

Anonymised version

Translation

C-763/22 – 1

Case C-763/22

Request for a preliminary ruling

Date lodged:

16 December 2022

Referring court:

Tribunal judiciaire de Marseille (France)

Date of the decision to refer:

14 December 2022

Applicant:

Procureur de la République

Defendant:

OP

Cour d'Appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence)

Tribunal judiciaire de Marseille (Court of Marseille)

[...] JUDGMENT IN A CRIMINAL MATTER

At the public hearing of the Tribunal Correctionnel de Marseille (Criminal Court of Marseille) **on the FOURTEENTH OF DECEMBER TWO THOUSAND AND TWENTY-TWO,**

the Court of Marseille, having deliberated following the hearing held on 2 December 2022 [...],

the case was called

BETWEEN:

the PROCUREUR DE LA REPUBLIQUE (Public Prosecutor), at this Court,
applicant and prosecutor

AND

Defendant

Name: **OP**

[...]

Nationality: French

[...]

Currently held at Madrid 5 Soto del Réal Prison, Spain

Position under criminal law: placed on bail

- Search warrant dated 25/01/2012
- Detention order dated 26/09/2012
- Bail order dated 20/09/2013 with a bond of EUR 4 000, EUR 400 of which is release bond
- Release bond paid on 20/09/2013
- Release order dated 20/09/2013
- EUR 1 100 paid
- Continuation of bail dated 19/01/2016
- Continuation of bail by judgment dated 18/06/2021
- Arrest warrant pursuant to Article 410-1 of the Code de procédure pénale (Code of Criminal Procedure) dated 03/06/2022

not appearing and represented at the hearing by [his counsel],

Charged with the following:

INVOLVEMENT IN A CRIMINAL ASSOCIATION WITH A VIEW TO
PREPARING AN OFFENCE PUNISHABLE BY A TERM OF
IMPRISONMENT OF AT LEAST FIVE YEARS

FRAUDULENT POSSESSION OF FALSE ADMINISTRATIVE DOCUMENT ESTABLISHING A RIGHT, AN IDENTITY OR A STATUS, OR GRANTING AN AUTHORISATION

USE OF FALSE ADMINISTRATIVE DOCUMENT ESTABLISHING A RIGHT, AN IDENTITY OR A STATUS, OR GRANTING AN AUTHORISATION

ACQUISITION OF EQUIPMENT, INSTRUMENT, COMPUTER PROGRAM OR DATA DESIGNED OR ADAPTED FOR COUNTERFEITING AN INSTRUMENT OF PAYMENT (SCRIPTURAL MONEY)

POSSESSION OF EQUIPMENT, INSTRUMENT, COMPUTER PROGRAM OR DATA DESIGNED OR ADAPTED FOR COUNTERFEITING AN INSTRUMENT OF PAYMENT (SCRIPTURAL MONEY)

HEARING

[...]. [Conduct of the hearing – procedural considerations]

*

Whereas by report constituting a summons dated 04/08/2022 drawn up by the Public Prosecutor, **OP** was summoned to today's hearing in accordance with Articles 551 and 559 of the Code of Criminal Procedure.

OP has not appeared but is duly represented by his counsel who has authorisation; it is necessary to give judgment on him in adversarial proceedings pursuant to the first and second paragraphs of Article 411 of the Code of Criminal Procedure.

He is charged with:

having, in FRANCE and ROMANIA, in May 2011, and in any case during a period in respect of which criminal proceedings are not time-barred, acquired and possessed equipment, instruments, computer programs or data designed or specially adapted for the purpose of committing offences involving the counterfeiting or falsification of payment cards or cash withdrawal cards,

for which penalties are laid down in Article L 163-4-1, L 163-5, L163-6 du Code monétaire et financier (Monetary and Financial Code) (natinf 23792, 23793);

having, in MARSEILLE and in French territory, from May 2010 to January 2012, and in any case during a period in respect of which criminal proceedings are not time-barred, been involved in a group formed or a conspiracy established with a view to the preparation, marked by one or more material actions, of one or more offences punishable by at least five years' imprisonment, in this case offences relating to the manufacture, acquisition, transfer, offering or making available, and possession of equipment, instruments, computer programs or data designed or

specially adapted for the purpose of committing offences involving the counterfeiting or falsification of payment cards or cash withdrawal cards,

for which penalties are laid down in Articles 450-1, 450-3, and 450-4 of the Code pénal (Criminal Code) (natinf 23002);

having, in FRANCE and THAILAND, between November 2011 and January 2012, possessed a false administrative document, in this case a passport in the name of SY,

for which penalties are laid down in Articles 441-3, 441-10, and 441-11 of the Criminal Code (natinf 11641); and

having, in FRANCE and THAILAND, between November 2011 and January 2012, used a false administrative document, in this case a passport in the name of SY,

for which penalties are laid down in Articles 441-2, 441-9, 441-10, and 441-11 of the Criminal Code (natinf 496).

OP was the subject of an action before the Criminal Court of Marseille for having acquired and possessed material for counterfeiting payment cards and having been involved in a criminal association in connection with the counterfeiting of payment cards between 2010 and 2012.

When he was due to be tried in September 2021, his counsel informed the court of he had been apprehended and imprisoned under an arrest warrant issued for him by the Swiss authorities and in respect of which an extradition request had clearly been made.

A severance of proceedings was ordered to enable his position to be reviewed and enable him to be tried in person.

An initial referral on 17 December 2021 showed that the position was unchanged and on 3 June 2022, that is to say almost one year after the case was first called, OP's counsel stated that the situation had not changed and that OP did not wish to be extradited to SWITZERLAND, but instead wished to be repatriated to FRANCE for the purpose, inter alia, of giving an account for himself in relation to that matter.

Since he still failed to appear at that hearing but had not given his counsel authority to represent him, the Court of Marseille decided to make use of Article 410-1 of the Code of Criminal Procedure, which allows, where a defendant fails appear before the Criminal Court of Marseille, use of an order to appear or an arrest warrant to compel a defendant to appear.

Since the Court of Marseille delayed raising the case for over six months, it was important to enable this particularly old matter (order for reference to the Criminal Court of Marseille dating from 2016) to be resolved, which is why the only solution was to issue an arrest warrant for OP to have him appear in FRANCE and try him in that case, whilst pointing out that if he failed to appear that could not be attributed to him and that it was understood that he wished to come and give an account of himself.

However, the Court of Marseille was to learn from the order of Madrid Central Court No 5 dated 2 September 2022 that, by decision of the Spanish Council of Ministers, priority had been given to the extradition request made by the Swiss Government and therefore it was not envisaged that the European arrest warrant issued by the French judicial authorities would be executed.

Article 57 of Spanish Law 23/2014 on the mutual recognition of judicial decisions provides, where a European arrest warrant and surrender is concurrent with an extradition request made by a third country, the Spanish judicial authority is to suspend the procedure and forward all the documents concerned to the Ministry of Justice, which in turn is to submit the matter to the Council of Ministers.

It is further observed that that decision, which thus confers on a governmental authority the power to decide on the coercive measure to be executed, ostensibly includes no legal remedy.

At the hearing of 2 December 2022, OP's counsel requested that the Court of Marseille refer the following question to the Court of Justice of the European Union for a preliminary ruling: **'Does Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States preclude the legislation of a Member State from granting a governmental authority the power to decide, between a European arrest warrant and a concurrent extradition request issued by a third country, which of the two is to be executed, without any possibility of legal remedy?'**

The Public Prosecutor's Office does not deny the difficulty thus posed by the functioning of the Spanish institutions, but considers that the question cannot be raised by the present court, which has no legitimate interest in the dispute; the court is requested to reserve the procedural issue for final judgment and to give a ruling.

Article 267 of the Treaty on the functioning of the European Union provides that the Court of Justice of the European Union is to have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is to bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union is to act with the minimum of delay.

In this instance, it is important to establish whether, in the present case, this Criminal Court of Marseille can legitimately refer a question relating to the way in which the institutions of a country other than its own are organised and whether such a question can be relevant to the dispute before it.

The question raised undoubtedly concerns an issue which does not relate directly to the way in which the French judicial system is organised but to the way in which the Spanish judicial system is organised, in that the latter provides that, in the event of a request for the execution of an arrest warrant, and in particular one that is concurrent with another coercive measure, the choice of which coercive measure takes priority lies not with the judicial authority but with the Spanish Council of Ministers.

In this instance, it should be pointed out that the facts before the Court of Marseille are particularly old and that the referral to the Court of Marseille dates back to January 2016, since which time OP has been waiting for an opportunity to appear in court to give an account of himself.

As he was held in Spain in connection with an extradition request made by the Swiss authorities, he was unable to appear before the court when the case was first called.

The primary purpose of the arrest warrant issued was to enable him to appear, since he had always made it known that he intended to give an account of himself and therefore did not want to give his counsel power of representation, which is covered by the right of any defendant to appear in person.

The purpose of the successive referrals made was to clarify the situation and to allow OP to be heard in relation to the acts of which he is accused, since the Court of Marseille was unable to give a ruling as long as OP's situation was not definitively known with regard to the two subpoenas issued against him. It was therefore legitimate for the country in which OP was held to decide that the execution of one or other of the measures would take priority and thus whether or not to execute the European arrest warrant issued by this Court of Marseille.

In this instance, however, the way in which the Spanish institutions are organised has not led to a judicial authority resolving the difficulty, but rather allowed a governmental body, the Spanish Council of Ministers, to take that decision, which appears to be contrary to the framework decision of the European Council of 13 June 2002, and more particularly to Articles 6 and 7 thereof, since reference is made to judicial authorities alone, whether it be for the purposes of issuing or executing the European arrest warrant, and the objective sought by only an executing judicial authority appears to be capable of resolving this dispute in accordance with that EU legislation.

Whether or not the French courts are able to try OP turns in actual fact on the decision thus taken by the Spanish authorities, since failure to execute the European arrest warrant deprives the Court of Marseille of the possibility of having OP appear and thus of administering justice; it is therefore incorrect to consider that the Criminal Court of Marseille does not have the necessary entitlement to refer the question drawn up by OP's counsel for a preliminary ruling, since the ability to try a defendant is in itself compromised and the conditions for his appearance are called into question.

In other words, it is in the interest of the French judicial authority to consider the conditions under which it will be able to try a defendant, who is currently subject to the Spanish governmental authorities' decision whether or not to execute the arrest warrant applying to OP, and consequently it is fundamental to ascertain whether or not the process applied by the Spanish authorities complies with the terms of the framework decision of 13 June 2002.

Furthermore, and pursuant to Article 267 of the Treaty on the Functioning of the European Union, the Court of Marseille, given the serious nature of the question raised and its relevance to the present dispute, has decided to refer the question to the Court of Justice of the European Union for a preliminary ruling, in the light of Council Framework Decision of 13 June 2002, since Article 57 of Spanish Law 23/2014 on the mutual recognition of judicial decisions in the European Union, which grants the Council of Ministers the power to assess the preference to be given as between a European arrest warrant and an extradition request, is open to question in the light of the common provisions of EU law, which are binding as a matter of priority on the Member States of the European Union.

[...]

ON THOSE GROUNDS:

the Court of Marseille, ruling in public, as the court of first instance and in adversarial proceedings with regard to OP,

By interlocutory judgment,

DECLARES that it is necessary to refer a question for a preliminary ruling;

ORDERS that the following question be referred to the Court of Justice of the European Union for a preliminary ruling:

‘Does Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States preclude the legislation of a Member State from granting a governmental authority the power to decide, between a European arrest warrant and a concurrent extradition request issued by a third country, which of the two is to be executed, without any possibility of legal remedy?’

[...]

WORKING DOCUMENT