

Case C-481/23 [Sangas] ⁱ

Request for a preliminary ruling

Date lodged:

26 July 2023

Referring court:

Audiencia Nacional (Spain)

Date of the decision to refer:

24 July 2023

Respondent:

JMTB

AUDIENCIA NACIONAL (National High Court, Spain)

CRIMINAL DIVISION

[...]

[internal procedural matters]

**QUESTION REFERRED TO THE COURT OF JUSTICE OF THE
EUROPEAN UNION FOR A PRELIMINARY RULING**

1. Body which refers the question for a preliminary ruling:

[...] Criminal Division of the National High Court.

2. [...] [identification of the interveners]

3. Subject matter of the proceedings and facts:

By judgment of 21 February 2022 (ROJ: SAN 677/2022 – ECLI:ES:AN:2022:677), clarified by order of 3 March 2022, the accused JMTB,

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.

among others, was convicted of THREE offences AGAINST THE TAXATION AUTHORITIES and one offence of MONEY LAUNDERING and sentenced as follows:

a) For each of the three offences AGAINST THE TAXATION AUTHORITIES: Two years of imprisonment and a fine of EUR 23 million for the financial year 2011, EUR 135 million for the financial year 2012 and EUR 140 million for the financial year 2013, with the loss of the opportunity to receive public subsidies or grants and the right to benefit from tax or social security benefits or incentives during the three-year period.

b) For the offence of MONEY LAUNDERING: Six years of imprisonment and a FINE of EUR 54 million.

The offences for which the accused was convicted consisted, in essence, in the creation of several companies in Spain, to which the accused appointed fictitious agents to act as apparent directors, with a view to evading the payment of value added tax (VAT) in Spain for financial years 2011, 2012 and 2013, relating to the sale of hydrocarbons in Spain. Likewise, in order to conceal the origin of the fraudulent sums, the accused arranged withdrawals of funds in Spain from the companies used to commit the tax fraud and ordered transfers to other companies in the scheme and to accounts located abroad.

Following the announcement that the accused had lodged an appeal against that judgment, he was refused permission to travel to Romania, but when he was found at the Croatian border heading towards Romania, a European and International Arrest Warrant was issued for his search, capture and detention at national and international level.

In a communication dated 4 April 2023, the Court of Appeal of Alba Iulia (Romania) sent a copy of judgment in criminal matters No 21/13.03.2023, refusing the execution of the European arrest warrant against the accused.

The legal basis of the judgment of the Romanian court refusing to surrender the accused person states, first, that none of the mandatory grounds for refusal to execute the European arrest warrant exist.

Next, when analysing that judgment to determine whether any of the optional grounds for refusal to execute the European arrest warrant exist, it states that the requested person has produced documents proving continuous and lawful residence in the territory of Romania for a period of at least five years, and that the requested person has stated that he does not wish to be surrendered to the Spanish judicial authorities, which amounts to a refusal to execute the conviction of the issuing Member State, with the result that a ground for refusing the surrender exists.

Furthermore, the Romanian court notes that the offences for which the requested person was convicted at first instance, by the issuing judicial authority of the

European arrest warrant, are established under Romanian legislation as offences of tax fraud and money laundering, that the penalty provided for in respect of those two offences is a term of imprisonment of between 3 and 10 years and, therefore, if the acts had been committed within the jurisdiction of the Romanian judicial authorities, the limitation period for criminal liability would have been 10 years from the date of the last action/inaction. The Romanian court notes that the three offences of tax evasion in respect of which the requested person was convicted were committed during the financial years 2011, 2012 and 2013, with the result that the limitation period may be regarded as running from 31 December 2013 at the latest.

However, despite indicating the foregoing, that the limitation period begins on 31 December 2013 and that the limitation period is 10 years, the Romanian court states as follows: *Unless interrupted or suspended, the limitation period for criminal liability would have expired on 30 December 2021* and, since the commission of the offence, there has been no cause that would allow the interruption of the limitation period for criminal liability, although that division of the National High Court expressly informed the Romanian authorities that there had been no stoppage in the proceedings, to the extent that a trial had been held and the conviction was being appealed.

The Romanian court therefore finds that there are two optional grounds for refusal to execute a European arrest warrant and, therefore, it refuses to execute the European arrest warrant issued in the name of the requested person JMTB:

- The person requested is a resident of Romania.
- The offences would be statute-barred had they fallen within the jurisdiction of the Romanian judicial authorities.

4 Relevant provisions:

Article 4 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) includes the following in the Grounds for optional non-execution of the European arrest warrant:

- In paragraph (4): *where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law;*
- In paragraph (6): *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 staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.*

- a) In accordance with Article 4(4), execution of the surrender may be refused only if the State executing the European arrest warrant has jurisdiction under its domestic law to prosecute the acts for which the European arrest warrant has been issued and can therefore apply its domestic law for the purpose of determining whether the limitation period for the statute-barring of the offence or penalty laid down in its law has expired.

In contrast, where the courts of the executing State do not have jurisdiction over the acts for which the European arrest warrant has been issued, they cannot rule on the statute-barring of the penalty or offence by applying their own law, but must comply with the law of the State in which the criminal procedure is taking place.

- b) In addition, Article 4(6) allows refusal to surrender, subject to three conditions:
- the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order;
 - the requested person is staying in, or is a national or a resident of the executing Member State; and
 - the executing State undertakes to execute the sentence or detention order in accordance with its domestic law.

5 Reasons for that court’s uncertainty as to the interpretation or validity of EU law:

In the light of the decision of the Romanian court, the principles of that Council Framework Decision, with which all Member States of the European Union must comply, do not appear to have been respected.

- a) First, the decision of the Romanian court refuses the surrender of the accused JMTB, on the ground that the offences are statute-barred under Romanian law.

However, that decision is based on the application of the rules on the limitation periods for the statute-barring of offences under Romanian law, despite all the acts in question having been committed in Spain, and constitute tax fraud affecting Spain’s economic interests, with the result that the Romanian courts have no jurisdiction to prosecute them.

- b) Furthermore, the refusal to surrender, on the ground that the person concerned was a Romanian resident, does not appear to meet the conditions laid down by the Framework Decision for the application of that optional clause for refusing the surrender.

The first of those conditions is not met in the present case, since the examination of the facts is still ongoing, even though a judgment was handed down at first instance in respect of the requested person.

In addition, even if the requested person is considered to be resident in Romania, even though during the proceedings he has only been authorised to travel to Romania for short periods of time, the refusal to surrender is not accompanied by an undertaking by the Romanian authorities to enforce any sentence that may be finally imposed on the requested person in Romania, which, if that situation were to persist, would create an area of impunity for those acts.

As demonstrated by the CJEU judgment of 31 January 2023 (ROJ: PTJUE 21/2023 – EU:C:2023:57), in paragraphs 75 and 76, *to accept that it is permissible for each Member State to add other grounds to those grounds enabling the executing judicial authority not to give effect to a European arrest warrant would likely, first, undermine the uniform application of Framework Decision 2002/584, by making its application subject to rules of national law, and, second, render ineffective the obligation to execute European arrest warrants laid down in Article 1(2) of that framework decision, by permitting, in practice, each Member State freely to determine the scope of that obligation on its executing judicial authorities. Such an interpretation would impede the proper operation of the simplified and effective system for the surrender of persons convicted or suspected of having infringed criminal law established by that framework decision and, therefore, would run counter to the objective it pursues, referred to in paragraph 67 above.*

The need to refer the question for a preliminary ruling:

This question referred for a preliminary ruling is necessary given that the European arrest warrant issued by this Court has become ineffective in relation to Romania, where the fugitive has taken refuge, and certainly in relation to the other members of the European Union. In that regard, the abovementioned decision of the Romanian court states: *‘the Romanian judicial authority executing the European arrest warrant shall request that the National SIRENE Bureau take the steps necessary to add a validity indicator to the SIS alert entered by another Member State on the basis of a European arrest warrant the execution of which is refused by the judicial authority concerned.’*

Paragraph 140 of the judgment of the Court of Justice of the European Union (Grand Chamber) of 31 January 2023 (EU:C:2023:57) states that no provision of Framework Decision 2002/584 excludes the issuing *of several successive European arrest warrants against a person, including where the execution of a first European arrest warrant concerning that person has been refused.*

However, the same judgment also states, in paragraph 141, that the issuing of a new arrest warrant may prove necessary *after the factors which prevented the execution of a previous European arrest warrant have been ruled out or, where*

the decision refusing to execute that European arrest warrant was not consistent with EU law.

It is therefore necessary for the Court of Justice of the European Union to rule on whether or not the decision of the Romanian court complies with EU law, at least in order to enable a new European arrest warrant to be issued against the requested accused person, with effect in the territory where he has taken refuge in order to seek impunity.

6. Procedure carried out:

[...]

[procedural measures; observations of the parties on the referral for a preliminary ruling; the State lawyer and the Public Prosecutor’s Office support the referral; the accused, JMTB, opposes it]

7. Questions referred for a preliminary ruling:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 19(3)(b) TEU and Article 267 TFEU:

1. Since Article 4(6) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) provides that the grounds for optional non-execution of the European arrest warrant include cases in which the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law:

a) Is it permissible to extend the application of that optional ground for refusal to surrender to cases in which a final decision has not yet been reached regarding the requested person?

b) If that possibility were allowed, is it possible to refuse to surrender on the ground that the requested person is resident in the State in which enforcement is sought, without that State undertaking to execute the sentence or detention order in accordance with its domestic law?

2. Since Article 4(4) of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) provides that the grounds for optional non-execution of the European arrest warrant include cases where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member

State under its own criminal law, is it permissible to extend that ground for optional non-execution of the European arrest warrant to cases in which the offence or penalty is regarded as statute-barred under the law of the executing Member State, even if the courts of that State do not have jurisdiction to determine the facts?

[...]

[signatures of the judges]

WORKING DOCUMENT