Case C-95/24 [Khuzdar] [i]

Request for a preliminary ruling

Date lodged:

6 February 2024

Referring court:

Corte di appello di Napoli (Italy)

Date of the decision to refer:

6 February 2024

Criminal proceedings against:

ATAU

ORDER

for a request 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)

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

[…]

in the proceedings for the European arrest warrant pursuant to l. 69/05 (Law No 69/05) brought by the Slovak Republic against:

ATAU, […]

having regard to the European arrest warrant of 5 October 2015 issued by the District Court of Dunajska Streda (Slovakia) for the enforcement of Slovak criminal conviction No 3T/219/2009 of 23 August 2010, which became final on 7 September 2010, sentencing the requested person to a total of five years' imprisonment, a sentence still to be carried out in its entirety;

[…] [national procedure]

[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.

OBSERVES

1. Facts

On 5 October 2015, the Slovak Republic issued a European arrest warrant for the enforcement of Slovak criminal conviction No 3T/219/2009, delivered by the District Court of Dunajska Streda (Slovakia) on 23 August 2010 and which became final on 7 September 2010, sentencing the requested person ATAU (alias ATAU) to a total of five years' imprisonment, a sentence still to be carried out in its entirety. The requested person was found by the criminal investigation police in Italy on 19 June 2023 and was provisionally arrested. The Court of Appeal was then called upon to assess the surrender requested by the Slovak Republic by means of the European arrest warrant. During the proceedings before the Court of Appeal, the requested person declared and demonstrated that he had been lawfully and actually resident in Italy for more than five years. He thus applied to the Court of Appeal to refuse his surrender and order the sentence imposed on him by the Slovak criminal conviction to be carried out in Italy, by means of the recognition of that judgment for enforcement in Italy.

To assess the application, which is not manifestly unfounded, the Court of Appeal requested the Slovak Republic to complete the certificate specifying the procedural safeguards applied to the convicted person. By memorandum dated 2 November 2023, the District Court of Dunajska Streda replied that the convicted person had not been present at the trial resulting in his conviction. However, he had been assisted and represented by a lawyer during the trial. Furthermore, he had not been given notice of the date and place of the trial, but had been aware that his trial was pending because he had been arrested and placed in pre-trial detention in Slovakia on 28 September 2009 for the same offence. On 15 December 2009, he had been released and placed in a refugee camp in Slovakia, but had fled on 31 December 2009. Since he had not returned and had not provided an address for service, the Slovak court had been unable to trace him or serve the summons on him to appear at the court hearing. As a result, the hearing took place in the absence of the convicted person, who had disappeared without trace despite being aware of the trial. The convicted person had been assisted and represented at the trial by a defence lawyer, at the end of which he was given a five-year custodial sentence.

Since, without further investigation, there do not appear to be any other grounds for refusing the surrender, the Court of Appeal must ascertain whether the conditions for refusing the surrender have been satisfied, subject to recognition of the judgment allowing the five-year custodial sentence imposed on the requested person to be carried out in Italy, as per his application.

2. Provisions of national law relied on

Article 18a(2) 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 *ratione temporis*, provides that 'when the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, the appeal court may refuse the surrender of the Italian citizen or of a person who has been lawfully and actually resident or staying in Italian territory continuously for at least five years … provided that it orders such custodial sentence or detention to be executed in Italy in accordance with its domestic law'. In the case of ATAU (alias ATAU), the documents before the court suggest that those conditions were satisfied.

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 laying down provisions to bring domestic 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 (Court of Appeal) 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.

Accordingly, under Italian law, the Court of Appeal, where it decides to refuse the surrender and orders the enforcement in Italy of the foreign criminal conviction, must recognise that judgment pursuant to Legislative Decree No 161 of 7 September 2010, provided the requirements are satisfied.

Article 13(1)(i) of Legislative Decree No 161 of 7 September 2010 […] provides that 'the court of appeal may refuse to recognise the conviction in any of the following cases:… (i) if the person did not appear in person at the trial resulting in the decision to be carried out, unless the certificate states: (1) that, in due time, the person either was summoned in person and thereby informed of the scheduled date and place of the trial or, by other means, actually received official information of the scheduled date and place of that trial in such a manner that it was established unequivocally that he or she was aware of the scheduled trial, and were informed that a decision may be handed down if he or she does not appear

for the trial; or (2) that, being aware of the date on which the trial was scheduled, he or she had given a mandate to a legal counsellor, either appointed by the person concerned or assigned to him or her, and were indeed defended by that counsellor before the court; or (3) that, after having been served with the decision and informed expressly of the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, he or she stated expressly that he or she does not contest the decision or did not request a retrial or appeal within the applicable time frame'.

In the present case, as mentioned above, the requested person had never been informed of the scheduled date and place of the trial, as provided for in subparagraph (1), or of the date on which the trial was scheduled, as provided for in subparagraph (2), and he did not receive the information referred to in subparagraph (3). The Slovak Republic has disclosed that he was aware only that the trial was pending, because he had been arrested and placed in pre-trial detention for three months. Once released, he had disappeared without a trace, so it had not been possible to inform him of the scheduled date and place of the trial or of the fact that a decision would be handed down even if he did not appear for the trial.

Therefore, in the present case, even if the Court of Appeal did decide to refuse the surrender and order the sentence to be carried out in Italy, it would be unable to do so, because the requirements for refusing to recognise the judgment have all been satisfied.

As to the procedural safeguards relating to the European arrest warrant, Article 1(1a) of Law No 69 of 22 April 2005 […], in the version applicable *ratione temporis*, provides that 'when it has been issued for the purpose of enforcing a custodial sentence or a detention order imposed at the end of a trial in which the person concerned has not appeared in person, the European arrest warrant shall also stipulate at least one of the following conditions: … (b) the person concerned, informed of the trial, was represented at the trial resulting in the aforementioned decision by a legal counsellor, appointed by or assigned to the person concerned'.

It must be concluded therefore that when the convicted person has been informed of their pending trial, and is assisted by a legal counsellor, surrender in execution of the European arrest warrant is permitted, whereas recognition of the judgment in the executing State is not.

The surrender based on the European arrest warrant is permitted on the sole condition that the convicted person, assisted by a legal counsellor, has been informed that his or her trial is pending. By contrast, recognition of the judgment in the executing State is permitted on the condition that the convicted person, assisted by a legal counsellor, has been informed of the date on which the trial has been scheduled.

In the present case, those provisions mean that ATAU (alias ATAU) could be surrendered to the Slovak Republic, because he had been assisted by a legal counsellor and informed that his trial was pending. However, Italy could not, despite him actually residing in Italian territory for more than five years and having made a request to that effect, refuse the surrender by ordering the sentence to be carried out in Italy, because he had not been informed of the date on which the trial had been scheduled.

Paradoxically, therefore, the procedural safeguard envisaged for the convicted person as regards recognition of the judgment is more extensive than the procedural safeguard relating to the European arrest warrant. This is detrimental to the convicted person, rather than being in his favour.

In the present case, in fact, ATAU (alias ATAU) could not benefit from the refusal of surrender resulting from him actually residing in Italy for five years because, paradoxically, the procedural safeguard provided by the Slovak Republic (notification that the trial is pending) is weaker than the one envisaged for the recognition of the judgment (notification that a date has been scheduled for the trial). Had that not been the case, it would have allowed the sentence to be carried out in Italy if the surrender were refused.

In such an event, the requested person would forfeit the right to serve his sentence in the executing State, not because he had benefited from a more extensive procedural safeguard, but paradoxically because he was the recipient of a weaker procedural safeguard. He was therefore penalised twice: first by the trial in absentia, not having been informed of the date on which the trial was scheduled, and subsequently by the surrender to the sentencing State instead of serving the sentence in the executing State, even though the other requirements had been satisfied.

This system also leads to the paradoxical conclusion that the same criminal conviction cannot be recognised in Italy for the purposes of enforcement, because the procedural safeguard applied (notification that the trial is pending) is less than the one envisaged (date on which the trial has been scheduled), yet it allows surrender to the sentencing State for enforcement. Consequently, within the same European judicial area, the same judgment is considered to lack the minimum procedural safeguard necessary for its enforcement, but to offer the minimum procedural safeguard necessary for surrender to the same sentencing State that issued the judgment, granting the defendant the weaker safeguard.

That finding should be compared with the provisions of EU law to assess whether EU law is valid and can be interpreted to the effect that the surrender may be refused, after recognition of the judgment for the sentence to be served in the executing State, even if there is no procedural safeguard for recognition of the judgment, whereas there is a procedural safeguard for the surrender based on the European arrest warrant.

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.

Article 9(1)(i) of Framework Decision 2008/909/JHA […] provides that 'the competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if: (i) according to the certificate provided for in Article 4, the person did not appear in person at the trial resulting in the decision, unless the certificate states that the person, in accordance with further procedural requirements defined in the national law of the issuing State: (i) in due time: either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial and were informed that a decision may be handed down if he or she does not appear for the trial; or (ii) being aware of the scheduled trial had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or (iii) after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: expressly stated that he or she does not contest the decision or did not request a retrial or appeal within the applicable time frame'.

EU law thus expressly provides that the condition for the recognition in the executing State of a criminal conviction handed down in the absence of the convicted person is the fact that he or she, assisted by a legal counsellor, has been informed at least of the scheduled date of the trial. The same provision exists in Italian law.

The difference is that, whereas Italian law provides that failing such a procedural safeguard, the national court 'shall refuse recognition', EU law provides that, in such a case, the court of the executing State 'may refuse to recognise the judgment'. Therefore, although under the equivalent Italian law the Court of Appeal would be obliged to refuse recognition, under EU law the Court of Appeal would have the power, but not the obligation, to refuse it.

This difference is crucial in the present case: by applying the equivalent Italian law, it would not be possible to recognise the judgment for enforcement in Italy because ATAU (alias ATAU) had not been informed of the scheduled trial date, and therefore the Court of Appeal would have to surrender him to the Slovak Republic even if he were entitled to serve his sentence in Italy and had applied to do so. Conversely, by applying EU law – the source of the equivalent Italian legislation – the court of the executing State would have discretionary power to assess whether to recognise the foreign criminal conviction and, if so, to refuse the surrender and order the sentence to be carried out in Italy.

It thus appears that the Italian law transposing EU law in the matter of the recognition of criminal convictions, both directly and indirectly through the European arrest warrant, conflicts with EU law by providing for the mandatory, rather than optional, refusal of recognition in the event that the abovementioned minimum procedural safeguards are not observed.

Accordingly, it must be determined whether EU law is valid and should be interpreted to that effect.

It is therefore necessary to request 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;
- Article 9(1)(i) and Article 25 of Council Framework Decision 2008/909/JHA of 27 November 2008;

must be interpreted as meaning that:

1. the court of the executing State, requested to recognise a foreign criminal conviction, has discretionary power, not the obligation, to refuse recognition of the judgment, where it appears that the trial resulting in that judgment has not afforded the defendant any of the procedural safeguards provided for in Article 9(1)(i) of Council Framework Decision 2008/909/JHA of 27 November 2008;

2. the court of the executing State, requested to order the surrender based on a European arrest warrant issued to enforce a judgment, when the conditions for ordering the surrender of the convicted person to the sentencing State and the requirements for refusing the same have all been satisfied, simultaneously ordering that the sentence be carried out in the territory of the executing State, has the power to refuse the surrender, recognise the judgment and order the enforcement of that judgment in its territory, even if the trial resulting in the recognised judgment has not afforded the accused any of the procedural safeguards provided for by Article 9(1)(i) of Council Framework Decision 2008/909/JHA of 27 November 2008.

[…] [instructions for the registry]

Naples […]

[…]