

Supreme Court's DECISION

delivered in Stockholm on 4 April 2024

Case no.

B 3511-23

REQUESTING STATE

Republic of Serbia

PERSON TO WHOM THE REQUEST PERTAINS

ZH

Counsel and Public Defender: Attorney NK

THE MATTER

Determination pursuant to Section 18 of the Swedish Extradition for Criminal Offences Act (Swedish Code of Statutes 1957:668)

THE SUPREME COURT'S RULING

The Supreme Court declares that, pursuant to Section 2 of the Swedish Extradition for Criminal Offences Act, there is an impediment to the extradition of ZH to Serbia.

NK shall receive compensation from public funds for the representation of ZH in the Supreme Court of SEK 203,326. Of the amount, SEK 62,395 relates to

work, SEK 8,750 relates to loss of time, SEK 91,516 relates to outlays and SEK 40,665 relates to value added tax. The State shall bear the cost.

THE EXTRADITION REQUEST, ETC.

The request

1. The Republic of Serbia has requested that ZH be extradited there for execution of a prison sentence.

The position of the Prosecutor General

2. According to the Prosecutor General, there are no impediments to the extradition of ZH to Serbia.

ZH's position, etc.

3. ZH has opposed extradition. He has argued that there are impediments to extradition under Sections 2, 9 and 10 of the Extradition for Criminal Offences Act. He has further argued that extradition would be contrary to Articles 6 and 8 of the ECHR and Article 3 of the Convention on the Rights of the Child.

4. In the extradition case, ZH has been deprived of liberty from 18 November 2022 through 6 March 2023.

REASONS FOR THE RULING

The judgment invoked

5. The request is based on a judgment issued by the Higher Court in Sremska Mitrovica, Serbia, on 4 February 2022. ZH was convicted of the offences of unlawful manufacture, possession, carrying and sale of weapons and explosives as well as causing public danger. The sentence was three years

and six months' imprisonment. The offences were committed on 3 April 2010 in Ruma, Serbia.

6. The judgment was delivered following a main hearing at which ZH did not appear in person. The judgment states that ZH, under the influence of alcohol, illegally carried a weapon and ammunition. It was a pistol for which he had no licence. With the gun, he fired two shots at a group of people, thereby causing danger which threatened their lives and well-being. Earlier on the same evening, he had been involved in an argument with one of the people. He was found to be aware of his act and aware that the act was prohibited.

ZH's statements

7. ZH has stated the following.

8. He is a Union citizen and, given his connection to Sweden, extradition would be contrary to the principle of equal treatment under EU law. He has been in Sweden since 2013, is registered in the national registration and has paid income tax since 2015. He lives with his cohabitant and daughter, both of whom have been registered in Sweden since 2015 and 2016 respectively. They hold a headlease on their dwelling. His daughter has lived most of her life in Sweden. He is involved in the day-to-day care of his daughter, who has a significant need for close contact with her father. Since his arrival in Sweden, he has mainly worked in the construction sector. At present, he and his cohabitant run their own business in the same sector. The family has applied for Swedish citizenship.

9. There is reason to question the assurance given by Serbia that he has an unconditional right to a retrial. He was previously extradited to Serbia and denied a retrial, despite an affirmation from Serbia and a request by him to have the case retried.

The Supreme Court's assessment

Extradition for prosecution or execution of a sentence?

10. The Prosecutor General has argued that the request from Serbia should be considered as a request for extradition for prosecution. This is because ZH has been convicted *in absentia* in Serbia, and a necessary precondition for granting the extradition request is that he be given the opportunity for a retrial which satisfies his right of defence.

11. The Prosecutor General has referred to a judgment of the Court of Justice of the European Union (CJEU) concerning a European arrest warrant for execution of a sentence (see I.B., C-306/09, EU:C:2010:626). That case concerned the interpretation of Articles 3, 4(6), 5(1) and 5(3) of the Council Framework Decision on the European arrest warrant¹. In that decision, the CJEU stated that a person requested for surrender for execution of a sentence, if they have been convicted *in absentia* and are still entitled to a retrial, is comparable to a person subject to a European arrest warrant for prosecution. The Court concluded that, in such a situation, the executing Member State can impose the condition that the subject of the request be returned to serve any sentence that may be imposed after a retrial in the issuing Member State.

12. It may be noted in this context that a surrender for prosecution under a European arrest warrant may, in some cases, be subject to the condition that the requested person be returned to the executing Member State for execution of any sentence. No such similar condition can be imposed in connection with extradition.

13. The extradition request from Serbia relates to the execution of a custodial sentence pursuant to a legally binding judgment imposing

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

imprisonment. The fact that ZH has the right to request a retrial, pursuant to Section 9, third paragraph, second sentence of the Extradition for Criminal Offences Act, since it is a conviction *in absentia*, cannot be considered to entail that the request is to be regarded as a request for extradition for prosecution when considering the question of extradition. The CJEU's judgment, with regard to the Council Framework Decision on the European arrest warrant, does not change that assessment.

14. The request must therefore be examined as a request for extradition for the purposes of execution of a sentence.

Extradition of a Union citizen to a third country

15. A Swedish citizen may not be extradited (Section 2 of the Extradition for Criminal Offences Act).

16. As EU Member States are obliged to apply the principle of equal treatment under EU law when considering extradition cases where a Union citizen has exercised his or her right to free movement, they are obliged to treat citizens of other Member States in the same way as their own citizens. This presupposes that the person whose extradition has been sought demonstrates such an evident degree of integration in the Member State examining the extradition request that he or she can be considered permanently resident there. (See Articles 18 and 21 of the Treaty on the Functioning of the European Union, TFEU, the judgments of the CJEU in *Petruhhin*, C-182/15, EU:C:2016:630 and *Raugevicius*, C-247/17, EU:C:2018:898.)

17. The wording of Section 2 means that a Swedish citizen is treated differently from a citizen of another Member State (cf. the prohibition of discrimination in Article 18). Thus, the provision can also be said to constitute a restriction on freedom of movement within the meaning of Article 21. (See

"Extradition of the Union citizen I" NJA 2019 p. 377 para. 13 and cf. Raugevicius para. 27, 28 and 30.)

18. The CJEU has ruled that the restriction imposed by such a difference can only be justified if it is based on objective considerations and is proportionate to the legitimate objective pursued. Extradition has the legitimate objective of preventing the risk of impunity for persons who have committed an offence. Extradition may therefore be justified to achieve this objective. However, this presupposes that the objective cannot be achieved by a measure which is less restrictive of freedom of movement. (See Raugevicius, para. 31, 32 and 40 and "Extradition of the Union citizen I", para. 14.)

19. Member States must therefore verify whether any available measures are as effective as extradition in preventing impunity for persons who have committed an offence, but less restrictive. In requests for extradition for the purpose of execution of a sentence, one less restrictive measure is that the law of the requested State permits execution of the sentence there. (Cf. Raugevicius para. 30–32 and 47.)

20. The Supreme Court has stated that any claims that extradition would be contrary to EU law must be treated as a question of whether a legal impediment exists pursuant to Section 2 of the Extradition for Criminal Offences Act. This shall then be applied in a way that is compatible with Sweden's obligations under EU law, and shall equate Union citizens with Swedish citizens, if the former satisfies the requirement for permanent residence in Sweden. (See "Extradition of the Union citizen I", para. 18 and 22)

21. Furthermore, the Supreme Court has stated that the review, required by the CJEU, of available measures which are less restrictive than extradition, must consider whether Swedish legislation provides for the possibility of

execution of the sentence in Sweden. However, the possibility of executing the sentence in the individual case is not to be examined in the context of the extradition case. (See "Extradition of the Union citizen I", para. 16 and 24).

22. Following the above-mentioned decision of the Supreme Court, the CJEU has clarified its case law in the judgment S.M., C-237/21, EU:2022:1017. This case concerned a request for extradition to a third country from Germany of a Union citizen who had exercised his right to free movement. Germany, unlike Sweden, is obligated under international law, by the European Convention on Extradition, to extradite persons other than its own citizens without exception. The CJEU ruled that extradition could take place without conflicting with EU law. However, for extradition to be compatible with the Treaty, the Member State must first actively seek the third country's consent to execution occurring instead in the Member State, using all the mechanisms for judicial assistance in criminal matters at its disposal. Only after consent was not obtained could extradition be compatible with the Treaty. (See S.M. para. 49, 53 and 56.)

23. It is therefore now evident that some scope exists for extraditing Union citizens who are permanent residents of the requested State and who have exercised their right to free movement. However, it does not follow in such cases that there is an obligation, based on EU law, to extradite a Union citizen.

24. As the Supreme Court has already ruled, the question of whether the conditions exist for execution of a sentence in an individual case is separate from the examination of whether an impediment to extradition exists under the Extradition for Criminal Offences Act. The Swedish procedure is not designed such that an enforcement review is conducted in the context of the extradition review. Equal treatment of permanently resident Union citizens and Swedish citizens in the application of Section 2, without a review of the conditions for execution in the individual case, cannot conflict with Articles 18 and 21

TFEU. In addition, such equal treatment serves the overriding interest in ensuring that prison sentences are executed in the State with the best conditions for the offender's social rehabilitation.

25. In conclusion, the case law established by the Supreme Court should not be changed as a result of the CJEU's stance in the S.M. decision.

The permanent residence requirement

26. The question of whether a person is to be considered permanently resident in Sweden as required for him or her to be equated with a Swedish citizen upon application of Section 2 of the Extradition for Criminal Offences Act must be considered on the basis of an overall assessment of the person's connection to Sweden and taking into account the overriding interest that prison sentences be enforced in the State with the best conditions for the convicted person's social rehabilitation (cf. "Extradition of the Union citizen II" NJA 2022 p. 709, para. 13).

27. This overall assessment must take into account, among other things, the individual's family, work and length of time in Sweden. Linguistic, social and economic integration may also be significant, as may housing conditions. The individual's conduct in Swedish society in other respects may also affect the assessment, e.g., the extent to which he or she has committed crimes. (Cf. "Extradition of the Union citizen II", para. 14)

The assessment in this case

28. ZH is a citizen of Croatia and therefore falls within the scope of Article 18 TFEU. He has exercised his right to free movement within the EU. If he is considered to be permanently resident in Sweden, he must therefore be treated in the same way as a Swedish citizen upon application of Section 2 of the Extradition for Criminal Offences Act.

29. The facts that have emerged regarding ZH's personal circumstances strongly suggest that he demonstrates an evident degree of integration in Sweden. He has been resident in Sweden for more than a decade, with income from employment or self-employment since 2015. He has lived in Sweden with his cohabitant and their 13-year-old daughter for many years. His daughter has lived most of her life in Sweden. Both he and his family thus have long-standing ties to Sweden. During his time in Sweden, he has only been subject to legal proceedings for a traffic offence, which is not relevant to the assessment.

30. He himself has stated that his knowledge of the Swedish language is limited. In view of his extensive integration in other respects, this circumstance cannot be accorded decisive importance. The same applies to the fact that, in 2017, he was extradited to Serbia for execution of a monthslong prison sentence, for offences committed in 2012 and 2013.

31. Against this background, ZH's connection to Swedish society is so strong that he must be considered to be permanently resident here and thus equated with a Swedish citizen.

32. The Supreme Court also notes that Swedish law permits, under certain conditions, the execution of a custodial sentence imposed by a court in Serbia (see Section 25a of the Act on International Co-operation in the Enforcement of Criminal Judgments (1972:260)). Whether such execution of a sentence can be realised in the present case is beyond the scope of the impediment review. (See para. 21 and 25.)

33. Therefore, there is an impediment to extradition under Section 2 of the Extradition for Criminal Offences Act.

34. There is no reason for the Supreme Court to rule on the question of whether there are also other impediments to the extradition of ZH to Serbia

under the Extradition for Criminal Offences Act, or whether extradition would be incompatible with the ECHR or the Convention on the Rights of the Child.

35. The compensation requested for the defence of ZH may considered reasonable.

Justices of the Supreme Court Agneta Bäcklund, Thomas Bull, Stefan Reimer (reporting Justice), Johan Danelius and Christine Lager participated in the ruling.

Judge referee: Mathilda Rydstern