

SUPREME COURT'S DECISION

delivered in Stockholm on 31 March 2022

Case no.

Ö 7821-21

PARTIES

Appellant

The Swedish Prison and Probation Service
Slottsgatan 78
601 80 Norrköping

Respondent

BK

Counsel: Attorney SH

THE MATTER

Recognition and enforcement of custodial sentence in the European Union

RULING APPEALED

Decision of the Court of Appeal of Western Sweden of 30 November 2021 in
case ÖÄ 5838-21

THE SUPREME COURT'S RULING

The Supreme Court sets aside the decision of the court of appeal and affirms the decision of the district court.

SH shall receive compensation from public funds for the representation of BK in the Supreme Court in the amount of SEK 11,176. Of the amount, SEK 8,940.40 relates to work and SEK 2,235.10 relates to value added tax. The state shall bear the cost.

CLAIMS IN THE SUPREME COURT

The Swedish Prison and Probation Service has claimed that the Supreme Court shall set aside the decision of the court of appeal and affirm the decision of the district court.

BK has opposed modification of the decision of the court of appeal.

REASONS FOR THE DECISION

Background

1. In October 2020, the Bremen Public Prosecutor's Office requested that the Swedish Prison and Probation Service recognise and enforce in Sweden a court decision regarding conversion of a sentence. The decision concerned the Swedish citizen, BK, and pertained to the conversion of a previous penalty to a prison sentence of one year and five months.
2. The following, *inter alia*, appears from the certificate attached to the request. In 2017, Amtsgericht Bremen-Blumenthal (the German court) issued three *Strafbefehle* (most closely corresponding to summary impositions of fines) against BK regarding day fines for crimes which, according to Swedish law, correspond to drug crimes, unlawful threats and theft. In 2018, the same court imposed on BK a sentence of imprisonment of eight months for crimes which, according to Swedish law, correspond to fraud. BK was served with

the orders for summary impositions of fines and was notified that they would become legally binding if he failed to exercise his right to appeal. The summary impositions of fines became legally binding in June and August 2017. BK was personally present at the trial which led to the judgment imposing the prison sentence. The judgment became legally binding in March 2019.

3. On 3 September 2019, the German court, following application from the prosecutor, decided to convert the summary impositions of fines and the prison sentence to a combined penalty of imprisonment of one year and five months. The decision was sent by registered letter to BK's address in Sweden. He acknowledged receipt of the letter on 16 September, and the decision became legally binding on 24 September 2019.

4. The Swedish Prison and Probation Service requested supplementary information concerning the decision regarding conversion. According to the German prosecution authority the decision was rendered following a written procedure and BK was informed by letter that the prosecutor had claimed that a combined prison sentence of one year and five months was to be imposed. It was also stated that BK had been afforded the opportunity to be heard and that his defence counsel had reviewed the matter without rendering any opinion.

5. On 16 June 2021, the Swedish Prison and Probation Service decided that the decision regarding conversion would be recognised and enforced in Sweden.

6. BK appealed the decision of the Swedish Prison and Probation Service. The district court rejected the appeal. The court of appeal has set aside the decision of the Swedish Prison and Probation Service and found that the decision regarding conversion was not to be recognised and enforced in Sweden. According to the court of appeal, there was an impediment to recognising and enforcing the decision regarding conversion.

What is at issue in the case

7. The case pertains to the application of the provisions regarding recognition and enforcement of custodial sentences in the EU as regards a decision issued following a written procedure.

Legislation*Certain starting points*

8. The Mutual Recognition and Enforcement of Custodial Sentences Within the European Union Act (2015:96) (the European Enforcement Act) is based on the implementation of Council Framework Decision 2008/909/JHA which was adopted by the Council of the European Union on 27 November 2008¹ (see Chapter 1, Section 1 and Government Bill 2014/15:29, p. 36). According to the recitals of the Framework Decision, the principle of mutual recognition of judgments comprises a cornerstone of judicial cooperation within the Union (see Recitals 1, 2 and 5). A starting point is that the Framework Decision shall be applied with respect for the Charter of Fundamental Rights of the European Union, in particular in respect of the administration of justice (*cf.* Recital 13).

9. Article 47 of the Charter provides that everyone is entitled to a fair and public hearing within a reasonable time. In this respect, the Charter is linked to Article 6 (1) of the European Convention on Human Rights.

10. In certain parts, Framework Decision 2008/909/JHA has been amended by Framework Decision 2009/299/JHA.² The purpose of the latter Framework

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.

² Council Framework Decision 2009/2009/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 procedural rights of persons and fostering

Decision was to establish when an authority shall have the possibility – within the framework of the European cooperation in the field of criminal law – to execute judgments and decisions despite the absence of the person at the trial (*cf.* Recitals 1 and 4).

Recognition and enforcement of a foreign judgment

11. According to Chapter 3, Section 1 of the European Enforcement Act, the main rule is that a foreign judgment regarding custodial sentences sent from another Member State are to be recognised and enforced in Sweden in the event certain conditions are fulfilled, *inter alia*, regarding the sentenced person's ties to Sweden (Chapter 3, Sections 2 and 3).

12. A *foreign judgment regarding custodial sentence* means a decision which has been issued following criminal law proceedings by a court in another Member State where the decision has become legally binding and pertains to a custodial measure based on an act which is punishable there (*cf.* Chapter 1, Section 5).

13. The similar Framework Decision regarding a European arrest warrant³ is also based on the principle of mutual recognition. As regards the Framework Decision, the European Court of Justice has stated that Member States are required to execute foreign decisions. According to the Court, execution constitutes the rule and the possibilities for refusing are to be perceived as exceptions which must be interpreted strictly (see, for example, the judgment of the European Court of Justice of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:68, para. 50). Accordingly, the starting point is clear; recognition and enforcement shall occur except where express impediments are prescribed.

the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

³ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

14. The impediments to recognition and enforcement which may arise are set forth in Chapter 3, Sections 4 (1) – (9) of the European Enforcement Act. These pertain to various circumstances. There is no basis for refusal which expressly addresses the situation in which a judgment has been issued following a written procedure.

15. On the other hand, Section 7 states that, provided that there is no confirmation in a certificate from the requesting state that certain conditions are fulfilled, a judgment may not be recognised and enforced if it has been issued following a trial in the absence of the sentenced person at the trial. The provision refers to the conditions stated in Framework Decision 2008/909/JHA, Article 9 (1) (i). The conditions are apparent from the amendment to the Framework Decision implemented by virtue of Framework Decision 2009/299/JHA (*cf.* Government Bill 2014/15:29, pp. 106 and 171).

What applies when a judgment has been issued following a written procedure?

16. Thus, there is no express basis for refusal which pertains to judgments which have been issued following a written procedure. The question which then arises is whether the provisions of Chapter 3, Section 4 (7) of the European Enforcement Act – regarding trials in which the sentenced person has not been personally present – are to be regarded such that they have in view also judgments which have been issued following a written procedure.

17. Sub-section (7) refers, as mentioned, to the conditions in Article 9 (1) (i) of the Framework Decision. Therein it is stated that recognition and enforcement of a sentence may be denied if the judgment has been issued in the absence of the sentenced person at the trial provided that certain information has not been provided by the requesting state in a certificate appended to the request. An annex to the Framework Decision states how the certificate is to be formulated.

18. The information which is to be provided is intended to ensure that the sentenced person was, in due time, either summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the judgment (Section 3.1a of the certificate) or by other means actually received official information of the scheduled date and place of the trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial (Section 3.1b of the certificate). According to section 3.1b, it is also necessary that the certificate state that the sentenced person was informed that a decision may be handed down if he or she does not appear for the trial.

19. Recognition and execution may also take place if the requesting state certifies the time when the sentenced person was served the decision and that the sentenced person was expressly informed of the right to a re-trial or appeal and regarding the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined. In addition, it must be certified that the sentenced person has not requested a re-trial or appeal within the applicable time frame. (See Section 3.3.)

20. Both the statutory text and the conditions of the Framework Decision thus describe a situation in which the judgment which is subject to assessment has been rendered following trial.

21. The European Court of Justice has had cause in several decisions to express itself regarding what is meant by *trial*. This has occurred in relation to an examination of the expression "trial resulting in the decision" in accordance with the similar Framework Decision regarding arrest warrants. In this context, reference may be made to the judgments of the European Court of Justice, *Tupikas and Zdziaszek*, C-271/17 PPU, EU:C:2017:629, the latter also issued on 10 August 2017.

22. However, the court's statements provide no basis for the assessment that what is stated in the grounds for refusal regarding trials where the sentenced

person did not appear in person, also has in view judgement rendered following a written procedure. It may be noted that both decisions involve situations in which the sentenced person had been summoned to appear in the proceedings at an oral hearing but failed to appear.

23. To this may be added the fact that the term *trial* in normal speech may be deemed to indicate deliberations, discussions or procedures with oral components. Linguistically, allowing the expression to include procedures which are exclusively in writing does not work as well. Such an augmentation of the purport of the expression would also be particularly difficult to reconcile with the requirements following from Chapter 3, Section 4 (7) of the European Enforcement Act and the conditions in the Framework Decision according to which, where applicable, a particular time and a particular place are to be stated.

24. The above leads to the conclusion that the basis for refusal in Chapter 3, Section 4 (7) of the European Enforcement Act may not be deemed to be applicable to a foreign judgment rendered after a written procedure.

Recognition and enforcement of a judgment rendered after a written procedure

25. As previously stated, the regime in the European Enforcement Act entails that a foreign judgment is to be recognised and enforced here in accordance with Chapter 3, Section 1 if the conditions of Chapter 3, Sections 2 and 3 are fulfilled and there are no grounds for refusal. This is in keeping with the principle regarding mutual recognition which supports the underlying Framework Decision.

26. A starting point for the Framework Decision regarding the recognition and enforcement – and for the similar Framework Decision – is not designed to regulate the forms and methods, including procedural requirements, that are used to achieve the results, which are a matter for the national laws of the

Member States (see Recital 4 of Framework Decision 2009/299/JHA). It is usually said that, in principle, procedural autonomy applies to the Member States. Written procedures occur also both in Sweden and other countries.

27. Thus, no examination of the written procedures over and above that which follows from the grounds for refusal in the European Enforcement Act is to take place.

28. However, the reservation needs to be made that the national trial which preceded a judgment which forms the basis for a request for recognition and enforcement must have been carried out with respect for the fundamental rights and principles reflected in the Charter of Fundamental Rights of the European Union (see paras. 8 and 9). However, concrete circumstances which make it possible to establish that the trial has been in contravention of the provisions of the Charter should nevertheless be a requirement in order to justify a refusal to acknowledge and enforce criminal law decisions from another Member State (*cf.* "The Romanian arrest warrant" case, case NJA 2020, p. 430, para. 15).

The assessment in this case

29. It is apparent from the certificate issued by the German prosecution authority that the German court has decided to convert three summary impositions of fines regarding day fines and a prison sentence to a combined term of imprisonment of one year and five months.

30. The court's decision regarding conversion has been issued in accordance with the rules of German criminal procedure. Accordingly, what is involved is a decision which has been issued by a court in criminal proceedings. It pertains to a Swedish citizen. The conditions for recognition and enforcement in accordance with Chapter 3, Section 1 of the European Enforcement Act are thus fulfilled.

31. It is apparent from supplemental information from the German prosecution authority that a written procedure has been involved. It is also apparent that BK was informed that a decision was imminent, that he had been afforded the possibility to comment in writing and that he has received the decision.

32. What the German prosecution authority has stated is to be accepted. There are no circumstances which indicate that BK's rights in accordance with the Charter have been disregarded (see para. 28).

33. Accordingly, the decision of the court of appeal shall be set aside and the decision of the district court shall be affirmed.

Justices of the Supreme Court Anders Eka, Dag Mattsson, Sten Andersson, Eric M. Runesson (reporting Justice) and Stefan Reimer participated in the ruling.

Judge referee: Emelie Hansell