

Anonymised version

Translation

C-566/19 — 1

Case C-566/19

Request for a preliminary ruling

Date lodged:

25 July 2019

Referring court:

Cour d'appel (chambre du conseil) (Luxembourg)

Date of the decision to refer:

9 July 2019

Appellant:

JR

[...]

LA CHAMBRE DU CONSEIL DE LA COUR D'APPEL (THE COUNCIL CHAMBER OF THE COURT OF APPEAL, LUXEMBOURG)

By declaration of 19 June 2019 made to the registry of the tribunal d'arrondissement de et à Luxembourg (District Court of and in Luxembourg), JR duly appealed against the order made on the same day by the chambre du conseil du tribunal d'arrondissement (Council Chamber of the District Court, Luxembourg) [...]:

- ruling that it did not have jurisdiction to hear the application for a declaration of invalidity of the European arrest warrant issued in respect of JR,

[...]

ruling that JR had to be surrendered to the French authorities for the purposes of conducting a criminal prosecution in connection with the offences referred to in the European arrest warrant of 24 April 2019 issued by Virginie BRELURUT, Deputy Principal Prosecutor attached to the Public Prosecutor's Office at the Tribunal de Grande Instance de Lyon (Regional Court, Lyon, France). [**Or. 2**]

[...]

The appellant takes the view, first, that his surrender should be refused because the chambre du conseil de première instance (the Council Chamber of the first instance court) did not give its ruling within the statutory period. Furthermore, he requests that the European arrest warrant be declared invalid on the ground that the judicial authority which issued it is not a ‘judicial authority’ within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 since, according to the appellant, the French Public Prosecutor’s Office may be subject to indirect instructions from the executive, interference which is contrary to the criteria established by the Court of Justice of the European Union (CJEU) prohibiting any such influence, whether direct or indirect, by the executive on the authority issuing the European arrest warrant. In the alternative, he requests that a request for a preliminary ruling be submitted to the CJEU.

The lawyer representing the Parquet général (Prosecutor-General) argues that the grounds of appeal raised should be rejected. He asks the present court to find that the issuing authority, even though it is a public prosecutor’s office, nevertheless satisfies the criterion of independence described by the CJEU. He takes the view, however, that, in the event of any doubt about this criterion, a request for a preliminary ruling must be made.

[...]. **[Or. 3]** [...] (Rejection of the first ground of appeal relating to a statutory period).

The CJEU, in two judgments of 27 May 2019, interpreted the concept of ‘issuing judicial authority’, within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, (judgments of 27 May 2019, *OG and PI* (Public Prosecutors’ Offices in Lübeck and Zwickau, Germany), C-508/18 and C-82/19 PPU, EU:C:2019:456, and *PF* (Prosecutor General of Lithuania), C-509/18, EU:C:2019:457).

The CJEU found:

- that although, in accordance with the principle of procedural autonomy, the Member States may designate, in their national law, the ‘judicial authority’ with the competence to issue a European arrest warrant, the meaning and scope of that term cannot be left to the assessment of each Member State,
- that the words ‘judicial authority’, contained in that provision, are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, *inter alia*, ministries or police services which are part of the executive,

- that it follows that the concept of a ‘judicial authority’, within the meaning of Article 6(1) of Framework Decision 2002/584, is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State and that an authority, such as a public prosecutor’s office which is competent, in criminal proceedings, to prosecute a person suspected of having committed a criminal offence so that that person may be brought before a court, must be regarded as participating in the administration of justice of the relevant Member State.
- that the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person,
- that the second level of protection of the rights of the person concerned means that the judicial authority competent to issue a European arrest warrant by virtue of domestic law, must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant, **[Or. 4]**
- that the ‘issuing judicial authority’ must therefore be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive,
- that the issuing judicial authority must be able to act independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant, such independence requiring that there should be statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive,
- that, in addition, 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 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 that Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection,

in order to conclude that the concept of ‘issuing judicial authority’ within the meaning of the Framework Decision, does not include public prosecutors’ offices

of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant, but that, on the other hand, that concept does include a Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose role affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant.

The representative of the Parquet general (Prosecutor-General's Office) contends that the Ministère public français (French Public Prosecutor's Office) satisfies the requirements of the CJEU given that, since the introduction of Law No 2013-669 of 25 July 2013, Article 30 of the Code de procédure pénale français (French Code of Criminal Procedure) expressly excludes the possibility of the ministre de la Justice (French Minister for Justice) issuing any instruction to prosecutors in specific cases.

Admittedly, under Article 30 of the French Code of Criminal Procedure, in its current version resulting from the Law of 25 July 2013, the French Minister for Justice may not issue any instruction to the prosecutors from the Public Prosecutor's Office in specific cases. He may, however, issue instructions of a general nature to them.

It might therefore be concluded that, formally, the French Public Prosecutor's Office meets the criteria of independence established by the aforementioned judgments of the Court of Justice of the European Union, since the procureur de la République (the public prosecutor) is not subject to any instruction in specific cases from the executive. **[Or. 5]**

That analysis is, however, at variance with that given by the Advocate General of the Court of Justice of the European Union, Campos Sánchez-Bordona, in his Opinion delivered on 30 April 2019 (in Cases *OG and PI* (Public Prosecutors' Offices in Lübeck and Zwickau), C-508/18 and C-82/19 PPU, EU:C:2019:337), when he stated that: *'that independence of the national authority which issues the EAW presupposes that the authority in question exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'* (point 87 of his Opinion).

That is what the hierarchical link, in particular, between the Prosecutor-General's Office and the parquet des tribunaux français (Prosecutors of the French courts), may contravene, given that Article 36 of the French Code of Criminal Procedure provides that *'the Principal Public Prosecutor may, by written instructions which are attached to the file of the case, direct the public prosecutors to initiate prosecutions, or to cause them to be initiated, or to refer to the competent court*

such written submissions as the Principal Public Prosecutor considers appropriate’.

And which led the Advocate General to specify that *‘independence ... is incompatible with any hierarchical constraint or subordination to any other body. Members of the judiciary are also independent from the higher courts, which — although they can review and annul the rulings of the lower courts a posteriori — cannot, however, dictate to them how they should adjudicate’* (point 96 of his Opinion).

In the judgment in *Moulin v. France* of 23 November 2010, the European Court of Human Rights, confirming its judgment in the case of *Medvedyev v. France* of 29 March 2010 concerning the lack of status as a ‘judicial authority’ of the public prosecutor, identified an infringement of Article 5(3) of the Convention on the ground that *‘the public prosecutors in France do not satisfy the requirement of independence from the executive which, according to well-established case-law, is, like impartiality, one of the guarantees inherent in the autonomous notion of ‘officer’ within the meaning of Article 5(3)’*

In that judgment, the European Court of Human Rights *‘notes, first, that whilst all the judges within the judiciary represent the judicial authority referred to in Article 66 of the Constitution, it is apparent from the national law that judges are subject to different rules than public prosecutors. The latter are all subject to a common higher hierarchy, le garde des sceaux, ministre de la Justice (Keeper of the Seals, Minister for Justice), who is a member of the government and therefore of the executive. Unlike judges, they are not irremovable pursuant to Article 64 of the Constitution. They are managed and supervised by their hierarchical superiors within the Public Prosecutor’s Office, under the authority of the garde des sceaux, ministre de la Justice (Keeper of the Seals, Minister for Justice). In accordance with Article 33 of the Code of Criminal Procedure, the Public Prosecutor’s Office is bound to make written submissions in conformity with the instructions given under the conditions set out in articles 36, 37 and 44 of that Code, although it is free to make such oral submissions as it believes to be in the interests of justice’* (paragraph 56 of the judgment) and *‘reiterates that the guarantees of independence from the executive and the parties preclude, inter alia, its subsequent intervention in criminal proceedings against the applicant’* (paragraph 58 of the judgment). **[Or. 6]**

Whilst it is true that, as mentioned above, since the 2013 reform, the French Minister for Justice may not issue instructions to public prosecutors in individual cases, the other findings of the European Court of Human Rights remain relevant and, in particular, that concerning the lack of independence and impartiality of the prosecutor vis-à-vis the requested person, given that the Public Prosecutor’s Office is also characterised by its indivisibility: prosecutors in the same office form an indivisible unit; an action taken by one prosecutor is an action taken by the unit as a whole and they may therefore replace one another or be replaced during the course of proceedings.

In the present case, it must be stated that the Public Prosecutor's Office at the tribunal de grande instance de Lyon (Regional Court, Lyon, France) initiated criminal proceedings against the appellant and a prosecutor from that same office issued the European arrest warrant at issue.

Having regard to these developments and to the case-law of the CJEU arising from its judgments of 27 May 2019, the question arises as to whether, in this case, the French Public Prosecutor's Office satisfies the criteria of independence and impartiality, as described, to enable it to issue a European arrest warrant, when the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, and when the competent judicial authority designated in France, which is supposed to monitor compliance with the conditions necessary for such issue and consider its proportionality, having regard to the details of the criminal file, is also the authority responsible for the criminal prosecution in the same case.

In so far as the proper application of EU law is a matter of public policy and, in this case, there can be little reasonable doubt that it is, it is therefore necessary [...] to refer the question formulated in the operative part of this judgment to the CJEU for a preliminary ruling, in accordance with Article 267 of the Treaty on the Functioning of the European Union.

FOR THESE REASONS

[...]

stays proceedings pending a ruling from the Court of Justice of the European Union on the following question: **[Or. 7]**

‘Can the French Public Prosecutor's Office at the investigating court or trial court, which has jurisdiction in France, under the law of that State, to issue a European arrest warrant, be considered to be an issuing judicial authority, within the autonomous meaning of that term in Article 6(1) of Council Framework Decision No 2002/584/JHA of 13 June 2002, in circumstances where, deemed to monitor compliance with the conditions necessary for the issue of a European arrest warrant and to examine whether such a warrant is proportionate in relation to the details of the criminal file, it is, at the same time, the authority responsible for the criminal prosecution in the same case?’

[...] [signatures]