



# *ALEKSEI PETRUHHIN:* EXTRADITION OF EU CITIZENS TO THIRD STATES

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ABSTRACT: Extradition agreements between Member States and third States fall within the competence of Member States, but the ruling in *Aleksei Petruhhin* (Court of Justice, judgment of 6 September 2016, case C-182/15 [GC]) shows that Member States must exercise this competence in light of EU law if extradition may affect an EU citizen's fundamental rights protected under the Treaties and the Charter of Fundamental Rights of the European Union. This can be the case if the EU citizen who is subject to extradition has exercised his right to free movement by moving from his home State to another Member State. Extradition of Petruhhin, an Estonian citizen, was requested by Russia while he was exercising his right to freedom of movement and residence in Latvia. As is the case in many States, the national law of Latvia does not extend the same level of protection against extradition to foreign citizens, as to its own nationals. The Court of Justice ruled that in such a case, extradition of an EU citizen to a third State is generally prohibited under Art. 18 TFEU and can only be justified if the prosecution in the home Member State is not possible. In addition, this case confirms earlier rulings that the extradition of an EU citizen will not be permitted if his fundamental rights under the Charter will be endangered in the requesting State. The case concerns prohibitions of absolute character, such as prohibition against torture and degrading treatment. To determine the possibility of breach of rights under the Charter, the Member State must undertake a rigorous verification of the level of protection of human rights in the relevant third State before deciding whether to grant the extradition request.

KEYWORDS: EU citizenship – freedom of movement – discrimination – extradition – European Arrest Warrant – Charter of Fundamental Rights of the European Union.

## I. INTRODUCTION

In *Aleksei Petruhhin*,<sup>1</sup> the Grand Chamber of the Court of Justice ruled on a request for a preliminary ruling referred by the Supreme Court of Latvia in a case involving the extradition of an EU citizen to a third State under a bilateral extradition agreement concluded between Latvia and Russia.

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<sup>1</sup> Court of Justice, judgment of 6 September 2016, case C-182/15, *Aleksei Petruhhin* [GC].

The case discusses the applicability of Art. 18 TFEU prohibiting discrimination, EU citizenship provisions of TFEU and the Charter of Fundamental Rights of the European Union (hereinafter, “the Charter”), to international agreements concluded by Member States with third States. It should be noted that the EU has only been involved to a limited extent in extradition agreements with non-EU States, and extraditions to the majority of third party States take place on the basis of bilateral agreements.

The questions discussed in the *Aleksei Petruhhin* case concern the balance between the objectives of extradition agreements, i.e. the need to combat impunity, on the one hand, and the need to protect the rights of the person to be extradited (the EU citizen) under the Treaties. Although, as discussed in what follows, the Court’s reasoning and findings in *Aleksei Petruhhin* are generally in line with the well-established principles of EU law on EU citizens’ rights, the case also raises novel issues, and will have a considerable impact on the functioning of bilateral extradition agreements with third States. Two other cases also raise similar questions, which have not yet been resolved by the Court of Justice at the time of writing.<sup>2</sup>

This *Insight* starts with an overview of the facts and legal background of the case. The *Insight* then discusses the Court’s findings on the applicability of EU law to the proposed extradition in the particular circumstances of this case. It examines whether a national provision protecting the Member State’s own nationals, but not foreigners (i.e. EU citizens who reside in a host Member State) against extradition to third States, amounts to discrimination within the meaning of Art. 18 TFEU. We shall further explore the criteria for the assessment of justifications for discrimination against an EU citizen who is to be extradited to a third State.

Lastly, the *Insight* will present and discuss the protection of EU citizens from extradition to third States under the Charter, and finally round up with conclusions.

## II. FACTS AND LEGAL BACKGROUND OF THE CASE

Petruhhin, an Estonian citizen, was detained in Latvia at the request of the authorities in Russia where he was being investigated for large-scale organized drug trafficking offences. Detention and extradition of Petruhhin was requested on the basis of a bilateral treaty on judicial cooperation concluded by Latvia and Russia in 1993.<sup>3</sup> Since no agreement to that end exists between EU and Russia, extradition between these parties is governed by this bilateral agreement.

According to Art. 98 of the Constitution of Latvia (*Satversme*), a citizen of Latvia “may not be extradited to a foreign country, except in the cases provided for by international

<sup>2</sup> Court of Justice, request for a preliminary ruling lodged on 5 April 2016, case C-191/16, *Romano Piscioti v. Germany*, and request for a preliminary ruling lodged on 7 September 2015, case C-473/15, *Peter Schotthöffer & Florian Steiner GbR*.

<sup>3</sup> Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters.

agreements ratified by the *Saeima* [the Latvian Parliament] if by the extradition the basic human rights specified in the Constitution are not violated". The Criminal Procedure Law of Latvia also contains a corresponding provision, prohibiting the extradition of a Latvian citizen and other persons whose rights could be infringed by the State requesting extradition. Neither the Constitution, nor the Criminal Procedure Law, preclude, in principle, extradition of a foreigner such as Petruhhin.

The decision authorizing extradition of Petruhhin to Russia was adopted by the Latvian prosecutor's office, and Petruhhin was provisionally placed in custody in Latvia while awaiting extradition. Petruhhin appealed the decision on extradition, initially arguing that he was being discriminated against on the grounds of nationality, and that such discrimination was contrary to the agreement on judicial assistance between Latvia, Lithuania and Estonia, which granted nationals of the three States the same "personal and economic rights" in the territory of each State.<sup>4</sup>

Having examined provisions of Latvian law, the referring court established that Petruhhin, as an Estonian citizen, was not in principle protected from extradition to Russia. However, the national court still questioned whether the extradition of Petruhhin was lawful in light of EU law, since the extradition of an EU citizen residing in a Member State other than where he is a national could be "contrary to the essence of the citizenship of the Union, that is to say, the right of Union citizens to protection equivalent to that of a Member State's own nationals".<sup>5</sup>

The first two questions referred to the Court of Justice were addressed jointly and asked (in summary) the Court to clarify whether Arts 18 and 21 TFEU meant that EU citizens were protected against extradition to a non-EU State to the same extent as the nationals of the host Member State. The third question aims at clarifying whether, in the absence of such a protection under Arts 18 and 21 TFEU, the extradition of EU citizens to a third State may be precluded where there is a serious risk that their rights under the Charter would be infringed, and what requirements for verification of compliance with the Charter are imposed under EU law on the extraditing Member State.

While referring the questions to the Court of Justice, the national court annulled the decision on detention of Petruhhin, who then disappeared in an unknown direction. However, the Court found that the questions referred by the national court were not devoid of interest, since the extradition proceedings were still pending before the Supreme Court of Latvia and the Court's interpretation was necessary to decide the dispute in those proceedings.

<sup>4</sup> Agreement of 11 November 1992 between Estonia, Latvia and Lithuania on Judicial Assistance and Judicial Relations.

<sup>5</sup> *Aleksēi Petruhhin* [GC], cit., para. 16.

### III. EXTRADITION OF AN EU CITIZEN TO A THIRD STATE IN LIGHT OF ART. 18 TFEU

#### III.1. INTRODUCTION

Whereas extradition within the EU is governed by the Framework Decision 2002/584/JHA,<sup>6</sup> extradition from EU Member States to third States is mainly regulated by the bilateral agreements between the extraditing Member State and the third State, and not by an EU-made agreement. The EU has only concluded agreements with few States, including the USA.<sup>7</sup> This may suggest that Member States retain competence with respect to entering and performing such agreements, until the EU has concluded a corresponding agreement. However, as the ruling in *Aleksei Petruhhin* shows, EU law does provide for certain restrictions on the way that Member States can exercise their competence in cases where provisions of EU law may be involved.

#### III.2. DOES EXTRADITION OF EU CITIZENS TO THIRD STATES ON A BASIS OF A BILATERAL AGREEMENT WITH THE MEMBER STATE FALL WITHIN THE EU LAW DOMAIN?

As a starting point, Art. 18 TFEU prohibits discrimination on the grounds of nationality in cases falling “within the scope of application of the Treaties, and without prejudice to any special provisions contained therein”. In such situations, persons falling within the scope of the Treaties must be treated equally.<sup>8</sup> EU citizens may generally rely on the right to equal treatment in other Member States; however, it was argued in *Aleksei Petruhhin* that the agreement with the third State, under which the extradition was to be carried out, did not fall within the ambit of the Treaties.

The Court of Justice examined first whether the case of *Aleksei Petruhhin* falls within the EU law domain at all, since the extradition in this case was governed by the bilateral agreement between the Member State – not the EU – and the third State. The Court of Justice generally agreed with the arguments submitted by some Member States that, in the absence of an extradition agreement concluded by the EU, the rules governing the extradition fall within the competence of the individual Member States.

However, the Court of Justice did not agree that the extradition of Petruhhin should remain entirely outside the sphere of EU law, merely due to the absence of an EU extradition agreement. Such an understanding would, in Court’s view, compromise Petruhhin’s rights “to move and reside freely within the territory of the Member States”, as protected under Art. 21 TFEU. Since Petruhhin made use of his right to move freely within

<sup>6</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

<sup>7</sup> EU Agreement with USA approved by Council Decision 2009/820/CFSP of 23 October 2009 supplements national bilateral agreements between USA and individual Member States. See also S. PEERS, *EU Justice and Home Affairs, Volume II: Criminal Law, Policing, and Civil Law*, Oxford: Oxford University Press, 2016.

<sup>8</sup> *Aleksei Petruhhin* [GC], cit., para. 29.

the European Union, in his capacity as a EU citizen, by moving to Latvia, his situation falls within the scope of application of the Treaties.

It should be pointed out that, to establish the EU-link, it was sufficient for the Court of Justice to draw on the mere fact of Petruhhin travelling from Estonia to Latvia and living there for a while. The Court did not expand on this cross-border element by inquiring whether Petruhhin had stayed in Latvia for any noticeable period of time and what the purpose of his stay had actually been (e.g. whether his exercise of his rights to free movement had been connected with his criminal activities or fleeing from justice).

The question which may arise (but which has not been asked expressly by the referring court) is whether a host Member State could argue that a person such as Petruhhin may not rely on EU law, if the real reason for exercising free movement rights is to take advantage of these rights in order to avoid punishment, or with a view to continue or engage in further criminal conduct.

In principle, Art. 21 TFEU contains a very broad formulation of EU citizens' rights to free movement and residence in the EU, but it does envisage the possibility of "the limitations and conditions" on such rights being laid down in the Treaties and being included in the measures adopted to give them effect. Such a limitation is laid down in Art. 35 of the Citizens' Rights Directive, which provides that "Member States may adopt necessary [proportionate] measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriage of convenience".<sup>9</sup> This provision merely allows, but does not oblige, Member States to take such measures, and it generally targets situations involving marriages of convenience and other cases where an EU citizen's family members unjustifiably and intentionally benefit from EU law.

The case law as well as the Commission's view on the concept of abuse of rights can be understood as excluding situations where EU citizens benefit from the advantages inherent in the exercise of the right of free movement protected by TFEU, regardless of the purpose or motive of their move to a Member State.<sup>10</sup> In *Aleksiej Petruhhin*, the Court of Justice implicitly endorses the view that the very fact of the movement by an EU citizen across the border is sufficient for the situation to fall within EU law domain.<sup>11</sup>

This means that, even though Member States retain the power to enter into agreements on extradition, that power must be exercised in a manner consistent with EU law

<sup>9</sup> Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>10</sup> Communication COM(2009) 313 final of 2 July 2009 from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See also Court of Justice: judgment of 9 March 1999, case C-212/97, *Centros*; judgment of 23 September 2003, case C-109/01, *Akrich*. See also C. BARNARD, *The Substantive Law of the EU*, Oxford: Oxford University Press, 2016, p. 212.

<sup>11</sup> *Aleksiej Petruhhin* [GC], cit., para. 29. AG Bot takes the same view: see Opinion of AG Bot delivered on 10 May 2016, case C-182/15, *Aleksiej Petruhhin*, paras 39-42.

and the national rules concerned must have due regard to the latter, including rules governing EU citizenship. In particular, the non-discrimination rule in Art. 18 applies.<sup>12</sup>

### III.3. IS EXTRADITION OF AN EU CITIZEN TO A THIRD STATE DISCRIMINATORY WITHIN THE MEANING OF ART. 18 TFEU?

It is generally unsurprising that, having determined that the situation is covered by EU law, the Court of Justice quickly came to the conclusion that Latvian law discriminated against Petruhhin as a national of another Member State, because it only protected Latvian nationals from extradition to third States. In the Court's view, such national rules result in the unequal treatment of EU citizens, giving rise to a restriction of the freedom of movement within the meaning of Art. 21 TFEU.<sup>13</sup>

The Court of Justice is very brief in its analysis of Art. 18 TFEU. For the Court the most profound importance lies in the finding that the national rules on extradition of the host Member State were liable to affect the *freedom of nationals of other Member States to move within the EU*, and not in the assessment of a comparability of situations as suggested by the Court's AG Bot. However, the AG's findings in *Aleksei Petruhhin* will be given some attention in this *Insight*.

In the AG's view, once it was established that EU law applies to this situation, it was also necessary to examine whether Latvian nationals and Estonian nationals (here, Petruhhin) were in comparable positions for the purposes of Art. 18 TFEU.<sup>14</sup> To find out whether this was the case, the AG carefully examined the objective of the extradition, i.e. the prevention of impunity. An EU citizen and a Latvian national would be in comparable situations, if they could both be prosecuted for the offences in question in the territory of the host Member State.

In his Opinion, the AG thoroughly discusses the principles of international law applicable to the exercise of jurisdiction and the provisions of Latvian criminal law concerning crimes committed by foreign citizens.<sup>15</sup> The relevant provisions of national law only applied to nationals and residents of Latvia. Thus, a foreigner like Petruhhin could not be prosecuted in Latvia, but a Latvian citizen could be. On the basis of these findings, the AG concluded that the two would not be in comparable situations, so that Petruhhin could be extradited to Russia.<sup>16</sup> Such extradition could, however, be prevented by the Charter, which was the matter for the third question referred by the national court.

The AG adopts a very practical approach to the problem and places significant weight on the objective of preventing impunity, which may be made ineffective by the national rules precluding the exercise of criminal jurisdiction with respect to crimes committed

<sup>12</sup> *Aleksei Petruhhin* [GC], cit., paras 27-30.

<sup>13</sup> *Ibidem*, para. 32.

<sup>14</sup> Opinion of AG Bot, *Aleksei Petruhhin*, cit., para. 62.

<sup>15</sup> *Ibidem*, paras 58 *et seq.*

<sup>16</sup> *Ibidem*, para. 70.

outside their territory. The Court's line of argument is, however, more consistent with the EU's protection of the fundamental right of EU citizens to free movement and residence in the EU. In my view, the Court's reasoning provides for a more transparent and predictable evaluation of Art. 18 implications in individual cases. The application of the AG's approach is, on the contrary, likely to result in a much more fragmented and unpredictable situation for EU citizens, as rules of extraterritorial jurisdiction vary from State to State, so that some Member States may, for example, envisage jurisdiction in cases like Petruhhin's, whereas others may not.

Nonetheless, the Court of Justice agreed with the AG on the point that the important objective of extradition is the prevention of impunity. However, the Court does not discuss the objective of impunity as a part of the comparability analysis under Art. 18 TFEU. Instead, the Court examines it as a part of justification for discrimination against EU citizens in extradition cases.

#### III.4. JUSTIFICATION OF DISCRIMINATION OF EU CITIZENS IN EXTRADITION CASES

The need to prevent the risk of impunity for persons who have committed an offence is recognized as a legitimate objective by the Court of Justice, which may justify discrimination against an EU citizen and the restriction of his fundamental right to free movement within the EU.<sup>17</sup> However, any measures, which restrict a fundamental freedom, such as that laid down in Art. 21 TFEU, may only be justified by objective considerations if they are necessary for protection of the interests which they are intended to secure, and only in so far as those objectives cannot be attained by less restrictive measures.<sup>18</sup>

Following the general approach to the proportionality assessment, the Court of Justice pointed out that alternatives, which are less restrictive to the exercise of the rights conferred by Art. 21 TFEU than extradition, should be considered.<sup>19</sup>

Extradition may be useful to prevent impunity in cases where the crime was committed outside the territory of the requested State, and this State does not have jurisdiction to prosecute the offender. This can be the case where the national law does not provide for extraterritorial jurisdiction for the type of offence in question, or a State requesting extradition has a stronger basis in international law for criminal jurisdiction (e.g. if the crime was committed within its territory) or, as the case may be, the requested State does not wish or is not able to initiate criminal proceedings, for example, due to lack of sufficient evidence. In these circumstances, extradition to a State which is willing to prosecute may be appropriate to achieve the legitimate objective of preventing impunity and will also be in line with the principle of *aut dedere, aut judicare*.<sup>20</sup>

<sup>17</sup> *Aleksei Petruhhin* [GC], cit., paras 35-37.

<sup>18</sup> *Ibidem*, paras 34-38.

<sup>19</sup> *Ibidem*, paras 41.

<sup>20</sup> *Ibidem*, paras 39-40.

However, within the EU there may be alternative ways to prevent impunity for crimes by EU citizens which would at the same time be less dramatic than extradition to third States. The Framework Decision 2002/584/JHA on the European Arrest Warrant and other instruments adopted to facilitate judicial cooperation address the extradition of persons within the EU and can be used to extradite an Estonian national from Latvia to his home State for prosecution there. According to the Court of Justice, this would allow the host Member State to act in “a manner which is less prejudicial to the exercise of the right to freedom of movement while avoiding, as far as possible, the risk that the offence prosecuted will remain unpunished”.<sup>21</sup>

Effective prevention of impunity in such cases will, however, only be possible if certain conditions are met. In *Aleksei Petruhhin*, the Court of Justice gave some thought to the possible hindrances which such a solution may face, and arrived at rather specific criteria for the host Member State which considers a request for extradition from a third State.

Firstly, the Member State of the suspect’s nationality must send a request to the host Member State requesting surrender of its citizen for prosecution. In light of the principle of sincere cooperation laid down in Art. 4, para. 3, TEU, Member States are required to assist each other in carrying out tasks which flow from the Treaties, including the situation in the case of *Petruhhin*. Member States should, therefore, not act in a manner which would complicate such a cooperative effort to combat impunity.

Secondly, the Member State of nationality must actually have jurisdiction under the national law to prosecute the offence in question committed outside its territory. The impunity will not be avoided if the offender is extradited to its own State of nationality and this State does not have an appropriate basis for the exercise of jurisdiction under its national law. It is also not likely that the State of nationality would itself extradite its own citizen to a requesting third State, because of the commonly existing provisions precluding extradition of own citizens.

If these requirements are met, and prosecution is possible in the Member State of nationality, extradition of the EU citizen to a third State will not meet the proportionality requirement, because the prosecution by the Member State of nationality will be equally effective to prevent impunity, and far less restrictive of the freedom of movement of EU citizens.

The Court of Justice has thus arrived at a quite concrete answer to the question on compatibility of extradition of EU citizens to third States with EU law, setting out the steps to be undertaken by Member States before extradition of an EU citizen to a third State on a basis of a bilateral agreement will be viewed as compatible with Arts 18 and 21 TFEU.<sup>22</sup> It is, however, uncertain how such an approach will function in practice, as further questions arise. The crucial question pertaining to the prevention of the impunity is

<sup>21</sup> *Ibidem*, paras 47-49. See also para 43.

<sup>22</sup> *Ibidem*, para. 50.



whether the State of nationality will actually perform the criminal proceedings in a satisfactory way: difficulties may arise due to a possible lack of evidence, especially if there is no cooperation with the third State in question on that matter. Furthermore, it is not possible to bind the State of nationality to any specific conclusion of the criminal proceedings in a particular case, and the case may be closed for various reasons before it comes before the court of that State.

Lastly, it is unclear whether the surrender of the offender to his or her State of nationality will be possible in practice. Petruhhin was released from his detention while the request for preliminary ruling was pending before the Court of Justice. In another case (with the circumstances close to the *Aleksei Petruhhin* case), the Court of Justice was expressly asked to determine whether or not an EU citizen could be held in custody for extradition, where application has been made by a non-Member State.<sup>23</sup>

#### IV. PROTECTION OF EU CITIZENS AGAINST EXTRADITION TO A THIRD STATE UNDER THE CHARTER

With its third question addressed to Court of Justice, the Latvian Supreme Court wanted to determine whether the Charter imposed an additional constraint on the extradition of an EU citizen to a third State, in circumstances where such extradition was justified under the criteria discussed above. Specifically, it was necessary to clarify whether the requested Member State had an obligation to verify that the national of another Member State to be extradited to the third State would, in the case of such extradition, be prejudiced in respect of his rights under Art. 19 of the Charter – and which criteria had to be taken into account for such a verification?

The Charter is binding on EU institutions and Member States, and consequently on national courts when they apply EU law.<sup>24</sup> Art. 19 of the Charter prohibits extradition to a State where there is a serious risk that a suspect would be subjected to the death penalty, torture or other inhumane or degrading treatment or punishment.<sup>25</sup> Art. 4 of the Charter contains a prohibition on torture and degrading treatment and punishment. The Court of Justice reiterated that the prohibition on such treatment is absolute and protects basic values, such as human dignity.

Earlier decisions by Court confirm that extradition to a State where the offender will be subject to treatment prohibited under Art. 4 of the Charter is not permissible.<sup>26</sup> The

<sup>23</sup> Court of Justice, application lodged on 7 September 2015, case C-473/15, *Peter Schotthöfer & Florian Steiner GbR* (case pending).

<sup>24</sup> See, e.g., Court of Justice, judgment of 5 April 2016, case C-404/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], para. 84 (addressing extradition under European Arrest Warrant).

<sup>25</sup> As the situation in the present case is under the TFEU, it is “of EU law” for the purposes of Art. 51, para. 1, of the Charter.

<sup>26</sup> See, e.g., *Pál Aranyosi and Robert Căldăraru* [GC], cit.

same applies to treatment prohibited under Art. 19 of the Charter. A corresponding prohibition is also envisaged under international human rights instruments, including the European Court of Human Rights.

In the *Aleksei Petruhhin* judgment, the Court of Justice confirmed that the verification of compliance with these rights in individual cases must indeed be made by the authorities of the extraditing Member State, taking into account the specific situation in the relevant third State requesting the extradition. The Court stated that:

“existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are *not in themselves sufficient* to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are *manifestly contrary* to the principles of the ECHR”.<sup>27</sup>

The Court of Justice thus clarifies that the obligations of the host Member State go far beyond checking formal compliance with fundamental human rights in the requesting State, where there exists evidence of “a real risk” of inhuman or degrading treatment of individuals in the requesting State. The Member State “is bound to assess the existence of that risk when it is called upon to decide on the extradition of a person to that State”.<sup>28</sup> The information must be objective, reliable, specific and properly updated.<sup>29</sup>

The ruling provides instructions on what sources can be used by the requesting Member State to determine whether extradition of a person to a third State is permissible under EU law. The information may be obtained from judgments of international courts, such as the European Court of Human Rights, national courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the *aegis* of the United Nations.<sup>30</sup> The Court of Justice did not, however, expressly refer to such sources of information as international non-governmental associations for human rights (e.g. Amnesty International), government sources or assurances given by the third State as suggested by the AG.<sup>31</sup>

The Court of Justice confirmed that the methodology defined previously in *Pál Aranyosi and Robert Căldărăru* can be transposed into the case involving extradition to a third State. This means that the fact that risk is identified by virtue of general conditions in the State, is not in itself sufficient to refuse extradition.<sup>32</sup> In *Pál Aranyosi and Robert Căldărăru*, the Court of Justice specified that

<sup>27</sup> See *Aleksei Petruhhin* [GC], cit., para. 57 [author’s emphasis], citing European Court of Human Rights, judgment of 28 February 2008, no. 37201/06, *Saadi v. Italy*, para 147.

<sup>28</sup> See, to that effect, as regards Art. 4 of the Charter, *Pál Aranyosi and Robert Căldărăru* [GC], cit.

<sup>29</sup> *Aleksei Petruhhin* [GC], cit., para. 82.

<sup>30</sup> Cf. *Pál Aranyosi and Robert Căldărăru* [GC], cit., para. 89.

<sup>31</sup> Opinion of AG Bot, *Aleksei Petruhhin*, cit., paras 79-80.

<sup>32</sup> *Pál Aranyosi and Robert Căldărăru* [GC], cit., para 91.

“[w]henever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State”.<sup>33</sup>

In the above case, the authorities of the requested Member State had to examine in detail the conditions in which the offender would be held in the requesting Member State, in particular, by obtaining necessary information from the latter State. The case of *Aleksei Petruhhin* is, however, essentially different from *Pál Aranyosi and Robert Căldăraru* because the requesting State is a third State, which means that effective EU cooperation mechanisms are not available for use by the requested Member State.<sup>34</sup>

In the *Aleksei Petruhhin* case, the Court of Justice appears to confirm that, in addition to a general assessment based on relevant knowledge, the requested Member State must assess whether there is a real risk of degrading treatment in the individual circumstances of the case.<sup>35</sup> The Court does not state expressly that in such a case it is not permitted to extradite the offender to the third State; however, this conclusion can be deduced from the general discussion of this question. In any case, no specific obligations were mentioned by the Court of Justice as to the cooperation with the authorities of the third State with a view to ensuring that conditions of detention after the extradition are compatible with human rights.

## V. CONCLUSIONS

The ruling in *Aleksei Petruhhin* case is interesting for several reasons. Firstly, it confirms that EU law may still apply to issues falling within the competence of the Member State, such as a bilateral extradition agreement between a Member State and a third State. The Court of Justice does not question the competence of Member States to enter into agreements unless the EU has exercised its competence, but merely requires that this competence is exercised in line with EU law, in cases falling within the EU law domain. This was the case in *Aleksei Petruhhin*, since the freedom of movement of EU citizens could be affected by the discriminatory national rules which only protected the nationals of Latvia against extradition to third States. The outcome of the case is not surprising, since it could be anticipated that the Court of Justice would not ignore the implications of extradition to a third State for an EU citizen's fundamental rights.

Secondly, the Court of Justice accepts that the host Member State may not need to extend its national provisions protecting its own citizens from extradition to another

<sup>33</sup> *Ibidem*, para. 92.

<sup>34</sup> It is outside the scope of this paper to examine what possibilities for cooperation are available in the bilateral agreement between Latvia and Russia, but it is in any case likely that Latvian authorities would not be able to effectively inspect whether Petruhhin's conditions after extradition will be compatible with the relevant Charter provisions.

<sup>35</sup> See, e.g., *Aleksei Petruhhin* [GC], cit., paras 78 and 80.

Member State, if this is necessary to promote the legitimate objective of prevention of impunity. However, this ruling also seeks less restrictive ways to achieve this objective and highlights how impunity in such cases may be combatted by making use of cooperation mechanisms available in EU, such as the European Arrest Warrant, which enables extradition to the home Member State and thereby avoids unduly compromising citizens' right to free movement within the EU.

A case pending at the moment in the Court of Justice addresses, among other things, the question of whether the host (extraditing) Member State may keep the EU citizen in detention while anticipating an action to be taken by the State of nationality.<sup>36</sup> In *Aleksei Petruhhin*, his release from detention by the Latvian Supreme Court may have provided the Latvian authorities with an explanation as to why extradition would not be carried out, but the release has clearly compromised the objective of preventing impunity with respect to this particular individual. Nonetheless, prolonged detention, while awaiting a request from the State of nationality, may have disproportionately limited his right to liberty.

The case also shows that the harmonization of criminal laws of EU Member States is essential to address cases such as *Petruhhin's*, where serious offences committed by EU citizens outside of the EU may remain unpunished due to the lack of adequate national provisions on criminal jurisdiction. As a minimum, the national laws of Member States ought to envisage criminal liability for serious crimes committed by their nationals abroad, extending the territorial scope of their national laws to such crimes. In addition, certain limitations on extraterritorial criminal jurisdiction may also follow from international law and it is possible that impunity will persist in some cases, despite harmonization efforts within the EU.

Thirdly, the Court of Justice confirms its findings in the previous case law that the host Member State must ensure that the rights of an EU citizen laid down in the Charter are effectively, and not only formally, protected in case of extradition. The ruling concerns, however, only manifest violations of the rights which enjoy absolute protection under the Charter, such as human dignity and the prohibition of torture and degrading treatment. The threshold for rejecting an extradition request is, in the author's view, set very high by the Court and not all of the rights envisaged under the Charter may be relevant for the assessment of extradition cases.

The practical importance of the ruling in *Aleksei Petruhhin* cannot be underestimated, since extraditions to most third States are governed by agreements concluded between Member States and the third States. As national laws commonly lay down provisions, restricting the extradition of their own citizens to third States, it may affect a significant number of extraditions from the EU, especially to third States with a poor record on human rights enforcement.

The answers given by the Court of Justice may also significantly influence the way the agreement on judicial cooperation between Russia and Latvia will function in the future.

<sup>36</sup> See *Peter Schotthöfer & Florian Steiner GbR*(case pending), cit.

Since the agreement in question covers a wide range of areas of cooperation, it is important to ensure that it continues to function effectively with respect to these areas. The situation post-*Aleksei Petruhhin* will generally remain unchanged with respect to the extradition of non-EU citizens to Russia, as well as the extradition of Latvian citizens (the latter having always been excluded from extradition under this agreement). However, extradition of EU citizens to Russia under this agreement will from now on be subject to the analysis laid down in *Aleksei Petruhhin*.

On a rather speculative note, one could ask if the rights of EU citizens' family members may also come under the protection of EU law, if such extradition will affect EU citizens' rights to free movement and rights under the Charter. It would not be surprising if such a question were to be submitted to the Court of Justice in the near future, raising even more far-reaching consequences for the functioning of bilateral extradition agreements with third States.

It is not likely that Russia will accept the restraints imposed by EU law on extraditions to Russia of EU citizens. It is beyond the scope of this *Insight* to analyse the international law perspective of this ruling, but it can be pointed out that a such narrowing of the scope of the Russia-Latvia treaty may not have been considered at the time it was concluded (in 1993), and arguments for refusal to extradite persons based on EU law may not be easily accepted by the other State party to this agreement.<sup>37</sup>

The judgment raises further legal issues, some of which the Court of Justice will have the chance to answer in the near future. By bringing the extradition of Petruhhin under the scope of EU law, the Court of Justice ensures that EU citizens' rights under the Treaties are not compromised, even though the EU has not yet taken action to conclude its own agreement with the third State. Would the outcome be different if the extradition of an EU citizen were governed by a bilateral agreement between the EU and a third State?<sup>38</sup>

It is unclear, in particular, whether assessment of the extradition in light of the Charter would be approached differently by the Court of Justice if an agreement existed between the EU and the relevant third State. As the Court pointed out in *Aleksei Petruhhin*, in its external relations ("with the wider world"), the EU "is to uphold and promote its values and interests and contribute to the protection of its citizens, in accordance with Art. 3, para. 5, TEU".

It can be assumed, therefore, that the EU would not enter into extradition agreements with third States which have a poor human rights enforcement record. The ruling in *Aleksei Petruhhin* may, albeit topically but still hypothetically, show that the existence of an EU extradition agreement could, in itself, suffice as evidence of a perception that

<sup>37</sup> Art. 62 of the Agreement between Latvia and Russia contains a list of grounds to refuse extradition which does not support refusal in the circumstances of Petruhhin's case.

<sup>38</sup> A question concerning such a situation is asked in a pending case *Romano Pisciotto v. Germany*, cit., involves a situation where there is an agreement between EU and US on extradition.

no general and manifest violations of fundamental human rights take place in the third State party to such an agreement.

Still, national courts and competent authorities would not be able to discount the Charter if the circumstances of an individual case raised concerns as to the situation of the offender following his extradition to the third State. Even an EU-made extradition agreement will not allow extradition without the national courts reviewing compliance with the Charter by the third State which is party to the agreement. The opposite understanding would be contrary to the wording and the spirit of the Charter.

Irrespective of whether extradition of an EU citizen is governed by an EU agreement or a bilateral agreement with the third State, there should be a dialogue between the authorities of the States involved, in order to clarify the situation of the person following the extradition. By contrast to Court's ruling in the case involving extradition between Member States, the Court of Justice in *Aleksei Petruhhin* does not expressly instruct the national authorities of Latvia to take active steps in order to clarify the individual prospects for the offender in the third State to which he will be extradited for prosecution.

Apparently, the possibilities for such an examination will depend on the provisions of the extradition agreement in question, which may vary from case to case.<sup>39</sup> Generally, the human rights of the accused have not been the main theme of the extradition agreements, but are sometimes acknowledged as a general value in the introductory provisions of such instruments. The ruling in *Aleksei Petruhhin* should be taken into account by the EU when concluding extradition agreements with the third States in the future.

<sup>39</sup> The Agreement between Latvia and Russia does not contain provisions that would enable authorities of both State parties to engage in comprehensive cooperation on this issue.