

Supreme Court's DECISION

delivered in Stockholm on 04 April 2023

Case no.

Ö 8346-22

PARTIES

Appellant

RR

Counsel and Public Defender: Attorney RB

Respondent

Prosecutor General

Box 5553

114 85 Stockholm

THE MATTER

Leave to appeal to the court of appeal in a case regarding surrender in accordance with a European arrest warrant

RULING APPEALED

Judgment of the Svea Court of Appeal of 28/11/2022

THE SUPREME COURT'S DECISION

The Supreme Court declares that RR, an EU citizen, shall be equated with a Swedish citizen for the purposes of Chapter 2, Section 5, sixth paragraph of the Act (2003:1156) regarding surrender from Sweden under a European arrest warrant (*Lagen om överlämnande från Sverige enligt en europeisk arresteringsorder*).

In modifying the Court of Appeal's decision, the Supreme Court grants leave to appeal to the Court of Appeal.

RR shall remain in custody in the case.

RB shall receive compensation from public funds for the defence of RR in the Supreme Court in the amount of SEK 24,660. Of this amount, SEK 13,653 relates to labour, SEK 6,075 to loss of time and SEK 4,932 to VAT. The State shall bear the cost.

CLAIMS IN THE SUPREME COURT

RR has requested that the decision to surrender him to Poland for prosecution under the European arrest warrant be annulled.

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

Leave to appeal has been granted by the Supreme Court in accordance with what is stated in paragraph 4. Pending that examination, the question of whether to grant leave to appeal to the Court of Appeal is stayed.

REASONS FOR THE DECISION

Background

1. On 19 May 2022, the regional court in Łódź, Poland, issued a European arrest warrant for the surrender of Polish citizen RR for the prosecution of five crimes allegedly committed in Poland between 2006 and 2010.
2. The District Court decided that RR was to be handed over to Poland in accordance with the arrest warrant. The District Court noted that RR has been resident in Sweden for more than 10 years and that he works, pays taxes and has a family here. According to the District Court, his connection to Sweden is such that, as regards the enforcement of any sentence, he can be equated with a Swedish citizen upon a treaty-compliant interpretation of the provision in Chapter 3, Section 2 of the Act (2003:1156) regarding surrender from Sweden under a European arrest warrant (Act on the European arrest warrant). The District Court therefore made surrender conditional on his return to Sweden for enforcement of the sentence, in the event that he is convicted in Poland and sentenced to prison.
3. RR appealed the District Court's decision. The Court of Appeal has not granted leave to appeal.

At issue in the Supreme Court

4. On the basis of Chapter 54, Section 12a of the Code of Judicial Procedure, the Supreme Court has granted leave to appeal and decided that the court shall examine the question of whether RR, an EU citizen, shall be equated with a Swedish citizen when applying Chapter 2, Section 5, sixth paragraph of the Act on the European arrest warrant. This provision regulates cases where surrender may not be authorised due to the statute of limitations.

Regarding the Framework Decision

5. The European arrest warrant system was introduced by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (the Framework Decision). Its purpose was to establish a simplified and more efficient system within the European Union for the surrender of persons convicted or suspected of a criminal offence. The Framework Decision is based on the principle of mutual recognition. This means that a European arrest warrant issued in one Member State will, as a matter of principle, be recognised and executed in the other Member States without any further examination. A Member State may not refuse to recognise and execute an arrest warrant in cases other than those provided for in the Framework Decision (cf. Article 1(2) of the Framework Decision and the judgment of the European Court of Justice of 6 October 2009, *Wolzenburg*, C-123/08, EU:C:2009:616, para. 57).

6. In Sweden, the Framework Decision has been implemented mainly through the Act on the European arrest warrant.

Impediments to surrender due to the statute of limitations

7. According to Chapter 2, Section 5, sixth paragraph of the Act on the European arrest warrant, surrender may not be granted if the penalty for the offence is statute-barred or can no longer be imposed under Swedish law and the offence has taken place wholly or partly in Sweden, or the requested person is a Swedish citizen.

8. This ground for refusal stems from Article 4(4) of the Framework Decision, which states that the executing judicial authority may refuse to execute the arrest warrant if the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing

Member State and the acts fall within the jurisdiction of that Member State under its own criminal law.

9. In relation to the Framework Decision, the Swedish legislator has thus limited the ground for refusal to situations where the arrest warrant relates either to a Swedish national or where the offence has been committed in Sweden. In general, it is permissible to limit the scope of a ground for refusal (cf., e.g., CJEU judgment in *Wolzenburg*, para. 58 and 59).

10. A prerequisite for ensuring that the scope to refuse surrender under Chapter 2, Section 5, sixth paragraph of the Act on the European arrest warrant does not exceed what is permitted under the Framework Decision is that the offence falls within the jurisdiction of the Swedish court (cf. para. 8). This prerequisite is generally fulfilled, but it should be noted, *inter alia*, that Swedish jurisdiction over Swedish citizens is not without exception (cf. Chapter 2, Section 5 of the Swedish Criminal Code, which, read together with Chapter 2, Section 3, second paragraph of the same Code, generally requires double criminality for the exercise of jurisdiction).

The prohibition of discrimination on the basis of nationality under EU law

11. The Court of Justice of the European Union has stated in several judgments that the Member States, when incorporating Article 4(6) of the Framework Decision, must ensure that EU citizens are not treated differently on the basis of nationality in breach of the prohibition against discrimination presently found in Article 18 of the Treaty on the Functioning of the European Union (see, *inter alia*, the judgment of the Court of Justice of the European Union in *Wolzenburg*, para. 42-46, and the judgment of the Court of Justice of

the European Union of 5 September 2012, Lopes Da Silva Jorge, C-42/11, EU:C:2012:517, para. 39).

12. Article 4(6) of the Framework Decision states that surrender for enforcement may be refused if the requested person is staying in, is a citizen or resident of, the Member State, and the State undertakes to enforce the sentence itself. In the Lopes Da Silva Jorge case, the Court of Justice of the European Union held that a Member State may not, without infringing the principle of non-discrimination on the basis of nationality, limit the scope of the provision to its own nationals and thus exclude, without exception and automatically, EU citizens from other Member States from the scope of the ground for refusal (see, *inter alia*, para. 59).

13. Similarly, in the context of extradition to a non-EU country, the Court of Justice of the European Union has stated that a Member State is obliged to treat an EU citizen in the same way as its own citizens, provided that the citizen permanently resides in the Member State (see CJEU judgment of 13 November 2018, Raugevicius, C-247/17, EU:C:2018:898, pp. 45–48).

14. As indicated, no precedent of the Court of Justice of the European Union addresses a situation such as the one at hand in the case, i.e., where a Member State has restricted the application of the ground for refusal authorised by Article 4(4) to its own citizens alone. However, the precedent of the Court of Justice of the European Union, which has just been mentioned, is nevertheless relevant in assessing the situation.

The provision to be applied in compliance with the Treaty

15. The provision in Chapter 2, Section 5, sixth paragraph of the Act on the European arrest warrant entails that Swedish citizens are treated differently from citizens of other Member States. To avoid a breach of Article 18 of the

Treaty on the Functioning of the European Union, there must be objective reasons for such special treatment (see, e.g., CJEU judgment in *Wolzenburg*, p. 63).

16. The preparatory works for the Swedish provision states that the reason for limiting the ground for refusal regarding the statute of limitations to Swedish nationals is that, for Sweden, it was considered a major step to permit extradition of its citizens without a requirement of double criminality. It was therefore considered justifiable to retain the statute of limitations as an impediment to the surrender of Swedish nationals. (Govt. bill 2003/ 04:7 p. 88 et seq.)

17. Clearly, there are no acceptable reasons, from the point of view of EU law, for restricting the application of Chapter 2, Section 5, sixth paragraph to Swedish citizens, either with regard to what has been stated in the preparatory works or for any other reason. The provision must therefore—in order to avoid results that are incompatible with the Treaty—be applied in conformity with the Treaty (cf. “Extradition of the Union citizen I” NJA 2019 p. 377 para. 21 & 22).

18. This entails that EU citizens must be treated in the same way as Swedish citizens when applying Chapter 2, Section 5, sixth paragraph. There are no reasons here—unlike in cases involving the application of, for example, Chapter 3, Section 2—to require an EU citizen to have a special connection to Sweden.

19. At the same time, there is reason to recall that Chapter 2, Section 5, sixth paragraph may not be applied in such a way that surrender is refused in more cases than permitted by Article 4(4) of the Framework Decision (cf. para. 5). Since the Article’s ground for refusal presupposes jurisdiction, on the part of the executing Member State, over the offences to which the arrest

warrant pertains, Swedish courts must, when applying Chapter 2, Section 5, sixth paragraph, also examine whether the offences fall within Swedish jurisdiction.

The assessment in this case

20. RR is an EU citizen, and the prohibition of discrimination under EU law applies when examining the question of surrender. This means that he is to be equated with a Swedish citizen when applying Chapter 2, Section 5, sixth paragraph of the Act on the European arrest warrant.

21. With reference to the assessment now made, leave to appeal to the Court of Appeal is to be granted.

22. There is no reason at present to assess otherwise than that RR shall remain in custody in the case.

Justices of the Supreme Court Anders Eka, Stefan Johansson,
Petter Asp (reporting Justice), Cecilia Renfors and Christine Lager
Judge referee: Hanna Hallonsten