Case C-804/21 PPU

Request for a preliminary ruling

Date lodged:

20 December 2021

Referring court:

Korkein oikeus (Supreme Court, Finland)

Date of the decision to refer:

20 December 2021

Applicant:

C

CD

Defendant:

Syyttäjä (Public Prosecutor)

ORDER OF THE KORKEIN OIKEUS (Supreme Court, Finland)

[…]

Made on 20 December 2021

[…]

APPLICANTS	C and CD
DEFENDANT	Syyttäjä (Public Prosecutor)
SUBJECT MATTER	Continuation of detention
	Postponement of execution of a decision on surrender

REQUEST FOR THE APPLICATION OF THE URGENT PRELIMINARY RULING PROCEDURE

The Korkein oikeus (Supreme Court, Finland) requests this reference for a preliminary ruling to be dealt with under the urgent preliminary ruling procedure pursuant to Article 107 of the Rules of Procedure of the Court of Justice. The present case raises questions of interpretation of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States ('the framework decision'), which falls within an area covered by Title V of Part Three of the TFEU. The applicants have been deprived of their liberty and whether they remain in detention depends on the outcome of the main proceedings. **[Or. 2]**

ORDER OF THE KORKEIN OIKEUS

1. Subject matter of the proceedings

1 The present case concerns the final phase of a European arrest warrant procedure, in which it has not been possible to execute final decisions on surrender issued for the purpose of execution of a sentence in accordance with the usual rapid schedule. The surrender has been delayed partly for reasons relating to the covid-19 pandemic, but mostly because of legal obstacles relating to actions and applications for asylum lodged by the individuals ordered to be surrendered. The question is whether such reasons can be regarded as constituting circumstances preventing surrender which are beyond the control of any of the Member States [referred to as 'force majeure' in the French version of the framework decision] within the meaning of Article 23(3) of that decision, so as to enable the time limit for surrender to be extended, which would mean that the individuals ordered to be surrendered were not required to be released pursuant to Article 23(5) of that decision. In addition, the question arises of the procedure to be followed in the context of an extension of the time limit for surrender of the individual, and of and the available remedies.

Facts of the case

2 The competent Romanian judicial authority issued a European arrest warrant on 19 May 2015 in respect of C, and on 27 May 2015 in respect of CD, both C and CD being Romanian nationals, with a view to their surrender to Romania for the purpose of executing prison sentences of five years and additional sentences of three years. Those sentences were imposed for trafficking of dangerous and very dangerous narcotics and participation in a criminal organisation.

3 Prior to the current proceedings, the Swedish Supreme Court, by a decision delivered on 8 April 2020 (NJA 2020 p. 430) ordered C to be surrendered to Romania. By a decision of 30 July 2020, the Svea Court of Appeal, Sweden, ordered the surrender of CD **[Or. 3]** to Romania. Nevertheless, both individuals left Sweden for Finland before those decisions on surrender were executed.

4 On 15 December 2020, C and CD were arrested in Finland on the basis of the European arrest warrant and placed in detention. By decisions of 16 April 2021, the Korkein oikeus (KKO 2021:24 and No. 582) ordered the surrender of C and CD to Romania. At the request of the Romanian authorities, the Finnish keskusrikospoliisi (National Bureau of Investigation) initially set a surrender date of 7 May 2021, as no suitable flight was available before that date because of the covid-19 pandemic.

5 On 3 May 2021, C and CD brought an appeal before the Korkein oikeus. The Korkein oikeus initially, on 4 May 2021, made a provisional order preventing execution of the decisions on surrender, and subsequently, on 31 May 2021, dismissed the appeals, which nullified the decision preventing execution. The second date agreed for the surrender, 11 June 2021, was also postponed, as there were no direct flights to Romania and it was not possible to arrange air transport via another Member State without departing from the agreed schedule. C and CD made several other applications for a stay of execution of the decisions on surrender before the käräjäoikeus (District Court) and the Korkein oikeus. All of those applications were dismissed or declared inadmissible.

6 Arrangements were ultimately made for CD to be surrendered to Romania on 17 June 2021, and C on 22 June 2021, but in each case the surrender was prevented by an application for asylum in Finland. The Maahanmuuttovirasto (National Immigration Office) rejected the applications for asylum on 12 November 2021, but C and CD brought an action against those decisions before the Hallinto-oikeus (Administrative Court).

The decisions of the Helsingin käräjäoikeusdes of 8 and 29 October 2021

7 C and CD ask the Helsingin käräjäoikeus, first, for their release from detention on the ground that the time limit for surrender has expired, and second for **[Or. 4]** the postponement of their surrender to Romania in view of their applications for asylum. By decisions of 8 and 29 October 2021, the käräjäoikeus declared those applications inadmissible. The current proceedings concern appeals brought by C and CD against those decisions of the käräjäoikeus.

Procedure before the Korkein oikeus

8 C and CD have reiterated their claims in their appeal. In the response, the syyttäjä (public prosecutor) contends that the applicants should remain in detention and that their surrender to Romania should not be postponed.

9 In a decision on questions of principle delivered on 8 December 2021 (KKO 2021:86), the Korkein oikeus ruled that persons subject to a decision on surrender have a right of access to the court on the issue of continuation of their detention. To avoid any delay, the Korkein oikeus seised itself directly of the case.

2. Legal framework

2.1. Surrender

EU law

10 The provisions which are relevant to the present case are recital 9 of Framework Decision 2002/584/JHA and Article 6(2), Article 12, Article 15(1) and Article 23 of that decision. **[Or. 5]**

National law

11 The national provisions adopted by way of implementation of the framework decision are found in the rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan Unionin jäsenvaltioiden välillä annettu laki (Law on surrender, by reason of an offence, between Finland and the other Member States of the European Union) (Law No 1286 of 30 December 2003; 'the Law on surrender within the European Union').

12 In Finland, the executing judicial authorities competent to decide on surrender and continuation of detention are the Helsingin käräjäoikeus and, on appeal, the Korkein oikeus (Articles 11, 19 and 37 of the Law on surrender within the European Union). By virtue of Paragraph 44 of that law, however, it is the keskusrikospoliisi that is competent to execute a decision on surrender.

13 By virtue of Paragraph 46(1) of the Law on surrender within the European Union, the person to whom such a decision relates is to be surrendered to the competent authorities of the requesting Member State as soon as possible, on a date agreed between the authorities concerned. He or she must however be surrendered no later than 10 days after the decision on surrender becomes final.

14 By virtue of Paragraph 46(2) of the Law on surrender within the European Union, if the surrender of the person concerned, within the period laid down in paragraph 1, is prevented by a situation of force majeure in Finland or the Member State making the request, the competent authorities must agree on a new surrender date. The surrender must take place within 10 days of the new date thus agreed.

15 By virtue of Paragraph 47 of the Law on surrender within the European Union, the court may postpone execution of the decision on surrender where there are circumstances which, from a humanitarian perspective, would make such execution excessively severe. The execution of the decision on surrender is to take place as soon as the grounds for postponement have ceased to exist. The competent authorities must then agree a new surrender date. The surrender must take place within 10 days of the new date thus agreed. **[Or. 6]**

16 By virtue of Paragraph 48 of the Law on surrender within the European Union, if, upon expiry of the time limits referred to in Paragraphs 46 and 47, the person is still being held in custody, he or she is to be released.

2.2. Application for asylum

EU Law

17 The provision that is relevant to the present case is the sole article of the Protocol (No 24) on asylum for nationals of Member States of the European Union, which is annexed to the FEU Treaty.

National law

18 The national provisions on asylum are found in the Ulkomaalaislaki (Law on foreign nationals) (Law No 301 of 30 April 2004), which corresponds to the provisions of the Geneva Convention on the status of refugees. The provisions of the Law on foreign nationals apply to all foreign nationals resident in the country and thus also to EU citizens.

19 Paragraph 40(3) of the Law on foreign nationals provides that a foreign national is lawfully entitled to stay in the country while the application is under consideration, until a final decision has been made on that application or an enforceable decision to remove the foreign national has been made. It is apparent from the preparatory work that asylum seekers also have that right.

20 By virtue of Paragraph 101(3) of the Law on foreign nationals, an application may be regarded as manifestly unfounded if the applicant arrived from a safe country of origin to which he or she may be returned. By virtue of Paragraph 104(1) of the Law on foreign nationals, a decision on an application for international protection may be made in an expedited procedure where the application is regarded as manifestly unfounded pursuant to Paragraph 101. **[Or. 7]**

3. The need for the preliminary ruling

21 The Korkein oikeus must rule on the applications which the applicants, who are still in detention and whose surrender has been ordered by final decisions on surrender, have made with a view to securing, first, their release from detention and, second, postponement of the surrender. As their applications for asylum are under consideration, they have not yet been surrendered to Romania. The referring court must rule on questions concerning the interpretation of the framework decision on which the Court of Justice does not appear to have addressed in its case-law.

3.1. The first question

22 It is necessary in the first place to evaluate the procedure leading to a finding, made pursuant to Article 23(3) of the framework decision, that a situation of force majeure exists, and to an extension of the time limit for surrender.

23 It is apparent from the judgment in *Vilkas* that expiry of the time limits referred to in Article 23(1) to (4) of the framework decision does not have the effect of terminating the surrender procedure, but simply means that the requested person is to be released, pursuant to Article 23(5) of that decision (judgment of 25 January 2017, *Vilkas*, C-640/15, EU:C:2017:39, paragraph 70). In accordance with Article 23(3) of the framework decision, the expiry of the time limit depends on whether surrender has been prevented by a situation of force majeure. The judgment in *Vilkas* does not address the question of which authority is competent to assess whether there is a situation of force majeure for the purposes of the framework decision, or what procedural requirements are imposed, where relevant, by that decision, as regards the assessment of the grounds for exceeding the time limit and the release of the person ordered to be surrendered. **[Or. 8]**

24 Under the rules of national law, tasks relating to the execution of the surrender are transferred to the keskusrikospoliis once the court's decision on surrender has become final. The court's decision does not set the date of surrender, but it is executed in conformity with the time limits laid down in that regard by the Law on surrender within the EU, in accordance with the framework decision. The keskusrikospoliisi takes responsibility for the practical implementation of the decision on surrender, liaises with the competent authorities of the Member State which issued the arrest warrant and agrees a new surrender date where surrender has not taken place within 10 days, as in the present case. In accordance with a decision of the Korkein oikeus (KKO 2021:86), the person to be surrendered nevertheless retains the right to put before the court the issue of whether it is justified to keep him or her in detention, or whether he or she ought to be released on the ground that detention is excessive. It is then incumbent on the court to consider, amongst other things, whether the fact that surrender has not taken place is due to circumstances amounting for the purposes of Article 23(3) to force majeure, in which case the time limit for surrender can be extended and the person to be surrendered can remain in detention, notwithstanding Article 23(5). However, neither the keskusrikospoliisi nor any other authority systematically puts the question of continued detention before the court.

25 The referring court is not certain that this national procedure meets the requirements of Article 23(3) of the framework decision. The wording of Article 23(3) – unlike that of Article 23(1), which refers to 'the authorities concerned' – appears to require actions to be taken specifically by the executing judicial authority referred to in Article 6(2) of the framework agreement. Those actions would appear to involve, in particular, the executing judicial authority negotiating with the issuing judicial authority, agreeing on a new surrender date and, above all, considering whether the conditions for continued detention are still

met. It is apparent from the case-law of the Court of Justice that the keskusrikospoliisi cannot be regarded as an executing judicial authority within the meaning of Article 6(2) of the framework agreement (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of Documents)*, C-510/19, EU:C:2020:953, paragraphs 41 and 42). Action by a police authority is limited to practical and administrative assistance **[Or. 9]** for the competent judicial authorities (judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 42). The determination of force majeure, or decision-making as regards continued detention cannot be regarded as such tasks.

26 The concept of force majeure employed in Article 23(3) of the framework decision must be understood as referring to abnormal and unforeseeable circumstances (judgment in *Vilkas*, paragraph 53 and the case-law cited). The covid-19 pandemic has shown that obstacles arising from travel restrictions and reduced availability of transport can be long lasting, that circumstances change rapidly and that it is difficult to make a reliable prediction as to when such obstacles will cease to exist. The efficiency of the European arrest warrant system depends on the execution of final decisions on surrender being rapid and simple, subject to guaranteeing, particularly with regard to persons in detention, the rights based on Article 6 of the Charter of Fundamental Rights, which also requires the application of Article 23(3) and (5) of the framework decision.

27 Negotiations between Member States concerning the postponement of execution of a decision on surrender are essentially practical in nature, their objective being to settle the appropriate time for surrender and the logistical aspects, such as means of transport and schedules. Such tasks are more suited to administrative authorities than to courts acting as judicial authorities. The question therefore arises of whether Article 23(3) of the framework decision precludes a procedure under which it is the authority responsible for practical execution of the decision on surrender which has primary competence to assess whether there are obstacles to the surrender and how surrender would be possible, and to agree a new surrender date, the person ordered to be surrendered and the prosecutor having, by way of a remedy, the right to put the case before the court for examination and ask for the detention to be brought to an end (see judgment of 11 November 2021, *Gavanozov II*, C-852/19, EU:C:2021:902, paragraph 33). The court before which the case is brought will then determine whether the delay in execution arises out of a situation of force majeure and, depending on the answer to that question, and on other factors affecting reasonableness, will also determine whether the duration of detention is excessive. In the light **[Or. 10]** of the case-law of the Court of Justice (judgments in *Openbaar Ministerie (Forgery of Documents)*, paragraph 53, and of 27 May 2019, *OG and PI (Offices of the Public Prosecutor of Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraphs 70 and 75), there is room for doubt as to whether such a judicial remedy fully satisfies the requirements inherent in effective judicial protection, and whether execution of the decision on surrender is subject to adequate judicial review.

28 If Article 23 of the framework decision is interpreted as meaning that the judicial review-based procedure described above is not satisfactory, as a remedy, with respect to the framework decision and its objectives, and does not sufficiently guarantee the rights of the person ordered to be surrendered, it will be necessary to consider what consequences should follow from this. It is must be determined whether the lack of judicial intervention necessarily means that the requested person must be released, pursuant to Article 23(5) of the framework agreement – even if, having regard to all the relevant features of the case, the duration of the custody was not excessive (judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474, paragraph 58 and 59).

29 Article 23(3) of the framework decision also raises the question of when the authorities must contact each other and agree a new surrender date. The wording does not indicate whether that action must be taken immediately, as soon as a situation of force majeure arises in either of the Member States which prevents the surrender from being executed at the intended time, on expiry of the time limit previously fixed, or – as in the situation envisaged by Article 23(4) – only when the obstacle has ceased to exist. A situation may just as well be one of force majeure where it is impossible to make a reliable prediction as to when it will come to an end. In such a situation it is impossible, in practice, to agree a new surrender date immediately after the obstacle arises. **[Or. 11]**

3.2 The second question

30 The second question relates to whether legal obstacles based on the national legislation of a Member State which, in practice, prevent the surrender, can be regarded as constituting a situation of force majeure for the purposes of Article 23(3) of the framework decision.

31 In the judgment in *Vilkas*, the Court interpreted the concept of force majeure in a situation of repeated physical resistance on the part of the person to be surrendered. In the present case, the authorities with practical responsibility for the execution of decisions on surrender have complied with the orders of the national court and with the rules intended to preserve the position of applicants while their applications are under consideration. If the concept of force majeure is interpreted narrowly and so as to give decisive importance to the fact that it relates to external causes, beyond the control of the Member States, this type of obstacle could be excluded from its scope.

32 In the present case, the practical implementation of the surrender has been complicated by the covid-19 pandemic, as has compliance with the timescales, but the main obstacles to the surrender have been, initially, the order of the national court that the surrender should not be executed, and, subsequently, the applications for asylum made by the persons ordered to be surrendered. Under the national legislation, an asylum seeker has the right to remain in the country while his or her application is under consideration, or until a decision to remove him or her has been made. **[Or. 12]**

33 The answers to these questions of interpretation are needed in order to resolve the dispute in the proceedings before the Korkein oikeus.

4. The questions referred

The Korkein oikeus, after giving the parties the opportunity to express their views on the content of the request for a preliminary ruling, has decided to stay the proceedings and refer the questions below to the Court of Justice of the European Union for a preliminary ruling.

1. Does Article 23(3) of Framework Decision 2002/584/JHA, read in conjunction with Article 23(5) thereof, require that, if a person in detention has not been surrendered within the time limits, the executing judicial authority referred to in Article 6(2) of the Framework Decision is to decide on a new surrender date and must determine whether a situation of force majeure exists and if the conditions required for detention are met, or is a procedure under which the court only examines those matters where the parties so request also compatible with the framework decision? If action on the part of the judicial authority is required in order for the time limit to be extended, does the lack of any such action necessarily mean that the time limits laid down in the framework decision have expired, in which case the person in detention must be released pursuant to Article 23(5) thereof?

2. Is Article 23(3) of Framework Decision 2002/584/JHA to be interpreted as meaning that the concept of force majeure includes legal obstacles to the surrender which are based on the national legislation of the executing Member State, such as an order preventing execution which has effect for the duration of the legal proceedings, or the right of an asylum seeker to remain in the executing Member State until his or her application for asylum has been determined?

Once it has received a preliminary ruling, the Korkein oikeus will give judgment in the case.

[…]