

**THE EUROPEAN ARREST WARRANT AND  
REFUSAL TO SURRENDER FOR EXTRADITION**

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## **1. Introduction**

This paper aims to examine the European Arrest Warrant (hereafter EAW) with particular regard to refusals to surrender for extradition. The authors have also attempted to provide an overview of legislation concerning the EAW at EU and Finnish national levels and to examine possible points of difficulty via case law.

Because the length guidelines for this paper set unavoidable limits on the range of material that can be covered here, the authors have tried to emphasise the key issues and those we believe are of the greatest interest in this area of research.

Finally, this paper presents some points of criticism and suggestions for improvement concerning the difficulties identified.

## **2. The Council Framework Decision on the EAW and the surrender procedures between Member States**

### **2.1 General**

The Council Framework Decision on the EAW (hereafter FD) and the surrender procedures between Member States (2002/584/JHA) was adopted by the Council of the European Union on 13 June 2002. This FD is part of the legal cooperation between Member States of the European Union in criminal matters. The FD is based on the Commission's Proposal issued on 19 September 2001 (OJ C 332, 27/11/2001, p. 305), which itself was based substantially on the conclusions of the European Council of Ministers assembled in Tampere, Finland on the 15th and 16th of October 1999. According to the Conclusions of the Tampere European Council, the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced, and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.

### **2.2 Purpose and objectives**

The term "EAW" is used to denote a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or enforcing a custodial sentence or detention order. Member States shall execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the FD (Article 1). The implementation of the FD shall not have the effect of

modifying the obligation to respect fundamental rights and fundamental legal principles, such as the respect for human rights and fundamental freedoms, and the rule of law, as enshrined in Article 6 of the Treaty on European Union.

The purpose of the FD is to speed up and simplify the procedures associated with extradition, replacing a political and administrative procedure with a judicial procedure. A further aim of the FD is to create a new, uniform system of rules for extradition among the EU Member States, replacing the previous regulations which were based on a number of different international treaties. A faster extradition procedure can also be viewed as beneficial for the person whose extradition is being sought, because the objective should be to keep the time the person is deprived of his/her liberty due to the extradition procedure to a minimum.

Effective 1 January 2004, the FD replaced the corresponding provisions of the conventions applicable to extraditions in relations between the Member States (Article 31).<sup>1</sup>

### **2.3. Scope of application**

Article 2 of the FD sets out the scope of the EAW. A EAW may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months. Where a sentence has been passed or a detention order has been made on the basis of the act for which a warrant has been issued, then a EAW may be issued for sentences of at least four months.

Article 2 of the FD includes a listing of crimes which give rise to surrender pursuant to a EAW without verification of the double criminality of the act by the executing Member State. An additional requirement is that the crimes must be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State. The list includes 32 crimes or types of crimes.<sup>2</sup> These include participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children, rape, murder, racism and xenophobia, corruption, counterfeiting currency, trafficking in stolen vehicles, and fraud, including that affecting the financial interests of the European Communities.<sup>3</sup>

The question of whether a particular act is included in this list is determined according to the legislation of the Member State issuing the EAW. The Council may decide unanimously to extend or amend the list. For offences other than those covered in the list, surrender may be subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

## **2.4 Grounds for execution and refusal to surrender**

### **2.4.1 Grounds for mandatory non-execution**

Article 3 of the FD contains a list of situations in which the judicial authority of the Member State of execution shall refuse to execute the EAW.

The first item states that execution must be refused if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law.

Execution shall also be refused if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts (the *ne bis in idem* or double jeopardy principle). An additional condition in such situations is that where there has been sentence, the sentence has been served or is currently being served or may no longer be enforced under the law of the sentencing Member State.

The executing judicial authority must also refuse to execute the EAW if the person who is the subject of the EAW may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

### **2.4.2 Grounds for optional non-execution**

Article 4 of the FD includes provisions for optional non-execution of a EAW. The executing judicial authority may refuse to execute the EAW (1) if the act on which the EAW is based does not constitute an offence under the law of the executing Member State (double criminality). However, in relation to taxes or duties, customs and exchange, execution of the EAW shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State.

Execution may also be refused: (2) where the person who is the subject of the EAW is being prosecuted in the executing Member State for the same act as that on which the EAW is based; or (3) where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the EAW is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings.

Execution of a EAW may also be refused: (4) where the criminal prosecution is time-barred 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; or (5)

if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts. In such cases, an additional requirement is that if there has been sentence, the sentence must have been served or be currently being served or may no longer be enforced under the law of the sentencing country.

If a EAW has been issued for the purposes of enforcement of a custodial sentence or detention order, execution of that EAW may be refused (6) where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to enforce the sentence or detention order in accordance with its domestic law.

Further, execution of a EAW may be refused where the EAW relates to offences which (7 a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or (7 b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

### **2.4.3 New Article 4a**

Council FD 2009/299/JHA amending FDs 2002/584/JHA, 2005/214/JHA, 2008/909/JHA and 2008/947/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial added a new Article 4a to the FD on the EAW.

FD 2009/299/JHA entered into force on 28 March 2009. The objectives of this FD are to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States.

Article 2 of FD 2009/299/JHA includes provisions amending FD 2002/584/JHA on the EAW. Under the new Article 4a, the executing judicial authority may refuse to execute the EAW issued for the purpose of enforcing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision.

Paragraphs (a) – (d) of that article set out exceptional cases where a judicial authority may not refuse to execute a EAW, even if the person did not appear in person at the trial. For example, if the person 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. A further requirement in such cases is that the person must

have been informed that a decision might be handed down if he or she does not appear for the trial. Nor may execution be refused in cases where the person, 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.

#### **2.4.4 Special conditions for execution of the EAW**

The execution of the EAW by the executing judicial authority may, by the law of the executing Member State, be subject to certain conditions. These guarantees to be given by the issuing Member State are set out in Article 5 of the Framework Agreement.

According to that Article, conditions may be set in cases involving a custodial life sentence or where the person is a national or resident of the executing Member State.

For example, if the offence on the basis of which the EAW has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State.<sup>4</sup> In cases where a person who is the subject of a EAW for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him/her in the issuing Member State.

#### **2.5 Procedure**

When the location of the requested person is known, the issuing judicial authority may transmit the EAW directly to the executing judicial authority. Help may be obtained from the Schengen Information System (SIS) and Interpol. If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network.

Member States may decide to keep the requested person in detention. Such measures must, however, be necessary and in accordance with the law of the executing Member State. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the EAW and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority. A requested person who is arrested for the purpose of the execution of a EAW shall have a right to be assisted by a legal counsel and by an

interpreter in accordance with the national law of the executing Member State.

A EAW shall be dealt with and executed as a matter of urgency. In cases where the requested person consents to his surrender, the final decision on the execution of the EAW should be taken within a period of 10 days after consent has been given. In other cases, the final decision on the execution of the EAW should be taken within a period of 60 days after the arrest of the requested person. If a Member State refuses to execute a EAW, reasons must be given for such refusal.

### **3. Legislation concerning the EAW in the Finnish legal system**

Finland implemented the FD in its national legislation by enacting the Act on Extradition on the Basis of an Offence Between Finland and Other Member States of the European Union (in Finnish, *Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä* 1286/2003, Ri 403, hereinafter referred to as the EU Extradition Act). This Act came into force on 1 January 2004.

The Nordic countries (Finland, Sweden, Denmark, Norway and Iceland) adopted an inter-Nordic extradition convention (the Nordic Extradition Convention) on 15 December 2005 to be applied instead of the EU Extradition Act for criminal extraditions between Nordic countries.<sup>5</sup> Denmark, Finland and Sweden have issued a statement saying that they will continue to apply the uniform legislation in force between them. These countries have stated that the convention between them is compatible with the FD and their uniform legislation in force allows the provisions of the FD to be extended and enlarged.<sup>6</sup>

The EU Extradition Act sets out the authorities that are competent to deal with matters relating to the EAW. The Helsinki, Oulu, Kuopio and Tampere District Courts and the district prosecutors working in the judicial districts of those courts are competent to deal with matters concerning extradition and taking persons into custody. Appeals against decisions concerning extraditions under a EAW are made directly to the Supreme Court of Finland without requesting leave to appeal.<sup>7</sup>

When making a request for extradition to Finland, the competent authority to extradite a person suspected of committing a crime shall be the prosecutor who is competent to bring charges in the criminal case in question. A request for extradition for enforcement of a custodial sentence shall be made by the Criminal Sanctions Agency (*Rikosseuraamusvirasto*).

Thus the decision-making concerning extradition has been regulated as primarily a legislative, rather than administrative, matter. Exceptions to this are cases where there are competing extradition requests by an EU Member State and a non-Member State which is not a Nordic

country, or by an EU Member State and the International Criminal Court. In such cases, the law provides for the Finnish Ministry of Justice to make a decision.

If a person resident in Finland is extradited to another Member State for prosecution, this requires national criminal sanctions for the crime(s) on the basis of which the extradition is being sought. If extradition of a person is being sought for enforcement of a custodial sentence, the request must be based on a valid court judgment.

Extradition of a Finnish citizen shall be subject to the same requirements as extradition of a citizen of another country. If a Finnish citizen has been sentenced to a custodial sentence, he or she may request to serve the custodial sentence in Finland. If an extradition request pertains to the enforcement of a custodial sentence, a Finnish citizen may choose whether to serve the sentence in Finland or in the other Member State.<sup>8</sup>

The EU Extradition Act includes certain basic conditions that must be satisfied before a person may be extradited to another Member State. The act on which the request for extradition is based must be punishable by the law of the requesting State by a custodial sentence of at least one year and the act must also be an offence according to the law of Finland. If, on the other hand, extradition is requested for enforcement of a custodial sentence, the penalty imposed must be a custodial sentence of at least four months and the act must also be an offence according to the law of Finland.

Extraditions under this “dual criminality” condition are subject to the list of 32 types of offences included in the FD as well.<sup>9</sup> Where these types of offences are concerned, the maximum penalty for the act provided by the law of the Member State requesting extradition must be a custodial sentence for a maximum period of at least three years.<sup>10</sup>

As in the FD, the EU Extradition Act also includes provisions on the grounds for refusing extradition, which Finland can apply to refuse an extradition. These grounds for refusal are divided into mandatory (s. 5) and optional (s. 6) grounds for refusal.

Section 5 sets out the grounds for mandatory refusal. The term “mandatory grounds for refusal” means that Finland must refuse to surrender a person if any of the mandatory grounds for refusal set out in this section are present. Section 5 states that extradition shall be refused if:

- (1) the offence on which the request is based is covered by a general amnesty enacted in accordance with Article 105(2) of the Constitution of Finland, and in accordance with Chapter 1 of the Criminal Code (39/1889) the law of Finland applies to the

offence;

(2) the requested person has been convicted in a legally final manner in Finland or in another Member State for the offence on which the request is based, on the prerequisite that if he or she has been sentenced to punishment, he or she has served or is serving this sentence or in accordance with the law of the Member State that has sentenced the person the sentence may no longer be enforced;

(3) the requested person had not reached the age of fifteen years at the time of commission of the offence on which the request is based;

(4) the request refers to the enforcement of a custodial sentence and the requested person is a citizen of Finland and requests that he or she may serve the custodial sentence in Finland; the custodial sentence shall be enforced in Finland as separately provided;

(5) the act on which the offence is based is deemed in accordance with Chapter 1 of the Criminal Code to have been committed in full or in part in Finland or on a Finnish vessel or in a Finnish aircraft and:

a) the act or the corresponding act is not punishable in Finland; or

b) the right to bring charges, according to the law of Finland, has become time-barred or punishment may no longer be imposed or enforced;

(6) there is justifiable ground to suspect that the requested person is threatened by capital punishment, torture or other degrading treatment or that he or she would be subjected, on the basis of origin, membership in a certain social group, religion, belief or political opinion, to persecution that threatens his or her life or liberty or to other persecution, or there is justifiable cause to assume that he or she would be subjected to a violation of his or her human rights or constitutionally protected due process, freedom of speech or freedom of association.

A request for extradition shall also be refused if the extradition, in view of the age, state of health or other personal circumstances or special circumstances of the person in question would be unreasonable on humanitarian grounds and this unreasonableness cannot be avoided by postponing execution on the basis of section 47.

Section 6 leaves the matter of whether or not a person is extradited up to a competent court. Under the grounds for optional refusal, a court may refuse to extradite a person if:

- (1) the requested person is being prosecuted in Finland for the same act on which the request is based;
- (2) a decision has been taken in Finland not to prosecute for the offence on which the request is based or to abandon prosecution that has been initiated;
- (3) a final decision other than a judgment, which prevents the bringing of charges, has been issued in a Member State regarding the act on which the request is based;
- (4) in accordance with Chapter 1 of the Criminal Code the act on which the request is based is deemed to have been committed in full or in part in Finland or on a Finnish vessel or aircraft and it is more appropriate to consider the case in Finland;
- (5) prosecution of the offence is statute-barred according to the law of Finland or punishment may no longer be imposed or enforced and in accordance with Chapter 1 of the Criminal Code, the law of Finland applies to the act;
- (6) the request pertains to the enforcement of a custodial sentence, the requested person has his or her permanent residence in Finland and requests that he or she may serve the custodial sentence in Finland and on the basis of his or her personal circumstances or another special reason it is justified that he or she serves the custodial sentence in Finland; the custodial sentence is to be enforced in Finland in accordance with what is separately enacted on this;
- (7) the requested person has been finally judged in a state other than a Member State of the European Union or by the International Criminal Court in respect of the act on which the request is based provided that where he or she has been sentenced, the sentence has been served or is currently being served or may no longer be enforced under the law of the sentencing country;
- (8) the act on which the request is based has been committed outside of the territory of the requesting Member State and in accordance with Chapter 1 of the Criminal Code in a corresponding situation in Finland the law of Finland does not apply.

The grounds for refusal set out above are largely the same as those in the FD. Finland has adopted certain additional grounds for refusal that are not mentioned in the FD.

One such ground for refusal is item 6 in s. 5(1) of the EU Extradition Act. According to this provision, Finland must refuse to extradite a person if there is justifiable ground to suspect that the requested person is threatened by capital punishment, torture or other degrading treatment or that he or she would be subjected, on the basis of origin, membership in a certain social group, religion, belief or political opinion, to persecution that threatens his or her life or liberty or to other

persecution, or there is justifiable cause to assume that he or she would be subjected to a violation of his or her human rights or constitutionally protected due process, freedom of speech or freedom of association. In the preliminary work for this provision (Government Proposal 88/2003 vp) the view was taken that this ground for refusal could be based on other provisions of the FD and Finnish human rights obligations, regardless of the fact that they are not expressly mentioned as grounds for refusal in the FD.<sup>11</sup>

Nor was the ground relating to unreasonableness on humanitarian grounds set out in s. 5(2) adopted in the FD. According to this provision, extradition must be refused if, in view of the age, state of health or other personal circumstances or special circumstances of the person in question, it would be unreasonable on humanitarian grounds. Further, under this subsection 2, extradition cannot be refused if the said unreasonableness can be avoided by postponing execution on the basis of section 47.<sup>12</sup> This provision was added to the Act at the suggestion of the Constitutional Committee, who deemed it necessary because it could not be considered reasonable that extradition of a seriously or chronically ill person could only be requested by postponing execution of the decision to extradite and no other means.<sup>13</sup>

#### **4. Case law**

##### **4.1 The Supreme Court of Finland**

###### **Reference for a preliminary ruling in the case of Gataev and Gataeva<sup>14</sup>**

The official prosecutor submitted a request to the Helsinki District Court to extradite Gataev and Gataeva to Lithuania on the basis of a EAW issued by the Lithuanian Ministry of Justice for the enforcement of a criminal sentence. Gataev and Gataeva had been convicted in the Kaunas District Court on 4 June 2009 on charges including two counts of causing bodily injury or mild physical harm and extortion and were each sentenced to eighteen months' imprisonment.

Gataev and Gataeva applied to have the extradition action struck out. They had sought asylum in Finland and maintained that their asylum procedure should have precedence over the extradition proceedings, so their application for asylum should be decided first. They claimed that the trial in Lithuania had been based on witness evidence obtained in violation of the principles of proper judicial procedure. The best conditions for ruling on whether there was a barrier to extradition under s. 5(1)(6) of the EU Extradition Act were in connection with the asylum procedure. Gataeva also stated that extradition had to be refused under s. 5(2) of the EU Extradition Act or postponed under

s. 47 of the EU Extradition Act because circumstances existed in which the extradition would be unreasonable on humanitarian grounds due to her health.

In its ruling of 25 January 2010 the Helsinki District Court stated that the argument of failure to exercise due process was not *per se* proof of grounds for refusal under s. 5(1)(6) of the EU Extradition Act. The evidence given by the foster daughter did, however, support the argument. The District Court referred to Article 1(3) of the FD and Article 6 of the EU Treaty and declared that extradition would not violate the basic human rights, such as the right to asylum proceedings, of the persons for whom extradition was sought. The granting of asylum constituted a barrier to extradition. Although asylum proceedings were not specifically mentioned in the FD as grounds for refusal, that legal provision had to be construed broadly according to the FD, such that a refusal was also possible on this ground. The District Court refused to extradite Gataev and Gataeva on the grounds of s. 5(1)(6) of the EU Extradition Act. The District Court also ruled that Gataeva's health was a sufficient ground to postpone execution of the extradition, but there were no grounds to refuse extradition on health grounds under section 5(2) of the EU Extradition Act.

The public prosecutor appealed against this decision to the Supreme Court of Finland. The Supreme Court decided to refer the matter to the European Court of Justice for a preliminary ruling. The following questions were referred for a preliminary ruling:

1. How is the relationship between the provisions of the Asylum Procedures Directive and the provisions of the FD to be interpreted when a person whose surrender is requested under a EAW, who is a national of a third country, has applied for asylum in the executing Member State and the application for asylum is in progress at the same time as the case concerning the execution of the arrest warrant? Can a surrender in accordance with the FD be refused on the grounds of a pending asylum application? If asylum is granted, does it therefore follow that the executing Member State must refuse surrender?
2. Is the FD to be interpreted in such a way that execution of the arrest warrant can also be refused on grounds other than those set out in Articles 3 and 4? If so, does it furthermore follow from this that the FD also permits a Member State to refuse to execute an arrest warrant that was issued for the purposes of enforcement of a sentence, on the basis of factors relating to the content or grounds of the judgment delivered in the State which issued the arrest warrant or the appropriateness of the court proceedings which resulted in the judgment?
3. Can the provisions of the FD be interpreted in such a way that surrender can be refused

altogether in a situation in which the surrender may be temporarily postponed for serious humanitarian reasons, if in such a case the unreasonableness of the surrender cannot be eliminated by a stay of execution?

4. If the FD is to be interpreted in such a way that execution of the arrest warrant can be refused on grounds regarding which there are no explicit provisions in the FD, what conditions for such refusal must be imposed, particularly when the arrest warrant was issued for the purposes of enforcement of a sentence?
5. What significance must or may be afforded to the fact that a person apprehended, who is a citizen of a third country, opposes the surrender by claiming that he or she is threatened with deportation to a third country in the country which issued the arrest warrant?
6. Is the obligation of a national court to interpret national law in conformity with the FD, as set out in the *Pupino* case, valid irrespective of whether the interpretation required by the FD turns out to be to the advantage or to the disadvantage of an individual party?<sup>16</sup>

With regard to the procedural law, it is unfortunate that Lithuania rescinded the arrest warrant before the ECJ issued its preliminary ruling in this case. Nevertheless, the questions submitted by the Supreme Court of Finland highlight some significant areas of difficulty with regard to the application of the EAW. Some of the difficulties are technical in nature (the relationship between the arrest warrant and asylum proceedings) and some go to the fundamental principles (the possibility for the executing Member State to refuse to extradite a person on the basis of a judgment issued by the issuing Member State or the issuing Member State's procedural content).

The case of Gataev and Gataeva received a great deal of media attention in Finland because of Gataev and Gataeva's background,<sup>17</sup> and the associated political aspect highlights the fundamental difficulties inherent in the case.

Prior to the withdrawal of the request for a preliminary ruling, the European Commission did manage to issue a response.<sup>18</sup> The Commission took the view that an asylum application in itself was capable only of leading to a postponement of extradition. Articles 2 and 3 of the FD were to be interpreted as containing an exhaustive list of grounds for refusal. Article 1(3) of the FD allowed for the refusal of extradition in exceptional cases if the executing authority is convinced that on the basis of objective factors, the EAW clearly violates fundamental human rights under Article 6 of the EU Treaty or that the person being sought is threatened with deportation to a third country from the country which issued the arrest warrant.

There is a significant difficulty with the EAW evident in the questions referred for preliminary ruling and the replies issued by the Commission: a refusal to extradite on the basis of s. 5(1)(6) of

the EU Extradition Act means a vote of no confidence in the Member State that issued the arrest warrant, and is in direct conflict with the principle of mutual recognition.

### **Supreme Court of Finland case no. 2005:139**

A was convicted of assault and sentenced by the Stockholm District Court to secure psychiatric care, with the need for continuation of care to be assessed at six-monthly intervals. The competent authority in Sweden had issued a EAW for A. The warrant was deemed to apply to the EAW and the surrender procedures between Finland and other EU Member States for enforcement of custodial sentences. Because A, a Finnish national, wanted to serve his sentence in Finland and because the sentence in this case was to be enforced in Finland and was convertible as separately provided, he had grounds for mandatory refusal under s. 5(1)(4) of the Act.

In this case, the Supreme Court of Finland interpreted the EU Extradition Act in accordance with the preliminary ruling issued in the *Pupino* case and viewed the secure psychiatric care ordered by the Stockholm court as constituting consequences for enforcement under the FD and therefore a custodial sentence under the EU Extradition Act. The execution of the warrant was, however, rejected on the basis of s. 5 (1)(4) of the EU Extradition Act. That provision corresponds to Article 4(6) of the FD, which in Finland constitutes a mandatory ground for refusal. The Supreme Court of Finland stressed in its ruling that the FD created a mandatory obligation to place consequences on enforcement in Finland as a result of refusal, even though the authorities would have discretion to enforce the sentence under the domestic Enforcement Act.

## **4.2 The European Court of Justice**

### **Kozlowski**

In the Kozlowski case (C-66/08) the Grand Chamber of the ECJ ruled that Article 4(6) of the FD, which sets out a ground for optional non-execution of the EAW pursuant to which the executing judicial authority may refuse to execute such a warrant issued for the purposes of enforcement of a sentence where the requested person ‘is staying in, or is a national or a resident of, the executing Member State’, and that State undertakes to enforce that sentence in accordance with its domestic law, is to be interpreted as meaning that a requested person is ‘resident’ in the executing Member State when he has established his actual place of residence there and he is ‘staying’ there when,

following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence.

The terms 'staying' and 'resident', which determine the scope of Article 4(6), must be defined uniformly, since they concern autonomous concepts of Union law. Therefore, in their national law transposing Article 4(6), the Member States are not entitled to give those terms a broader meaning than that which derives from such a uniform interpretation.

In order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State.

### **Wolzenburg**

In the Wolzenburg case (C-123/08) the Grand Chamber of the Court ruled that a national of one Member State who is lawfully resident in another Member State is entitled to rely on the first paragraph of Article 12 EC against national legislation, which lays down the conditions under which the competent judicial authority can refuse to execute a EAW issued with a view to the enforcement of a custodial sentence.

Article 4(6) of the FD must be interpreted as meaning that, in the case of a citizen of the Union, the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, make application of the ground for optional non-execution of a EAW laid down in that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

Member States are in principle obliged to act upon a EAW. Apart from the cases of mandatory non-execution laid down in Article 3 of the FD, the Member States may refuse to execute such a warrant only in the cases listed in Article 4 thereof. It follows that a national legislature which, by virtue of the options afforded it by Article 4 of the FD, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that FD to the advantage of an area of freedom, security and justice. When implementing Article 4 and in particular paragraph 6 thereof, the Member States have, of necessity, a certain margin of discretion.

### **Pupino**

The Pupino case<sup>19</sup> principally concerned the standing of victims in criminal proceedings in the interpretation of the FD.<sup>20</sup> The Grand Chamber of the ECJ stressed in its ruling that the national court is required to interpret national law in the light of the FD.

Even though this case does not deal directly with the EAW, its legal principles are relevant in the application of national law to the EAW.<sup>21</sup>

#### **4.3 The European Court of Human Rights**

The preliminary rulings of the European Court of Human Rights have not dealt specifically with the EAW. The ECtHR's rulings are, however, relevant for the evaluation of extradition requirements in relation to the legal principles expressed in the European Convention on Human Rights, and the principles set out therein must also be considered in the application of the EAW.

Due to the limited scope of this paper, a detailed analysis of the ECtHR case law is not presented here, as it is beyond the scope of the actual application of the EAW.

#### **5. Assessment of the EAW system and conclusions**

In the practical application of the EAW, certain issues have arisen that affect decisions concerning extradition as well as the interpretation of principles for refusing extradition.

One problem in the extradition request stage is the lack of precision in requests. The facts of the case on which the request for extradition is based are not identified at all, or else they are described in terms that are too general. A request might describe a particular act only by listing general elementary factors, such as forgery of documents or participation in organised criminal activities, without giving specific details of the actual acts the person has done.

When making a decision on extradition, which is therefore the most critical stage for considering grounds for refusal, problems are caused by the manner and extent to which the authority making the decision on extradition should examine the request submitted and ensure it is reasonable. The Member States have adopted their own practices for checking the warrants, so there is no uniform procedure. In light of the underlying principles of the FD – those of mutual trust and recognition – it would seem that extremely penetrating examination is not justified, for reasons described below. This view is supported by the fact that the aim of the procedure is to speed up and simplify the procedures associated with extradition, thereby promoting cooperation between Member States. Additional checking would cancel out the benefits of the system and would lengthen and complicate proceedings. On the other hand, this procedure is not meant to infringe individuals' protection under the law, so a blind trust in the reasonableness of all extradition requests – without

any checks at all – cannot be considered acceptable.<sup>22</sup>

How and at what level should requests for extradition be examined? Is a formal check sufficient, or is it necessary to compare the facts presented with legal norms ('subsumption') in order to guarantee legal protection? The evaluation of the sufficiency of evidence – i.e. the question of whether the evidence submitted is sufficient to show that a crime has been committed and that the person being sought is the culprit – may not be a desirable method in light of the FD? Member States' attempts to evaluate requests for extradition are partly a reflection of a lack of trust between Member States. Member States have presented claims, set conditions and asked for checks on extradition requests in a manner that is not supported by a strict interpretation of the FD.<sup>23</sup> The fact that the FD mentions respect for human rights, a ban on discrimination, right to due process, freedom of association and freedom of expression only in the preamble to the FD is also regarded as problematic. In practice, this is significant in considering whether a Member State can refuse to surrender a person to another Member State while observing these factors. It is also unclear to what extent the Member States should implement these provisions in their national law. The authors take the view that uniform legislation between Member States is required to safeguard these important rights.

Practice has revealed differing interpretations of the effects of the rights and freedoms mentioned in the preamble on the procedure. Some Member States have deemed it sufficient that other Member States have adopted the European Convention on Human Rights, so they have not seen a need to enact specific legal safeguards in their national extradition laws. Other Member States have taken the view that the preamble to the FD requires express implementation of those provisions, or that it at least provides authorisation for enacting legislation that addresses those matters. Then again, some Member States maintain that the preamble is too general to lead to any such legislation.<sup>24</sup> The Gataev case presented above concerned a similar situation to that mentioned here. The issue in that case was whether people could be extradited to another Member State when they had applied for asylum in Finland prior to the extradition request being made and when they had also opposed the extradition by stating that they had been subject to persecution by authorities in that state, which took the form of politically motivated charges against them.<sup>25</sup>

Thus the fact that the FD leaves the Member States too much leeway in decision-making to solve technical and practical problems is a central problem of the procedure. The methods and practices chosen by different Member States can be radically different from one another, which does not

achieve the uniform procedure that is at the foundation of the FD. This lack of a uniform procedure still engenders a lack of trust between Member States, which makes cooperation more difficult.<sup>26</sup>

Problems can also be caused by the application of the FD extradition procedure to new Member States immediately upon their accession to membership.

The greater mobility of people throughout the European Union, as well as the accession of new Member States, will likely increase the number of extradition requests in the future. Therefore, it is important that national practices are unified at both legislative and practical levels. Training should also be considered for authorities dealing with extradition matters. Improvement and updating of IT systems is also of great importance.

To ensure legal protection of individuals, it is important to obtain confirmation of the significance of the legal principles emphasised in the preamble to the FD in the practical application of national extradition law. It should also be borne in mind that the protection of fundamental and human rights is a guiding principle of the European Union and was reinforced by the Lisbon Treaty. It is clear that individuals' legal protection cannot be subject to differences in national procedural regulations and their varying effectiveness.

Then again, it must be remembered that the express purpose of the EAW system is to strengthen cooperation among authorities. Thus there is a certain structural conflict between the legal protection of individuals and the effectiveness of the system. EU legislation ought to strike a reasonable balance between these two objectives.

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## **CASE LAW**

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- Advocaten voor de Wereld VZW v. Leden van de Ministerraad, case no. C-303/05

### Decisions issued by the European Court of Human Rights

- Kafkaris v. Cyprus, 12/2/2008

## **ENDNOTES**

<sup>1</sup>These conventions are the previously mentioned European Convention and its 1978 amendment, the European Convention on the Suppression of Terrorism (1977), the 1995 and 1996 European Union cooperation treaties and the provisions on extradition in the Schengen Convention, the amendment to the EU Treaty made on 15 October 1975, and the Agreement of 26 May 1989 between the Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests.

<sup>2</sup>See item 9 below, under Finnish legislation

<sup>3</sup>This listing may be considered somewhat problematic in relation to the principle of legality. See the case *Advocaten voor de Wereld VZW* (C-303/05)

<sup>4</sup>For the legal principle contained here, see the ECtHR case *Kafkaris v. Cyprus*

<sup>5</sup>Website of the Finnish Ministry of Justice. Extraditions in criminal matters.

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<sup>6</sup>Europa website.

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_criminal\\_matters/133167\\_fi.htm#amendingact](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/133167_fi.htm#amendingact)

<sup>7</sup>Cf. the amendment application procedure in Finland, which generally has three steps. In cases involving EAWs, the first appeal stage (Court of Appeal) has been eliminated in the interest of speeding up the procedure.

[8](#) Website of the Finnish Ministry of Justice. Extradition within the European Union.

[9](#)The types of offences listed in this section are: 1) participation in a criminal organisation; 2) terrorism; 3) trafficking in human beings; 4) sexual exploitation of children and child pornography; 5) illicit trafficking in narcotic drugs and psychotropic substances; 6) illicit trafficking in weapons, munitions and explosives; 7) bribery; 8) fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention on the protection of the European Communities' financial interests (Treaty Series 85/2002); 9) laundering of the proceeds of crime; 10) counterfeiting currency, including of the euro; 11) computer network crime; 12) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; 13) facilitation of unauthorised entry and residence; 14) deliberate homicide, serious assault and serious causing of bodily injury; 15) illicit trade in human organs and tissue; 16) kidnapping, illegal restraint and hostage-taking; 17) racism and xenophobia; 18) organised and armed robbery; 19) illicit trafficking in cultural goods, including antiques and works of art; 20) swindling; 21) racketeering and extortion; 22) counterfeiting and piracy of products; 23) forgery of administrative documents and trafficking therein; 24) forgery of means of payment; 25) illicit trafficking in hormonal substances and other growth promoters; 26) illicit trafficking in nuclear or radioactive materials; 27) trafficking in stolen vehicles; 28) rape; 29) arson; 30) offences within the jurisdiction of the International Criminal Court; 31) unlawful seizure of aircraft and ships; and 32) sabotage.

[10](#) Website of the Finnish Ministry of Justice. Extradition within the European Union.

[11](#)HE 88/2003, p. 22.

[12](#)Section 47, Stay of execution

The court may stay execution of the extradition decision if circumstances exist in which the extradition would be unreasonable on humanitarian grounds. The execution of the extradition decision shall take place as soon as these grounds have ceased to exist. The competent authorities shall then agree on the new extradition date. The requested person shall be extradited within ten days of the new date thus agreed.

[13](#)Supreme Court of Finland: Gataev case, p. 4 and Legal Committee report 7/2003.

[14](#) C-105/10 PPU. The prosecutor withdrew its appeal against Gataeva and Gataev to the Supreme Court of Finland on 25 March 2010 after Lithuania had withdrawn its arrest warrant for them. As a result of the withdrawal of the appeal, the Supreme Court of Finland withdrew its request to the ECJ for a preliminary ruling.

[15](#) 2002/584/JHA

[16](#) The questions for preliminary ruling are presented here in an abbreviated form, according to the main topics.

[17](#) For background information on the case, see e.g. [http://en.wikipedia.org/wiki/Hadijat\\_Gatayeva](http://en.wikipedia.org/wiki/Hadijat_Gatayeva)

[18](#) Brussels, 17 March 2010, JURM(2010)13007

[19](#) C-105/03

[20](#) 2001/220/JHA

[21](#) see the request for a preliminary ruling in the Gataev and Gataeva case

[22](#)Keijzer & van Sliedregt, pp. 249–254.

[23](#)Ibid.

[24](#)Keijzer & van Sliedregt, pp. 257–259.

[25](#) In the Gataev case, extradition was opposed on the grounds that they were asylum seekers under s. 87(2) of the Finnish Aliens Act (*Ulkomaalaislaki*).

[26](#)Keijzer & van Sliedregt, p. 261.