The Supreme Court (Criminal Chamber) decision of 4 August 2011, Ref. No. II KK 42/11 in the case of Andrei S., prosecuted by the Republic of Belarus

The decision:

To dismiss the cassation appeal. The condition of double criminality of the act, determining *inter alia*, the extradition of the prosecuted person between Republic of Poland and Republic of Belarus for the purpose of a criminal prosecution and the execution of a sentence was expressed only in actual form (Article 66 § 2 and § 3 of the Agreement of 26 October 1994 between the Republic of Poland and the Republic of Belarus on legal assistance and legal relations in civil, family, employment and criminal matters, Official Journal 1995, No. 128, item. 619, hereinafter the "Agreement"). The act that a prosecuted person is accused of in the summoning State, or the act that this person was convicted for therein, must constitute a crime in the understanding of the summoned State. This means that the above-mentioned act must be directed against legal goods protected by the criminal law in the summoned state. An act that violates only the common goods of the Republic of Belarus's fiscal interests does not constitute a fiscal offence under Polish criminal fiscal law.

The facts:

On 17 October 2010 the prosecutor of the Regional Prosecutor's Office in W. requested the Regional Court in W. for the issuance of a decision on the legal admissibility of the extradition of Andrei S. to the authorities of the Republic of Belarus, and on passing the above-mentioned decision after its validation, together with the records of the case, to the Ministry of Justice for the purpose of deciding on an extradition request. The Regional Court in W., by its decision of 25 October 2010, declared the legal inadmissibility of the extradition of Andrej S. to the Republic of Belarus, quashing at the same time the preventive detention of Andrei S. Inasmuch as it was not appealed by any party to the proceeding, this decision became final. The General Prosecutor filed a cassation from the above-mentioned decision to the disadvantage of the prosecuted person, within the time set forth in Article 524 § 3 of the Criminal Code Proceedings. He claimed that the decision violated the provisions of the criminal proceedings law, particularly Article 66 § 2 and Article 68 § 1 of the Agreement. The alleged violation consists in the failure to apply these provisions and in basing the judgment on Article 604 § 1 and § 2 of the Criminal Proceedings Code and Article 60 § 1 of the Agreement, despite the fact that these provisions were not applicable, which eventually led

to an unjustified claim of legal inadmissibility of the extradition of Andrej S. on the grounds that there was an absolute obstacle to extradition in the form of lack of the double criminality prerequisite of the act charged under the Article 231 part 2 of the Belarusian Criminal Code.

In the justification of the cassation there was an additional allegation, though it was indirect and did not point out a violation of any other provision of Polish law. Namely, it was noted that the Regional Court stated, without grounds, that the act which the prosecuted person was accused of in the Republic of Belarus does not fulfil the features of a criminal offence under Article 270 § 1 of the Polish Criminal Code, inasmuch as the criminal proceedings in Belarus accused the prosecuted person of "*inter alia* using forged documents but not forging documents, and this behaviour may not fulfil the features of Article 270 § 1 of the Criminal Code." In bringing these allegations the General Prosecutor requested that the decision in question be quashed and the case remanded to the Regional Court in W. for re-examination. In response to the cassation the counsel for the defendant petitioned for its dismissal.

Reasoning:

The submitted cassation is groundless. Admittedly, the rules of procedure were misapplied in the present case, as the decision was based on Article 60 § 1 of the Agreement, instead of Article 66 § 2 thereof. Nevertheless, taking into consideration the circumstances of present case, this infringement of regulations did not have any influence on the merits of the decision and therefore the cassation is dismissed.

It shall be agreed with the General Prosecutor that the aforementioned Article 60 of the Agreement was not applicable to the present case, since this provision, contained in Part Three of the bilateral agreement in Chapter One, entitled "Taking over the criminal prosecution", regards only the interstate cooperation in the form that was described in the Chapter's title. Therefore it is not applicable in extradition proceedings, especially since the latter are regulated by separate provisions of aforementioned agreement with the Republic of Belarus (Articles 66-82, which are contained in Chapter Two of Part Three, entitled "Extradition for the purpose of prosecution and execution of the sentence.")

However the foregoing defectiveness of the decision in question, in the circumstances of present case, is only of a technical nature (regarding which provision was cited in the legal assessment of the judgment), and is without a substantive effect. The Regional Court in W., in its written substantiation of the decision, refers to all the relevant prerequisites from the standpoint of Article 66 § 2 of the Agreement, and also in view of Article 604 of the Criminal Proceedings Code, including in particular the condition of the double criminality of the act.

This issue constitutes the core of the cassation, the justification of which presents contradictory viewpoints. On one hand it is indicated that Article 66 § 2 of the Agreement does not establish the condition that extradition for the purpose of criminal prosecution is admissible only if the prosecuted act is a criminal offence under the law of both parties thereto. In the view of the party filing the cassation, the condition as such was introduced only in respect of an extradition for the purpose of execution of a sentence under Article 66 § 3 of the Agreement. This is also supposedly confirmed by the content of Article 68 § 1 of the Agreement, which lists a catalogue of obstacles to extradition. On the other hand it is stated that this agreement, in respect of extradition for the purpose of criminal prosecution, provides the condition of double criminality of the act, even if not *sensu stricto* as specified in Article 604 § 1 point 2 of the Criminal Proceedings Code and Article 60 § 1 and Article 66 § 3 of the Agreement, but in the sense that there are categories of criminal offences which, under the law of both parties, are punishable under Article 66 § 2 thereof.

In this context it should be pointed out that Article 66 § 2 of the Agreement states that "Extradition for the purpose of calling to criminal responsibility takes place only for the offences that (...) are punishable (...)". Furthermore § 3 of above-mentioned provision provides that "Extradition [for the purpose of the execution the sentence takes place only as for the acts, that constitute a criminal offences under the law of both parties (...)"]. Thus in both types of extradition it is required that the condition of double criminality of the act be fulfilled. The difference in wording of these provisions results not from the intention to give them a different content, as is argued by the General Prosecutor, but is the result of purely linguistic aspects, and so is purely technical in nature.

Moreover, no reasons are offered to support the assumption that the parties to the Agreement wanted to regulate differently the basic prerequisite for the extradition, i.e. the condition of double criminality of the act, with respect to whether it was extradition for the purpose of criminal prosecution or for the purpose of the execution of a sentence.

Besides, in the present case the real question is not whether the bilateral agreement in respect of extradition for the purpose of criminal prosecution provides the condition of the double criminality of the act, but whether the alleged behaviour of the prosecuted person met the features of a prohibited act, i.e. one which in Poland constitutes an offence or a fiscal offence. The Prosecutor is also misreading the content of the cited decision of the Court of Appeal in Kraków dated 27 October 1999 (Ref. No. II AKz 244/99, KZS 1999, p. 10, item 45). The conclusion of this decision is that an act which forms the basis for an extradition request must fulfil features of a type of crime, but the features do not have to be identical with the features in the legally comparative area.

The point is that the act committed by Andrej S. which constitutes the subject of his accusation by Republic of Belarus does not fulfil the features of any kind of offence or fiscal offence under Polish law, in particular of offences described in Article 86 and Article 87 of the Criminal Fiscal Code. This has already been pointed out by the Regional Court in W. The intended subject of the protection provided by the Polish provisions of the criminal fiscal law is solely the wide-ranging fiscal interests of the Polish State and the fiscal interests of the European Union, which is admitted also by the General Prosecutor. This means that an act directed against other legal goods (in this case, the fiscal interests of the Republic of Belarus) does not constitute a fiscal offence under the Polish provisions, because it does not fulfil all the features of this type of prohibited act. This leads to the conclusion that the extradition of Andrej S. to the Republic of Belarus is legally inadmissible, due to the non-fulfilment of the condition of double criminality of the act.

Such a conclusion may not be altered by the arguments of a systemic nature brought by the General Prosecutor.

Firstly, although indeed the catalogue of obstacles to extradition specified in Article 68 of the Agreement does not recognise as an obstacle the lack of double criminality of the act, this premise was put in Article 66 § 2 ["extradition takes place only because of following crimes (...)"].

Secondly, the rest of the provisions of the bilateral agreement that were relied upon by the General Prosecutor do not support the statement of the cassation. Quite to the contrary – they prove the correctness of the contested decision. Articles 92 and 93 of the Agreement relate to the institution of taking over to enforce a judgement passed in the other State, and not to extradition. Moreover, these regulations directly refer to the issue of offences against goods of the State, including fiscal offences. Article 92 § 2 provides, as a prerequisite of such a takeover, fulfilment of the condition of the double criminality of the act, including also in its hypothetical aspect – "the act for which a penalty was imposed (...) would have been punishable at law, if had been committed on its territory" (Article 92 § 3 *in fine*). Article 93 points out that in the cases of the fiscal offences as widely understood, the refusal to take over is unacceptable if it is made only on the grounds that the law of the executing State does not provide the same type of public charges. Therefore both provisions explicitly allow for the possibility of taking over the enforcement of a judgement passed in the other country for a fiscal offence, even if that offence was not directed against national interests of summoned State (State of execution of the sentence). Since the parties to the bilateral agreement foresaw this kind of possibility in respect of taking over the enforcement of the judgement and did not introduce it with regard to the extradition of a prosecuted person, therefore the hypothetical extension of the condition of double criminality of the act, as specified in Articles 92 and 93, is inadmissible to the extradition procedure.

Thirdly, in the process of interpretation of the provisions of the bilateral agreement, it is inadmissible to refer to the Second Additional Protocol to the European Convention on Extradition, drawn up in Paris on 13 December 1957 (Official Journal 1995, No. 70 pos. 307), as it would be contrary to the principles of interpreting international agreements, as set forth in Articles 31-33 of the Vienna Convention on the Law of Treaties, drawn up in Vienna on 23 May 1969. Besides, the Republic of Belarus is not a party to the aforesaid Protocol; it has not even ratified the Convention on Extradition itself.

Moving on to the last issue, namely the accusation formulated in the substantiation of the cassation, it is necessary to point out that it is not supported with any argumentation and moreover it is not placed in the factual and legal circumstances of this case. According to the documents in the case files, the prosecuted Andrej S. is not accused in the Republic of Belarus of either forging or using forged documents (within the understanding of Article 270 § 1 of the Criminal Code). As was correctly noted by the Regional Court in W., he is only charged with presenting to the customs officials untrue ("forged") information.

The above reaffirms (which was also noted by the Court in the contested decision) that the only legal basis for the act that Andrej S. is charged with is Article 231 part 2 of the Criminal Code of the Republic of Belarus, concerning the offence of evasion of customs duties, and not the provision that would penalize the offence of substantial falsification (within any meaning specified in Article 270 § 1 of the Criminal Code). These features are also not contained in the abovementioned Article 231 of the Criminal Code of Republic of Belarus.

For these reasons, the cassation must be dismissed as groundless.

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