

Case C-625/19 PPU

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

22 August 2019

Referring court:

Rechtbank Amsterdam (Netherlands)

Date of the decision to refer:

22 August 2019

Applicant:

Openbaar Ministerie

Defendant:

XD

Subject matter of the action in the main proceedings

Application lodged by the Officier van Justitie (Public Prosecutor) for dealing with a European arrest warrant ('EAW').

Subject matter and legal basis of the request for a preliminary ruling

This request, brought under Article 267 TFEU, concerns (1) the conditions under which a Public Prosecutor can be regarded as an issuing judicial authority within the meaning of Article 6(1) of Framework Decision 2002/584 and (2) the requirement that there must be the possibility of instituting court proceedings to challenge the decision to issue an EAW.

Question referred

Can a Public Prosecutor who participates in the administration of justice in the issuing Member State, who acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant, and

who has issued an EAW, be regarded as an issuing judicial authority within the meaning of Article 6(1) of Framework Decision 2002/584/JHA if a judge in the issuing Member State has assessed the conditions for issuing an EAW and, in particular, its proportionality prior to the actual decision of that Public Prosecutor to issue the EAW?

Provisions of EU law cited

Articles 1 and 6 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

Provisions of national law cited

Article 1 of the Overleveringswet (Law on the surrender of persons) (Stb. 2004, 195).

Brief summary of the facts and the procedure in the main proceedings

- 1 XD was arrested in the Netherlands on 28 May 2019 on the basis of an EAW issued by the Swedish Prosecution Authority on 27 May 2019. The EAW seeks the surrender of the requested person for the purposes of prosecution in Sweden. He is suspected in Sweden of having smuggled heroin and cocaine, along with others, in an organised context, to countries in Europe, including Sweden. The EAW in question is based on a national arrest warrant issued by the Göteborgs Tingsrätt (First-instance Court, Gothenburg, Sweden) on 27 May 2019.
- 2 On 29 May 2019, the Netherlands Public Prosecutor lodged an application for the consideration of the EAW. The proceedings were stayed twice. In the meantime, further questions were put to the Swedish issuing authority. In Sweden this is the Prosecution Authority. The latter was designated as the competent authority within the meaning of Article 6(1) of Framework Decision 2002/584.
- 3 The questions were put to the Swedish issuing authority in order to assess whether the issuing of an EAW by that authority was compliant with the requirements laid down by the Court of Justice of the European Union ('the Court of Justice') in its judgment of 27 May 2019, *OG and PI* (the Public Prosecutor's Offices of Lübeck and of Zwickau), C-508/18 and C-82/19 PPU, EU:C:2019:456.
- 4 In the opinion of the referring court, it follows from that judgment that a Public Prosecutor can be regarded as the issuing judicial authority if he participates in the administration of justice in the issuing Member State and operates independently and if it is possible to institute court proceedings challenging the decision of the Public Prosecutor to issue an EAW.

Main submissions of the parties to the main proceedings

- 5 The Public Prosecutor's Office, as the applicant in the present case, argues that the criterion applied by the national court in its decision on the issuing of the EAW is materially in accordance with the requirements of the *OG and PI* judgment, with the result that the Swedish Prosecution Authority was correctly designated as the issuing authority.

Brief summary of the reasons for the referral

- 6 On the basis of the information provided by the Swedish authorities, the finding of the referring court with regard to the position taken by the Public Prosecutor's Office is that a Swedish Public Prosecutor participates in the administration of justice in Sweden and acts independently; he is not exposed in an individual case to the risk of being directly or indirectly directed by, or of receiving instructions from, the executive, for example, from a Minister for justice, in the context of the adoption of a decision on the issuing of an EAW.
- 7 The Swedish Public Prosecutor thus meets at least the first two of the requirements set out in paragraph 4 above for classification as an 'issuing judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584. The Court of Justice set out those requirements in paragraphs 73 and 74 of the *OG and PI* judgment.
- 8 However, according to the referring court, it appears from the information provided that in Sweden there is no right to institute court proceedings to challenge the decision of the Public Prosecutor to issue an EAW. In view of that, in the present case the EAW may not have been issued by a judicial authority within the meaning of Article 6(1) of Framework Decision 2002/584.
- 9 According to the referring court, the requirement that it must be possible to institute court proceedings is evident from paragraph 75 of the *OG and PI* judgment, in which the Court of Justice stated: 'In addition, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, while participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.'
- 10 The words 'such an arrest warrant' can only refer to the 'European arrest warrant' and leave no scope for interpreting them as referring to an order other than a EAW, in particular, not to the national arrest warrant underlying the EAW.
- 11 Furthermore, in paragraph 67 of the *OG and PI* judgment, the Court of Justice distinguishes a dual level of protection of procedural and fundamental rights. The

first level concerns the protection when the national arrest warrant is issued and the second level indicates the protection when the EAW is issued.

- 12 The referring court notes that, in the present case, the Swedish Public Prosecutor has argued that, in view of paragraph 68 of the *OG and PI* judgment, the criterion of paragraph 75 does not apply. In other words, it would suffice that a decision which meets the requirements of effective legal protection be taken at only one of the two levels of protection referred to in paragraph 68.
- 13 According to the referring court, it follows from paragraph 68 that the two levels of protection entail, inter alia, that a decision meeting the requirements inherent in effective judicial protection should be adopted, ‘at least’, at one of the two levels. This means that where the EAW has been issued by an authority which, while participating in the administration of justice, is not a judge or a court, the national arrest warrant must have been issued by a judge or a court.
- 14 In paragraph 69 of the *OG and PI* judgment, the Court of Justice held as follows in that regard: ‘It follows that, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, the national judicial decision, such as a national arrest warrant, on which the European arrest warrant is based, must, itself, meet those requirements.’
- 15 It must therefore be inferred from the aforementioned paragraph 68 that a decision of a judge or a court is required on at least one of the two levels. It is clear from paragraph 70 that, in the situation as described in paragraph 69, the level of protection at national level — namely, the national arrest warrant on which the decision to issue the EAW is based — is guaranteed.
- 16 It follows from paragraphs 71 and 72 of the aforementioned judgment that it is then the responsibility of the authority which takes the decision to issue the EAW to ensure the second level of protection, ‘even where the European arrest warrant is based on a national decision delivered by a judge or a court’.
- 17 In the context of that second level of protection, the first requirement is that the issuing judicial authority, when taking the decision to issue an EAW, ‘is not exposed [...] to any risk of being subject, inter alia, to an instruction in a specific case from the executive’ (paragraphs 73 and 74). In the event that the competence to issue an EAW has been conferred on a (fully independent) authority which, while participating in the administration of justice, is not itself a court, it is also required (‘in addition’ in paragraph 75) that the decision to issue an EAW and, inter alia, the proportionality of such a decision, must be capable of being the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, in other words, of proceedings before a judge or a court.
- 18 Nothing in the wording of the aforementioned paragraph 68 — in particular, not the words ‘at least’ — precludes the requirement laid down in paragraph 75 from

being imposed if the decision was taken at national level by a judge or judicial authority. Paragraph 68 requires merely that a judge or a court either take the national decision or issue the EAW. In the former case, paragraph 75 adds that a decision to issue an EAW taken by an authority other than a judge or a court must be capable of being the subject of court proceedings before a judge or a judicial authority.

- 19 The requirements set out in paragraphs 75 and 68 of the *OG and PI* judgment therefore stand side by side.
- 20 This also follows from the judgment of 27 May 2019, *PF* (Prosecutor General of Lithuania), C-509/18, EU:C:2019:457, which was delivered on the same day as the *OG and PI* judgment. In that case, the national arrest warrant was issued by a court (paragraphs 22 and 54 of the judgment), moreover, the Prosecutor General of Lithuania participated in the administration of criminal justice in Lithuania (paragraph 42) and there was a guarantee that the Prosecutor General of Lithuania is independent of the executive, but the referring court was nevertheless obliged to examine ‘whether a decision of the Prosecutor General [...] to issue a European arrest warrant may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection’ (paragraph 56).
- 21 Even if the national arrest warrant has been issued by a judge or a court, there must be the possibility of bringing court proceedings before a judge or a court against the decision to issue an EAW, if that decision was taken by an authority other than a judge or a court. In a previous decision of 5 July 2019, the referring court has already described that issue as ‘*éclairé*’. Since what is at issue in the present case is a decision to issue an EAW taken by the Swedish Public Prosecutor’s Office and thus not by a judge or a court, according to the letter of the two judgments of 27 May 2019 both requirements as referred to in paragraphs 68 and 75 of the *OG and PI* judgment must be met.
- 22 However, following the two judgments of 27 May 2019, it has become apparent to the referring court in various cases concerning several Member States that the laws of the Member States concerned do not provide for court proceedings to be brought against a decision to issue an EAW as referred to in paragraph 75 of the *OG and PI* judgment. In a number of those cases it has been argued that the criterion applied by the national court in its decision on the issuing of the national arrest warrant materially meets the requirements of that paragraph.
- 23 That is also the case here. Although Swedish law does not provide for court proceedings to be brought against a decision to issue an EAW as referred to in paragraph 75 of the *OG and PI* judgment, the information from the Swedish authorities suggests that the proportionality of the issuing of the EAW is addressed during the examination of the request for a national arrest warrant. Moreover, the information provided by the Swedish Public Prosecutor on the proceedings at the XD hearing which was devoted to the national arrest warrant

shows that it was openly discussed at that hearing that the purpose was to issue an EAW in order to have XD arrested and subsequently transferred to Sweden.

- 24 The foregoing raises the question whether a judicial assessment when issuing the national judicial decision — and thus prior to the actual decision of the Public Prosecutor's Office to issue the EAW — of, inter alia, the proportionality of the possible issuing of an EAW, is materially in accordance with the principles expressed in the condition that a decision of the Public Prosecutor's Office to issue an EAW must be capable of being the subject of court proceedings which meet in full the requirements inherent in effective judicial protection.
- 25 In answering that question, the referring court considers it important that, from the point of view of effective judicial protection against a disproportionate decision to issue an EAW, the assessment of that proportionality should take place *ex nunc*. Although in the present case the national judicial decision and the decision to issue the EAW were taken on the same day, in general, some time may have elapsed between the taking of the national judicial decision — and thus the prior assessment of the proportionality of the issuing of an EAW — and the issuing of an EAW. During that time, new facts and circumstances may have come to light which are relevant to the proportionality of issuing an EAW. In such a case, a prior judicial assessment would not be capable of providing effective judicial protection against a disproportionate decision to issue an EAW. If the question had to be answered in the affirmative, it would therefore be logical in any event to lay down the condition that the actual decision to issue the EAW should be taken as soon as possible after the assessment of proportionality.
- 26 The Court of Justice has not yet addressed the question set out in paragraph 24 above. Various issuing authorities from several Member States have taken the view that that question must be answered in the affirmative, whereas the wording of the *OG and PI* judgment points to a negative answer. It is therefore desirable to refer this question to the Court of Justice.
- 27 The answer to that question is, moreover, necessary for the decision to be taken by the referring court.
- 28 If a prior assessment of, in particular, the proportionality of issuing an EAW by the court which has issued the national arrest warrant does *not* materially comply with the principles expressed in the condition that the decision of the Public Prosecutor to issue an EAW must be capable of being the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, then the EAW cannot be considered by the referring court and a decision cannot be taken on the surrender request.
- 29 If such a prior assessment of the proportionality of issuing an EAW *does* materially comply with those principles, then the referring court must consider the substance of the EAW and make a substantive ruling on its implementation.

- 30 The referring court asks the Court of Justice to deal with this request for a preliminary ruling under the urgent procedure as referred to in the fourth paragraph of Article 267 TFEU and Article 107 of the Rules of Procedure.
- 31 The requested person is in detention pending surrender while awaiting the decision on the surrender request. The referring court cannot take that decision as long as the Court of Justice has not answered the questions referred. The prompt reply of the Court of Justice therefore has a direct and decisive influence on the duration of the detention pending surrender of the requested person.

WORKING DOCUMENT