

**Case C-627/19 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:**

ZB

**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 the applicability of the requirement that there must be the possibility of instituting court proceedings against the decision to issue an EAW if the EAW seeks the enforcement of a custodial sentence already imposed by a judicial decision.

**Question referred**

In the case where an EAW seeks the enforcement of a custodial sentence imposed by an enforceable decision of a judge or court, whereas the EAW has been issued by a Public Prosecutor who participates in the administration of justice in the issuing Member State, and there is a guarantee that he acts independently in the

execution of those of his responsibilities which are inherent in the issuing of a European arrest warrant, does the condition also apply that there must be a possibility of instituting court proceedings against the decision to issue an EAW — in particular its proportionality — which meet in full the requirements inherent in effective judicial protection?

### **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 ZB was arrested in the Netherlands on 3 May 2019 on the basis of an EAW issued by the Public Prosecutor in Brussels (Belgium) on 24 April 2019. The EAW seeks the surrender of the requested person for the purposes of enforcing a judgment of 7 February 2019 of the French-speaking Brussels Court of First Instance, by which the requested person was sentenced to prison terms of 30 months and of one year.
- 2 On 3 May 2019, the Public Prosecutor lodged an application for the consideration of the EAW. During the course of proceedings, further questions were put to the Belgian issuing authority.
- 3 Those questions were asked in order to assess whether the issuing of an EAW by that authority was in accordance 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 against the decision of the Public Prosecutor to issue an EAW.

**Main submissions of the parties to the main proceedings**

- 5 The openbaar ministerie (Public Prosecutor's Office), as the applicant, takes the view, like the Belgian issuing authority, that the requirement that there must be the possibility of instituting court proceedings against the decision to issue an EAW does not apply in the case of an EAW seeking to enforce a custodial sentence.

**Brief summary of the reasons for the referral**

- 6 On the basis of the information provided by the Belgian authorities, the finding of the referring court with regard to the position taken by the Public Prosecutor's Office is that a Belgian Public Prosecutor participates in the administration of justice in Belgium 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 Belgian Public Prosecutor thus meets at least the first two of the requirements set out in paragraph 4 above in order to be classified 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, the information from the Belgian authorities raises the question whether the condition laid down in paragraph 75 of the *OG and PI* judgment that the decision of the Public Prosecutor to issue an EAW and, in particular, 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, also applies if the EAW seeks the enforcement of a custodial sentence.
- 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 an 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 earlier cases concerning surrender, the 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’ (points 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 merely requires 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 Belgian 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 In a separate case, the referring court held in an interlocutory decision of 4 June 2019 (ECLI:NL:RBAMS:2019:4010) that, although the *OG and PI* judgment relates to EAWs for the purposes of prosecution, the considerations concerning the protection which the issuing judicial authority must provide when making its decision on the issuing of an EAW are formulated in such a way that they draw no distinction between EAWs for the purposes of prosecution and EAWs for the purposes of enforcement. The referring court stands by that assessment.
- 23 Since the two judgments of 27 May 2019, the referring court has found in respect of two Member States, on the basis of the information provided by the authorities of those Member States, that the legal systems of those Member States do not provide for the possibility of subjecting the decision to issue an EAW and, in particular, its proportionality, to court proceedings which meet in full the

requirements inherent in effective judicial protection, as referred to in paragraph 75 of the *OG and PI* judgment.

- 24 In both cases the EAW concerned prosecutions, and in both cases both the issuing authority and the Netherlands Public Prosecutor's Office took the view that paragraph 75 of that judgment does not apply to cases where the EAW is based on a decision of a judge or court. As explained in paragraph 22 above, the referring court does not agree with that view for the reason there stated.
- 25 In the present case, the EAW seeks the enforcement of a custodial sentence. In such a case, the EAW is necessarily based on a decision of a judge or a court. Both the issuing authority and the Netherlands Public Prosecutor have taken the position that paragraph 75 does not apply in the case of an EAW that involves the enforcement of a custodial sentence. Since there is a difference of opinion on a number of points relating to the interpretation of the judgments of 27 May 2019 between the referring court and the issuing authorities from other Member States — as is also apparent from the orders for reference which the referring court has made simultaneously with the present order in two other cases — and it believes that such differences of opinion are undesirable, it considers it advisable also to refer this point of contention to the Court of Justice.
- 26 The referring court will therefore ask the Court of Justice — in brief — whether it must be possible to bring court proceedings against a decision of a Public Prosecutor to issue an EAW and, in particular, its proportionality, if the EAW seeks to enforce a custodial sentence.
- 27 The referring court considers the following to be relevant in answering that question. Even where the EAW seeks the enforcement of a custodial sentence and the EAW is therefore based on an enforceable judgment of a judge or a court, it is necessary, in its opinion, to guarantee the independence of the Public Prosecutor who issued the EAW. After all, it is still important even at the stage of the enforcement of a sentence that there be an independent verification as to whether the conditions for issuing an EAW obtain and, inter alia, whether the issuing thereof is proportionate. The mere fact that an enforceable judgment has been given against the requested person does not automatically mean that the issuing of an EAW to enforce the custodial sentence imposed by that judgment is proportionate. An assessment of the proportionality of issuing such an EAW is generally not contained in the enforceable judgment delivered by the judge or court.
- 28 In addition, some time may have elapsed between the judgment becoming enforceable and the decision to issue the EAW, during which new facts and circumstances may have come to light which are relevant to the proportionality of the decision to issue an EAW. In line with this, there seems to be no good reason to assume that, in the case of an EAW issued by a Public Prosecutor which seeks to enforce a custodial sentence, the possibility of court proceedings which meet in full the requirements inherent in effective judicial protection is not necessary.

- 29 The Court of Justice has not yet addressed the question of whether the possibility of court proceedings as referred to in paragraph 75 of the *OG and PI* judgment should also exist in the case of an EAW seeking to enforce a custodial sentence. It has been explained above why it is desirable to refer that question to the Court of Justice. The answer to that question is, moreover, necessary for the decision to be taken by the referring court, since a positive answer to the question referred for a preliminary ruling would mean that it cannot consider the substance of the EAW and cannot decide on the surrender request, whereas a negative answer to the question could lead to the surrender being granted.
- 30 The referring court asks the Court of Justice to deal with this reference for a preliminary ruling under the urgent procedure as referred to in the fourth paragraph of Article 267 TFEU and in 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 question 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