

**Case C-237/21**

**Request for a preliminary ruling**

**Date lodged:**

13 April 2021

**Referring court or tribunal:**

Oberlandesgericht München (Germany)

**Date of the decision to refer:**

9 April 2021

**Person whose surrender is sought:**

S.M.

**Applicant:**

Generalstaatsanwaltschaft München

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**Oberlandesgericht München (Higher Regional Court, Munich)**

[...]

**C-237/21 –**

**1**

[...]

In the extradition proceedings

S. M. (née M.),

[...]

concerning corruption,

on 9 April 2021 the Higher Regional Court of Munich (1st Criminal Chamber)

[...] made the following

**Order:**

1. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ('the TFEU'):

Do the principles governing the application of Articles 18 and 21 TFEU established by the Court in its judgment of 13 November 2018 in *Raugevicius* (C-247/17, EU:C:2018:898) require that a request from a third country under the European Convention on Extradition of 13 December 1957 seeking the extradition of an EU citizen for the purpose of enforcing a sentence is to be refused, even where the requested Member State is obliged by international law under that Convention to extradite the EU citizen, because it has defined the term 'nationals' within the meaning of Article 6(1)(b) of the Convention as meaning that it refers only to its own nationals, not to other EU citizens?

2. The extradition procedure is stayed pending a ruling by the Court of Justice of the European Union on the question referred. [Or. 2]

**Reasons:**

**I.**

On 5 November 2020, the authorities of Bosnia-Herzegovina requested that the Federal Republic of Germany extradite the person whose surrender is sought for the purpose of enforcing the 6-month custodial sentence for corruption imposed by judgment of the District Court, Bosanska Krupa, of 24 March 2017 in case 18 0 K 031029 16 K.

The person whose surrender is sought is a citizen of Serbia, Bosnia-Herzegovina and Croatia who has lived in Germany with his wife since mid-2017 and who has been working as a regional courier since 22 May 2020. Having been placed in the interim under provisional arrest, he is now at large.

The Croatian authorities were notified of the request by the authorities of Bosnia-Herzegovina purely as a precautionary measure, but did not respond.

The Generalstaatsanwaltschaft München (Public Prosecution Service, Munich), referring to the judgment in *Raugevicius*, requests that the court find that the extradition of the person whose surrender is sought is inadmissible.

**II.**

- 1.

The Chamber holds that the application made by the Public Prosecution Service pursuant to Paragraph 29(1) of the Gesetz über die internationale Rechtshilfe in

Strafsachen (Law on International Mutual Assistance in Criminal Matters, ‘the IRG’) is admissible [...] [further details] [**Or. 3**]

2.

The merits of the application depend upon the question referred in the operative part of the order as to whether Articles 18 and 21 [TFEU] are to be interpreted as meaning that an EU citizen should not be extradited even where the requested State is obliged to extradite that person under international law.

That question is not answered in the judgment of the Court of 13 November 2018 in *Raugevicius* (C-247/17, EU:C:2018:898), as the Republic of Finland was entitled under international law to refuse to extradite the Lithuanian citizen to the Russian Federation, as explained in greater detail under section II.2.b, whereas in this case the Federal Republic of Germany has an obligation towards Bosnia-Herzegovina under international law to extradite the Croatian citizen.

More precisely:

a)

The Federal Republic of German has an obligation towards Bosnia-Herzegovina under international law pursuant to Article 1 of the European Convention on Extradition of 13 December 1957 (‘the Convention’) to extradite the person whose surrender is sought for the purpose of enforcing the custodial sentence imposed by the District Court, Bosanska Krupa.

aa)

The extradition of the person whose surrender is sought is based on the European Convention on Extradition of 13 December 1957, which was ratified by the Federal Republic of Germany on 2 December 1976 and by Bosnia-Herzegovina on 25 April 2005.

Under Article 1 of the Convention, the Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in the Convention and provided an exemption is not allowed under any other provision of the Convention, all persons wanted by the judicial authorities of the requesting Party for the carrying out of a sentence ([...] [Commentaries]; see also order of the Bundesverfassungsgericht (Federal Constitutional Court) of 31 March 1987, 2 BvM 2/86, juris, paragraph 34, and Articles 26 and 27 of the Vienna Convention on the Law of Treaties of 23 May 1969).

bb)

The requirements of the Convention governing the obligation to extradite are fulfilled in this case. [**Or. 4**]

An extraditable offence within the meaning of the first sentence of Article 2(1) of the Convention has been committed. The conduct of the person whose surrender is sought, as established by the District Court, Bosanska Krupa, would also be punishable by a maximum custodial sentence of 5 years under the first sentence of Paragraph 332(1) of the Strafgesetzbuch (German Criminal Code). The punishment awarded exceeds the 4 months required under the second sentence of Article 2(1) of the Convention.

There is no obstacle to extradition pursuant to Articles 3 to 11 of the Convention, and Bosnia-Herzegovina provided the supporting documents required under Article 12 of the Convention in full.

The extradition of the person whose surrender is sought and the instruments on which it is based would safeguard the minimum standard under international law which is binding in the Federal Republic of Germany under Article 25 of the Grundgesetz (Basic Law) and would not infringe mandatory constitutional principles or the mandatory level of protection of fundamental rights (see, in that regard, order of the Federal Constitutional Court of 26 February 2018, 2 BvR 107/18, juris; interim order of 26 January 1982, 2 BvR 856/81).

b)

However, the question that arises is whether Articles 18 and 21 TFEU require that the Croatian person whose surrender is sought should not be extradited to Bosnia-Herzegovina, notwithstanding the obligation to do so under international law, because the Federal Republic of Germany would refuse to extradite a German national pursuant to Article 6(1)(a) of the Convention.

(1)

This question would appear at first sight to have been settled by the judgment of the Court in *Raugevicius* (C-247/17, EU:C:2018:898). The Court answered the question referred for a preliminary ruling by the Finnish court as follows:

*'In the light of the foregoing considerations, the answer to the questions referred is that Articles 18 and 21 TFEU must be interpreted as meaning that, where an extradition request has been made by a third country for an EU citizen who has exercised his right to free movement, not for the purpose of prosecution, but for the purpose of enforcing a custodial sentence, the requested Member State, whose national law prohibits the extradition of its own nationals out of the European Union for the purpose of enforcing a sentence and makes provision for the possibility that such a sentence pronounced abroad may be served on its territory, is required to ensure that that EU citizen, provided that he resides permanently in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition.'*

However, on closer consideration, it is clear that the Republic of Finland could have refused to extradite the EU citizen in that case without infringing any obligation towards the Russian Federation under international law. That is because the Republic of Finland chose in the declaration made on 12 May 1971, at the time of its accession, to define the term ‘nationals’ within the meaning of Article 6(1)(b) of the Convention as ‘nationals of Finland, Denmark, Iceland, Norway and Sweden as well as aliens domiciled in these States’. [Or. 5]

The judgments of the Court in *Petruhhin*, C-182/15, EU:C:2016:630, *Pisciotti*, C-191/16, EU:C:2018:222, and *BY*, C-398/19, EU:C:2020:1032) were based on a similar situation under international law concerning extradition for the purpose of prosecution. In those cases, the requested State had to decide, based on Article 65 of the Agreement of 3 February 1993 between the Republic of Latvia and the Russian Federation on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters and on Article 10 of the Agreement on extradition between the European Union and the United States of America of 25 June 2003 (OJ 2003 L 181, p. 27) and Article 17 of the Convention, to which of the several requesting States the person whose surrender was sought should be extradited. Extradition to the country of origin of the EU citizen whose surrender was sought would therefore have been possible in all the cases adjudicated by the Court, without causing the requested EU Member States to infringe their obligations towards the third countries concerned under international law.

(2)

In this case, the situation under international law is different.

The Federal Republic of Germany made the following declaration on 3 October 1976, at the time of deposit of its instrument of ratification, in connection with Article 6(1)(b) of the Convention:

*‘Extradition of Germans from the Federal Republic of Germany to a foreign country is not permitted by virtue of Article 16, paragraph 2, first sentence, of the Basic Law for the Federal Republic of Germany and must, therefore, be refused in every case. The term “nationals” within the meaning of Article 6, paragraph 1 b, of the European Convention on Extradition 1957 covers all Germans within the meaning of Article 116, paragraph 1, of the Basic Law for the Federal Republic of Germany.’*

The first sentence of Article 16(2) and Article 116(1) of the Basic Law for the Federal Republic of Germany (‘the GG’) read as follows:

First sentence of Article 16(2) of the GG

*No German may be extradited to a foreign country.*

Article 116(1) of the GG

*Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person.*

Nothing is otherwise provided by law with regard to the extradition of persons for the purpose of enforcing a sentence. Paragraph 2(1) and (3) of the IRG, which is relevant in that regard, states:

- (1) *A foreign national who is being prosecuted in a foreign state for an offence or who has been convicted of an offence which is punishable there may be extradited to that foreign state upon the request of a competent agency [Or. 6] for prosecution or for enforcement of a penalty or other sanction imposed for that offence.*
- (2) *[...]*
- (3) *For the purposes of this Act, 'foreign nationals' means persons who are not Germans as defined in Article 116(1) of the Basic Law (Grundgesetz).*

Bosnia-Herzegovina did not make any reservations or declarations in connection with the Convention.

(3)

Doubt therefore arises as to whether the case-law of the Court on Articles 18 and 21 TFEU established in *Raugevicius* applies in this case.

(a)

The Court assumes in its case-law that unequal treatment which allows the extradition of an EU citizen who is a national of a State other than the requested State, but not of a national of the requested Member State, gives rise to a restriction on the right pursuant to Article 21 TFEU (judgments of 13 November 2018, C-247/17, EU:C:2018:898, paragraph 30; of 17 December 2020, C-398/19, EU:C:2020:1032, paragraph 40; of 10 April 2018, C-191/16, EU:C:2018:222, paragraph 45; and of 6 September 2016, C-182/15, EU:C:2016:630, paragraph 33).

Such a restriction can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions (judgments of 13 November 2018, C-247/17, EU:C:2018:898, paragraph 31; of 17 December 2020, C-398/19, EU:C:2020:1032, paragraph 41; of 10 April 2018, C-191/16, EU:C:2018:222, paragraph 46; and of 6 September 2016, C-182/15, EU:C:2016:630, paragraph 34).

The Court has accepted that preventing the risk of impunity for persons who have committed an offence must be regarded as a legitimate objective and may in principle justify a restrictive measure such as extradition (judgments of 13 November 2018, C-247/17, EU:C:2018:898, paragraphs 32 and 33; of 17 December 2020, C-398/19, EU:C:2020:1032, paragraph 42; of 10 April 2018, C-191/16, EU:C:2018:222, paragraph 47; and of 6 September 2016, C-182/15, EU:C:2016:630, paragraph 37).

Measures may, however, be justified by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures (judgments of 13 November 2018, C-247/17, EU:C:2018:898, paragraph 32; of [Or. 7] 17 December 2020, C-398/19, EU:C:2020:1032, paragraph 42; of 10 April 2018, C-191/16, EU:C:2018:222, paragraph 48; and of 6 September 2016, C-182/15, EU:C:2016:630, paragraphs 38 and 41).

(b)

The question of whether less restrictive measures in that sense include practices that would cause a Member State to infringe its obligations under international law was not addressed in those judgments, as the Member States concerned were legitimately able to refuse extradition to the third country under international law. The Court has (therefore) not yet expressed its views on that question.

However, the Advocate General assumed in his Opinion in *Raugevicius* that, ‘in accordance with the possibility provided by Article 6(1)(b) of that convention, the Republic of Finland chose to define in a declaration the term “nationals”, within the meaning of that convention, as ‘nationals of Finland, Denmark, Iceland, Norway and Sweden as well as aliens domiciled in these States’ (Opinion of Advocate General Yves Bot of 25 July 2018, EU:C:2018:616, point 85). He further stated (point 86): ‘In the present case, the Republic of Finland’s intention as expressed in that declaration to provide equal treatment with respect to protection against extradition cannot, as regards Union citizens such as Mr Raugevicius, remain a dead letter. Articles 18 and 21 TFEU require the Republic of Finland to give full effect to it.’

Therefore, having considered all aspects in law and in fact, the court has doubts as to whether the principles established by the Court in *Raugevicius* also apply in this case and Articles 18 and 21 TFEU are to be interpreted as meaning that the extradition to Bosnia-Herzegovina of the person whose surrender is sought should be found to be inadmissible, notwithstanding the obligation to the contrary under Article 1 of the Convention.

(4)

Even though the Chamber takes the view that it is irrelevant for the ruling on the question referred, it notes, in light of the finding of the Court at paragraph 42 of the judgment in *Raugevicius* and for the purpose of providing a complete picture

of the situation under national law, that the custodial sentence imposed by the District Court, Bosanska Krupa, could in principle be enforced in the Federal Republic of Germany. As the person whose surrender is sought is already present in the territory of the Federal Republic of Germany, the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 ('the Council of Europe Convention'), which both the Federal Republic of Germany and Bosnia-Herzegovina have ratified, is irrelevant ([...] [legislative material, commentaries and case-law]). Enforcement of the judgment of the Bosnian-Herzegovinan court is therefore governed by Paragraphs 48 et seq. of the IRG and, contrary to Article 3(1)(a) and (d) of the Council of Europe Convention, depends neither on German nationality nor the consent of the person whose surrender is sought ([...] [legislative material]). **[Or. 8]**

According to the first sentence of Paragraph 57(1) of the IRG, enforcement is only possible with the consent of the State which delivered judgment ([...] [commentaries]). That does not apply here, at least not at present, as the Bosnian-Herzegovinan authorities have requested extradition, not enforcement.

[...]