

APPLICATION OF THE EUROPEAN ARREST WARRANT TO POLISH CITIZENS

Type of proceedings: Question of law referred by a court Initiator: Regional Court for Gdańsk	Composition of the Tribunal: Plenary session	Dissenting opinions: 0
Legal provisions under review	Basis of review	
Admissibility of surrendering a Polish citizen to another Member State of the European Union on the basis of the European Arrest Warrant [Criminal Procedure Code 1997: Article 607t § 1 (supplemented in 2004)]	Prohibition on extraditing Polish citizens [Constitution: Article 55(1)]	

On 13th June 2002, the Council of the European Union issued a Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). The aforementioned decision constitutes a source of secondary European Union law within the framework of the so-called Third Pillar of the European Union (*cf.* Article 34 [ex-Article K.6] (2) point b of the Treaty on the European Union).

The Framework Decision of 13th June 2002 represents a reaction of the EU Member States to the undesirable side-effects of the free movement of persons between those States, such as requires a new form of cooperation in counteracting more serious criminal offences.

According to the definition contained in Article 1(1) of the Framework Decision of 13th June 2002, the EAW is “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 executing a custodial sentence or detention order”.

The obligation to execute a European Arrest Warrant (EAW) also exists, in principle, when the person to whom the EAW relates is a citizen of a State to whom the warrant was directed. Such a State is entitled to refuse to surrender one of its citizens, against whom an EAW has been issued, only where the warrant was issued for the purpose of executing a previously imposed custodial sentence or detention order and where that State undertakes to execute the custodial sentence or detention order in accordance with its domestic law (Article 4 point 6 of the Framework Decision). Where the EAW was issued for the purpose of prosecuting an offence which has not yet been adjudged, the Member State obliged to execute the warrant may subject the surrendering of its citizen to the condition that such

person is returned to that Member State in order to serve the custodial sentence or detention order there (Article 5 point 3 of the Framework Decision).

Furthermore, the Framework Decision departs from the principle of so-called double criminalisation – a feature of the classical institution of extradition within inter-State relations. This principle makes extradition conditional upon the extraditing State recognising as a criminal offence the acts done by the convicted or accused person. However, in the case of many acts enumerated in the Framework Decision of 13th June 2002, it is sufficient, in order to require a person's surrender on the basis of an EAW, that the act must be recognised as an offence in the State where the warrant was issued. Furthermore, the political nature of an offence does not constitute an obstacle to executing an EAW.

The surrender procedure on the basis of an EAW is simpler than in the case of classical extradition. This is demonstrated, for example, by the fact that EAW's are passed directly between the appropriate judicial organs without the participation of a diplomatic channel or other intermediaries.

When Poland acceded to the European Union on 1st May 2004, it accepted the obligation to implement in full the Framework Decision of 13th June 2002. For the purpose of executing this obligation, it was primarily necessary to transpose the content of the Framework Decision into Polish legislation (framework decisions issued within the EU's Third Pillar, just as Directives issued within the First Pillar, are not directly applicable).

A divergence of opinions arose within judicial circles regarding Poland's ability to execute an EAW against its own citizens, given the prohibition on "extraditing" Polish citizens contained in Article 55(1) of the 1997 Constitution. Alongside views expressing the opinion that an appropriate amendment of the Constitution was required, other commentators suggested that the "surrendering" of a citizen on the basis of an EAW is a concept distinct from the notion of "extradition" within international law, which is mirrored (in these commentators' opinions) in Article 55(1) of the Constitution. The Marshal of the Sejm and the Prosecutor General referred to the latter views in proceedings before the Constitutional Tribunal.

The Polish legislator decided to transpose the Framework Decision of 13th June 2002 by way of amendment to the Criminal Procedure Code 1997, without any accompanying alteration of the Constitution. The aforementioned amendment took place on the basis of a 2004 Act amending several criminal statutes. Two new chapters were introduced into the Criminal Procedure Code (CPC): Chapter 65a, regulating situations when a Polish court issues an EAW, and Chapter 65b, regulating situations when an EAW issued by a court of another EU Member State concerns a person present in Poland. Concomitantly, the legislator created a terminological distinction between extradition and the surrendering of a person on the basis of an EAW: in the amended Article 602 of the CPC, located in Chapter 65 (entitled "Extradition and transport of prosecuted or convicted persons, or the delivery of material objects upon the request of foreign states"), "extradition" is defined in a manner so as to ex-

clude the surrendering of a person on the basis of the EAW, pursuant to the procedure regulated in Chapter 65b.

No provision in the Code expressly states that the surrendering of a person from Polish territory, on the basis of an EAW, may also apply to a Polish citizen. Such a conclusion stems, however, from certain regulations contained in Chapter 65b, as interpreted in conjunction with the Framework Decision of 13th June 2002. Namely, Article 607p of the CPC, specifying the compulsory prerequisites for refusing to execute an EAW, fails to envisage that the possession of Polish citizenship by the person to whom the warrant relates could constitute a basis for refusal to execute such a warrant (in comparison, Article 604 of the CPC, concerning extradition, states that extradition is not permissible where the person to whom the extradition relates is a Polish citizen or enjoys the right of asylum in Poland). Articles 607s and 607t successively institute certain restrictions for executing an EAW in respect of Polish citizens and persons enjoying the right of asylum in Poland, who are treated in the same way as Polish citizens.

These latter two articles of the Criminal Procedure Code differentiate the application of an EAW in respect of Polish citizens on the basis of whether an EAW was issued for the purpose of executing a previously imposed custodial sentence (or detention order), or rather for the purpose of prosecuting the person for a criminal offence. Article 607s § 1 governs the first situation and states that an EAW may not be executed against a Polish citizen in the absence of their consent to the surrender. In the absence of such consent, the carrying out of the penalty takes place in Poland (Article 607s § 3-5). Article 607t § 1, challenged in the present case, concerns the second situation: “Where a European arrest warrant has been issued for the purposes of prosecuting a person holding Polish citizenship or enjoying the right of asylum in the Republic of Poland, the surrender of such a person may only take place upon the condition that such person will be returned to the territory of the Republic of Poland following the valid finalisation of proceedings in the State where the warrant was issued”.

In the present case, proceedings before the Constitutional Tribunal were initiated by the Regional Court for Gdańsk, which considered the public prosecutor’s application concerning the issuance of a procedural decision on surrendering a Polish citizen – Maria D. – on the basis of an EAW, for the purpose of conducting a criminal prosecution against her in the Kingdom of the Netherlands.

The delay of loss of binding force of the unconstitutional provision, determined in part II of the ruling, runs from the date on which the judgment was announced in the Journal of Laws (this took place on 5th May 2005). It follows from the reasoning for the judgment that the legislator may avoid the effects of failing to adjust Polish law to the requirements of the Framework Decision by way of an appropriate amendment of the Constitution and, subsequently, the re-introduction of the statutory norm found unconstitutional in the judgment summarised herein (*cf.* points 10 and 14-16 below).

THE TRIBUNAL'S RULING

I

Article 607t § 1 of the Criminal Procedure Code, insofar as it permits the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European Arrest Warrant, does not conform to Article 55(1) of the Constitution.

II

The Tribunal ruled that the loss of binding force of the challenged provision shall be delayed for 18 months following the day on which this judgment was published in the Journal of Laws.

PRINCIPAL REASONS FOR THE RULING

1. Constitutional notions have an autonomous nature in relation to binding acts of lower rank. The meaning of terms contained in ordinary statutes may not determine the interpretation of constitutional provisions; otherwise the guarantees contained in these provisions would lose any sense. On the contrary, it is constitutional norms that dictate the manner and direction of interpreting statutory provisions. The starting point for the interpretation of constitutional notions is the understanding of terms used in the text of the Constitution, shaped historically and defined within legal doctrine.
2. Traditionally, the terms “extradition” and “surrendering” were treated as synonymous within Polish legal discourse. This was true as regards the Criminal Procedure Code of 1969 and 1997 (until its amendment of 18th March 2004). Accordingly, it should be assumed that, within the currently operative 1997 Constitution of the Republic of Poland, the constitutional legislator identified “extradition” with “surrendering” as legal institutions consisting in the transfer of a prosecuted person upon the request of a foreign State, for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed upon them. In using the term “extradition” in the 1997 Constitution and in vesting a constitutional rank to the prohibition on extraditing Polish citizens, the constitutional legislator could not have taken into account provisions concerning the European Arrest Warrant, even when envisaging Poland’s future membership of the European Union. It was only the Council of the European Union Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) that created the obligation for EU Member States to surrender their own citizens prosecuted on the basis of the EAW.
3. Significant discrepancies between “surrendering” on the basis of the EAW and “extradition” on the basis of the Criminal Procedure Code, as amended in 2004, do not preclude the possibility that the former does not constitute extradition within the autonomous constitutional sense, as contained in Article 55(1) of the Constitution (*cf.* point 1 above). The Constitution fails to regulate those aspects which would determine the differences between both of these institutions on the basis of the Code. This indicates that it would only be possible to consider the surrendering of a person prosecuted on the basis of an EAW as an institution distinct from extradition, as referred to in Article 55(1) of the Constitution, where the essence of each of these institutions was different. Since the essence (core) of extradition lies in the transfer of a prosecuted, or sentenced, person for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed

upon them, the surrendering of a person prosecuted on the basis of an EAW for the purpose of conducting a criminal prosecution against them or executing an imposed custodial sentence or another measure consisting in the deprivation of liberty, on the territory of another Member State, must be viewed as a form of extradition within the meaning of Article 55(1) of the Constitution.

4. The prohibition on extradition contained in the aforementioned constitutional provision expresses a right for Polish citizens to be held criminally accountable before a Polish court. Surrendering a citizen to another EU Member State on the basis of an EAW would entirely preclude enjoyment of this right and, *ipso facto*, would amount to an infringement of the essence of this right, which is impermissible in light of Article 31(3) of the Constitution. It should, therefore, be recognised that the prohibition on extraditing Polish citizens, as formulated in Article 55(1) of the Constitution, is absolute in nature and the personal right of citizens stemming therefrom may not be subject to any limitations.
5. When Poland became a Member State of the European Union, Polish citizens also became citizens of the European Union. This circumstance constitutes an argument justifying the overturning, by means of an appropriate amendment to Article 55(1) of the Constitution, of the prohibition on extraditing Polish citizens to EU Member States. However, it does not constitute a sufficient prerequisite for concluding that such overturning has already occurred, by virtue of a dynamic interpretation of this provision. It is crucial that the Constitution links a certain set of individual rights and obligations (independent of the rights and obligations vested in “everyone” falling within the jurisdiction of the Republic of Poland) with the possession of Polish citizenship. In consequence, the possession of Polish citizenship must constitute a significant criterion when assessing an individual’s legal status – concerning both the obligations of the State vis-à-vis the citizen (particularly, when they are formulated as categorically as in Article 55(1) of the Constitution) and the obligations of the citizen vis-à-vis the State, coupled with the former (*cf.* Articles 82 and 85 of the Constitution). Furthermore, it should be noticed that the surrender procedure on the basis of an EAW is not so much a consequence of introducing the institution of “citizenship of the Union” but rather an answer to the right of EU Member States’ citizens to move freely and reside within the territory of another Member State, which preceded creation of the aforementioned institution.
6. The Code does not contain any norm stating *expressis verbis* that the transfer of a person prosecuted on the basis of an EAW from the territory of the Republic of Poland shall also apply in respect of Polish citizens. Such a norm should, however, be derived from Article 607t § 1, read in conjunction with Article 607p, of the CPC, which does not include the prosecuted person’s possession of Polish citizenship as one of the enumerated prerequisites for obligatory refusal to execute an EAW.
7. Whilst the obligation to implement secondary European Union law, including framework decisions adopted within the Union’s Third Pillar (*cf.* Article 32 of the Treaty on the European Union, as amended by the Amsterdam Treaty), has its basis in Article 9 of the Constitution of the Republic of Poland, the fact that a domestic statute was enacted for the purpose of implementing secondary EU law does not *per se* guarantee the substantive conformity of this statute with the norms of the Constitution.
8. The obligation to interpret domestic law in a manner sympathetic to EU law (so as to comply with EU law) has its limits. In particular, it stems from the jurisprudence of the Court of Justice of the European Communities (ECJ) that EU secondary legislation may not independently (in the absence of appropriate amendments in domestic legislation)

worsen an individual's situation, especially as regards the sphere of criminal liability. It is beyond doubt that the surrender of a person prosecuted on the basis of an EAW, in order to conduct a criminal prosecution against them in respect of an act which, according to Polish law, does not constitute a criminal offence, must worsen the situation of the suspect.

9. The basic function of the Constitutional Tribunal within the Polish constitutional system is to review the conformity of normative acts with the Constitution. The Tribunal is not relieved of this obligation where the allegation of non-conformity with the Constitution concerns the scope of a statute implementing European Union law.
10. Given the content of Article 9 of the Constitution, and the obligations stemming from Poland's membership of the European Union, an amendment of the currently operative law is inevitable, enabling a full and, concomitantly, constitutionally compatible implementation of the Framework Decision of 13th June 2002. In order to enable fulfilment of this task, an appropriate amendment of Article 55(1) of the Constitution may not be excluded so that this provision will envisage an exception to the prohibition on extraditing Polish citizens, so as to permit their surrender to other Member States of the European Union on the basis of an EAW.
11. The possibility, envisaged in Article 190(3) of the Constitution, for a judgment of the Constitutional Tribunal to delay the loss of binding force of a provision found nonconforming to an act of higher rank, is not limited to cases of the [abstract review of norms](#) but may also be applied within the procedure for review of norms initiated by a [question of law](#) referred by a court or by a [constitutional complaint](#).
12. Article 190 of the Constitution endows the Tribunal with significant discretion in exercising the competence to delay the entry into force of its judgments – both as regards the grounds for such a period of delay and the specified duration of such delay (within the limits indicated by the discussed provision). However, this discretion does not signify arbitrariness. The aforementioned delay is equivalent to temporarily leaving in force the provision found nonconforming to an act positioned higher in the hierarchical system of the sources of law and, *ipso facto*, must always be applied as an exception, permitted by the constitutional legislator, from the principle of the hierarchical conformity of the legal system and the principle of the supremacy of the Constitution. Each decision concerning the application of such a delay should be based on a balancing of, on the one hand, values infringed in consequence of a prolonged application of unconstitutional provisions and, on the other hand, values served by this delay.
13. The regulation contained in Article 31(3) of the Constitution, concerning the limitation of an individual's constitutional rights and freedoms, does not refer directly to the application of the delay envisaged in Article 190(3) of the Constitution. Accordingly, it is also permissible for the Tribunal to take advantage of the possibility to delay the entry into force of its judgments for reasons other than the values enumerated in Article 31(3) of the Constitution (security and public order, protection of the natural environment, health or public morals, or the freedoms and rights of other persons), even where it is inevitable that this leads to the temporary maintenance in force of provisions limiting constitutional rights and freedoms.
14. Whilst a judgment of the Constitutional Tribunal delaying the loss of binding force of an unconstitutional provision does not immediately eliminate this provision from the legal system, it does create an obligation for the legislator to undertake actions aiming at rapid elimination of the defects of the legal regulation indicated by the Tribunal, insofar as pos-

sible before the lapse of the time period stipulated in the Tribunal's judgment. The loss of binding force of the provision following the lapse of this period may be conceived as a specific sanction for failure to fulfil the indicated obligation.

15. Taking into account the complexity and more stringent requirements (also regarding the relevant time periods) governing the procedure for amending the law, as well as the fact that Poland's obligation to implement the Framework Decision of 13th June 2002 only exists from the date of Poland's accession to the EU, i.e. from 1st May 2004, the Tribunal decided (in part II of the ruling) that the loss of binding force of the unconstitutional provision shall be delayed for 18 months, i.e. for the maximum period of delay, as envisaged in Article 190(3) of the Constitution.
16. If, as a consequence of the present judgment, an amendment of the Constitution is introduced, it will be necessary, in order to ensure the compatibility of domestic law with EU law, to re-introduce legal provisions concerning the EAW which were found unconstitutional on the grounds of the hitherto constitutional provision.
17. The institution of the EAW has crucial significance for the functioning of the administration of justice and, primarily – as a form of cooperation between Member States assisting in the fight against crime – for improving security. Accordingly, the Polish legislator should give the highest priority to ensuring its continued functioning. The absence of appropriate legislative actions undertaken within the time period specified in part II of the judgment summarised herein will not only amount to an infringement of the constitutional obligation for Poland to observe binding international law but could also lead to serious consequences on the basis of European Union law.
18. The Constitution does not envisage any exceptions from the principle of the universally binding force of Constitutional Tribunal judgments, as expressed in Article 190(1) of the Constitution. In particular, the Tribunal's judgments are binding upon all courts.
19. The delay of the loss of binding force of Article 607t § 1 of the CPC has the effect that, during the period of 18 months following publication of the present judgment, this provision should be applied by organs administering justice, provided that the legislator does not earlier quash or amend this provision. Whilst this provision remains in force, Polish courts may not refuse to apply it for the reason that it fails to conform to Article 55(1) of the Constitution.
20. In light of the fact that the Constitutional Tribunal is bound by the limits of the referred question of law (Article 66 of the Constitutional Tribunal Act), whose scope is, in turn, determined by the substance of the case before the court referring the question (Article 193 of the Constitution), the issue raised in various writings as to whether provisions permitting the surrender, on the basis of an EAW, of a person suspected of committing an offence for political reasons, without the use of violence, conforms to Article 55(2) of the Constitution, may not be adjudicated on in the present case.

Provisions of the Polish Constitution, the Constitutional Tribunal Act and the Treaty on the European Union

Constitution

Art.9. The Republic of Poland shall respect international law binding upon it.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 55. 1. The extradition of a Polish citizen shall be forbidden.

2. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden.

3. The courts shall adjudicate on the admissibility of extradition.

Art. 190. 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.

[...]

3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

Art. 193. Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

CT Act

Art. 66. The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint.

EU Treaty

Art. 34. [...] 2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: [...]

b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect; [...]

Should you have any questions or comments, you may write to us:

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