

Case C-492/22 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 July 2022

Referring court:

Rechtbank Amsterdam (Netherlands)

Date of the decision to refer:

22 July 2022

Applicant:

CJ

Defendant:**Subject matter of the main proceedings**

The dispute concerns the continued detention in the Netherlands of a person arrested there pursuant to a European arrest warrant issued by a Polish court and whose extradition has been postponed by the Officier van Justitie (public prosecutor) because a criminal prosecution is pending against him in the Netherlands for an offence other than that referred to in the European arrest warrant and the requested person does not wish to waive his right to be present at the Netherlands criminal prosecution.

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

The request lodged concerns, in essence, whether (i) an authority other than an executing judicial authority may decide to postpone surrender in the context of the European arrest warrant and (ii) if not, in what circumstances the executing judicial authority can decide to postpone surrender.

Article 267 TFEU

Questions referred for a preliminary ruling

- I. Do Articles 12 and 24(1) of Framework Decision 2002/584/JHA, read in conjunction with Article 6 of the Charter of Fundamental Rights of the European Union, preclude a requested person, whose surrender for the purpose of executing a custodial sentence was definitively authorised but has been postponed ‘so that he or she may be prosecuted in the executing Member State ... for an act other than that referred to in the European arrest warrant’, from being detained for the duration of that criminal prosecution in order to execute the European arrest warrant?
- II. (a) Is the decision to exercise the power to postpone surrender provided for in Article 24(1) of Framework Decision 2002/584/JHA a decision on the execution of the [European arrest warrant] which, pursuant to Article 6(2) of Framework Decision 2002/584/JHA, read in conjunction with recital 8 thereof, must be taken by the executing judicial authority?

(b) If so, does the fact that that decision was taken without the intervention of an executing judicial authority within the meaning of Article 6(2) of Framework Decision 2002/584/JHA have the consequence that the requested person may no longer be detained for the purpose of executing the European arrest warrant issued against him?
- III. (a) Does Article 24(1) of Framework Decision 2002/584/JHA, read in conjunction with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, preclude the surrender of the requested person for the purpose of a criminal prosecution in the executing Member State for the sole reason that, upon request, the requested person does not wish to waive his right to be present at that criminal prosecution?

(b) If so, which factors should the executing judicial authority then take into account when deciding whether to postpone the actual surrender?’

Provisions of EU law and national law cited

EU law:

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), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) (‘the Framework Decision’), Articles 6(2), 12, 23 and 24.

Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), as

amended by Council Framework Decision 2009/299/JHA ('Framework Decision 2008/909/JHA').

Netherlands law:

Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Law of 29 April 2004 implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between Member States of the European Union; 'the Overleveringswet'), *Stb.* 2004, p. 195, as subsequently amended, Articles 1(e), 27(2), 33, 34, 35 and 36.

Brief presentation of the facts and procedure in the main proceedings

- 1 On 31 August 2021, a Polish court issued a European arrest warrant ('an EAW') for the purpose of executing a two-year custodial sentence imposed for thirteen criminal offences falling under the category of 'organised or armed robbery' referred to in Article 2(2) of the Framework Decision.
- 2 In execution of that EAW, the requested person was arrested in the Netherlands on 9 April 2022.
- 3 On 2 June 2022, the executing judicial authority – the Rechtbank Amsterdam (District Court, Amsterdam) – ordered that the requested person be detained. On 16 June 2022, it authorised his surrender to Poland. No ordinary legal remedies are available against the latter judgment.
- 4 In the Netherlands, the requested person was convicted at first instance of an offence other than the offences forming the basis of the EAW, namely, driving a motor vehicle without a licence. In respect of that, the kantonrechter (sub-district judge) of the Rechtbank Den Haag (District Court, The Hague) on 15 December 2021 sentenced the applicant to a fine of EUR 360 or, in the alternative, to seven days' imprisonment. The requested person lodged an appeal against that judgment. The hearing of that appeal is scheduled for 4 October 2022. The lodging of an appeal in cassation against that appeal judgment is open to the Openbaar Ministerie (public prosecution service) and the requested person.
- 5 If and for as long as a criminal prosecution is pending in the Netherlands against the requested person, the Rechtbank may, in accordance with settled case-law on Articles 34(2)(b) and 36(1) of the Overleveringswet, at the request of the public prosecutor, extend the detention of the requested person each time by a maximum of thirty days for the duration of the Netherlands criminal prosecution, provided that the surrender procedure is conducted in a sufficiently diligent manner and the duration of the detention is therefore not excessively long. On 22 June and 6 July 2022, respectively, the Rechtbank, at the request of the public prosecutor, extended the detention of the requested person by thirty days each time.

- 6 Since the requested person does not wish to waive his right to be present at the Netherlands criminal prosecution, the public prosecutor intends periodically to request the extension of his detention as long as the Netherlands criminal prosecution is still pending.
- 7 In this case, no other circumstance has been put forward that could lead to an extension of the detention under Article 34(2), in conjunction with Article 35 of the Overleveringswet. The requests for extension of the detention period therefore necessarily mean that the public prosecutor has postponed the surrender because of the pending Netherlands criminal prosecution. He can decide on such a postponement on the basis of the Overleveringswet. The Rechtbank does not review the decision to postpone because, under national law, such a decision is for the public prosecutor.

Brief presentation of the reasoning of the reference

First question

- 8 Referring to the judgments of the Court of Justice of 25 January 2017, *Vilkas*, (C-640/15, EU:C:2017:39, paragraph 43) and of 12 February 2019, *TC*, (C-492/18 PPU, EU:C:2019:108, paragraph 60), the Rechtbank states that, although Article 24(1) of the Framework Decision, unlike Article 23 thereof, does not contain a reference to (the continuation of) the detention, the combination of Articles 12 and 24(1) of the Framework Decision and Articles 33 to 36(1) of the Overleveringswet provides a clear, foreseeable and accessible legal basis for the continuation of the detention in the event of postponement of the surrender, which meets the requirements of Article 6 of the Charter of Fundamental Rights of the European Union ('the Charter'), with the Rechtbank also observing that it checks every 30 days whether or not the detention can be extended. According to the Rechtbank, the mere fact that the – irrevocably authorised – surrender has been postponed does not mean that the surrender procedure is no longer 'in progress' and that the surrender procedure is being conducted with insufficient diligence.
- 9 Since the second question is based on that interpretation, the Rechtbank considers it desirable to submit that interpretation explicitly to the Court of Justice, in the form of the first question.

Second question

- 10 Whereas Article 24(1) of the Framework Decision assigns the power to postpone surrender to the executing judicial authority, the national transposing legislation provides that the public prosecutor is to take the decision to postpone surrender.
- 11 However, in its judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:953), the Court of Justice held that a Netherlands public prosecutor cannot be regarded as an executing judicial

authority within the meaning of, inter alia, Article 6(2) of the Framework Decision because he may receive individual instructions from the Minister van Justitie en Veiligheid (Minister for Justice and Security), which is still the case.

- 12 Furthermore, in its judgment of 28 April 2022, *C and CD (Legal obstacles to the implementation of a surrender decision)*, (C-804/21 PPU, EU:C:2022:307), the Court of Justice held that the assessment of the existence of *force majeure* within the meaning of Article 23(3) of the Framework Decision and, where appropriate, the setting of a new surrender date, are decisions on the execution of the EAW, which, under Article 6(2) of that decision, read in conjunction with recital 8 thereof, must be taken by the executing judicial authority.
- 13 Consequently, the Rechtbank wishes to ascertain whether the decision to exercise the power to postpone surrender provided for in Article 24(1) of the Framework Decision, pursuant to Article 6(2) of that decision, read in conjunction with recital 8 thereof, must be taken by the executing judicial authority. The Rechtbank is of the view that such a decision, like the situation which gave rise to the judgment of the Court of Justice cited in the previous paragraph, appears to go beyond any ‘practical and administrative assistance’ which, under Article 7 of the Framework Decision, read in conjunction with recital 9 thereof, may be entrusted to an authority which is not an executing judicial authority. This is the subject of paragraph (a) of the second question referred.
- 14 If that question is answered in the affirmative, the Rechtbank poses the follow-up question of whether the fact that that decision was taken without any intervention by an executing judicial authority within the meaning of Article 6(2) of the Framework Decision, has the effect of preventing a person who has been arrested from being detained for the purpose of executing the EAW issued against him [paragraph (b) of the second question].

Third question

- 15 If paragraph (a) of the second question is not answered in the negative, the Rechtbank wishes to ascertain what kind of balancing exercise the executing judicial authority must carry out and which factors it must take into account when carrying out that balancing exercise, when it assesses whether to postpone the surrender so that the person whose surrender has been definitively authorised may be prosecuted in the executing State for an offence other than that referred to in the EAW.
- 16 In that regard, the Rechtbank points out in particular that the current practice in the application of Article 36(1) of the Overleveringswet is that the public prosecutor generally postpones the surrender if the requested person does not wish to waive his or her right to be present at the Netherlands criminal prosecution. By making use of his or her right of appeal and right of appeal in cassation, the requested person can also ensure that the period of postponement of the surrender drags on for many months, if not years.

- 17 Due to the obligation under Article 26(1) of the Framework Decision to deduct all periods of detention arising from the execution of the EAW, therefore, in such a situation the requested person in practice serves (a large part of) his or her custodial sentence in the Netherlands, where the issuing Member State has seen no reason to apply Framework Decision 2008/909/JHA and the executing judicial authority has seen no reason to apply the ground for refusal laid down in Article 4(6) of the Framework Decision.
- 18 Although the Netherlands has transposed Article 24(2) of the Framework Decision in order for conditional surrender – referred to in Netherlands law as ‘voorlopige terbeschikkingstelling’ (‘making provisionally available’) to be possible, Poland in practice does not cooperate with conditional surrender when the EAW serves the purpose of executing a custodial sentence. The possibility of conditional surrender is therefore not a real possibility in the present case.
- 19 By its third question, the Rechtbank specifically seeks to ascertain whether the considerations set out by the Court of Justice in its judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return to the executing State)*, (C-314/18, EU:C:2020:191), particularly in paragraphs 59 to 61 thereof, apply by analogy, and whether the executing judicial authority therefore may not postpone the surrender on the sole ground that the requested person will not waive his or her right to be present at a criminal prosecution in the executing Member State but must determine, on a case-by-case basis, whether concrete grounds relating to the safeguarding of the rights of the defence of the person concerned or the proper administration of justice make his or her presence essential in the executing Member State until those proceedings have been brought to a conclusion by a final decision, taking into account, where appropriate, cooperation mechanisms which enable the person concerned to exercise his or her rights of defence in the criminal proceedings in the executing Member State following his or her transfer to the issuing Member State.

Request that the case be dealt with under the urgent procedure

In view of the fact that the requested person is in detention pending surrender while awaiting the conclusion of a Netherlands criminal prosecution, the Rechtbank has requested that this case be dealt with under the urgent procedure within the meaning of Article 107 of the Rules of Procedure.