

The Right to Liberty and Security enshrined in Article 5 of the ECHR as a Limitation on Extradition

El derecho a la libertad y a la seguridad consagrado en el artículo 5 del CEDH como límite a la extradición

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Abstract

This paper examines the role of Article 5 of the European Convention on Human Rights as a limit to extradition procedures, focusing on the protection against arbitrary deprivation of liberty in the context of international judicial cooperation. The objective of the research is to analyse whether the risk of unlawful or disproportionate detention following extradition may constitute a ground for refusing surrender under European human rights standards. The study employs a doctrinal and jurisprudential methodology, based on the analysis of the case law of the European Court of Human Rights and the Court of Justice of the European Union, as well as relevant provisions of Romanian legislation on international judicial cooperation in criminal matters. The results indicate that Article 5 ECHR rarely operates as an autonomous ground for refusing extradition but may become decisive when detention results from a manifestly unfair trial or when previously executed custodial measures are not properly taken into account. The study concludes that although Article 5 plays mainly a subsidiary role compared to Articles 3 and 6 ECHR, it remains a relevant safeguard against excessive or arbitrary deprivation of liberty in extradition proceedings.

Keywords: extradition, Article 5 ECHR, deprivation of liberty, European arrest warrant, fundamental rights

Resumen

El presente estudio analiza el papel del artículo 5 del Convenio Europeo de Derechos Humanos como límite a los procedimientos de extradición, centrándose en la protección contra la privación arbitraria de libertad en el contexto de la cooperación judicial internacional. El objetivo de la investigación es examinar si el riesgo de una detención ilegal o desproporcionada tras la extradición puede constituir un motivo para denegar la entrega conforme a los estándares europeos de derechos humanos. La metodología utilizada es de carácter doctrinal y jurisprudencial, basada en

el análisis de la jurisprudencia del Tribunal Europeo de Derechos Humanos y del Tribunal de Justicia de la Unión Europea, así como de la legislación ruman relevante en materia de cooperación judicial internacional en materia penal. Los resultados muestran que el artículo 5 del CEDH rara vez opera como motivo autónomo de denegación de la extradición, pero puede adquirir relevancia cuando la detención deriva de un proceso manifiestamente injusto o cuando no se tienen en cuenta adecuadamente medidas previas de privación de libertad ejecutadas en el extranjero. Se concluye que, aunque el artículo 5 tiene un papel principalmente subsidiario en comparación con los artículos 3 y 6 del CEDH, sigue siendo una garantía relevante contra la privación arbitraria o excesiva de libertad en los procedimientos de extradición.

Palabras clave: extradición, artículo 5 CEDH, privación de libertad, orden de detención europea, derechos fundamentales

Introduction

The protection of the right to individual liberty enshrined in Article 5 of the European Convention on Human Rights (“the Convention”) constitutes one of the fundamental guarantees of the rule of law and acquires particular relevance in the field of international judicial cooperation in criminal matters, especially in extradition proceedings. Although the assessment of the compatibility of extradition with the Convention is traditionally carried out by reference to Articles 3 and 6 thereof, the case law of the European Court of Human Rights demonstrates that Article 5 of the Convention may also constitute, in certain exceptional circumstances, a

legal obstacle to the surrender of the requested person.

This paper seeks to examine the role of Article 5 of the Convention as a limitation on extradition, aiming to highlight the manner in which the standards developed in the case law of the European Court of Human Rights and of the Court of Justice of the European Union influence the interpretation of domestic rules concerning international judicial cooperation.

In this context, the issue of delineating between measures involving deprivation of liberty and those involving restriction of liberty acquires particular practical importance, since the legal classification of such measures influences both the lawfulness of extradition and the manner of calculating periods previously served in other jurisdictions. The case law of the European Court of Human Rights and of the Court of Justice of the European Union emphasises that the notion of “deprivation of liberty” has an autonomous and contextual character, requiring a concrete assessment of the intensity of the restrictions imposed upon the individual, rather than a formal evaluation based solely on the classification provided by the domestic law of the states concerned.

Methodology

The present research is predominantly doctrinal and jurisprudential in nature, being based on the analysis of relevant provisions of the Convention, of national legislation concerning international judicial cooperation in criminal matters, and of the legal instruments of the European Union applicable to surrender and extradition procedures.

The methodology employed consists in the systematic examination of the case law of the European Court of Human Rights relating to Article 5 of the Convention, particularly in cases concerning extradition or the transfer of persons to other jurisdictions, as well as the case law of the Court of Justice of the European Union concerning the notion of detention and the calculation of periods of deprivation of liberty in the context of the European arrest warrant. The analysis is complemented by the interpretation of Romanian domestic provisions, in particular those of Law No. 302/2004, the Criminal Code and the Code of Criminal Procedure, with a view to identifying the legal limits of extradition from the perspective of the protection of individual liberty.

The comparative method has been employed in order to highlight the convergences between conventional standards and those of European Union law, as well as to assess their impact on the practice of national courts.

1. THE STANDARD OF PROTECTION CONFERRED BY ARTICLE 5 OF THE CONVENTION

As is well known, the provisions of Article 5 of the Convention protect the physical liberty of the individual against arbitrary detention.

The notion of “deprivation of liberty” within the meaning of Article 5 of the Convention has an autonomous meaning, independent of the classification given by domestic law. The Court is not bound by the assessment of national courts and conducts its own evaluation of the concrete situation of the individual, on the basis of the specific circumstances of the case (see, for

example, *Khlaifia and Others v Italy*,¹ §71; *H.L. v the United Kingdom*,² §90; *Creangă v Romania*,³ §92).

In order to determine whether a person has been deprived of liberty, the Court starts from the concrete situation and examines a set of criteria such as the type of measure, its duration, the effects produced, and the manner of its execution (*Guzzardi v Italy*,⁴ §92; *De Tommaso v Italy*,⁵ §80; *Medvedyev and Others v France*,⁶ §73). The analysis also takes into account the context in which the measure is applied, since in modern societies there may be legitimate restrictions on freedom of movement which do not amount to detention (*Nada v Switzerland*,⁷ §226; *Austin and Others v the United Kingdom*,⁸ §59).

The Court has emphasised that the distinction between a mere restriction on freedom of movement and a deprivation of liberty depends on factors such as the individual’s situation, the applicable legal framework, the duration of the measure, and the actual degree of the restrictions imposed (Z.A.

1 *Khlaifia and Others v Italy* (GC), no. 16483/12, ECHR 2016.

2 *H.L. v the United Kingdom*, no. 45508/99, ECHR 2004-IX.

3 *Creangă v Romania* (GC), no. 29226/03, 23 February 2012.

4 *Guzzardi v Italy*, 6 November 1980, Series A no. 39.

5 *De Tommaso v Italy* (GC), no. 43395/09, ECHR 2017.

6 *Medvedyev and Others v France* (GC), no. 3394/03, ECHR 2010.

7 *Nada v Switzerland* (GC), no. 10593/08, ECHR 2012.

8 *Austin and Others v the United Kingdom* (GC), nos. 39692/09, 40713/09 and 41008/09, 15 March 2012.

and Others v Russia,⁹ §138; *Ilias and Ahmed v Hungary*,¹⁰ §217). Even measures adopted for protective purposes or in the interest of the individual may constitute a deprivation of liberty if they produce a sufficient level of constraint (*Khlaifia and Others v Italy*, §71).

The concept traditionally includes two elements: an objective element, consisting in the confinement of the person in a limited space for a significant period of time, and a subjective element, namely the absence of valid consent to that situation (*Storck v Germany*,¹¹ §74; *Stanev v Bulgaria*,¹² §117). In assessing the objective element, the Court takes into account factors such as the possibility of leaving the space in question, the level of supervision over the person's movements, and the degree of social isolation (*Guzzardi v Italy*, §95).

Furthermore, the Court has held that the relatively short duration of a measure does not exclude the existence of a deprivation of liberty where the circumstances indicate a real constraint upon the individual (*Rantsev v Cyprus and Russia*,¹³ §317; *Iskandarov v Russia*,¹⁴ §140). Nor is the absence of classical forms of detention –such as placement in a cell or the use of handcuffs– decisive for this classification (*M.A.*

v Cyprus,¹⁵ §193). In the Strasbourg Court's case law, issues under Article 5 also arise in relation to house arrest (*Buzadji v the Republic of Moldova*¹⁶ (GC), 2016; *Dacosta Silva v Spain*,¹⁷ 2006).¹⁸

Consequently, the notion of deprivation of liberty within the meaning of Article 5 of the Convention is a flexible and contextual one, determined through a global assessment of the effective restrictions imposed upon the individual and their impact on his or her personal liberty.

The applicability of Article 5 of the Convention in the context of extradition proceedings may be analysed in two principal contexts: (i) the lawfulness of detention during the extradition procedure and (ii) the risk of a violation of the right to liberty of the person following surrender to the requesting state. Whereas the first hypothesis directly engages Article 5 as a procedural safeguard, the second raises the more complex issue of the existence of a substantive human rights obstacle to the extradition of the requested person.

Proceeding from these premises, the present paper seeks to analyse the impact of Article 5 of the Convention in extradition proceedings, with particular attention given to the latter hypothesis—namely, the situation in which the risk of a violation of guarantees relating to individual liberty may constitute a

9 *Z.A. and Others v Russia* (GC), no. 61411/15 and others, 21 November 2019.

10 *Ilias and Ahmed v Hungary* (GC), no. 47287/15, 21 November 2019.

11 *Storck v Germany*, no. 61603/00, ECHR 2005-V.

12 *Stanev v Bulgaria* (GC), no. 36760/06, 17 January 2012.

13 *Rantsev v Cyprus and Russia*, no. 25965/04, ECHR 2010.

14 *Iskandarov v Russia*, no. 17185/05, 23 September 2010.

15 *M.A. v Cyprus*, no. 41872/10, ECHR 2013.

16 *Buzadji v the Republic of Moldova* (GC), no. 23755/07, ECHR 2016.

17 *Dacosta Silva v Spain*, no. 69966/01, ECHR 2006-XIII.

18 European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights. Right to liberty and security, updated on 28 February 2025.

ground for refusing extradition, as a limitation derived from European human rights protection standards.

2. Relevant Case Law of the European Court of Human Rights

In its case law, the European Court of Human Rights (“the ECtHR”) has established that a state may breach its obligations under the Convention where it orders the extradition or expulsion of an individual to another state in which there exists a real risk of a serious or flagrant violation of the fundamental rights guaranteed by the Convention. This principle was first enshrined in the Court’s case law in *Soering v the United Kingdom*,¹⁹ in which it was held that a Contracting State cannot absolve itself of responsibility merely because the violation would occur on the territory of a third state. The rationale of this case law lies in the fact that the obligations arising under the Convention are incumbent upon the state ordering the removal or surrender measure. Accordingly, responsibility for compliance with Convention rights lies with the state deciding upon extradition, and not with the requesting state, even where the latter is not a party to the Convention.

Consequently, in extradition proceedings, the courts of the Romanian state, acting as the requested state, are called upon to examine also whether the surrender of the person might foreseeably lead to a situation incompatible with the guarantees of the Convention, without there being any exception as regards the verification of the risk of deprivation of liberty contrary to Article 5 of the Convention, even where the requesting sta-

te is a third state which has not ratified the Convention.

In such circumstances, the courts of the requested state must verify whether extradition could lead to a deprivation of liberty lacking a legal basis, to excessive or disproportionate detention, or to a situation in which the person would not benefit from effective guarantees of judicial review of detention.

Where there exists a real risk that such situations may occur, extradition may become incompatible with the obligations of the requested state under the Convention, irrespective of whether the requesting state is or is not a party to the Convention (*Othman (Abu Qatada) v the United Kingdom*).²⁰

Specifically, in *Othman (Abu Qatada) v the United Kingdom*, the ECtHR held that Article 5 of the Convention may constitute a basis for preventing extradition in situations where the applicant has already been convicted in the state of residence following a flagrantly unfair trial and there is no possibility of reopening those proceedings upon return. In such circumstances, the applicant could not rely on Article 6, as he would not be at risk of a flagrant denial of justice, such that it is reasonable for him to rely on Article 5 (para. 232). Accordingly, the Court held that a Contracting State would violate Article 5 if it extradited an applicant to a state where he would be exposed to a real risk of a flagrant breach of that provision. A flagrant violation of Article 5 will occur only where, for example, the receiving state would detain the applicant arbitrarily for many years without any

19 *Soering v the United Kingdom*, 7 July 1989, Series A no. 161, ECHR.

20 *Othman (Abu Qatada) v the United Kingdom*, no. 8139/09, judgment of 17 January 2012, ECHR.

intention of bringing him to trial. A flagrant breach of Article 5 may also arise where an applicant would be at risk of being imprisoned for a significant period in the receiving state following a conviction obtained in a flagrantly unfair trial (para. 233).

The absence of specific regulation in this field in Romanian law is all the more relevant given that Romania itself may face issues regarding compliance with Article 5 of the Convention where it submits extradition requests in its capacity as a requesting state. In such situations, the manner in which periods of deprivation or restriction of liberty previously served in other jurisdictions are recognised and taken into account, in particular measures such as house arrest, may raise questions as to the lawfulness and proportionality of the deprivation of liberty following extradition.

As a party to the Convention, Romania is required to organise its criminal procedures and detention regime in such a way as to comply with the guarantees of Article 5 of the Convention. Accordingly, when requesting extradition of a person, the Romanian state must be able to demonstrate that the detention which will follow surrender has a legal basis, is proportionate, and is subject to judicial review. This obligation arises from the consistent case law of the ECtHR according to which deprivation of liberty must be lawful and foreseeable, and its duration must not exceed that which is justified by the purpose of detention (see, for example, *Mooren v Germany*²¹).

In particular, the question may arise whether the failure to take into account such measures executed abroad does not lead, after extradition, to the execution of a total period of deprivation of liberty greater than that justified by the legitimate purpose of detention.

From the perspective of the Convention, such a situation could raise issues concerning the lawfulness and proportionality of the deprivation of liberty, since the total duration of detention must remain within the limits permitted by Article 5 of the Convention, an aspect which may become particularly relevant for the courts of the requested state, which may examine whether extradition would lead to detention incompatible with the Convention. In such a context, the requesting state must be able to explain how periods of deprivation of liberty previously served, including those served in other jurisdictions, will be treated.

On the other hand, the assessment of the compatibility of such a situation with the guarantees of Article 5 of the Convention becomes relevant not only for the requested state, called upon to decide on extradition, but also for the requesting state, which must ensure that the subsequent execution of custodial measures does not lead to arbitrary or disproportionate detention, having regard to the measures already executed by the individual in other jurisdictions. Thus, where a person has previously been subject to severe restrictive measures affecting physical liberty, such measures may constitute a genuine deprivation of liberty within the meaning of Article 5.

The case law of the ECtHR reveals arguments supporting the view that, in the context of extradition, the failure to recognise or to deduct from the senten-

21 *Mooren v Germany* (GC), no. 11364/03, judgment of 9 July 2009, ECHR.

ce to be served the period during which the individual was subjected abroad to restrictive measures affecting physical liberty may lead to excessive deprivation of liberty, contrary to Article 5 of the Convention.

In *Mooren v Germany*, the Court established the principle that deprivation of liberty complies with the protection standards under Article 5 of the Convention only if it is not only in accordance with domestic law, but also free from arbitrariness, in the sense that the legal basis of detention must be clear, foreseeable, and subject to effective judicial review.

In *Buzadji v the Republic of Moldova* (paragraphs 85-86), the Court held that pre-trial detention represents one of the most frequently applied forms of deprivation of liberty and, at the same time, an exception to the general rule laid down in Article 5 § 1, according to which everyone has the right to liberty. The relevant period begins at the moment of arrest or placement in pre-trial detention and ends upon release or when the charge is determined, even at first instance. The Court also reiterated the principle that the duration of pre-trial detention must not exceed a reasonable time. The reasonableness of such duration cannot be assessed in the abstract, but must be examined in light of the circumstances of each case. Continued detention is justified only if there are genuine indications that the public interest outweighs the right to liberty, without infringing the presumption of innocence. Factors such as the risk of absconding, the character and conduct of the individual, his or her assets, and connections with the state or with other countries may be taken into account (paragraph 90).

In *Del Río Prada v Spain*,²² the Court established, as general principles, the prohibition of retroactive application of a more severe penalty, the foreseeability of punishment, and the limits of judicial interpretation in criminal matters. Under Article 7 of the Convention, the principle of legality of offences and penalties prohibits not only the retrospective criminalisation of conduct, but also the subsequent application of rules or interpretations which have the effect of aggravating the execution of the sentence. Thus, any change occurring after conviction which leads to an effective extension of detention is incompatible with the requirements of Article 7. The principle of legality entails the obligation that the convicted person must be able reasonably to foresee the legal consequences of his or her conviction, including the effective duration of deprivation of liberty, in the light of the legal rules applicable at the time of conviction. Although national courts have the competence to interpret and develop domestic law, such interpretation cannot lead to a retrospective aggravation of the criminal situation of the convicted person. To the extent that a change in case law leads, in an unforeseeable manner, to an extension of the duration of detention, this may constitute a violation of Article 7 of the Convention. Finally, where a convicted person continues to be deprived of liberty after the moment at which, under the previously applicable legal framework, he or she ought to have been released, the detention no longer has a sufficient legal basis. Such a situation may lead to a finding of a violation of Article 5 of

22 *Del Río Prada v Spain* (GC), application no. 42750/09, judgment of 21 October 2013, ECHR.

the Convention concerning the right to liberty and security.

Relevant for the Member States of the European Union are also the principles deriving from the case law of the Court of Justice of the European Union (“the CJEU”), which are binding on national courts. In particular, reference is made to the judgment of the Court (Fourth Chamber) of 28 July 2016, “Reference for a preliminary ruling – Urgent preliminary ruling procedure – Police and judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – Article 26(1) – European arrest warrant – Effects of surrender – Deduction of detention served in the executing Member State – Concept of ‘detention’ – Measures involving restriction of liberty other than detention – House arrest accompanied by electronic monitoring – Charter of Fundamental Rights of the European Union – Articles 6 and 49”, delivered in Case C-294/16,²³ *Sąd Rejonowy dla Łodzi – Śródmieście w Łodzi*, in the field of the European arrest warrant.

Thus, in *Sąd Rejonowy dla Łodzi – Śródmieście w Łodzi*, the CJEU established, as a matter of principle, that in the procedure relating to the European arrest warrant, the notion of “detention” refers to an actual deprivation of liberty comparable to imprisonment, and not to any measure restricting freedom of movement. Consequently, measures such as house arrest, electronic monitoring, or other similar restrictions cannot automatically be regarded as detention for the purpose of deducting the period served in the executing Member State from the sentence imposed by the

issuing state. Nevertheless, it is for the national court to assess, in concreto, the nature and intensity of the restrictions imposed, in order to determine whether they are equivalent, in their effects, to an actual deprivation of liberty.

This case law is also relevant in the field of extradition because, although the two legal mechanisms are distinct, they pursue the same functional objective, namely the surrender of a person to another state for prosecution or the execution of a sentence.

Firstly, both extradition and the European arrest warrant involve the deprivation of liberty of the requested person and raise similar issues regarding the observance of fundamental rights, in particular the right to liberty and the right to a fair trial. Accordingly, the interpretations of the CJEU concerning the notion of “detention”, the proportionality of measures, or the deduction of periods of deprivation of liberty may be used as interpretative benchmarks in extradition proceedings as well.

Secondly, the interpretative case law in the field of the European arrest warrant contributes to clarifying European standards concerning judicial cooperation in criminal matters. Even though extradition is generally conducted on the basis of international conventions, the principles developed within European Union law may influence the manner in which national courts interpret those instruments, particularly where they are required to ensure compliance with fundamental rights protected and guaranteed at European level. In this context, Member States, which are bound to comply with the case law of the Court of Justice of the European Union, should not apply substantially different standards or criteria where the surrender procedure concerns a third

23 <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62016CJ0294>

state, since the obligation to guarantee an adequate level of protection of fundamental rights subsists independently of the legal framework of judicial cooperation.

Lastly, the European arrest warrant is regarded as a simplified and enhanced form of extradition between the Member States of the European Union, and the solutions of the CJEU in this field may provide useful criteria for the interpretation and application of rules concerning deprivation of liberty in extradition proceedings, particularly as regards the duration and nature of measures restricting liberty.

3. Extradition and the Protection of Fundamental Rights: between the Standards of the Convention and the Limits of Romanian Domestic Law

3.1. THE INDIRECT APPLICATION OF ARTICLE 5 OF THE CONVENTION IN EXTRADITION PROCEEDINGS AND ITS SUBSIDIARY ROLE IN REFUSING THE SURRENDER OF THE REQUESTED PERSON

The Romanian legislation currently in force, namely Article 21 of Law No. 302/2004 on international judicial cooperation in criminal matters,²⁴ expressly includes non-observance of fundamental rights and freedoms among the mandatory grounds for refusing an extradition request. These provisions represent no more than the transposition into domestic law of limits imposed by international human rights law, intended to

prevent judicial cooperation where it would lead to the violation of fundamental rights, thereby establishing a domestic mechanism for guaranteeing the conformity of extradition with Convention standards.

The protection of fundamental rights may constitute, under Romanian extradition law, a subsidiary ground for refusing the surrender of the requested person, such refusal being capable of being displaced only if the requesting state provides sufficient guarantees regarding observance of those rights. The relevant normative framework is laid down principally by the provisions concerning mandatory and optional grounds for refusal, as well as by the regulations relating to capital punishment.

In practice, human rights may prevent extradition in four principal situations: (i) the risk of an unfair trial or of trial before a tribunal which does not afford minimum procedural guarantees; (ii) the risk of persecution or of aggravation of the person's situation on protected grounds; (iii) the risk of torture or inhuman or degrading treatment, including through detention conditions; and (iv) in the case of judgments delivered in absentia, where the right of defence has been infringed and there are no real guarantees of a retrial.

In addition to these hypotheses, extradition is excluded in the case of persons benefiting from international protection where surrender would expose the person to serious risks to life, liberty, or integrity. Likewise, the law permits refusal of extradition where surrender would have consequences of exceptional gravity for the requested person, the courts interpreting this provision extensively, including in situations where there exists a risk of treatment contrary to the standards of the European

²⁴ Law No. 302/2004 on international judicial cooperation in criminal matters, republished in the Official Gazette No. 411 of 27 May 2019.

Convention on Human Rights. Taken as a whole, these mechanisms operate as filters for the protection of fundamental rights in extradition proceedings.

It should be noted that, having regard to the scheme of Law No. 302/2004, a violation of Article 5 of the Convention, governing the right to liberty and security or “unlawful detention”, does not appear as an autonomous, express ground –whether mandatory or optional– for refusal of extradition. According to the wording of the statute, “unlawful detention” could be relevant only indirectly, in so far as the factual situation which it describes would in reality overlap with a legal ground already provided for by Law No. 302/2004, for example the absence of fundamental procedural guarantees and of the right of defence, trial before a tribunal not affording minimum guarantees, trial in absentia without sufficient guarantees of retrial, or a real risk of torture or inhuman or degrading treatment.

Even so, in practice, the optional ground in Article 22(2), concerning a significant risk of violation of fundamental rights, has been interpreted extensively chiefly in respect of risks falling within Article 3 of the Convention, namely torture, inhuman or degrading treatment, detention conditions incompatible with Convention standards, and other consequences of exceptional gravity for the extraditable person.

In cases in which the High Court of Cassation and Justice of Romania has refused extradition, the argument has been constructed around the real and credible risk of serious impairment of fundamental rights, particularly under the standard of Article 3, and not as a mere autonomous violation of Article 5 of the Convention.

In situations in which Article 5 of the Convention has been analysed by the Romanian courts in extradition proceedings, that analysis has been situated within the first hypothesis previously set out, namely on the plane of reviewing the lawfulness and necessity of the measure of provisional arrest in Romanian extradition proceedings. Thus, where revocation of provisional arrest is sought or its lawfulness is challenged,²⁵ Article 5 § 1(f) and Article 5 § 4 of the Convention become applicable. In other words, Article 5 operates here as a standard governing deprivation of liberty in extradition proceedings, and not as an autonomous ground for refusing extradition. Similarly, the existence of intervention by the ECtHR or of an impediment to enforcement has not been treated as a “ground for refusal” of extradition, but as an impediment to the enforcement of the extradition decision, capable of being relied upon by way of an enforcement challenge.²⁶

In conclusion, in Romanian law, a violation of Article 5 of the Convention does not, as such, fall within the mandatory or optional grounds for refusal of extradition provided for by Law No. 302/2004. It may be relevant only indirectly, if the facts relied upon in reality support another express legal ground of refusal, or separately, for the purpose of challenging provisional arrest or establishing an impediment to the enforcement of extradition.

25 Dan Lupășcu, *Passive extradition. Theoretical and practical aspects*, available at www.juridice.ro

26 Camelia Sutiman, *High Court of Cassation and Justice. Filing an application before the ECtHR in connection with extradition proceedings constitutes an impediment to enforcement of the extradition request*, available at www.juridice.ro.

Of relevance, however, the risk of violation of Article 5 of the Convention through the surrender of the requested person, as a ground for refusal of extradition, was retained in at least one well-known case in which Romania had the status of requesting state, namely *Popoviciu v Curtea de Apel București*, decided by the courts of the United Kingdom.²⁷

Specifically, in the extradition proceedings, the requested person relied upon the risk of violation of Article 5 of the Convention, contending that his surrender to the requesting state, Romania, would lead to the execution of a custodial sentence resulting from a conviction pronounced following a fundamentally unfair trial. In those circumstances, the subsequent detention would constitute an arbitrary deprivation of liberty, incompatible with the Convention standard. This Convention ground was relied upon in conjunction with Article 6 of the Convention, the requested person arguing that he had been the victim, in the requesting state, of a flagrant violation of the right to a fair trial culminating in his conviction, and that detention resulting from such a conviction becomes arbitrary.

In the case under consideration, the British court examined whether there were substantial grounds for considering that the previous criminal trial had constituted such a violation and, finding that there was a real risk that such grounds were engaged in the case analysed,²⁸ held, in accordance with Ar-

ticle 5(1)(a) of the Convention, that there existed a risk of a complete denial of the rights conferred by Article 5 of the Convention,²⁹ since, in the event of surrender to Romania, the subsequent detention of the requested person would be based upon a conviction pronounced in breach of fair trial standards.

Accordingly, the court concluded that there were substantial grounds for considering that the requested person had not been tried by an impartial tribunal, which is equivalent to a radical violation of the guarantees of a fair trial. In those circumstances, the execution of the sentence resulting from such a conviction would constitute arbitrary detention.

Thus, the court's analysis focused principally on Article 6 of the Convention, the substance of the reasoning being devoted to the assessment of the existence of the risk of a flagrant violation of the right to a fair trial, according to the balance of probabilities standard of proof applied by the British court. Article 5 was examined only as a consequence of that analysis, the argument based on Article 5 being treated as a corollary of the findings concerning Article 6 of the Convention. Therefore, the judgment confirms that, in extradition proceedings, Article 5 may be invoked indirectly, as a consequence of a flagrant violation of the right to a fair trial.

For these reasons, the British appellate court quashed the extradition order previously made by the court of first

27 *Popoviciu v Curtea de Apel București* (Romania) [2021] EWHC 1584 (Admin), High Court of Justice (Queen's Bench Division, Divisional Court), 11 June 2021.

28 The British court found that there were credible indications of an improper relationship between the trial judge and the prosecution's main witness, a relations-

hip that had not been disclosed during the proceedings. This circumstance was considered capable of fundamentally affecting the impartiality of the tribunal.

29 *Popoviciu v Curtea de Apel București* (Romania) [2021] EWHC 1584 (Admin), § 167.

instance. The judgment was regarded as particularly important because it represents one of the rare situations in which the British courts found that the execution of a conviction pronounced in a Member State of the European Union could lead to a flagrant violation of the rights guaranteed by the Convention.

The updated ECtHR guides on Article 5 and the relevant case law confirm that this provision may have extraterritorial application in the extradition context, although it is rarely relied upon successfully as an autonomous ground, as compared with Articles 3 (prohibition of inhuman or degrading treatment) and 6 (right to a fair trial). For example, in situations where detention following surrender would result from a profoundly unfair trial, leading to arbitrary imprisonment, Article 5 may be examined in parallel with Article 6.

3.2. THE APPLICATION OF ARTICLE 5 IN THE CONTEXT OF EXTRADITION TO THIRD STATES AND IN RELATION TO EUROPEAN UNION LAW

In the case of extradition from a Member State of the European Union to a third state, the state surrendering the person must comply with the obligations arising under the Convention. National courts routinely examine risks relating to fundamental rights, including those which may arise under Article 5. Where the situation falls within the scope of European Union law –in particular in the case of Union citizens– the CJEU has established additional safeguards.

In *Petruhhin* (C-182/15) and subsequent case law, such as *Raugevicius* and *S.M.*, the CJEU has held that Member States must protect Union citizens against discrimination and must ensure observance of the fundamental rights laid down in the Treaties and in the Charter

of Fundamental Rights of the European Union. Although those judgments focus principally on the principle of non-discrimination on grounds of nationality and on the mechanism *aut dedere aut judicare*, they confirm that extradition cannot take place if it would lead to a violation of the fundamental rights guaranteed by the Charter, including the right to liberty.

Accordingly, the existence of a real risk of flagrant arbitrary detention in the third state could justify refusal of extradition, especially in the absence of sufficient guarantees from the requesting state. However, the Court of Justice has not developed a specific test concerning “flagrant violation” in relation to Article 6 of the Charter or Article 5 of the Convention, comparable to the standard developed in the case law relating to Article 4 of the Charter (for example, in the field of detention conditions). In practice, refusals of extradition are founded more frequently on the risk of ill-treatment or on violation of the right to a fair trial.

In the reverse situation, namely extradition from a third state to a Member State of the European Union, the receiving state must ensure that detention following surrender complies with the requirements of Article 5 of the Convention and Article 6 of the Charter. This hypothesis is, in general, less controversial, since Member States are presumed to comply with Convention standards, although systemic problems –such as excessive duration of pre-trial detention– might, theoretically, give rise to challenges.

Although Article 5 may, in theory, constitute an obstacle to extradition, cases in which it has been successfully relied upon are rare. The high threshold of a “flagrant violation” requires proof

of arbitrary detention of a systemic or extreme nature (for example, detention for an indeterminate period without judicial review), which is difficult to establish in the absence of extensive and documented evidence. In cases of extradition to third states, arguments based on Article 3 of the Convention (such as the risk of torture) or on the issue of capital punishment are invoked far more frequently. There are, however, situations of overlap, where a profoundly unfair trial may lead to arbitrary detention; notwithstanding this, courts generally prefer analysis under Article 6, the case law on which is more developed.

Furthermore, the harmonisation of procedures within the European Union and the use of diplomatic or judicial assurances further reduce the scope for reliance on Article 5. Even so, in cases involving states in which there are documented practices of arbitrary detention, such as cases of politically motivated imprisonment, Article 5 remains a possible legal ground, albeit an exceptional one.

In continuation of the analysis of the protection of the right to liberty in the context of international judicial cooperation, it is necessary to clarify the domestic conceptual framework concerning the delineation of custodial measures, particularly by reference to the criteria developed in national and European case law.

3.3. THE CLASSIFICATION OF CUSTODIAL MEASURES IN ROMANIAN LAW: CRITERIA, APPLICABILITY, AND THE PARTICULAR FEATURES OF HOUSE ARREST

3.3.1. The Convention and European criteria for classifying a measure as involving deprivation of liberty

In order to determine whether a person is deprived of liberty within the meaning of Article 5 of the Convention, account must be taken of his actual situation in relation to the execution of the measure imposed, as well as the type, duration, effects, and manner of execution of the measure in question.

According to the case law of the CJEU (Case C-294/16 PPU³⁰), it is held that: “In this regard, as the Polish Government and the European Commission stated both in their written observations and at the hearing, the liberty-depriving effect, a constitutive element of detention, may characterise both imprisonment and, in exceptional cases, other measures which, without constituting incarceration in the strict sense, are nevertheless so constraining that they must be assimilated to such incarceration.

That would be the case for measures which, because of their type, duration, effects and methods of implementation, have such a degree of intensity that they deprive the person concerned of his liberty in a manner comparable to incarceration. It follows that Article 26(1) of Framework Decision 2002/584 cannot be interpreted as limiting itself to requiring the issuing Member State

30 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=182300&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3882490>.

of the European arrest warrant to calculate only periods of incarceration served in the executing Member State, to the exclusion of periods during which other measures were applied that involve a deprivation of liberty with effects comparable to those of incarceration.”

Ultimately, the Court concludes as follows: “Having regard to the foregoing considerations, and in particular the distinction which must be drawn between measures restricting liberty, on the one hand, and those involving deprivation of liberty, on the other, the concept of ‘detention’, within the meaning of Article 26(1) of Framework Decision 2002/584, must be interpreted as covering, in addition to incarceration, any measure or any set of measures imposed on the person concerned which, because of their type, duration, effects and methods of implementation, deprive that person of his liberty in a manner comparable to incarceration.”

The CJEU has held that measures such as house arrest limited to short periods during the night, coupled with electronic monitoring, the obligation to report periodically to a police station at pre-determined times, and the prohibition on applying for travel documents, are not, in principle, sufficiently constraining to attain the threshold of a deprivation of liberty comparable to detention in the classic sense. Nevertheless, the European court emphasised that such classification cannot be made automatically, but requires a rigorous, case-by-case analysis of all relevant circumstances, national courts being under an obligation to verify in detail whether the measure in question attains, in concreto, the level of “detention”, beyond any reasonable doubt.

Consequently, for a person to suffer a deprivation of liberty, there must be

a restriction of that person’s relations with third parties, as well as the temporary but constant impossibility of leaving a certain defined area, together with the subjective aspect, namely the feeling of isolation and the inability to live a normal life.

3.3.2. The regulation of custodial and restrictive preventive measures in Romanian law

At the level of Romanian domestic law, according to Article 15 of Law No. 302/2004 on international judicial cooperation in criminal matters, “The duration of penalties and of measures involving deprivation of liberty, in the fulfilment of a request made by the Romanian authorities pursuant to this Law, shall be taken into account in the Romanian criminal proceedings and shall be deducted from the duration of the sentence imposed by the Romanian courts.”

Likewise, pursuant to Article 72(1) of the Romanian Criminal Code, the period during which a person has been subject to a custodial preventive measure is deducted from the duration of the sentence of imprisonment imposed, and pursuant to Article 73(1) of the Criminal Code, the same procedure applies in the case of custodial preventive measures executed outside the country.

Thus, in domestic law, preventive measures are procedural measures which concern, directly, either the state of liberty of a person, in the case of detention, pre-trial detention, and house arrest, classified as custodial preventive measures, or other fundamental rights or freedoms, in the case of judicial control and judicial control on bail, classified as preventive measures restrictive of liberty.

As regards the definition of house arrest in Romanian criminal procedural legislation, it consists in the obligation imposed on a person, for a specified period of time, not to leave the building in which he lives without the permission of the judicial authority and to be subject to certain restrictions, while according to Article 399(9) of the Code of Criminal Procedure, “The duration of the measure of house arrest shall be deducted from the sentence imposed by equating one day of house arrest with one day of sentence.”

Moreover, according to Decision No. 22 of 12 October 2009 delivered by the High Court of Cassation and Justice of Romania in the appeal in the interests of the law concerning the determination of the solution to be given by the court in the event of a request for deduction of house arrest executed abroad, in application of the provisions of Article 15 of Law 302/2004, it held that “The duration of house arrest, executed abroad, a custodial preventive measure, within the meaning of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, must be taken into account *הרגסמב* the Romanian criminal proceedings and deducted from the duration of the imprisonment imposed by the Romanian courts.”

Likewise, regard must also be had to Article 129(2) of Law 254/2013, which provides for the possibility of leaving the home: “After consulting the defendant, the supervisory authority shall draw up a programme including the manner of execution of house arrest, the obligation to provide information in the event of leaving the home in urgent cases, as well as, where appropriate, the conditions of leaving, travel and return to the home, which shall be

communicated to him forthwith, against signature.”

As regards the classification of a preventive measure as amounting to a mere restriction of freedom of movement, and not to a genuine deprivation of liberty, a rigorous delineation requires reference also to the legal regime of judicial control, the sole liberty-restricting measure enshrined in Romanian criminal procedural legislation.³¹

Thus, according to Article 215(1) of the Code of Criminal Procedure, while under judicial control, the defendant must comply, mandatorily, with the following obligations:

- (a) to appear before the criminal investigation body, the preliminary chamber judge, or the trial court whenever summoned;
- (b) to inform without delay the judicial authority which ordered the measure, or before which the case is pending, regarding any change of residence;
- (c) to present himself before the police authority designated for his supervision by the judicial authority which ordered the measure, in accordance with the supervision programme drawn up by the police authority or whenever summoned.

Likewise, the following paragraph of the same provisions provides that the judicial authority which ordered the measure may impose upon the defen-

31 Although the Code of Criminal Procedure also regulates the institution of judicial supervision on bail, the specific difference lies exclusively in the mechanism for posting bail, the other elements being, in essence, subject to the same provisions applicable to judicial supervision.

dant (thus, on an optional basis) that, while under judicial control, he comply with one or more of the following obligations:

- (a) not to exceed a certain territorial limit, fixed by the judicial authority, except with its prior approval;
- (b) not to travel to places specifically designated by the judicial authority or to travel only to the places designated by it;
- (c) to wear permanently an electronic monitoring device;
- (d) not to return to the family home, not to approach the injured party or members of his family, other participants in the commission of the offence, witnesses or experts, or other persons specifically designated by the judicial authority, and not to communicate with them directly or indirectly, by any means;
- (e) not to exercise the profession, trade, or activity in the exercise of which he committed the offence;
- (f) to communicate periodically relevant information about his means of subsistence;
- (g) to submit to measures of control, care, or medical treatment, especially for the purpose of detoxification;
- (h) not to participate in sporting or cultural events or other public gatherings;
- (i) not to drive vehicles specifically designated by the judicial authority.

From a comparison of the applicable legal texts relating to the measure of house arrest with the domestic law rules relating to the measure of judicial control, it may be observed that among

the obligations which may be imposed where the liberty-restrictive preventive measure of judicial control is ordered, there is no prohibition on leaving the residence or domicile.

That obligation not to leave the home is provided for only by Article 221 of the Romanian Code of Criminal Procedure, where it is stated that the measure of house arrest consists in the obligation imposed upon the defendant, for a specified period, not to leave the building where he resides without the permission of the judicial authority which ordered the measure or before which the case is pending and to submit to restrictions established by it.

In national law, the measure of house arrest may be imposed for a specified period of 30 days; however, differences of regulation as to duration and manner of execution, by comparison with other legal systems, may raise issues of compatibility at the stage of deduction by the national courts, particularly as regards classification as custodial or restrictive measures, there being situations where, under the legislation of other states, the prohibition on leaving the home may be imposed for certain hours only.

In the same vein, domestic regulation itself relativises the continuous nature of the measure, since criminal procedural legislation allows the person under house arrest to leave the home for the purpose of carrying out professional activity, which, in practical terms, may lead to a configuration of the measure similar to a prohibition limited to those time intervals during which work is not performed.

Thus, according to Article 221(6) of the Romanian Code of Criminal Procedure, upon the written and reasoned request of the defendant, the judge of

rights and freedoms, the preliminary chamber judge, or the trial court may, by interlocutory order, permit him to leave the building for the purpose of attending the workplace, educational or vocational training courses or other similar activities, or for obtaining essential means of subsistence, as well as in other duly justified situations, for a specified period of time, if this is necessary for the exercise of legitimate rights or interests of the defendant.

By Decision No. 650/2014, the Constitutional Court of Romania held that the essential differentiating element between a custodial measure and a mere restriction of the exercise of the right to freedom of movement lies in the intensity of the measure imposed and the concrete manner of its execution.

Thus, unlike pre-trial detention, which involves placing the person in a detention centre, in conditions of isolation and under permanent supervision, house arrest has the effect of the person remaining in his own home. Even so, leaving the home is permitted exclusively for appearing before judicial authorities, at their request, or in other situations only with the prior authorisation of the preliminary chamber judge or of the trial court.

Having regard to those elements, the Romanian Constitutional Court held that, by its manner of regulation, house arrest represents a measure which, by its intensity and by the manner of its execution, affects the liberty of the person.

Now, a comparative analysis would reveal that the essential elements of these measures are, in reality, convergent both with the regulations of the law of other states and with those of domestic law.

Thus, Article 221(6) of the Romanian Code of Criminal Procedure expressly enshrines the possibility of leaving the home in the case of house arrest for the exercise of professional activity, for obtaining means of subsistence, or for other justified situations, without this aspect altering the classification of the measure as one involving deprivation of liberty.

Similarly, Article 399(9) of the Romanian Code of Criminal Procedure does not distinguish, in relation to deduction of the duration of preventive measures, according to the intervals during which the defendant leaves or does not leave the domicile under the conditions permitted by law, thereby confirming that the essential element is the legal nature of the measure, and not the specific modalities of its execution.

Although, under Romanian criminal procedural legislation, custodial preventive measures may be imposed for specified periods of 30 days, with the possibility of successive extension by the judge for the same duration, while the equivalent measure ordered by the requested state in extradition proceedings may have a duration expressed in hours, this difference should not, in itself, constitute an impediment in the process of recognition or deduction, in so far as that measure is capable, in concreto, of being classified as a deprivation of liberty, both within the meaning of Article 5 of the Convention and under national legislation.

Moreover, although the execution of custodial sentences is regulated by its own mechanisms of individualisation and deduction, and within the framework of international judicial cooperation procedures the measures and forms of execution ordered by other states may present peculiarities of dura-

tion, intensity, or manner of implementation, these differences should not, in themselves, constitute an impediment to recognition or assumption of execution, the Romanian state being under an obligation to respect the decision of the competent executing state, which has effectively undertaken to ensure enforcement of the criminal sanction.

3.4. ISSUES ARISING IN THE CASE LAW OF THE ROMANIAN COURTS

3.4.1. Practical difficulties concerning the classification of the duration of preventive measures expressed in hours and ordered by foreign judicial authorities in relation to the provisions of Romanian law

In one case,³² following the conclusion of extradition proceedings to Romania (acting as requesting state), the extradited person lodged an enforcement challenge by which he sought the deduction of a period of 1 year, 5 months and 22 days from the sentence fixed by the conviction judgment. In the enforcement challenge, the extradited person relied on the fact that, following the communication of the European arrest warrant to the British authorities, Westminster Magistrates' Court had ordered his house arrest under the following conditions: he was not to leave his home address for 23 hours per day, namely during the period 16:00–15:00, from 23 September 2020 until 17 February 2021. Subsequently, from 18 February 2021 until 17 March 2022, he was not to leave his home address for 20 hours per day, namely during the period 16:00–12:00.

Consequently, he contended that there should be deducted, from the duration of the sentence to be served in Romania, the period of house detention already served in the United Kingdom.

In essence, the Romanian judge entrusted with determining the case held, by reference to the relevant national articles, that the duration of arrest carried out abroad in fulfilment of a request made by the Romanian authorities is taken into account in the Romanian criminal proceedings and deducted from the duration of the sentence imposed by the Romanian courts, and that the duration of the measure of house arrest is deducted from the sentence imposed by equating one day of house arrest with one day of sentence.

Thereafter, following analysis of the conditions of the house arrest measure as imposed by the authorities of the United Kingdom and detailed in the communications of Westminster Magistrates' Court, by reference to the national provisions comprising the conditions for imposing the measure of house arrest, the judge found that they were similar and, accordingly, held that the applicant had been subject to a custodial preventive measure and ordered deduction of the entire period claimed.

What should be noted from the court's reasoning is the fact that the judge did not conduct a detailed analysis of all the conditions laid down by the British authorities in order to conclude whether or not the applicant had been under a form of detention capable of being classified as a custodial measure, but held exclusively that, during that period (even though it was quantified in hours, in a manner apparently difficult to reconcile with the national system based on days) the applicant had been subject to the measure of hou-

32 Criminal Judgment No. 1106 of 11 May 2022 delivered by the District Court of Bucharest, Sector 5, in case no. 6732/302/2022.

se arrest and, having regard to the legal provisions requiring deduction of any custodial measure executed abroad, ordered the full deduction of that period.

In practice, other national courts have considered that the measures to which persons subject to extradition proceedings are subjected, where these are quantified by hourly intervals, do not attain the threshold of a deprivation of liberty, being classified predominantly as mere restrictions on the exercise of rights. That interpretation may be regarded as prevailing in Romanian domestic law.

In this context, it has often been held that the measure applied in the requesting state, namely the notion of “bail”, would correspond, from the perspective of the domestic authorities, to a form of “security” or placement under judicial control, although such an institution has no direct terminological or conceptual counterpart in domestic law, the notion being taken over and interpreted through an approximate translation, without the support of official documents objectively clarifying the legal nature of the measure imposed pursuant to the European arrest warrant.

This approach sometimes leads to the conclusion that the requested person would be “at the disposal of the authorities” or in a form of “custody”, but the reasoning thus constructed proves problematic, since it proceeds from a formal equation, without a complete analysis of the concrete content of the measure.

Thus, it is frequently concluded that the measure in question would have no counterpart in domestic law, being closer to judicial control than to house arrest, a conclusion which does not

always faithfully reflect the real content of the obligations imposed.

By way of illustration, in another case,³³ the judge dismissed the applicant’s challenge, holding that the period during which the applicant had been released on bail (*released on bail* – 30 March 2022) until the date on which he was incarcerated in Romania (11 July 2024) did not represent a custodial measure, but only a liberty-restricting measure, considering that the provisional measure (*conditional bail*) which imposed the prohibition on leaving the domicile for a number of 5 hours (at various intervals and with variations of +/- 30 minutes) could not be assimilated to the preventive measure of house arrest.

In the case, the applicant argued that the national court should not have regard only to the most severe restriction, namely the prohibition on leaving the home for 5 hours, but also to his personal situation, in the sense that, in order to support himself, he had to work 60 hours per week, while the distance to the workplace was approximately 4 hours round trip, so that, in concrete terms, his social life had been affected and he had experienced a feeling of isolation. The applicant also relied on section 240A of the Criminal Justice Act 2003, which provides for the possibility of deducting from a custodial sentence periods spent under certain forms of “bail”, but only in situations where these involve significant restrictions, such as compliance with a “curfew”, as a rule during the night, combined with electronic monitoring. In such hypotheses, British law permits the granting of cre-

33 Criminal Judgment No. 324 of 26 March 2025 delivered by the Bucharest Tribunal – First Criminal Section in case no. 20686/302/2024.

dit in the individualisation of the duration of the sentence, by transforming the period of restriction into an equivalent number of days of detention, without operating an automatic day-by-day deduction, but by means of a mechanism of calculation established by the court, according to the concrete intensity and duration of the measures.

The Romanian court held that the prohibitions imposed on the applicant, following his release by the British authorities and until determination of the request for surrender to the Romanian authorities, constituted a much less serious interference with his right to private life than those specific to house arrest under domestic law. Consequently, there was no justification whatsoever for deducting the period of approximately 2 years and 4 months, this not having the legal nature of a period effectively served from the duration of the sentence.

Thus, the national court considered that it did not follow that the applicant's private life had undergone any radical change as a result of his inability to carry out certain social, professional, or family activities in those particular intervals (07:00–12:00), that this obligation was not determinative for the overall measure imposed on the applicant and could not be subsumed within house arrest, which requires that the determinative obligation be represented by the prohibition on leaving the building and by no means by the requirement that daily life be conducted only under the effect of obligations restrictive of rights.

Accordingly, the applicant's arguments that the court's analysis ought not to be confined exclusively to the most restrictive component of the obligation, namely the prohibition on leaving the

home for a 5-hour interval, but ought to incorporate his concrete personal context (i.e., the need to carry out professional activity of approximately 60 hours per week, coupled with travel time of approximately 4 hours round trip, impacting social life and a claimed feeling of isolation, as well as the obligation imposed to live and sleep, every night, at the home address) were not accepted, and the court identified no obligations sufficiently constraining to be capable of being equated with a custodial measure such as the measure of house arrest provided for by national legislation.

Equally, the Romanian court considered that no substantial impairment or radical alteration of private life could be found, in the sense of the impossibility of pursuing social, family, or professional activities within the intervals in question (07:00–12:00), since that obligation did not have a determinative character in shaping the measure as a whole, which cannot be equated with house arrest, the latter presupposing, as its defining element, the prohibition on leaving the premises, and not the conduct of daily activity under the incidence of simple obligations restrictive of rights.

3.4.2. Practical difficulties concerning the recognition in Romania of forms of execution ordered by the authorities of other states

In another case,³⁴ the difficulty of recognising the execution procedure ordered by another state was identified, the national courts being placed in the position of analysing its compatibility

34 Criminal Judgment No. 25 of 20 January 2022 delivered by the District Court of Bucharest, Sector 1, in case no. 14756/299/2021.

with the forms and effects regulated by domestic law, as well as the extent to which the assumption of execution by the foreign authority produces direct effects upon forms of execution previously issued on Romanian territory.

Thus, following the imposition of a sentence of 1 year and 6 months' imprisonment upon a French national, the execution documents for enforcement of the sentence were issued, namely the warrant for execution of the sentence of imprisonment, the request for international tracing, and the European arrest warrant.

In examining the request for execution of the European arrest warrant, the *Chambre de l'instruction* of the Paris Court of Appeal refused, by its decision delivered on 24 March 2021 in file No. 2020/00072, the surrender of the applicant to the Romanian authorities, he having been placed under judicial control from 8 January 2020, and ordered enforcement, on French territory, of the sentence imposed by the Romanian courts.

The decision of the French court was founded on Article 4(1)(6) of Framework Decision 2002/584/JHA, which provides that the executing judicial authority may refuse to execute a European arrest warrant where it has been issued for the purposes of executing a custodial sentence or detention order, where the requested person remains in the executing Member State, is a national or resident thereof, and that state undertakes to execute that sentence or detention order in accordance with its domestic law.

The Office for Criminal Enforcement within the court which had delivered the conviction judgment referred the matter to the court seeking withdrawal of the execution documents, making reference to Article 598(1)(c), second

limb, of the Romanian Code of Criminal Procedure, concerning the existence of a ground impeding enforcement of the sentence which no longer justifies maintaining the execution documents issued by the Romanian judicial authorities.

The first-instance court ordered dismissal of that referral concerning withdrawal of the execution documents, reasoning, in essence, that the French authorities had not confirmed that the respondent had actually commenced execution of the sentence on the territory of the foreign state, despite the fact that they had allegedly been requested by numerous communications to reply on that issue.

Thus, the court held merely that the French state had refused surrender, had recognised the judgment of the Romanian courts, and had agreed to assume execution of the sentence, but that those elements did not represent an impediment to enforcement of the sentence imposed by the Romanian court, so long as the French state had not communicated information regarding the commencement or completion of enforcement of the sentence on French territory.

Against that background, the convicted person lodged an appeal and sought withdrawal of the execution documents issued by the Romanian authorities, contending that there existed a ground impeding enforcement. He submitted that refusal of surrender pursuant to Article 4(6) of Framework Decision 2002/584/JHA is conditional upon the effective assumption of execution of the sentence by the executing state, which, in the present case, had occurred through the judgment of the Paris Court of Appeal of 24 March 2021, that act representing the determinative mo-

ment of the transfer of competence in matters of execution.

He further contended that the first-instance court had misinterpreted the effects of that judgment, since the existence of recognition and the undertaking by the French state to execute the sentence removes the basis for maintaining the execution documents previously issued by the Romanian authorities, those documents no longer being justified in the circumstances of the assumption of execution.

In support of the appeal, he further submitted that, according to the applicable European normative framework, namely Article 8(1) of Framework Decision 2008/909/JHA, competence in matters of execution and all aspects relating to the concrete manner of execution belong exclusively to the executing state, and recognition of the Romanian judgment produces binding effects in that state.

Consequently, he submitted that the decision of the Romanian first-instance court dismissing the request for withdrawal of the execution documents was unlawful, since it had failed to give effect to the decision of the French judicial authorities and to the mechanism of mutual recognition, ignoring the effect of the assumption of execution of the sentence and the existence of a current impediment to enforcement.

To date, this issue has remained unresolved, the national appellate court having ordered, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), with reference to Article 19(3)(b) of the Treaty on European Union (TEU) and Article 2(2) of Law No. 340/2009, the stay of proceedings and the referral of questions to the Court of Justice of the European

Union for a preliminary ruling on the following questions:

“1. Must the provisions of Article 4(6) of Framework Decision 2002/584/JHA, read together with Article 25 and Article 8(2) and (3) of Framework Decision 2008/909/JHA, be interpreted as meaning that refusal to execute a European arrest warrant issued for the execution of a custodial sentence and recognition of the conviction judgment, without actual enforcement through the incarceration of the convicted person, as a result of ordering execution of the sentence under house arrest according to the law of the executing state and without obtaining the consent of the sentencing state in the course of the sentence adaptation procedure, entails the loss of the right of the sentencing state to proceed with enforcement of the sentence, in accordance with Article 22(1) of Framework Decision 2008/909/JHA?

2. Must the provisions of Article 8(1)(c) of Framework Decision 2002/584/JHA and Article 22(1) of Framework Decision 2008/909/JHA be interpreted as meaning that a conviction judgment imposing a custodial sentence, on the basis of which a European arrest warrant was issued and refused under Article 4(6), with recognition of the judgment, but without actual enforcement through incarceration of the convicted person, as a result of adaptation of the sentence according to the law of the executing state and without obtaining the consent of the sentencing state in the course of the sentence adaptation procedure, loses its enforceable character?”

In this context, the difficulties generated by the delineation of competence in matters of execution between the sentencing state and the executing state, as well as the uncertainties regarding the legal effects of recognition of the crimi-

nal judgment under the mechanisms of European judicial cooperation, demonstrate the need for a uniform interpretation of the applicable standards, aspects which justify the formulation of conclusions concerning the role of Article 5 of the Convention in configuring the limits of execution and recognition of custodial measures in a transnational context.

4. Conclusions

Article 5 of the Convention may prevent extradition to or from third states within the legal framework of the European Union, particularly where surrender would expose the person to a real risk of flagrant arbitrary detention in the requesting state. The case law of the ECtHR, in particular *Othman*, confirms the extraterritorial application of that standard, and European Union law reinforces it through the Charter of Fundamental Rights and the protection conferred by European citizenship.

Even so, the practical impact of this doctrine remains limited. The very high threshold of a “flagrant violation”, the preference of courts for arguments founded on Articles 3 and 6 of the Convention, and the role of assurances provided by the requesting state reduce the frequency with which Article 5 is invoked successfully. Thus, Article 5 of the Convention operates rather as a residual safeguard against extreme violations of individual liberty than as an ordinary obstacle in extradition proceedings. Nevertheless, in a changing geopolitical context, marked by the increase of extradition requests to states with rule of law deficiencies, its potential to prevent extradition could become more relevant, albeit only in truly exceptional situations.

The analysis carried out demonstrates that Article 5 of the Convention does not ordinarily constitute an autonomous ground for refusal of extradition, but may acquire legal relevance in situations where surrender of the requested person would lead to arbitrary, disproportionate, or judicially unreviewable detention.

Accordingly, Article 5 of the Convention performs a subsidiary, yet significant, role in reviewing the compatibility of extradition with fundamental rights, contributing to ensuring the lawfulness and proportionality of deprivation of liberty in the framework of international judicial cooperation.

The analysis further shows that failure to recognise periods of deprivation of liberty previously executed in other jurisdictions may lead to an excessive duration of detention, incompatible with Convention standards.

The analysis of the criteria for classifying measures involving deprivation of liberty in Romanian law, correlated with the standards developed in the case law of the ECtHR and the CJEU, shows that determining whether a measure is custodial or restrictive cannot be carried out formally, solely by reference to its legal designation or to its duration expressed in days or hours, but requires a concrete assessment of the type, intensity, duration, and manner of execution. In this respect, the case law of the CJEU confirms that measures other than incarceration properly so called may also be assimilated to detention where their effects are comparable to those of an actual deprivation of liberty.

At the same time, domestic regulation consistently enshrines the custodial character of house arrest, including where it is executed outside the

national territory, which in principle requires these periods to be taken into account in determining the duration of the sentence to be served. At the same time, the differences existing between national legal systems, especially as regards the method of temporal quantification of preventive measures, should not constitute an obstacle to their recognition, in so far as the restrictions imposed attain the threshold of a genuine deprivation of liberty.

In this context, it follows that the national courts are called upon to carry out an individualised analysis of the concrete conditions in which the measure was executed in the foreign state, avoiding both the automatic classification of such measures as mere restrictions on freedom of movement and their formal deduction without effective verification of the intensity of the constraints imposed. Such an approach is necessary not only to ensure coherent application of domestic rules concerning deduction of preventive measures executed in other jurisdictions, but also to guarantee observance of the requirements of Article 5 of the Convention, particularly as regards the lawfulness and proportionality of the total duration of deprivation of liberty.

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- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters.
- Charter of Fundamental Rights of the European Union (2012/C 326/02).
- Romanian Criminal Code.
- Romanian Code of Criminal Procedure.
- Law No. 254/2013 on the execution of sentences and measures involving deprivation of liberty.
- Decision No. 22 of 12 October 2009 of the High Court of Cassation and Justice (Appeal in the interests of the law concerning deduction of house arrest executed abroad).