



## Transfer of sentenced prisoners

Have you been sentenced to a custodial sentence or measure involving deprivation of liberty in an EU country outside your country of residence but wish to serve your sentence or other measure involving deprivation of liberty in your home country?

This is possible based on Council Framework Decision 2008/909/JHA of 27 November 2008 (hereinafter: "**Framework Decision**"), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 on trials in the absence of the person concerned (hereinafter: "**Framework Decision 2009/299**").

### I. Background

If you have been sentenced to imprisonment or measures involving deprivation of liberty in a foreign country, you may have to spend years isolated from the outside world in a country whose language you may not speak. Your family, friends, colleagues etc. would only be able to see you during visiting hours for a certain period of time. It should be clear that this is extremely stressful for every convicted person and their relatives and also counterproductive for the intended reintegration of the convicted person into society through a prison sentence. It is undisputed - based on relevant surveys, research and statistics - that reintegration into society works best in the country with which the strongest ties exist. As the execution of sentences imposed on foreign nationals is often limited to custody in practice, transferring the execution of the sentence to the sentenced person's home country (the so-called executing country) takes better account of the concept of resocialization.

In this context, the Framework Decision regulates the procedure for transferring a sentenced person to their home state.

### II. Legal aspects

According to recital (the recitals are a kind of justification for the adoption of legal acts (in this case the Framework Decision)) No. 9 of the Framework Decision, the enforcement of the sentence in the executing State should promote the social rehabilitation of the sentenced person.

To this end, the competent authority of the issuing State (this is the State in which the judgment against the sentenced person was handed down) should ascertain whether the enforcement of the sentence by the executing State serves to achieve the objective of the social rehabilitation of the sentenced person. The term "issuing state" is probably used because a "certificate" is issued in the issuing state for the executing state to initiate the proceedings.

Aspects such as the sentenced person's attachment to the executing state should be taken into account and whether they regard it as the place of family, linguistic, cultural, social, economic or other ties to the executing state.

However, the Convention (the Framework Decision) does not create an obligation for the Member States to agree to a transfer request.



The Framework Decision applies to all EU citizens and third-country nationals who are resident in an EU Member State. For foreign nationals who are not resident in an EU Member State, other international instruments of judicial cooperation apply, such as the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 (hereinafter: "**1983 Council of Europe Convention**") and the Additional Protocol to that Convention of 18 December 1997 (hereinafter: "**1997 Additional Protocol**").

This Convention of 1983 also formed the first basis for facilitating cross-border transfers within the EU. With effect from 5 December 2011, the Framework Decision replaced the 1983 Council of Europe Convention and the 1997 Additional Protocol for the EU Member States.

The Framework Decision applies to the transfer of prisoners who are continuing to serve their sentence and not to the deportation of offenders who have already served their sentence and are therefore no longer subject to criminal proceedings.

The Framework Decision provides for transfers to the following countries:

- Transfer to the Member State of nationality of the sentenced person where he or she lives.

Determining where a person lives is an important aspect of the correct application of the Framework Decision and is directly linked to the mandatory nature of this provision. If this condition is not met, the consent of the sentenced person is often required for the transfer of the sentence. The "State in which the sentenced person lives" should be understood to mean the place with which that person is connected by virtue of habitual residence and aspects such as family, social or professional ties. According to the Court's interpretation, the term "domicile" means that the person concerned "has established his actual residence there and is 'staying' there if, as a result of a continuous stay of a certain duration in that Member State, he has established links with that State such as are inherent in a domicile".

- Transmission to the Member State to which the person will be deported.

Accordingly, the judgement and the certificate may also be forwarded to the Member State of nationality of the sentenced person to which he or she will be deported after release from prison, even though he or she does not live there.

The prerequisite for this is that the underlying expulsion or deportation order is contained in the judgement or in a court decision or administrative decision or other measure taken because of the judgement.

- Transmission to another Member State which consents to the transmission.

The third case to which the Framework Decision applies occurs when the issuing State wishes to forward the judgment and the certificate to a Member State other than the Member State of nationality where the sentenced person lives or to which he or she will be deported on the



basis of an expulsion or deportation order. This may, for example, be the Member State in which the sentenced person resides or is studying, or the Member State of which the person is a national but in which he or she does not live and to which he or she will not be deported.

### **III. Procedure**

The Framework Decision provides for a standardized procedure in which the issuing State transmits the following documents to the executing State:

1. the final judgement on the basis of which a person has been sentenced to a custodial sentence or other measure involving deprivation of liberty, i.e. that all national remedies against the decision have been exhausted or the time limits for such remedies have expired.
2. the so-called certificate: a form containing the information required for the transfer, which is attached to the Framework Decision as Annex I.
3. a statement by the sentenced person.

### **IV. Duration of the procedure**

The Framework Decision provides for a maximum period of 90 days for recognizing the judgment (i.e. consent to transfer) and a further 30 days for carrying out the transfer. For this reason, if the period of imprisonment still to be served is less than six months, the executing state may not consider a transfer to be appropriate, which may result in the judgment not being recognized and thus the transfer for enforcement being refused.

### **V. Practice**

In practice, we handle cases in which the client wishes to be transferred to his or her home country in such a way that we submit a corresponding transfer application on behalf of our client, in which all relevant facts are summarized and - as far as possible - proven. The focus here is on demonstrating - and this is usually the decisive factor in the question of whether the executing state accepts that (remaining) imprisonment in the executing state should be given priority over further imprisonment in the issuing state in the interests of successful resocialization and that the convicted person will serve his/her (remaining) sentence in the executing state in future - that the convicted person has a closer connection to his/her home state and that the (remaining) sentence should therefore be served in his/her home state.

As far as the duration of the procedure is concerned, however, we have found that the maximum duration of 120 days stipulated by the Framework Decision has (so far) never been adhered to in practice. Realistically speaking, a procedure duration of six to nine months must be expected. We see the reasons for this mainly in the length of time it takes to translate documents, problems in interpreting the judgement (e.g. the rules on early release in other Member States), delays in sending documents, delays in processing and/or failure to process requests and the exchange of information



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between the bodies involved in the physical transfer modalities. In fact, the only thing that helps here is constant enquiry combined with a request to expedite the process.