

Supreme Court's DECISION

delivered in Stockholm on 31 October 2023

Case no.

B 3926-23

REQUESTING STATE

Ukraine

PERSON TO WHOM THE REQUEST PERTAINS

IS

Counsel and Public Defender: Attorney KJ

THE MATTER

Determination pursuant to Section 18 of the Swedish Extradition for Criminal Offences Act (Swedish Code of Statutes 1957:668)

THE SUPREME COURT'S RULING

The Supreme Court declares

that, pursuant to Section 10, second paragraph, of the Extradition for Criminal Offences Act (1957:668), there is an impediment to the extradition of IS to Ukraine insofar as the request relates to suspicion of violent resistance in April 2019, and

that extradition would be in violation of Article 3 of the ECHR.

KJ shall receive compensation from public funds for the representation of IS in the Supreme Court in the amount of SEK 100,502. Of this amount, SEK 44,280 relates to labour, SEK 29,025 to loss of time, SEK 7,096.50 to expenses and SEK 20,100 to VAT. The State shall bear the cost.

THE EXTRADITION REQUEST, ETC.

The request

The office of the Prosecutor General of Ukraine has requested the extradition of IS for prosecution for offences which, under Swedish law, are equivalent to violence against a public official and violent resistance.

In the extradition request, Ukraine has provided, inter alia, the following guarantees:

- that IS will be guaranteed a fair trial with a right to an effective defence,
- that IS's human rights and fundamental freedoms will be guaranteed both while in detention and during any future prison sentence; and
- that Swedish authorities will be able to inspect his circumstances in the future.

In a letter from the Ukrainian Advocate General, dated 11 July 2023, Ukraine has stated that further guarantees on the location of the requested person's detention can be provided if the Swedish government deems it necessary.

The position of the Prosecutor General

According to the Swedish Prosecutor General, there is an impediment to extradition under Section 10 of the Extradition for Criminal Offences Act

insofar as the request concerns what, under Swedish law, is equivalent to violent resistance. Otherwise, according to the Prosecutor General, there is no impediment to extradition. The Prosecutor General has indicated that the current situation in Ukraine does not affect the determination of the extradition case.

IS's position, etc.

IS has opposed extradition. He argues that there are impediments to extradition under Sections 7–9 of the Extradition for Criminal Offences Act and that extradition would be in violation of Articles 3 and 6 of the ECHR.

IS was deprived of liberty in the extradition case from 9 March 2023 until 21 September 2023, when the Supreme Court set aside the remand order.

REASONS FOR THE RULING

The alleged offences and the judgment invoked

1. IS is suspected of violent resistance and violence against a public official. According to the extradition request, when asked to identify himself at the scene of a recent burglary, he used violence against police officers. Later, in the police station, he offered resistance. The offences were allegedly committed on 8 April 2019.

2. In support of the request, the Prosecutor General of Ukraine has invoked a remand order issued by the district court of Vinnytsia on 17 November 2020.

The assessment in this case*The requirement of double criminality under Sections 1, 4 and 10 of the Extradition for Criminal Offences Act*

3. IS is suspected in Ukraine of offences under Articles 342 and 345 of the Criminal Code of the Republic of Ukraine and is present in Sweden (cf. Section 1 of the Extradition for Criminal Offences Act).

4. As a general rule, extradition for legal proceedings may be granted only if the act for which it is requested corresponds to an offence for which imprisonment for one year or more is prescribed by Swedish law (cf. section 4, first paragraph of the Extradition for Criminal Offences Act).

5. The acts referred to in the extradition request both correspond to offences under Swedish law (see the provisions on violence against public officials and violent resistance in Chapter 17, Sections 1 and 4 of the Swedish Criminal Code).

6. The penalty for violence against a public official – a fine or imprisonment for a maximum of two years – is such that the conditions set out in Section 4 of the Extradition for Criminal Offences Act are met. Nevertheless, the range of punishment for violent resistance, which carries a maximum sentence of six months' imprisonment, is not such that extradition can take place for that offence alone. However, extradition for the offence can still be granted if extradition is also made for another offence that meets the requirements set out in the Section. Assuming that extradition is made for violence against a public official, the conditions for extradition set out in Section 4 are thus fulfilled in respect of both offences.

7. According to Section 10, second paragraph, of the Extradition for Criminal Offences Act, extradition may not be granted if the statute of limitations for the offence has run out according to Swedish law. The limitation period for violent resistance is two years from the day the offence was committed (cf. Chapter 17, Section 4 and Chapter 35, Section 1 of the Criminal Code). The limitation period has therefore expired, if no action has been taken to suspend the limitation period.

8. In the immediate aftermath of the offences, IS was both suspected of the offences and detained. The detention order was valid for 60 days. However, he was released on bail only a few days after the order, and then the detention period also expired. When assessing whether these measures interrupted the limitation period, the measures should be assessed as if they were taken in Sweden (cf. NJA 2016 p. 1001).

9. The detention of IS may be considered equivalent to an executed remand order. However, as IS was released without being charged, the detention cannot be considered to have the effect of suspending the limitation period (cf. Chapter 35, Section 3 of the Criminal Code). Nor does the extradition request indicate that IS was subsequently charged with the offence. There is therefore an impediment to extradition with regard to suspected violent resistance.

10. The limitation period for violence against public officials is five years (see Chapter 17, Section 1 and Chapter 35, Section 1 of the Criminal Code). The statute of limitations has not run out for that offence, and there is therefore no impediment to extradition on such grounds in respect of that offence.

The requirement under Section 9 of the Extradition for Criminal Offences Act for a remand order, etc.

11. In support of its request, Ukraine has referred to a remand order. Since Ukraine has acceded to the European Convention on Extradition of 1957, Section 9 (3) states that the remand order shall be accepted provided that it is not manifestly incorrect.

12. The remand order is not manifestly incorrect. The conditions for extradition set out in Section 9 are therefore met.

Impediment under Section 7 of the Extradition for Criminal Offences Act due to risk of persecution

13. IS has claimed that, during Russia's 2014 annexation of Crimea, he was forced to cooperate with the Russian military and was recruited against his will into the Russian security services; since the Ukrainian authorities learnt of his recruitment, they have made his life difficult. However, his statements are general and are not really supported by the investigation. They cannot therefore constitute an impediment to his extradition under Section 7.

Impediment under Section 8 of the Extradition for Criminal Offences Act due to inhumane treatment

14. There is some evidence that IS has previously injured himself and has also threatened to do so again in the event of his extradition. He has stated in the extradition case that if he is extradited to Ukraine, he will most likely be transferred to Russia. This information, which is also general in nature, does not mean that extradition would be manifestly incompatible with basic

standards of humane treatment. There is therefore no impediment to his extradition on that basis.

Article 3 of the ECHR

15. Article 3 of the ECHR provides that a state may not extradite a person to another country if there are substantial grounds for believing that he or she would face a real risk of torture or inhuman or degrading treatment or punishment in that country. The Article may also apply in cases where the risks originate from persons or groups who are not public officials in the recipient country, if the authorities cannot eliminate the risk by organising the necessary protection (cf. e.g., NJA 2007 p. 574).

16. The primary consideration is the individual risk posed to the person requested. However, an all-encompassing and highly violent situation in the recipient country can, in the most serious of cases, such as widespread war, entail that extradition would be contrary to Article 3. (See, for example, *NA. v. the United Kingdom*, no. 25904/07, § 115, 17 July 2008, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, §§ 218 and 248, 28 June 2011 and *K.A.B. v. Sweden*, no. 886/11, §§ 75 and 76, 5 September 2013; cf. also *Khasanov and Rakhmanov v. Russia* [GC], nos. 28492/15 and 49975/15, §§ 93–101, 29 April 2022.)

17. The assessment of whether an extradition is incompatible with Article 3 must therefore take into account both the individual risk to the requested person and the general situation in Ukraine, in particular the fact that the country has been subject to a full-scale war of aggression by Russia since February 2022.

18. As regards the general situation in Ukraine, it should be noted that the development of the judicial system in the 2010s has been at least partly positive (cf. the Ministry for Foreign Affairs' report *Ukraina – Mänskliga rättigheter, demokrati och rättsstatens principer: situationen den 31 december 2019*). This development is reflected in the Supreme Court's opinions in various extradition cases (cf. the opinions issued in cases Ö 4885-13 and Ö 384-14 with the opinion in Ö 3004-19). In neither case was there considered to be an impediment to extradition to Ukraine.

19. In the two opinions from the first half of the 2010s, however, the reservations were significant, and the Supreme Court emphasised in particular that the Government is able to make a broader determination of whether extradition should be refused, despite there being no impediment under the Extradition for Criminal Offences Act and even though extradition would not be in violation of the ECHR. In the latter case, there were fewer reservations, and no reference was made to the Government's broader powers to determine the question. While developments in Ukraine in the 2010s can be said to have been positive, even before the outbreak of the war there were still problems, including widespread corruption affecting the functioning of the judiciary and worrying conditions in the country's prisons.

20. Added to this are the general risks of war. The war has resulted in a state of emergency in Ukraine and the application of martial law. The positive developments of the 2010s which the Supreme Court recognised in the 2019 case have not been able to continue during the war. Rather, the war has had a negative impact on the legal system in a broad sense. Thus, various reports indicate that prison conditions have deteriorated, that the risk of being subjected to various types of abuse has increased, and that conditions there pose a threat to both life and health; torture and abuse have been reported,

inter alia, in relation to persons suspected of cooperating with Russia (see, for example, the Ukraine 2022 Human Rights Report of the US Department of State). Although these are consequences of a war of aggression against Ukraine, the negative developments that have actually taken place as a result of that war cannot be ignored in the extradition case.

21. In this context, it can be pointed out that the Swedish Migration Agency has decided that deportations to Ukraine may not be executed until further notice and that assessment of the current situation in Ukraine is so difficult that asylum cases are not to be decided until further notice, as a legally secure assessment of the need for protection cannot be made (see the Swedish Migration Agency's legal position RS/002/2022). In addition, the European Union has activated the so-called Temporary Protection Directive, which, in somewhat simplified terms, means that Ukrainian citizens and certain other categories of people are entitled to a temporary residence and work permit in the EU without having to apply for asylum.

22. After an overall assessment, it must be considered that extradition of IS in the present situation would be incompatible with Article 3 of the ECHR, despite the assurances given by Ukraine (cf. on assurances given by the applicant State, *Khasanov and Rakhmanov v. Russia*, § 101).

Summary assessment

23. There is an impediment to the extradition of IS under Section 10, second paragraph of the Extradition for Criminal Offences Act as regards the offence which, under Swedish law, corresponds to violent resistance. His extradition would also be in violation of Article 3 of the ECHR.

Other means of prosecution

24. In situations where extradition cannot take place, the requesting state – in this case, Ukraine – can request that prosecution take place in Sweden. This can be done on the basis of international agreements on the transfer of prosecution or can be based directly on Sweden’s jurisdiction according to internal rules (cf. e.g., Chapter 2, Section 3, paragraphs 2 c and 5 b of the Criminal Code). In some situations, there may even be a more or less unconditional obligation for Sweden to seek to prosecute an offence, irrespective of any request to do so (cf. e.g., Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and Chapter 2, Section 3, paragraph 5 c of the Criminal Code; see also Govt. bill 2020/ 21:204 p. 112).

Justices of the Supreme Court Gudmund Toijer, Stefan Johansson, Petter Asp (reporting Justice), Stefan Reimer and Christine Lager participated in the ruling.

Judge referee: Cecilia Andgren