

COURT OF JUSTICE OF THE EUROPEAN UNION

**ECJ JUDGMENT
IN CASE C-123/08 *DOMINIC WOLZENBURG***

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1. Introduction

The decision to discuss the judgment in the *Wolzenburg* case² becomes understandable as soon as one reads the reasoning of the Court of Justice (hereinafter referred to as the ECJ). In this case, the ECJ dealt with a number of very important questions posed in the reference for a preliminary ruling made by the Rechtbank Amsterdam (the Netherlands) in proceedings concerning the execution of European Arrest Warrant issued against Dominic Wolzenburg.

It should be noted at the outset that, given the nature of the procedure for preliminary rulings concerning judicial cooperation in criminal matters as foreseen by the Treaty on European Union (prior to the entry into force of the Lisbon Treaty), few ECJ judgments to date have concerned framework decisions. Actually, all of the judgments in the former so-called EU third pillar may be divided into the following

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² Reference for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) – European arrest warrant issued against Dominic Wolzenburg, Case no C-123/08, Judgment of 6.10.2009, E.C.R. 2009, p. I-9621 (Wolzenburg judgement).

categories: those dealing with the *ne bis in idem* principle, those concerning the framework decision on the standing of victims in criminal proceedings (2001/220/JHA) and those concerning the European Arrest Warrant (hereinafter referred to as the EAW).

The judgment discussed herein, delivered on 6.10.2009 – shortly prior to the entry into force of the Lisbon Treaty – the ECJ was required to deal with certain sensitive issues concerning the execution of the aforementioned Framework Decision, especially as regards its application to nationals or residents of the executing state. Once again the ECJ was asked to consider the scope of Article 4 (6) of Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States (hereinafter referred to as the FD EAW)³. The FD EAW provides that Member States are, in principle, obliged to act upon the European Arrest Warrant. Nevertheless, in certain situations, the executing judicial authority may refuse to surrender the person to whom the EAW applies. Article 4 (6) FD EAW provides a specific ground for discretionary non-execution of an EAW where it was issued for the purposes of executing a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

The questions posed by the Dutch court were very similar to those referred in the case which gave rise to the judgment in *C-66/08 Kozłowski*⁴. In that case the ECJ defined the concepts of “staying” and of “resident” in the executing Member State for the purposes of Article 4 (6) FD EAW. However, it did not rule on the problem of discrimination and on the surrender of a Member State’s own nationals. The problem of non-discrimination was also raised in *Kozłowski*, but the ECJ refused to deal with this issue on the basis that it was unconnected with the facts of the case. Accordingly, the *Wolzenburg* case required the ECJ to clarify and to supplement its answer in *Kozłowski*, as regards the scope of Article 4 (6) of FD EAW.

³ Council Framework Decision on the European arrest warrant and the surrender procedures between Member States No. 2002/584/JHA of 13.6.2002, O. J. 2002, L 190, p. 1.

⁴ Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski, Case no C-66/08, Judgment of 17.7.2008, E.C.R. 2008, p. I-06041.

Substantially, the ECJ had to deal with the problem of application of ex-Article 12 of the Treaty establishing the European Community (the EC Treaty)⁵ in the context of the framework decision, the Member States' margin of discretion in relation to the FD EAW and the legitimacy of automatic non-surrender decisions regarding a Member State's own nationals. The first of those problems is somehow historical because of the new provisions of the Lisbon Treaty and the "communitarization" of the third pillar⁶.

The case is also very important for the Polish legislator because of some of the findings of the ECJ on which I will comment later on.

2. Factual and legal context

Dominic Wolzenburg (a German citizen) was sentenced in 2002/2003 by several German courts to serve a custodial sentence of one year and nine months (combined sentence). This sentence was conditionally suspended. He was found guilty of a number of offences committed during 2001, including the importation of marijuana into Germany (partly committed in the Netherlands). At the beginning of June 2005 he entered the Netherlands and since then – together with his wife – established his principal residence in Venlo (the Netherlands). Between 2005 and 2007 Mr. Wolzenburg was employed in the Netherlands and possessed both tax and social insurance numbers and medical insurance. In 2005 a German court revoked the conditional suspension of his sentence, on the ground that Mr. Wolzenburg had infringed the conditions thereof, and in 2006 the German issuing judicial authority issued an European Arrest Warrant and an alert in the Schengen Information System against Mr. Wolzenburg. On 1.8.2006 Dominic Wolzenburg was arrested and provisionally detained

⁵ At the moment Article 18 of the Treaty on the Functioning of the European Union.

⁶ Currently, judicial cooperation in criminal matters is regulated generally by Articles 82–86 of the Treaty on the Functioning of the European Union and therefore is subject to the general rules of EU law. For further comments on this motive of the judgment (cross-pillar application of ex-Article 12 of the EC Treaty) see: Ch. Janssens, *Case C-123/08, Dominic Wolzenburg, Judgment of the Court (Grand Chamber) of 6 October 2009, not yet reported*, *Common Market Law Review* 2010, Vol. 47, No. 3, at pp. 837–840.

in the Netherlands. In September 2006 Mr. Wolzenburg reported to the Netherlands Immigration and Naturalization Department in order to register in the Netherlands as a citizen of the Union. He derived his right of residence from the EU law on citizenship.

The problem facing the judicial authority in the Netherlands concerned the applicability of the ground for non-execution set out in Article 6 of the Dutch Law on the surrender of persons, which constitutes the Dutch implementation measure of Article 4 (6) FD EAW. The Dutch court struggled with the problem that Mr. Wolzenburg did not possess a permanent residence permit.

Accordingly, the Dutch court referred five questions which essentially dealt with three main problems:

1. the required period of residence (in the executing Member State) of a person against whom an EAW has been issued in order to qualify as “resident” or “staying” in that State for the purpose of Article 4 (6) FD EAW;
2. whether application on the ground for non-execution laid down in that Article may be subject to administrative conditions, such as possession of a residence permit of indefinite duration;
3. whether the principle of non-discrimination laid down in ex-Article 12 of EC Treaty precludes legislation of a Member State under which the surrender of nationals of that state must always be refused, while that of nationals of other Member States may be refused only if they possess a residence permit of indefinite duration.

Prior to discussion of the judgment itself it should be noted that, according to Dutch law, the surrender of a Dutch national shall not be permitted if that surrender is sought for the purposes of executing a custodial sentence imposed on him by a final judicial decision. This provision is equally applicable to foreign nationals in possession of a residence permit of indefinite duration insofar as they may be prosecuted in the Netherlands for the offences in respect of which the European Arrest Warrant is based and insofar as they may be expected not to forfeit their right of residence in the Netherlands as a result of any sentence or measure which may be imposed following surrender⁷. Moreover, the Dutch

⁷ Article 6 para. 2 and 5 of the Law on the surrender of persons of 29.4.2004 *Overleveringswet*, Staatsblad 2004, No. 195.

Law on Aliens⁸ provides that the Minister of Justice issues a document attesting that a foreign national is lawfully resident in the Netherlands.

3. Judgment

One of the first issues dealt with by the ECJ in the *Wolzenburg* judgment was the problem of a residence document. The ECJ recalled that, in accordance with the Directive on residence of citizens of the Union⁹ such citizens who have resided legally for a continuous period of five years in the host Member State acquire the right of permanent residence in that State. The Directive allows citizens of the Union to apply for a document attesting to their permanent residence in the host Member State, but it does not require such a formality. Consequently, the ECJ ruled that the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, apply the ground for non-execution of an European Arrest Warrant subject to supplementary administrative requirements such as the possession of a residence permit of indefinite duration¹⁰. In support of its reasoning, the ECJ recalled the *Martinez Sala*¹¹ judgment from the late 1990s that such a document has only declaratory and probative force, but does not *per se* give rise to the existence of the right, which derives from the Treaty itself.

Furthermore, the ECJ examined, on the basis of the principle of non-discrimination, the compatibility of the Dutch legislation which provided for nationals of other Member States who had not resided for a period of five years in its territory to be treated differently from its own nationals.

⁸ Law on Aliens of 23.11. 2000, *Vreemdelingenwet*, Staatsblad 2000, No. 495.

⁹ Directive of the European Parliament and of the Council of on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC No. 2004/38/EC of 29.4.2004, O. J. 2004, L 158, p. 77.

¹⁰ Cf. *Wolzenburg* judgment, points 48–53.

¹¹ *María Martínez Sala v. Freistaat Bayern.*, Case no C-85/96, Judgment of 12.5.1998, E.C.R., p. I-2691, para. 53.

The ECJ stated that the EAW is based on the principle of mutual recognition and that Member States are generally obliged to act upon a request issued by a judicial authority of another Member State. Apart from in cases concerning the mandatory non-execution of an EAW, laid down in Article 3 FD EAW, Member States may refuse to execute such a warrant only in the circumstances listed in Article 4 thereof¹². Nevertheless, according to the ECJ, they retain, when implementing the grounds for optional non-execution, a certain margin of discretion¹³.

As settled in the previous case-law, to be compatible with EU law, a difference in treatment based on nationality must be objectively justified, proportionate to the objective pursued and must not go beyond what is necessary to achieve that objective¹⁴. Therefore, the ECJ considered that the ground for optional non-execution has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of improving the EAW subject's chances of reintegrating into society when the imposed sentence expires. The Member State of execution is therefore entitled to pursue such an objective only in respect of persons who have demonstrated a certain degree of integration in the society of that Member State. In the *Wolzenburg* case, the ECJ considered that the single condition based on nationality for its own nationals, on the one hand, and the condition of residence of a continuous period of five years for nationals of other Member States, on the other, may be regarded as being such as to ensure that the person in respect of whom the EAW was issued is sufficiently integrated in the Member State of execution.

Therefore, the ECJ decided that a condition requiring residence for a continuous period of five years for nationals of other Member States could not be considered as excessive, mainly because of the requirements of integration. In that respect, the ECJ highlighted that EU legislation on the right of residence has expressly laid down the condition of residence for a continuous period of five years as precisely the length of time beyond which citizens of the Union acquire a permanent right of residence in

¹² Criminal proceedings against Artur Leymann and Aleksei Pustovarov, Case no C-388/08PPU, Judgment of 1.12.1998, E.C.R. p. I-08893, para. 51.

¹³ *Wolzenburg* judgment, points 55–61.

¹⁴ *Advocaten voor de Wereld VZW v Leden van de Ministerraad.*, Case no C-303/05, Judgment of 3.5.2007, E.C.R. p. 3633, para. 56.

the host Member State. Next, it found that a requirement for residence, such as that provided for by the national legislation in question, did not go beyond what was necessary to attain the objective of ensuring that persons who are nationals of other Member States achieve a degree of actual integration in the Member State of execution.

The ECJ also dealt with the problem as to whether the principle of non-discrimination is adhered to in provisions laid down in the framework decision, because it was – prior to the Lisbon Treaty – an act emanating from the EU’s third pillar, adopted on the basis of the TEU, which contained no direct treaty provision on non-discrimination. The ECJ stated in that context that Member States may not infringe the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States. It is worth noting that, although the legal situation is different at the moment, this statement is very important because of the temporary provisions included in Protocol No. 36 annexed to the Lisbon Treaty.

Finally, in contradistinction to the opinion of the Advocate General in the case¹⁵, the ECJ concluded that ex – Article 12 of the EC Treaty (the principle of non-discrimination) does not preclude the legislation of a Member State of execution under which the competent judicial authority of that State is to refuse execution of an European Arrest Warrant issued against one of its nationals with a view of enforcing a custodial sentence, whilst such a refusal is, in the case of a national of another Member State having a right of residence as a citizen of the Union, subject to the condition that the person has lawfully resided for a continuous period of five years in that Member State of execution.

4. Comment

Allow me to begin my commentary with some words on the Member States’ margin of discretion defined by the ECJ in its judgment. The ECJ in *Wolzenburg* stated that it was permissible to impose a five-year residence requirement and that Member States possess such discretion when

¹⁵ Opinion of Mr Advocate General Bot delivered on 24.3.2009.

implementing Article 4 FD EAW and in particular para 6 thereof¹⁶. That means that, ultimately, a national judge when exercising national provisions implementing the FD EAW has no margin at all to make any further evaluations once he verified that this requirement has/has not been fulfilled.

This conclusion seems rather strange, especially in comparison to the judgment in *Kozłowski*, in which the ECJ ruled that a national judge should place special emphasis on an overall assessment of various factors characterizing the EAW subject's situation. Moreover, the obligation of uniform interpretation of various concepts in the Member States was underlined. This approach was subsequently endorsed in academic literature¹⁷. Accordingly, there is no place for Member States' discretion when implementing those provisions of the FD EAW. One can wonder in that situation how to explain this duality of approach.

Ch. Janssens looks for the solution in the national legislation. In this author's opinion, in *Kozłowski* the ECJ had to decide "on the national judicial authority's margin of discretion in the absence of specific national provisions, whereas in *Wolzenburg* the national legislature had laid down specific criteria"¹⁸. That would mean – firstly – that the ECJ in reality assessed the validity of national provisions. Secondly, it would mean that a national legislature which does not exercise its margin of discretion (which is doubtful) and strictly implements the FD EAW (which should be rather correct) is placed in a worse position. That statement is therefore rather unconvincing. One more situation seems to be awkward: the ECJ itself did not explain the difference in its approach in this manner. The ECJ in the judgment actually found positives in this situation, stating that:

"a national legislature which, by virtue of options afforded it by Article 4 of the Framework Decision, 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 Framework Decision to the advantage of an area of freedom, security and justice"¹⁹.

¹⁶ *Wolzenburg* judgment, point 61.

¹⁷ R. Kierzyńska, T. Ostropolski, *Znaczenie pojęć „miejsce zamieszkania” oraz „pobyt” w procedurze ENA – glosa do wyroku ETS z 17.07.2008 r. w sprawie C-66/08 Kozłowski*, Europejski Przegląd Sądowy 2009, Vol. 1, at p. 44.

¹⁸ Ch. Janssens, *op. cit.*, p. 841.

¹⁹ *Wolzenburg* judgment, point 58.

Whilst this may be true, one must notice that this might be simultaneously in conflict with certain other freedoms, especially the free movement of persons in specific situations²⁰.

Actually, the ECJ did not explain more problems, for example: what is meant by “certain” as far as the margin of discretion is concerned. It seems that, according to the judgment, this margin exists when the means applied by Member States fulfill the criterion of possibility improving the EAW subject’s chances of reintegrating into society when the sentence imposed on him expires²¹. It brings me again to the conclusion that this is contrary to the strict approach in *Kozłowski*, where the notions of “residence” and “staying” were said to require uniform interpretation throughout the whole of the European Union, giving national judges no possibility to assess any chances and prospects for reintegration.

The ECJ quite directly pronounced that it is a Member State’s decision to make obligatory those grounds which are provided by the FD EAW as facultative²². This means that it is possible not only in the case of Article 4(6), but also as concerns other optional grounds for non-execution. This is a crucially important statement, since it responds to the doubts not only of Member States, but mainly of the Commission. One should remember that such a problem also existed in several other cases. According to the Commission staff working document²³, some Member States have transposed all of the grounds for optional non-execution of an EAW as mandatory. As far as Poland is concerned, this is the case in respect of Article 4(5). The Commission does not appear to consider this problematic. It rather underlines that certain Member States have provided for additional grounds which are not provided for by the FD EAW. Now it is easier to agree that, in such a situation, a national legislature has correctly transposed the FD EAW²⁴. However,

²⁰ Janssens, *op. cit.*, p. 842.

²¹ Wolzenburg judgment, point 62.

²² Wolzenburg judgment, point 61.

²³ Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2007) 407 final, 11.7.2007, point 4.

²⁴ It used to be also a Polish legislator’s problem. Cf. opinion on the implementation of FD EAW into Polish law issued by the Office of the Committee for European

in this author's opinion, this does not close the discussion, because in each of these cases it should be proven that this does not go beyond what the ECJ meant by a "certain" margin of discretion.

Returning to the problem of reintegration, which seems to have been a decisive factor for the ECJ in finding that such a national solution does not infringe the principle of non-discrimination, one must remember that different situations may also exist. For example, a person fulfills a criterion of a five-years residence, but in the end has no job (or even any real perspective of employment), does not speak the national language or – even more complicated – has dual nationality and in fact is better integrated with other society. Accordingly, this author concurs with Ch. Janssens that this conclusion remains far from convincing and considers that the ECJ's conclusions regarding the possibility to systematically transpose optional grounds of non-execution into mandatory grounds is incorrect. Interestingly, Poland transposed Article 4(5) FD EAW (optional) as a mandatory ground art. 607s(1) of the Code of criminal procedure²⁵, which means that Polish citizens in case of executing sentence, generally should not be surrendered without their consent²⁶. Conversely, Poland opposed the automatic transfer of sentenced Polish citizen in case of enforcement of sentences (any custodial sentence or any measure involving the deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings), on the basis of the Council Framework Decision 2008/909/JHA of 27.11.2008 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 Union²⁷.

Integration no. Sekr. Min. DH/2942/2003/DPE-agg. [http://orka.sejm.gov.pl/Druki4ka.nsf/%28\\$vAllByUnid%29/396C30AF85542441C1256DB1004D49E9/\\$file/2031.pdf](http://orka.sejm.gov.pl/Druki4ka.nsf/%28$vAllByUnid%29/396C30AF85542441C1256DB1004D49E9/$file/2031.pdf).

²⁵ G. Jaworski, A. Sołtysińska, *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz*, Wolters Kluwer, Warszawa 2010, at pp. 362–363.

²⁶ R. Kierzyńska, T. Ostropolski, *op. cit.*, at p. 47.

²⁷ Preamble, para. 11 and Article 6 para. 5 of the Council Framework Decision 2008/909/JHA of 27.11.2008 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, O. J. 2008, Series L 327, p. 27.

Advocate General Y. Bot also raised the problem of a Member State's automatic refusal to surrender its own nationals. The FD EAW clearly signals the abandonment of the traditional principle of non-extradition of a State's own nationals. That surrender was made possible because of the anticipated high level of confidence between Member States. Advocate General Y. Bot suggests that:

“in spite of the absence, to date, of extensive harmonization of substantive and procedural criminal law within the Union, the Member States have thus been able to convince one another that the conditions under which their nationals are prosecuted and tried in the other Member States observe the rights of those nationals and will allow the latter properly to defend themselves, notwithstanding any language difficulties and lack of procedural familiarity”²⁸.

Nevertheless, this author considers such a situation to be highly theoretical. Member States have, on numerous occasions, demonstrated a lack of confidence in another State's legal system, for example by not agreeing to wider reaching provisions of framework decisions concerning procedural rights, evidence warrants etc., by not using existing tools, such as joint investigation teams etc. In that case, as far as the actual level of legal harmonization and practice is concerned, this author wholeheartedly agrees with the ECJ's statement that: that in regard, the view may reasonably be taken that the rule that an European Arrest Warrant may not be executed against nationals of the Member State of execution does not appear to be excessive. Those nationals have a connection with their Member State of origin such as to ensure their social reintegration after the sentence imposed on them has been enforced. Moreover, nor can a condition requiring residence for a continuous period of five years for nationals of other Member States be considered to be excessive, having regard, in particular, to the conditions necessary to satisfy the requirement of integration of non-nationals in the Member State of execution²⁹.

²⁸ Opinion of Advocate General, point 137.

²⁹ Wolzenburg judgment, point 70.

Last, but not least, it was interesting to read the ECJ's findings concerning the cross-pillar application of ex-Article 12 of the EC Treaty³⁰. This problem, as mentioned above, is now partly historical but – regarding provisional provisions provided by Protocol No. 36 annexed to the Lisbon Treaty – this does not preclude the possibility that it may reappear in coming years. This author fully supports the findings of the ECJ, not only in the *Pupino*³¹ case (concerning the former third pillar of the EU), but also in other cases dealing with first pillar problems (such as *Cowan*³²) in connection with criminal matters, where the ECJ attempted to ensure cross-pillar application of the general rules of EC/EU law.

Ultimately, this author concurs with the ECJ's conclusion that it is not incompatible with the principle of non-discrimination to adopt national legislation under which the competent judicial authority of that State is entitled to refuse to execute an European Arrest Warrant issued against one of its nationals with a view to the enforcement of a custodial sentence, whilst such a refusal is, in the case of a national of another Member State having a right of residence on the basis of the Treaty, subject to the condition that that person has lawfully resided for a continuous period of five years in that Member State of execution. There are numerous other findings and incomplete conclusions presented in this case with which it is far more difficult to agree.

It is regrettable that the Polish courts and national judiciary are still unable to request a preliminary ruling on the interpretation of the FD EAW³³.

³⁰ Wolzenburg judgment, points 42–47.

³¹ Criminal proceedings against Maria Pupino, Case no C-105/03, Judgment of the Court (Grand Chamber) of 16.6.2005, E.C.R. 2005, p. I-05285.

³² Ian William Cowan v Trésor public, Case no 186/87, Judgment of the Court of 2.2.1989, E.C.R. 1989, p. 00195.

³³ A. Grzelak, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 18 lutego 2009 r. (sygn. akt Kp 3/08)*, Przegląd Sejmowy 2009, No. 4, p. 205 and A. Grzelak, *Sytuacja polskich sądów w odniesieniu do pytania prejudycjalnego w dziedzinie współpracy w sprawach karnych w UE* [in:] A. Wróbel (ed.), 'Zapewnienie skuteczności orzeczeń sądów międzynarodowych w polskim porządku prawnym', to be published by Wolters Kluwer, Warsaw 2010.