

**Case C-919/19****Request for a preliminary ruling****Date lodged:**

16 December 2019

**Referring court:**

Najvyšší súd Slovenskej republiky (the Slovak Republic)

**Date of the decision to refer:**

22 October 2019

**Applicant:**

Generálna prokuratúra Slovenskej republiky

**Defendant:**

XY

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Najvyšší súd **Slovenskej republiky**

(Supreme Court of the Slovak Republic) ...

**ORDER**

The Najvyšší súd Slovenskej republiky (the Supreme Court of the Slovak Republic) ('the Najvyšší súd') ... [composition of the bench] in criminal proceedings against **XY**, the sentenced person, convicted for the exceptionally serious crime of robbery under Paragraph 173(1) and (2)(b) of the Trestní zákoník České republiky (Czech Criminal Code), in closed session on 22 October 2019 in Bratislava,

**hereby orders:**

Under Paragraph 318(1) of the Trestný poriadok (Slovak Code of Criminal Procedure) by analogy, in conjunction with Paragraph 244(4) thereof, the proceedings on the recognition and enforcement of the judgment of the Krajský soud v Plzni (Regional Court, Plzeň, Czech Republic) dated 18 July 2017 ... [case number], together with the judgment of the Vrchní soud v Praze (High Court, Prague, Czech Republic) dated 20 September 2017 ... [case number], by which

XY was convicted of the exceptionally serious crime of robbery under Paragraph 173(1) and (2)(b) of the Czech Criminal Code and sentenced to a eight-year custodial sentence in a closed prison [věznice so strážním] **are stayed and an order for reference is made to the Court of Justice of the European Union** concerning the interpretation of Article 4(1)(a), Article 4(2) and Article 9(1)(b) of 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 (OJ 2008 L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, [p. 24]) ('the Framework Decision').

### Grounds

(1) By a judgment of 17 May 2018, ... [case number], the Krajský súd v Košiciach (Regional Court, Košice, Slovak Republic) ('the Krajský súd') decided, under Paragraphs 15(1) and 17(1) of Zákon č. 549/2011 Z.z. o uznávaní a výkone rozhodnutí, ktorými sa ukladá trestná sankcia spojená s odňatím slobody v Európskej únii [**Or. 2**] a o zmene a doplnení zákona č. 221/2006 Z.z. o výkone väzby (Law No 549/2011 on the recognition and enforcement of decisions imposing custodial sentences in the European Union, amending and consolidating Law No 221/2006 on custodial sentences), in the version in force until 31 December 2019 ('Law No 549/2011'), to recognise and enforce the judgment of the Krajský soud v Plzni (Regional Court, Plzeň) dated 18 July 2017, ... [case number], together with the judgment of the Vrchní soud v Praze (High Court, Prague) dated 20 October 2017, ... [case number], by which XY was convicted of the exceptionally serious crime of robbery under Paragraph 173(1) and (2)(b) of the Czech Criminal Code and sentenced to an eight-year custodial sentence to be served in a closed prison. Under Paragraph 48(4) of the Trestný zákon (Slovak Criminal Code), that court ruled that the sentenced person was to carry out that custodial sentence in a medium-security closed prison.

(2) XY brought an appeal in due time against that judgment, in which he essentially stated his entire family (spouse, two daughters, son-in-law and grandchild) lives and works in Plzeň and the family members visit him every month while he is serving his sentence. He has no contact with his son or stepbrother, who live in the territory of the Slovak Republic because they are at odds with him. At the same time, he pointed out that his parents are no longer alive and therefore he has no family ties or close friends in Slovakia. He also maintains that by moving to Slovakia he would lose contact with his family who have nowhere to return to in Slovakia, whereas in the Czech Republic they (his family) have a roof over their head and work. For these reasons, XY applied to serve his sentence in the Czech Republic, attaching to the appeal a copy of the rental agreement for a flat in Plzeň.

(3) By order of 28 August 2018 ... [case number] the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) ('Najvyšší súd') stayed the

proceedings on recognition and enforcement pursuant to Paragraph 318(1) of the Trestný poriadok (Slovak Code of Criminal Procedure) by analogy, in conjunction with Paragraph 244(4) thereof, pending a judgment of the Court of Justice of the European Union on its earlier reference for a preliminary ruling made in a case similar in terms of the facts, conducted under reference number 2 Urto 1/2018; in the proceedings before the Court of Justice Case C-495/18.

(4) Since, in the case before the Nejvyšší soud bearing reference number 2 Urto 1/2018 the Krajský soud v Ústí nad Labem (Regional Court, Ústí nad Labem, Czech Republic) withdrew the certificate issued pursuant to Article 4 of the Framework Decision and consequently, by order of 1 October 2019, the Court of Justice decided that there was no longer any need to adjudicate on the request for a preliminary ruling in Case C-495/18, the Nejvyšší soud ordered in that case, by order of 22 October 2019, reference number 2 Urto 5/2018, pursuant to Paragraph 318(2) of the Trestný poriadok (Slovak Code of Criminal Procedure) by analogy, that the stayed proceedings be resumed. At the same time, however, it concluded that in the present case it is necessary to make a new reference for a preliminary ruling to the Court of Justice for the reasons set out below. **[Or. 3.]**

(5) On 12 February 2018, the Krajský sud received a certificate issued by the Krajský soud v Plzni (Regional Court, Plzeň) pursuant to Article 4 of the Framework Decision, with the judgments mentioned above [in paragraph 1] by which XY was sentenced under Paragraph 173(1) and (2)(b) of the Czech Criminal Code to an eight-year custodial sentence to be served in a closed prison for the exceptionally serious crime of robbery. In accordance with part (g) of that certificate, the judgments and the certificate were sent to the Slovak Republic as the executing State because the issuing authority was satisfied that enforcement in the executing State of the sentence imposed serves the purpose of facilitating the social rehabilitation of the sentenced person and the executing State is the State of which the sentenced person is a national and in which he lives. In addition, the certificate [part (d)(4) and part (l)] shows that the sentenced person arrived in the Czech Republic with his wife five months before the crime was committed and worked briefly at the company X in Plzeň, but that his employment was terminated and he was unemployed at the time the crime was committed. In the Czech Republic he initially stayed in a hostel and then with his family in a rented flat for a short time. According to the Krajský soud v Plzni (Regional Court, Plzeň), rehabilitation of the sentenced person will be more easily achievable for him in Slovakia because he is a Slovak national and has spent his whole life and is registered as permanently resident there. According to the Krajský soud v Plzni (Regional Court, Plzeň), he has no place of habitual residence in the Czech Republic because before committing the offence he lived in the Czech Republic for a very short time during which he established no professional, cultural or social links and did not make use of the opportunity of residing in the Czech Republic to integrate fully into society and create for himself a base which could be regarded as a place of habitual residence where he could live with his family. On the contrary, he used his residence in the Czech Republic to commit a violent crime very shortly after his arrival. According to the Krajský soud v Plzni

(Regional Court, Plzeň), the fact that the children of the sentenced person, who are also Slovak nationals, reside in the territory of the Czech Republic and may return to the territory of the Slovak Republic at any time, likewise has no effect on the creation of an obstacle to the sentenced person's 'habitual residence' in the territory of the Czech Republic preventing his transfer.

(6) In his statement on the transfer XY pointed out that in Slovakia he only has a stepbrother with whom he has no contact and after his release he will remain in the Czech Republic at a specific address in Plzeň where he is temporarily resident and where he has children and grandchildren who could not [if he was transferred to the Slovak Republic] visit him and with whom he would lose contact.

(7) According to the register of inhabitants of the Slovak Republic XY ... is a Slovak citizen and since 24 August 1998 has been registered as permanently resident [Or. 4] in the municipality of Mníšek nad Hnilcom ... in the vicinity of Gelnica (Slovak Republic). According to the report of the Obvodné oddelenie Policajného zboru v Spišskej Novej Vsi (district police department in Spišská Nová Ves, Slovakia) dated 5 March 2018, the appellant does not appear at all in the above municipality, has no contact with anyone, and has been with his family in France for about five years. According to the report of the mayor of the municipality of Mníšek nad Hnilcom, XY is registered as permanently resident in that municipality ... [address], however, only the son resides at that address with his grandmother XY, according to whom, although she does not maintain contact with them, her daughter X (the spouse of the appellant) and her two daughters are probably living in the Czech Republic. At present, XY is serving his sentence at a prison in Plzeň ... [prison address], in the Czech Republic.

(8) Under Paragraph 4(1)(a) of Law No 549/2011, it is possible to recognise and enforce a decision in the Slovak Republic if the fact or deed on the basis of which the decision was issued also constitutes an offence under Slovak law, subject to the provisions of Paragraph 4(2) and (3), and if the sentenced person is a Slovak citizen who habitually resides in the Slovak Republic or has in its territory proven family, social or professional links which may contribute to facilitating his rehabilitation in the course of the enforcement of the custodial sentence in the Slovak Republic.

(9) It is apparent from the above that the recognition and enforcement of a decision of the issuing State is conditional, under Slovak legislation, on the fact that the sentenced person, who is a Slovak citizen, must have in the Slovak Republic (i) either his place of habitual residence, (ii) or proven family, social or professional links which may contribute to facilitating his rehabilitation in the course of the enforcement of the custodial sentence in the Slovak Republic.

(10) Under Paragraph 3(g) of Law No 549/2011, for the purposes of that law 'habitual residence' means permanent residence or temporary residence.

(11) Under Paragraph 2(2) of Zákon č. 253/1998 Z. z. o hlásení pobytu občanov Slovenskej republiky a registri obyvateľov Slovenskej republiky (Law No 253/1998 on declaring the residence of Slovak citizens and the register of Slovak citizens, as amended) ('the Law on declaring residence'), 'residence' for the purposes of keeping records of citizens' residence is interpreted as permanent residence and temporary residence.

(12) Under Paragraph 3(1) to (3) and the first sentence before the semicolon of Paragraph 3(7) of the Law on declaring residence, a citizen's permanent residence, as a rule, is at his permanent address in the Slovak Republic. A citizen has only one place of permanent residence at a given time. A citizen may have his permanent residence **[Or. 5]** only in a building or in a part of a building which is identified by a house number [súpisné číslo] or a house number and orientational number [orientačné číslo] and which is intended as housing or accommodation or for private recreation, subject to contrary provision in that law. A flat is also considered to be part of a building. Registration of a citizen's permanent residence cannot be relied on to found any right to the building mentioned in Paragraph 3(2) or ownership thereof and is for the purposes of record-keeping. Every citizen is required to declare their place of permanent residence unless they are living abroad on a permanent basis.

(13) Under Paragraph 6(1) of the Law on declaring residence, a citizen who is preparing to travel abroad with the intention of living there permanently is required before leaving the country to declare the termination of his permanent residence to the records office which holds the data on his permanent residence; in the declaration he must give the State and place of residence to which he has decided to travel and the date on which his residence abroad will commence, which is also the date on which his permanent residence [in the Slovak Republic] terminates. Pursuant to Paragraph 6(3), a citizen who is resident abroad and who decides during that period of residence to terminate his permanent residence in the Slovak Republic may declare such termination through the authority representing the Slovak Republic [in his State of residence] or through a person duly authorised to act on his behalf in the Slovak Republic. The authority representing the Slovak Republic or the duly authorised person must ensure delivery to the records office holding the data on the citizen's permanent residence of the document notifying termination of permanent residence, with the certified signature of the citizen concerned, in which the State and place of his current residence abroad must be given. The date on which that document is received by the record office is the date on which the permanent residence is deemed to terminate.

(14) Under Paragraph 8(1) of the Law on declaring residence, temporary residence means a citizen's residence outside his place of permanent residence, [in a place] where the citizen lives temporarily, provided that such residence is of a duration of longer than 90 days; temporary residence also means the residence in the Slovak Republic of a citizen who is permanently living abroad, provided it is of a duration of longer than 90 days.

(15) Under Paragraph 9 of the Law on declaring residence, a citizen who is permanently resident in the Slovak Republic and who is preparing to travel abroad for a period longer than 90 days has the right to declare that fact to the records office in the place of his permanent or temporary residence; in the declaration he must give the State and place of his residence and the envisaged period of residence.

(16) It is apparent from the abovementioned legal provisions that any finding of either the permanent or the temporary residence of a Slovak citizen in the Slovak Republic, which for the purposes of Law No 549/2011 constitute habitual residence, is merely for record-keeping purposes (Paragraph 2(2) and Paragraph 3(3) of the Law on declaring residence) and such findings are not conditional upon the fact that the citizen must actually live in those places and thus have family, social, professional or other links to them. In the case of permanent residence, although the Law imposes on every citizen who is not permanently resident [Or. 6] abroad the obligation to declare their permanent residence (the phrase before the semi-colon in Paragraph 3(7) of the Law on declaring residence), together with the obligation to declare its termination if they are preparing to travel abroad with the intention of living there permanently (Paragraph 6(1) of the Law on declaring residence), there is no penalty set out therein for any failure to fulfil those requirements.

(17) Under Paragraph 4(1)(a) of Law No 549/2011, decisions of the issuing State on the imposition of a custodial sentence may therefore be recognised and enforced (where the condition as to double criminality is satisfied, subject to the law providing otherwise) also where the sentenced Slovak citizen does not in fact live in the Slovak Republic (but lives in the issuing State), yet has in the Slovak Republic a recorded permanent or temporary residence. Paradoxically, this applies equally in the situation in which a Slovak citizen permanently living abroad is registered merely as temporarily resident in the Slovak Republic. The condition as to the existence of proven family, social or professional links which might facilitate the social rehabilitation of the sentenced person is thus laid down in the alternative and, under Slovak law, must be satisfied only if the Slovak citizen does not have his habitual, that is to say, permanent or temporary, residence in the Slovak Republic.

(18) The appellant's objections, based on the fact that he does not live in the Slovak Republic and that any family or social links which might facilitate his social rehabilitation are in the issuing State, seem *prima facie* to be unfounded.

(19) On the other hand, it cannot be disregarded that the Framework Decision was implemented into the Slovak legal order by Law No 549/2011. It is therefore true that European Union law must be interpreted as meaning that the national court is required to take all provisions of national law into account and interpret them, as far as is possible, in accordance with the Framework Decision in order to achieve the result sought by it and to ensure its full effectiveness (see for example judgments of the Court of Justice of 5 September 2012, *Lopes Da Silva Jorge*,

C-42/11, EU:C:2012:517, and 8 November 2016, *Ognyanov*, C-554/14, EU:C:2016:835).

(20) Recital 9 of the Framework Decision states that enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links. **[Or. 7.]**

(21) In accordance with recital 15 of the Framework Decision, that Framework Decision should be applied in accordance with the right of citizens of the Union to move and reside freely within the territory of the Member States conferred by Article 18 of the Treaty establishing European Community.

(22) In accordance with recital 17 of the Framework Decision, where in that Framework Decision reference is made to the State in which the sentenced person 'lives', that indicates the place to which that person is attached based on habitual residence and on elements such as family, social or professional ties.

(23) Under Article 3(1) of the Framework Decision, the purpose of that Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.

(24) Under Article 4(1)(a) of the Framework Decision, provided that the sentenced person is in the issuing State or in the executing State, and provided that that person has given his or her consent where required under Article 6, a judgment, together with the certificate for which the standard form is given in Annex I, may be forwarded to the Member State of nationality of the sentenced person in which he or she lives.

(25) Under Article 4(2), the first sentence of Article 4(3), and Article 4(4) of the Framework Decision, the forwarding of the judgment and the certificate may take place where the competent authority of the issuing State, where appropriate after consultations between the competent authorities of the issuing and the executing States, is satisfied that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person. Before forwarding the judgment and the certificate, the competent authority of the issuing State may consult, by any appropriate means, the competent authority of the executing State. During such consultation, the competent authority of the executing State may present the competent authority of the issuing State with a reasoned opinion, that enforcement of the sentence in the executing State would not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society. Where there has

been no consultation, such an opinion may be presented without delay after the transmission of the judgment and the certificate. The competent authority of the issuing State is to consider such opinion and decide whether to withdraw the certificate or not.

(26) Under Article 6(3) of the Framework Decision, in all cases where the sentenced person is still in the issuing State, he or she is to be given an opportunity to state his or her opinion orally or in writing. ... The opinion of the sentenced person [Or. 8] is to be taken into account when deciding the issue of forwarding the judgement together with the certificate. Where the person has availed him or herself of the opportunity provided in this paragraph, the opinion of the sentenced person shall be forwarded to the executing State, in particular with a view to Article 4(4). ...

(27) Under Article 8(1) of the Framework Decision, the competent authority of the executing State is to recognise a judgment which has been forwarded in accordance with Article 4 and following the procedure under Article 5, and is to forthwith take all the necessary measures for the enforcement of the sentence, unless it decides to invoke one of the grounds for non-recognition and non-enforcement provided for in Article 9.

(28) Under Article 9(1)(b) of the Framework Decision, the competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if the criteria set forth in Article 4(1) are not met.

(29) Under Article 9(3) of the Framework Decision, in the cases referred to in paragraph 1(a), (b), (c), (i), (k) and (l), before deciding not to recognise the judgment and enforce the sentence, the competent authority of the executing State is to consult the competent authority of the issuing State, by any appropriate means, and, where appropriate, is to ask it to supply any necessary additional information without delay.

(30) According to the standard form certificate, which is set out in Annex I to the Framework Decision, it is necessary under section (d), point 4, to provide any other relevant information about the sentenced person's family, social or professional ties to the executing State, if such information is available and appropriate.

(31) It is apparent from the abovementioned provisions of the Framework Decision that its objective is to facilitate the social rehabilitation of the sentenced person. The Najvyšší súd therefore considers that the criteria set out in Article 4(1)(a) of the Framework Decision will be satisfied only when the sentenced person has in the Member State of nationality such family, linguistic, cultural, social or economic and or professional links that it is possible to reasonably assume from those links that enforcement of the sentence in that State will enhance the possibility of his social rehabilitation. From that perspective, therefore, the Slovak national legislation, under which a decision imposing a

custodial sentence on a Slovak citizen may be recognised and enforced also where such a citizen has in the Slovak Republic merely his formally-recorded permanent or temporary residence, without concurrent family, social, professional or other links which could facilitate his social rehabilitation, it not being meanwhile a situation in which the sentenced person is to be deported to the Slovak Republic after enforcement of the penal sentence (Article 4(1)(b) of the Framework Decision), does not [Or. 9] ensure the full effectiveness of the Framework Decision in the sense that the recognition and enforcement of decisions in such cases contributes (may contribute) to enhancing the possibility of the social rehabilitation of the sentenced person.

(32) However, it should be noted that even though there will be, as from 1 January 2020, a change to Slovak national legislation and it will be possible, in accordance with the new wording of Paragraph 4(1)(a) of Law No 549/2011, to recognise in the Slovak Republic the judgment imposing the custodial sentence where the sentenced person is a national thereof and has his or her place of habitual residence in its territory, which will no longer be defined as his or her permanent or temporary place of residence, under Paragraph 32 of that Law (in the version in force from 1 January 2020) proceedings instituted before 1 January 2020 will be completed pursuant to that Law in the version in force until 31 December 2019, that is to say under the provisions referred to in paragraphs 8 and 10 of the grounds for this judgment.

(33) Having regard to the above, and also to the duty of a national court which is called upon within the exercise of its jurisdiction to apply provisions of European Union law to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, without it being necessary for that court to request or await the prior setting aside of such a provision by legislative or other constitutional means (see in particular judgments of the Court of Justice of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 21 and 24; of 19 November 2009, *Filipiak*, C-314/08, EU:C:2009:719, paragraph 81; of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 43; [of 26 February 2013,] *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 45), the Najvyšší súd has concluded that an interpretation of European Union law is essential for a decision in this case. It has therefore decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

**Is Article 4(1)(a) of the Framework Decision to be interpreted to the effect that the criteria set out therein are satisfied only when the sentenced person has, in the Member State of his nationality, such family, social, professional or other links that it is possible to reasonably assume from those links that enforcement in that State of the sentence may facilitate his social rehabilitation, and as therefore precluding national legislation such as Paragraph 4(1)(a) of Law No 549/2011 [Zákon č. 549/2011 Z.z. o uznávaní a výkone rozhodnutí, ktorými sa ukladá trestná sankcia spojená s odňatím slobody v Európskej únii a o zmene a doplnení zákona č. 221/2006 Z.z. o**

výkone väzby] (in the version in force until 31 December 2019) which, in such cases, enables a judgment to be recognised and enforced in the event of merely formally-recorded habitual residence in the executing State, regardless of whether the sentenced person has concrete links in that State which could enhance his social rehabilitation? [Or. 10.]

If that question is answered in the affirmative, is Article 4(2) of the Framework Decision to be interpreted to the effect that the competent authority of the issuing State is required also in the situation provided for in Article 4(1)(a) of the Framework Decision to satisfy itself, even before forwarding the judgment and certificate, that enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person and is, furthermore, required to provide the information gathered for that purpose in section (d), point 4, of the certificate specifically, where the sentenced person claims in the statement of his opinion provided for in Article 6(3) of the Framework Decision that he has concrete family, social or professional links in the issuing State?

If question 1 is answered in the affirmative, must Article 9(1)(b) of the Framework Decision be interpreted to the effect that where, in the situation set out in Article 4(1)(a) of the Framework Decision, despite the consultation under Article 4(1)(3) of that Decision and any provision of other necessary information, it is not proven that there are such family, social or professional links from which it could reasonably be assumed that the enforcement in the executing State of the sentence may facilitate the social rehabilitation of the sentenced person, there is still a ground for refusing to recognise and enforce the judgment?

... [information on the possibility of appeal]

Bratislava, 22 October 2019

... František Mozner

President of the Bench