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The Transfer of Sentenced Persons Between European Countries and the Protection of the Right to Family Life: A Comment on *Serçe v Romania* (Application no. 35049/08) (30 June 2015)

Abstract

One of the ways through which European countries cooperate in criminal matters is the transfer of sentenced persons from one country to serve their sentences in their countries of nationality. These transfers are governed by two instruments: 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; and the Convention on the Transfer of Sentenced Persons. In *Serçe v Romania* (Application no. 35049/08) the European Court of Human Rights, the Court, dealt with the issue of whether Romania's refusal to transfer the applicant, a Turkish national who was serving a prison sentence for murder, to serve his sentence in Turkey violated his right to family life. The Court held that Romania's refusal to transfer the applicant did not violate his right to family life as neither the treaty between Romania and Turkey nor Romanian national law provided for the right to be transferred. The author argues, inter alia, that European countries should take seriously the right to family life in prisoner transfer issues.

Keywords: transfer; sentenced persons; Europe; European Court; right; family life; prisoner

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1. Introduction

One of the ways through which European countries cooperate in criminal matters is the transfer of sentenced persons from one country (the sentencing country) to serve their sentences in their countries of nationality (the enforcement country). These transfers are governed by two instruments: 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;¹ and the Convention on the Transfer of Sentenced Persons.² In addition to those two instruments, some European countries have also signed or are reported to be in the process of signing bilateral prisoner transfer agreements. This is the case, for example, between the United Kingdom and Albania,³ Turkey and Romania,⁴ Italy and Albania,⁵ and Russia and Ukraine.⁶ The transfer of offenders between European countries has always raised human rights issues including the right to family life, the right to freedom from inhuman or degrading treatment or punishment and the right to liberty.⁷ Recently, in July 2016, the Supreme Court of the Republic of Ireland grappled with the issue of whether the continued imprisonment of the offenders who were transferred from the United Kingdom to serve their sentences in Ireland was unlawful.⁸ In *Serçe v Romania*⁹, which was decided on 30 June 2015 but became final on 30

- 1 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 OJ L 327, 5.12.2008, p. 27–46. Some countries have started the transfer of offenders on the basis of this framework decision. This has been the case, for example, between the United Kingdom and Germany, see *Kandola & Ors v Generalstaatsanwaltschaft Frankfurt, Germany & Ors* [2015] EWHC 619 (Admin) (13 March 2015) paras 91 – 93; Bulgaria and Denmark, *Ognyanov (Judgment)* [2016] EUECJ C-614/14 (05 July 2016) paras 9 – 10. This Framework Decision is an instrument of ‘secondary law.’ See Case C-129/14 PPU, *Zoran Spasic*, (View of Advocate General Jääskinen, delivered on 2 May 2014), para 51.
- 2 Convention on the Transfer of Sentenced Persons, ETS No.112.
- 3 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Albania on the Transfer of Sentenced Persons, Country Series No.1/2013: Cm8559 (15-Jan-2013). Available at <http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=14628>
- 4 As discussed in this article.
- 5 *Groni v Albania* (Application no. 25336/04) 7 July 2009 para 22, where it is reported that “[o]n 23 April 2002 the Governments of Italy and Albania signed an agreement for the transfer of sentenced persons, which was ratified by the respective parliaments in 2003 and 2004.”
- 6 See, ‘Russia, Ukraine ombudspersons agree on transfer of prisoners’ 21 June 2016. Available at <http://tass.ru/en/world/883777> (accessed 19 July 2016).
- 7 See generally Jamil Ddamulira Mujuzi, ‘Legal pluralism and the convention on the transfer of sentenced persons in practice: highlighting the jurisprudence of the European Court of Human Rights on the transfer of sentenced persons within and to Europe.’ *Journal* (2015) 47(2) *The Journal of Legal Pluralism and Unofficial Law* 324-346.
- 8 *O’Farrell and Others v The Governor of Portlaoise Prison* [2016] IESC 37 (judgement of 12 July 2016).
- 9 *Serçe v Romania* (Application no. 35049/08) 30 June 2015.

September 2015, the European Court of Human Rights dealt with the question of whether the refusal by the Romanian authorities to transfer the applicant to Turkey to serve his sentence there violated his right to family life. We shall consider the facts of the case first.

2. *The facts of the case, the parties' arguments and the Court's holding*

2. 1. The facts of the case and the arguments

In *Serce v Romania*,¹⁰ the applicant was a Turkish national who lived in Romania. His wife and four children lived in Turkey.¹¹ The Romanian court convicted him of 'aggravated murder and sentenced him to eighteen years' imprisonment.¹² The Court also ordered 'that the applicant would be deported to Turkey at the end of his prison term.'¹³ The applicant argued before the European Court of Human Rights that he had been imprisoned at two different facilities and that, at both of them, the conditions of imprisonment were inhuman. In particular, he 'described a severe lack of hygiene in both prisons, with insufficient cleaning and personal hygiene products being provided by the prison authorities. He alleged that he could not sleep at night because of bed bugs. He also complained that the food was not adapted to his diabetes.'¹⁴ He also 'alleged that throughout his detention in both prisons he had not been included in any educational activities and had not been allowed to do any work' which meant that he 'had thus been unable to integrate, to be re-educated or to have the term of his prison sentence reduced.'¹⁵ In 2008 he was 'diagnosed with type II diabetes and a sleep disorder.'¹⁶

On its part, the government submitted that the prisons in which the applicant was detained were not overcrowded; there was cold and warm water and the prisons were fumigated to kill the bugs. The government also argued that the applicant's diet was changed to accommodate his diabetic condition.¹⁷ The government submitted further that '[t]he applicant participated in educational and recreational activities whenever necessary' and that 'the applicant's reduced participation in the above-mentioned activities was due to his state of health.'¹⁸ On the issue of rehabilitation, the government added that the applicant had participated in the following programmes: he 'had watched a folk music concert...he had taken part in a discussion on religious themes

10 *Serce v Romania* (Application no. 35049/08) 30 June 2015.

11 *Serce v Romania*, para 5.

12 *Serce v Romania*, para 6.

13 *Serce v Romania*, para 6.

14 *Serce v Romania*, para 7.

15 *Serce v Romania*, para 8.

16 *Serce v Romania*, para 9.

17 *Serce v Romania*, paras 10 – 11; and 14 – 16.

18 *Serce v Romania*, para 12.

conducted by the orthodox priest...and...had taken part in a quiz on Romanian history.¹⁹

Because of the fact that both Turkey and Romania ratified the Convention on the Transfer of Sentenced Persons²⁰ and had also signed a bilateral prisoner transfer convention, in 2007 the applicant made an application to the Romanian authorities requesting to be transferred to serve the remainder of his sentence in Turkey. In his transfer request, he stated that he wanted the transfer ‘in order to be closer to his family, who lived in a Turkish village in humble conditions and did not have the means to travel to Romania.’²¹ The Romanian Ministry of Justice started the process relating to the applicant’s transfer and as a result, a Turkish court ‘acknowledged the judgment of the Romanian court which had convicted the applicant and decided that the rest of the applicant’s sentence should be served in Turkey.’²² In terms of Romanian law, the applicant’s transfer request had to be approved by a Romanian court. In his submissions before the Romanian court, the applicant ‘claimed... that such a transfer would be in accordance with the convention signed between Romania and Turkey and would allow him to see his children and to receive visits from his family, who would provide him with adequate food and treatment for his diabetes.’²³ However, the Romanian court refused to approve the applicant’s transfer request ‘on the ground that Turkey had less severe legal provisions on conditional release, which might lead to the applicant’s release in a shorter period of time. The punitive and educational purpose of his sentence would thus fail to be achieved.’²⁴ The applicant’s appeal against the court’s decision was dismissed.²⁵

2. 2. The European Court of Human Rights’ decision

The Court had to determine two issues: one related to the applicant’s right not to be subjected to inhuman treatment and the other, on the right to family life. The Court relied on reports by the non-governmental organisations which had visited the prisons at which the applicant had been detained. These reports indicated, inter alia, that the first prison ‘was overcrowded and that no activities of any type were proposed to prisoners’ and that the second prison was also overcrowded and there was ‘a lack of hygiene in the shower areas and the food-preparation area, and the fact that the spaces provided for various sportive or cultural activities were left unused.’²⁶ The Court also

19 Serce v Romania, para 17.

20 Romania on 1 December 1996 and Turkey on 1 January 1988. See Chart of signatures and ratifications of Treaty 112, Convention on the Transfer of Sentenced Persons, Status as of 19/07/2016. Available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/112/signatures?p_auth=oTEDHZOW

21 Serce v Romania, para 18.

22 Serce v Romania, para 19.

23 Serce v Romania, para 20.

24 Serce v Romania, para 21.

25 Serce v Romania, para 22.

26 Serce v Romania, para 25.

observed that the Romanian High Court ordered the government to award prisoners damages to compensate them for ‘breaches of their right to correspondence and medical assistance, and for a specific incident of failure to provide hot water for a period of three months.’²⁷ The Court referred to the relevant Article of the agreement between Turkey and Romania on the transfer of sentenced persons²⁸, the Romanian law on the transfer of offenders,²⁹ and Article 3 of the European Convention on Human Rights which provides that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

On the issue of the admissibility of the complaint, the government argued that the applicant had not exhausted domestic remedies and the complaint should be dismissed. The Court held that the complaint was admissible because the law and practice in Romania did not afford ‘the applicant immediate and effective redress for the purposes of his complaint.’³⁰ It is against that background that the Court ‘reject[ed] the Government’s plea of non-exhaustion of domestic remedies in respect of the applicant’s complaint concerning the physical conditions of his detention, in particular the lack of hygiene and the absence of activities and work in...prisons.’³¹ The Court also found that the application was not ill-founded.³²

On the issue of the applicant’s conditions of detention, the Court referred to its earlier jurisprudence on Article 3 of the European Convention on Human Rights and observed that:

Under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of execution of the measure of detention do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured... When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific alle-

27 *Serçe v Romania*, para 28.

28 It referred to article 6 which states that “‘The transfer of a convicted person shall be refused: a) if one of the two states considers that the transfer may breach its sovereignty, security, public order, fundamental principles of the rule of law or other fundamental interests; b) if the competent authorities from the administering state have issued a final judgment against the same convicted person, for the same acts; c) if the judgment against the convicted person cannot be enforced in the administering state due to prescription or any other cause which, according to the legislation of the said state, prevents the enforcement of the sentence; d) if the person was sentenced for a crime of a strictly military nature.”

29 Article 140 of the Romanian Law no. 302/2004 on international judicial cooperation on criminal matters provided that “‘A request for the transfer of a convicted person may be refused, mainly, for the following reasons:...c) if there are sufficient reasons to believe that, once transferred, the convicted person may be set free immediately or after much too short a term compared with the rest of the sentence to be served in accordance with the Romanian law...” See *Serçe v Romania*, para 30.

30 *Serçe v Romania*, para 35.

31 *Serçe v Romania*, para 36.

32 *Serçe v Romania*, para 37.

gations made by the applicant... The Court notes that, in addition to overcrowding, other aspects of the physical conditions of detention are relevant for its assessment of compliance with Article 3... The Court has found that the following conditions of detention raise an issue under Article 3 of the Convention: lack of appropriate furniture in the cells; poor sanitary facilities, such as a limited number of toilets and sinks for a large number of detainees; sinks in cells providing only cold water for a wide range of needs (personal hygiene, washing clothing and personal objects, cleaning the toilets); limited access to hot showers; poor sanitary conditions in general, including the presence of cockroaches, rats, lice and bedbugs...³³

The Court referred to the conditions in which the applicant had been detained (as outlined above in the arguments)³⁴ and observed that ‘the applicant... was subjected to unsatisfactory sanitary conditions.’³⁵ The Court observed further that ‘the applicant’s state of health made him vulnerable and that his detention in unhygienic conditions must have been aggravated by the lack of activities or work as well as the overcrowding.’³⁶ In holding that the government had violated Article 3 of the Convention, the Court concluded that ‘the cumulative conditions of the applicant’s detention caused him distress that exceeded the unavoidable level of suffering inherent in detention and that attained the threshold of severity under Article 3.’³⁷

On the issue of the right to family life, the Court observed that the applicant argued ‘his right to private and family life [had been violated] because he had been unable to maintain contact with his wife and four children owing to the Romanian authorities’ refusal to allow his transfer to serve the rest of his sentence in a Turkish prison.’³⁸ The Court stated that this issue had to be determined on the basis of Article 8 of the European Convention on Human Rights which provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

33 Serce v Romania, paras 41 – 43.

34 Serce v Romania, paras 44 – 45.

35 Serce v Romania, para 46.

36 Serce v Romania, para 47.

37 Serce v Romania, para 48. The Court of Justice of the European Union has also held that “it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected.” See In Joined Cases C-404/15 and C-659/15 PPU, Judgment of the Court (Grand Chamber) 5 April 2016 para 90.

38 Serce v Romania, para 50.

The government submitted that the Court's earlier jurisprudence shows 'that the Convention did not grant prisoners the right to choose their place of detention and that separation and distance from their family were an inevitable consequence of their detention.'³⁹ The government added that:

*[T]he aim of the Transfer Convention concluded between Romania and Turkey was not to enable sentenced persons to return to their country of origin and free themselves of the unfavourable consequences of serving the sentence imposed by the sentencing State. The sentencing State was not obliged to agree to the transfer.*⁴⁰

The Court noted that:

[T]here is no evidence that Romanian law confers on the applicant any right to be transferred to Turkey and the applicant did not refer to any relevant legal provisions which would indicate the existence of such a right. Nor is there any domestic court transfer order in his favour. Accordingly, it cannot be maintained that he has any substantive right under Romanian law to be transferred to his country of origin.

The Court also noted that:

*[W]hereas provisions of international agreements may create individual rights protected by the Convention, either where the provision is directly applicable...or where the requisite domestic legislation applying it has been enacted..., the provisions of the convention between Romania and Turkey confine themselves to providing an inter-State procedural framework for the transfer of sentenced persons and do not generate any individual substantive rights per se. In any event, those types of international instruments do not contain an obligation on the signatory States to comply with a request for transfer...Even though the convention contained grounds for refusing a transfer, it did not bind the Romanian authorities to find in favour of the applicant's transfer requests.*⁴¹

The Court, in rejecting the applicant's submission on the right to family life, concluded that:

*[I]t must be recalled that, as regards the refusal to authorise the applicant's transfer to Turkey, the Convention does not grant prisoners the right to choose their place of detention and that separation and distance from their family are an inevitable consequence of their detention following the exercise by the Romanian State of its prerogatives in the area of criminal sanctions.*⁴²

39 *Serce v Romania*, para 51.

40 *Serce v Romania*, para 51.

41 *Serce v Romania*, para 55.

42 *Serce v Romania*, para 55.

3. *Analysing the Court's judgement*

The Court's judgment raises some issues that are worth highlighting in the context of the transfer of offenders between European countries. The Court emphasises the fact that the applicant did not adduce any evidence to show that under Romanian law he had a right to be transferred to serve his sentence in Turkey or that there was a court order in favour of his transfer. This means that the Court would probably have found a violation of his right had there been a right to be transferred or had there been a court order permitting his transfer. Those two issues aside, in the author's opinion, the Court's reasoning could easily be understood as having created the impression that the applicant's submission was to the effect that he had a right to be transferred to serve his sentence in Turkey. The applicant never submitted that he had a right under Romanian law to be transferred to serve his sentence in his country of nationality. His submission was that the refusal by the Romanian authorities to transfer him to serve his sentence in Turkey violated his right to family life. A relevant, though hypothetical question, is whether the Court would have resolved the issue differently if both Romania and Turkey had been members of the European Union, and Council Framework Decision 2008/909/JHA of 27 November 2008 was applicable. In the author's opinion, even if the Court were dealing with Council Framework Decision 2008/909/JHA of 27 November 2008, it would have come to the same conclusion. This is because although Council Framework Decision 2008/909/JHA of 27 November 2008 emphasises the issues of rehabilitation and social reintegration in the context of prisoner transfer,⁴³ it does not provide for the offender's right to be transferred to and be rehabilitated in his country of nationality or origin. A subsequent Council of Europe instrument on foreign prisoners is also silent on the right of such prisoners to be transferred.⁴⁴ Related to the above is the fact that the Court confirmed its earlier jurisprudence that the right to family life cannot be invoked to compel a state to transfer an offender to serve his sentence in his country of nationality. Much as this right is important, it is not absolute. There may be a need for national jurisdictions to start recognising the right to family life in the transfer of offenders.⁴⁵

43 See preamble paras 8, 9, and 10. See also Articles 3(1); and 4(2), (4), and (6).

44 See for example, Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners (Adopted by the Committee of Ministers on 10 October 2012 at the 1152nd meeting of the Ministers' Deputies);

45 In *Butcher v Minister for Justice and Equality* [2012] IEHC 347, the applicant, a British citizen, was serving a sentence of imprisonment in the Republic of Ireland. He applied to be transferred to serve his sentence in the United Kingdom so as to be able to be visited by his family members. When his application was refused, he approached the High Court arguing, inter alia, that the refusal to transfer him violated his right to family life under Article 8 of the European Convention on Human Rights. The Irish High Court observed that: "In my view the developments in the jurisprudence of the Court of Human Rights in this area are sufficient to ground a finding that a request by a prisoner for transfer to his home country on the grounds of access to his family is capable of engaging Article 8 rights. The consequence of that is that a decision to refuse such a request is an interference with the right to a family life requiring to be justified according to the Convention criteria." para 40.

Another important issue relates to the rationale behind the transfer of offenders. The reason why the Romanian court refused to permit the offender to be transferred to serve his sentence in Turkey was because he would have served a shorter sentence after the transfer. This is not a far-fetched issue as there is evidence from some European countries to the effect that sometimes when an offender is transferred to serve his sentence in his country of nationality, he/she has ended up serving a shorter sentence than he/she would have served had he/she remained in the sentencing country.⁴⁶ Some countries such as the United Kingdom⁴⁷ and Germany have refused to transfer offenders to the Netherlands where there is evidence that after transfer the offender's sentence would be converted into a shorter sentence than he would have served had he served his sentence in the sentencing country.⁴⁸ There is in fact one case in which the offender was convicted of murder and transferred from one European country (Hungary) to serve his sentence in another European country (Azerbaijan) but on the day he arrived in Azerbaijan to serve his sentence, as the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights noted with dismay, 'he was welcomed as a national hero, granted an immediate pardon, long before the expiry of the minimum sentence set by the Hungarian court, a retroactive promotion as well as other rewards.'⁴⁹ The Committee noted that his pardon was 'a violation of the principles of good faith in international relations and of the rule of law.'⁵⁰

In the author's opinion, the solution lies in streamlining the laws regulating the manner in which the offender will serve his/her sentence after the transfer.⁵¹ In terms of the Convention on the Transfer of Sentenced Persons, countries have a choice between one of the two approaches: continued enforcement (article 10) or conversion of the sentence (article 11). According to the Explanatory Report to the Convention on the Transfer of Sentenced Persons,⁵² continued enforcement under article 10 means:

46 This has been the case, for example, with regards to the offender transferred from the United Kingdom to serve his sentence in the Republic of Ireland. See *Sweeney v The Governor of Loughan House Open Centre & Others* [2014] I.E.S.C. 42.

47 *The Queen on the Application of Henry Max Shaheen v The Secretary of State for Justice* [2008] EWHC 1195 (Admin).

48 *Buijen v Germany* (Application no. 27804/05) 1 April 2010, para 15 'On 20 February 2003 the Head of the Chief Public Prosecutors stated that he would only endorse a transfer under Article 10 of the Transfer Convention on condition that the Dutch authorities gave an assurance of continued enforcement and did not release him before two-thirds of the sentence had been served.' See also *Smith v Germany* (Application no. 27801/05) 1 April 2010.

49 See 'Committee condemns abusive use of Convention on transfer of sentenced persons by Azerbaijan in the Safarov case' 27 May 2014. Available at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5051&lang=2&cat=5>

50 *Ibid.*

51 The Supreme Court of Ireland also dealt with a similar question when it handed down a judgement on the transfer of offenders from the United Kingdom to serve their sentences in the Republic of Ireland. See *O'Farrell and Others v The Governor of Portlaoise Prison* [2016] IESC 37.

52 Explanatory Report to the Convention on the Transfer of Sentenced Persons, Strasbourg, 21.III.1983. Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/Display-DCTMContent?documentId=09000016800ca435>

49. Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer.

50. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention...[T]he procedure under Article 10.2 enables the administering State merely to adapt the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system.

The same report provides that for conversion in as follows:

51. Article 11 concerns the conversion of the sentence to be enforced, that is the judicial or administrative procedure by which a sanction prescribed by the law of the administering State is substituted for the sanction imposed in the sentencing State, a procedure which is commonly called "exequatur". The provision should be read in conjunction with Article 9.1. b. It is essential for the smooth and efficient functioning of the convention in cases where, with regard to the classification of penalties or the length of the custodial sentence applicable for similar offence, the penal system of the administering State differs from that of the sentencing State.

52. The article does not regulate the procedure to be followed. According to paragraph 1, the conversion of the sentence is governed by the law of the administering State.

European countries have adopted one of the two approaches or a combination of both approaches.⁵³ Thus some countries have adopted a continued-enforcement approach,

53 See Jamil Ddamulira Mujuzi "Prisoner Transfer to South Africa: Some of the Likely Challenges" (2013) 16 Potchefstroom Electronic Law Journal 151 – 185.

others a conversion approach, yet some are open to both continued enforcement and conversion. For example, at the time of ratifying the Convention on the Transfer of Sentenced Persons, Greece made the following declaration:

Greece declares that it excludes the application of the procedure provided in Article 9.1 b. [conversion]. By way of exception, if a sentenced person cannot be transferred to Greece according to the procedure provided in Article 9.1 a, [continued enforcement] the Greek Ministry of Justice is competent to decide whether the procedure provided in Article 9.1 b [conversion] will be followed.⁵⁴

What could be done in this case is for Turkey to amend its law to provide for both continued enforcement and conversion so that, depending on conditions imposed by the transferring country, the transferred offender's sentence is dealt with accordingly. In the case of continued enforcement, future transfer applications will not be blocked by European countries which do not permit transfers where the sentence would be converted. In case a transferring country permits conversion, a sentence would have to be converted.

The Romanian court did not concern itself with whether the offender was being rehabilitated in Romanian prisons or whether his transfer to Turkey would have increased his chances of being rehabilitated. One should recall that there was evidence that he was being detained in inhuman prison conditions and that he had no access to meaningful rehabilitation programmes. This suggests that the Romanian court did not have the interests of the offender in mind. All it had in mind were the interests of the state – he should be imprisoned for a longer time for the offence he committed. Some scholars have argued that these days the transfer of offenders between European countries is motivated by state interests as opposed to offender interests.⁵⁵ This brings us to another issue that emerges from the case – the issue of rehabilitation of offenders.

There are many cases from the European Court of Human Rights emphasising the fact that prisoners should have access to rehabilitation programmes (these cases are referred to below). There are also many Council of Europe instruments emphasising offender rehabilitation.⁵⁶ This is not unique to Europe; it is also the position in international human rights law.⁵⁷ The European Court of Human Rights held recently (April

54 Declaration contained in the instrument of ratification deposited on 17 December 1987 – Or. Fr., Reservations and Declarations for Treaty No.112 – Convention on the Transfer of Sentenced Persons. Available at <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/112/declarations>

55 Dirk van Zyl Smit and John R Spencer, 'The European Dimension to the Release of Sentenced Prisoners' in Nicola Padfield and others (eds), *Release from Prison: European Policy and Practice* (Routledge 2010) 43.

56 See generally *Vinter and Others v The United Kingdom* (Applications nos. 66069/09, 130/10 and 3896/10) 9 July 2013.

57 See Article 10(3) of the International Covenant on Civil and Political Rights (1966) provides that 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'

2016) in *Murray v The Netherlands*⁵⁸ that ‘[o]ne of the aims of rehabilitation is to prevent reoffending and thus to ensure the protection of society.’⁵⁹ In the case under discussion, the Romanian court made an order that the offender should be deported after serving his sentence. This meant that whether or not he had been rehabilitated while serving his sentence in Romania was not a concern for the Court. The problem is that, whereas after his deportation he would not pose a threat to the Romanian population, he would be a threat to the Turkish population as he risked re-offending. Related to the above is the issue of the relationship between early release or parole and rehabilitation. Parole almost always depends on the fact that the offender has been rehabilitated. This explains why the applicant argued that the fact that he did not participate in rehabilitation programmes meant that his sentence could not be reduced. There are numerous cases in which the European Court of Human Rights has held that the government has a duty to provide rehabilitation programmes to offenders in order to enhance their chances of being released on parole.⁶⁰ This is the case whether the offender is a citizen or a foreign national. One of the judges of the European Court of Human Rights has gone to the extent of holding that an offender who has been rehabilitated has a right to be released on parole. In *Öcalan v Turkey (No. 2)*,⁶¹ Judge Pinto De Albuquerque held that:

*In the light of Vinter, States must establish a mechanism to review the justification of continued imprisonment according to the penological needs of the prisoner sentenced to a “whole life order”. If a parole mechanism must be available to those convicted of the most heinous crimes, it must a fortiori be available to the other prisoners. In other words, the Convention guarantees a right to parole, including for those convicted of the most serious crimes. This means that prisoners have a vested and enforceable right to be paroled if and when the legal requisites of parole are present, not that all prisoners should necessarily be granted parole. Moreover, parole is not a release from the sentence, but a modification of the form of state interference with the sentenced person’s liberty, by way of supervision of his or her life at large. And this supervision may take a very stringent form, with strict conditions attached, according to the needs of each paroled person.*⁶²

In the light of the above judgement, an effort should be made by European countries imprisoning foreign nationals to ensure that they get access to rehabilitation pro-

58 *Murray v The Netherlands* (Application no. 10511/10) 26 April 2016.

59 *Murray v The Netherlands* (Application no. 10511/10) 26 April 2016 para 102.

60 *Oldham v The United Kingdom* (Application no. 36273/97) 26 September 2000; *Blackstock v The United Kingdom* (Application no. 59512/00) 21 June 2005; *Hussain v The United Kingdom* (Application no. 21928/93) 21 February 1996; *Von Bülow v The United Kingdom* (Application no. 75362/01) 7 October 2003.

61 *Öcalan v Turkey (No. 2)* (Applications nos. 24069/03, 197/04, 6201/06 and 10464/07), 18 March 2014.

62 *Öcalan v Turkey (No. 2)* para 11. For a detailed discussion of this case see, Jamil Ddamulira Mujuzi, ‘A Prisoner’s Right to Be Released or Placed on Parole: A Comment on *Öcalan v Turkey (No. 2)* (18 March 2014)’ (2016) 9(1) *Baltic Journal of Law & Politics* 69 – 92.

grammes and enhance their chances of being placed on parole sooner than later. In fact, Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners⁶³ requires member states of the Council of Europe imprisoning foreign nationals to ensure that these offenders have access to rehabilitation programmes to enhance their prospects of social reintegration.⁶⁴

4. Conclusion

In this article, the author has dealt with the case of *Serce v Romania*⁶⁵ in which the European Court of Human Rights held, inter alia, the right to family life is not violated when a state does not transfer a foreign national to serve his sentence in his country of nationality near his family members in case where such an offender does not have a right to be transferred. The author has argued that there is a need for Romania to consider the right to family life in prisoner transfer issues, to ensure that foreign prisoners also have access to rehabilitation programmes and for Turkey to amend its law on the transfer of offenders to provide for both continued enforcement and conversion as opposed to conversion only of sentences of the offenders transferred from Romania and other countries to serve their sentences in Turkey. Most of the recommendations made in this article are also applicable, with the necessary changes, to other European countries involved in the transfer of prisoners between themselves. A smooth prisoner transfer programme could also have a positive impact on the execution of the European Arrest Warrant.⁶⁶ It should be noted in passing that the Court of Justice of the European Union has called upon states to ensure that foreign prisoners are not discriminated against.⁶⁷

63 Adopted by the Committee of Ministers on 10 October 2012 at the 1152nd meeting of the Ministers' Deputies.

64 See paras 9, 10, 14.3, 17, 35.1, 35.2, and 35.4.

65 *Serce v Romania* (Application no. 35049/08) 30 June 2015.

66 The Advocate General has observed that "In connection with the execution of a European arrest warrant issued for purposes of the execution of a custodial sentence, the problem may appear less sensitive in so far as, if the requested individual resides on the territory of the executing Member State,... The issuing judicial authorities might also, for their part, invoke the provisions of 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, in order that that individual may serve his sentence on the territory of the executing Member State." See Pál Aranyosi (C-404/15) and Robert Căldăraru (C-659/15 PPU) (delivered on 3 March 2016), para 61.

67 See Joao Pedro Lopes Da Silva Jorge [2012] EUECJ C-42/11 (05 September 2012) paras 49 – 50. The Court has also held that family members of a transferred prisoner are entitled to family benefits provided for in the relevant legislation. See Case C-302/02, Judgment of the Court (First Chamber) 20 January 2005, ECLI:EU:C:2005:36 (involving a prisoner who was transferred from Austria to serve his sentence in Germany).