

**Case C-78/20****Request for a preliminary ruling****Date lodged:**

14 February 2020

**Referring court:**

Najvyšší súd Slovenskej republiky (Slovakia)

**Date of the decision to refer:**

26 November 2019

**Parties to the national proceedings:**

M.B.

and

Generálna prokuratúra Slovenskej republiky

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**Najvyšší súd****Slovenskej republiky**

...

**ORDER**

The Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) ... in criminal proceedings against **M.B.** — the requested person — for the crime of murder within the meaning of Paragraph 75 of the Austrian Criminal Code, at a hearing in closed session held in Bratislava on 26 November 2019,

**has decided as follows:**

Pursuant to Paragraph 318(1) of the Trestný poriadok (Slovak Code of Criminal Procedure), in conjunction with Article 244(1) thereof, the proceedings concerning the European arrest warrant issued on 15 November 2017 by the public prosecutor's office in Graz, Republic of Austria, file number ..., against M.B., a national of the Slovak Republic, **are stayed and an order for reference is made to the Court of Justice of the European Union** concerning the interpretation of Articles 1(1), 6(1), 8(1) and 15(2) and (3) of Council Framework

Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 [(OJ 2009 L 81 ('the Framework Decision'))].

### Grounds

(1) By order of 17 January 2019, ... in conjunction with correcting order of 21 February 2019 made under the same file reference number, the Krajský súd v Trnave (Regional Court, Trnava, Slovak Republic) ordered, pursuant to Paragraph 22(1) of Zákon č. 154/2010 Z. z. o európskom zatýkacom rozkaze (Law No 154/2010 on the European arrest warrant), as amended ('the Law on the EAW') that the European arrest warrant issued by the public prosecutor's office in Graz, Republic of Austria, on 15 November 2017 ... against M.B., be executed for the purposes of the criminal prosecution of him for the crime of murder within the meaning of Paragraph 75 of the Austrian Criminal Code, in the form of direct perpetration, [Or. 2], under the first alternative of Paragraph 12 of the Austrian Criminal Code, which he is alleged to have committed in the following factual circumstances:

(1) M.B. and M.D., acting consciously and jointly as direct perpetrators, deliberately killed a person by the name of G.V., in the municipality of S. on 14 July 2001, by inflicting a wound to his spinal cord with a knife and a gunshot wound to his head with a pistol;

(2) At an unspecified time before 14 July 2001, L.B. commissioned M.B. and M.D. to commit the act described in paragraph 1 by asking them to kill G.V.;

(3) At an unspecified time before 14 July 2001, I.P. contributed to the commission of the act described in paragraph 1 by making available to M.B. and M.D. a pistol, and also a car, and drawing up a specific plan for the commission of the act.

(2) Immediately after that order was made, M.B., as the requested person, appealed against it through his chosen defending counsel. In his additional statement of reasons the appellant argues inter alia that the prosecuting authorities are still conducting criminal proceedings against him in Austria in which the act does not involve a financial motive, which corresponds to the legal classification of the offence of murder within the meaning of Paragraph 219(1) of the Trestný Zákon (Criminal Code) in force until 31 December 2005, which, however, would be time-barred under the law of the Slovak Republic. As a further ground of appeal, he states that there is a ground in this case for obligatory non-execution of the European arrest warrant under Paragraph 23(1)(d) of the Law on the EAW, namely that the criminal prosecution in connection with which the execution of a European warrant is requested is time-barred. In so far as the court of first instance did not uphold that plea, as it held that the act could not be classified legally as an offence of murder within the meaning of Paragraph 219(1) of the

Criminal Code in force until 31 December 2005 (the limitation period for which is 10 years), but as an offence of murder within the meaning of Article 219[(2)](h) of the Criminal Code in force until 31 December 2005 (the limitation period for which is 20 years), and in this respect relied on a letter from the public prosecutor's office in Graz of 10 January 2018 showing that the motive for the act was to obtain a life assurance policy and therefore held that there is a financial motive which provides grounds for an 'aggravated' classification of the offence with a longer limitation period, the appellant does not agree with that position taken by the Krajský súd (Regional court). In that regard, he argued that the public prosecutor in Graz specified the act (by extending it to include a financial motive), but that action was not endorsed by the regional court in Graz. In the view of the applicant, it is not permissible for the public prosecutor to change the classification of the act without the court also 'accepting' that action. In this regard, he assumed that if national law requires that a European arrest warrant issued [Or. 3] by a public prosecutor's office must also be endorsed by the Austrian court, it is also necessary, in his view, to do so where facts of decisive importance to the execution of the European arrest warrant are supplemented.

(3) On the basis of the above appeal, which was lodged good time by the requested person, the Najvyšší súd Slovenskej republiky (the Supreme Court of the Slovak Republic; 'the Supreme Court'), examining the accuracy of the findings in the contested order disputed by the appellant, and the earlier proceedings, found as follows.

(4) On 15 November 2017, the public prosecutor's office in Graz, Republic of Austria issued ... a European arrest warrant against M.B., a national of the Slovak Republic, for the purposes of the criminal prosecution of him for the suspected crime of murder within the meaning of Paragraph 75 of the Austrian Criminal Code, which he allegedly committed in the form of direct perpetration under the first alternative in Paragraph 12 of the Austrian Criminal Code, in that M.B. and M.D., acting consciously, intentionally and jointly as direct perpetrators, deliberately killed a person by the name of G.V., in the municipality of S. on 14 July 2001, by inflicting a wound to his spinal cord with a knife and a gunshot wound to his head with a pistol. That European arrest warrant was permitted (endorsed) on the grounds set out therein by order of the Landesgericht für Strafsachen Graz (Criminal Court, Graz) of 20 November 2017.

(5) Subsequently, at the request of the regional procurator's office in Trnava of 4 January 2018, the procurator's office in Graz announced, by letter of 10 January 2018, inter alia that the motive for committing the act could be seen in a lucrative assurance policy which the murder victim had taken out in favour of L.B., the daughter of his former life partner L.B. According to the procurator's office in Graz, the investigation had revealed that L.B. ordered the murder for which she hired M.B., her sister's former boyfriend, and M.D., who together committed the murder for which they were to receive a share of the life assurance policy.

(6) Under Paragraph 3(d), (e), (g) and (k) of the Law on the EAW, for the purposes of that law the following terms are to have the following meanings: [(d)] European arrest warrant — a decision issued by a judicial authority of a Member State with a view to the detention and surrender of the requested person to that Member State from another Member State, for the purposes of conducting a criminal prosecution or executing a custodial sentence, [(e)] issuing Member State — the Member State whose judicial authority issued the European arrest warrant, [(g)] judicial authority of the issuing Member State — the judicial authority of the Member State which is entitled to issue a European arrest warrant in accordance with its law, and [(k)] other documents — documents issued or requested by a judicial authority of the issuing Member State or by an executing judicial authority in European arrest warrant proceedings other than a European arrest warrant, **[Or. 4]** a request for additional consent and a request for subsequent surrender; additional information communicated or requested by a judicial authority of the issuing Member State or executing judicial authority for the purposes of supplementing the obligatory elements of the European arrest warrant are not to be regarded as other documents.

Under Paragraph 19(5) of the Law on the EAW, if information provided by the judicial authority of the issuing Member State in the European arrest warrant is not sufficient to adopt a decision on its enforcement, in particular where the European arrest warrant does not contain all the obligatory elements and data necessary for the issue of the decision, or if it is obvious that it was issued by a judicial authority which was not competent to do so, or if the legal assessment of the act as an offence subject to surrender but not subject to verification of double criminality is clearly erroneous, the public prosecutor is to ask the judicial authority of the issuing Member State for additional information. It may also set an appropriate time limit for communicating that information, having regard to the time limits for issuing a decision on the execution of the European arrest warrant under Paragraph 24.

Under Article 22(4) of the Law on the EAW, where it is established in the course of the proceedings that there are grounds for refusing to execute a European arrest warrant under Paragraph 23(1), the court is to decide not to enforce the European arrest warrant. Where it is established in the course of proceedings that there is a ground for refusal as referred to in Paragraph 23(2), the court may decide not to execute the European arrest warrant.

Under Paragraph 23(1)(e) of the Law on the EAW, implementation of the European arrest warrant is to be refused where the executing judicial authority finds that under Slovak law the criminal proceedings or the enforcement of a custodial sentence in respect of the requested person is time-barred and that prosecution of the offence falls within the jurisdiction of the Slovak authorities under the law of the Slovak Republic.

Under Paragraph 16(1) of the Trestný zákon (Criminal Code) [Zákon č. 140/1961 (Law No 140/1961), in the version in force until 1 August 2001 ('the Criminal

Code’)], the criminality of an act is to be assessed in the light of the law in force at the time the act is committed; it is to be assessed in the light of subsequent law only if it is more favourable to the perpetrator.

Under Paragraph 18 of the Criminal Code, the criminality of an act committed abroad by a national of the Slovak Republic or stateless person **[Or. 5]** ordinarily resident in the territory of the Slovak Republic, or by a foreign national ordinarily resident in the territory of the Slovak Republic, is also to be assessed under Slovak law.

Under Paragraph 67(1)(a) and (b) of the Criminal Code, the criminality of an act is to cease on the expiry of the limitation period which is to be [(a)] twenty years in the case of an offence for which that law specifically permits an exceptional penalty to be imposed and [(b)], ten years where the maximum custodial sentence is at least 10 years.

Under Paragraph 219(1) of the Criminal Code, any person who intentionally kills another person is to be liable to a custodial sentence of between 10 and 15 years.

Under Paragraph 219(2)(h) of the Criminal Code, a perpetrator who commits an act referred to in subparagraph 1 with the aim of obtaining financial profit or concealing or facilitating the commission of another offence, or for other particularly reprehensible reasons, is to be liable to a custodial sentence of between 12 and 15 years.

Under Article 1(1) of the Framework Decision, the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

Under Article 6(1) of the Framework Decision, the issuing judicial authority is to be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

Under Article 8(1)(d) and (e) of the Framework Decision, the European arrest warrant is to contain the following information set out in accordance with the form contained in the Annex: [(d)] the nature and legal classification of the offence, particularly in respect of Article 2; [(e)] a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;

Under Article 15(2) of the Framework Decision, if the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it is to request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to **[Or. 6]** observe the time limits set

in Article 17. Under Article 15(3), the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.

In its judgment of 27 May 2019, *OG and PI* (Public Prosecutors of Lübeck and Zwickau), C-508/18 and C-82/19 PPU, EU:C:2019:456, the Court of Justice of the European Union ruled that the concept of an ‘issuing judicial authority’, within the meaning of Article 6(1) of Framework Decision 2002/584 must be interpreted as not including public prosecutors’ offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.

In its judgment of 9 October 2019, *NJ*, C-489/19 PPU, EU:C:2019:849, the Court of Justice held that the concept of a ‘European arrest warrant’ referred to in Article 1(1) of Framework Decision 2002/584 must be interpreted as meaning that European arrest warrants issued by the public prosecutor’s offices of a Member State fall within that concept, despite the fact that those public prosecutor’s offices are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in the context of the issue of those arrest warrants, provided that those arrest warrants are subject, in order to be transmitted by those public prosecutor’s offices, to endorsement by a court which reviews independently and objectively, having access to the entire criminal file to which any specific directions or instructions from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form.

(8) In the light of the above, the Supreme Court is in no doubt that the European arrest warrant issued against the appellant by the public prosecutor’s office in Graz, and subsequently endorsed by the criminal court in Graz, constitutes a European arrest warrant within the meaning of Article 1(1) of the Framework Decision. However, on the basis of the description of the circumstances in which the offence, for which the European arrest warrant was issued against the appellant, was allegedly committed, as set out in the European arrest warrant endorsed by the court, the criminal prosecution of the person requested is time-barred under the law of the Slovak Republic. In this regard, the court of first instance reached the opposite conclusion solely on the basis of the additional information provided by the public prosecutor’s office in Graz, but without it having been approved by the competent court, which substantially supplements the description of the act, in such a way that the requested person is alleged to have committed an offence with the aim of [Or.7] of obtaining financial benefit. Since the Austrian public prosecutors’ offices do not meet the requirement of objectivity and independence as regards the issue of a European arrest warrant (judgment of the Court of Justice of the European Union of 9 October 2019, *NJ*, C-489/19 PPU, EU:C:2019:849, paragraph 40), the Supreme Court also considers legitimate the question raised by the appellant in those proceedings, namely whether or not the additional information communicated by the Austrian public

prosecutor's office should also be subject to endorsement by the Austrian court, where, for the purposes of the decision of the executing judicial authority, it substantially supplements, or possibly changes, the content of the arrest warrant endorsed by the court.

(9) In the light of the foregoing considerations, the Supreme Court has concluded that an interpretation of European Union law is necessary for a decision in this case and has therefore decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

**Must the requirements which an European arrest warrant must satisfy as a judicial decision under Articles 1(1) and 6(1) of Framework Decision 2002/584 be applied also to supplementary information provided pursuant to Article 15(2) thereof, where, for the purposes of the decision of the executing judicial authority, it substantially supplements or changes the content of the arrest warrant originally issued?**

... [information on the possibility of appeal]

**Bratislava, 26 November 2019.**

...

[signatures]

WORKING DOCUMENT