



Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 October 2016¹

Case C-582/15

Openbaar Ministerie
v
Gerrit van Vemde

(Request for a preliminary ruling from the rechtbank Amsterdam (District Court, Amsterdam, the Netherlands))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Mutual recognition of judgments — Framework Decision 2008/909/JHA — Article 28 — Transitional provision — Declaration by a Member State — Concept of ‘issuing of the final judgment’)

This reference for a preliminary ruling is concerned with the interpretation of Article 28(2) of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in crim

inal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

1. ²

2. The reference was made in proceedings relating to a request seeking authorisation for enforcement, in the Netherlands, of a judicial decision of the hof van beroep Antwerpen (Court of Appeal, Antwerp, Belgium) imposing, inter alia, a custodial sentence of three years on Mr Gerrit van Vemde.

I – Legal context

A – EU law

3. Recitals 1 and 2 of the Framework Decision read as follows:

‘(1) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition, which should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.

¹ — Original language: French.

² — OJ 2008 L 327, p. 27, ‘the Framework Decision’.

(2) On 29 November 2000 the Council, in accordance with the Tampere conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters [(OJ 2001 C 12, p. 10)], in which it called for an assessment of the need for modern mechanisms for the mutual recognition of final sentences involving deprivation of liberty (Measure 14) and for extended application of the principle of the transfer of sentenced persons to cover persons resident in a Member State (Measure 16).’

4. Article 1 of the Framework Decision, entitled ‘Definitions’, provides:

‘For the purposes of this Framework Decision:

- (a) “judgment” shall mean a final decision or order of a court of the issuing State imposing a sentence on a natural person;
- (b) “sentence” shall mean 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;
- (c) “issuing State” shall mean the Member State in which a judgment is delivered;
- (d) “executing State” shall mean the Member State to which a judgment is forwarded for the purpose of its recognition and enforcement.’

5. Article 26 of the Framework Decision, entitled ‘Relationship with other agreements and arrangements’, provides as follows in paragraph 1:

‘Without prejudice to their application between Member States and third States and their transitional application according to Article 28, this Framework Decision shall, from 5 December 2011, replace the corresponding provisions of the following conventions applicable in relations between the Member States:

- The European Convention on the transfer of sentenced persons of 21 March 1983 and the Additional Protocol thereto of 18 December 1997;
- The European Convention on the International Validity of Criminal Judgements of 28 May 1970;
- Title III, Chapter 5, of the Convention of 19 June 1990 implementing the Schengen Convention of 14 June 1985 on the gradual abolition of checks at common borders;
- The Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991.’

6. Under Article 28 of the Framework Decision, entitled ‘Transitional provision’:

‘1. Requests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this Framework Decision.

2. However, any Member State may, on the adoption of this Framework Decision, make a declaration indicating that, in cases where the final judgment has been issued before the date it specifies, it will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. If such a declaration is made, those

instruments shall apply in such cases in relation to all other Member States irrespective of whether or not they have made the same declaration. The date in question may not be later than 5 December 2011. The said declaration shall be published in the *Official Journal of the European Union*. It may be withdrawn at any time.’

7. On the basis of Article 28 of the Framework Decision, the Kingdom of the Netherlands made the following declaration:³

‘In accordance with Article 28(2), the Netherlands hereby declares that, in cases where the final judgment has been issued within 3 years following the date on which the Framework Decision enters into force, the Netherlands will, as an issuing and an executing State, continue to apply the legal instruments on the transfer of sentenced persons applicable prior to this Framework Decision.’

B – Netherlands law

8. Article 2(11) of the Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (Law on the mutual recognition and enforcement of custodial and suspended sentences, ‘the WETS’), which implements the Framework Decision, provides:

‘1. [The] Minister [for Security and Justice] shall forward the judicial decision ... to the advocate general of the Public Prosecutor’s Office at the appeal court.

2. The advocate general shall forthwith submit the judicial decision ... to the specialised division of the Arnhem-Leeuwarden court of appeal ...

...

8. Within six weeks of receipt of the judicial decision, ... the specialised division of the court of appeal shall forward [to the] Minister [for Security and Justice] the written and reasoned assessment.’

9. Under Article 2(12) of the WETS, the Minister for Security and Justice is to decide whether to recognise the judicial decision, taking account of the assessment made by the specialised division of the court of appeal.

10. Article 5(2) of the WETS provides:

‘1. This law replaces the Wet overdracht tenuitvoerlegging strafvonnissen (Law on the transfer of enforcement of judgments in criminal matters, “the WOTS”) in relations with the Member States of the European Union.

...

3. This law shall not apply to judicial decisions ... which became final before 5 December 2011.

...’

3 — OJ 2009 L 265, p. 41, ‘the declaration on the application of the Framework Decision’.

11. According to Article 2 of the WOTS, ‘foreign judicial decisions shall be enforced in the Netherlands only under a convention’. Furthermore, according to Article 31(1) of the WOTS, ‘where it deems the enforcement of the foreign judicial decision to be permissible, the court [of Amsterdam] shall authorise it and, with due regard for the provision made in that connection by the applicable convention, it shall impose the sentence or the measure laid down for the equivalent offence in Netherlands law’.

II – The facts in the main proceedings and the question referred for a preliminary ruling

12. Mr Gerrit van Vemde was arrested in the Netherlands, on 27 October 2009, under a European arrest warrant issued by a Belgian judicial authority for the purposes of criminal prosecution. After being surrendered, he was remanded in custody in Belgium. Mr Gerrit van Vemde was then released on bail in the course of the Belgian criminal proceedings and he returned, by his own means, to the Netherlands before judgment was delivered.

13. On 28 February 2011, the hof van beroep Antwerpen (Court of Appeal, Antwerp, Belgium) sentenced Mr Gerrit van Vemde to a custodial sentence of three years. On 6 December 2011, the Hof van Cassatie (Court of Cassation, Belgium) dismissed the appeal in cassation against that decision and on that same date the decision of the hof van beroep Antwerpen (Court of Appeal, Antwerp) became final. A detention order issued by the Procureur Generaal in Antwerpen (Prosecutor General of Antwerp, Belgium) was served on the sentenced person on 13 February 2012.

14. On 23 July 2013, the Belgian authorities requested the Netherlands to take over the enforcement of the custodial sentence imposed by the judgment of the hof van beroep Antwerpen (Court of Appeal, Antwerp). By application of 10 October 2013, the procureur du Roi (Public Prosecutor, Belgium) subsequently requested that the rechtbank d’Amsterdam (District Court, Amsterdam, the Netherlands), the referring court, authorise the enforcement of the custodial sentence imposed by the hof van beroep Antwerpen (Court of Appeal, Antwerp).

15. Having received that request, the referring court asks whether the applicable provisions are those of the WOTS or those of the WETS, which replaced the earlier law. On the one hand, the WETS, according to Article 5(2)(3) thereof, is not to apply to judicial decisions that ‘became final’ before 5 December 2011. Thus, given that the judgment of the hof van beroep Antwerpen (Court of Appeal, Antwerp) became final after 5 December 2011, it is, in principle, the WETS which would be applicable.

16. On the other hand, the referring court has doubts as to whether that provision complies with Article 28 of the Framework Decision. Under paragraph 1 of that article, requests for the transfer of enforcement of a custodial sentence received after 5 December 2011 are to be governed by the rules adopted by Member States pursuant to the Framework Decision. However, under paragraph 2 of that article, any Member State could, on the adoption of the Framework Decision, make a declaration indicating that, in cases where the final judgment was ‘issued’ before the date it specifies, it will, as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons which were applicable before 5 December 2011. The Kingdom of the Netherlands made such a declaration on the application of the Framework Decision, a declaration which, essentially, reproduces the wording of Article 28(2) of that framework decision.

17. The referring court states that, according to the case-law of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), Article 5(2)(3) of the WETS must be interpreted, in accordance with Article 28(2) of the Framework Decision, as meaning that the judgment in question must have been issued before 5 December 2011, irrespective of when it became final, so that, in the present case, the provisions of the WOTS would still be applicable. However, if, on the contrary, it were necessary to

interpret Article 28(2) of the Framework Decision as meaning that the judgment must have become final before 5 December 2011, the referring court, on the basis of the provisions of the WETS, considers, *inter alia*, that it would not have jurisdiction to give a ruling on the request seeking authorisation for the enforcement of the custodial sentence issued against the sentenced person.

18. In those circumstances, the rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Must the first sentence of Article 28(2) of [the Framework Decision] be understood as meaning that the declaration referred to therein may relate only to judgments issued before 5 December 2011, irrespective of when those judgments became final, or must that provision be understood as meaning that the declaration may relate only to judgments which became final before 5 December 2011?’

III – My analysis

19. The question raised by the referring court seeks, essentially, to establish whether, in the event that a Member State has made the declaration provided for in Article 28(2) of the Framework Decision, the date to be used for determining which legal regime is applicable to the transfer of persons sentenced to custodial sentences is the date when the judgment was issued or the date on which that judgment became final.

20. Before responding to that question, it is appropriate to examine, as requested by the Austrian Government and the European Commission, whether or not the declaration made by the Kingdom of the Netherlands pursuant to Article 28(2) of the Framework Decision is capable of producing legal effects.

A – Whether or not to take account of the declaration made by the Kingdom of the Netherlands pursuant to Article 28(2) of the Framework Decision

21. It should be noted that Article 28(2) of the Framework Decision is unambiguous as to when such a declaration may be made.

22. In accordance with the wording of that provision, it was ‘on the adoption of [the] Framework Decision’ that it was possible for any Member State to make a declaration having the effect of delaying the application of that framework decision.

23. According to the information submitted to the Court and as the Netherlands Government acknowledged at the hearing, the declaration of the Kingdom of the Netherlands was sent to the Council on 24 March 2009, and then circulated as a Council document on 30 April 2009, before being published in the Official Journal on 9 October 2009.⁴ In the light of those considerations, the Netherlands Government does not deny that that declaration was formally submitted after the adoption of the Framework Decision.

24. However, in the letter accompanying its declaration, and as it explained at the hearing, the Kingdom of the Netherlands stated that, in the course of the negotiations on the draft Framework Decision, it had consistently argued that it should be possible to apply the Framework Decision only to future cases. That Member State explains that the option provided for in Article 28(2) of the Framework Decision was included, *inter alia*, at its request and that, from its point of view, that option was an important element in the political agreement on that framework decision reached at the JHA Council on 4 December 2006 and 15 February 2007. The Kingdom of the Netherlands also

⁴ — OJ 2009 L 265, p. 41.

stated that the Framework Decision was placed on the agenda as an ‘A’ item so shortly before the JHA Council meeting of 27 November 2008 that it was not possible to follow the internal procedure for preparing the Council in that connection. Consequently, when that framework decision was adopted at the JHA Council meeting on 27 November 2008, the Kingdom of the Netherlands did not submit a declaration within the meaning of Article 28(2). That Member State states, however, that when political agreement was reached at the JHA Council on 4 December 2006, it announced that it would make the relevant declaration. In its view, that declaration may be considered to have taken effect when the Framework Decision was adopted on 27 November 2008.

25. Like the Commission, I take the view, however, that a communication of that kind is not equivalent to a declaration made ‘on the adoption of [the] Framework Decision’, within the meaning of Article 28(2) of that framework decision. Merely expressing the intention to make a declaration is not sufficient. The declaration referred to in Article 28(2) of the Framework Decision must be made, by any means, when the Framework Decision is adopted and must specifically indicate the choice of the Member State concerned as to the date of delivery of final judgments before which the Framework Decision will not apply. Article 28(2) of that framework decision gives Member States a certain degree of discretion in setting that date, provided that it is no later than 5 December 2011.

26. In the absence of any official version of the precise declaration made by the Kingdom of the Netherlands prior to the document sent by that Member State on 24 March 2009, I therefore take the view that the declaration of the Kingdom of the Netherlands was not made in a valid manner since it was presented out of time.

27. Furthermore, I observe, like the Commission, that the situations in which the Framework Decision authorises Member States to make a declaration not only when it is adopted but also at a later date are set out very clearly in the Framework Decision. I refer in particular to Article 4(7) and Article 7(4) thereof.

28. It follows from the foregoing that the declaration of the Kingdom of the Netherlands is not capable of producing legal effects.

29. In the absence of any declaration complying with the conditions laid down in Article 28(2) of the Framework Decision, it is Article 28(1) thereof which determines the scope *ratione temporis* of the rules contained in the Framework Decision, namely those for requests received after 5 December 2011.

30. Since the request sent by the Belgian authorities to the Netherlands authorities is dated 10 October 2013, there can be no doubt that the rules contained in the Framework Decision are fully applicable in the present case.

31. It is only in the alternative, in the event that the Court does not concur with my analysis that the declaration of the Kingdom of the Netherlands must not be taken into account, that I shall examine the referring court’s question on the interpretation of Article 28(2) of the Framework Decision.

B – *The interpretation of Article 28(2) of the Framework Decision*

32. I consider, like the Commission, the Netherlands Government, the Austrian Government and the Openbaar Ministerie, that the date to be taken into account for implementation of Article 28(2) of the Framework Decision is the date on which the judgment became final.

33. It follows from Article 26(1) of that framework decision that, from 5 December 2011, the uniform mechanism provided for by that framework decision essentially replaces the pre-existing system based on conventions.

34. According to Article 28(1) of the Framework Decision, ‘requests received before 5 December 2011 shall continue to be governed in accordance with the existing legal instruments on the transfer of sentenced persons. Requests received after that date shall be governed by the rules adopted by Member States pursuant to this Framework Decision’.

35. However, Article 28(2) of the Framework Decision allows Member States to select for the purposes of the application of that framework decision not the date of the request but the date on which the final judgment was issued, if they made a declaration to that effect when that framework decision was adopted.

36. Thus, by way of derogation from Article 28(1) of the Framework Decision, in which the point of reference is the date of receipt of the request, Article 28(2) of that framework decision establishes the date of the final judgment as the reference point.

37. In accordance with the latter provision, the declaration made by the Kingdom of the Netherlands provides that ‘in cases where *the final judgment has been issued* within 3 years following the date on which the Framework Decision enters into force, [it] will, as an issuing and an executing State, continue to apply the legal instruments on the transfer of sentenced persons applicable prior to this Framework Decision’.⁵

38. That declaration is expressed in national law in Article 5(2)(3) of the WETS, which provides that ‘this law shall not apply *to judicial decisions ... which became final* before 5 December 2011’.⁶

39. This request for a preliminary ruling rests largely on the difference in wording between, on the one hand, Article 28(2) of the Framework Decision and the declaration made by the Kingdom of the Netherlands, which both refer to the date when ‘the final judgment [was] issued’, and, on the other hand, Article 5(2)(3) of the WETS, which refers to the date on which judicial decisions ‘became final’.

40. I consider, unlike the referring court, the defendant in the main proceedings and the Polish Government, that despite being worded differently, those provisions are all concerned with the same legal event, namely the moment when a judgment has become final. In adopting Article 5(2)(3) of the WETS, the Netherlands legislature therefore fully implemented Article 28(2) of the Framework Decision and the declaration made by the Kingdom of the Netherlands.

41. The interpretation that Article 28(2) of that framework decision refers to the moment when a judgment has become final follows from the wording, the scheme and the objective of that framework decision.

42. As regards the wording of Article 28(2) of the Framework Decision, I would observe that it does not merely refer to the moment when the judgment was issued but rather concerns the ‘final’ judgment. That precision as regards the finality of the judgment is not specific to the French version of that framework decision, but is found in other language versions too.⁷

43. That precision is consistent with the scheme of the Framework Decision, in so far as a request on the basis of that framework decision is in any event possible, in accordance with the definition of ‘judgment’ adopted by the EU legislature in Article 1(a) of that framework decision, only when a judgment has become final.

⁵ — Emphasis added.

⁶ — Emphasis added.

⁷ — See, for example, in Spanish ‘en los casos en los que la sentencia firme haya sido dictada antes de la fecha que especificará’, in German ‘wonach er in Fällen, in denen das rechtskräftige Urteil vor dem angegebenen Zeitpunkt ergangen ist’, in English ‘in cases where the final judgment has been issued before the date it specifies’ and in Italian ‘nei casi in cui la sentenza definitiva è stata emessa anteriormente alla data da esso indicata’.

44. Furthermore, as is clear in particular from recitals 1 and 2 thereof, the Framework Decision seeks to implement the principle of mutual recognition in criminal matters as regards the enforcement of final sentences involving deprivation of liberty. That implementation entails a more modern and extensive cooperation mechanism than was possible under the treaty law in force.

45. Having regard to the fundamental importance of the principle of mutual recognition in the creation of the area of freedom, security and justice, and in so far as Article 28(2) of the Framework Decision constitutes a derogation authorising Member States to continue to apply the earlier system based on conventions for longer than the general regime of that framework decision allows, Article 28(2) of that framework decision must be interpreted strictly.

46. By limiting the cases continuing to fall under the earlier system based on conventions and thus by increasing the number of cases liable to be covered by the rules provided for in the Framework Decision, a strict interpretation of that kind is the surest way to safeguard the objective pursued by the Framework Decision.

47. I would note, in that regard, that the principal objective of the Framework Decision is to further the social rehabilitation of persons who have been sentenced to imprisonment by enabling individuals who have been deprived of their liberty as a result of a criminal conviction to serve their sentence, or the remainder of it, within their own social environment. That is clearly expressed in recital 9 and Article 3(1) of the Framework Decision.

48. This means that all measures concerning how the sentence is to be enforced and organised must be tailored to the individual by the judicial authorities, in such a way as to further the social inclusion or social rehabilitation of the sentenced person, while at the same time respecting the interests of society and the rights of victims and the aim of preventing repeat offending.⁸

49. In the light of the foregoing, in so far as the judgment sentencing Mr Gerrit van Vemde became final on 6 December 2011, the transfer of the enforcement of the sentence imposed on him must fall within the scope of the rules contained in the Framework Decision.

IV – Conclusion

50. In the light of the foregoing considerations, the answer to be given to the rechtbank Amsterdam (District Court, Amsterdam, the Netherlands) should be as follows:

In so far as the declaration of the Kingdom of the Netherlands on Article 28 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union was made after the adoption of that framework decision, contrary to the requirements of Article 28(2) of that framework decision, it is not capable of producing legal effects.

In the alternative, in the event that that declaration is deemed capable of producing legal effects, Article 28(2) of Framework Decision 2008/909 must be understood as meaning that the declaration referred to therein may apply only to judgments which became final before 5 December 2011.

⁸ — See my Opinion in *Ognyanov* (C-554/14, EU:C:2016:319).