

Case C-626/19 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:

YC

Subject matter of the action in the main proceedings

Application lodged by the Officier van Justitie (Public Prosecutor) for execution of 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 it must be possible to institute court proceedings in order to challenge the decision to issue an EAW.

Questions referred

- I. 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 his 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, the proportionality thereof, prior to the actual decision of that Public Prosecutor to issue the EAW?

II. If the answer to the first question is in the negative: has the condition been met that the decision of the Public Prosecutor to issue an EAW and, in particular, the question of its proportionality, must be capable of being the subject of court proceedings which meet in full the requirements inherent in effective judicial protection as referred to in paragraph 75 of the judgment of the Court of Justice of 27 May 2019 (Cases C-508/18 and C-82/19 PPU, EU:C:2019:456) if, after his actual surrender, the requested person can avail of a legal remedy under which the invalidity of the EAW may be invoked before a court in the issuing Member State and under which that court examines, *inter alia*, whether the decision to issue that EAW was proportionate?

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 YC was arrested in the Netherlands on 5 April 2019 on the basis of an EAW issued on 27 March 2019 by the Procureur de la République du Tribunal de grande instance de Tours (Public Prosecutor attached to the Regional Court, Tours, France). The EAW seeks the surrender of the requested person for the purposes of prosecution in France. He is suspected in France of having committed, with others, an armed robbery in Tours. The EAW in question is based on a national arrest warrant issued by the investigating magistrate in Tours.
- 2 On 5 April 2019, the Public Prosecutor lodged an application for execution of the EAW. The proceedings were stayed several times. In the interim, further questions were put to the French issuing authority. In France, the magistrates of the Public

Prosecutor's Office have been designated as judicial authorities with the power to issue EAWs in accordance with Article 6(1) of Framework Decision 2002/584.

- 3 The questions were put to the French issuing authority 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 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 in material compliance with the requirements of the *OG and PI* judgment, with the result that the French Public Prosecutor's Office 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 French authorities, the finding of the referring court with regard to the position taken by the Public Prosecutor's Office is that a French Public Prosecutor participates in the administration of justice in France 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 French 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 French authorities raises questions as to the meaning of the condition laid down in paragraph 75 of that judgment that the decision of the Public Prosecutor 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.

- 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 many 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, in the case 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 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 is 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 give effect to an EAW issued by the French 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. From the information provided by the French authorities, it can be concluded that the most common situation in issuing an EAW is that the French court issues a national arrest warrant and the Public Prosecutor is then asked to issue an EAW because it is already known that the requested person is not present in France. In such a case, the French court also examines the conditions for, and the proportionality of, issuing an EAW. The information from the French authorities shows that this was also the position in the present case.
- 24 The foregoing raises the question as to whether a judicial assessment at the time of issue of 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 in material compliance 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 If the question referred to in paragraph 24 above must be answered in the negative, then another question arises. It follows from the information provided by the French authorities that the invalidity of the EAW can be invoked before the French court and that the French court, when assessing such a claim, examines, *inter alia*, whether the issuing of the EAW was necessary and proportionate. That legal remedy appears to be available to the person concerned when he is brought before the French court after his actual surrender. The question is therefore

whether the legal proceedings before the French court available to the person concerned after his actual surrender, to challenge the decision to issue an EAW, and, inter alia, its proportionality, constitute court proceedings as referred to in paragraph 75 of the *OG and PI* judgment.

- 27 In answering that question, the referring court considers it important, on the one hand, that paragraph 75 does not contain the temporal limitation that it must be possible to bring court proceedings prior to the actual surrender. On the other hand, it considers it relevant that paragraph 75 requires the possibility of 'effective judicial protection' against, inter alia, a disproportionate decision to issue an EAW and thus, in particular, against any disproportionate surrender. It might therefore be argued that judicial protection against a disproportionate decision to issue an EAW will be effective only if it is offered prior to the actual surrender.
- 28 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.
- 29 The answer to that question is, moreover, necessary for the decision to be taken by the referring court.
- 30 If a prior assessment of, inter alia, the proportionality of issuing an EAW by the court which has issued the national arrest warrant is in material compliance with the principles expressed in the condition that the decision of the Public Prosecutor to issue an EAW and, inter alia, its proportionality, must be capable of being the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, then the referring court must consider the EAW and make a substantive ruling on its implementation.
- 31 If such a prior assessment is not in material compliance with those principles, then the ability of the referring court to consider the substance of the EAW and to decide on the surrender request will depend on the answer to the question referred to in paragraph 26 above.
- 32 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.
- 33 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 will therefore have a direct and decisive influence on the duration of the requested person's detention pending surrender.