

**Case C-489/19 PPU**

**Request for a preliminary ruling**

**Date lodged:**

26 June 2019

**Referring court:**

Kammergericht Berlin (Germany)

**Date of the decision to refer:**

26 June 2019

**Applicant:**

Generalstaatsanwaltschaft Berlin

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**KAMMERGERICHT  
(HIGHER REGIONAL COURT, BERLIN)**

**Order**

[...]

In the extradition case concerning

the Algerian national

NJ,

currently on remand in connection with another matter in Moabit prison [...],

alias

[...],

the 4th Criminal Chamber of the Kammergericht (Higher Regional Court) in Berlin, on 26 June 2019 [...], made the following order:

1. The decision on the permissibility of the extradition is deferred.

2. The following question is referred to the European Court of Justice for a preliminary ruling under Article 267 TFEU: **[Or. 2]**

Does the fact that a public prosecutor's office is required to act on instruction preclude it from effectively issuing a European arrest warrant even in the case where that decision is subject to a comprehensive judicial review prior to the execution of the European arrest warrant?

3. It is requested that the reference for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.

4. On account of the basis on which the order imposing detention was made, the status of the detention remains unchanged.

5. [...] [Appointment of a lawyer for the person sought]

6. [...] [Appointment of an interpreter for the person sought]

#### Grounds:

#### 1 I. Facts:

The Austrian authorities have issued a European warrant for the arrest of the person sought with a view to his extradition for purposes of criminal prosecution. Since 14 May 2019, the person sought has been on remand on a charge of theft pending prosecution [...] by the public prosecutor's office at the Amtsgericht Berlin (Local Court, Berlin). When questioned by the judge on 24 May 2019, in accordance with Paragraphs 22 and 28 of the IRG (Gesetz über die internationale Rechtshilfe in Strafsachen) (Law on international mutual legal assistance in criminal matters), he declared himself unwilling to consent to simplified extradition (Paragraph 41 of the IRG); he did, however, waive entitlement to the speciality rule (Article 27 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States). By order of 29 May 2019, this Chamber (on account of doubts relating to the authority issuing the European arrest warrant **[Or. 3]**) ordered only the provisional detention pending extradition of the person sought, who is noted as already being in custody on other grounds. The Generalstaatsanwaltschaft Berlin (Principal Public Prosecutor's Office, Berlin) applied [to this Chamber] for a declaration as to the permissibility of the extradition (Paragraph 29(1) of the IRG). This Chamber has deferred its decision on that application and referred the [aforementioned] question to the European Court of Justice [...].

2 1. From the point of view of its content, the European arrest warrant issued by the Public Prosecutor's Office, Vienna on 16 May 2019 and endorsed by order of the Landesgericht Wien (Regional Court, Vienna) on 20 May 2019 [...] meets the requirements laid down in Paragraph 83a(1) of the IRG. It shows that the

person sought is already the subject of an arrest warrant, bearing the same reference number, which was issued by the Public Prosecutor's Office, Vienna on 14 May 2019 and endorsed by the same court on 16 May 2019, and by which the person sought is accused of the following offences committed in Vienna:

- 3 (a) It is alleged that, on 9 August 2018, he, in conjunction with an accomplice, broke into a coach belonging to the undertaking SQ Equipment Leasing Polska and stole from there a camera and camera bag, two rucksacks, a purse and CYN 1 000 in cash. In the course of this act, he is also alleged to have suppressed the use [within the meaning of Paragraph 229 of the Austrian Strafgesetzbuch (Criminal Code)] of a credit card belonging to a victim of his offence.
- 4 (b) It is alleged that, on 10 August 2018, he, in conjunction with an accomplice, broke into a vehicle belonging to the undertaking W.E. Blaschitz in order to steal valuables from there, but fled empty-handed when the two perpetrators were discovered by a third party whom the person sought is alleged to have persuaded not to give chase by brandishing a knife.
- 5 (c) It is alleged that, on 17 August 2018, he, in conjunction with an accomplice, stole a handbag containing a purse, a mobile phone and a pair of glasses worth a total of EUR 950 together with EUR 50 in cash, the person sought allegedly having taken the bag while his accomplice distracted the victim's husband. **[Or. 4]**
- 6 (d) It is alleged that, on 18 August 2018, he, in conjunction with an accomplice, broke into a car belonging to a third party by smashing the side window in order to steal valuables from it, but found nothing there.
- 7 2. The extradition of the person sought is permissible in principle too.
- 8 The acts with which the person sought is charged are extraditable criminal offences (Paragraphs 3 and 81 of the IRG), the double criminality of the charges of theft (theft on a commercial scale and, in some instances, attempted theft) not requiring examination, in accordance with Paragraph 81(4) of the IRG, since they are offences defined by the law of the requesting State as punishable by a custodial sentence of a maximum period of at least three years, as provided for in Article 2(2) of the Framework Decision on the European arrest warrant. The other acts are punishable both under the law of the requesting State (Paragraphs 105(1) and 241e(3) of the Austrian Criminal Code) and under German law (Paragraphs 240 and 274(1), point 1, of the [German] Criminal Code (StGB)) and are punishable under the law of the requesting State by a custodial sentence of a maximum period of at least twelve months.
- 9 There do not appear to be any obstacles that would preclude the extradition of the person sought.
- 10 II. Reasons for the reference for a preliminary ruling

In the light of the judgment of the European Court of Justice of 27 May 2019 in the joined cases against *OG* (C-508/18) and *PI* (C-82/19 PPU), this Chamber considers itself to be prevented from declaring extradition to be permissible on the basis of the European arrest warrant issued by the Public Prosecutor's Office, Vienna. It has doubts, however, as to whether that judgment is applicable also to Austrian public prosecutor's offices.

- 11 1. In accordance with Paragraph 2(1) of the Austrian Staatsanwaltschaftsgesetz (Law on public prosecutor's offices) (StAG), [Or. 5] Austrian public prosecutor's offices are required to act on instruction. Paragraph 2(1) of the StAG is worded as follows:
- 12 At the seat of each Landesgericht (Regional Court) exercising criminal jurisdiction, there shall be a public prosecutor's office, at the seat of each Oberlandesgericht (Higher Regional Court) a higher public prosecutor's office, and at the Oberster Gerichtshof (Supreme Court) the principal public prosecutor's office. The public prosecutor's offices shall be directly subordinate to, and act on the instructions of, the higher public prosecutor's offices, just as the latter and the principal public prosecutor's office shall be directly subordinate to, and act on the instructions of, the Federal Minister for Justice.
- 13 In accordance with the findings of the aforementioned judgment of the Court of Justice of 27 May 2019, therefore, an Austrian public prosecutor's office cannot be an issuing authority within the meaning of Article 6(1) of the Framework Decision on the European arrest warrant.
- 14 2. However, the proceedings for the adoption of a European arrest warrant in Austria differ from the situation forming the basis of the judgment of 27 May 2019 inasmuch as, under Austrian law, decisions on the adoption of European arrest warrants are not made by the public prosecutor's offices alone.
- 15 Paragraph 29 of the Austrian Gesetz über die Justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (Law on judicial cooperation in criminal matters with the Member States of the European Union) (EU-JZG) provides that the European arrest warrant is to be subject to judicial endorsement, as was the case in this instance too. The first sentence of Paragraph 29(1) of the EU-JZG is worded as follows:
- 16 The public prosecutor's office shall make an order for arrest by issuing a court-endorsed European arrest warrant and, where appropriate, have an alert relating to the person sought entered into the Schengen Information System, in accordance with Article 95 of the Convention implementing the Schengen Agreement, by the competent security authorities, in cases where there are grounds for initiating a search with a view to the arrest of the person sought in at least one Member State.
- 17 The judicial endorsement procedure is governed by Paragraph 105 of the Austrian Strafprozessordnung (Code of Criminal Procedure) (StPO): [Or. 6]

- 18 (1) The court shall decide on applications for the imposition and continuation of detention on remand as well as applications for the endorsement of certain other enforcement measures. For the purposes of the implementation of a measure which it has endorsed (Paragraph 101(3)), the court shall lay down a period on the expiry of which, if the measure in question has not been implemented, the endorsement shall lapse. In the case of an order for the issue of an arrest alert under Paragraph 169, that period shall not include the period of validity of the alert, although the public prosecutor's office shall review at least once a year whether the conditions of arrest still obtain.
- (2) To the extent necessary on legal or factual grounds for the purposes of deciding on an application under subparagraph 1, the court can order further investigations by the Kriminalpolizei (Criminal Police) or undertake them of its own motion. It can also require the public prosecutor's office and the Criminal Police to provide factual clarifications from the case file and to submit a report on the implementation of the endorsed measure and the further investigations. Even after the imposition of detention on remand, the court can continue to order that copies of the documents referred to in Paragraph 52(2), points 2 and 3, be submitted to it.
- 19 In carrying out this examination, the court must take into account the criteria of lawfulness and proportionality, in accordance with Paragraph 5(1) and (2) of the StPO:
- 20 (1) When exercising their powers and taking evidence, the Criminal Police, public prosecutor's office and the court shall interfere with individuals' rights only to the extent to which this is expressly provided for in law and is necessary to enable them to carry out their tasks. Any such impairment of legal interests must be proportionate to the seriousness of the offence, the degree of suspicion and the outcome sought.
- (2) From the various effective investigative and enforcement measures available to them, the Criminal Police, the public prosecutor's office and the court shall take those which least adversely affect the rights of the persons concerned. Powers granted by law shall in any circumstances obtaining in the proceedings be exercised in such a way as to avoid unnecessary publicity, respect the dignity of the persons concerned and safeguard their rights and their interests that are worthy of protection.
- 21 In accordance with Paragraph 87(1) of the StPO, the endorsement granted by the court is open to challenge by way of a complaint.
- 22 3. According to the clarification which it issued following the judgment of the Court of Justice of 27 May 2019, the Austrian Government takes the view that that judgment [Or. 7] does not affect Austria because the procedure described above is, in its view, consistent with paragraph 75 of that judgment. This Chamber does not share that view, since, on its understanding, the conditions set out in

paragraphs 74 and 75 must be present not — as the Austrian Government evidently appears to assume — alternatively but cumulatively.

23 This Chamber is of the opinion, however, that the Austrian procedure, under which the external-facing public prosecutor's office, as the issuing authority within the meaning of Article 6(1) of the Framework Decision on the European arrest warrant, does not in fact have the sole power under national law to decide on the adoption of the European arrest warrant, which lies rather with the endorsing court, and thus with an unequivocally independent judicial authority, does satisfy in full the legal interests of the person concerned which the Court of Justice highlights in the judgment of 27 May 2019. It therefore refers to the Court of Justice the question set out in the operative part of this order.

24 III. Reasons for requesting the application of the urgent preliminary ruling procedure

The question referred for a preliminary ruling concerns one of the areas referred to in Article 107(1) of the Rules of Procedure of the Court of Justice. The person sought is currently on remand pending prosecution in Germany, although this may come to an end at any time. In accordance with the first sentence of Paragraph 16(2) of the IRG, the duration of the provisional detention pending extradition that must be executed thereafter if it does is limited to two months. If a normal preliminary ruling procedure is conducted, there is a concern that the person sought will have to be released from detention before judgment is given and may disappear again.

[...]