

# Assessment of Social Rehabilitation as the Main Purpose of Framework Decision 2008/909/JHA on the Transfer of Prisoners in the Light of the Lithuanian Experience

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Almost 10 years have passed since the date for the implementation<sup>2</sup> 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 (Council Framework Decision 2008/909/JHA, 2008 (hereinafter, Framework Decision on the transfer of prisoners))<sup>3</sup>. During this period of time, a significant number of sentenced persons were transferred back to the European Union (hereinafter, the EU) country of which they are nationals and where they normally live to serve the sentence with a view to enhancing their social rehabilitation<sup>4</sup>. As a result, it is ap-

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- <sup>2</sup> As foreseen in Article 29(1) Framework Decision on transfers of prisoners should have been implemented by 5 December 2011.
- <sup>3</sup> In 2009 it was amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 on trials *in absentia*, which as stated in recital 6, is focused on setting conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused (Council Framework Decision 2009/299/JHA..., 2009).
- <sup>4</sup> In the context of this paper social rehabilitation is understood in accordance with Recital 9 of Framework Decision on the transfer of prisoners and Article 2(11) of Law on the mutual recognition and enforcement of judgments in criminal matters by Member States of the European Union on the mutual recognition (2014).

propriate to evaluate issues related to the Framework Decision on the transfer of prisoners functioning and to discuss the challenges ahead. This paper is focused on the assessment of social rehabilitation as the main purpose of the Framework Decision on the transfer of prisoners. Special attention is given to the relevant jurisprudence of the Court of Justice of the EU (hereinafter, the CJEU), Lithuanian legislation and jurisprudence regarding the mentioned subject.

During the past few years, the CJEU have already delivered various judgements related to the interpretation regarding practical application of the Framework Decision on the transfer of prisoners. For instance, in 2016, the CJEU delivered their first judgement in *Ognyanov* case on the law governing the enforcement of the sentence (Judgement of the Court (Grand Chamber) of 5 July 2016 in Case C-614/14), then a few more in 2017: *Grundza* regarding interpretation of the condition of the double criminality (Judgement of the Court (Fifth Chamber) of 11 January 2017 in Case C-289/15), *van Vemde* regarding interpretation of the concept of the final judgement under the transitional provision (Judgement of the Court (Fifth Chamber) of 25 January 2017 in Case C-582/15) and one more in 2019: *Popławski (II)* regarding declaration foreseen in Article 28(2) and principle of the primacy of EU law (Judgement of the Court (Grand Chamber) of 24 June 2019 in Case C-573/17). Most recent CJEU judgement was delivered in March, 2020 in *SF* case, where the CJEU emphasised that the duration of the sentence or detention must be adapted only within the strict conditions set out in Article 8(2) (Judgement of the Court (Fourth Chamber) of 11 March 2020). However, until now there are no cases directly related to evaluation of social rehabilitation<sup>5</sup> in the context of the Framework Decision on the transfer of prisoners.

<sup>5</sup> It is noteworthy that in 2018 the Slovak Republic had submitted a request for a preliminary ruling to the CJEU regarding interpretation of social rehabilitation of the sentenced person (The Slovak Republic request for preliminary ruling of 30 July 2018, applicant YX). The essence of the questions referred to the CJEU was related to evaluation of social rehabilitation in those cases were a sentenced person in the executing State, which is a Member State of his nationality, has no concrete links which could enhance his social rehabilitation (such as family, social, professional etc.), but merely formally-recorded habitual residence. However, in 2019 the CJEU issued an order stating that the sentence pronounced against YX is being enforced in the issuing Member State, as a result, the questions referred for a preliminary ruling are now hypothetical and the conditions enabling the Court (i.e. CJEU) to proceed with the reference are no longer satisfied (Order of the Court (Fourth Chamber) of 1 October 2019).

On one hand, it is well known that the Framework Decision on transfers of prisoners is one of the most commonly used EU's legal instrument which seeks to extend the application of the principle of mutual recognition. On the other hand, social rehabilitation is declared as the main purpose of this instrument. As stated in recital 9, the enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. Article 3(1) adds that rules under which the Member States recognise judgments and enforce sentences are established with a view to facilitating the social rehabilitation of the sentenced person. Obligation to respect fundamental rights must be observed too (Article 3(4)). While the Framework Decision on the transfer of prisoners provides no explicit definition of social rehabilitation, it provides a non-exhaustive list of elements to take into account when assessing if social rehabilitation of the sentenced person will be enhanced as a result of the transfer of the sentence. As foreseen in recital 9 of the Framework Decision on the transfer of prisoners the competent authority of the issuing State should take into account such elements as, for example, "the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State. Based on these criteria, the issuing Member State authority is requested to predict whether the transfer will increase the chances of rehabilitation" (Martufi, 2018, p. 51).

It follows from the above that in the context of the Framework Decision on the transfer of prisoners, social rehabilitation should be understood in the sense that it is more appropriate for measures of rehabilitation to be taken in a Member State where the sentenced person understands the language and to which he or she has close links (Commission notice – Handbook on the transfer..., 2019). The opportunity for social contact with relatives and friends helps preparing the sentenced person for a return to the community. This objective may not be served if such a person is kept in a foreign State when it is likely that he or she will no longer be permitted to remain in that State after having served the sentence (Commission notice – Handbook on the transfer..., 2019). However, a negative opinion of the sentenced person regarding social rehabilitation itself (as referred to in recital 10 of the Framework Decision on the transfer of prisoners), cannot be considered as ground for non-recognition and non-enforcement<sup>6</sup>.

<sup>6</sup> The exhaustive list of grounds for non-recognition and non-enforcement are foreseen in Article 9.

What is more, it is generally accepted that transfer of the sentenced person to the Member State of his nationality will ensure way more successful and easier social rehabilitation. EU Member States have an interest in transferring sentenced persons to the EU country of their nationality as soon as possible.

Taking into consideration the fact that concept of social rehabilitation is still vague and the Framework Decision on the transfer of prisoners limits the situations where consent of the sentenced person is required, prescribes a clear timeframe for the procedure and transfers can only be refused on the basis of a limited number of grounds of non-recognition or non-enforcement (Commission notice – Handbook on the transfer..., 2019), it is inevitable to ask, whether the competent authorities responsibly assess the elements stated above when deciding on the recognition of the judgement and enforcement of the sentence (especially in cases when the sentenced person is transferred back to the EU Member State of his or her nationality and where he or she normally lives<sup>7</sup>)? And if the main purpose of the Framework Decision on the transfer of prisoners is actually fulfilled? One of the possible ways to answer this question is to analyse national legislation and case-law.

The provisions of the Framework Decision on the transfer of prisoners into Lithuanian legal system were implemented in 2014 through the Law on the mutual recognition and enforcement of judgements in criminal matters by the Member States of the European Union (Law on the mutual recognition..., 2014)<sup>8</sup>, which came into force on 1 April 2015. This act of law not only emphasises social rehabilitation as the main purpose of the Framework Decision on the transfer of prisoners, but also defines the concept of it. Pursuant to Article 2(11), social rehabilitation is understood as social, psychological, legal, pedagogical measures which aim to ensure successful reintegration of the sentenced person into society. Nonetheless, in the vast majority of the cases, regardless of the sentenced persons arguments that, for instance, they no longer have ties with the Republic of Lithuania, since they live and work in

<sup>7</sup> As stated in Article 6(2)(a) the consent of the sentenced person is not required where the judgment together with the certificate is forwarded to the Member State of nationality in which the sentenced person lives.

<sup>8</sup> In order to fully implement Framework Decision on the transfer of prisoners, several amendments have also been made to the Penal Enforcement Code and the Code of Criminal Procedure.

another EU country for the past few years, citizens of the Republic of Lithuania are transferred back to Lithuania for further execution of a sentence.

To illustrate this, examples from the recent national case law where Lithuanian citizens were transferred back to Lithuania for further execution of the sentence are provided. In this first example the person was convicted of a criminal offence – aggravated theft. The competent authorities of the issuing Member State decided to transfer him to back to Lithuania for further execution of the sentence. The sentenced person, on the other hand, refused to be transferred and stated that he considered himself to be attached to Member State in which a final decision was delivered and stated that his family (a spouse and a minor child) lives in the issuing Member State. Despite these arguments the court ruled that, *inter alia*, the execution of a custodial sentence in Lithuania does not prevent him from maintaining contacts with his family remotely. His marital status is not generally considered to be a relevant factor in recognition of the sentence and is not affected by it. What is more, he is a citizen of Lithuania, he was born and raised in Lithuania and has other relatives here, therefore there is no doubt that the aim of social rehabilitation will be more effectively achieved by serving the custodial sentence in Lithuania (the Ruling of the Panevėžys Regional Court of 25 April 2019). In the second example, a person was convicted of rape. The competent authorities of the issuing Member State decided to transfer him to back to Lithuania for further execution of the sentence<sup>9</sup>. The sentenced person refused to be transferred and stated that by serving his sentence in the issuing Member State he will have the opportunity to work, study and meet with his family (brother and sister) living there. And on the contrary, he would lose the opportunity to meet with his family if he was transferred to Lithuania. In this case, the court ruled that he is a citizen of Lithuania, his last place of residence is in Lithuania and there is no data on the declared departure to a foreign country. His refusal to be transferred to Lithuania in order to achieve a more comfortable execution of the custodial sentence does not create grounds for non-recognition and non-

<sup>9</sup> It is important to note that in this case a decision regarding the sentenced person's deportation was issued, meaning that once the sentenced person is released from the enforcement of the sentence he will be deported to the Member State of his nationality (as in a given example to Lithuania) (Article 4(1)(b)).

enforcement (the Ruling of the Šiauliai Regional Court of 20 November 2020). In the third example, a person was convicted of theft. The competent authorities of the issuing Member State decided to transfer him back to Lithuania for further execution of the sentence. The sentenced person considered himself to be attached to the Member State in which a decision was delivered rather than to Lithuania and stated that there are more favourable conditions for his social rehabilitation: prison conditions are better, he can work and earn money here, which he sends to his family, regular communication with family is ensured not only remotely but also during meetings. There were also requests from the sentenced person's family members (spouse and parents) asking not to transfer him back to Lithuania as prison conditions are poor there. The court ruled that he is a citizen of Lithuania, his last place of residence is also in Lithuania, what is more, there is no data on the declared departure to a foreign country. His refusal to be transferred to Lithuania in order to achieve more comfortable execution of the custodial sentence and allegations that Lithuanian prisons do not meet international standards guaranteeing human rights and freedoms do not create grounds for non-recognition and non-enforcement (the Ruling of the Panevėžys Regional Court of 1 July 2019). It is of no surprise that the court stated almost the same things regarding the sentenced person's citizenship and its residence, but what was unexpected that the court also stated that a person's desire to change his lifestyle is fundamentally linked to his strong personal determination and will, and not to the surrounding environment, regardless of the country in which he would serve the sentence (the Ruling of the Panevėžys Regional Court of 1 July 2019). Assessment of the essence of this statement may lead to a conclusion that no matter in which country the sentence will be served, successful social rehabilitation depends solely on the person and his "desire to change his lifestyle". This naturally forms the basis to question the court's decision: why to transfer the sentenced person back to Lithuania if as the court stated country in which the sentence will be served does not matter? In author's opinion, this is not entirely compatible with the essence of the rules foreseen in the Framework Decision on the transfer of prisoners. Although only a few examples were mentioned, from the analysis of the national case law of the past 4 years it is almost clear that in assessment of social rehabilitation the elements of the sentenced person's citizenship and formally-recorded residence are usually decisive. From the author's point of view, this does not en-

tirely support the aim of enhancement of social rehabilitation since elements such as family, social or professional ties are unreasonably underestimated.

To sum up, the Framework Decision on the transfer of prisoners ensures more efficient and simpler legal cooperation among the EU Member States with regard to transferring the sentenced persons for further execution of the custodial sentence. However, it remains questionable whether the main purpose of the Framework Decision on the transfer of prisoners is fulfilled since in assessment of social rehabilitation the elements of the sentenced person's citizenship and formally-recorded residence are usually decisive.

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