

I. SUMMARY OF THE QUERY

In essence, the query concerns Council Framework Decision 2008/909/JHA on mutual recognition of judgments in criminal matters. The Slovak Public Defender of Rights has dealt with a complaint from a Slovak citizen who has been deprived of liberty following criminal proceedings in Czechia, but whose transfer was refused by the Slovak courts. The reason given by the Slovak courts is that Framework Decision 2008/909/JHA applies only to people found guilty in criminal proceedings by a final judgment of conviction. This is not the case for this citizen, who, because of mental health issues, was declared not criminally responsible for his crimes. Nonetheless, he is still deprived of liberty under a decision of a criminal court and as a result of a criminal offence.

II. EUROPEAN OMBUDSMAN'S INQUIRY

- (1) Could the Commission clarify if Article 9(1)(k) of Council Framework Decision 2008/909/JHA should be interpreted as covering cases where the person sentenced has not been found guilty of a criminal offence, but where the competent authority in the issuing Member State has nonetheless applied measures involving the deprivation of liberty as a consequence of a criminal offence based on criminal proceedings?
- (2) Where the Commission replies in the affirmative to the first question, in what circumstances and on what grounds can a competent authority in an executing Member State refuse the transfer of a sentenced person where that individual is subject to a measure depriving them of their liberty in a psychiatric institution?
- (3) The Commission, in its 2014 report on the implementation of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, took the view that the list of grounds for transfer refusals provided by Article 9(1) should be understood as optional, and that the competent authority may decide on a case-by-case basis whether or not to apply a ground for refusal. Could the Commission provide us with an update on that matter, if there is any to report? More precisely, should Article 9(1) of Council Framework Decision 2008/909/JHA be interpreted as obligatory or optional grounds for refusal? Can a Member State decide if the grounds for refusal shall be obligatory or optional?

III. THE REPLY OF THE EUROPEAN COMMISSION

(1) Could the Commission clarify if Article 9(1)(k) of Council Framework Decision 2008/909/JHA should be interpreted as covering cases where the person sentenced has not been found guilty of a criminal offence, but where the competent authority in the issuing Member State has nonetheless applied measures involving the deprivation of liberty as a consequence of a criminal offence based on criminal proceedings?

In 2019, the Commission issued a “Handbook on the transfer of sentenced persons and custodial sentences in the European Union¹” aiming to provide Member States and their competent

¹ OJ 2019/C 403/02, of 29 November 2019 (Handbook)

authorities with practical guidance in applying the Council Framework Decision 2008/909/JHA² on transfer of prisoners (hereinafter “Framework Decision”).

On the “Scope of the Framework Decision³” the Commission takes the position that *“With a view to facilitating the social rehabilitation of the sentenced person, the Framework Decision covers any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings (Article 1(b)). As is clear from the definition, any judgment, following criminal proceedings on account of a criminal offence, and resulting in a deprivation of liberty, may be forwarded under the Framework Decision. This means that decisions imposing internment – following the establishment of the offender’s full or partial criminal unaccountability due to a mental disability (see recital 20) – are included in the definition used in the instrument”*.

Recital 20 of the Framework Decision provides: *“The ground for refusal provided for in Article 9(1)(k) may be applied also in cases where the person has not been found guilty of a criminal offence although the competent authority applied the measure involving the deprivation of liberty other than a custodial sentence as a consequence of a criminal offence”*.

(2) Where the Commission replies in the affirmative to the first question, in what circumstances and on what grounds can a competent authority in an executing Member State refuse the transfer of a sentenced person where that individual is subject to a measure depriving them of their liberty in a psychiatric institution?

Article 9 of the Framework Decision lists the grounds for non-recognition and non-enforcement (grounds for refusal). The competent authority of the executing State **may** refuse to recognize the judgment and enforce the sentence, if one or more of the grounds for non-recognition and non-enforcement listed in Article 9(1) apply. Article 9(1)(k) provides for the following ground for refusal which may be applicable where the individual concerned is subject to a measure depriving them of their liberty in a psychiatric institution.:

“The sentence imposed includes a measure of psychiatric or health care or another measure involving deprivation of liberty, which, notwithstanding Article 8(3), cannot be executed by the executing State in accordance with its legal or health care system⁴”.

Recital 19 states that *“in cases referred to in Article 9(1)(k), the executing State should consider the possibility of adapting the sentence in accordance with the Framework Decision before it refuses to recognize and enforce the sentence involving a measure other than a custodial sentence”*.

(3) The Commission, in its 2014 report on the implementation of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA, 2 took the view that the list of grounds for transfer refusals provided by Article 9(1) should be understood as optional, and that the competent authority may decide on a case-by-case basis whether or not to apply a ground for refusal. Could the Commission provide us with an update on that matter, if there is any to

² Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, p. 102

³ Handbook, p. 9.

⁴ Commission Handbook, p.29.

report? More precisely, should Article 9(1) of Council Framework Decision 2008/909/JHA be interpreted as obligatory or optional grounds for refusal? Can a Member State decide if the grounds for refusal shall be obligatory or optional?

As laid down in the above-mentioned Commission Handbook⁵, the Commission considers that “The general duty to recognize and execute a judgment which has been forwarded (enshrined in Article 8(1)) is limited by the grounds for non-recognition and non-enforcement, that is to say, the grounds for refusal (Article 9). It is important to note that these grounds are the only ones which the executing authority may invoke as the basis for non-execution. The Court of Justice has clarified in relation to the Framework Decision 2002/584 that the list of grounds for refusal is exhaustive⁶. The grounds for refusal should be implemented as optional for the competent authority. Article 9 clearly states that the competent authority ‘may’ refuse to recognise the judgment and enforce the sentence, meaning that the competent executing authority still has a discretionary margin to assess on a case-by-case basis the appropriateness of invoking a ground for refusal⁷.”

Conclusion:

The Framework Decision applies to the situation at hand where a citizen, who, because of mental health issues, was declared not criminally responsible for his crimes is nonetheless deprived of liberty by a decision of a criminal court and as a result of a criminal offence.

⁵ Commission Handbook, p. 26.

⁶ Notably in its Judgments in Case C-123/08 *Wolzenburg*, paragraph 57, and Joined Cases C-404/15 and C-659/15 *PPU Aranyosi and Căldăraru*, paragraph 80.

⁷ See in this respect also the Judgment of the Court of Justice of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, paragraph 21.