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Right to information in European Arrest warrant proceedings

Case C-105/21 - Preliminary reference from the Bulgarian Specialised Criminal Court

Case summary

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Facts and background

The case

IR (the requested person) was accused of participating in a criminal organisation with the purpose of committing tax offences. During the pre-trial stage of the criminal proceedings against him, when he was represented by two lawyers chosen by him, IR was informed of only some of his rights as an accused person. In 2017, the Bulgarian Specialised Criminal Court (the referring court) - adopted a pre-trial detention measure in respect of IR (the national arrest warrant). IR did not take part in the proceedings and was defended by the court-appointed lawyer. The referring court subsequently issued a European arrest warrant was issued in respect of IR, who had still not been found. The lawyer appointed by the court to represent him was replaced by another court-appointed lawyer.

The referring court, being uncertain whether the European arrest warrant that it had issued in respect of IR was compatible with EU law, on the ground that that person had not been made aware of certain rights he could claim under Bulgarian law, decided to annul that arrest warrant with the intention of issuing a new European arrest warrant in respect of IR. Wishing to obtain clarification of the information to be attached to that new warrant, it referred questions to the Court for a preliminary ruling in Case C-649/19, Spetsializirana prokuratura (Letter of rights). According to the referring court, the judgment of 28 January 2021, Spetsializirana prokuratura (Letter of rights) (C-649/19), while replying to the questions that it raised in its request for a preliminary ruling, did not remove all of its doubts. In addition, further doubts have arisen in light of the answers given in that judgment. Thus, according to the referring court, the questions raised in the present case seek, in essence, to clarify the way in which it must draft the new European arrest warrant – which it intends to issue in respect of IR – as regards the information on the rights of the accused person that it is required to forward to the executing judicial authority, and to determine how it must proceed in the event that that person requests the annulment of the national arrest decision.

Background

On 28 January 2021, the Court of Justice of the European Union (CJEU) issued a judgment in the case (C-649/19)[1], finding that Articles 4 (Letter of rights on arrest), 6 (right to information about the accusation) and 7 (right to access materials of the case) of Directive 2012/13 on the right to information ("Directive 2012/13") do not require the requested person to be informed of their rights in relation to the national arrest warrant before surrender.[2] According to the Court, a person acquires the status of a "suspect or accused person" within the meaning of Directive 2012/13 only

1 CJEU, Case C-649/19, Judgment of 28 January 2021.
2 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1–10).

when the person concerned is surrendered to the issuing Member State and can exercise their rights under Directive 2012/13 after surrender.

Questions referred

The referring court acknowledges the finding by the CJEU in case C-649/19 that the issuing judicial authority is not obliged to notify the requested person before surrender because Articles 4, 6 and 7 of Directive 2012/13 are not applicable to the requested person at this stage. However, the referring court firstly questions whether the principles on which EU law is based nevertheless preclude that conclusion. Secondly, it notes that Bulgarian law requires a suspected person to be notified of their rights, including the right to challenge their arrest, even if the person sought is not in Bulgaria and asks whether the application of the national law in this regard would constitute a breach of EU law.

Under Bulgarian law, a detained person is required to be notified of the factual and legal grounds of their detention and of how to challenge it, which applies also when a request is made for detention in another country. However, generally in EAW proceedings, neither the national arrest warrant itself nor the details of its content are sent to the executing authority. It is merely indicated in the EAW form that a national arrest warrant exists. As there is no obligation for the issuing judicial authority in EAW proceedings to notify the requested person before their surrender about the factual and legal grounds on which the national arrest warrant was issued and about the possibilities of challenging it, the referring court questions whether this approach is compatible with the principles on which EU law is based.

Specifically, the referring court asks:

- Whether it is consistent with Articles 6 and 47 of the EU Charter of Fundamental Rights ("Charter")[3]; Article 5(4), (2), (1)(c) European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")[4]; the right to freedom of movement and residence; the principle of equivalence and the principle of mutual trust for the issuing judicial authority to not inform the requested person of the factual and legal grounds for their detention and of the possibilities of challenging that detention while that person is in the territory of the executing Member State?
- If so, does the principle of primacy of European Union law over national law require the issuing authority not to give that notification? If, despite the absence of such notification, the person challenges the national detention order, does the issuing judicial authority only have to consider the substance of that application after the person sought has been surrendered?
- What legal measures of EU law are the appropriate basis for such provision of information?

3 European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1.
4 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

Legal opinion

A Bulgarian lawyer, Asya Mandzhukova, submitted a legal opinion in the case. She argued that a detained person against whom an EAW is issued, and who has the status of an "accused person" in the parallel national proceedings, does not lose this status during the EAW proceedings both prior to and after detention in the executing state. Further, the detention in the executing Member State is, from the point of view of national proceedings, detention within the meaning of Article 5(1)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which prescribes the lawfulness of pre-trial detention. Thus, the requested person is entitled to all the rights under Directive 2012/13 and Article 5 ECHR for detainees in the context of criminal suspicion and the corresponding obligations of the issuing Member State. Legal arguments of her opinion are summarised below.

The legal status of the requested person

The first question in the reference for a preliminary ruling concerns the right of the requested person to be informed, based on their status of the "accused", of the factual and legal grounds for detention laid down in the national arrest warrant and of the possibilities for challenging the latter. Answering this first requires addressing the legal status of the person concerned.

It is argued that the right of a person detained under an EAW to be informed of the factual and legal grounds of the national arrest warrant and of their right to challenge its lawfulness derives from their status as an accused or defendant in the national proceedings. In the Bulgarian national proceedings, an EAW may be issued only against a person who has at least the status of "accused" and does not have to do with whether the requested person is physically located in the executing State. Additionally, according to Article 6(1) of the ECHR, the "requested person" acquires the status of "accused" in the issuing state from the moment they are charged with a criminal offence.

Similarly, the application of Directive 2012/13 is not dependant on the physical location of the requested person. Instead, it applies from the time the person is made aware by the competent authorities that they are a suspect or accused of committing a criminal offence and until the conclusion of the proceedings.[5] This is further highlighted by the fact that the physical presence of an accused is not essential for the effective exercise of those rights as they can, and often are, exercised through a defence lawyer.

Finding that a person requested under an EAW loses the status of "accused" in the parallel national proceedings and that they are, thus, not entitled to the rights set out in Directive 2012/13 would mean that a person subject to EAW proceedings is not protected by the fundamental rights enjoyed by all accused persons under the EU and national law.

5 See Article 2(1) of Directive 2012/13.

The legal nature of the actual detention of the requested person in the executing Member State

If the detention falls within Article 5(1)(c) of the ECHR, which prescribes when deprivation of liberty is lawful, then the rights prescribed under Article 5(2) and (4) of the ECHR, the right to be informed of the reasons for arrest and charges against them and to challenge their detention, are applicable.

An EAW is only valid if issued on the basis of a national arrest warrant and essentially serves the purpose of executing a national arrest warrant when the person concerned is located on the territory of another Member State. An EAW can thus be considered "subsidiary" to the national arrest warrant or an extension of it. Therefore, detention in execution of a national arrest warrant which is carried out through the issuance of an EAW constitutes detention within the meaning of Article 5(1)(c) of the ECHR.

The legal consequences of the actual detention of the requested person in execution of an EAW, from the point of view of the issuing Member State

As the CJEU held in case C-367/16, the issuing State is responsible for ensuring that the rights of the person requested under an EAW are guaranteed.[6] Further, the principle of mutual trust requires the issuing judicial authority to respect the rights of the requested person.

The status of the detainee as an "accused" and the legal basis of their detention determine the obligations of the issuing judicial authority to guarantee their rights after detention. Because the reason for the detention under an EAW essentially is to execute a national arrest warrant in another Member State, the detained person should not lose their status and all the rights associated with that status within the meaning of Article 5(1)(c) of the ECHR in the issuing state. This includes the rights set out under Articles 4, 6 and 7 of Directive 2012/13 and the right to be informed and challenge the proportionality and necessity of arrest and detention in the national proceedings in accordance with Article 5(2) and (4) of the ECHR.

The right to effective judicial protection under Article 47 of the Charter

While the CJEU concluded in case C-649/19 that the right to effective judicial protection does not entail a right to appeal a decision to issue an EAW prior to surrender of the requested person, this case concerns the right to information regarding the national arrest warrant, the right to appeal against it, as well as the corresponding obligations of the issuing judicial authority within the parallel and main national criminal proceedings.

6 CJEU, Case C-367/16 Piotrowski, Judgment of 23 January 2018, paragraph 50.

Effective judicial protection within the meaning of Article 47 of the Charter should be understood as the right to appeal the national arrest warrant, i.e., address the legal and factual grounds on which the warrant is based, before the actual surrender of the requested person. Denying this possibility would mean that no effective remedy satisfying the requirements set out in Article 47 is available to the requested person in relation to the merits of the EAW.

Further, limiting the possibility to challenge such a decision by requiring the physical presence of the requested person in the issuing state would be contrary to the principle of equivalence because it creates a difference in treatment between those subject to cross-border proceedings and those subject to national proceedings. While the latter has the right to challenge the lawfulness of a national arrest warrant, a person who has chosen to exercise their right to free movement as set out under Article 45 of the Charter would have to relinquish this right in order to exercise their right to challenge the lawfulness of a detention order.

As previously argued, the possibility to exercise this right should not be dependent on the physical presence of the person concerned but should be accessible to them through their legal representation, given the general acceptance in criminal proceedings of defendants exercising their rights through authorized legal representation.

Regarding the appropriate means notifying the requested person about their rights

National law gives the requested person a right to be notified of their rights before or at least at the time or shortly after the arrest to enable them to exercise their right to challenge the detention. Support for this can also be found in Directive 2012/13[7], which expressly provides it does not prevent each Member State from applying a higher level of protection under national law. Thus, the issuing state has an obligation to timely notify the requested person of their right to challenge. However, there are no straightforward procedures established for such notification and it is suggested that a practical or legislative solution should be established to ensure that the requested person can enjoy their rights in practice, instead of denying them due to the lack of explicit procedures.

7 See recitals 9, 10, 14, 20, 40 and Article 10 of Directive 2012/133.

CJEU judgment

On the 30 June 2022, the CJEU delivered a judgment in the case C-105/21. The Court took a narrow approach to the rights of the requested person under Article 47 of the Charter and the corresponding obligations of the issuing state ruling that the requested person has no right to access case materials or challenge the national arrest warrant before the surrender. Similarly, the issuing judicial authority is prevented by the supremacy of EU law from complying with national law which requires to provide the requested person with information about the possibilities to challenge the national arrest warrant before their surrender.

On access to case materials in the issuing state

The CJEU stated that the right to effective judicial protection, within the meaning of Article 47 of the Charter, does not require that the right, provided for in the legislation of the issuing Member State, to challenge the decision to issue a European arrest warrant for the purposes of criminal prosecution can be exercised before the surrender of the person concerned to the competent authorities of that Member State. The mere fact that the requested person is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he or she is surrendered to the competent authorities of the issuing Member State cannot result in any infringement of the right to effective judicial protection.

Thus the Court reiterated that its judgment of 28 January 2021, Spetsializirana prokuratura (Letter of rights) (C-649/19), already states that Articles 6 and 47 of the Charter do not require that the requested person be given access, before being surrendered to the competent authorities of the issuing Member State, to the materials of the national case and to information on the remedies available for the purpose of challenging the decision on the European arrest warrant before the issuing judicial authority.

Furthermore, the CJEU applied the same interpretation to national arrest warrant proceedings. The Court considered that in those proceedings the rights of the accused person under Articles 6 and 47 of the Charter and, in particular, his or her right to information, relating to his or her rights in criminal proceedings and to the accusation against him or her, are protected since, first, the European arrest warrant incorporates the information provided for in Article 8 of Framework Decision 2002/584 and, secondly, the accused person receives the information on the remedies in the issuing Member State and is given access to the materials of the case, in accordance with Directive 2012/13, as soon as he or she is surrendered to the competent authorities of that State.

Thus the court considered that the requested person's rights are protected at the issuing of the national arrest warrant and the EAW therefore the protection conferred by Articles 6 and 47 of the Charter in no way requires that a third level of judicial protection be afforded to the requested person in which that person would be entitled to receive the national arrest decision

on which the European arrest warrant is based and information on the possibilities of challenging that decision before his or her surrender.

The Court therefore answered the first question stating that Articles 6 and 47 of the Charter, the right to freedom of movement and residence and the principles of equality and mutual trust must be interpreted as meaning that the judicial authority issuing a European arrest warrant, adopted under Framework Decision 2002/584, is under no obligation to forward to the person who is the subject of that arrest warrant the national decision on the arrest of that person and information on the possibilities of challenging that decision, while that person is in the Member State executing the European arrest warrant and has not been surrendered to the competent authorities of the Member State issuing that arrest warrant.

On providing information about possibility to challenge the national arrest warrant

The Court noted that Framework Decision 2002/584 established a simplified and more efficient system for the surrender between judicial authorities of persons who have been convicted or are suspected of having infringed criminal law, which makes it possible to remove, as stated in recital 5 of the framework decision, the complexity and potential for delay inherent in the extradition procedures that existed before the adoption of that decision. The information contained in the EAW form is designed to provide sufficient information to enable the executing judicial authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency.

The CJEU considered that the objective of speeding up and simplifying the surrender procedure between Member States, pursued by Framework Decision 2002/584, would be compromised if the issuing judicial authority were required to forward to the person who is the subject of the European arrest warrant, before the surrender of that person to the competent authorities of the issuing Member State, the national decision on his or her arrest and information on the possibilities of challenging that decision. The forwarding of that information and of that decision is liable to hinder the implementation of the EAW by the executing judicial authority since it would be required, in order to ensure a correct application of the national procedural rules of the issuing Member State, to ensure that the accused person has received the information in question.

The surrender procedure thus might become appreciably more complicated and its duration might be significantly extended. Therefore Framework Decision 2002/584 precludes national law from requiring the issuing judicial authority to forward to the person who is the subject of a European arrest warrant, before his or her surrender to the competent authorities of the issuing Member State, the decision on his or her arrest and information on the possibilities of challenging that decision.

In the light of that finding and the principle of the primacy of EU law which establishes the pre-eminence of EU law over the law of the Member States, the

CJEU answered the second question stating that the principle of the primacy of EU law must be interpreted as meaning that it requires the issuing judicial authority to give, as far as is possible, an interpretation of its national law that is in conformity with EU law, which enables it to ensure an outcome that is compatible with the aim pursued by Framework Decision 2002/584, which precludes national law from requiring that authority to forward to the person who is the subject of a European arrest warrant, before his or her surrender to the judicial authorities of the issuing Member State, the national decision on his or her arrest and information on the possibilities of challenging that decision.

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