Ariadna H. Ochnio, Hanna Kuczyńska (eds),
Current Issues of EU Criminal Law
(Publishing House of ILS PAS 2022)
DOI: 10.5281/zenodo.6860620
pp. 123–136

The system of transfer of sentenced persons within the EU in the light of the CJEU judgement in the *Popławski (II)* case

Michał Hara

Abstract

The author presents the consequences of the CJEU judgment of 24 June 2019 in case C-573/17 *Popławski* in relation to declarations limiting the temporal application of Framework Decision 2008/909 made under its Article 28(2). The CJEU clearly stated that any declaration made after the adoption of the Framework Decision is invalid and cannot bear legal consequences. As such, Member States should give effect to the Framework Decision as if the declaration had never been made. However, this may cause conflicts with their national laws enacted to implement such a declaration, since a framework decision, while binding, does not have a direct effect and, therefore, cannot require national authorities to refrain from applying their national laws. The author presents several ways this conflict can be resolved, in particular, through the pro-European interpretation of national law and the notion of dispersed constitutional review.

Keywords

mutual recognition of judgments, transfer of sentenced persons, Framework Decision 2008/909/JHA, direct effect of EU law

Introduction

The system of transfer of sentenced persons within the European Union forms a part of a larger network of legal instruments aiming to ensure mutual recognition and execution of judicial decisions between EU Member States. Its application, in the day-to-day operation of Member State courts, naturally provides certain practical difficulties and occasional obstacles.

This article seeks to present some of these difficulties relating to the application of the 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[1] (hereinafter: Framework Decision 2008/909) regulating this matter, as it was interpreted by the CJEU, in particular with regard to the possibility of applying the rules laid down in the Framework Decision to national judgments issued in individual cases prior to 5 December 2011.

Since this issue can potentially have a serious impact on the legal situation of persons sentenced to a custodial penalty (and any lawyers acting on their behalf), it was deemed necessary to explore in detail under what circumstances a Member State can, in fact, limit the temporal scope of application of the Framework Decision and what are the possible remedies in the event that this is done in breach of EU legal principles.

1. Council Framework Decision 2008/909

There are a great number of EU instruments enabling quick, effective and insofar as possible, simplified recognition of foreign judicial decisions in criminal matters. These relate to, *inter alia*, financial penalties, probation measures and exchange of evidence. Some of the most widely-known instruments in this field, however, relate to the recognition of decisions relating to the detention of suspected, accused or convicted persons.

There are two principal framework decisions[2] regulating this matter. The first one, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European

1 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 [2008] OJ L 327/ 27.

2 The framework decision, as a legal instrument of the EU has been made obsolete with the adoption of the Treaty of Lisbon. Since its entrance into force, justice and home affairs are regulated by directives. However, framework decisions already in place when the Treaty of Lisbon was adopted remain in force, though they are being gradually replaced by relevant directives regulating the same legal matters (this process is sometimes referred to as the 'lisbonisation' of EU law).

arrest warrant and the surrender procedures between Member States[3] is probably the most recognisable legal instrument pertaining to cooperation in the area of justice and home affairs (JHA). The European Arrest Warrant (EAW) system has been a significant success for the EU, allowing for the swift transfer of accused and convicted persons between Member States. Fleeing to another Member State no longer affords an offender practical impunity.

The second instrument is the Council Framework Decision 2008/909 which only applies to sentenced persons. Since the EAW can also be employed to seek the surrender of already convicted persons[4], one might question the need to adopt a subsequent, separate instrument serving this purpose. However, the objective of Framework Decision 2008/909 is somewhat different to that of the EAW system. As indicated by its Article 3(1):

> *The purpose of this Framework Decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.*

The chief purpose of Framework Decision 2008/909 is not to aid law enforcement authorities but rather to enable a swifter and more thorough social rehabilitation of the convicted person.[5] This can be achieved more effectively if the convicted person serves the sentence in a Member State to which they have greater links, be they family, linguistic, cultural, social, economic or other (Recital 9). As such, the Framework Decision purposefully adopts the criterion of 'living' in a particular state (as explained in its recital 17), rather than that of citizenship or permanent residence.[6]

Framework Decision 2008/909 follows a fairly standard pattern for instruments related to the mutual recognition of judicial decisions (pioneered by the EAW), in that it provides rules for transferring the person, grounds for refusal, the obligation to respect fundamental rights and technical provisions, etc. However, its practical application over the years has understandably given rise to certain doubts and differences in interpretation. These are clarified by the case-law of the Court of Justice of the European Union

3 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

4 Indeed, a majority (57% as of 2019) of EAWs issued by Member States are issued for the purpose of execution of an already imposed sentence or detention order: Commission Staff Working Document Statistics on the practical operation of the European arrest warrant – 2019 (Brussels, 6 August 2021, SWD(2021) 227 final) <https://ec.europa.eu/info/sites/default/files/law/search_law/documents/eaw_statistics_2019_swd_2021_227_final_08_2021_en.pdf> accessed 22 January 2022.

5 See Sławomir Buczma, Michał Hara, Rafał Kierzynka, Paweł Kołodziejski, Andrzej Milewski and Tomasz Ostropolski, *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK* (C.H. Beck 2016) 1103.

6 Tomasz Ostropolski 'Współpraca wymiarów sprawiedliwości w sprawach karnych' in Jan Barcz (ed), *System Prawa Unii Europejskiej. Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna,* Vol. 8 (C.H. Beck 2021) 358.

chiefly as a result of a preliminary reference made by a Member State court unsure how to apply the framework decision provisions in a particular case.

2. THE C-573/17 *POPŁAWSKI* JUDGEMENT

One of the most important, recent rulings relating to this Framework Decision has to be the judgment of 24 June 2019 in the case C-573/17 *Popławski,*[7] sometimes referred to as the *Popławski (II)* case, as it was the second judgment issued by the CJEU in that particular matter.[8]

To fully understand the implications of that judgment one must first explore the temporal application of Framework Decision 2008/909. It came into force on the day of its publication (5 December 2008) and the implementation deadline was set by Article 29(1) for 5 December 2011. Article 28(1) further states that requests for the transfer of convicted persons received before 5 December 2011 shall be governed by legal instruments already in place before that date. This could be bilateral agreements but would most often mean the Council of Europe's Convention on the Transfer of Sentenced Persons of 21 March 1983 which came into force on 1 July 1985[9] (hereinafter: Strasbourg Convention). All requests received after 5 December 2011 are to be handled in accordance with the rules laid down by Framework Decision 2008/909, irrespective of when the decision imposing detention was issued.

As an exception to the above principles, Article 28(2) allowed any Member State to make a declaration stating that in cases where the final judgment has been issued before a date specified by that Member State, it will continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011. The date in question itself could not be later than 5 December 2011. Several Member States availed themselves of this possibility: Ireland, Latvia, Lithuania, the Netherlands, Malta and Poland all made declarations that any judgment issued before 5 December 2011 would be subject to the old rules.[10] The CJEU later clarified that such a declaration may only cover judgments which became final before that set date and does not extend to judgments which, while issued before said date, became final after it.[11]

The crucial provision which affects the entirety of subsequent applications of the above derogation is contained in the phrase 'any Member State may, on the adoption of

7 Case C-573/17 *Popławski*, EU:C:2019:530.

8 The first being case C-579/15 *Popławski,* EU:C:2017:503.

9 ETS No 112. All EU Member States are parties to that Convention.

10 Council Framework Decision 2008/909/JHA 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 – Declarations under Article 7(4) and Article 28(2) <https://www.ejn-crimjust.europa.eu/ejnupload/uploadFiles/ST09603-EN16.PDF> accessed 23 January 2022.

11 Case C-582/15 *van Vemde*, EU:C:2017:37.

this Framework Decision, make a declaration [...]' in Article 28(2). The text of Framework Decision clearly states that any declaration limiting the temporal scope of its application had to be made 'on its adoption'. Nevertheless, several of the abovementioned states made their declarations at a later date. This includes Poland whose declaration was made only in 2011.

This issue became the chief subject of the CJEU's judgment of 24 June 2019 in the case C-573/17 *Popławski*. In its preliminary referral, the Dutch Rechtbank Amsterdam (District Court in Amsterdam)[12] expressly asked whether a declaration of a Member State within the meaning of Article 28(2) of Framework Decision 2008/909, which it did not make 'on the adoption of this Framework Decision', but at a later date, has legal effect.

The CJEU's answer was unambiguous. Any declaration had to be made strictly on the date of the adoption of the Framework Decision, i.e. on 27 November 2008. A declaration made pursuant to Article 28(2) by a Member State, after Framework Decision 2008/909 was adopted, is not capable of producing legal effects.

The CJEU elaborated further on the legal consequences of making such a late, invalid declaration. It recalled that framework decisions had a specific, legal status as acts of law belonging to the former Third Pillar. They were addressed to Member States, rather than individuals, and had the aim of achieving a certain goal while leaving Member States some leeway in choosing the method of achieving that goal. Crucially, as a result, framework decisions could never have a direct effect.

As such, the CJEU stated that EU law does not require authorities in the Member States to refrain from applying their national provisions if they are found to be incompatible with the requirements of a framework decision. The authorities of the Member States, including the courts, are, nevertheless, required to interpret their national law, to the greatest extent possible, in conformity with EU law. This enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned. In other words, if there is any interpretation of national provisions at all, which would mean that the provisions of a framework decision are given effect, the authorities are obliged to employ that interpretation.[13]

3. Implementation of an invalid declaration made under Article 28(2)

These general issues have to be transposed onto practical considerations concerning the application of Framework Decision 2008/909 by Member States which made an

12 The Netherlands filed their declaration in 2009, i.e. also at a later date.

13 For an in-depth analysis of the issues of primacy and direct effect of EU law raised here, see e.g. Sim Haket, '*Popławski II*: A Half-Hearted Embrace of Hierarchical Supremacy' (2020) 13 Review of European Administrative Law 155; Dawid Miąsik, Monika Szwarc, 'Primacy and direct effect – still together: *Poplawski II*', (2021) 58 Common Market Law Review 571 <https://doi.org/10.54648/cola2021030>.

aforementioned, invalid declaration. Such Member States have naturally introduced provisions of national law which aim to give legal effect to such a declaration. Other Member States may have also adopted provisions allowing for cooperation with such Member States.[14]

Poland did this by way of Article 4(1) of the Act of 16 September 2011 on the amendment of the Act 'The Code of Criminal Procedure', the Act on public prosecution service and the Act on the National Criminal Register[15] (hereinafter: Amending Act). This provision expressly states that Chapters 66f and 66g of the Polish Code of Criminal Procedure (1997) [*Kodeks postępowania karnego*][16] (hereinafter: CCP), which regulate cooperation under the Framework Decision 2008/909 system, are not applied to judgments issued before 5 December 2011. As such, if a Polish court wishes to request another Member State for the recognition and enforcement of a custodial penalty imposed in Poland before that date, it would have to employ the earlier system based on the Strasbourg Convention.

As mentioned above, despite the declaration by Poland, under Article 28(2) of the Framework Decision being invalid, there are seemingly no grounds for a Polish court to refrain from following Article 4(1) of the Amending Act. The courts are bound to follow provisions of legal acts[17] unless they have been declared unconstitutional or are manifestly unconstitutional (e.g. because a similar provision has already been deemed unconstitutional).[18] Neither of these circumstances apply to Article 4(1) of the Amending Act. The CJEU clearly stated that EU law does not provide such grounds either.

Other Member States also continue to maintain provisions designed to give effect to an invalid declaration.[19] Again, the mere fact that these provisions are in contradiction with the Framework Decision (limiting its scope of application in a way not foreseen by the Framework Decision itself), does not mean that authorities in these States should refrain from applying their own national law.

If the abovementioned situation resulted merely in a minor technical misalignment between Polish and EU law, it would, probably, not warrant deeper examination. It does, however, have significant, practical ramifications for persons serving a custodial sentence.

14 An example of such a provision would be Section 102 of the German Gesetz über die internationale Rechtshilfe in Strafsachen [Act on international mutual legal assistance in criminal cases]. Even though Germany never made a declaration under Article 28(2) of framework decision 2008/909, it introduced provisions limiting its temporal scope of application in relations with states that did make one, including Poland.

15 Act of 16 September 2011 on the amendment of the Act – Criminal Procedure Code, Act on public prosecution service and Act on the National Criminal Register, Dz.U. (2011), No 240, item 1430.

16 Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments.

17 Article 178(1) of the Constitution of the Republic of Poland (1997).

18 However, as explained later, exceptions may be found here.

19 One could once again call on the example of Germany which maintains provisions limiting the scope of application of framework decision 2008/909 with countries which made an invalid declaration under Article 28(2).

Normally, the procedure for transferring a sentence to be served in a different State, under the Framework Decision 2008/909 system, is initiated by the sentenced person.[20] Whilst, as already mentioned, the goal of the Framework Decision is not to provide a benefit to the sentenced person if the requirements for the transfer are met, the sentenced person themselves is usually interested in being transferred to the executing Member State. In any case, the rule expressed in Article 611t CCP is that the consent of the sentenced person is required.[21]

However, sentenced persons who should have the option of their sentence being transferred under Framework Decision 2008/909 rules are, instead, denied this possibility as a result of Article 4(1) of the Amending Act. Applications made by such persons concerning sentences issued before 5 December 2011 are, instead, handled under the previous, Strasbourg Convention system, which is more formalised, lengthy and requires the consent of the Minister of Justice (Article 610 CCP). Furthermore, the old system is only available to foreigners, so a Polish national can never be transferred to another state under it, even if they have resided in that State for many years and do not have any ties to Poland anymore, apart from formally holding citizenship.[22] The Strasbourg Convention itself also requires that the transferred person be a national of the administering State (i.e. the State to which such person would be transferred).[23] Depending on the particular, factual circumstances concerning a given sentenced person, their transfer may therefore be either more difficult or completely unavailable, whereas if their case was handled under the Framework Decision 2008/909 system, they would be transferred through direct cooperation between judicial authorities.

4. The need for amendments to the law and attempts so far to introduce change

In the light of Poland's declaration under Article 28(2) of the Framework Decision being invalid and unable to cause any legal effect, as decided by the CJEU in the *Popławski (II)* case, there are currently no grounds to maintain the provision of Article 4(1) of the Amending Act in the legal system. It should be repealed as soon as possible in order to

20 It is however also possible for a court to initiate this procedure *ex officio*, (Article 611t para 1 CCP) or at the request of the Minister of Justice or an authority in the executing Member State (Article 611t para 2 CCP).

21 There are exceptions to this requirement if the sentenced person is a national of the executing Member State and has permanent or temporary residence there, or would be expelled to the executing state after serving the sentence, or fled to the executing state (Article 611t para 5 CCP).

22 Article 604 para 1(1) CCP in conjunction with Article 611b para 2(3) CCP expressly forbids the transfer of a person who is a Polish national. In a recent ruling the Supreme Court did however clarify that the Strasbourg Convention system is available to persons holding dual citizenship, including Polish (Supreme Court, decision of 7 April 2022, IV KK 578/21).

23 Article 3(1)(a).

ensure the conformity of Polish law with binding requirements of Framework Decision 2008/909, as interpreted by the CJEU. It is chiefly the duty of the legislature to bring national law in line with EU law devoid of direct effect.[24] The need to repeal Article 4(1) of the Amending Act was already brought up by the Polish Commissioner for Human Rights who issued two official addresses to the Minister of Justice indicating the aforementioned problem.[25] The Minister of Justice, however, did not respond to them in any way. It is therefore impossible to ascertain what reasons the Minister might have for not taking any legislative action in response to the *Popławski (II)* judgment.

The matter of temporal limitations to the application of Framework Decision 2008/909 has also been brought before the Constitutional Tribunal. A constitutional complaint was filed by an individual on 9 April 2019 and is being considered under case file No SK 77/20. The complainant alleges *inter alia* that Article 4(1) of the Amending Act is incompatible with Article 2 of the Polish Constitution[26] in conjunction with Article 15(1) sentence 3 of the International Covenant on Civil and Political Rights.[27] The complainant alleges that Article 4(1) of the Amending Act violates the prohibition of retroactivity in criminal law.

Whilst it can indeed be argued that Article 4(1) of the Amending Act is unconstitutional, it appears that the complaint filed under case file SK 77/20 omits the most pertinent reasons for it. The obligation to implement framework decisions binds the Polish government by dint of Article 34(2) of the TEU in its wording introduced by the Treaty of Nice, applicable until the entry into force of the Treaty of Lisbon. As a result, it constitutes an international obligation for Poland under public international law. Failure to properly implement a framework decision is, therefore, a breach of the TEU. The appropriate provisions of the Constitution, with which Article 4(1) of the Amending Act should therefore be confronted, are Articles 9[28] and 91(1),[29] as introducing temporal limitations of the application of Framework Decision 2008/909 in contradiction to its provisions (i.e. on the basis of an invalid declaration) constitutes faulty implementation

24 Miąsik, Szwarc (n 13) 583.

25 General addresses of 26 October 2020 and of 20 May 2021 (II.516.3.2020.MH): Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, 'Skazani na karę więzienia w Polsce skarżą się, że nie mogą być przekazani do innego państwa UE. Interwencja RPO', 26 October 2020 <https://bip.brpo.gov.pl/pl/content/rpo-skazani-w-polsce-nie-moga-byc-przekazani-do-innego-panstwa-ue> accessed 10 April 2022; Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, 'Niemożność przekazywania do innego państwa UE osób skazanych w Polsce na karę więzienia. Ponaglenie RPO do MS', 24 May 2021 <https://bip.brpo.gov.pl/pl/content/skazani-nie-moga-byc-przekazani-do-panstwa-ue-ponaglenie-rpo-ms> accessed 10 April 2022.

26 'The Republic of Poland is a democratic, rule of law state implementing the principles of social justice.'

27 International Covenant on Civil and Political Rights (1966), UNGA Res 2200A.

28 'The Republic of Poland complies with binding international law'.

29 'A ratified international agreement, following its publication in the Journal of Laws of the Republic of Poland, constitutes a part of the national legal order and is applied directly, unless its application is contingent on passing an Act of Law'.

and therefore a breach of international law. If a provision of national law is incompatible with binding international law (such as TEU), it is also incompatible with Articles 9 and 91(1) of the Constitution. In the aforementioned case, the Tribunal is, however, bound by the scope of the complaint filed by the complainant and is not authorised to extend or modify the provisions of constitutional control.[30]

Both the Sejm[31] and Public Prosecutor General[32] moved that the proceedings in case SK 77/20 be dismissed. In light of that, and the increasing doubts as to the impartiality of the Constitutional Tribunal, as well as a recent streak of decisions contesting the fundaments of EU law,[33] it seems extremely unlikely that it would rule that Article 4(1) of the Amending Act is, indeed, unconstitutional. It may never even consider the case at all since, as of May 2022, the date for a hearing has not even been set.

It therefore seems that urgent legislative action repealing Article 4(1) of the Amending Act is necessary in order to ensure the compliance of Polish national provisions with EU law, understood and applied with consideration for binding CJEU case-law.

5. Pro-EU interpretation of national law

Until the necessary legal changes are made, one must keep in mind the directions contained in the *Popławski (II)* judgment. The CJEU clearly stated that authorities in Member States should interpret their national provisions in such a way to give the broadest possible effect to Framework Decision 2008/909.

Laws implementing an invalid declaration under Article 28(2) of the Framework Decision are usually clear-cut, simply stating that certain provisions, or sections of legal acts implementing Framework Decision 2008/909, are not applied to judgments issued before 5 December 2011 (as is the case with Article 4(1) of the Amending Act). However, even with such seemingly unambiguous provisions, there is still room for pro-European interpretation.

30 Article 67(1) of the Act of 30 November 2016 on the organisation and proceedings before the Constitutional Tribunal, Dz.U. (2019), item 2393.

31 Procedural document of 22 February 2021, No BAS-WAK-1901/20.

32 Procedural document of 29 December 2020, No PK VIII TK 126.2020.

33 Polish Constitutional Tribunal, P 7/20, 14 July 2021 (the judgment pertaining to Article 4(3) TEU and Article 279 TFEU) <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa> accessed 8 July 2022; Polish Constitutional Tribunal, K 3/21, 7 October 2021 (the judgment pertaining to Articles 1, 2, 4(3) and 19(1) TEU), as well as decisions contesting provisions of the European Convention on Human Rights <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> accessed 8 July 2022.

First of all, while the CJEU clearly states that EU law does not require national authorities to refrain from applying their own laws, it certainly does not prevent them from doing so. If a court in an issuing Member State is able to find some way to circumvent the prohibition on using the Framework Decision 2008/909 system to pre – 5 December 2011 judgments in their national law, they are free, and indeed, obliged to do so.

In Poland this could potentially be achieved by employing the strict, hierarchical structure of sources of law as indicated by Article 8(1) and 87(1) of the Constitution and the notion of 'dispersed constitutional review' under which any court may decide not to apply a certain provision if it considers it contrary to the Constitution. This doctrine has its roots in Article 8(2) of the Constitution which states that the provisions of the Constitution are to be applied directly unless the Constitution itself states otherwise. As indicated above, it is feasible to demonstrate that Article 4(1) of the Amending Act is, indeed, incompatible with the Constitution. The doctrine of 'dispersed constitutional review' has recently gained popularity[34] and more widespread application due to the changes made to the Constitutional Tribunal, it is still, however, somewhat controversial. The Constitutional Tribunal naturally denies that such a possibility exists. The case-law of the Supreme Court, however, is known to allow for common courts to carry out constitutional review and refrain from applying provisions of law they found to be contrary to the Constitution.[35] In this way, a Polish court could potentially find Article 4(1) of the Amending Act unconstitutional, refuse to apply it and use the Framework Decision 2008/909 system even with regard to a judgment issued before 5 December 2011.

The obligation to apply a pro-European interpretation of national law also applies to executing Member States. While not expressly mentioned in the *Popławski (II)* judgment, this obligation arises directly from Article 4(3) TEU. This means that authorities in the executing Member State should also strive to give full effect to EU law (even if it does not have direct application, as is the case with framework decisions), rather than exploit national law in order to refuse to apply it.

In relation to the invalidity of declarations made under Article 28(2) of Framework Decision 2008/909, this may come into play if an authority in the executing State receives a request for recognition of a custodial penalty imposed before 5 December 2011 from a Member State which made such an invalid declaration. Such an authority should exhaust all legal possibilities to consider this request under its own national provisions whilst implementing Framework Decision 2008/909. Whilst, once again, the *Popławski*

34 See e.g. Piotr Mikuli, 'Doktryna konieczności jako uzasadnienie dla rozproszonej kontroli konstytucyjności ustaw w Polsce' (2018) XL Gdańskie Studia Prawnicze 635; Piotr Kardas, 'Rozproszona kontrola konstytucyjności prawa w orzecznictwie Izby Karnej Sądu Najwyższego oraz sądów powszechnych jako wyraz sędziowskiego konstytucyjnego posłuszeństwa' [2019] (4) Czasopismo Prawa Karnego i Nauk Penalnych 7; Paulina Jabłońska, 'Konstytucyjne podstawy rozproszonej kontroli konstytucyjności prawa' [2020] (11-12) Przegląd Sądowy 21.

35 See case-law extensively quoted in the decision of the Supreme Court of 9 October 2020, III CZP 95/19 <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%2095-19.pdf> accessed 26 April 2022.

(II) judgment does not give grounds to simply refuse to apply a direct provision of national law,[36] other ways may be possible to interpret the national provisions in a way which would give effect to Framework Decision 2008/909. One such potential interpretation was suggested by the Dutch Rechtbank Amsterdam in its preliminary referral to the CJEU in the *Popławski (II)* case itself. The Rechtbank considered whether it could treat a framework decision as equivalent to an international convention for the purposes of national law in order to give it fuller effect. Whether such interpretations are valid depends, of course, on the particulars of the legal system of a given Member State.

Another example would be if the request pertains to a combined judgment, i.e. a judgment which links together several previously imposed penalties and imposes a single, aggregate one in their place. It may well happen that every constituent judgment was issued before 5 December 2011 but the combined judgment itself was pronounced after that date. In such an event, when considering the request, the executing authority should use the date of the combined judgment, rather than the partial judgments when deciding whether, under its national law, the request pertains to a penalty imposed before or after 5 December 2011. In this example, this would allow for the use of the Framework Decision 2008/909 system and mitigate the consequence of the invalid declaration.

The above are just a few examples of how the *Popławski (II)* judgment may be implemented in practice. The numerous legal systems in place in EU Member States means that there are undoubtedly many more instances in which different interpretations of legal norms concerning the transfer of sentenced persons are possible. It is important for authorities in all States to remember that they should always choose the interpretation which would give the fullest possible effect to provisions of European Union law.

Conclusions

In conclusion, one must make one final observation that the impact of the *Popławski (II)* case is slowly going to diminish over time. As penalties become fully served, fewer and fewer judgments issued before 5 December 2011 are going to be present in legal circulation. As such, the issue in controversy will eventually naturally fade away.

However, the worst course of action, governments of Member States which made an invalid decision under Article 28(2) of Framework Decision 2008/909 could take, would be to do nothing and just wait for the problem to go away on its own. This would only serve to demonstrate a lack of respect for binding legal instruments of the EU and the case-law of the CJEU. Whilst the European Commission is unlikely to institute any infringement proceedings in this regard, it is still the duty of the Member States to ensure that their national laws are compliant with Framework Decision 2008/909.

36 Such as the aforementioned Section 102 of the German Gesetz über die internationale Rechtshilfe in Strafsachen. See also Antoine Bailleux, 'The Two Faces of European Sovereignty' (2020) 5 European Papers 304 <https://doi.org/10.15166/2499-8249/380>.

The system of transfer of prisoners of the EU is of benefit to the community as a whole. If the goals of social reintegration are met, the offender is less likely to relapse into criminal activity, thus serving to realise the objectives of individual crime prevention. If the goals of reintegration are better served in a different Member State, national authorities should be striving to achieve them rather than looking for loopholes and excuses not to apply binding EU law, whether it has a direct effect or not.

It is therefore imperative that Poland and other Member States, which made invalid declarations under Article 28(2) of Framework Decision 2008/909, introduce urgent amendments to their legal systems with the aim of mitigating the consequences of an invalid declaration. In the case of Poland, as already mentioned, this would take the form of repealing Article 4(1) of the Amending Act. For the reasons mentioned above, awaiting the decision of the Constitutional Tribunal (which may indeed never actually come) is by no means sufficient.

Until the necessary amendments to the law are made, it is the obligation of courts to apply national provisions in a way which, as far as possible, allows for the application of Framework Decision 2008/909, as if the invalid declaration had never been made. It is worth repeating here that whilst EU law devoid of direct effect, as clarified by the CJEU in the *Popławski (II)* judgment, does not require national authorities to refrain from applying national law, it does not prohibit them from doing so either.

BIBLIOGRAPHY

Legal acts

International Covenant on Civil and Political Rights (1966), UNGA Res 2200A

Kodeks postępowania karnego (1997) [Code of Criminal Procedure], Dz.U. (1997), No 89, item 555 with subsequent amendments

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1

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 [2008] OJ L 327/27

Act of 16 September 2011 on the amendment of the Act – Criminal Procedure Code, Act on public prosecution service and Act on the National Criminal Register, Dz.U. (2011), No 240, item 1430

Treaty on European Union, consolidated version [2016] OJ C 202/1

Act of 30 November 2016 on the organisation and proceedings before the Constitutional Tribunal, Dz.U. (2019), item 2393

Case law

CJEU

Case C-582/15 *van Vemde*, EU:C:2017:37
Case C-579/15 *Popławski*, EU:C:2017:503 ('Popławski (I)')
Case C-573/17 *Popławski*, EU:C:2019:530 ('Popławski (II)')

Polish Constitutional Tribunal

P 7/20, 14 July 2021 <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa> accessed 8 July 2022
K 3/21, 7 October 2021 <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> accessed 8 July 2022

Polish Supreme Court

Decision of 9 October 2020, III CZP 95/19 <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%2095-19.pdf> accessed 26 April 2022
Decision of 7 April 2022, IV KK 578/21, 7 April 2022 <http://www.sn.pl/sites/orzecznictwo/orzeczenia3/IV%20KK%20578-21.pdf> accessed 31 May 2022

Scientific publications

Bailleux A, 'The Two Faces of European Sovereignty' (2020) 5 European Papers <https://doi.org/10.15166/2499-8249/380>
Buczma S, Hara M, Kierzynka R, Kołodziejski P, Milewski A, Ostropolski T, *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK* (C.H. Beck 2016)
Haket S, '*Popławski II*: A Half-Hearted Embrace of Hierarchical Supremacy' (2020) 13 Review of European Administrative Law
Jabłońska P, 'Konstytucyjne podstawy rozproszonej kontroli konstytucyjności prawa' [2020] (11-12) Przegląd Sądowy
Kardas P, 'Rozproszona kontrola konstytucyjności prawa w orzecznictwie Izby Karnej Sądu Najwyższego oraz sądów powszechnych jako wyraz sędziowskiego konstytucyjnego posłuszeństwa' [2019] (4) Czasopismo Prawa Karnego i Nauk Penalnych
Kierzynka R, 'Przekazywanie skazanych na kary pozbawienia wolności w Europie' [2009] (2) Ius Novum

Miąsik D, Szwarc M, 'Primacy and direct effect – still together: *Poplawski II* (2021) 58 Common Market Law Review <https://doi.org/10.54648/cola2021030>

Mikuli P, 'Doktryna konieczności jako uzasadnienie dla rozproszonej kontroli konstytucyjności ustaw w Polsce'(2018) XL Gdańskie Studia Prawnicze

Ostropolski T, 'Współpraca wymiarów sprawiedliwości w sprawach karnych' in J Barcz (ed), *System Prawa Unii Europejskiej. Współpraca sądowa w sprawach cywilnych, karnych i współpraca policyjna,* Vol. 8 (C.H. Beck 2021)

Online sources

Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, 'Niemożność przekazywania do innego państwa UE osób skazanych w Polsce na karę więzienia. Ponaglenie RPO do MS', 24 May 2021 <https://bip.brpo.gov.pl/pl/content/skazani-nie-moga-byc-przekazani-do-panstwa-ue-ponaglenie-rpo-ms> accessed 10 April 2022

Biuletyn Informacji Publicznej Rzecznika Praw Obywatelskich, 'Skazani na karę więzienia w Polsce skarżą się, że nie mogą być przekazani do innego państwa UE. Interwencja RPO', 26 October 2020 <https://bip.brpo.gov.pl/pl/content/rpo-skazani-w-polsce-nie-moga-byc-przekazani-do-innego-panstwa-ue> accessed 10 April 2022

Commission Staff Working Document Statistics on the practical operation of the European arrest warrant – 2019 (Brussels, 6 August 2021, SWD(2021) 227 final) <https://ec.europa.eu/info/sites/default/files/law/search_law/documents/eaw_statistics_2019_swd_2021_227_final_08_2021_en.pdf> accessed 22 January 2022

Council Framework Decision 2008/909/JHA 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 – Declarations under Article 7(4) and Article 28(2), (Brussels, 10 June 2016, (OR. en) 9603/16 COPEN 184) <https://www.ejn-crimjust.europa.eu/ejnupload/uploadFiles/ST09603-EN16.PDF> accessed 23 January 2022

Information about the Author

Michał Hara is an advocate and a member of the Warsaw Bar Association. He currently serves as Head of the Legislative and Systemic Matters Team in the Criminal Law Department of the Office of the Commissioner for Human Rights. He is also a sworn translator and interpreter of the English language. Michal Hara is the author of several publications relating to topics such as European criminal law, money laundering and the prevention of terrorism. Additionally, he is the a co-author of an extensive commentary on the chapters of the Polish Criminal Procedure Code pertaining to international cooperation in criminal cases. ORCID 0000-0003-2385-3308. E-mail: hara.michal@gmail.com.