STREAM Research Brief Sweden

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2023

Document Version:
Förlagets slutgiltiga version

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Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant

UPDATE

Research Brief

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This report was funded by the European Union's Justice Programme (2014-2020). It has been prepared in the context of the STREAM project (JUST AG 101007485). The content of this report represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Introduction

The Supreme Court of Sweden handed down, on 4 April 2023, a decision[1] in a case dealing with the European arrest warrant. This decision is significant not only for the conclusion that the Supreme Court draws on specific points of law; it also shows an emerging general approach by the Supreme Court on matters in the field concerning EU criminal law and has the potential for considerable impact on the treatment of EU criminal law by courts in Sweden. The case started, however, as a routine procedure pertaining to a European arrest warrant for surrender to Poland for the purpose of prosecution.

The European arrest warrant and the proceeding at the district court

The European arrest warrant was issued on 19 May 2022 by Sąd Okręgowy w Łodzi (The Regional Court in Łódź), a competent judicial authority for this purpose, for the surrender of RR to Poland for the prosecution of five offences involving drug trafficking, various narcotic offences, vehicle-related crimes and other property crimes including attempted robbery, while participating in an organized criminal group. All of the offences were alleged to have been committed between 2006 and 2010.[2]

According to Act (2003:1156) on surrender from Sweden pursuant to a European arrest warrant ("the EAW Act"), double criminality is imposed as a general mandatory requirement for surrender (ch. 2 sec. 1 para. 1 EAW Act). This requirement is fulfilled with respect to four of the five offences stated in the arrest warrant. The offence of participation in an organized criminal group according to Article 258 § 1 of the Polish Criminal Code does not, however, correspond to a Swedish criminal offence. In the arrest warrant it is indicated, however, that the offence constitutes "participation in an organized criminal group or organization, whose purpose is to commit offences", being one of the offences, according to Article 2(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD-EAW), for which the requirement of double criminality shall not apply, if an offence is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as it is defined by the law of the issuing Member State. In the case of the offence in question, Polish law prescribes a maximum of five years' imprisonment. This means that, under Swedish law, the requirement of double criminality is removed according to ch. 2 sec. 1 para. 2 EAW Act. So far this has only involved a routine application of EU and Swedish law. No issues have been raised on the application of any ground for non-execution of the arrest warrant.

1 Supreme Court, decision of 4 April 2023 in case no. Ö 8346-22 "*Unionsmedborgaren och preskriptionshindret*" [Eng. "EU-citizen and statute of limitation"].

2 See the European arrest warrant (hereafter "the arrest warrant") included as an appendix to the decision of the district court in Södertälje of 28.10.2022 in case no. B 2945-22.

However, RR made a request that he, if he were convicted for the offences, be returned to Sweden for the enforcement of the sentence as a result of the criminal proceedings in Poland.

Under both EU law (Article 5(3) FD-EAW) and Swedish law (ch. 3 sec. 2 EAW Act), surrender of a specific category of persons may be subject to the condition that the person, after the trial in the issuing Member State, is returned to the executing Member State in order to serve, there, the custodial sentence or detention order passed against him in the issuing Member State. In these cases, a guarantee by the issuing Member State to return the person is a condition for the surrender. This should not be a problem with respect to RR if Sweden had chosen to apply the optional requirement of guarantee permitted by FD-EAW, as the specific category of persons in that context covers a national or resident of the executing Member State. However, Sweden has chosen to transpose FD-EAW in a narrower way and restricted the application of the guarantee requirement to Swedish nationals. RR, who is a Polish citizen, will therefore not be able benefit from this special treatment on a literal interpretation of the Swedish law. The matter will in most cases end there as the district courts in Swedish, as shown by the research carried for the Country Report, are reluctant to depart from a literal interpretation of the Swedish law.

The district court pointed out, however, that the guarantee requirement in Article 5(3) FD-EAW applies not only to nationals but also residents of the executing Member State. The district court did not clarify the significance of this provision in the application of Swedish law, but presumably, this reference to Article 5(3) was meant to convey the idea that the court's solution to the issue here was in line with the spirit of EU law.

The district court then applied an interpretation of the Swedish provision that, in its view, would conform to the requirement of EU law. In this connection, the district court noted that RR had been a resident of Sweden for over a decade, he paid taxes and had his family here in the country. He should therefore be treated as a Swedish national for the purpose of the application of ch. 3 sec. 2 EAW Act. The district court decided, therefore, to approve the execution of the European arrest warrant subject to a guarantee being provided by the issuing judicial authority, that RR be returned to Sweden for the enforcement of sentence.

When reaching its conclusion, the district court did not refer to any case law of the CJEU. Instead, the district court based its finding solely on a precedent of the Swedish Supreme Court, NJA 2019 s. 377 "*Utlämningen av unionsmedborgaren I*" (Eng. "Extradition of EU citizen I").

In that case, the Swedish Supreme Court held that the principle established by the CJEU in cases such as *Petruhhin*[3] and *Raugevicius*[4] should be applied when interpreting sec. 2[5] of the Swedish Extradition Act (1957:668), the law to be applied for the extradition of a person to a State other

3 Case C-182/15 *Petruhhin*, judgment [GC] of 6.9.2016, EU:C:2016:630

4 Case C-247/17 *Raugevicius*, judgment [GC] of 13.11.2018, EU:C:2018:898

5 Sec. 2 of the Extradition Act provides for an absolute prohibition of extradition of Swedish nationals.

than an EU Member State, a Nordic State or the United Kingdom, hereafter a "third State". In *Extradition of EU Citizen I*, the Supreme Court holds in essence that a request for extradition of an EU citizen shall not be granted unless the Swedish authorities have attempted to identify and adopt less intrusive measures (such as the prosecution of the offence or enforcement of sentence in Sweden, or the surrender of the requested person to the EU Member State of which he or she is a citizen), as long as that EU citizen is well-established in Sweden and for that reason should not be treated differently when compared to a Swedish citizen.

The district court has thus, consciously or unconsciously, applied the Supreme Court precedent to a totally different situation. A basic premiss behind *Extradition of EU Citizen I*, and the CJEU cases mentioned above, is that extradition to a third State is by definition a more intrusive measure than surrender to an EU Member State, and that is why EU citizens well-established in the requested State should not be treated less favourably than citizens of that State. In a situation involving a European arrest warrant, the surrender is by definition between EU Member States, and citizens are presumed to be able to enjoy the same rights in all Member States. For this reason, it is submitted that the district court has erred in the application of *Extradition of EU Citizen I* (and the corresponding CJEU case law) to the case at hand, or at least, that it has failed to provide sufficient reasons for the application of a precedent on extradition to third States to a situation concerning the surrender of a person to an EU Member State pursuant to a European arrest warrant.

Appeal to the Court of Appeal

RR appealed the district court's decision to the Court of Appeal, presumably against the decision to surrender, as such, and not the decision on the guarantee requirement.[6] A leave of appeal is required before the appeal is heard by the Court of Appeal. Leave of appeal shall be granted, pursuant to ch. 49 sec. 14 Code of Judicial Procedure (1942:740) if

- there is reason to question the correctness of the conclusion of the district court;
- it is impossible to determine whether the conclusion of the district court is correct without granting leave of appeal;
- it is of value for guiding the application of law that the appeal be heard by a higher court; or
- there are exceptional reasons to hear the appeal.

The Court of Appeal refused to grant leave of appeal in the present case, stating simply that it had examined the case and did not find reason to grant leave of appeal. The decision of the Supreme Court (see next section) examined in this Country Briefing Note is the decision on the

6 It is not apparent from the decision of the Court of Appeal (Svea Court of Appeal, decision of 28.11.2022 in case B 13536-22) what questions have been the subject of RR's appeal. In this connection it may be mentioned according to ch. 5 sec. 9 para. 1 EAW Act a decision not to execute a European arrest warrant is not subject to appeal by the prosecutor. The EAW Act does not contain an explicit rule on whether the prosecutor can appeal the district court's decision to impose a guarantee requirement.

appeal to the Supreme Court of the decision by the Court of Appeal not to grant leave of appeal.[7] The Supreme Court's decision is thus not a judgment finally disposing of the matter and it is not out of the question that the case will come up to the Supreme Court again when the Court of Appeal has ruled on the appeal.

Decision of the Supreme Court

The reason for the Supreme Court's decision to hear the appeal against the Court of Appeal's refusal to grant leave of appeal is that the Court finds that it is of importance, for precedential reasons, to answer the question whether an EU citizen should be treated as Swedish citizen for the purpose of the application of point 6 of ch. 2 sec. 5 EWA Act involving the statute of limitation.[8] The first question that one would ask is why the above mentioned provision of the EWA Act is the key issue for the Supreme Court's consideration since that provision has not been raised at all in the proceedings at the district court and the Court of Appeal. The Supreme Court did not provide an explicit explanation for this treatment. To understand why the Supreme Court has chosen to examine the relevance of the statute of limitation one must depart from the subject of appeal, viz. that the applicant requests that the Court of Appeal overturn the district court's decision to surrender him to Poland without stating for what reasons his appeal is grounded. Following the principle of *curia novit jura*, the Court of Appeal could have reviewed the district court's decision based on all facts presented in the case, even though a relevant legal ground has not been considered by the district court, nor has it been adduced by any of the parties. It is against this background that the Supreme court's decision to examine the issue of statute of limitation must be understood. In taking up this appeal the Supreme Court must have seen the relevance of the statute of limitation for the disposition of the case. In order to see the relevance of this, it is necessary to go back to the case material and pay attention to some details that have not been considered at the district court and the Court of Appeal.

According to the arrest warrant, the maximum penalties of the offences subject to the surrender procedure range from five to twelve years' imprisonment and the prosecution of these offences will be statute-barred between June 2037 and 31 December 2040.[9] However, as a ground for non-execution of a European arrest warrant the statute of limitation according to Polish law is irrelevant. Instead, it is the statute of limitation according to the law of the executing Member State that forms the point of departure for non/execution. The Swedish courts should therefore apply their judicial knowledge to the offences stated in the arrest warrant.

7 The procedure used here is a rule (ch. 54 sec. 12 a Code of Judicial Procedure) on the determination of a question of importance for precedential reasons which enables the Supreme Court to rule on that question, before granting leave of appeal for the Court of Appeal.

8 See ¶ 4, *EU-citizen and statute of limitation*.

9 See section C.1 and section F of the arrest warrant.

If the drug trafficking and narcotic offences were deemed to be standard offences (*narkotikabrott av normalgraden*) under Swedish law, the maximum penalty would be imprisonment for three years,[10] while the maximum penalty for a gross offence (*grovt narkotikabrott*) would be imprisonment for seven years.[11] In both cases, prosecution of these offences will be statute-barred ten years after the date of the offence.[12] However, if the offences were deemed to be particularly gross (*synnerligen grovt narkotikabrott*), the maximum penalty would be ten years,[13] which means that prosecution will be statute-barred first fifteen years after the date of the offence.[14] For property offences, including attempted robbery, similar periods of ten or fifteen years apply depending on whether the offence is deemed as gross.[15] In the case at hand, prosecution of all of the offences alleged to have been committed in 2006 and 2007 would be statute-barred, while prosecution of offences alleged to have been committed closer to 2010 would also have become statute-barred by 2020, unless they were deemed to be particularly gross offences, in which case prosecution would be statute-barred sometime around 2025. From the description of the offences in the arrest warrant, none of the alleged conduct appears to be of such severity that it would entail a limitation period of fifteen year. In other words, prosecution of all of the offences specified in the European arrest warrant would be, or would very likely be, statute-barred according to Swedish law.[16] Given these facts, it is therefore of enormous importance to examine whether the optional ground of non-execution based on the statute of limitation is applicable in the present case.

According to point 4 of Article 4(4) FD-EWA, Member States may impose an optional ground for non-execution of a European arrest warrant where 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. Sweden chose however not to make use of this optional ground for non-execution to its full extent and restricted the application of this ground for non-execution only to cases where the offence was committed on Swedish territory or where the requested person is a Swedish national.[17] In the context of the present case, a literal interpretation of the Swedish statutory text, i.e. point 6 of ch. 2 sec. 5 EAW Act, entails that a Swedish nationals – and only Swedish nationals – may not be surrendered for offences that would have statute-barred according to

10 Sec. 1 para. 1 Narcotic Offences Act (1968:64)

11 Sec. 3 para. 1 Narcotic Offences Act (1968:64)

12 Ch. 35 sec. 1 point 3 Penal Code (1962:700)

13 Sec. 3 para. 2 Narcotic Offences Act (1968:64)

14 Ch. 35 sec. 1 point 4 Penal Code (1962:700)

15 For details see ch. 8 sec. 1–6 Penal Code (1962:700) with regarding the penalties for various categories of property offence and ch. 35 sec. 1 Penal Code (1962:700) for limitation periods.

16 It should be added that the Supreme Court did not actually examine the question whether the offences stated in the arrest warrant were in fact statute-barred; this would be the task of the Court of Appeal when it examines case after granting leave of appeal.

17 The relevant Swedish statutory text is point 6 of ch. 2 sec. 5 EAW Act, which reads as follows: "Surrender may not be granted in respect of an offence if … penalty has expired imposed due to the statute of limitation or can no longer be imposed according to Swedish law *and* the offence has been committed, in whole or in part, on Swedish territory, *or* when the requested person is a Swedish national" (own translation with italics and underscore added for emphasis).

the Swedish statute of limitation. The question, then, is whether an EU citizen should be afforded equivalent protection as a Swedish national.

The Supreme Court has not identified any relevant CJEU case law on the specific question of a nationality criterion in connection with Article 4(4) FR-EAW. What it has identified, instead, are cases dealing with the special treatment of own nationals in connection with Article 4(6) FR-EAW and the prohibition of discrimination according to Article 18 TFEU. The Supreme Court referred to both *Wolzenburg*[18] and *Lopes Da Silva Jorge*[19] in support of the principle that EU-citizens should be afforded equivalent protection as a Member State's own nationals. To support this line of thought, the Supreme Court also pointed to a similar principle established by the CJEU's in *Raugevicius*[20] with regard to extradition of EU-citizens to third States. On the basis of this reasoning, the Supreme Court was prepared to conclude that EU law would preclude disparate treatment of EU-citizens even with respect to the application of Article 4(4) FR-EAW without feeling the need to request a preliminary ruling from the CJEU on the issue. Having stated what EU law requires, the Supreme Court then went on to rule that point 6 of ch. 2 sec. 5 EAW Act must be interpreted in conformity with the Court has determined as EU law. Such an interpretation would entail that when applying point 6 of the Swedish provision, no distinction could be made between a Swedish national and other EU-citizens.[21] The Supreme Court also pointed out that this interpretation of the Swedish law applies to all EU-citizens. In the Court's view, there is no reason why there should be an additional requirement that the EU-citizen is well-established in Sweden.[22] If this interpretation is followed in the case at hand, the Swedish court would have to refuse to execute the European arrest warrant for the surrender of RR.

The Supreme Court pointed out, however, that there is another aspect to point 6 of ch. 2 sec. 5 EAW Act. The text of the Swedish statute does not explicitly require that Swedish courts must have jurisdiction over an offence if an exception to the obligation to surrender is based on the statute of limitation. However, the Supreme Court reminded us of the text of Article 4(4) FR-EAW, which clearly presupposes that "the acts fall within the jurisdiction of that Member State under its own criminal law" when the statute-bar exception is applied. This means that the Swedish courts, when applying point 6 of ch. 2 sec. 5 EAW Act, must read in the condition that the offence must be subject to Swedish jurisdiction. In the present case, the statute-bar exception may be rendered inapplicable in one of the five offences stated in the arrest warrant as Swedish courts would not have jurisdiction over that offence.

After giving an interpretation of point 6 of ch. 2 sec. 5 EAW Act, the Supreme Court granted leave of appeal for the case to be heard by the Court of Appeal. Although the Supreme Court

18 Case C-123/08 *Wolzenburg*, judgement [GC] of 6.10.2009, EU:C:2009:616

19 Case C-123/08 *Lopes Da Silva Jorge*, judgement [GC] of 5.9.2012, EU:C:2012:517

20 *Raugevicius* (note 4 *supra*)

21 See 17–18, *EU-citizen and statute of limitation*.

22 See 18, *EU-citizen and statute of limitation*. Cf., on the other hand, the application of Article 5(3) FD-EAW, which would require a close link with Sweden.

only pronounced on questions of law, the practical effect of the Supreme Court's decision is a directive to the court below how to judge the issues in the present case.

By focusing exclusively on ch. 2 sec. 5 EAW Act, the Supreme Court did not rule explicitly on the basis on which the district court based its decision to execute the European arrest warrant, viz. the requirement of a guarantee to return RR to Sweden for the enforcement of sentence, based on ch. 2 sec. 5 EAW Act, which has its basis in Article 5(3) FD-EAW. If one must speculate, however, it is likely that the Supreme Court would not object to the condition of return to Sweden for enforcement of sentence in the event that the person is surrendered, as this is in conformity with the principle of equivalent treatment of EU-citizens.

Determination of the Appeal

After the Supreme Court's grant of leave of appeal, the case was heard by the Court of Appeal.[23] The Court of Appeal applied the statute-of-limitation exception to four of the five offences stated in the arrest warrant and decided that RR could not be surrendered for those offences since they were all statute-barred. For the remaining offence of "participation in an organized criminal group", Swedish courts have no jurisdiction. In fact, this is not even a criminal offence according to Swedish law and surrender to Poland for this crime is possible only due to the "list offence"-exception.[24]

The only contentious issue at the Court of Appeal pertains to surrender for the offence of participation in an organized criminal group. A new objection is raised by reference to point 7 of ch. 2 sec. 5 EAW Act, which prescribes that surrender shall not be granted for an offence committed, in whole or in part, on the territory of Sweden and that this is not a punishable offence according to Swedish law. This provision reinstates, in effect, the requirement of double criminality with regard to "list offences". RR argues that he has been resident in Sweden during the period in which he is alleged to have committed the Polish offence, which would mean that the offence was committed in part on Swedish territory and would thus trigger point 7 of ch. 2 sec. 5 EAW Act. However, the Court of Appeal dismissed RR's argument by simply referring to the statement in the arrest warrant that the offence was committed in Poland and not in

23 Decision of Svea Court of Appeal of 4.5.2023 in case no. B 4425-23. This decision has, at the time of writing, not yet acquired final force and can be appealed to the Supreme Court by 2 June 2023.

24 See discussion under "The Supreme Court of Sweden handed down, on 4 April 2023, a decision in a case dealing with the European arrest warrant. This decision is significant not only for the conclusion that the Supreme Court draws on specific points of law; it also shows an emerging general approach by the Supreme Court on matters in the field concerning EU criminal law and has the potential for considerable impact on the treatment of EU criminal law by courts in Sweden. The case started, however, as a routine procedure pertaining to a European arrest warrant for surrender to Poland for the purpose of prosecution.

" *supra*.

Sweden. The principle of mutual recognition and mutual trust can therefore be said to have been applied here, blindly. The outcome of the case is that RR shall be surrendered to Poland, but only for the offence of participation in an organized criminal group. The Court of Appeal also found that the surrender shall be subject to a guarantee being given by the Polish authorities to return RR to Sweden for enforcement of sentence.

Implication of the Supreme Court decision

As the above account has shown, the Swedish Supreme Court has been quite prepared to intervene in a case when the facts show that a question of EU law is involved in the solution of a concrete case. This preparedness stretches in fact to the extent that even when an issue has not been raised in the courts below, the Supreme Court, following the principle of *curia novit jura*, would on its own initiative supply the case with the relevant legal rule necessary for the resolution of the legal problem at hand. This judicial intervention is not a common phenomenon in the Swedish legal system, and the fact that the Supreme Court has intervened in this case may create an expectation that, in future, the Supreme Court would do likewise. Indirectly, this would then exert pressure on courts of appeal too, when they decide on appeals when the relevant legal questions have not been at the district court. It remains to be seen, however, whether the the activity approach taken by the Supreme Court taken in present case is an unique occurrence, or whether it is beginning of a trend. In the case at hand, the intervention by the Supreme Court leads to a favourable outcome from the point of view of RR, the requested person; the Supreme Court's intervention would, therefore, not have an adverse effect on the human rights of the person concerned. It may be questioned, however, whether an impartial court will be able to supply relevant legal rules even though they have not been raised by the parties (or a lower court), if the effect would be detrimental to the person subject to a European arrest warrant. In practice, the problem of unfairness to the requested person may be avoided given the wide discretion of the Supreme Court in the selection of cases to take up on grounds of interest of precedence.

It is also apparent from the account given above, that the Supreme Court's approach has been extremely “EU-law friendly”, and in two different respects.

Firstly, the Supreme Court has made it abundantly clear that EU law is relevant for the interpretation and application of Swedish statutory texts. In routine cases, the literal meaning of a statute and the guidance given in the preparatory work in the legislative process are the two most important factors taken into consideration when determining the meaning of a statute. In this respect, the intention of the legislator occupies a particularly important place and the interpretation will usually be chosen, that gives effect to legislative intent. But in EU-citizen and statute of limitation, the Supreme Court has given priority to conformity with EU law over conformity with guidance given in the preparatory work. Thus, the Supreme Court has let the principle of non-discrimination of EU-citizens to override the clear intention of the legislator to provide Swedish nationals with some form of special treatment. The Supreme Court has thus confirmed the approach that EU law is an organic part of Swedish law, that

Swedish statutes should be interpreted in conformity with EU law and that the principle of supremacy of EU law would steer the application of Swedish law.

Secondly, having established the relevance of EU law, the Supreme Court has been willing to apply EU law generously, in such a way that due weight is given to the principles of EU law as illustrated through the CJEU's case law as well as to the inherent logic behind secondary EU legislation such as FD-EAW. We have seen that, in the present case, such consideration has necessitated the "reading in" of the requirement of the Swedish court's jurisdiction in the Swedish provision on the exception based on statute of limitation.

One final observation can be made on the Supreme Court's handling of the present case. The Supreme Court admitted itself that there is no case law of the CJEU that is directly applicable to the situation arising from the case, albeit that case law does exist in adjacent areas. Given that there is no definitive answer to a question of EU law, it is not unreasonable to ask whether the Supreme Court should have made a request for a preliminary ruling from the CJEU. In the main Country Report, the reluctance of Swedish courts to request preliminary rulings has been raised as an issue and the Supreme Court's approach in *EU-citizen and statute of limitation* has confirmed this reluctance.