

Portugal, Supreme Court of Justice, 48/12.2YREVR.S1, 5 June 2012

Deciding bodies and decisions

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Area of law

Freedom of expression -hate speech

Subject matter

Can the limitation to freedom of expression be a justification for a denial to enforce a European Arrest Warrant?

Summary Facts Of The Case

The Nuremburg-Fürth Regional Tribunal issued a European arrest warrant (EAW) regarding a German citizen (AA) who fled and was found in Portugal. According to the EAW, the convicted made several statements, in internet articles and public speeches (on May 8th, 2002 and January 11th, 2004), denying the crimes committed by the Third Reich against Jews during the II World War, considering it "the most profitable lie in the history of human race", insulting the Federal Republic of Germany and inciting hatred against Jews.

To comply with the EAW, the Portuguese authorities detained AA on April 11th, 2012. The Évora Court of Appeal (Appeal Court) judge confirmed the execution of the EAW and ordered AA's extradition.

AA appealed to the Portuguese Supreme Court of Justice (Supremo Tribunal de Justiça, STJ), which after a detailed reasoning on the arguments presented by the applicant, reaffirmed the decision of the Appeal Court.

In the decision under analysis, the STJ began its legal reasoning with a summary on the main arguments presented by the appellant for the non-execution of the EAW by Portuguese authorities. First, AA claimed that the German court's decision, and the consequent EAW issued against him, had political motivations which was, according to the former article 11(2)(e) of Law nº 65/2003, a ground for mandatory non-execution of the EAW. Secondly, the applicant invoked the double criminality condition, maintaining that, according to Portuguese Law, he had not committed any crime since his right to express freely that same opinion would be protected by the Constitution of the Portuguese Republic (Constituição da República Portuguesa, hereinafter CRP), namely articles 13, on the principle of equality, and 37, on freedom of expression and information. The double criminality condition is a ground for optional non-execution of the EAW, according to article 12(1)(a) of Law no. 65/2003, which foresees that Portuguese authorities can refuse to execute an EAW when the act which resulted in the issuing of the EAW does not constitute an offence under national law. Finally, AA claimed that if his extradition to Germany

would take place, he would not be granted a fair trial .

The Court advanced with considerations on the concept and evolution of the EAW. However, the more relevant reasoning of the decision is related to the second main argument presented by AA in the request for appeal – lack of double criminality – because, in this instance, the STJ made important remarks and drew relevant conclusions concerning the balance to be found between the constitutional right to freedom of expression and the criminalisation of hate speech.

AA claimed he was convicted for exercising his right to freedom of thought and expression, rights that should be granted to every citizen. The STJ admitted that freedom of expression is, indeed, protected by article 37 of the CRP. According to the Court, the right to freely express one's thought and opinions is a negative right of every citizen of not being prevented from expressing and disseminating his or her opinions. The STJ decision affirmed that this right cannot be restricted .

This is such a pronounced constitutional protection that it encompasses a prohibition of censorship even if the opinion which is being expressed is unconstitutional. Nonetheless, the STJ found that, still, the right to freedom of expression is not absolute and it can be limited when there is a collision with other rights with equal or higher constitutional value, for example the right to personal dignity, to a good name and reputation, (article 26 of the CRP) and that the violation of such limits can result in criminal or administrative punishment .

The Court carries on its reasoning by discussing article 240 of the Portuguese Criminal Code (Código Penal, hereinafter CP) on discrimination and incitement to hatred and violence . The Court clarifies that the legislator used the denial of genocide, war crimes and crimes against peace and humanity as an example in article 240(2). In fact, according to the STJ, the denial of genocide and other crimes of the same nature cannot be, in itself, criminalised due to the constitutional protection afforded to freedom of expression. That is the reason why article 240(2) requires that the denial of such crimes is accompanied by the offender's intention to provoke acts of violence, inflict libel, threaten or incite violence and hatred against a person or a group of people, i.e., act committed by the offender constitutes or is accompanied by hate speech.

The Court proceeds by mentioning the Council Framework Decision 2008/913/JHA by agreeing that the mere dissemination of opinion on the occurrence, or not, of a certain fact, without making any value judgement cannot be considered as a reason to restrict the right to freedom of expression. Instead, the act which is criminalised and punishable by law is the diffusion of behaviours and ideas which “justify” a genocide or the denial of genocide as a manifestation of hate speech.

When considering whether the declarations of the applicant, that crimes against Jews were not committed by the Third Reich and that such idea is the “most profitable lie in the history of humanity”, are a criminal offence under Portuguese national law, the STJ declares that AA's conduct can, indeed, be considered as an offence under article 240(2) of the CP. To reach this conclusion, the Court notes that the applicant did not just denied the genocide, but he also made a clear negative judgement which was offensive to the victims, their families and friends by declaring it as a “profitable lie”.

The Court, thus, considers that the statements made by AA, in the context of his denial of the crimes committed during the II World War by the Third Reich, were offensive to the Jews and constitute hate speech. This means, as the Court affirms, that the act of the appellant exceeds the limits of the constitutional protection afforded to the right to freedom of expression and, consequently, is a criminal offence under article 240(2) of the CP. Therefore, the double criminality condition was verified and the STJ decided to consider the request for appeal unfounded and confirmed the decision of the Court of appeal.

Relation to the scope of the Charter

The case is highly relatable with the Charter because, in the core of the STJ's reasoning is a discussion on the restriction of the right to freedom of expression. Therefore, articles 11, on freedom of expression, as well as article 51(1), on the scope of guaranteed rights, of the Charter are directly related to the case under analysis by the STJ. However, the Charter was not mentioned in the decision of the STJ, the relevant point of reference in this case was instead the ECHR.

Sources - EU and national law

Council Framework Decision 2002/584/JHA on the EAW

Council Framework Decision 2009/299/JHA

Council Framework Decision 2008/913/JHA
