

Presentation of Professor Ján Mazák at the conference “Ensuring cross-border justice for all in the EU: sharing practices and experiences from the ground” in Bratislava, 9 November 2016

First of all I would like to thank you for inviting me to speak in this panel in the presence of my learned colleagues and before such a distinguished audience.

The topic of this panel discussion is, politically and legally, a hot potato including the principle of mutual trust that is, as the Court of Justice has recently concluded, of a constitutional importance. I would like to say a couple of words about the difficulties linked with the understanding of the concept of mutual trust, mainly where it concerns the Area of Freedom, Security and Justice (AFSJ).

How to start?

Try to imagine, please, that I am a promising young judge at a district court in one of the Member States of the EU. Sitting at my desk, I have a case in front of me in which a citizen of a third country claims that transferring him from my own Member State to another Member State, which is the first country of his entry within the Dublin system, would violate his EU fundamental rights. The claimant asserts that he might face a real risk of inhuman or degrading treatment in that country.

Undoubtedly, before deciding this case, I should clarify the question of how to interpret and apply the notion of mutual trust. And what does it actually mean?

The principle of ‘mutual trust’ is not defined in the Treaties, so the only way how to become familiar with this term is by reading the case law. Being aware that in the case at hand I have to apply the Charter of Fundamental Rights, I turn initially my attention to the case law of the Court of Justice.

I found out quite easily that the notion of mutual trust has been defined in the famous Opinion 2/13.

This Opinion contains a definition of the principle based predominantly on the judgements of *NS and Melloni*. Allow me to cite it literally:

That principle [principle of mutual trust] requires, particularly with regard to the [AFSJ], each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.

I was aware that it is hard to speculate about the definition of the Court of Justice but with due respect to the case law, it seems to disregard the inherently subjective nature of trust and the difficulties in providing an objective definition that would meet the requirements of legal certainty.

In light of that definition of the principle of mutual trust I was convinced that the Member States, when implementing EU law, are required to **presume** that fundamental rights have been observed by the other Member States.

That presumption imposes two negative obligations on the Member States.

First, they may ‘not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law’.

Second, 'save in exceptional cases', Member States are prevented from 'check[ing] whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.

By reading the *N.S.* judgment, I understood what exceptional cases means. In this case the Court of Justice states clearly: the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that **systemic deficiencies** in the asylum procedure and in the **reception conditions** of asylum seekers in that Member State amount to **substantial grounds** for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

The Court of Justice underlines in the *N.S.* case also that it cannot be concluded that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003. These conclusions of the Court of Justice have been reiterated in the case of **Abdullahi**.

I wish I could have stopped my inquiry in the case law there, but, in fact, I could not. According to Article 52(3) of the Charter I had to search for some case law from the ECtHR. And I have succeeded but at the same time I was surprised.

In one of the latest judgment, *TARAKHEL v. SWITZERLAND*, the ECtHR rejected entirely 'systemic deficiencies' as necessary to rebut the presumption of safety in the country of first entry.

It repeats its 'well-established case-law', citing a line of authority from **Soering to MSS**, emphasising its consistency and continuity with phrases such as 'on numerous occasions' concerning the threshold for Article 3 cases. There is no mention of the 'systemic breaches' approach as part of the legal principles, supporting the analysis that it has no role as an additional test or threshold in these cases.

It sets aside the problematic *NS* judgment in full, and then it asserts that the '*source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal*'. It then proceeds to assert the ECHR approach, stating that the presumption of safety 'can therefore validly be rebutted' in the normal ECHR test of 'substantial grounds' and 'real risk'.

I was really perplexed. How to proceed? In compliance with the case law of the Court of Justice or with *Tarakhel* judgment? Or could I leave both sources aside and apply the Constitution of my country?

On top of that I have been informed by my colleague that this conundrum might be further complicated by the latest judgment of the Court of Justice in cases **Aranyosi and Caldaru** dealing with the Framework Decision on the European Arrest Warrant (FDEAW).

After reading this judgment I had to agree with that conclusion. The **Aranyosi** judgment set out a **new limit to the mutual trust presumption in the AFSJ**. Put differently, the Court says openly that mutual trust in the FDEAW **is not unconditional**.

The Court, in essence, allows the executing judicial authority to assess fundamental rights protection practices in the issuing Member States and, under very strict circumstances, defer surrender of the requested person. This approach allows the executing judicial authority to question the fundamental rights record of the issuing Member State.

It is something that is clearly at odds with mutual trust which builds on the perceived presumption that other Member States provide effective and equivalent fundamental rights protection.

What is clear is that the judgment reveals the intention of the Court of Justice to bring its case law on Article 4 of the Charter in line with the ECtHR's case law on Article 3 ECHR.

The two-stage test that the CJEU adopted in *Aranyosi and Căldăraru*, which required the executing judicial authority to assess both **the general circumstances** of detention and **the situation of the person to be surrendered**, is the same test adopted by the ECtHR in its case law on the interpretation of Article 3 ECHR.

But I am still assailed by doubts. Could the *Tarakhel* judgment and the *Aranyosi* judgment influence the Court of Justice to also opt for the two-staged test, with both a general and an individual assessment, in its asylum case law or not?

There will be even more of similar, yet open, questions.

As you can see, the cases in which a national judge must decide in the context of the AFSJ on the basis of mutual trust doctrine cannot be ruled easily mainly due to lasting clashes between the different standards stemming from national case law (here I can cite the decision of the German Constitutional Court adopted on 15 December 2015 in relation to EAW and with the emphasis of protection of constitutional identity) and the case law of Court of Justice and ECtHR.

Taking into account all these disparities and diverging case law we should, at the end of the day, solve the only problem: How to advise that young promising judge or what kind of a recommendation would help him decide the case at hand? I am nearly sure he should submit a couple of preliminary ruling questions to the Court of Justice, asking about how to reconcile achievements connected with the AFSJ and the values associated with the protection of fundamental rights.

A tough nut to crack.

Ján Mazák