

Case C-595/23 [Cuprea]ⁱ

Request for a preliminary ruling

Date lodged:

26 September 2023

Referring court:

Corte di appello di Napoli (Italy)

Date of the decision to refer:

7 September 2023

Criminal proceedings against:

EDS

[...]

CORTE DI APPELLO DI NAPOLI

(COURT OF APPEAL, NAPLES)

Specialised chamber for preventive measures

[...]

ORDER

referring a question for a preliminary ruling to the Court of Justice of the European Union concerning the validity and interpretation of acts of the institutions of the European Union (Article 267 of the Treaty on the Functioning of the European Union)

REQUEST FOR AN URGENT PRELIMINARY RULING PROCEDURE

(Article 107 of the Rules of Procedure of the Court of Justice)

The Corte di Appello di Napoli (Court of Appeal, Naples, Italy), specialised chamber, by operation of law, for preventive measures, [...]

in the interlocutory proceedings brought by:

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

EDS [...] [applicant's details]

having regard to the application lodged on 15 May 2023 seeking the deletion from the Schengen Information System (SIS) of the alert relating to the European arrest warrant issued against EDS by the Member State Romania, enforcing the criminal conviction handed down by the Curtea de Apel București (Court of Appeal, Bucharest) in judgment No 148 of 10 July 2017, set aside by the Înalta Curte de Casație și Justiție a României (High Court of Cassation and Justice of Romania) by judgment No 32/A of 7 February 2019;

[...] [national procedure]

WHEREAS

1. Facts

The Member State Romania issued European arrest warrant No 6536/2/2008 of 8 February 2019 to enforce a criminal conviction handed down in a final and enforceable judgment (judgment No 148 of 10 July 2017) by the Curtea de Apel București, following judgment No 32/A of the Înalta Curte de Casație și Justiție of 7 February 2019, which partially set aside the judgment as regards the custodial sentence of five years and six months imposed on EDS.

Romania simultaneously entered an alert in the SIS pursuant to Article 26(1) of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 *on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters*, for EDS's arrest with a view to his surrender to Romania on foot of European arrest warrant No 6536/2/2008 of 8 February 2019.

EDS was subsequently arrested in Italy on 13 January 2020 and brought before the Corte di appello di Napoli (Court of Appeal, Naples), which has jurisdiction in the matter of the European arrest warrant.

By judgment No 20/2020 of 15 September 2020, which became final on 26 September 2020, the Corte di appello di Napoli refused the surrender of EDS to Romania. At the same time, that court recognised the Romanian criminal conviction on which the European arrest warrant was based and ordered the enforcement of the sentence in Italy, in accordance with its domestic law.

The enforcement of the sentence imposed on EDS effectively began in Italy on 15 July 2022 in accordance with Italian domestic law.

The Corte di appello di Napoli, as the court enforcing the sentence, subsequently declared that the enforcement of the sentence had ceased by final order of 11 October 2022, pursuant to Article 673 of the codice di procedura penale (Italian Code of Criminal Procedure). The Corte di appello simultaneously revised

the judgment of recognition on the ground that the Romanian criminal conviction recognised in Italy for enforcement was no longer enforceable.

To date, Romania has not deleted the alert in respect of EDS, pursuant to Article 55 of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018, nor has it discharged the European arrest warrant in respect of EDS, despite the refusal of surrender and the simultaneous recognition of the judgment for enforcement in Italy, and the enforcement of that judgment in accordance with Italian domestic law.

Deletion of the alert was requested from Romania by the Ministero della Giustizia (Italian Ministry of Justice) on 24 August 2022. Romania replied on 30 August 2022 that the European arrest warrant would not be discharged because a question had been referred for a preliminary ruling to the Court of Justice of the European Union and the proceedings had therefore been suspended.

By judgment of 2 February 2023, the Curtea de Apel București withdrew the question referred for a preliminary ruling to the Court of Justice of the European Union and rejected EDS's application for discharge of the European arrest warrant and deletion of the alert from the SIS.

Consequently, the Italian Ministry of Justice requested the Curtea de Apel București (by letter of 9 March 2023) and the Romanian Ministry of Justice (by letter of 9 May 2023) to discharge the European arrest warrant and to delete the alert from the SIS.

By judgment of 11 March 2023, the Înalta Curte de Casație și Justiție a României dismissed EDS's appeal, ruling that, having recognised the Romanian criminal conviction for enforcement, any question relating to such enforcement is subject to the exclusive jurisdiction of the Italian enforcement court, as the court of the Member State in which the judgment recognised is to be enforced.

In view of this, EDS again lodged an objection to enforcement before the Corte di appello di Napoli, as the enforcement court, pointing out that, although his surrender requested by Romania by means of the European arrest warrant had been refused, and although the criminal conviction on which the European arrest warrant was based was recognised in Italy, and although the sentence had been enforced in Italy, Romania had still not discharged the European arrest warrant or even deleted the alert from the SIS.

EDS argues before the present court that, since all legal remedies provided by Romanian law have been exhausted to no avail, the current state of affairs amounts to an unlawful limitation of his personal liberty and his right to free movement, since, until the alert is deleted from the SIS, he will continue to be arrested in any Member State to which he travels.

In order to substantiate that claim, EDS has provided documentary evidence that on 9 August 2021, after surrender had been refused in a judgment delivered by the

Corte di appello di Napoli, and before the enforcement of the sentence began, he had gone on holiday to Greece and had been arrested by police on the island of Mykonos, under the same European arrest warrant issued by Romania on 8 February 2019. In delivering its judgment on 8 September 2021, the Efeteio Aigaiou (Court of Appeal of the Aegean Islands (Greece)) refused surrender on the ground that the judgment on which the European arrest warrant was based had already been recognised in Italy for enforcement, following refusal of the surrender.

To protect his personal liberty and his right to free movement, EDS therefore requested the Corte di appello di Napoli, as the court enforcing the sentence, to order the deletion of the alert from the SIS and the discharge of the European arrest warrant or, alternatively, to refer a question for a preliminary ruling to the Court of Justice of the European Union in relation to the interpretation and validity of acts of the institutions of the European Union, pursuant to Article 267 of the Treaty on the Functioning of the European Union.

2. Provisions of national law relied on

Article 18a of legge n. 69 (*Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri*) (Law No 69, Provisions to bring national law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States), of 22 April 2005, in the version applicable at the time of the judgment refusing the surrender of EDS to Romania, provided that the Corte di appello could refuse surrender '*if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is an Italian national or a national of another Member State of the European Union who is legally and actually resident or staying in Italy, on the condition that the Corte di appello orders that sentence or detention to be executed in Italy in accordance with its domestic law*'.

Since EDS satisfied the requirements, the Corte di appello di Napoli, by judgment No 20/2020, refused surrender and ordered that the sentence imposed with the criminal conviction on which the European arrest warrant was based should be enforced in Italy in accordance with its domestic law.

Article 24 of decreto legislativo n. 161 (*Disposizioni per conformare il diritto interno alla Decisione quadro 2008/909/GAI relativa all'applicazione del principio del reciproco riconoscimento alle sentenze penali che irrogano pene detentive o misure privative della libertà personale, ai fini della loro esecuzione nell'Unione Europea*) (Legislative Decree No 161, Provisions to bring national law into line with 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), of 7 September 2010, provides that, in the event that the Corte di appello refuses the surrender requested with a European arrest warrant based on a criminal conviction and orders the enforcement of the sentence in Italy, it must simultaneously recognise the enforcement in Italy of the foreign criminal conviction on which the European arrest warrant is based, where the relevant requirements are satisfied.

Since EDS satisfied the requirements, the Corte di appello di Napoli, by judgment No 20/2020, after refusing surrender and ordering the enforcement of the sentence in Italy, recognised the Romanian criminal conviction for enforcement in Italy.

Article 16 of Legislative Decree No 161 of 7 September 2010 provides that, when a judgment of recognition is delivered, the sentence is to be enforced in accordance with Italian law, [...] including the rules on pardon or clemency decisions.

Since EDS satisfied the requirements, the sentence (a term of imprisonment of five years and six months) was declared extinguished, the term having been reduced to three years' imprisonment as a result of the pardon recognised by legge n. 241 (Law No 241) of 2006.

Under Article 7 of Legislative Decree No 161 of 7 September 2010, when Italy transfers the enforcement of an Italian criminal conviction to another country, it is no longer possible to enforce the sentence in Italy once the enforcement of that sentence has begun in the executing State, unless the sentenced person escapes from custody.

Italian domestic law therefore provides that, once a foreign criminal conviction issued by the judicial authority of a Member State of the European Union has been recognised for enforcement by another Member State, and the enforcement of the sentence has begun in the executing State, the issuing State loses the power to enforce the sentence, unless the sentenced person escapes from custody.

EDS, by virtue of the refusal of the surrender requested with the European arrest warrant, the recognition for enforcement in Italy of the Romanian criminal conviction and the start of the enforcement of the sentence recognised in Italy, thus appears to be entitled to discharge of the European arrest warrant issued against him by Romania on 8 February 2019 and to the deletion of the corresponding alert entered in the SIS.

Romania's failure to discharge the European arrest warrant and, more importantly, the failure to delete the related alert in the SIS therefore directly, currently and effectively compromise EDS's personal liberty and his right to free movement within the European Union, since he is likely to be arrested whenever he crosses any European border.

However, Italian domestic law does not grant the Italian court, as the court of the executing State, the power to order the discharge of a European arrest warrant

issued by another Member State or to delete an alert entered in the SIS by another issuing Member State.

Therefore, according to the wording of the provisions of Italian domestic law, EDS's application could not be granted, since the executing State does not have the power to order the discharge of the European arrest warrant issued by the issuing State or to order the deletion of the alert entered in the SIS by the issuing State.

This finding must therefore be compared with the rules of EU law in order to assess whether EU law is valid and can be interpreted as recognising such power for the court of the executing State.

3. Provisions of European Union law relied on

Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 *on the European arrest warrant and the surrender procedures between Member States* provides that the judicial authority in the executing Member State may refuse the surrender if the warrant has been issued for the purposes of execution of a custodial sentence and the sentenced person is staying in, or is a national or a resident of the executing Member State, and that State undertakes to execute the sentence in accordance with its domestic law.

Article 25 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* provides that, in the event that the judicial authority of the executing State refuses surrender under Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002, the provisions of Council Framework Decision 2008/909/JHA of 27 November 2008 apply to recognition for the enforcement of sentences.

Accordingly, in the event that the judicial authority of the executing State refuses surrender under Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002, providing for the enforcement of the sentence in its territory and in accordance with its domestic law, Article 22(1) of Council Framework Decision 2008/909/JHA of 27 November 2008 also applies, which provides that the issuing State may no longer proceed with the enforcement of the sentence once its enforcement in the executing State has begun (unless the sentenced person escapes from custody).

In EDS's case, the Corte di appello di Napoli, as the judicial authority of the executing State, refused surrender under Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002, ordering the enforcement of the sentence in Italy in accordance with its domestic law, subject to recognition of the Romanian criminal conviction under Article 25 of Council Framework Decision 2008/909/JHA of 27 November 2008.

The enforcement of the sentence began in Italy, as the executing State, and for that reason Romania, as the issuing State, lost the power to enforce the judgment, according to the provisions of Article 22(1) of Council Framework Decision 2008/909/JHA of 27 November 2008. In this case, the person sentenced [...] has not escaped from custody, and thus the exception to the rule does not apply.

EDS thus appears to be entitled to the discharge of the European arrest warrant issued by Romania on 8 February 2019 and to deletion of the alert entered in the SIS by Romania, since the court of the executing State proceeded with the enforcement of the sentence recognised in Italy and subsequently declared that that enforcement had ceased.

3.1. It is therefore necessary to ascertain whether EU law provides legal instruments for the direct protection of the right of the person sentenced not to be further prosecuted as a result of the European arrest warrant and the SIS alert once the enforcement of the sentence has begun in the executing State.

Article 55(1) of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 *on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters* provides that alerts entered in the SIS under Article 26 of that regulation must be deleted in three distinct and independent cases: (1) when the person requested to be surrendered by means of the European arrest warrant has been surrendered to the issuing State; (2) when the judicial decision on which the European arrest warrant was based has been revoked by the competent judicial authority in accordance with national law; (3) upon the expiry of the alert in accordance with Article 53.

In this regard, it is to be noted that Article 55 does not provide for the deletion of the alert entered in the SIS under Article 26 in the event that surrender has been refused under Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002, with an order for enforcement of the sentence in the executing State in accordance with its domestic law, subject to recognition of the criminal conviction in accordance with Article 25 of Council Framework Decision 2008/909/JHA of 27 November 2008.

In the opinion of the present Corte di appello, that omission is the result of a lack of regulatory coordination and is open to interpretation.

It is clear why the alert should be deleted when the person has been surrendered: the European arrest warrant has been executed and therefore that person should no longer be sought or arrested in connection with that warrant, which at that point has exhausted its effects.

It is also clear why the alert should not be deleted, in general, when the person has not been surrendered: there are various grounds for refusing surrender, some mandatory and others optional, some temporary because they relate to the

temporary circumstances or characteristics of the person sought, some applicable in some Member States but not in others.

It is therefore entirely reasonable that the SIS alert should not be deleted, in general, when the person has not been surrendered: the person is still wanted and, where appropriate, must be arrested under the same European arrest warrant, albeit at a different time and in a different location and/or circumstances.

It is for that reason that Articles 24 and 25 of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 grant each Member State the power to request the SIRENE Bureau of the issuing Member State to add a flag to the alert that prevents the execution of the action requested with the alert entered in the SIS, on the territory of the Member State that requested that the flag be added. In those circumstances, the SIRENE Bureau of the issuing Member State is obliged to add the flag.

By contrast, it is unreasonable not to require the deletion of the alert from the SIS in the event that surrender is refused under Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002, with an order for enforcement of the sentence in the executing State in accordance with its domestic law, after recognition of the criminal conviction under Article 25 of Council Framework Decision 2008/909/JHA of 27 November 2008.

In that case, the European arrest warrant has served its purpose, as with the surrender of the person to the issuing State.

Ultimately, when the person has been surrendered to the issuing State, the alert must be deleted from the SIS because the European arrest warrant has been executed and has exhausted its effects. This view is also supported by recital 46 of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018, according to which '*an alert should be kept only for the time required to achieve the purpose for which it was entered*'.

However, even when surrender has been refused following recognition of the foreign criminal conviction for enforcement in the executing State, the European arrest warrant has exhausted its effects. This is because Article 22(1) of Council Framework Decision 2008/909/JHA of 27 November 2008 specifically provides that the issuing State may no longer proceed with the enforcement of the sentence once its enforcement in the executing State has begun.

Accordingly, it is clear that the European arrest warrant has served its purpose both in the event that the surrender has been executed, and in the event that it has been refused following recognition of the foreign criminal conviction for enforcement in the executing State, and enforcement has begun.

That being the case, since Article 55(1) of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 provides for the deletion of the alert from the SIS in the event that surrender has taken place, it is

entirely reasonable and consistent to take the view that that provision must be considered extended, by way of interpretation, to the similar case in which the surrender has been refused following recognition of the criminal conviction for the enforcement of the sentence in the executing State, and enforcement has begun. In both cases, the European arrest warrant will have served its purpose, with the result that the related alert must be deleted from the SIS in accordance with recital 46 of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018, according to which *'an alert should be kept only for the time required to achieve the purpose for which it was entered'*.

In the case where the issuing Member State that entered the alert in the SIS under Article 26 of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 does not delete that alert pursuant to Article 55(1), the executing Member State may request the deletion from the SIRENE Bureau of the issuing Member State, similarly to what is provided by Articles 24 and 25 of the same regulation, where the SIRENE Bureau of the issuing State is required to add the flag, or in the present case to delete the alert, solely on the basis of the request of the executing State.

If such an interpretation of EU law were valid, EDS's application would have to be granted, because the Corte di appello di Napoli, as the enforcement court of the Member State enforcing the judgment recognised, would have to request the SIRENE Bureau in Romania to delete the alert from the SIS relating to the European arrest warrant issued against the applicant on 8 February 2019.

It is therefore necessary to refer a question for a preliminary ruling under Article 267 TFEU.

4. Question referred for a preliminary ruling

The Court of Justice of the European Union is requested to declare whether the combined provisions of the following articles:

- Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002;
- Articles 22(1) and 25 of Council Framework Decision 2008/909/JHA of 27 November 2008;
- Articles 24, 25, 26 and 55(1) of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018;
- recital 46 of Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018;

must be interpreted as meaning that:

1. when the executing State has refused surrender of the person, requested by the issuing State by means of a European arrest warrant issued for the enforcement of a criminal conviction, recognised the judgment and ordered enforcement of the sentence on its territory in accordance with its domestic law, and the enforcement has begun, the issuing State is obliged to delete the alert entered in the SIS and to discharge the European arrest warrant;
2. until the issuing State has proceeded with the discharge and the deletion, the judicial authority of the executing State has the power to request the SIRENE Bureau of the issuing State to delete the alert from the SIS, and that SIRENE Bureau is obliged to comply with that request.

5. Request for an urgent preliminary ruling procedure pursuant to Article 107 of the Rules of Procedure of the Court of Justice of the European Union

The Court of Justice of the European Union is requested to proceed by means of an urgent preliminary ruling procedure since EDS, despite the completion of the sentence that was the subject of the European arrest warrant, recognised for enforcement in Italy following refusal of surrender, cannot travel to any Member State of the European Union without the specific risk of being arrested until such time as the alert entered by Romania relating to the European arrest warrant of 8 February 2019, which has now exhausted its effects, has been deleted from the SIS.

The protection of EDS's personal liberty and right to free movement within the European Union thus directly depends on the preliminary ruling decision.

If the question referred for a preliminary ruling is dealt with in the manner indicated, the alert would be deleted from the SIS and EDS would be able to move freely within the European Union without being arrested on foot of the European arrest warrant, which Romania issued on 8 February 2019 and which has now exhausted its effects.

[...] [instructions for the national registry]

Naples [...], 4 July 2023

[...]