Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

5 June 2014*

(Convention implementing the Schengen Agreement — Article 54 — 'Ne bis in idem' principle — Scope — Order made by a court of a Contracting State finding that there is no ground to refer a case to a trial court because of insufficient evidence — Possibility of reopening the criminal investigation in the case where new facts and/or evidence come to light — Concept of person whose trial has been 'finally disposed of' — Criminal prosecution in another Contracting State of the same person in respect of the same acts — Preclusion of further prosecution and application of the ne bis in idem principle)

In Case C-398/12,

REQUEST for a preliminary ruling under Article 35 EU from the Tribunale di Fermo (Italy), made by decision of 11 July 2012, received at the Court on 29 August 2012, in the criminal proceedings against

M,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fourth Chamber, M. Safjan, J. Malenovský and A. Prechal, Judges,

Advocate General: E. Sharpston,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2013,

after considering the observations submitted on behalf of:

— Q and R, by C. Taormina and L.V. Mascioli, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello, avvocato dello Stato,

— the Belgian Government, by T. Materne and C. Pochet, acting as Agents,

— the German Government, by T. Henze and J. Kemper, acting as Agents,

— the Netherlands Government, by C. Schillemans, M. de Ree, C. Wissels and B. Koopman, acting as Agents,

— the Austrian Government, by A. Posch, acting as Agent,

* Language of the case: Italian.

— the Polish Government, by B. Majczyna, M. Arciszewski, M. Szpunar and M. Szwarc, acting as Agents,

— the Swiss Government, by D. Klingele, acting as Agent,

— the European Commission, by F. Moro and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed in Schengen on 19 June 1990 ('the CISA').

2 The request has been made in criminal proceedings brought in Italy against M, on the basis of the same acts as those which had been the subject of a parallel investigation in Belgium, on the ground that he had committed, between May 2001 and February 2004, on the territory of that latter Member State, acts of sexual violence against a child.

Legal context

European Convention for the Protection of Human Rights and Fundamental Freedoms

3 The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), has annexed to it Protocol No 7, signed at Strasbourg on 22 November 1984 and ratified by 25 Member States of the European Union ('Protocol No 7 to the ECHR'), Article 4 of which, entitled 'Right not to be tried or punished twice', is worded as follows:

'1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [ECHR].'

EU law

Charter of Fundamental Rights of the European Union

4 Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which is entitled 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence', is worded as follows:

'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

Protocol (No 19) on the Schengen *acquis*

5 Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290), states in Articles 1 and 2 that the Kingdom of Belgium and the Italian Republic are among the Member States to which the Schengen *acquis* applies.

Protocol (No 36) on transitional provisions

6 In accordance with Article 10(1) and (3) of Protocol (No 36) on transitional provisions, annexed to the FEU Treaty, the powers of the Court under Title VI of the EU Treaty, in the version in force prior to the entry into force of the Treaty of Lisbon, are to remain the same, for five years after the date of entry into force of the Treaty of Lisbon with respect to acts of the European Union which were adopted before the entry into force of that Treaty, including where they were accepted under Article 35(2) EU.

Declaration on the basis of Article 35(2) EU

7 It is apparent from the information concerning the date of entry into force of the Treaty of Amsterdam, published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56), that the Italian Republic made a declaration on the basis of Article 35(2) EU by which it accepted the jurisdiction of the Court to give preliminary rulings in accordance with the arrangements laid down in Article 35(3)(b) EU.

The CISA

8 The Schengen *acquis* includes the CISA. Title III of the CISA, entitled 'Police and Security', contains a Chapter 3, itself entitled 'Application of the *ne bis in idem* principle'. Under Article 54 of the CISA, which is in Chapter 3:

'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

Belgian law

9 Article 128 of the Belgian Criminal Investigation Code (the 'CIC') provides that, when a request is made for a person under investigation to be committed for trial, '[i]f the pre-trial chamber is of the opinion that the facts disclose no crime, offence or misdemeanour, or that there are no facts and/or evidence against the accused, it shall declare that the proceedings should not be continued'.

10 Article 246 of the CIC states:

'Where the indictment division has decided that there is no cause to send the case to trial, the accused may not be tried thereafter on the basis of the same facts, unless new facts and/or evidence become available.'

11 Article 247 of the CIC provides:

'Witness statements, documents and minutes which it was not possible to submit to examination by the indictment division, and which are capable either of strengthening the evidence that the indictment division found to be too weak or of presenting the facts in new ways which are useful in establishing the truth, are considered to be new facts and/or evidence.'

12 It is apparent from the documents before the Court that, in Belgium, the Cour de cassation (Court of cassation) has held that Articles 246 and 247 of the CIC govern not only decisions of the indictment division that a case should not proceed to trial, but also all instances in which investigatory courts, including the pre-trial chamber, have closed a criminal investigation by a finding having the same effect.

13 Article 248 of the CIC provides that, if new facts and/or evidence become available, the relevant senior police officer or examining magistrate is required to send copies of the documents and factual and/or evidentiary material to the senior prosecutor before the court of appeal. On request by the senior prosecutor, the president of the indictment division designates the judge before whom a new investigation is to proceed at the request of the prosecuting authority.

Italian law

14 Article 604 of the Italian Criminal Code provides that acts of sexual violence committed by Italian nationals may be prosecuted in Italy even if they were committed abroad.

The dispute in the main proceedings and the question referred for a preliminary ruling

15 M, an Italian citizen, resides in Belgium, where — following a series of reports made by Q, his daughter-in-law — he was the subject, in 2004, of criminal proceedings in respect of multiple acts of sexual violence or unlawful acts of a sexual nature, including indecent assault on a young person under the age of 16.

16 It was alleged that those acts were carried out in Belgium between May 2001 and February 2004 against N, his granddaughter, born on 29 April 1999, with the complicity of his son O, who is N's father.

17 At the conclusion of an investigation during which various items of evidence were collected and examined, the pre-trial chamber of the tribunal de première instance de Mons (Court of First Instance, Mons) (Belgium) made, by order of 15 December 2008, a finding that there was no ground to refer the case to a trial court because of insufficient evidence ('the order making a finding of "non-lieu"').

18 The indictment division of the cour d'appel de Mons (Court of Appeal, Mons) (Belgium) upheld that order making a finding of 'non-lieu' by judgment of 21 April 2009. The appeal against that judgment was dismissed by the Cour de cassation (Belgium) by judgment of 2 December 2009.

19 In parallel to the investigation carried out in Belgium, and following a complaint made by Q, on 23 November 2006, to the Italian police, criminal proceedings against M were opened before the Tribunale di Fermo (District Court, Fermo) on the basis of the same facts as those referred to in paragraphs 15 and 16 above.

20 On 19 December 2008, at the conclusion of an investigation which essentially followed the same course as the investigation carried out in Belgium, the examining magistrate of the Tribunale di Fermo committed M to be tried before the collegiate formation of that court.

21 At the hearing held on 9 December 2009 before the Tribunale di Fermo, M invoked the Cour de cassation's judgment of 2 December 2009 and the principle of *ne bis in idem*.

22 While acknowledging that the facts which had been the subject of investigations in both Belgium and Italy were identical, the public prosecutor and Q's lawyers disputed the existence of a judgment on the merits which had the force of *res judicata* and, in that respect, claimed that the order of 15 December 2008 making a finding of 'non-lieu' was not an obstacle to a subsequent reopening of the proceedings if new facts and/or evidence came to light.

23 The referring court states that that order making a finding of 'non-lieu' precludes the accused from being committed for trial unless new facts and/or evidence, as defined in Article 247 of the CIC, come to light.

24 The referring court also notes that, under Belgian law, the criminal investigation may be reopened on the basis of new facts and/or evidence only at the request of the public prosecutor.

25 In those circumstances the Tribunale di Fermo decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does a final judgment of "non-lieu" that terminates criminal proceedings after an extensive investigation but which permits the proceedings to be reopened in the light of new evidence, given by [a court of] a Member State of the European Union and a party to the Convention Implementing the Schengen Agreement (CISA), preclude the initiation or conduct of proceedings in respect of the same facts and the same person in another Contracting State?'

The question referred for a preliminary ruling

26 By its question the referring court asks, in essence, whether Article 54 of the CISA must be interpreted as meaning that an order making a finding that there is no ground to refer the case to a trial court which precludes, in the Contracting State in which that order was made, new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person become available, must be considered to be a final judgment, for the purposes of that article, thereby precluding new proceedings against the same person in respect of the same acts in another Contracting State.

27 As is clear from the actual wording of Article 54 of the CISA, no one may be prosecuted in a Contracting State for the same acts as those in respect of which his trial has been 'finally disposed of' in another Contracting State.

28 In order to determine whether a judicial decision constitutes a decision finally disposing of the case against a person, within the meaning of that article, it is necessary to be satisfied that that decision was given after a determination had been made as to the merits of the case (see, to that effect, Case C-469/03 *Miraglia* EU:C:2005:156, paragraph 30).

29 In this respect, the Court has held that a decision of the judicial authorities of a Contracting State by which an accused person is definitively acquitted because of the inadequacy of the evidence must be considered to be based on such a determination (see, to that effect, Case C-150/05 *van Straaten* EU:C:2006:614, paragraph 60).

30 It is therefore necessary to state that an order making a finding of 'non-lieu' at the end of an investigation during which various items of evidence were collected and examined must be considered to have been the subject of a determination as to the merits, within the meaning of *Miraglia* EU:C:2005:156, in so far as it is a definitive decision on the inadequacy of that evidence and excludes any possibility that the case might be reopened on the basis of the same body of evidence.

31 In that respect, it is apparent from the settled case-law of the Court that, for a person to be regarded as someone whose trial has been 'finally disposed of' in relation to the acts which he is alleged to have committed, for the purposes of Article 54 of the CISA, further prosecution must have been definitively barred, with the result that the decision at issue leads, in the Contracting State in which it was adopted, to the protection granted by the *ne bis in idem* principle (see, to that effect, Case C-491/07 *Turanský* EU:C:2008:768, paragraphs 32 and 35 and the case-law cited).

32 A decision which does not, under the law of the Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State (*Turanský* EU:C:2008:768, paragraph 36).

33 As is apparent from the decision making the reference, following the judgment delivered by the Cour de cassation on 2 December 2009, the order making a finding of 'non-lieu' acquired the force of *res judicata*. Therefore, further prosecution must be considered to be definitively barred, thus precluding, in the Kingdom of Belgium, any new criminal proceedings against M for the same acts and on the basis of the same body of evidence as that examined in the context of the proceedings which led to that order. Articles 246 to 248 of the CIC provide, in essence, that the proceedings can be reopened only on the basis of new facts and/or evidence, namely, in particular, evidence which has not yet been submitted for examination by the indictment division and which is capable of altering its finding of 'non-lieu'.

34 In addition, it should be noted that, as the Court found in paragraph 40 of its judgment in Case C-297/07 *Bourquain* EU:C:2008:708, in relation to a judgment delivered *in absentia*, the sole fact that that criminal procedure would, under national law, have necessitated the reopening of the proceedings does not, in itself, mean that the judgment cannot be regarded as 'final' for the purposes of Article 54 of the CISA.

35 Furthermore, it should be noted that, since the right not to be tried or punished twice in criminal proceedings for the same criminal offence is also set out in Article 50 of the Charter, Article 54 of the CISA must be interpreted in the light of that provision.

36 In this respect, it must be noted, first, that the assessment of the 'final' nature of the criminal ruling at issue must be carried out on the basis of the law of the Member State in which that ruling was made.

37 Second, it must be noted that, according to the explanations relating to Article 50 of the Charter, which have to be taken into consideration for the purpose of interpreting it (judgment in Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, paragraph 20 and the case-law cited), '[a]s regards the situations referred to by Article 4 of Protocol No 7, namely the application of the [*ne bis in idem*] principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR'. Given that Article 54 of the CISA makes the final nature of a judicial decision dependent, for the purposes of application of the *ne bis in idem* principle to possible prosecutions by another Contracting State, on whether or not that decision is final in the Contracting State in which it was made, that point in the explanations is relevant in the present case.

38 It follows from Article 4(2) of Protocol No 7 to the ECHR that the *ne bis in idem* principle set out in paragraph 1 of that article does not preclude the reopening of the case 'if there is evidence of new or newly discovered facts' which could affect the outcome of the case.

39 In this respect, it was held in the judgment of the European Court of Human Rights ('the ECtHR') in *Sergey Zolutukhin v. Russia*, no. 14939/03, § 83, ECHR 2009, that Article 4 of Protocol No 7 to the ECHR 'becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*.' On the other hand, extraordinary remedies are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the 'final' nature of the decision does not depend on their being used (*Sergey Zolutukhin v. Russia*, no. 14939/03, § 108, ECHR 2009).

40 In the present case, the possibility of reopening the criminal investigation if new facts and/or evidence become available, as provided for in Articles 246 to 248 of the CIC, cannot affect the final nature of the order making a finding of 'non-lieu' at issue in the main proceedings. While that possibility is not an 'extraordinary remedy', within the meaning of the case-law of the European Court of Human Rights just cited, it does involve the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed. Furthermore, in view of the need to verify that the evidence relied on to justify the reopening of the proceedings is indeed new, any new proceedings, based on such a possibility of reopening, against the same person for the same acts can be brought only in the Contracting State in which that order was made.

41 In the light of the foregoing considerations, the answer to the question is that Article 54 of the CISA must be interpreted as meaning that an order making a finding that there is no ground to refer a case to a trial court which precludes, in the Contracting State in which that finding was made, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person come to light, must be considered to be a final judgment, for the purposes of that article, precluding new proceedings against the same person in respect of the same acts in another Contracting State.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990, must be interpreted as meaning that an order making a finding that there is no ground to refer a case to a trial court which precludes, in the Contracting State in which that order was made, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person come to light, must be considered to be a final judgment, for the purposes of that article, precluding new proceedings against the same person in respect of the same acts in another Contracting State.

[Signatures]