As was the case with the EAW, most of the mandatory prescribed requirements for extradition in terms of the Trade and Cooperation Agreement are rarely likely to prove controversial. Many of the details are covered, as was also the case with the EAW, by the forms that the issuing State is required to complete. These include matters such as dual criminality, access to a lawyer and timelines where the arrested person agrees to be extradited.

It is where human rights are concerned directly that the differences between the EAW Framework Decision and the Trade and Cooperation Agreement become clearest. The EAW is based on a commitment to mutual trust in shared
values among EU Member States in which human rights standards play a prominent, if sometimes controversial, part.\(^\text{11}\) However, since its 2016 decision, in \textit{Aranyosi and Căldăraru},\(^\text{12}\) involving EAWs issued by Hungary and Romania for persons in Germany, the Court of Justice of the European Union (CJEU) has gradually recognised that mutual trust does not mean blind trust. In ‘exceptional circumstances’ this mutual trust may be challenged on the basis that allowing extradition based on an EAW can pose a risk to the human rights of the person whose extradition is being sought.\(^\text{13}\)

The possibility of challenge to an EAW on human rights grounds does not mean that mutual trust has been negated. It has only been limited.\(^\text{14}\) For such a challenge to succeed, even in ‘exceptional circumstances’, a restrictive two-step process has to be followed. First, the judicial authority in the issuing Member State has to establish whether, on the basis of objective and reliable information on the detention conditions in the issuing Member State, there was a risk of inhuman or degrading treatment of the person named in the EAW.\(^\text{15}\) Secondly, the judicial authority has to decide whether there were ‘substantial grounds’ to believe that, in the specific case before it, the person concerned would be exposed to such a risk.\(^\text{16}\) Even if such grounds are present, the execution of the warrant must initially only be postponed.\(^\text{17}\) However, if the existence of the risk to the person facing extradition cannot be discounted within a reasonable time, the executing judicial authority to decide to bring surrender procedure should be brought to an end.\(^\text{18}\)

As the UK is not a Member State of the EU any more, this primary commitment to shared values cannot be assumed, and the Trade and Cooperation Agreement does not refer to mutual trust at all. Instead, in the Trade and Cooperation Agreement the human rights values that must


\(^{12}\) Joined cases CJEU C-404/15 and C-659/15 \textit{Aranyosi and Căldăraru}, 5 April 2016. The approach has been reaffirmed in subsequent decisions: see for example, joined cases CJEU C-354/20 PPU and C-412/20 PPU \textit{Openbaar Ministerie}, 17 December 2020, paras. 53–55.

\(^{13}\) \textit{Aranyosi and Căldăraru}, loc. cit., para. 82.


\(^{15}\) \textit{Aranyosi and Căldăraru}, loc. cit., para.89.

\(^{16}\) \textit{Ibid}, para. 94.

\(^{17}\) \textit{Ibid}, para. 98.

\(^{18}\) \textit{Ibid}, para. 104.
underpin the extradition process are emphasised in other ways. Thus, Article 524 of the Trade and Cooperation Agreement, a general provision in Part Three that governs all forms of cooperation in criminal matters between the UK and EU Member States, including extradition, deals with the ‘protection of human rights and fundamental freedoms’. It provides:

1. The cooperation provided for in this Part is based on the Parties’ and Member States’ longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.19

This general provision is complemented by Article 597 of the Trade and Cooperation Agreement, which highlights the ‘principle of proportionality’ as it should be applied specifically to extradition:

Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention.

Even when the mandatory requirements are met, there are also provisions in the Trade and Cooperation Agreement for additional guarantees to be sought by the executing State if further protection of the fundamental rights of prospective extraditees is deemed necessary. In this regard, Article 604(a) of the Trade and Cooperation Agreement provides, as did the EAW, that the executing State may ask for guarantees that the issuing State will ensure that formal and informal life sentences are reviewed at the latest after 20 years. The executing State may also require, in terms of Article 604(b) of the Trade and Cooperation Agreement, that where a person who may be extradited is a national or resident of such State, they be returned to the executing State to serve any sentence that may be imposed on them.

19 Article 524 of the TCA.
Article 604(c) of the Trade and Cooperation Agreement, however, goes further than the EAW Framework Directive by also providing specifically that:

if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person’s surrender before it decides whether to execute the arrest warrant.

Article 604(c) is perhaps the clearest indicator that the Trade and Cooperation Agreement does not envisage any reduction of the fundamental human rights of persons facing extradition. Unlike the EAW, however, the expedited extradition process created by the Trade and Cooperation Agreement is not subject to the oversight of the CJEU. The Trade and Cooperation Agreement has established an oversight committee, the Specialised Committee on Law Enforcement and Judicial Cooperation, to oversee various aspects of the process of surrendering someone for extradition.20 The Committee’s functions do not include hearing appeals from individuals whose extradition has been approved by the executing judicial authority, but who fear that their fundamental rights will be compromised if they were extradited.

The lesser role of the CJEU is evidence of the UK’s desire not to have matters to which it is a party decided by that Court. Nevertheless, when authorities in EU Member States take decisions on extradition to the UK, they are still bound to respect the fundamental rights and legal principles as reflected in the Charter of Fundamental Rights of the European Union in addition to those reflected in the ECHR, even though the EAW and the specific procedures developed to enforce it do not apply. Although the Trade and Cooperation Agreement provides that the UK is bound only by the ECHR,21 this means that, when the UK requests that someone be extradited from an EU Member State, that State will also be bound by any relevant substantive standards of the Charter developed by the CJEU.

3 Procedure and Evidence of Possible Fundamental Rights Violations

When the case of me first came before the Karlsruhe Court, the mandatory requirements for extradition in terms of the Trade and Cooperation Agreement

20 Article 8(1)(r) of the TCA.
21 Article 524 of the TCA.
pertaining to the arrest warrant issued by the UK pending a decision on extradition were not in dispute. However, counsel for me successfully argued before the Karlsruhe Court that me’s extradition could pose a ‘real risk’ to his fundamental rights. The evidentiary basis for this preliminary finding is significant. Somewhat unusually, the Karlsruhe Court referred to counsel of me’s knowledge of prison conditions based on his own visits to various British prisons and his scientific contribution to research on them. However, for its initial impression the Karlsruhe Court relied most heavily on the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its periodic visit to the United Kingdom from 8 to 21 June 2021, which described English prisons as overcrowded with limited facilities and programmes for many prisoners.

Noting that this information was somewhat dated, and that the UK government had undertaken to remedy some of the faults that the CPT had found, the Karlsruhe Court used this material carefully. However, the Karlsruhe Court also recorded that the World Prison Brief reported that on 25 November 2022 the prisons in England and Wales were still significantly overcrowded. Its preliminary conclusion was that there could be a real risk of me’s fundamental rights being infringed if the extradition were to go ahead.

The Karlsruhe Court did not follow the formal two-step process the CJEU has developed to govern human rights based objections to the implementation of an EAW, but focussed instead on the requirements of the Trade and Cooperation Agreement. The Karlsruhe Court requested additional information and guarantees, asking the Karlsruhe Public Prosecutor General’s Office to approach the UK government on its behalf. Most of the guarantees sought were phrased in terms of Article 604(c) of the Trade and

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23 Report to the United Kingdom Government on the periodic visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 21 June 2021. CPT/Inf (2022) 13.

24 Response of the United Kingdom Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its periodic visit to the United Kingdom from 8 to 21 June 2021. PT/Inf (2022) 14.

25 Karlsruhe Higher Regional Court, decision of 10 March 2023, loc. cit., p. 4.
Cooperation Agreement, the key provision that sets out, in terms somewhat different from the previous EAW Framework Decision, what a court could do under such circumstances.

The guarantees sought by the Karlsruhe Court were spelled out in considerable detail.\textsuperscript{26} The Karlsruhe Court began by pointing out to the UK that they had to guarantee that the physical accommodation and other conditions of detention relating specifically to the extraditee in all detention facilities receiving him comply with the European minimum standards throughout the period of his detention. The UK also had to guarantee that the extraditee would not be threatened there with inhuman or degrading treatment within the meaning of Article 3 of the ECHR. On this point the Karlsruhe Court even quoted specific decisions of the European Court of Human Rights (ECtHR) that spelled out the sorts of inhuman and degrading treatment that prisoners might face. Questions about the system as a whole were combined with questions about the specific individual risk that the extraditee would face if he were to be extradited. The Karlsruhe Court asked where the extraditee would be held prior and during his trial and, if he were to be convicted and sentenced to imprisonment, during the execution of the sentence. This question was followed by very detailed requests for information on the conditions in the specific prisons where the extraditee was likely to be held. Questions were raised about cell sizes; numbers of prisoners in cells; ablution facilities: lights, ventilation, and heating; exercise; employment and recreation opportunities; and medical care. Finally, the Karlsruhe Court requested a guarantee, phrased in terms of Article 604(a) of the Trade and Cooperation Agreement, that there would be appropriate procedures in place for the consideration of release if the extraditee were eventually to be sentenced to life imprisonment.

The UK authorities replied, shortly before the deadline set by the Karlsruhe Court. Most of the UK’s reply was contained in a statement from the ‘Director General of Operations [of the Prison and Probation Service of England and Wales]’.\textsuperscript{27} It began by referring to the matter on which it was asked to comment as an EAW issued in terms of the EAW Framework Direction. This reveals a lack of understanding by the representative of the Prison Service of England and Wales of the different requirements for a Trade and Cooperation Agreement Warrant. This statement purported further to address the detailed questions and guarantees sought, other than the guarantee in respect of life

\textsuperscript{26} The Karlsruhe Higher Regional Court, decision of 10 March 2023, \textit{loc. cit.}, pp. 5–6, quotes in full the request for guarantees and information that the Court asked the Karlsruhe Public Prosecutor General’s Office to convey to the UK authorities.

\textsuperscript{27} Karlsruhe Higher Regional Court, decision of 10 March 2023 \textit{loc. cit.}, pp. 8–9 reproduces the full statement of the Director General of Operations in English.
imprisonment, which was dealt with separately and ultimately did not play a role in the final decision of the Karlsruhe Court.\textsuperscript{28} The substance of the statement was extremely vague, however. For example, the statement did not specify in which prison \textit{me} would be held if he were to be extradited, noting only that he was likely to be detained during his trial in a prison near the Westminster magistrates court, which had issued the warrant for his arrest and extradition. The statement added, however, that that would not necessarily be the case. Nor did the statement deal with the square meterage of the cells in which the extraditee would actually be held or the other related questions. It noted, however, that the authorities were engaged in a building programme that would ensure that standards set by the CPT would be met in the future.

The Karlsruhe Court was not satisfied with these responses to its questions and requests for guarantees. It therefore asked the Karlsruhe Public Prosecutor General’s Office to inform the UK authorities that the deadline had been extended by nine days to enable them to provide more comprehensive answers. Article 615 of the Trade and Cooperation Agreement allowed the Court the discretion to extend the deadline by up to 30 days, but the Karlsruhe Court justified setting a shorter period in the light of \textit{me}’s personal circumstances,

\textsuperscript{28} An additional statement ‘in the name of the Minister,’ set out the position relating to the release of life sentenced prisoners in England and Wales. The Karlsruhe Higher Regional Court, decision of 10 March 2023, \textit{loc. cit.}, pp. 7–8, reproduces the full statement in the name of the Minister in a German version apparently provided by the UK authorities. In its final decision, the German Court did not refer to the shortcoming of the release procedures for life prisoners as a basis for its overall conclusion that the treatment that \textit{me} would face in the UK could be inhuman and degrading.

Theoretically at least, a whole life sentence with no date set for consideration of release could have been imposed on \textit{me}, if he were to have been extradited to England on a drug dealing charge. Such a sentence would be problematic for extradition from Germany, for in 2019 the German Federal Constitutional Court held that extradition to the USA should be refused if there was a possibility that the extraditee could be sentenced to life imprisonment without a prospect of parole (\textit{LWOP}) (BVerfG, BvR 1258/19 Decision of 4 December 2019). The Federal Constitutional Court based its decision on the judgment of the ECtHR in \textit{Trabelsi v Belgium} App no 142/10 (ECtHR, 4 September 2014), and held that \textit{LWOP} imposed following extradition would be an inhuman and degrading form of punishment, which posed a bar to extradition as it infringed Article 3 of the ECHR. More recently however, in \textit{Sanchez Sanchez v UK} App no 22854/20 (ECtHR, 3 November 2022) the Grand Chamber of the ECtHR has overruled \textit{Trabelsi} and set a less strict standard for evaluating whether different forms of release from life sentences imposed following extradition infringe Article 3. It remains to be seen whether, in its own right, the possibility of a whole life sentence as sometimes imposed in England and Wales will provide a successful ground for challenging extradition from Germany to the UK in the future.
and referred in this regard to the principle of proportionality spelled out in Article 597 of the Trade and Cooperation Agreement.

With respect to its questions about conditions of detention and clearer guarantees in that regard, however, the Court probed further, by asking again about specifics. For example, it noted that the UK had not responded clearly to the questions about which prison ME would be held at pending and during his trial, or about the square meterage of the cells in which he would be held. These further questions were transmitted to the UK authorities by the Karlsruhe Public Prosecutor General’s Office, but no further reply was received from the UK within the nine-day period granted by the Court. The Karlsruhe Court therefore had to decide the case on the skimpy response of the UK authorities to its initial enquiries and other information gleaned from published sources. Based on that information, counsel for ME argued further that if he were to be extradited, he would be held probably in one of the London prisons as these prisons were near Westminster Magistrates’ Court where the initial warrant had been issued. This meant, the Court noted, that ME could possibly be held at HMP Wandsworth, described by the UK Inspector of Prisons in a report as grossly overcrowded, with a regime that was inadequate in other respects too.

Given the facts provided, the Karlsruhe Court concluded that the extradition request was inadmissible, and that ME’s further detention could not be justified. It held that there were valid grounds for assuming that there would be a ‘real risk’ to the protection of ME’s fundamental rights if he were to be extradited. This risk had not been ameliorated by a sufficient guarantee that ME would not be subject to inhuman or degrading treatment contrary to Article 3 of the ECHR during his detention in UK prisons. Furthermore, the failure of the UK to comply with the second deadline set by the Karlsruhe Court made extradition inadmissible on an additional ground. Accordingly, the Karlsruhe Court ordered ME’s immediate release.

4 The Approach to Legal Standards

The judgment of the Karlsruhe Court gives some important insights into the legal standards that a court in a major European jurisdiction, such as Germany,

29 Karlsruhe Higher Regional Court, decision of 10 March 2023, loc. cit., p. 12.
is likely to apply when evaluating a request for enforcing an arrest warrant issued by the UK in terms of the Trade and Cooperation Agreement. Human rights referenced in the Trade and Cooperation Agreement will clearly form a prominent part of these standards, but they will be situated in the application of German public law.

As the Karlsruhe Court explained, German public law emphasises the liberty rights of all persons in Germany, no matter what their circumstances. The German Federal Constitutional Court has stressed that, where the liberty of the individual is concerned, the guarantee of access to the courts in Article 19 of the German Basic law should be observed strictly in all cases. When setting a relatively short, nine-day period for the UK to respond to follow-up questions, the Karlsruhe Court referred not only to the requirements of the Trade and Cooperation Agreement, but also emphasised more widely that appropriate weight had to be given to the ‘Gebot der Verfahrensbeschleunigung in Hafsachen und dem Freiheitsanspruch des Verfolgten’, that is, the precept of expediting proceedings in cases involving detention and the claim to liberty of the prosecuted person. Both of these have strong roots in German constitutional doctrine. The Federal Constitutional Court has recognised explicitly that:

According to Art. 2.2 sentence 2 of the Basic Law and its inherent requirement of the greatest possible expedition of proceedings as well as the proportionality of detention pending extradition, stricter conditions for its continuation apply ... as the duration of the detention pending extradition increases.

With regard to international human rights standards, the Karlsruhe Court referred to some key precedents on extradition established by the German Federal Constitutional Court, in cases that did not involve the Trade and Cooperation Agreement directly. These require German courts to adopt an overall approach to extradition which is völkerrechtsfreundlich, that is, positively considers international law in a ‘friendly’ way.

The Karlsruhe Court met this requirement in the first instance by referring specifically to Muršić v Croatia, the leading decision of the Grand Chamber

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32 Karlsruhe Higher Regional Court, decision of 10 March 2023, loc cit., para. 11.
35 App no 7334/13 (ECtHR, 20 October 2016).
of the ECtHR on the square meterage required by all prisoners, and to other
decisions of the ECtHR on this issue.\textsuperscript{36} It also drew the Muršić case specifically
to the attention on the UK government where requesting further information
about prison conditions in England. In addition, the Karlsruhe Court referred
in its judgment to a decision of the CJEU, the 2019 case of \textit{Dorobantu},\textsuperscript{37} which
also dealt, \textit{inter alia}, with the substantive question of what standards should
be adopted when deciding on conditions of detention. The \textit{Dorobantu} decision
endorsed the approach adopted by the ECtHR in Muršić and similar cases on
prison conditions, and it emphasised that on this substantive issue there was
little or no difference between the interpretations of these two courts.

The same conclusion has been reached by the ECtHR in 2021 in \textit{Bivolaru and Moldovan v France}.\textsuperscript{38} The ECtHR held that, while it did not require EU
Member States to follow the two-step procedure adopted by the CJEU for
deciding on whether there would be a potential breach of the human rights of
someone who might be extradited in terms of an EAW, the standard that had
to be met when considering extradition was the same for all Member States of
the ECtHR, whether or not they were implementing an EAW.\textsuperscript{39} The ECtHR also
concluded that the CJEU applied the same substantive human rights criteria in
extradition matters as it did.\textsuperscript{40}

The reference by the Karlsruhe Court to the Charter and its interpretation
by the CJEU is, nevertheless, a salutary reminder to the UK authorities that,
unlike the UK, the EU State Parties to the Trade and Cooperation Agreement
are bound by the Charter of Fundamental Rights and by the CJEU’s

\begin{itemize}
\item Lazăr \textit{v Romania} App no 4249/07 (ECtHR, 14 February 2017) and \textit{JMB v France} App no
9671/15 and 31 others (ECtHR, 30 January 2020).
\item Case C-128/18 \textit{Dorobantu} [2019] ECLI:EU:C:2019:857.
\item \textit{Bivolaru and Moldovan v France} App nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).
\item The \textit{Bivolaru and Moldovan} case related to two persons facing removal from France on
the basis of EAWs. In both instances the judicial authority in France had approved their
removal. The ECtHR found on the facts, however, that in one instance the implementation
of the warrant would result in the person concerned (Moldovan) prospectively facing a
real risk of inhuman or degrading treatment in the requesting State, while in the other the
person (Bivolaru) would not face such a risk. Accordingly, the ECtHR held that Moldovan's
rights in terms of Article 3 of the ECHR had been infringed by the decision of the French
judicial authority.
\item J. Callewaert, 'The European arrest warrant under the European Convention on Human
Rights: A matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility'
in 'Europa lässt sich nicht mit einem Schlag herstelle'-70 Jahre Europa-Institut der Universität
understanding of fundamental rights? About the looming fundamental rights patchwork
in Europe and the chances for the current negotiations on EU-accession to the ECHR to
help avoid it' 22 La Revue des Juristes de Sciences Po (March 2022) 25–30 at 26.
\end{itemize}
interpretations of these rights. Although currently they are the same as those developed by the ECtHR, this is largely because, until very recently, there were no specifically EU-based interpretative tools to apply to deciding whether prison conditions were inhuman or degrading. In making these decisions, the ECtHR relies heavily on the Council of Europe's own soft law instruments such as the European Prison Rules, which it cites routinely in cases involving prisoners’ rights.41 Recently however, the EU has begun to develop its own soft law standards on detention, a prime example of which is the 2022 European Commission Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.42 The CJEU has not yet referred to this Recommendation, but it in the future may well do so, particularly as it contains provisions on conditions of detention, including specifically recommendations on the accommodation of detainees.43

The UK’s reply to the Karlsruhe Court did not refer to the ECtHR decisions to which the Court referred (or to decisions of the CJEU that may have been relevant). This lack of attention to the legal niceties may have contributed to its failure to provided sufficient information to the Karlsruhe Court to judge whether their substantive requirements were met.

The UK authorities could also have found some further legal guidance on the information required, by considering the responses of foreign governments when the human rights compatibility of their prison systems has been challenged before British courts. For example, in Elashmawy v Court of Brescia, Italy,44 a case involving an extradition from the UK to Italy, the Queen’s Bench Division was confronted with the fact that the ECtHR had given a pilot judgment45 to the effect that Italian prisons were so overcrowded that they routinely infringed the rights of prisoners guaranteed by the prohibition on inhuman and degrading treatment in Article 3 of the ECHR. The Italian authorities, however, not only explained what they were doing to deal with the systemic problems that the pilot judgment had identified, but they also gave the UK Court precise information about the prisons where the potential extraditee would be held and specific guarantees that he would not be subject

42 Commission Recommendation, (EC) C (2022) 8987 final of 8 December 2022, on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.
43 Ibid, paras. 34–36.
45 Torreggiani and others v Italy App nos, 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10 (ECtHR, 8 January 2013).
to overcrowding of the kind that infected the Italian system as a whole. Under these circumstances the UK Court was satisfied that the extraditee’s rights would not be infringed and allowed the extradition to proceed. Similar conclusions were drawn by the Queen’s Bench Division from detailed information of this kind provided in a further case in which an extradition request had come from Romania.46

5 Conclusion

The judgment of the Karlsruhe Court is an indictment of the unsatisfactory UK government response to challenges posed by post-Brexit extradition in terms of a Trade and Cooperation Agreement Warrant. The shortcomings of the UK response began with the statement of the Director General of Operations of the Prison Service of England and Wales referring to the request of information and guarantees as an EAW matter, even though the Trade and Cooperation Agreement had been in force for more than two years by that time. The statement did not provide the detailed information that the Karlsruhe Court had requested under the Trade and Cooperation Agreement, even though this was the sort of detail that the CJEU and even UK courts had previously considered necessary under the EAW, which the Director General of Operations apparently thought still applied. No attention was paid to the important change in approach in the Trade and Cooperation Agreement, which emphasises international law standards rather than ‘mutual trust’. Yet, as this paper has demonstrated, in the absence of such trust, human rights challenges to the treatment of persons who face extradition to and imprisonment in the UK are not limited in law to exceptional circumstances. In addition, the standards that have to be met in order to show that conditions of detention will not infringe prisoners’ human rights may well become stricter in the future.

The response of the Director General of Operations also seemed oblivious to the approach that a German court could be expected to adopt when interpreting the Trade and Cooperation Agreement – an approach that would rely not only on the interpretation of Article 3 of the ECHR by the ECtHR, but also on the judgments of the CJEU and human rights protections provided by the German Basic law as interpreted by the Federal Constitutional Court. In particular, the failure to respond at all to the further questions posed and guarantees sought within the time limit set by the Court, ignored the emphasis on liberty in German law and led directly to the Karlsruhe Court releasing

unconditionally someone whom the UK authorities had sought to extradite on charges serious enough to potentially allow a life sentence to be imposed.

More fundamentally, the judgment of the Karlsruhe Court is also a grave indictment of prison conditions in the UK. If these prisons did not suffer from overcrowding and other shortcomings that threaten the human rights of prisoners, they would not have been placed in the same category as other European countries, such as Hungary and Romania, from which other German courts have unsuccessfully sought satisfactory additional guarantees of humane treatment of individuals facing extradition. Could it be that the failure by the UK to respond with satisfactory guarantees to requests for further information is the product not only of a failure to grasp the extent to which a British prison system is perceived abroad as widely failing to protect human rights of the prisoners in its care, but also of major substantive shortcomings that cannot be disguised? If so, extradition from all Member States of the EU to the UK will soon become problematic.

6 Postscript

The wider difficulties that the UK faces are not limited to extradition from Germany to England and Wales. On 29 June 2023 the High Court of Ireland declined to enforce a Trade and Cooperation Agreement Warrant issued by the UK requesting extradition to Scotland, on the grounds that Scottish prisons too had been found by the CPT to be grossly overcrowded. Although Ireland is an EU Member State, the Irish court did not focus on the specific provisions of the Trade and Cooperation Agreement when enforcing the warrant. Instead, the Irish court applied the principles that had been developed to enforce the EAW, thus taking on trust as its point of departure that Scottish prisons did meet human rights standards, and then considering in a two-step process whether there were exceptional circumstances that would allow it to find that warrant should not be enforced.

The more restrictive approach to denying extradition on human rights grounds followed by the Irish Court is unlikely to be adopted by other EU Member States, particularly if they follow the terms of the Trade and Cooperation Agreement as carefully as the German court did. A close reading of the judgment of the Irish court indicates that it did not analyse the working rules set by the Trade and Cooperation Agreement. It thus missed the extent that it has moved away from the mutual trust based approach of the EAW

47 Minister of Justice v Sharples Record No.2022/063/EXT of 29 June 2023.
Framework Directive. This can be explained in part by the wording of the legislation incorporating the Trade and Cooperation Agreement Warrant into the national law of Ireland, which equates the EAW and the new Trade and Cooperation Agreement Warrant.48

What is highly significant, even when applying this more restrictive approach, is that the Irish court nevertheless held that the Scottish Prison Service could not guarantee that it would be able to prevent the infringement of the human rights of the person whose extradition was being sought. The Irish court found, firstly, that Scottish prisons were chronically overcrowded and, secondly, that the Scottish Prison Service would not be able to detain him in a manner that took account of his special needs. The substantive upshot is that another British prison system has been held by an EU Member State to pose such a threat to the human rights of the prisoners that extradition cannot be allowed. The UK authorities will have to consider urgently how others see them, and what they need to do for their prisons again to be regarded universally as acceptable.

Ibid., para 75, where the Court refers to a ‘presumption’ that the Scottish authorities will act in a manner which is compliant with the human rights of potential extraditee. The Court derives this presumption from s. 4A of the Irish 2003 European Arrest Warrant Act (as amended), which provides: ‘It shall be presumed that an issuing state will comply with the requirements of the relevant agreement, unless the contrary is shown.’ Both the EAW and the TCA warrants are ‘relevant agreements’ in terms of the Act. Therefore, in the view of the Irish Court, they should be subject to the same trust-based presumption.