Supreme Court's DECISION

Case no.

delivered in Stockholm on 13 December 2022

B 4080-22

PARTIES

Appellant

OsO

Counsel and Public Defender: Attorney AF

Respondent

Prosecutor General

Box 5553

114 85 Stockholm

THE MATTER

Surrender in accordance with a European arrest warrant

RULING APPEALED

Decision of the Göta Court of Appeal of 07/06/2022 in case B 2077-22

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THE SUPREME COURT'S DECISION

By modification of the Court of Appeal's decision, the Supreme Court refuses the surrender of OsO to Greece for execution of a sentence in accordance with the European arrest warrant.

AF shall receive compensation from public funds for the representation of OsO in the Supreme Court in the amount of SEK 18,025. Of the amount, SEK 14,420 relates to work and SEK 3,605 relates to value added tax. The State shall bear the cost.

CLAIMS IN THE SUPREME COURT

OsO has claimed that the Supreme Court shall refuse the request to surrender him to Greece for execution of sentence under the European arrest warrant.

The Prosecutor General has opposed modification of the decision of the Court of Appeal.

OsO has been deprived of liberty in connection with the surrender request from 14 April to 11 May and from 7 June to 20 October 2022.

REASONS FOR THE DECISION

What is at issue in the Supreme Court

1. At issue in the case is whether there is an impediment to surrendering OsO to Greece due to the fact that the prison sentence on which the arrest warrant is based was imposed after a trial at which the person did not appear in person.

Background

2. On 26 January 2018, at the appellate court of Thessaloniki, Greece, the public prosecutor issued a European arrest warrant concerning the surrender of

OsO for the execution of a prison sentence. The arrest warrant states that, in 2012, OsO was sentenced by the appellate court to nine years' imprisonment for fraud committed on 12 September 2004. Further, the arrest warrant states that the remaining sentence is eight years, eight months and three days.

3. The Swedish Prosecution Authority requested additional information from Greece concerning the content of the arrest warrant. Subsequently, the Greek prosecutor indicated (by marking part 2, options 2 and 3.1b, in the arrest warrant) that OsO had not been present in person at the hearing leading to the judgment, and that he had not been summoned in person, but had otherwise been officially informed of the time and place of the hearing leading to the judgment, in such a way that it could be unequivocally established that he knew of the hearing, and had been informed that a decision could be issued whether or not he attended the hearing in person. The marked options correspond to Article 4a(1)(a) of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States[1] (EAW Framework Decision).

4. The Greek prosecutor further stated that OsO had appealed the original judgment of the district court to the appellate court. Further, it was stated that, on 21 October 2008, OsO had granted his defence counsel power of attorney to represent him in the proceedings before the appellate court. The supplementary file also shows that OsO's defence counsel had appeared for a hearing there on 9 November 2011 but that, at the request of defence counsel, the hearing was postponed until 7 June 2012, as OsO was unable to attend. The defence counsel had been informed that OsO was obliged to appear at the hearing in June 2012 without any special summons. Further, it is stated that neither OsO nor his defence counsel appeared at the hearing on 7 and 8 June

[1] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

2012, when the court tried OsO's appeal. According to the information provided, the judgment of the appellate court cannot be appealed because it was delivered by a court of second instance and was a consequence of the appeal lodged by OsO.

5. The District Court rejected the request for surrender. However, the Court of Appeal has granted the request.

6. OsO has stated that he is innocent, and that he became involved in the events underlying the conviction when someone asked him to serve as a Greek-language interpreter. Furthermore, he has stated that he was sentenced in the district court to nine years' imprisonment, but that he appealed that sentence. In the appellate court, the proceedings were cancelled several times because the injured party failed to appear. He has further stated that he has served many years of the sentence, and that a part of that time must be counted double because he worked during the execution. When the deprivation of liberty was lifted, he was told by his defence counsel that he was a free man. He travelled to Nigeria, because his mother became ill, but he then returned to Greece. Later, he travelled to Sweden. He only became aware of the appellate court’s ruling upon his arrest here.

General information regarding the European arrest warrant system

7. The European arrest warrant system has replaced the rules on extradition for criminal offences in the EU. The system was introduced by the 2002 EAW Framework Decision.

8. The Framework Decision has subsequently been amended with regard to judgments *in absentia* (see Council Framework Decision 2009/299/JHA of 26 February 2009[2]). These amendments introduced the current Article 4a of

[2] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing

the EAW Framework Decision. When reference is made to the EAW Framework Decision below, the current and consolidated version is meant.

9. The European arrest warrant system is based on the principle of mutual recognition, which means that, as a starting point, Member States must recognise and execute each other's decisions in the relevant area.

10. Framework decisions are a type of legal act that could previously be adopted by the Council of the European Union under the so-called third pillar. Such decisions, like directives, are binding on Member States as to the results to be achieved but leave it to Member States to determine the form and methods of implementation. It follows from the explicit text of the Treaty that framework decisions cannot have direct effect. (See Article 34(2)(b) of the Treaty on European Union as amended by the Treaty of Amsterdam. See also the judgment of the Court of Justice of the European Union of 29 April 2021, X, C-665/20 PPU, EU:C:2021:339 para. 62.)

11. As with other EU law, there is an obligation for, inter alia, courts in the Member States to take into account, as far as possible and in so far as they are given discretion to do so under national law, the requirements of a framework decision when interpreting national law. In other words, there is an obligation to interpret national legislation in conformity with EU law. However, the obligation does not extend to interpreting national law *contra legem*, i.e., in a way that would contradict its wording. (See, e.g. the judgment of the Court of Justice in X, para. 62-64.)

12. In Sweden, the EAW Framework Decision has been implemented mainly through the Act (2003:1156) regarding surrender from Sweden under a

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the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, p. 24–36

European arrest warrant (*Lagen om överlämnande från Sverige enligt en europeisk arresteringsorder)*.

Conditions for surrender under the Act on the European arrest warrant

13. The Act on the European arrest warrant regulates the issue of judgments *in absentia* in Chapter 2, Section 3, sixth paragraph. This provision provides that surrender may not be granted if the surrender is for the purpose of enforcing a liberty-depriving sentence imposed following a hearing at which the requested person did not appear in person, and the issuing authority has not confirmed that one of the conditions set out in Article 4a(1) of the Framework Decision is met.

14. The the text of the Act, in Chapter 2, Section 3, sixth paragraph, does not specify how the issuing authority shall confirm that the conditions of the Framework Decision are met. However, Chapter 1, Section 4 states that the arrest warrant shall be drawn up using a form set out in an annex to the Framework Decision. Furthermore, Chapter 4, Section 2a states that, if the form or content of a request is so deficient that it cannot be used without significant inconvenience as a basis for examining the question of surrender, the issuing authority shall be given the opportunity to supplement the request.

15. The application of Chapter 2, Section 3, sixth paragraph thus depends on how the information submitted by the issuing authority is to be understood. If the authority has marked, in the form, that the person was not present in person at the hearing which led to the decision, one of the options is to indicate that the person was not summoned in person, but was in fact otherwise officially informed of the time and place of the hearing which led to the decision, in such a way that it can be unequivocally established that he or she was aware of the scheduled hearing, and was informed that a decision could be made whether or not he or she was present at the hearing in person.

In connection with the various options, the authority must indicate, for the option that has been marked, how the related conditions are met.

16. It is therefore clear from the references in the Act to the Annex to the Framework Decision, and from the Annex itself, that it is not sufficient for the issuing authority to indicate that it considers that the conditions for the enforcement of a judgment *in absentia* are met. The authority is also expected to indicate how the conditions have been met.

17. The preparatory works also refer to what the issuing authority has certified in the arrest warrant itself. According to the preparatory works, if it is confirmed in the arrest warrant that one of the conditions for a ruling *in absentia* is met, the executing authority need not carry out its own substantive examination of whether the conditions are met. At the same time, the preparatory works counsel that the starting point is that all the information needed by the executing authority to take its decision should be contained in the arrest warrant, but that additional information may be requested if necessary. (Govt. bill 2012/13:156 pp. 27, 28 & 31.)

18. This means that it is up to the executing authority to interpret the meaning of the marked option in the light of any supplementary information provided by the issuing authority.

19. The grounds for refusal in the Act on the European arrest warrant have, pursuant to the text of the Act, been made mandatory throughout, that is, if any of the impediments listed in the Sections (see Chapter 2, Sections 3-6) are present, then surrender may not be granted.

20. The preparatory works make clear that Sweden, when implementing the EAW Framework Decision in Swedish law, interpreted the fact that a ground for refusal in the Framework Decision is optional, i.e., that the Framework Decision states that execution of an arrest warrant *may* be refused, in such a way that a

margin exists for Member States to choose whether, and how, the ground for refusal is to be implemented at national level. For the purpose of guaranteeing the individual a high level of legal certainty, Sweden chose to draft the provisions as mandatory grounds for refusal. (Govt. bill 2003/04:7 pp. 70 & Govt. bill. 2012/13:156 pp. 25 & 26.)

Case law from the Court of Justice regarding surrender following judgment *in absentia*

21. The Court of Justice has developed the meaning of Article 4a(1) of the EAW Framework Decision in several rulings.

22. First of all, the Court has made clear that, when applying Article 4a(1) of the Framework Decision, the executing judicial authority must verify whether the situation corresponds to one of the cases referred to in that Article. Such verification shall be carried out in the light of the information contained in the original arrest warrant and supplementary information. The verification shall be based on the factual information on which the issuing authority has based its finding that the conditions for surrender following a judgment *in absentia* are met. Where a prison sentence has been imposed following a trial at several levels, it is the hearing at the level which finally decided the case, and established the guilt of the person concerned, which is to be assessed. (See judgment of the Court of Justice of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628 para. 93-95 and 98; see also judgments of the Court of Justice of 24 May 2016, Dworzecki, C-108/16 PPU, EU:C:2016:346 para. 49 and of 10 August 2017, Zdziaszek, C-271/17 PPU, EU:C:2017:629 para. 103 and 104.)

23. In applying the ground for refusal based on Article 4a(1)(a), the executing authority is, according to the Court of Justice, obliged to verify, in the light of the information contained in the arrest warrant and any

supplementary information, whether the conditions for surrender following a judgment *in absentia* are actually met.

24. It should be noted that, according to the Court of Justice, the fact that the summons was handed over to a third party who undertook to pass it on to the person concerned cannot in itself satisfy the requirement that the person has unambiguously received the document (see the judgment of the Court of Justice in *Dworzecki*, para. 47).

25. At the same time, the Court of Justice has also pointed out – with reference to the optional nature of the grounds for refusal pursuant to the EAW Framework Decision – that, even if the executing judicial authority finds that the situation in question does not fall within any of the exceptions for refusing to execute a judgment *in absentia*, it may take into account other circumstances which ensure that the surrender of the requested person does not disregard his or her right of defence. When this assessment is made, the executing authority may take into account, inter alia, the actions of the requested person, e.g., whether he or she has tried to avoid being served with information. The court can thus take into account all the specific circumstances of the case, including those of which it may be aware of itself. (See, inter alia, the judgments of the Court of Justice in Dworzecki, para. 50 and 51, and Tupikas para. 96 and 97 and Zdziaszek para. 106-108.)

26. The Court of Justice has also made it clear that it is not compatible with the Framework Decision to implement optional grounds for refusal so that they become mandatory for the Member State's own public authorities and courts. According to the Court of Justice, there must be room for courts and public authorities to take into account the specific circumstances of the individual case. At the same time, the Court of Justice has emphasised that the Framework Decision does not have direct effect, and that a Member State is therefore not obliged to refrain from applying a provision of national law that

is contrary to the Framework Decision or to interpret its national law *contra legem*. (See the judgment of the Court of Justice in X, para. 43, 44, 62 and 63. See para. 10 and 11 above.)

How should the Swedish legislation be interpreted?

27. Nothing in the text of Chapter 2, Section 3, sixth paragraph of the Act on the European arrest warrant prevents the specific requirements imposed on the issuing authority's confirmation, and on the examination to be carried out by the executing authority on the basis of this information, from being interpreted in accordance with what the Court of Justice has indicated (see para. 22 and 23).

28. Thus, when a Swedish court decides whether the issuing authority has confirmed that a condition is met for surrendering a person sentenced *in absentia*, the court must verify whether the issuing authority has provided concrete information in the arrest warrant, together with any supplementation, that meets the conditions. In the absence of such information, the court may not grant the request for surrender.

29. More recent rulings of the Court of Justice indicate that the EAW Framework Decision requires that surrender can take place under certain conditions even if the conditions set out in Article 4(1)(a) have not been confirmed (see para. 25 and 26). However, Framework Decisions do not have direct effect and, as drafted, the Swedish legislation does not allow for an application whereby surrender shall be granted even if the conditions of Chapter 2, Section 3, sixth paragraph are not met. Such an application would be contrary to the wording of the Act.

The assessment in this case

30. The basic conditions for surrender are met in this case (see Chapters 2, Sections 1 and 2 of the Act on the European arrest warrant).

31. The Greek authorities have stated that the conditions are met for surrender for execution of a judgment *in absentia* under Article 4a(1)(a) of the EAW Framework Decision. At the same time, the authorities have provided concrete information to the contrary. It appears, from this information, that OsO was not informed of the time and place of the hearing in such a way that it can be unequivocally established that he was aware of the planned hearing.

32. Nor is there any basis for considering that surrender could be granted under any other grounds specified in Article 4a (1).

33. An impediment, pursuant to Chapter 2, Section 3, sixth paragraph, therefore exists to the surrender of OsO. Swedish law does not permit surrendering him nevertheless (see para. 29).

34. The request for surrender must therefore be refused.

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Justices of the Supreme Court Anders Eka (dissenting), Sten Andersson, Petter Asp (reporting Justice, dissenting, addendum), Johan Danelius and Christine Lager participated in the ruling.
Judge referee: Emelie Hansell

DISSENTING OPINION

Justices of the Supreme Court Anders Eka and Petter Asp dissent, stating:

1. It is clear from both the text of the Act and from explicit statements in the preparatory works that the regulation in Chapter 2, Section 3, sixth paragraph of the Act (2003:1156) regarding surrender from Sweden under a European arrest warrant is based on the idea that the examination of whether the conditions for surrender are met in cases of failure to appear must be carried out by the issuing State (cf. the text of the Act as drafted and Govt. bill 2012/ 13:156 p. 27). However, the position taken in the Act and in the preparatory works needs to be nuanced, since the Court of Justice of the European Union has made clear in its case law that an assessment must also be made by the executing State (see para. 22 and 23 of the majority's reasons for the judgment).

2. Further, the provision in Chapter 2, Section 3, sixth paragraph has been made mandatory, even though the ground for refusing execution under the EAW Framework Decision is optional. In this respect, the Court of Justice has pointed out (with reference to the optional nature of the ground for refusal) that the executing judicial authority, when examining whether the requested person shall be surrendered, may also consider other circumstances which entail that the surrender of the person would not disregard the person's right of defence. The Court of Justice has clearly indicated that implementing the optional grounds for refusal in a way which makes them mandatory for the Member State's own public authorities and courts is not compatible with the Framework Decision. There must be room for courts and authorities to take into account the specific circumstances of the case (see para. 25 and 26 of the majority's reasons for judgment).

3. The Swedish Act thus deviates in two respects from the implications of the findings of the Court of Justice as regards the meaning of the Framework Decision. Swedish courts and authorities are in this situation obliged to, as far as possible and in so far as they are given discretion to do so under national law, to consider the requirements arising from a Framework Decision when interpreting the Act (see para. 11 of the majority's reasons for judgment).

4. When applying the grounds for refusal of Chapter 2, Section 3, sixth paragraph of the Act on the European arrest warrant, this means, in our opinion, the following.

5. If the issuing authority has confirmed in the arrest warrant that one of the conditions is met, it is up to the Swedish executing authority to proceed to examine, in accordance with the case law of the Court of Justice and despite the way in which the Swedish Act is drafted, whether the issuing authority's confirmation is justified (cf. para. 1 above). Such an application of the Act cannot be considered contrary to the wording of the Act.

6. However, when making this extended assessment of whether an impediment to surrender exists that would prevent the execution of the arrest warrant, there must also be room – again, pursuant to the case law of the Court of Justice – to consider whether the surrender of the person in the individual case would disregard the person's right of defence. In other words, it must be considered possible, as one part of the examination of whether the ground for refusal should be applied in its extended form, to examine also whether the procedure, having regard to all the circumstances, safeguards the requested person's right of defence in an way which is acceptable (see para. 2 above).

7. This conclusion is based on the view that, if it is compatible with the wording to extend the mandatory ground for refusal in Chapter 2, Section 3, sixth paragraph of the Act on the European arrest warrant, so that an examination must be made also in Sweden, then it logically follows that it is

compatible with the wording to make this extension somewhat more limited, by taking into account the case law of the Court of Justice according to which the executing authority must have a possibility to examine whether a surrender in the individual case is contrary to the individual's right of defence.

8. Consequently, the grounds for refusal in Chapter 2, Section 3, sixth paragraph, when interpreted in the light of the EAW Framework Decision and the case law of the Court of Justice in this respect, should be understood as meaning that refusal must be made both

> (a) in cases directly following from the text of the Act, i.e., where the issuing authority has not confirmed that the conditions laid down in the Framework Decision are met; and
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> (b) in cases where the Swedish court, in its own examination of the circumstances of the case, finds that the conditions laid down in the Framework Decision are not met, and the procedure cannot be regarded as complying with the requested person's right of defence, even taking into account all the circumstances of the case.

9. When the Court of Justice has stated that there must be a possibility to consider whether surrender in the individual case would disregard the person's right of defence, the Court has based this on the optional nature of the ground for refusal. The fact that the requirements of EU law are based on the optional nature of the provisions of the Framework Decision does not, of course, prevent them from being taken into account – on a national level, when applying Swedish law – when making an assessment of whether there exists a mandatory impediment to surrender, in accordance with what has been stated in para 8 b above.

10. On the basis of the above, we make the following assessment in the individual case.

11. The basic conditions for surrender (cf. Chapter 2, Sections 1 and 2 of the Act on the European arrest warrant) are met.

12. The Greek authorities have confirmed that the conditions are met for surrender for enforcement of a decision *in absentia* pursuant to Article 4a(1)(a) of the Framework Decision (see para. 8 a above).

13. In the subsequent verification of whether these conditions are met, which must be made, it can be concluded that there is no basis for the conclusion that OsO was actually informed of the time and place of the hearing in such a way that it can be unequivocally established that he was aware of the planned hearing. The decisive factor when assessing whether surrender can take place is then whether the procedure can, nevertheless, be considered to have ensured his right of defence, taking into account all the circumstances of the case. Otherwise there is a mandatory impediment to surrender. (See para. 8 b above.)

14. OsO attended the district court hearing in person, and was represented by his defence counsel. It is OsO who has appealed the district court's judgment, and he has instructed defence counsel to represent him. The defence counsel was present on the first day of the trial in 2011, and was informed that the hearing was postponed to a later date, and that OsO was obliged to attend the later hearing without a special summons. Taking into account all of the facts it must be concluded that OsO was aware of the ongoing proceeding in the appellate court which he himself had initiated. He has not remained abreast of the proceedings in the case. Further, the appellate court, which heard the case upon appeal by OsO, did not convict him of anything beyond his conviction by the district court, nor did it increase the sentence he received there. In the light of the above, OsO's right of defence must be regarded as having been ensured. The ground for refusal in Chapter 2, Section 3, sixth

paragraph of the Act on the European arrest warrant does not therefore constitute an impediment to surrender.

15. The request for surrender must therefore be approved.

16. In the minority on this point, we are otherwise in agreement with the majority.

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ADDENDUM

On his own behalf, Justice of the Supreme Court Petter Asp adds the following.

In the context of the case, it is worth pointing out that the Court of Justice's statements on the limitations that exist regarding the obligation to interpret national law in conformity with EU law relate to *the obligation* to make such an interpretation. However, it is clear that, apart from this obligation, there is *scope* for the Swedish courts to take the requirements of EU law into account, even in cases where it is questionable whether a certain interpretation can be considered to fall within the scope of the wording. For example, it must be possible, even when interpreting national law in the light of EU law, to cut out a portion of the area of application of a certain provision, notwithstanding assertions that this is to apply the law *contra legem* (cf., e.g., the operations carried out in NJA 2000 p. 132 and "*Blankettstraffbudet och Skogsstyrelsens föreskrifter*" NJA 2005 p. 33). In other words, it must – in a way corresponding to what the Supreme Court has done when interpreting Swedish law in the light of the Swedish constitution – be possible to engage in what might be called a corrective application in conformity with EU law.

The limits of such corrective application are set primarily by general principles regarding the room for maneuver of judges and other persons who apply the law (including the principle of legality and more general principles according to which certain types of legislation should not be applied contrary to their wording).

However, it must also be pointed out that this issue is not directly raised by the case at hand. Indeed, it cannot be considered *contra legem* to interpret the

relevant national provision in the manner set out in para. 8 of the dissenting opinion.

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