THE CONSENT OF THE SENTENCED PERSON: DISREGARDED?

ANA - CATERINA ANIȚEI

Abstract:
The cooperation with regard to transfer of foreign prisoners is an important aspect of inter-state cooperation in criminal matters based on different bilateral and multilateral treaties and agreements. The problem of the transfer of foreign prisoners is one of actuality due to the increase in number of foreign sentenced persons serving sentences in other countries than those of their nationality.

The consent of the foreign prisoner subjected to the transfer represents the topic of this essay, namely the lack of his consent in the two cases provided by the Additional Protocol to the Convention on the Transfer of Sentenced Persons, namely when a sentenced person has fled the sentencing State in order to go to the State of his or her nationality, therefore making it impossible in most cases for the sentencing State to execute the sentence passed, and when the sentenced person is subject to expulsion or deportation as an effect of the sentence.

It is the opinion of this author that the sentenced person’s consent should be taken into consideration more seriously, and not so easily disregarded by the states. Thus, it will argue that a person should not be transferred if he or she refuses to and the motives expressed are reasonable enough.

Within this essay, several issues are going to be discussed, such as: the treatment of foreign prisoners, the treatment of prisoners in Romanian prisons and whether the existence of an expulsion measure automatically attracts the admission of the request for transfer of the convicted person, with the corresponding reference to case-law and (inter)national legal instruments (the Convention on the Transfer of Sentenced Persons, the European Convention on the International Validity of Criminal Judgments, and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council Framework Decision 2008/909/JHA of 27 November 2008, Law No. 302/2004 on International Judicial Cooperation in Criminal Matters and O.G. No. 92 of 30 August 1999 through which Romania ratified the Additional Protocol to the Convention on the Transfer of Sentenced Persons).

1. Introduction

The exercise of criminal prerogatives by states has always been an element of their national sovereignty. Therefore, in theory, without a treaty or national legislation, states do not recognize foreign criminal judgments\(^1\) [Bassiouni, (2008)]. However, in practice, ‘the transfer and enforcement of foreign penal sentences gives effect to a foreign penal judgment by enforcing the sanctions contained in the foreign penal judgment’ [Bassiouni, (2008)]; it is not based on the recognition of the criminal judgment given by another state.

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\(^1\) Here referring to H. Donnedieu de Vabres, Les Principes Modernes Du Droit Penal International (1928) and H. Donnedieu de Vabres, Introduction A L’Etude Du Droit Penal International (1922).
The European Union’s approach to cooperation between member states is founded on multilateral treaties\(^2\), based on the concept of a European judicial space [Bassiouni, (2008); Schengen Agreement, (1985)]. The cooperation with regard to transfer of foreign prisoners is an important aspect of inter-state cooperation in criminal matters, as well, based on different bilateral and multilateral treaties and agreements. The problem of the transfer of foreign prisoners is one of actuality due to the increase in number of foreign sentenced persons serving sentences in other countries than those of their nationality. The increase in the number of foreign prisoners could be explained by the growth and development of transnational crimes, trafficking in human beings, computer crimes and others which involve criminal networks working in multiple states [Mohamed, (2008)].

2. Main Legal Question

This work will mainly refer to the Additional Protocol to the Convention on the Transfer of Sentenced Persons, but also to the Convention on the Transfer of Sentenced Persons, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, the European Convention on the International Validity of Criminal Judgments and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and last, but not less important, Law No. 302/2004 on International Judicial Cooperation in Criminal Matters and O.G. No. 92 of 30 August 1999 through which Romania ratified the Additional Protocol to the Convention on the Transfer of Sentenced Persons. The consent of the foreign prisoner subjected to the transfer represents the topic of this essay, namely the lack of his consent in the two cases provided by the Additional Protocol above-mentioned: ‘where a sentenced person has fled the sentencing State to go to the State of his or her nationality, thus rendering it impossible in most cases for the sentencing State to execute the sentence passed’ and ‘where the sentenced person is subject to expulsion or deportation as a consequence of the sentence’ [Explanatory Report, Additional Protocol to the Convention on the Transfer of Sentenced Persons, (ETS No. 167)]. This essay believes that the sentenced person’s consent should be taken into consideration more seriously, and not be so easily disregarded by the states. Thus, it will argue that a person should not be transferred if he or she refuses to and the motives expressed are reasonable enough. Therefore, two ideas supporting this statement will be discussed here. Firstly, the purpose of the Convention on the Transfer of Sentenced Persons is to provide the member states with a simplified procedure for the transfer of foreign prisoners ‘so that they may serve their sentence in their home country’ [Explanatory Report, Convention on the Transfer of Sentenced Persons, (ETS No. 112)]. The social rehabilitation of offenders could be more efficient if the sentences imposed on them are enforced in their nationality country where friends and

family are rather than in the state where the offense was perpetrated and the judgment given [Mohamed, (2008)]. Another reason encouraging the transfer of a sentenced person to his home country is represented by the allegedly/possible discriminatory treatment of foreign prisoners. This paper will discuss in more detail this treatment and bring contra arguments supported by case-law, more precisely will try to prove that bad treatment and discrimination of foreign prisoners is not a valid motive in order to justify the transfer without their consent.

Secondly, regarding the other case when the transfer of a sentenced person is possible without his or her consent, namely when he or she is subject to expulsion or deportation as an effect of the respective sentence, this essay sustains that the expulsion measure is not enough reason for the transfer to take place disregarding the person’s consent.

3. The Treatment of Foreign Prisoners

To start with, a definition of ‘foreign prisoner’ is required. We can say that a foreign prisoner is a convict imprisoned within the territory of a state different of his nationality country. It is a very broad and complex term including various groups of people whose social, economic, political, family and psychological traits are totally different. Foreigners, same as other minorities, often become groups of marginal, ‘second class’ citizens [Mohamed, (2008)]. They have a difficult situation to which their treatments by prison guards and their relationship with other local convicts contribute, as well [Mohamed, (2008)]3. ‘Research findings indicate that discrimination is claimed to represent a feature in the treatment of foreigners in criminal justice in certain countries’ [Mohamed, (2008)]. The lack of sufficient safeguards against racial discrimination in prisons and the absence of human rights protection for foreigners make foreign prisoners vulnerable to abuse. Other difficulties which could be mentioned here are the language barriers and the lack or poor contact with family which is in another country.

Having considered all the reasons above-mentioned for the transfer of a foreign prisoner to his home country, even in the absence of his consent, this paper will argue that being a prisoner in one’s own country does not mean that he or she will not be discriminated or ill-treated. There are many other reasons for discrimination besides nationality, such as: religion, beliefs, colour of the skin, being part of an ethnic group or a minority and many others. Let’s assume that X, citizen of Romania, commits a crime and is sentenced in Italy, afterwards runs to Romania, a transfer occurs, without his consent, to his home country. But in the meantime, he has no connections left with Romania, just a citizenship and language, his family and friends being all in Italy. Then the purpose of rehabilitation and socialization of the offender, in the light of the provisions established by the Convention on the Transfer of Sentenced Persons, could not be reached.

4. The Treatment of Prisoners in Romanian Prisons

Another important aspect to be analyzed in this essay is that of the treatment of prisoners in Romania, not foreign prisoners, but prisoners in general, nationals, more precisely the bad treatment and the lack of conditions within the Romanian prison system, which could constitute a viable reason for a prisoner to refuse giving his consent to being transferred to this country, even if the person in question is a citizen of Romania.

A country report\(^4\) from 2007, made by the US Department of State, Bureau of Democracy, Human Rights, and Labor highlights serious issues Romania has with regard to prison and detention center conditions; the reason present tense is used is that Romania still has problems in this field as the case-law presented will show. Media, APADOR-CH (Association for the Defense of Human Rights in Romania – the Helsinki Committee), other human rights NGOs, studies, research, interviews with the prisoners reported the following issues in Romanian prisons:

- Lacking sanitation and hygiene in prisons;
- Insufficient medical facilities;
- Not enough medication;
- Lack of doctors;
- No available heating and hot water in all facilities;
- A high number of detainees had lice and scabies;
- Undrinkable water;
- Prison meals did not contain the minimum necessary of calories (APADOR-CH);
- Lack of natural light;
- Absence of activities for the detained;
- Abuse by authorities and other inmates;
- Many detention centers not providing for confidentiality of talks between prisoners and lawyers;
- Due to overcrowding, juveniles were sometimes kept in the same cell with adults.

The conclusion was that the conditions generally did not meet European standards. Some recent case-law before the European Court of Human Rights supports the argument that the bad and inhuman conditions in the Romanian prisons might be enough reason for a prisoner (even Romanian) to refuse being transferred here; argument which states should take into consideration before disregarding a sentenced person’s consent.

In the case of Demian v. Romania\(^5\), Ioan Tudorel Demian, sentenced to four years and two months' imprisonment for theft, complained that during his detention (he was in two prisons: Baia Mare prison, but transferred several times to Gherla prison) as a diabetes sufferer the two prisons refused to provide him with proper health care and food, and that this and the poor conditions of detention in both prisons had adversely affected his health. In particular he complained about the insufficient quantity of insulin, the low number of syringes and the lack of a specific diet for diabetes.

\(^5\) Demian v. Romania, Application No. 5614/05, Date of Judgment 27-09-2011.
sufferers. The Court found a violation of Article 3 (prohibition of inhuman and degrading treatment) and awarded him with 10,000 Euro, considering that, in this case, the authorities have failed in the obligation to provide medical treatment for the applicant's condition, causing a negative impact on his health and welfare from a physical and mental point of view. The Court also held that the test undergone by the applicant passed the inevitable level of suffering in detention, therefore there had been a breach of Article 3.

Another similar case is that of Ciobanu v. Romania\(^6\), where the applicant Fane Ciobanu, sentenced to 21 years of prison for murder, complained about the poor conditions in the prisons he served his sentence, namely the overcrowding (he had to share the same bed with other convicts, sometimes with people suffering from contagious afflictions) and criticized the authorities for failing to maintain the medical treatment and diet (he had ulcer) prescribed by the doctors, in particular by not providing him with false teeth (he had total edentulous). Other complaints regarded the lack of hot water and heating in the cell. In this case, the Court found a violation of Article 3, as well, and awarded the applicant with 13,300 Euro.

One last case is that of Brăndeș v. Romania\(^7\). The applicant, Ioan Brăndeș, was detained in prison in Arad, serving a ten year sentence for fraud. During his detention he made several complaints regarding the conditions of detention, namely overcrowding, bad food, no privacy and the most important complaint was with view to the fact that the prison was close to a rubbish dump and the stench coming from it was difficult to bear for all prisoners. In this case, the Court found a violation of both Article 3 (prohibition of inhuman and degrading treatment) and Article 8 (right to respect for private life) of the ECHR. The Court followed some of its earlier case-law and reached the conclusion that Article 8 of the ECHR can, ‘in cases of nuisance from noise or fumes, even be applicable if there is no grave danger for health, but when an environmental impact assessment has shown that there were dangerous effects of a certain activity’\(^8\) [Buyse, (2009)].

5. Does the Existence of an Expulsion Measure Automatically Attract the Admission of the Request for Transfer of the Convicted Person?

In continuation, this essay will answer the question expressed above and support it with pertinent arguments. To start with, let us have a look at the necessary legislation that could facilitate finding the right answer. The current Criminal Code of Romania provides in paragraph 3 article 117\(^9\), called Expulsion, that ‘If expulsion is

\(^6\) Fane Ciobanu v. Romania, Application No. 27240/03, Date of Judgment 11-10-2011
\(^7\) Brăndeș v. Romania, Application No. 6586/03, Date of Judgment 07-04-2009; this case is only available in Romanian and French; For an English summary: http://gnhrre.uwe.ac.uk/RenderPages/RenderLearningObject.aspx?Context=47&Area=2&Room=97&Constellation=78&LearningObject=827
\(^9\) Article 117 of the current Criminal Code of Romania:
(1) A foreign citizen who has committed an offence can be forbidden to stay on Romanian territory.
accompanying the penalty of imprisonment, the accomplishment of expulsion shall take place after service of the penalty’. The New Criminal Code of Romania, which is due to enter into force in 2013, comes with more detailed information. Article 55 of this new code stipulates that the prohibition of exercising certain rights represents a complementary punishment and the right of the foreigner to be on Romania’s territory is such a right. Article 66 (once more regarding a foreigner) provides that the complementary punishment of the prohibition of exercising certain rights can be ordered from 1 to 5 years. Article 68 mentions in paragraph 1 that this punishment begins after the imprisonment sentence has been executed, after total pardon or of the rest of the sentence, after expiration of the period of limitation/prescription or after the expiration of parole supervision sentence. Another thing which both of these codes have in common is that they forbid the ordering of this complementary sentence when there are reasonable motives to believe that the life of the expelled person is put in danger or that the sentenced person shall be subject to torture or other inhuman or degrading treatments in the state to which he or she is to be expelled. The moment when the expulsion is to take place is very important because it makes one ask himself/herself, if this measure is due to occur after the prison and assuming the prisoner in question does not want to give his consent for transfer, then why would states disregard that and decide on his transfer nevertheless? It would be logical and legal then, at least in the case of Romania10, that the foreign prisoner would first serve his prison sentence and at the end of it be expelled. The other way around should be possible too, assuming the legislations of the states involved are similar. For instance, through Judgment No. 25 of 5 February 200711, Court of Appeal Bucharest, Criminal Section I, recognized the effects of the sentence pronounced at June 6, 2006 by the Court of Appeal Anvers and those of the sentence pronounced at November 23, 2005 by the First Instance Court of Anvers. The accused T.P. was sentenced at 7 years of prison for the crimes of exploitation of prostitution, participation in a criminal organization, prostitution and trafficking in human beings. The measure of forbidding the accused the stay on the territory of the Kingdom of Belgium for a period of 5 years was also taken. In this case, although the accused did not give his consent for transfer, the states agreed for him to execute his prison sentence of 7 years in Romania, since all the conditions, including the one mentioned in the Additional Protocol, were fulfilled.

*Education based on EFQM Model, Groningen, Eindhoven.*

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(2) The previous paragraph shall apply also to persons with no citizenship who do not domicile in our country.

(3) If expulsion is accompanying the penalty of imprisonment, the accomplishment of expulsion shall take place after service of the penalty.

(4) Persons provided in the present Article shall not be expelled if there are serious reasons to believe that they risk being subjected to torture in the State to which they are to be expelled.


11 In Romanian, http://www.scj.ro/SP%20rezumate%202007/decSP2163-230407.htm