SWEDEN

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Overview Respondents in the Empirical Part of the Research

Respondent	**Function**	**Location**	**Date**
R1	Judge (Supreme Court)	Stockholm	9.12.2016
R2	Head of department, Prison and Probation Service	Norrköping	25.10.2016
R3	Advocate,* public counsel	Stockholm	29.11.2016
R4	Advocate,* public counsel	Stockholm	4.1.2017
R5	Judge (Court of Appeal)	Stockholm	29.11.2016
R6	Public prosecutor	Stockholm	9.5.2017

* 'Advocate' (*advokat*) is a protected professional title for members of the Swedish Bar Association (Sw. *Sveriges advokatsamfund*). They may either be appointed by the court on a case-to-case basis to act as a 'public defence counsel' (*offentlig försvarare*) in criminal proceedings or as 'public counsel' (*offentligt biträde*) in other proceedings (e.g. transfer of sentences) or be retained privately.

1. Meaning and scope of the fundamental rights subject to this study in the national legal order

1.1. Protection against torture and degrading treatment

a) Status and content of the protection against torture and degrading treatment based on Swedish legislation and case-law

Art 3 on the prohibition of torture or inhuman or degrading treatment or punishment of the ECHR is directly applicable in Sweden as part of Swedish law.[1] In addition, Sweden is bound *inter alia* by the United Nations Convention (1984) against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol (OPCAT) of 2002 and the European Convention (1987) for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) and its two additional protocols (1993). For the purpose of the present report, it is the ECPT that is most relevant, as it establishes an international monitoring body in the form of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which makes periodic and *ad hoc* visits to the State Parties and reports on its findings on the compliance of the State Parties with established standards. Sweden adopts in this respect the automatic publication procedure for the CPT's reports, whereby Sweden consents to the publication of all future reports. More will be said later in this sub-section on the CPT reports and measures taken by Sweden. Furthermore, the Council of Europe standard is important in the assessment of prison conditions in other EU Member States, when such conditions form part of the assessment in surrender/transfer cases subject to the present study.

In the Swedish Constitution, there is a general prohibition of torture for the purpose of extorting or suppressing statements,[2] i.e. the form of torture roughly corresponding to the definition in CAT. However, 'torture' as such is not a criminal offence under Swedish law, which means that acts of torture are only punishable as the underlying constituent offence such as threat, assault, inflicting bodily or mental harm etc. and not as 'torture'.[3] For the purpose of this report, however, it is not 'torture' as such that is of the greatest concern, but rather the less serious category of 'inhuman or degrading treatment' (with no restriction on the purpose of such treatments). Legislation authorizing the use of public power[4] is subject to the general norms laid down in the RF[5] as well as general principles governing the exercise of public authority in all area of law, and is presumed to have satisfied the requirements set by the

[1] The whole of the ECHR, with the amendments and additions made through additional protocols 1, 4, 6, 7, 11, 13 and 14, is incorporated into the Swedish legal system through an act of Parliament (*lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*) and is directly applicable as Swedish law. Act 1994:1219 has, formally, the status of 'law' on par with other statutes enacted by Parliament and not the status of 'basic law'. However, Act 1994:1219 forms the basis of the 'constitutional status' of the ECHR, in the sense that courts and public authorities in Sweden may 'disapply' domestic statutes and other legal provisions that are in breach of the Convention (see note 7 *infra*).

[2] There are in fact four 'basic laws' (*grundlagar*) forming parts of what in other legal systems will be known as 'the Constitution'. For the purpose of this report it is the provisions in the 'Instrument of Government' (*regeringsformen* (1974:152), hereafter 'RF') that are of relevance. The prohibition mentioned in the text is found in ch 2 art 5 RF, which provides that no one may be subjected to torture or medical intervention with the purpose of extorting or suppressing statements.

[3] In the report (Ds 2015:42 *Ett särskilt tortyrbrott?*) submitted in August 2015 to the Ministry of Justice, a proposal was made for the creation of the crime of torture in Swedish law. This proposal has not led to new legislation yet.

[4] E.g. the Code of Judicial Procedure (*rättegångsbalken* (1942:740), hereafter 'RB') with *inter alia* rules on the preliminary investigation, pre-trial detention and the use of coercive measures, the Police Act (1984:387), the Act on Detention Centres (2010:611) and the Prison Act (2010:610).

[5] Other relevant provisions can be found in the RF, such as the protection against physical violation and invasion of privacy (ch 2 art 6 RF) and the protection against the deprivation of personal liberty (ch 2 art 8 RF)

ECHR.[6] However, if a law is found to be in breach of the RF, the ECHR or EU law that has supremacy, a court or a public authority may not apply that law.[7] Thus, in theory at least, a court or a public authority may always ask the question whether a measure set out by law may be seen as inhuman or degrading, in which case that measure may not be applied.

Inhuman or degrading treatment also manifests itself in an improper application of the law. There are of course mechanisms within each public authority to deal with complaints of ill treatment. With respect to the particularly sensitive areas of criminal justice, the 'Parliamentary Ombudsman' (commonly known in Swedish as the *Justitieombudsmannen*, hereafter 'JO') functions as an independent monitoring body over the activities of the police, the public prosecutors, the courts and the prison service.[8] The JO may carry out inquiries on his or her own initiatives or as a result of complaints by the aggrieved or the general public. The public authority or an individual civil servant may be reprimanded and the findings of the JO are published on the JO's website. The most important cases are presented in the JO's annual report to Parliament. If the JO, in the course of his or her inquiry, finds that the conduct of a civil servant constitutes a criminal offence, the JO may bring prosecution against that civil servant. However, criminal prosecutions are rare. Therefore, in the area of law concerning the routine operation of the criminal justice system, it is the decisions of the JO – rather than case law – that practically serve as guidance for the standard of treatment expected of public officials. Another important area of activities of the JO is the inspections carried out in its capacity as part of the National Prevention Mechanism set up pursuant to OPCAT. The findings of the JO in these inspections may form the basis for criticisms of a public authority in a public decision of the JO. The OPCAT division of the JO is also much involved with the visits carried out by the CPT of the Council of Europe.

The CPT has identified several shortcomings in Sweden of the treatment of persons in detention or being deprived of liberty. In particular, strong criticism has been made of individual restrictions under pre-trial detention.[9] Under Swedish law, the public prosecutor may impose severe restrictions on the personal freedom of suspects such as the use of the telephone or the Internet, access to the media and contact with other detainees and with visitors. Such restrictions are routinely granted and renewed by the courts without detailed argument by the public prosecutor. These restrictions may also persist, in some cases, for a considerable period, as long as the preliminary investigation is on-going. After the publication of the CPT report, however, a commission of inquiry has made a proposal to amend the present legislation in order to impose a maximum time limit of pre-trial detention and to lay down in statute the criteria for the application of restrictions. As the present study is concerned with the transfer of persons who are already sentenced, restrictions are less likely to be applicable. However,

[6] Ch 2 art 19 RF provides that no act of law or other provision may be adopted which contravenes Sweden's undertakings under the ECHR. Legislative initiatives affecting individual rights are normally reviewed by the Legislative Council (*lagrådet*) composed of justices of the Supreme Court and Supreme Administrative Court before a government bill is put to the Parliament. One of the tasks of the Legislative Council is to review whether the proposal is in conformity with the RF and the ECHR.

[7] This power to 'disapply' the law has been given to the courts in ch 10 art 14 RF and to any other public authority in ch 12 art 10 RF. The power of such 'judicial review' of the validity of a law is this not restricted to a superior constitutional court having a special function to perform judicial review. In practice, however, the 'disapplication' of law on this ground is extremely rare.

[8] For a description in English of the JO as a public authority, see the introduction on the JO's website at <http://www.jo.se/en/About-JO/>.

[9] For details of the observations by the CPT, see Council of Europe doc. CPT/Inf (2016) 1, 17.2.2016, Report to the Swedish Government on the Visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 28 May 2015, para 48–53.

the requested sentenced person – if not already serving a prison sentence – will still be placed at a detention centre during the surrender procedure unless the court determines that a less intrusive measure is sufficient.

With regard to prison conditions, the CPT remarked that the facilities in the general prison population are of a high standard but expressed concern that prisoners placed in high security units for their own protection had to share the same facilities with inmates who posed security threats. Moreover, some such units were accommodated in very small facilities, which meant that social contact was limited; a scenario is that if one of the prisoners were put under restrictions, the only other prisoner in the facility would be put in *de facto* isolation for reasons outside of his or her control. The procedure for placing someone in a high security unit was also questioned by the CPT as the prisoners had complained that they were not given reasons why they were placed in high security units.[10] Member States considering the transfer of a prison sentence to Sweden may therefore wish to consult with the Swedish authority during the proceedings if the convicted person is expected to be placed in high security units, especially whether a person who normally would be placed in the general prison population would be likely to be placed in a high security unit. It should however be added that, although such conditions are not satisfactory, they are unlikely to be seen as so severe as to prevent a transfer of sentences to Sweden on account of a systematic violation of art 3 ECHR.

b) The protection against torture and degrading treatment and its relevance in judicial cooperation in criminal matters

The role of the competent authorities

In the context of judicial cooperation in criminal matters the main concern of Sweden – whether as issuing or executing State – is that a person transferred to another Member State runs the risk of being tortured or be exposed to inhuman or degrading treatment. The role of the competent authorities in Sweden is to verify whether allegation of torture or inhuman or degrading treatment in another Member State is well-founded, and in cases where there is a general risk of ill treatment, the competent authority in Sweden will seek guarantees in the particular case that ill treatment will be avoided through specific measures. In theory this task should be carried out by the courts or other public authorities *ex officio*, but in practice such issues are more likely to be brought up by the individual subject to a surrender/transfer measure, since the threshold for *ex officio* intervention is very high. When a transfer of a sentenced person to another Member State is initiated by Sweden, the competent authority responsible for the investigation and seeking of guarantee is, in almost all cases,[11] the Prison and Probation Service (*Kriminalvården*). When a person is surrendered to another Member State pursuant to a European arrest warrant for the purpose of enforcement of sentence, it is the public prosecutor who has this responsibility to act on behalf of the issuing Member State. In both cases it is ultimately the court that will make the final decision whether the risk is great enough to decline the particular form of cooperation in question. As discussed in 3.1.b. below, the Swedish implementation of the FD EAW contains a ground of refusal not found in the FD itself, namely refusal on account of breach of the ECHR, which certainly encompasses its art 3 on the prohibition of torture or inhuman or degrading treatment.

Criteria for review

The courts have a duty *ex officio* to take into account the risk of torture or inhuman or degrading treatment but in practice this ground of refusal, where relevant, is invariably raised

[10] CPT Report (above note 9), para 54–71.

[11] Medical expertise will naturally be involved in transfer of psychiatric care but there has not been any actual example of this so far.

by the sentenced person. Although the review is not characterized in terms of the burden of proof, a very convincing set of evidence of an individualized risk of maltreatment is required. Already in its early case law, the Swedish Supreme Court has ruled, in a European arrest warrant case, that there is only very limited room for refusing to surrender a person on account of breaches of the ECHR by the issuing Member State; in particular, neither past breaches nor the existence of a certain unspecified risk of future breaches are sufficient to justify a refusal.[12] This approach is reconfirmed in a recent decision of the Supreme Court, which added that refusal is possible only when there is a clear and concrete risk of breach of the ECHR.[13] In a recent decision of a lower court on transfer of sentence, where a challenge based on poor prison conditions was successful, the arguments made by the sentenced person were supported by numerous reports of international organizations and NGOs, judgment of the ECtHR as well as detailed descriptions of the actual conditions in the prisons where the person was expected to be interned.[14] There has not been any case at the Supreme Court level where a challenge based on a violation of art 3 ECHR has had any success due to the very high standard of proof required, but the above-mentioned decision shows that it is not practically impossible to prove a concrete risk of maltreatment.

1.2. Fair trial

a) Status and content of the right to fair trial based on national legislation and case-law

National sources

With regard to the procedure terminating in the conviction of the sentenced person, specific fair-trial rights are to be found in various chapters of the Code of Judicial Procedure (RB)[15] rather than in a single catalogue of rights. While some of the rights are explicitly defined, such as the 'right to defence counsel' according to ch 21 s 3 RB, other rights follow only implicitly, such as the 'right to remain silent', which can be deduced from the lack of rules imposing a positive duty for a suspect to answer questions, the inapplicability to the defendant of the rules on the laying of oaths in criminal proceedings and the mention in the rule of evidence (ch 35 s 4 RB) on what inferences may be drawn from a defendant's passivity. But as already discussed in 1.1.a above, the ECHR is part of Swedish law directly applicable in all criminal proceedings. This means that where there is no explicit rule on a fair-trial right the ECHR can be used to fill in the gap, and where there is a provision in Swedish law on a fair-trial right the provision must be interpreted in conformity with the ECHR and the case law of the ECtHR. A most illustrative case in this respect is the judgment of the Supreme Court in NJA 2007 s. 1037[16] where the Court, in order to comply with the case law of the ECHR, has to 'invent' a novel solution to acquit a defendant who has committed a crime after the initiative of a number of *agents provocateurs*, after discussing and rejecting four alternative

[12] NJA 2007 s. 168 (surrender to Poland for prosecution for fraud charges). The more important decisions of the Swedish Supreme Court are reported in the annual law report *Nytt Juridiskt Arkiv* (NJA). Cases are referred to by the page number of the first page of the case report in the annual volume.

[13] Order of the Supreme Court of 15 March 2017 in Case Ö 3439-16 (enforcement in Poland of sentences for unlawful threat, rape of a child, theft, robbery and blackmail). Although this case is not concerned with surrender but rather consent to having the sentence for another offence (prior to the surrender) enforced in Poland, the same reasoning applies as in cases concerning surrender pursuant to an EAW for the purpose of enforcement of sentences. In this case the argument of the sentenced person that prison conditions in Poland were unacceptable, that the length of sentence was an inhuman treatment and that no conditional release was expected was summarily dismissed by the Supreme Court.

[14] This decision of Solna district court (18.5.2016), confirmed by the Svea court of appeal (16.9.2016), will be discussed in more details in 3.3.c. below.

[15] See note 4 above.

[16] This case does not concern torture but is used only to illustrate the importance of the ECHR in the Swedish context.

Swedish rules that theoretically could have been, but were not, applied. The same is true with respect to fair-trial rights that have their origin in EU law and to the CFR in areas in which it is applicable.

It is not the purpose of this study to provide a survey of the rights actualized in criminal proceedings in Sweden,[17] but for Member States that need to consider the fairness of a criminal conviction in Swedish courts when assessing whether to surrender a person or to accept the transfer of enforcement of a Swedish prison, a mention of some of the structural features of the Swedish criminal proceeding can be useful. The criminal proceeding falls into two distinct phases: the investigative phase and the trial phase. The investigation is normally led by the police but in more complicated cases, a public prosecutor will lead the investigation. The principle of objectivity applies during the investigation and the leader of the investigation must seek not only incriminating evidence but also exculpatory ones. The overall goal of the investigation is to gather so much information as to enable the public prosecutor to decide whether a suspect is to be prosecuted. During the non-adversarial investigative phase, the suspect is not a party to the proceedings but he or she has certain rights such as the right to a defence counsel and some access to the case file. The suspect does not have any investigative power, but may request that the public prosecutor should carry out investigative measures that may be advantageous to the defence. The public prosecutor has rather extensive power in ordering coercive measures, but the most intrusive measures (e.g. remand in custody) require the approval of a court. It is for the public prosecutor to decide whether to prosecute and for which crimes the suspect is to be indicted; there is no proceeding for the confirmation of charges in Sweden and the public prosecutor's indictment will be the basis for the trial. This means that, typically, the investigative phase is a lengthy process (with the risk of a prolonged remand in custody) while the trial process is relatively short. The proceeding changes character when it comes to the court since the suspect has now the status of a party to an adversarial proceeding based on the principle of contradiction, equality of arms, and free admission and evaluation of evidence. At the trial phase, the defendant will have full access to the case file. Thus, a defendant in a criminal case enjoys the rights pertaining to a party in a judicial proceeding, as well as the rights pertaining to a suspect in a criminal proceeding. Furthermore, if a defendant is subject to any coercive measure at the trial stage, he or she also enjoys the rights pertaining to the coercive measure in question. The system, as such, provides thus a multi-layered protection of fair-trial rights to a defendant since protection will be afforded the individual in his or her different capacities in the proceeding.

A public counsel (R3 52:10) expressed fear that the courts in Sweden are only concerned with art 3 ECHR when considering the protection of human rights. In one case on the surrender of a person pursuant to an EAW for the purpose of enforcement of sentence, surrender was refused on the ground of risk of violation of art 3 ECHR, while the counsel has argued that the refusal should be based on violation of art 6, art 7 and art 3 ECHR in that order. The public counsel was particularly worried of the possibility of the issuing State sending a new EAW when prison conditions were marginally improved.

European sources

Directive 2010/64 was implemented in Swedish law mainly through amendments made to the RB,[18] which entered into force on 1 October 2013. As most of the amendments have been

[17] For such a survey, see Christoffer Wong, chapter on Sweden in K Ligeti (ed), *Toward a Prosecutor for the European Union, Volume 1: A Comparative Analysis* (Hart Publishing 2012) 743–779.
[18] Act (2013:663) amending the RB.

made in the chapter in RB concerning judicial proceedings in general, the new provisions affect thus all judicial proceedings and not just criminal proceedings. The main rule was, before the new amendments, that an interpreter *may* be appointed by the court if a party to the proceeding, a witness or any other person shall be heard before the court. After the amendment, the court *shall* appoint an interpreter when a suspect in a criminal proceeding is heard. There is also the addition that the court shall, when it is feasible, appoint an interpreter who is certified. Another important change concerns the translation of documents. Previously, there was only a vague provision to the effect that the court *may* arrange for translation of documents if necessary. There is now the addition that the court is obliged to translate a document in a criminal proceeding, or the most important of the document, if a translation is essential for the defendant to exercise his or her rights. This obligation is, however, qualified by the fact that the translation may be made orally if it is not deemed to be unsuitable having regard to the subject matter of the document or of the case, or other circumstances.

Directive 2012/13 was implemented mainly through some minor amendments of the RB.[19] The Government considers that existing Swedish law already fulfils the requirement of the directive and changes in the implementation legislation have been limited to the right of access to information in proceedings concerning remand in custody. There is now an explicit provision in the RB stating that a person who is deprived of liberty has an unconditional right to information on circumstances that have been of significance for the decision on the deprivation of liberty. In the opinion of the present national rapporteur, the Swedish legislation does not fully implement art 7 of the directive as the directive provides explicitly a right of access to the documents in the possession of the competent authorities (the case file) and not merely access to information contained in the documents.

Directive 2013/48 was implemented into Swedish law mainly through changes made to the RB, to the Act (1964:167) on Young Offenders (*lagen med särskilda bestämmelser om unga lagöverträdare*) and the Act on Detention Centres (2010:611) (*häkteslagen*); with the amendments entering into force on 27.11.2016.[20] A new provision has been introduced so that a child who is deprived of liberty has the right to immediate notification (to a parent or another closely-related person) of the reasons for the deprivation of liberty. Furthermore, a suspect who is deprived of liberty and represented by a defence counsel is to have an unconditional right to meet and consult with the counsel in private, or through communication via telephone or the post. There are however some restrictions for defence counsels who are not public defence counsels. The legislative work on the implementation of this directive has not attracted much attention as it was considered at the outset that the existing Swedish rules already fulfil the requirements of the directive. This is evidenced by the fact that the legislative proposal was made following two internal reports[21] within the Ministry of Justice rather than after a full investigation by a public commission of inquiry.

b) The protection of the right to fair trial

The role of the competent authorities

Member States have an interest in ensuring that a conviction on which a surrender or transfer will be based is in fact the result of a fair trial. Of all the decisions of judicial authorities to which the principle of mutual recognition is applicable, it is on the final decisions of the courts that one may put the greatest trust, since the fairness of the proceeding is under the direct control of the courts and the trial before a court is also the final stage of the proceeding

[19] Act (2014:257) amending the RB.
[20] See the amendment acts 2016:929, 2016:930 and 2016:931.
[21] Ds 2015:7 *Rätten till försvarare m.m.* and a memorandum entitled *Genomförandet av EU:s försvarardirektiv; kompletterande förslag.*

surrounded by procedural safeguards. This is also reflected in the approaches of the Swedish court when challenges to decisions of surrender or transfer are made on fair trial grounds. Already in the first European arrest warrant case that reached the Swedish Supreme Court,[22] the fair-trial challenge is either dismissed out-right, or ignored altogether, at all the instances that have heard the case. In the leading case NJA 2007 s. 168 decided some years later (mentioned already in 1.1.b. above), the Supreme Court says expressly that there is very little room to refuse surrender even though a Member State has been found in the past to have been in breach of art 6 ECHR and there is some, albeit unclear, risk that there will be a breach in the case in question.[23] The principle of mutual recognition weighs thus very heavily against potential violations of fair-trial rights.

Criteria for review

Theoretically the courts must refuse the surrender or transfer request if there is evidence of a flagrant breach of fair-trial rights in the process leading to the conviction at issue. The evidence must support breaches in the concrete case. Typically, even if there has been breaches of some aspects of art 6 ECHR, the proceeding cannot be seen as unfair overall, so it is extremely difficult for the courts of one Member State to find that a specific criminal proceeding in another Member State has been conducted in breach of the ECHR. It is of course a totally different matter in the unlikely event that the ECtHR has found that a conviction in the particular case has been obtained in breach of fair-trial rights. There are no examples of successful challenges to refusal based on fair-trial grounds in the Swedish courts. In the cases referred to in 1.1.b. above,[24] the challenge based on breaches of art 6 ECHR was dismissed summarily while the challenge based on art 3 ECHR has been successful.

An exception to the above is the case of conviction *in absentia*, which to some extent can be said to violate fair-trial rights. However, as *in absentia* sentences are dealt with under special provisions, challenges cannot be made based also on art 6 ECHR, as is shown by the judgment in *Melloni*.[25] As a general comment, it can be said that while *in absentia* judgments have been an issue in the early days of the system of surrender pursuant to a European arrest warrant, such judgments have presented much less of a problem after the amendment of the FD through the addition of a specific provision on *in absentia* judgments.[26]

1.3. Family life

a) Status and content of the right to family life based on National legislation and case-law (including the concept of family)

Considerations based on family life differ from those based on torture or on fair trial discussed above in that the possibility to enjoy family life in another Member State is a factor to take into account when determining whether a transfer of enforcement is conducive to the social rehabilitation, while the exclusion from family life is a reason for not making a surrender or transfer of enforcement. There is no precise definition of the concept of 'family' for the purpose of surrender or transfer but in cases that have come up to the courts it is a question of the immediate family, usually when minor children are involved. In the practice of

[22] NJA 2005 s 897 (surrender to Finland for enforcement of sentence).
[23] The case is concerned, however, with surrender for the purpose of prosecution and not for enforcement; hence, there was the mention of future risks.
[24] See note 14 above.
[25] Case C-399/11 *Melloni*, Judgment of the Court (Grand Chamber) of 26 February 2013, EU:C:2013:107.
[26] Council Framework Decision 2009/299/JHA of 26.2.2009 amending Framework Decisions 2002/584 /JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L81/24.

the Supreme Court in extradition cases (to non-EU States), reasons pertaining to family life have been weighed against other reasons for and against extradition in a general proportionality test. However, even when a proportionality test is performed family life must give way to other interests. There is also an in-built paradox in the weighing: there is reason to give more weight to family life if extradition would mean a lengthy period of separation from the family, but long sentences will also mean that the underlying crimes for which the person is sentenced are likely to be serious ones and the interest of justice will usually tip the balance; on the other hand, if the sentence to be served is a short one, extradition will not affect family life so seriously as to bar extradition.

In one case that reached the Supreme Court,[27] an attempt was made to tie the right to family life under art 8 ECHR and art 9 of the Convention on the Rights of the Child.[28] The twist in the argument here is that it is the child's right to a parent that should count against surrender rather than the sentenced person's right to family life. In the judgment, the Supreme Court stated simply very briefly, that the Convention on the Rights of the Child is not mentioned in the FD EAW as a ground for refusal. But interestingly, the Supreme Court also mentioned art 24 CFR, which contains a provision similar to that of the Convention on the Rights of the Child. However, in this pre-Lisbon decision the Swedish Supreme Court stated that it would not examine the CFR as it was not binding for the EU or Sweden.

In a case on transfer of prison sentence, a district court finds that the sentenced person's Belgian nationality and the fact that he has a child in Belgium is a reason to transfer the sentence to Belgium rather than to the Netherlands, which the sentenced person preferred.[29] In another case decided by the same district court, the sentenced person has a daughter in Sweden; but this is not considered to be a sufficient reason not to transfer the sentence to Hungary since the sentenced person has only had very limited contact with the daughter during her upbringing and the sentenced person is to be deported from Sweden for a period of 10 years, which means that he could not remain in Sweden in any case after his release from prison.[30]

b) The protection of the right to family life

The role of the competent authorities

In cases of surrender pursuant to a European arrest warrant for the purpose of enforcement of sentence in Sweden, the primary consideration is not the social rehabilitation of the sentenced person. Therefore, the issuing authority in Sweden will usually not consider family-life aspects when initiating a surrender procedure. It falls then on the executing Member State to determine a possible breach of the right to family life should bar the surrender to Sweden. The same is true when the Swedish authorities receive a European arrest warrant. Theoretically, surrender may be refused if there is a serious breach of the right to family life, but as the discussion in 1.3.a shows, it is highly unlikely that family life will override other interests. It remains to be seen what effect the CFR may have with respect to the rights of the child, when the CFR is clearly applicable after the entry into force of the Treaty of Lisbon.

[27] NJA 2007 s 168. This case has already been mentioned above but it is the rights of the child which constitute the main issue on appeal.

[28] Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, 20 November 1989, UNTS vol 1577, 3. The Convention was ratified by Sweden 29 June 1990.

[29] Order of Södertälje district court, 6.11.2015, in case n B 2082-15.

[30] Order of Södertälje district court, 27.4.2016, in case n B 843-16; subsequently the decision to transfer was rescinded for another reason (time remaining of the sentence too short).

In a proceeding on transfer of sentence for enforcement, on the other hand, the Prison and Probation Service in Sweden will examine issues of family life already at the initial stages when considering the prospects for social rehabilitation. In most cases the sentenced person will also be deported from Sweden and there are no family members in Sweden, in which case there is no reason not to go ahead with the proceeding on account of family-life considerations. In some cases, however, a sentenced person may be well-established in Sweden and also will have family here. If it is foreseen that the sentenced person will remain in Sweden with his or her family after serving the sentence, the Prison and Probation Service will most likely discontinue the procedure of its own accord. In all cases where the Prison and Probation Service decides to proceed, the sentenced person may appeal the decision in the general court system, in which case it is for the courts to decide whether the transfer procedure could go ahead. There are also cases in which family-life considerations may come into play even if no family connection is found in Sweden; these are cases where the sentence can theoretically be transferred to more than one EU Member State.

With regard to the enforcement of sentences in Sweden, the competent authority to examine the case and make the final decision is the Prison and Probation Service.

Criteria for review

While considerations based on family life can be taken into account at an early stage, a proper review based on art 8 ECHR will not be made unless other criteria for transfer are fulfilled. In this respect, family life is just one of the factors used in the overall assessment of whether a transfer is an appropriate measure. Other factors to be taken into account are discussed in 2.3.a. below.

In some cases on the transfer of a sentenced person to the Member State of his or her nationality for the purpose of enforcement of sentence, the fact that there are family members in that Member State has been used as a reason supporting the transfer against the wishes of the individual concerned.[31] In another case,[32] the sentenced person objects to a transfer of sentence to Belgium and argues that his right to family life will be curtailed after the transfer since he would not be able to work in a Belgian prison and to contribute economically to visits by his family. It appears from the case file that the sentenced person would prefer a transfer to the Netherlands instead, where he had been a resident but not a citizen. The court seems, however, to have taken the presence of the family in Belgium as the decisive factor and has ignored the economic argument. The records do not show that attention has been paid to the especially close connection that may exist between social life in Belgium and the Netherlands, in particular in the border regions.

In a case reaching the Supreme Court, the sentenced person objects to the transfer to Poland (country of citizenship) as he claims that he has a fiancée in the Netherlands and intends to live there upon release. However, the Court has not discussed the legal implication of this claim as it finds the facts to be unsubstantiated and the future plan to vague as a basis for the claim.[33]

2. National legal framework implementing the obligation of mutual recognition in the EAW, FD 2008/909 and FD 2008/947

[31] See, eg, order of the Svea Court of Appeal of 6.7.2016 in Case n ÖÄ 4586-16 (transfer of sentence to Hungary).
[32] Order of the Södertälje district court of 6.11.2016 in Case n B 2082-15.
[33] Order of the Supreme Court NJA 2017 s 300.

2.1. The status of the principle of mutual recognition and mutual trust in the national legal order

Mutual recognition of judicial decisions and mutual trust in the Member States' legal system are aspects that guide the interpretation and application of EU law and Swedish law having an origin in EU law. There is no specific statutory provision on the status of the principle of mutual recognition but this principle has invariably been referred to in the preliminary works when EU legislation is implemented in Swedish law. When adjudicating cases involving the application of Swedish law implementing EU legislation based on the principle of mutual recognition, the courts will also describe the operation of the law by reference to the principle of mutual recognition. The issue of mutual trust in the legal systems of the other EU Member States, on the other hand, has not been directly addressed in the practical application of the implemented legislation, although mutual trust is mentioned in the preliminary works outlining the background to the underlying EU instruments. It may also be mentioned that, as a means to facilitate the practical operation of cooperation based on mutual recognition, Sweden also accepts documents written in Danish, Norwegian and English without the need of translation into Swedish.

2.2. The functioning of the EAW for the purpose of executing a custodial sentence or detention order

Issuing authority

The issue of an EAW for surrender *to* Sweden is regulated in Ordinance (2003:1178) on surrender to Sweden pursuant to an EAW (as opposed to Act (2003:1156), which regulates surrender *from* Sweden). With respect Denmark and Finland, surrender *to* Sweden is regulated through Ordinance (2012:566) on surrender to Sweden pursuant to a Nordic Arrest Warrant (hereafter 'NAW'), which covers surrender among the Nordic States, namely the two above-mentioned States that are also EU Member States, and Iceland and Norway.

For the purpose of execution of a custodial sentence in Sweden, an EAW[34] or NAW[35] is issued by a public prosecutor pursuant to a request by:

- The Prison and Probation Service (*Kriminalvården*) when the surrender pertains to a prison sentence;
- The National Board of Health and Welfare (*Socialstyrelsen*) when the surrender pertains to an order for forensic psychiatric care (*rättspsykiatrisk vård*); and
- The National Board of Institutional Care (*Statens institutionsstyrelse*) when the surrender pertains to convicted persons between 15 and 17 years of age for secure youth care (*sluten ungdomsvård*)[36].

The decision *au fond* to issue an EAW/NAW for surrender to Sweden is made by the authorities mentioned above. The prosecutor does not carry out a further assessment of these decisions and should thus be treated as a purely administrative body. Prior to 19 December 2016, it was the Police Authority (*Polismyndigheten*), and not a public prosecutor, who was responsible for issuing an EAW/NAW for the purpose of enforcement of sentence, but the law has been changed quite speedily in light of the CJEU's decision in *Poltorak*[37].[38] It may still be

[34] S 4, Ordinance 2003:1178.
[35] S 4, Ordinance 2012:566.
[36] For an explanation of 'secure youth care' see the information given by the National Board of Institutional Care, available at <http://www.stat-inst.se/om-webbplatsen/other-languages/the-swedish-national-board-of-institutional-care/secure-youth-care/>.
[37] Case C-452/16 PPU *Poltorak*, judgment of the Court (4th Chamber), 10 August 2016, EU:C:2016:858.
[38] See ordinances 2016:1141 and 2016:1142 of 1.12.2016 and Sweden's notification to the Council (Council Doc. 6122/17, 9.2.2017). Note that in the notification to the Council, it was stated that the 'Swedish Prosecution

questioned, however, whether the mere designation of the public prosecutor as the issuing authority fulfills the 'spirit' of the FD EAW, since the 'real' decision to request surrender is made by the Prison and Probation Service etc.

Executing authority

When an EAW/NAW is issued by another Member State for the purpose of enforcement of a criminal sentence, the executing authority is, at the first instance, the district court, in the sense that it is the court that makes the decision on surrender. However, it will be the public prosecutor who is the competent authority to receive the EAW/NAW and is responsible for the investigation and dealing with practical matters arising from the EAW.[39]

One public counsel (R3 33:10) expressed concern that sometimes it was unclear what tasks should be performed by the public prosecutor and the courts, respectively, e.g. who would be responsible for asking for guarantees from the issuing Member State.

2.3. FD 2008/909 transfer of prisoners

a) Forwarding judgments imposing sentence and transfer of convicted persons (issuing state)

A custodial sentence covered by the act[40] implementing the FD 2008/909 is a judgment or final order of a Swedish court providing for a prison sentence, for forensic psychiatric care (*rättspsykiatrisk vård*) or for secure youth care (*sluten ungdomsvård*). It is the Prison and Probation Service that both determine whether the conditions for forwarding the judgment to another Member State for recognition and enforcement and actually forwards the judgment to the other Member State. The other Member State will be informed about the rules of conditional release according to Swedish law and provided with an exact date for the earliest possible conditional release if the sentence is enforced in Sweden. The decision of the Prison and Probation Service is considered an administrative decision and the Administrative Procedure Act (1986: 223) (*förvaltningslagen*) is applicable to this process, although appeal against the decision is handled through the general courts system rather than the administrative courts system.

A head of section at the Prison and Probation Service (R2 1:00 and 8:45) has explained that there are six staff members working with international recognitions and transfers etc. (including outside the EU), the section (*Sektionen för internationella klientärenden*) deals with about 40 cases per year for transfers from Sweden and 5 cases to Sweden.

Right to initiate the proceedings for transfer and the scope of application of FD 2008/909 on transfer of prisoners

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Authority' (*Åklagarmyndigheten*) was the competent issuing authority. However, according to the domestic law, it is an individual public prosecutor and not the authority as such, who issues the EAW/NAW.

[39] The initiation of the surrender procedure is regulated through different provisions in chapter 4 of Act (2003:1156) on surrender to Sweden pursuant to an EAW and chapter 3 of Act (2011:1165) on surrender to Sweden pursuant to a Nordic Arrest Warrant.

[40] Act (2015:96) on the recognition and enforcement of a custodial sentence within the European Union (*lagen om erkännande och verkställighet av frihetsberövande påföljder inom Europeiska union*) – This Act entered into force 1 April 2015. There is also an ordinance (2015:109) issued by the Government with more detailed rules on the application of the Act. See also notification by Sweden to the Council on the implementation of the framework decision including the designation of the Swedish Prison and Probation Service as the competent authority, Council Doc. 9822/1/15, 16.6.2015.

Arts 3 and 4 of the FD have been implemented through various provisions in chapter 2 of the Swedish act. The Prison and Probation Service initiates a transfer proceeding by establishing whether the basic requirements for forwarding a judgment are fulfilled, which means that (1) the sentenced person is present either in Sweden or in the other Member State, (2) the other Member State or the individual concerned consents to the transfer, (3) the social rehabilitation of the sentenced person is facilitated through the transfer. A transfer proceeding will, however, not be initiated if less than six months of the sentence remains to be served, unless there are special reasons for transferring the person to the other Member State. The sentenced person may naturally be able to indicate that he or she wishes to transfer the enforcement of sentence to another Member State, but the Swedish legislation is structured in a way that it is the Prison and Probation Service which makes the decision. The desire of the sentenced person to the transfer is usually a compelling reason for a decision to forward the judgment to the other Member State, unless there is reason not to transfer (e.g. if it is likely that the person will be released much earlier than he or she would be if the sentence is served in Sweden). If a request by the sentenced person is denied, the decision can be appealed against in accordance with the principle of administrative law.

Art 4 of the FD is implemented mainly through ch 2 s 2 of the Swedish act, according to which the main rule is that the other Member State should consent to the transfer. Sweden applies the exceptions permitted by the FD, so that consent is not required when the sentenced person (1) is a citizen of the other Member State who resides there, (2) is a citizen of the other Member State and to which the person will be deported upon release from Swedish prison, or (3) lives in and has been legally residing continuously for at least five years in the other Member State.

Art 6 of the FD is implemented mainly through ch 2 s 3 of the Swedish act. The main rule is that consent of the sentenced person is required. Consent is not required if the sentenced person (1) is a citizen of the other Member State who resides there, (2) is a citizen of the other Member State and to which the person will be deported upon release from Swedish prison, or (3) has escaped or returned to the other Member State following a criminal proceeding or judgment in Sweden.

Criteria for determining where the convicted person will be transferred and the factors taken into consideration when deciding about the transfer

In addition to the formal criteria mentioned in 2.3.a. above, the main factor taken into consideration is whether the transfer will facilitate the social rehabilitation of the sentenced person. The Swedish implementing act does not elaborate on what factors are to be counted as facilitating social rehabilitation, but the responsible minister has made some statements in the preliminary work and the Swedish courts and other public authorities normally give such statements considerable weight when making their decisions. The following factors have been identified:

- Citizenship, length of domicile in different States and current residence situation,
- Type of residence permit that the sentenced person has in Sweden and the other Member State,
- Special consideration shall be given to EEA citizens and their family members with regard to the right of residence,
- Work and family situation,
- Whether the sentenced person will be deported,
- The sentenced person's language, cultural, social, economic and other links to the other Member State,
- The sentenced person's own view, and

- When the sentenced person has children under 18 years of age, consideration shall be given to what is best for the children.[41]

Furthermore, the main rule that a transfer proceeding shall not be initiated if less than six months of the sentence remain to be served is significant. This may create a special problem if the six months remaining are the result of the application of the rules on early release according to Swedish law and the executing Member State does not apply such rules, or applies rules that are more stringent. In a case decided by a court of appeal,[42] the Prison and Probation Service's decision to forward a judgment to Austria was quashed because the sentenced person risks having the actual period of detention extended by eight months if Austria does not grant early release. The Supreme Court has granted leave to appeal to the Court of Appeal in a case concerning transfer to Lithuania. In its decision it has been stated explicitly that the effects of rules of early release on transfer of sentences are unclear, which is the reason why the case should be taken up by the court of appeal.[43] In a decision of the Prison and Probation Service, the time remaining to be served is just a little over 5 months taking into consideration the Swedish rule for conditional release after 2/3 of the prison sentence. The district court does not see this as a hinder for transfer of the prison sentence to Hungary. However, as a consequence of the time taken for the court proceedings, the Prison and Probation Service has of its own motion rescinded its previous decision to transfer as only 3 months would remain to be served by the time the district court's decision acquires finality.[44]

A head of section at the Prison and Probation Service (R2 38:30) has explained that when handling cases the Administrative Procedure Act applies, which means that the public authority has the duty to carry out such measures so that the case is satisfactorily investigated and a natural part of this is the opinion of the sentenced person. This is not an adversarial process where the sentenced or the public authority can be said to bear a burden of proof.

Thus, there is a series of questions that the authority/court must ask itself in arriving at the decision to transfer:

(1) The basic conditions must be satisfied, i.e. either there is consent from the executing State and the transferred person, or when such consent is not required;

(2) The transfer would facilitate the sentenced person’s social rehabilitation;

(3) The transfer is appropriate also from other points of view; and

(4) At least 6 months remain to be served or there are special reasons why the transfer should be effected even though less than 6 months remain to be served.

In practice, it is in step (2) above that the ties between the sentenced person and the executing State are the most important, where the existence of such ties constitutes a strong presumption that the sentenced person's social rehabilitation will be facilitated. At this stage other personal circumstances of the person do not play a significant role. It is only when the requirement in step (2) is satisfied that other circumstances are considered. These circumstances include *inter alia* personal circumstances of the sentenced person other than his or her ties to the executing State, the prison conditions in the executing State and the possibility of adaptation of the sentence in the executing State. In existing practice, it is only prison conditions in Romania that have been found to constitute ground for non-transfer; it is likely that other countries

[41] Government Bill 2014/15:29, 68–69.
[42] Order of the Göta Court of Appeal of 26.10.2016 in case n ÖÄ 2533-16.
[43] Decision of the Supreme Court to grant leave of appeal to the court of appeal, 15.12.2016, case n Ö 5181-16.
[44] See the order of Södertälje district court of 27.4.2016 in case n B 843-16, confirming the Prison and Probation Service's decision to rescind its previous decision to transfer.

subject to the criticism of the ECtHR will lead to the same outcome should such a case arise. The Supreme Court has ruled that prison conditions in Poland cannot in general constitute a ground for non-transfer.[45]

Principle of speciality

Art 18 of the FD is implement through ch 2 s 13 of the Swedish act in such a way that a request from the other Member State to prosecute or enforce a sentence for a crime committed before the transfer shall be handled in accordance with the provisions applicable for a European arrest warrant.

b) The obligation to recognize foreign judgments and execute the sentence (executing state)

Law governing enforcement and adaptation of the sentence

The competent authority for incoming cases is the Prison and Probation Service. It shall decide whether a foreign judgment shall be recognized and enforced in Sweden and to issue a certificate to that effect.

According to chapter 3 section 2 of the Swedish act, a foreign judgment may only be recognized if the sentenced person is present in Sweden or the issuing Member State and that person

(1) Is a Swedish citizen domiciled in Sweden,
(2) Is a Swedish citizen and can be deported to Sweden after the enforcement of a sentence in the other Member State,
(3) Lives in Sweden and has been legally residing continuously here for at least five years and will retain his/her right of residence in Sweden, or
(4) The Prison and Probation Service has consented to the transfer.

According to chapter 3 section 3 of the Swedish act, consent of the sentenced person is required as a main rule. Consent is not required if the sentenced person (1) is a Swedish citizen who resides here, (2) is a Swedish citizen and can be deported to Sweden after enforcement of the sentence in the other Member State, or (3) has escaped or returned to Sweden following a criminal proceeding or judgment in the other Member State. It may be pointed out that prison conditions in Sweden are generally of a high standard and as a main rule early release will be granted after two thirds of the sentence have been served. For these reasons the sentenced person normally will consent to the transfer to Sweden.

The Prison and Probation Service shall furthermore examine whether any ground for refusal to recognize and enforce the judgment is applicable. Such grounds for refusal are enumerated under chapter 3 section 4 of the Swedish act:

(1) Less than 6 months of the sentence remain to be served
(2) The act does not correspond to a Swedish criminal offence and is not a 'list crime' entailing 3 years or more of imprisonment in the issuing Member State
(3) (i) If the act was committed wholly or partially in Sweden and does not correspond to a Swedish criminal offence or (ii) the sentence can no longer be enforced according to Swedish statutes of limitation
(4) *Ne bis in idem* – both Sweden and other States
(5) The sentenced person was under 15 years of age when the crimes was committed
(6) If enforcement in Sweden would breach the rules of immunity

[45] NJA 2017 s 300.

(7) Sentence *in absentia* and no guarantee that conditions described under Art 9(1) of FD 2008/909 are fulfilled
(8) If the sentence is a measure of psychiatric care, health care or other measures involving deprivation of liberty that cannot be enforced in Sweden
(9) If the other State does not permit Sweden to prosecute or punish a crime committed prior to the transfer

Chapter 3 sections 12–14 of the Act outline the conditions and procedure for adaptation of the sentence if necessary. In simple cases the Prison and Probation Service will have the competence to make the necessary adaptations but the involvement of the Public Prosecution and the courts is required in more complicated cases.

Time limits for the decision to recognize
According to ch 3 s 10 of the Swedish act, a decision on recognition and enforcement shall be made within thirty days from the receipt of the foreign judgment. If the Prison and Probation Service has requested further information or that the judgment be translated, the time limit is calculated from the date when the further information or translation is received. There is however a provision that a decision may be made later if there is a special reason for this.

Principle of speciality
According to ch 2 s 12 of the Swedish act, if a sentenced person has been transferred to another Member State and an authority in that Member State requests permission to prosecute, sentence or deprive the individual's freedom for other causes for a crime committed prior to the transfer, the provisions in the Act on EAW will apply, which means that the Swedish court will give such permission if it would have granted the surrender had such a request be made. In the reverse situation when a person has been transferred from another Member State to Sweden, that individual may not, pursuant to ch 3 s 24 of the Swedish act, be prosecuted, sentenced or deprived of his or her liberty for a crime committed prior to the transfer unless the other Member State consents to this, when the individual chooses to remain in Sweden, when the crime does not lead to a sanction involving deprivation of liberty, when the individual has consented to the transfer or when the individual has expressly renounced the entitlement to the speciality rule.

The Swedish Act only entered into force on 1 April 2015 so there has not been that much experience of the application of the transfer mechanism. Of the persons interviewed only the head of section at the Prison and Probation Service has personally worked with cases dealing with the transfer of sentences; neither the judges nor public counsels interviewed have had personal experience. A review of the case law shows that there appears not have been much informal contact between Sweden and the other Member State when it is possible for Sweden to forward a judgment without the consent of the executing Member State.

2.4. FD 2008/947

a) Scope of application

The FD 2008/947 is implemented in Swedish law through Act (2015:650) on recognition and enforcement of probation decisions within the European Union (*lagen om erkännande och verkställighet av frivårdspåföljder inom Europeiska unionen*), which entered into force on 1

January 2016.[46] The following Swedish measures decided through a judgment or final decision in a criminal proceeding are covered by the Swedish act:

- Conditional release (*villkorlig frigivning*) classified as 'conditional release' in the terminology of the FD,
- Probation (*villkorlig frigivning*) classified as 'suspended sentence', and
- Supervision (*villkorlig frigivning*), also classified as 'suspended sentence'.

Sweden does not undertake to supervise any sanction or probation measure in addition to those referred to in art 4(1) of the FD. Sweden has not made a declaration to derogate from art 10(1) of the FD on the requirement of double criminality. The following grounds of refusals have been incorporated into chapter 3 section 4 of the Swedish act, which are formulated as mandatory grounds from the point of view of the executing competent authority:

(1) Less than 6 months of the sentence remain to be served
(2) The act does not correspond to a Swedish criminal offence and is not a 'list crime' entailing 3 years or more of imprisonment in the issuing Member State
(3) If the act was committed wholly or partially in Sweden and does not correspond to a Swedish criminal offence
(4) *Ne bis in idem* – both Sweden and other States
(5) The sentenced person was under 15 years of age when the crimes was committed
(6) If enforcement in Sweden would breach the rules of immunity
(7) Sentence in absentia and no guarantee that conditions described under art 9(1) of Framework Decision 2008/947/JHA are fulfilled
(8) If the sentence is a measure of psychiatric care, health care or other measures involving deprivation of liberty that cannot be enforced in Sweden

However, the Swedish law permits that, if having regard to the personal circumstances of the sentenced person and other circumstances there are special reasons to recognize and enforce a probation sentence in Sweden despite the fact that recognition shall be refused (according to Swedish law). This is considered acceptable from an EU point of view as this exception allows cooperation with other EU Member States to a greater extent than according to the main rule and the special reasons must take account of the purpose of social rehabilitation of the sentenced person.

b) The procedure

For the purpose of recognition and enforcement of a Swedish probation measure in another Member State, it is the Prison and Probation Service in Sweden that makes the decision to forward the judgment to the other Member State. The decision of the Prison and Probation Service can be appealed through the general court system.

For the purpose of recognition and enforcement of a foreign probation in Sweden, the foreign judgment together with the certificate specified in the FD shall be sent to the Swedish Prison and Probation Service. The Prison and Probation Service will then examine the case and determine whether any ground for refusal (see 2.4.a above) is applicable. If the foreign judgment is recognized, it will issue a certificate indicating (1) which measure shall be enforced and its duration, (2) what obligations are imposed on the sentenced person and their duration, (3) adjustment, if any, of the foreign sentence to a form that can be enforced in Sweden and (4) which parole board is competent to make decisions during the enforcement of

[46] There is also an ordinance (2015:652) issued by the Government with more detailed rules on the application of the Act. See also notification by Sweden to the Council on the implementation of the framework decision with designation of the Swedish Prison and Probation Service as the competent authority for the purpose of this framework decision, Council Doc. n 5221/16, 15.1.2016.

the sentence. The decision of the Prison and Probation Service can be appealed against through the general court system.

A head of section at the Prison and Probation Service (R2 50:00) has reported that there has so far not been any cases of transfer of probation and has explained that this is due to the fact that the law has entered into only very recently and that work in this area has not been prioritized.

c) Relation to other measures

The Swedish Act (2015:650) is not applicable in relation to Denmark and Finland. For these two Member States, Act (1963:193) on cooperation with Denmark, Finland, Iceland and Norway on the enforcement of punishment etc. (*lagen om samarbete med Danmark, Finland, Island och Norge angående verkställighet av straff m.m.*) is applicable instead.

There has hitherto not been any case law on this new Act, but it may be noted that the possibility to transfer enforcement of a probation measure to another EU Member State has been evoked as a factor to be taken into consideration when a Swedish decides on remand in custody of a suspect who is a national of another Member State.[47]

3. Limitations on mutual recognition provided in the EAW, FD 2008/909 and FD 2008/947 as implemented in the National legal order

3.1 EAW for the purpose of executing a custodial sentence or detention order

a) Safeguards for the requested (convicted) person

Access to lawyer

Pursuant to ch 4 s 8 of Act (2003:1156) on surrender from Sweden pursuant to a European arrest warrant (hereafter 'EAW Act'), a public defence counsel shall be appointed at the request of a person being sought for surrender (whether for the purpose of prosecution or for enforcement of sentence). Even without such a request, a public defence counsel shall be appointed if the person being sought is under 18 years of age or if it is considered that there is a need of a defence counsel for any other reason. This is a right that follows from the fact that the person is sought pursuant to a European arrest warrant. Moreover, if the person sought will be deprived of liberty (e.g. through remand in custody) a public defence counsel will also be appointed according to general Swedish procedural law for the proceedings dealing with deprivation of liberty. In practice, it will be the public defence counsel appointed pursuant to the EAW Act that will assist the person sought for surrender in all matters connected to the surrender procedure.

According to art 10 of Directive 2013/48, the requested person shall have the right of access to a lawyer in the executing Member State as well as in the issuing Member State. In the course of the implementation of this directive, the Government states that access to lawyer in Sweden (as an executing Member State) already conforms to the requirement of the directive. With regard to access to lawyer in the issuing State, it is considered that it is not a matter to be regulated in the Swedish legislation.[48] The thought behind this statement is that, when Sweden is the issuing State, the rights of the requested person are already taken care of by the public defence council in the criminal proceeding.

Access to documents, translation and the right to information

There is no special provision on translation in the EAW Act other than the requirement that the arrest warrant itself shall be in Swedish, Danish, Norwegian or English. According to ch 4 s 3 para. 2 of the EAW Act, the corresponding provisions in a Swedish criminal investigation

[47] NJA 2016 s 1024 (proceeding for remand in custody of a national of Lithuania).
[48] See the Government Bill prop. 2015/16:187, 40–42.

shall be applied if no special provisions have been made for the arrest warrant proceedings. This means that a person who does not understand Swedish will be assisted by an *interpreter* before the court or when heard during the criminal investigation and have documents *translated* when it is essential for the suspect to exercise his/her rights.[49] There is thus no exact rules on what and when the translation should be done and translation does not need to be written and is often done orally through the interpreter's explanation of the content of a written document. As the issuing Member State normally attaches a copy of the original judgment written in the language of the issuing Member State, it is not unlikely that the requested person knows that language, which eliminates the need of translation of some documents. It is a part of the public defence counsel's task to inform the requested person the meaning and consequences of the surrender procedure.

One public defence counsel (R3 36:36 and 41:05) commented on the need to study the original documents, such as the judgment, in order to see if challenge may be made on human rights grounds. In a case that he was working on, it was only through studying the original judgment that it is discovered that his client has been sentenced for something that is not a criminal offence. In this case it was the client who initially drew attention to possible deficiencies in the judgment.

The defence counsels give the general impression that the time constraint means that there is usually no possibility to study the documents in details even if translations are available. As far as the conviction is concerned, there is a general impression that it is futile to challenge the judgment itself as the Swedish courts do not, as a rule, question the validity of the foreign judgment.

Right to be heard

A requested person will be informed of the right to a public defence counsel and asked whether he or she consents to the surrender, and if so, whether he or she agrees to be prosecuted or punished for crimes committed before the surrender. There is no explicit rule on the assistance of a counsel on the question of consent, neither in the Act itself nor the associated ordinance. However, it is in the interest of the proceeding that the person fully understands the significance of the consent, a counsel will be appointed if assistance is needed on the question of whether to consent or not. If the requested person does not consent to the surrender, a main hearing will be held at the district court before a decision on surrender or not is made. The main rule in such cases is that the requested person be summoned to appear at an oral hearing, which means that the person will be heard.

A head of division at the Prison and Probation Service (R2 23:00) says: "when a sentenced person is held in another Member State pending surrender to Sweden, a public counsel would be appointed in Sweden if this is appropriate and information on the process can then be provided by the public counsel. Contact between the requested person and the public counsel could then be conducted through video links". The head of division adds that, "for obvious reason, a person who is at large and is being sought will not be provided with information that he or she is being sought pursuant to a European arrest warrant until he or she is apprehended". The possibility of using a video link when the requested person is in the other Member State is also mentioned by an appeals court judge interviewed (R5 24:31). A judge (R1 21:22) points out that the difficulty experienced in translation may not be due to the quality of the interpreter but rather to the intrinsic difficulty of translating legal terms that are untranslatable.

[49] Ch 5 s 6, ch 23 s 16 and ch 33 s 9 of the RB.

There is a consensus among the defence counsels interviewed that access to lawyer works well. Public defence counsels are appointed as a matter of course both during the interview and at the court hearing with no example of this being an issue.[50] Quality of interpretions are generally acceptable according to the public counsels interviewed, but there are individual variations in quality.[51]

b) Grounds for non-execution of an EAW for the purpose of executing a custodial sentence or detention order

Mandatory ('shall refuse')

The grounds for non-execution according to the Swedish EAW Act are:

- Ch 2 s 3 point 1 – insufficient formation in the arrest warrant, to such an extent that the order cannot be assessed properly
- Ch 2 s 3 point 2 – the issuing authority does not guarantee for the return of Swedish citizens for enforcement of sentence after trial in the issuing Member State
- Ch 2 s 3 point 3 – the requested person shall be surrendered to another Member State
- Ch 2 s 3 point 4 – the requested person shall be extradited to the International Criminal Court
- Ch 2 s 3 point 5 – when the requested person has been extradited/surrendered to Sweden from another State, the surrender would breach a condition for the requested person's extradition/surrender to Sweden
- Ch 2 s 3 point 6 – in case of surrender for the purpose of enforcement of sentence, the issuing authority fails to confirm that the conditions set out in Art 4a.1 of the FD EAW are fulfilled
- Ch 2 s 4 point 1 – the arrest warrant pertains to an act committed by the requested person when he or she was under 15 years of age
- Ch 2 s 4 point 2 – the surrender would be in breach of the ECHR and its additional protocols that have the force of law in Sweden
- Ch 2 s 4 point 3 – the surrender would be in breach of the privileges and immunities of the requested person
- Ch 2 s 5 point 1 – the requested person has been granted a pardon in accordance with Swedish law
- Ch 2 s 5 point 2 – a Swedish (final) decision not to prosecute the same act
- Ch 2 s 5 point 3 – *ne bis in idem* (EU Member States, Iceland and Norway)
- Ch 2 s 5 point 4 – *ne bis in idem* (States other than EU Member States, Iceland and Norway)
- Ch 2 s 5 point 5 – prosecution or criminal investigation has commenced in Sweden, if the prosecutor/investigator opposed the surrender
- Ch 2 s 5 point 6 – (i) the sentence can no longer be enforced under Swedish law (statute of limitation and similar provisions) and (ii) (a) the act was committed wholly or partially in Sweden or (b) the requested person is a Swedish citizen
- Ch 2 s 5 point 7 – the act was committed wholly or partially in Sweden and does not correspond to a crime under Swedish law

As is shown in the list above, the Swedish legislation contains several grounds of refusal that do not appear explicitly in the FD, e.g. that the requested person shall be extradited to the International Criminal Court (ch 2 s 3 point 4) or when surrender would entail a breach of the rules of immunity and privileges (ch 2 s 4 point 3). These grounds of refusal are however not controversial as they follow directly from the application of international law and cannot be

[50] R3 2:52, R4 28:00.
[51] R3 38:40, R4 34:30.

seen as a failure to correctly implement the FD. The provision in ch 2 s 4 point 2 EAW Act prohibiting surrender if this would be in breach of the ECHR and its additional protocols that have the force of law in Swede, however, is debatable. This ground of refusal means that, if a Swedish court finds that surrender would, in its opinion, be in breach of the ECHR (which is part of Swedish law), it must apply this ground of refusal and deny the request for surrender. This seems not to be in harmony with the EU law, in particular the principle established in *Melloni*,[52] that Member States cannot preclude the application of the FD EAW on the basis of a ground of refusal in national law not already contained in the exhaustive list of mandatory and optional grounds of refusal provided for in the FD. A problematic situation may arise if the Swedish ground of refusal is to be applied and a reference for a preliminary ruling by the CJEU is made. It should be borne in mind that the provision in ch 2 s 4 point 2 EAW Act refers specifically to the ECHR, and the CJEU is not in a position, and will not, pronounce on the eventuality of Sweden's breach of the European Convention; and the CJEU has made it clear that the Convention does not constitute a legal instrument which has been formally incorporated into EU law and the CJEU will only examine the question solely in the light of the fundamental rights guaranteed by the EU Charter of Fundamental Rights.[53] Thus, if what the Swedish court fears will be a violation of the European Convention of Human Rights is considered by the CJEU not to constitute a breach of EU law, in particular the EU Charter of Fundamental Rights, the Swedish court would find itself in the precarious situation of either risking a violation of the European Convention of Human Rights (which it believes a surrender will do and the CJEU would not give an answer), or to act in breach of the supremacy of EU law by applying a ground of refusal not permitted by the FD. Although this seems only to be a remote theoretical possibility,[54] divergence in the interpretation of rights by the different European courts can certainly not be ruled out, as is demonstrated in the CJEU's opinion[55] on the accession of the EU to the European Convention on Human rights.

Optional ('may refuse')

The term 'optional' according to art 4 of the FD EAW is interpreted as an option for the Swedish *legislator*, whether to adopt the optional grounds under art 4 in the domestic legislation. In the implementing legislation, when the legislator chooses to adopt an optional ground for non-execution, this ground has been formulated as a mandatory ground for non-execution addressed to the competent authorities that apply the Swedish law. In other words, the courts have no discretion in this matter.

The interviewed persons do not have much to comment on the grounds of refusal.
On the subject of the provision in ch 2 s 4 point 2 EAW Act with reference to the ECHR as a ground of refusal in addition to the grounds exhaustively provided for in the FDs, the Supreme Court justice and the Appeals Court judge interviewed both welcomed its inclusion in the Swedish law, while a defence counsel would prefer an explicit mention of the specific rights rather than a general reference to the ECHR. [56]

c) What role do (possible) fundamental rights violations have in the decision to issue or execute an EAW?

[52] *Melloni* (n 25 above).
[53] See Joined Cases C-217/15 and C-350/15 *Orsi and Baldetti*, judgment of the Court (4th Chamber), 5 April 2017, EU:C:2017:264.
[54] The Supreme Court has stated in NJA 2007 s. 168 that there is only a very small room for refusing to execute a European arrest warrant on human rights grounds in addition to the permitted grounds of refusal.
[55] Opinion 2/2013 of the Court (Full Court), 18 December 2014, EU:C:2014:2454.
[56] R1 30:12, R5 31:00 and R3 50:00.

Past violations

The past violation that is most frequently alleged is the breach of the right to a fair trial in the issuing Member State. Such allegations, although often made at first instance, are seldom examined more closely as they are often general in character or is unsupported by evidence. When a case concerning surrender to Finland with a claim of a violation of fair trial rights actually reaches the Supreme Court, it has been cursorily dismissed by the Court, simply stating that a 'claim' of violation of fair trial rights would not constitute a hinder against surrender.[57]

In a case where the request for the surrender to Romania for the purpose of enforcement of a prison sentence of 5 years for participation in a criminal organization and drug trafficking, the sentenced person has argued that he is a victim to past violations of arts 6 and 7 of the European Convention of Human Rights, as well as the risk of future violation of art of the same Convention. The arguments based on violation of arts 6 and 7 are dismissed by the courts. The sentenced person claims that there has been a violation of art 7 of the ECHR because he has been punished for something that is not illegal. In this case, it is argued that the defendant's conduct has consisted in the handling of some hemp products with such a low THC content (below 0.2 %) that it is not illegal, and are in fact sold openly in a shop. The argument for violation of art 6 is based *inter alia* on the refusal during the trial in Romania to undertake technical analysis of the samples with a better method in order to establish the correct THC content of the product. The district court has actually examined these two arguments in some details. With respect to the art 6 argument, the court has arrived essentially at the conclusion that even if there has been a violation of art 6 of the European Convention of Human Rights, it is not sufficiently gross to constitute a ground for refusing to execute the European arrest warrant. As for the argument based on a violation of art 7, the district court states that this is a question for the Romanian courts and under a system based on mutual recognition of judicial and against the background of the case law of the CJEU, the European arrest warrant must be executed on the assumption that the Romanian judgment is correct.[58] On appeal, the arguments based on arts 6 and 7 have not been examined; the request for surrender is denied solely on the basis of a risk of violation of art 3 of the European Convention.[59]

In summary it can be said that, against the background of the practice of the Swedish courts, such is the weight of the principle of mutual recognition that it would be extremely difficult, if not almost impossible, to succeed in arguing for refusal to surrender on the ground of past violation of human rights.

Violations of procedural safeguards

There is no express provision in Swedish law on the non-execution or suspension due to a current violation[60] of procedural safeguards whether this occurs in the issuing or the executing Member State. In case where such a violation occurs in Sweden, the court or the competent authority must apply the standard set by the ECHR and the EU Charter of Fundamental Rights. Some violations of procedural safeguards may however be repairable, such as the failure to provide adequate interpretation to a language that the requested person understands.

[57] NJA 2005 s 897.

[58] Order of Solna district court of 3.5.2016 in case n B 2768-16.

[59] Order of Svea Court of Appeal of 16.9.2016 in case n B 5372-16. The argument based on art 3 ECHR is examined under 3.1.c. below.

[60] For the purpose of surrender for enforcement, 'current' means the period between the final judgment in a criminal proceeding and the decision on surrender/recognition and enforcement.

This type of violations will not, *per se*, affect the final outcome of the proceeding; this requires rather that the violation be remedied.

Risk of future violations

One of the challenges often raised in the early cases concerns the availability of a retrial and the fairness of a re-trial in a Member State after the surrender on the basis of a judgment given *in absentia*.[61] But just as allegations of unfairness as a prior violation of human rights discussed under 3.1.c. above, there is very little room for refusing surrender on this ground, as has been established in the case law soon after the system of European arrest warrants has entered into operation.[62] However, much of the earlier uncertainties around *in absentia* judgments have been removed after the amendment of the FD on this particular point. The most important ground for refusal based on risk of future violation of human rights has shifted to the risk of violation of art 3 of the European Convention. In practice the focus is – as discussed in the following – put almost exclusively on certain typical situations involving violation of art 3, with alleged violation of other articles of the European Convention being dismissed rather summarily.

In connection with the arguments based on arts 6 and 7 of the ECHR, a public defence counsels (R3 45:40) regrets that the courts only take art 3 of the Convention seriously and stresses the importance of other rights of the Convention including arts 6, 7 and 8. The counsel also points out that whereas a refusal based on past violation of arts 6 or 7 would preclude the issue of a new European arrest warrant, a refusal based on a risk of future violation of art 3 may mean that a new European arrest warrant is issued when the prison conditions in a Member State are improved only marginally.

In the case concerning surrender to Romania mentioned in 3.1.c. above, the defence has successfully argued for a refusal to execute of a European arrest warrant based on risk of violation of art 3 of the European Convention of Human Rights. In this case, the district court made its decision in May 2016 to refuse surrender,[63] less than a month after the judgment of the CJEU in *Aranyosi and Căldăraru*,[64] a judgment that the Swedish court has relied upon in its assessment of what steps the Swedish authorities must take when there is a claim that there is a risk of violation of art 3 of the European Convention in the issuing Member State. First of all the district court finds that the ECtHR has found a breach of art 3 of the European Convention in a series of complaints (all decided in 2015) against Romania on account of its poor prison conditions; the district court also finds that the situation is supported by the findings of several independent reports. What remains, however, to be examined is the concrete circumstances with regard to the surrender in question. The requested person in this case has produced reliable information that he is likely to be placed in a prison in Iasi in so-called 'close regime'. He has pointed out that prisoners are placed in cells between 2 and 3 m^2 as opposed to the minimum of 4 m^2 recommended by the Council of Europe and the conditions of the prison facilities are generally poor with bad ventilation and hygiene as well as poor access to medical care. The Swedish prosecutor has requested further information from

[61] Fair-trial arguments are, for obvious reasons, more often raised in cases concerning surrender for the purpose of prosecution the first time, but basically the same reasoning would apply also to re-trials after a judgment *in absentia*.

[62] See the order of the Svea Court of Appeal of 1 December 2004 in case Ö 9128-04 on surrender to Greece (for the purpose of prosecution).

[63] Order of Solna district court, see n 58 above.

[64] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, judgment of the Court (Grand Chamber), 5 April 2016, EU:C:2016:198.

the Romanian authorities but the reply contains only general statements and no concrete decisions or promises on the conditions into which the requested person will be placed if surrendered to Romania. The district court finds that a much more detailed and binding statement is needed for it to perform a proper risk assessment and in the absence of this the court finds that there is a real risk that the requested person will risk treatment in violation of art 3 of the European Convention. The district court has explicitly mentioned the alternative adopted by a German regional court of appeal[65] of demanding a guarantee of acceptable treatment from the issuing Member State. However, referring to *Melloni*, the district court finds, without giving any reason, that surrender conditional upon such a guarantee is not compatible with EU law. Under such circumstances the district court chooses to refuse surrender in this case. On appeal to the court of appeal, the same findings with regard to prison conditions are made. Furthermore, the court of appeal finds that the Swedish prosecutor has already made repeated attempts to obtain more information from Romania and there is no point in making further attempts before a decision to confirm the district court's decision to refuse surrender.[66] Although it is not stated explicitly in the court of appeal's reasoning, the decision to refuse may be interpreted as a finding that postponement of a decision on surrender (through further attempts to obtain information from Romania) is no longer meaningful.

As the above case on surrender to Romania has not been appealed to the Supreme Court, the order of the court of appeal can be treated as indicative of the current state of law in Sweden. Although this case is concerned with surrender pursuant to a European arrest warrant, it has also effect on cases concerning the transfer of prison sentences when Sweden is the issuing Member State.

3.2. FD 2008/909

a) Safeguards for the convicted person

Access to lawyer

The first step in the transfer proceeding is the determination by the Prison and Probation Service whether to issue a certificate to transfer the sentence. This is an administrative proceeding. When coercive measures are applied during the process, the sentenced person has a right to a defence counsel on the application of the coercive measures.

According to ch 4 s 1 of the Act (2015:96) on recognition and enforcement of sentences involving deprivation of liberty[67] or 'Transfer of Sentence (EU) Act' (hereafter 'TSEU Act'), a public legal counsel shall be appointed for the sentenced person unless it can be assumed that a counsel is not necessary.

When Sweden is the forwarding Member State the legal counsel may assist the sentenced person already during the process when the Prison and Probation Service determines whether to issue a certificate of transfer to another Member State. This administrative decision is subject to appeal to the general courts and the legal counsel assists even during the appeal proceedings.

The reverse situation is unusual as a sentenced person would typically not object to a transfer to Sweden with its generally better prison conditions and the possibility to early release, in which case a legal counsel would not be helpful. It is, therefore, only when the sentenced person objects to the transfer to Sweden that a legal counsel is necessary.

[65] Order of Oberlandesgericht München of 27.10.2015 in case n 1 AR 392/15.
[66] Order of Svea Court of Appeal, see n 59 above.
[67] Lagen (2015:96) om erkännande och verkställighet av frihetsberövande påföljder inom Europeiska unionen.

Access to documents, translation and the right to information and opinion of the convicted person to the transfer

As with the situation regarding European arrest warrants, there are no express rules on what documents must be translated other than the one on the language of the certificate sent by the forwarding Member State. In practice, documents are translated when necessary. As the transfer procedure is governed by administrative law, it is a given part of the proceeding to give all relevant information to the sentenced person and to obtain his or her opinion on the matter, as all these factors constitute the background to the decision. If translation is needed for a proper investigation, translation will be made. It should however be noted that translation of documents may be made orally through an interpreter. There may also be little need of translation when the sentenced person understands the language of the Member State to which he or she is to be transferred or of the Member State that has delivered the sentence.

Right to be heard

For transfer from Sweden, a person currently serving a sentence in Sweden will naturally be consulted before a decision is made, in particular on the question of consent to the transfer, but this is not the same as a right to be heard. Such a right materializes, however, if the sentenced person appeals against the decision of the Prison and Probation Service; the sentenced person becomes the opposing party in a judicial proceeding at the general courts. There is however no automatic right to an oral hearing as in criminal cases since the appeal of the administrative decision is handled as a legal business under the Act on Legal Business (*lagen (1996:242) om domstolsärenden*) as opposed to the RB.

b) Consent of the executing state

According to ch 2 s 2 TSEU Act, a judgment may be forwarded to another Member State if that Member State gives its consent. But as provided for in the FD, the Swedish legislation permits the forwarding of a judgment without prior consent of the executing Member State when the sentenced person (1) is a national of the executing Member State and resides in that State, (2) is a national of the executing Member State and will be deported from Sweden to that Member State after serving the sentence in Sweden, or (3) resides in the executing Member State and has been legally staying there for at least 5 years without interruption.

The question of consent of the executing Member State has been dealt with by the Swedish Supreme Court.[68] As this is the first and only decision of the Supreme Court on the application of the Swedish law implementing the FD, there is reason to present this decision of the Supreme Court at some length, thus covering some other matters than the question of the consent of the executing Member State.

This case concerns the transfer of Polish citizen A.S. to Poland for a conviction for gross narcotic offence to a prison sentence of 5 years and 6 months and deportation from Sweden for a period of ten years counting from the date of conviction. Applying the rule on early release according to Swedish law, A.S. is entitled to a conditional release after 3 years and 8 months of the sentence have been served. The Prison and Probation Service made the decision to forward the judgment to Poland when almost three years of the sentence remains to be served.

As A.S. is a Polish citizen and shall be deported to Poland after serving the sentence in Sweden, there is no need to obtain the consent of the executing Member State, nor is the consent of A.S. a requirement. It has been questioned whether A.S. is to be deported to Poland as there is in fact no formal decision as to where he is to be deported to, the criminal conviction

[68] Order of the Supreme Court of 12.4.2017 in case n Ö 5747-16, NJA 2017 s 300.

only stating that he shall be deported. The Supreme Court finds that there is a strong presumption that a sentenced person will be deported to his or her country of citizenship and in this case there is nothing to suggest that A.S. will be deported to another country. This being the case, the basic requirements for forwarding the judgment to Poland are satisfied without the consent of either A.S. or of Poland.

The Supreme Court then turns to the question whether the transfer will facilitate the social rehabilitation of A.S. The Court reiterates statements in the preliminary work to the legislation that factors such as citizenship, length of residence in a Member State, the current housing, family and work situations are especially relevant in the consideration. There is a strong presumption that a person's social rehabilitation will be facilitated by the transfer if he or she is to be deported to his or her State of nationality. The Supreme Court also states that, even if the sentenced person's own view on the matter is relevant, it is not decisive when considering social rehabilitation. In this case, A.S. is born and brought up in Torun together with his parents and three siblings. A.S. does not have any connection to Sweden but he claims that he has lived in the Netherlands and intends to reside there with his fiancée upon release from prison. The Supreme Court finds that there is no proof of his previous connection to the Netherlands and his future intention to reside there is too uncertain to be taken into account. A.S. has also asserted that he would not have the opportunity to training and work in Poland as he does in a Swedish prison, which would negatively affect his social rehabilitation; but the Supreme Court states simply that conditions in prisons should normally not be taken into consideration in this kind of assessment. The Supreme Court thus arrives at the conclusion that a transfer to Poland would facilitate the social rehabilitation of A.S.

There is however a requirement under Swedish law that the transfer is deemed, when considered generally, appropriate. It is at this stage that the courts will consider questions concerning early release and prison conditions in the other Member State. As mentioned above, A.S. is entitled to a conditional release after 3 years and 8 months of the 5½ year sentence have been served. A.S. claims that there is a risk that the full sentence will be served if enforcement is transferred to Poland. On this question the Supreme Court finds that variations in the length of sentence does not *per se* constitute a reason not to forward a judgment. However, the total length of imprisonment must not be increased essentially, be it in absolute or in percentage terms. In this case A.S.'s prison sentence may be increased by up to 1 year and 10 months (a 50% increase). Referring to some judgments from the ECtHR,[69] the Supreme Court finds that the possible increase in the case in question does not entail an arbitrary deprivation of liberty in violation of art 5 of the ECHR. There is therefore no obstacle for forwarding the judgment to Poland for enforcement.

In this case, the consideration of the length of sentence to be served after the transfer to Poland has been made without actual knowledge of the Polish legislation on early release or an indication from the Polish authorities. As *obiter dicta*, the Supreme Court stresses the importation of consultation with the authorities in the other Member State during the process even though, in a case like the present one, consent of the other Member State is not a formal requirement for forwarding the judgment.

c) Interplay with the FD on the EAW

[69] The Supreme Court has relied mainly on two cases against Sweden appl. n 22318/02 *Csoszánszki v Sweden*, Judgment (5th Section) of 27 June 2006, CE:ECHR:2006:0627DEC002231802 and appl. n 28578/03 *Szabó v Sweden*, Judgment (2nd Section) of 27 June 2006, CE:ECHR:2006:0627DEC002857803 but also mentions two Polish cases decided more recently appl. n 498/10 *Ciok v Poland*, Judgment (4th Section) of 23 October 2012, CE:ECHR:2012:1023DEC000049810 and appl n 1997/11*Giza* v. *Poland*, Judgment (4th Section) of 23 October 2012, CE:ECHR:2012:1023DEC000199711.

Before the amendment that entered into force 1 April 2015, ch 7 of the EAW Act contained eight sections on the enforcement in Sweden of sentences involving the deprivation of liberty. S 2 to 8 of ch 7 have been moved to the new TSEU Act, which means that when a sentence is to be transferred after a person has been surrendered pursuant to a European arrest warrant, the EAW Act makes a reference to the TSEU Act, thus treating such transfers as any transfer of sentences within the EU, but of course without the need to determine whether the conditions for recognition and enforcement are fulfilled.

With the exception of the head of section at the Prison and Probation Service, none of the practitioners interviewed have personal practical experience with the handling of transfer of prison sentence according to FD 2008/909. The Supreme Court justice interviewed is author of the standard commentary to the Swedish TSEU Act but has not dealt with cases in the capacity as judge.

d) Exceptions to mutual recognition (situations when the executing state may refuse to accept the transfer of a convicted person)

Pursuant to ch 3 s 4 TSEU Act, a foreign judgment may not be recognized and enforced in Sweden if

(1) Less than 6 months of the sentence remain to be served

(2) The act does not correspond to a Swedish criminal offence and is not a 'list crime' entailing 3 years or more of imprisonment in the issuing Member State

(3) (i) If the act was committed wholly or partially in Sweden and does not correspond to a Swedish criminal offence or (ii) the sentence can no longer be enforced according to Swedish statutes of limitation

(4) *Ne bis in idem* – both Sweden and other States

(5) The sentenced person was under 15 years of age when the crimes was committed

(6) If enforcement in Sweden would breach the rules of immunity

(7) Sentence *in absentia* and no guarantee that conditions described under Art 9(1) of FD 2008/909 are fulfilled

(8) If the sentence is a measure of psychiatric care, health care or other measures involving deprivation of liberty that cannot be enforced in Sweden

(9) If the other State does not permit Sweden to prosecute or punish a crime committed prior to the transfer

All of the grounds for refusal, i.e. (1)–(9) above, are prima facie mandatory from the point of view of the Swedish authorities. However, pursuant to 3:5 TSEU Act, transfer may be granted, wholly or partially, even if a ground for refusal exists if there are special reasons for doing so, having regard to the personal circumstances of the sentenced person (such as the young age of the sentenced person) or other circumstances (e.g. the fact that some of the conditions in (1) and (9) above are not met due to technical reasons such as the law on inchoate offences). In case where the information is incomplete, the Act provides that the sending State be given the opportunity to provide the necessary information before the transfer is refused.

Note in particular, that according to ch 3 s 4 point 2 TSEU Act, there is a requirement of double criminality as a general rule. However, as required by the FD, this is not applicable to so-called 'list-offences' as long as the offence can give rise to a sanction of three years or more in accordance with the law of the issuing Member State. This notwithstanding, as permitted by the FD, double criminality is required if the crime has taken place wholly or partly on the territory of Sweden.

e) What role do (possible) fundamental rights violations have in the in the FD 2008/909?

Past violations

Just as with the case concerning surrender pursuant to a European arrest warrant, the presumption of mutual recognition of judicial decisions is so strong that there is very little room for alleged past violation of fundamental rights. The recognition of foreign sentences means that the Swedish courts implicitly acknowledge the judgment of the sentencing court and that fundamental rights have been respected even if that judgment is based on a balancing of rights. Serious violations still constitute ground for refusal but in such cases it is the seriousness of the violation and not the nature of the right as absolute or relative that is decisive.

The head of section at the Prison and Probation Service (R3 1.01.01) says: "there are different degrees of violation of fundamental rights, and violation of one right may in some cases be compensated by benefits in other aspects. Social rehabilitation should be the overall aim of the transfer."

Violations of procedural safeguards

[Same as 3.1.c.]: There is no express provision in Swedish law on the non-execution or suspension due to a current violation of procedural safeguards whether this occurs in the issuing or the executing Member State. In case where such a violation occurs in Sweden, the court or the competent authority must apply the standard set by the ECHR and the EU Charter of Fundamental Rights. Some violations of procedural safeguards may however be repairable, such as the failure to provide adequate interpretation to a language that the re-quested person understands. This type of violations will not, *per se*, affect the final outcome of the proceeding; this requires rather that the violation be remedied.

Risk of future violations

As is the case for surrender pursuant to a European arrest warrant, risk of violation of art 3 of the European Convention of Human Rights will be the most important obstacle to forwarding a Swedish judgment for recognition and enforcement in another Member State.

As discussed in 3.2.c. above, the difference in the actual length of service of a prison sentence may in some cases constitute a violation of art 5 of the European Convention of Human Rights. The main rule for the enforcement of a transferred sentence is that the executing Member State is responsible for the remaining sentence and the forwarding Member State may not know the actual terms of the enforcement until the executing Member State declares that it will recognize and enforce the sentence. If the sentence to be enforced will constitute a violation of art 5 of the European Convention, Swedish law provides the possibility to recall the transfer until the enforcement has commenced in the other Member State.

3.3. FD 2008/947

a) Safeguards of the convicted person

Access to lawyer

The sentenced person does not have the right to legal representation. S 4 s 1 of the Act (2015:650) on recognition and enforcement of probation measures within the European Union[70] provides that a public counsel shall be appointed if the sentenced person is in need of such a counsel. This is a matter for the competent authority or court to determine and not a right of the person involved. It is maintained in the preliminary work to the implementation legislation that normally a legal counsel will not be necessary, so it is expected that the appointment of legal counsels will be restrictive.

Access to documents, translation and the right to information

[70] Lagen (2015:650) om erkännande och verkställighet av frivårdspåföljder inom Europeiska unionen.

The question of the possibility of probation in another Member State may arise already during the trial and before a sentence is imposed.[71] There is no express obligation under the 2015 Act that the sentenced person be informed of this possibility but it is the responsibility of the court to ensure that the necessary investigation are made into the conditions for sentencing and the question of transfer of sentence will arise naturally in the course of the proceeding without a specific rule dealing with the situation. The court will within the judicial proceeding sentence the person to probation on the understanding that the competent authority in Sweden will forward in an administrative proceeding the judgment to another Member State.

If the option of transferring the sentence arises after the judgment, e.g. if the sentenced person subsequently expresses a wish to return to his or her home Member State, or when it is time for conditional release from a custodial sentence, rules of administrative law are applicable. This means that the competent authority will, without having a specific rule on this, take up the issue when appropriate.

As with the situation regarding European arrest warrants and the transfer of custodial sentences, there are no express rules on what documents must be translated other than the one on the language of the certificate sent by the forwarding Member State. In practice, documents are translated when necessary following the principle of administrative law.

Right to be heard

Following the principle of administrative law, the affected person's view on the matter is part of the material for the final decision. As mentioned above, the possibility of transfer of probation may have already been addressed as part of the criminal proceeding, in which case the person will have been heard as a party to that proceeding.

b) Double incrimination, exceptions to mutual recognition and other limitations concerning the decision to recognize

Pursuant to ch 3 s 4 point 2 of the 2015 Act, there is a general requirement of double criminality, unless it is a 'list offence' for which three years' imprisonment may follow in accordance with the legislation of the forwarding Member State. According to point 3 of the same section, double criminality is always required if the crime has been committed, in whole or in part, on Swedish territory.

c) What role do (possible) fundamental rights violations have in the FD 2008/947?

Past violations

Just as with the case concerning surrender pursuant to a European arrest warrant, the presumption of mutual recognition of judicial decisions is so strong that there is very little room for alleged past violation of fundamental rights.

Violations of procedural safeguards

[Same as 3.1.c.]: There is no express provision in Swedish law on the non-execution or suspension due to a current violation of procedural safeguards whether this occurs in the issuing or the executing Member State. In case where such a violation occurs in Sweden, the court or the competent authority must apply the standard set by the ECHR and the EU Charter of Fundamental Rights. Some violations of procedural safeguards may however be repairable, such as the failure to provide adequate interpretation to a language that the re-quested person understands. This type of violations will not, *per se*, affect the final outcome of the proceeding; this requires rather that the violation be remedied.

[71] In Sweden the guilt of the defendant and, where applicable, the sentence is determined within the same trial in one judgment.

Risk of future violations
As the sentenced person is not deprived of liberty in a prison facility, violation of art 3 of the European Convention on account of poor prison conditions is not an issue here. It is possible that the length of probation may be increased after a transfer, but this should be compared to an alternative custodial sentence, so violation of art 5 of the European Convention is unlikely to be a result.

4. In sum: how legal reality relates to the empirical conclusions
The FD on the transfer of custodial sentence for enforcement (FD 2008/909) and of probation decisions for supervision (FD 2008/947) have only recently been implemented in Swedish law after the expiry of the implementation date prescribed by the framework decisions. In the case of custodial sentence, the Swedish legislation entered into force on 1 April 2015, and in the case of probation measures as late as 1 January 2016. For this reason, there has not been that much practical experience of the daily application of these new instruments; in fact there is no experience at all with the transfer of probation measures during the period covered by the present study. As for the FD EAW (2002/584), implementation in Sweden was done within the time limit prescribed by the framework decision, with the Swedish legislation entering into force on 1 January 2004, which means that this system of cooperation within the EU has been in operation in Sweden for more than 10 years. From 2012 onwards, there is on average about 250 EAWs issued by Sweden and 150 EAWs received; these figures include however a considerable number of surrenders to and from Denmark and Finland, which follow a simpler procedure, so the actual experience of the procedure in relation to non-Nordic EU Member States is still limited. For the handling of incoming EAWs, whether it is for the purpose of prosecution or for enforcement of sentence, it is the public prosecutor who will deal with the case and act on behalf of the issuing Member State before the courts. There is thus no central authority dealing with EAW cases, and it is often a matter of where the requested person is located that determines the assignment of the prosecutor to deal with the case. This means that there is a possibility that a prosecutor dealing with an EAW case may not have previous experience or special training in this area of the law. The individual prosecutor may however have the assistance of the Swedish member of Eurojust, contacts through the European Judicial Network as well as the international prosecution chambers located in different parts of the country (if the case has not already been assigned to a prosecutor in such chambers). The situation is similar from the defence counsels' point of view, a lawyer available locally may not have the experience in EAWs or EU criminal law in general. Although there is a greater concentration of EAW cases in the three largest cities in Sweden, the volume of cases is still so small that there is no possibility for defence lawyers to specialize in this area. They are also in a more disadvantaged position compared to the prosecutors as they do not have the resources through official channels such as Eurojust, even though some European defence lawyer networks do exist. All of the persons interviewed have had some experience with the EAW or other matters concerning EU criminal law in general, and that is precisely why they have been selected for interview. Some of the persons are also experts in this area, having written books and legal commentaries on the subject and having been involved in the negotiation of the FDs in a previous professional capacity. However, there is still a lack of knowledge of EU criminal law in general among the average practitioner in this field and this fact must be taken into account when evaluating the operation of the system. The truth is that EAWs and transfer of custodial sentence are simply a small part of the criminal justice system. The analysis of the case law in this area also shows that the system does not present much *legal* problems as such, which also explains that,

during the more than 10 years of existence of the EAW system, only a handful of cases have reached the Supreme Court.

The situation with regard to the transfer of custodial sentence for the purpose of enforcement is, however, a little different. There is a small dedicated unit within the Prison and Probation Service dealing with such matters, so there is good potential for this unit to develop some real expertise in the matter and take full account of both Swedish and EU law already when the initial decision to transfer is made. This, however, alleviate the problems faced by public counsels, who still cannot specialize in such matters. It is also a matter of chance which court is to hear an appeal against the decision of the Prison and probation Service.

All of the instruments examined in this study are based on the principle of mutual recognition, which in turn is built upon the fiction of mutual trust between the Member States. The analysis of the case law shows that this principle works very well indeed in Sweden; in fact, too well, one may say. The courts, as a rule, will not question the veracity of statements contained in an EAW. The evidential threshold for raising issues related to a ground of refusal or violation of human rights is very high. In fact, before the decision of the CJEU in *Aranyosi and Căldăraru*, allegations of poor prison conditions have not been successful in the surrender proceeding. Even after the series of recent decisions refusing transfer to Romania, the public counsels still regret that in practice the chance of succeeding is limited to art 3 ECHR, while they consider that risks of violations of arts 5, 6, 7 and 8 ECHR are taken much less seriously.

Two final observations may be made concerning the transfer of custodial sentence. First, the combination of an administrative process and judicial proceedings in the general court systems means that there often may be uncertainty as to what rules are applicable. There are in fact few detailed rules in such matters corresponding to those applicable to a criminal suspect. Admittedly the Swedish act implementing the FD provides some basic safeguards of the sentenced person's rights, but much of the protection is based on the general principles of administrative law. Second, in the cases appealed to the general courts, the Prison and Probation Service does not seem to have, informally, consulted with the executing Member State before making its decision in cases where it is possible, pursuant to the rules permitted by the FD, to transfer a sentence to the other Member State without its consent. This is a practice that seems to be at odds with the spirit of the FD, which puts the social rehabilitation of the sentenced person at the forefront.