

Case C-641/23 [Dubers]ⁱ**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:**

26 October 2023

Referring court:

Rechtbank Amsterdam (Netherlands)

Date of the decision to refer:

26 October 2023

Person who is the subject of the European arrest warrant:

YM

Subject matter of the main proceedings

Execution of a European arrest warrant.

Subject matter and legal basis of the request

In the course of dealing with a European arrest warrant (EAW), questions were raised on the compatibility of Netherlands law with EU law as regards the conditions for the request for guarantee of return after prosecution in the issuing Member State. The order for reference was made after the expiry of the time limit for taking a decision on the execution of the European arrest warrant. This has also raised the formal question of whether this may preclude those substantive questions from being referred to the Court of Justice for a preliminary ruling.

Questions referred for a preliminary ruling

I. Does Article 17(4) and (7) of Framework Decision 2002/584/JHA, read in conjunction with Article 267 of the Treaty on the Functioning of the European Union, preclude a Member State from transposing the former provision in such a

ⁱ This is a fictitious name that does not correspond to the real name of any party to the proceedings.

way that an executing judicial authority against whose decisions no ordinary appeal is available cannot extend the time limit of 90 days for taking a decision for the sole purpose of carrying out its intention to refer questions to the Court of Justice of the European Union for a preliminary ruling outside that time limit, with the result that that authority is thus required to take a decision on the execution of the European arrest warrant without referring those questions?

II. Does Article 5(3) of Framework Decision 2002/584/JHA, read in conjunction with Article 18 of the Treaty on the Functioning of the European Union and, as the case may be, in conjunction with Articles 20 and 21(2) of the Charter of Fundamental Rights of the European Union, preclude a Member State from transposing the former provision in such a way that the surrender for the purpose of prosecution of residents of the executing Member State may be made subject to a guarantee of return only if that Member State has jurisdiction over the acts in respect of which the surrender for the purpose of prosecution is sought, with the result that that condition is not satisfied if those acts do not constitute offences under the law of that Member State, whereas that Member State does not lay down the same condition in respect of its own nationals?

III. If Question II is answered in the affirmative: does Article 9(1)(d) of Framework Decision 2008/909/JHA, read in conjunction with Article 25 of that framework decision and Article 4(1) and Article 5(3) of Framework Decision 2002/584/JHA, preclude a Member State which has applied Article 7(4) of Framework Decision 2008/909/JHA from transposing the former provision in such a way that,

after the executing judicial authority has authorised surrender for the purpose of prosecution to the issuing Member State subject to a guarantee of return in respect of an act referred to in Article 2(4) of Framework Decision 2002/584/JHA that does not constitute an offence under the law of the executing Member State, but in respect of which the executing judicial authority has expressly refrained from non-execution of surrender on that ground,

other authorities in the executing Member State (as the Member State in which enforcement is sought) must or may subsequently refuse to recognise and enforce the custodial sentence imposed in the issuing Member State for that act because it does not constitute an offence under the law of the executing Member State (as the Member State in which enforcement is sought) and must or may therefore refuse to implement the guarantee of return?

Provisions of European Union law relied on

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 Framework Decision 2009/299/JHA (OJ 2009 L 81, p. 24); corrigendum: OJ 2020 L 118, p. 39: Articles 2, 4, 5 and 17

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 Framework Decision 2009/299/JHA: Articles 7, 9 and 25

Provisions of national law relied on

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 (Overleveringswet) (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 (Law on the surrender of persons); ‘the OLW’) (Stb. 2004, 195), as subsequently amended: Articles 6, 7, 22 and 29

Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (Law on the mutual recognition and enforcement of custodial and suspended sentences; ‘the WETS’) (Stb. 2012, 333), as subsequently amended: Articles 1.1, 2.11, 2.12 and 2.13

Wetboek van strafrecht (Criminal Code; ‘the Sr’): Articles 7 and 86b

Wetboek van strafvordering (Code of Criminal Procedure): Article 456

Succinct presentation of the facts and procedure in the main proceedings

- 1 The dispute in the main proceedings concerns a European arrest warrant (EAW) issued on 9 May 2023 by the Sąd Okręgowy w Jeleniej Górze, Wydział III Karny (the Regional Court in Jelenia Góra, 3rd Criminal Division, Poland) against YM. The rechtbank Amsterdam (District Court, Amsterdam), as the executing judicial authority, must take a decision on the execution of that EAW. No ordinary appeal is available against its decision.
- 2 The EAW in question seeks to prosecute YM for a single act, namely failure to comply with the obligation to pay child maintenance in accordance with orders made by the Polish courts. The issuing judicial authority did not classify that act as an offence, within the meaning of Article 2(2) of Framework Decision 2002/584/JHA, which can give rise to surrender ‘without verification of the double criminality of the act’. The District Court found that the act does not constitute an offence under Netherlands law, but saw reason to refrain from applying the ground for optional non-execution provided for in Article 4(1) of Framework Decision 2002/584/JHA.
- 3 YM, a Polish national, has resided legally in the Netherlands for a continuous period of at least five years and has therefore acquired a right of permanent

residence in the Netherlands. According to the District Court, he is a resident of the Netherlands within the meaning of Article 5(3) of Framework Decision 2002/584/JHA. Furthermore, YM has such ties to the Netherlands that the enforcement in the Netherlands of any custodial sentence imposed after surrender to Poland will contribute to increasing the chances of social rehabilitation.

- 4 YM was arrested in the Netherlands on 2 July 2023 pursuant to the EAW. The time limit of 60 days for taking a decision began to run on that date. The first hearing in the present case was held on 24 August 2023. At that hearing, the District Court extended the 60-day time limit for taking a decision by 30 days. By interim decision of 7 September 2023, the District Court reopened the investigation in order to enable the parties to express their views, at the hearing on 28 September 2023, on the intention to refer questions for a preliminary ruling. The time limit of 90 days for taking a decision expired on 30 September 2023, that is to say, before the present order for reference.

Succinct presentation of the reasoning in the request for a preliminary ruling

Introduction

- 5 The fact that the act in respect of which surrender for the purpose of prosecution is sought does not constitute an offence under Netherlands law and that the requested person is a resident of the Netherlands gives rise to two questions for a preliminary ruling concerning the interpretation of Framework Decision 2002/584/JHA and Framework Decision 2008/909/JHA in the context of the decision as to whether the surrender of a resident for the purpose of prosecution may be made subject to a guarantee of return.
- 6 However, before it can refer the questions for a preliminary ruling, the District Court must consider whether, having regard to national legislation, it is still permitted to refer those questions to the Court of Justice at this stage of the proceedings.

Question 1

- 7 In view of the high number of EAWs it receives (approximately 1 000 per year), the District Court is often able to review an EAW only shortly before the sixty-day time limit expires (as in the present case), or even later. The fact that a certain case raises a question on the interpretation of EU law often does not become apparent until after that hearing, during the judicial deliberations on the decision to be taken. This is also so in the present case. At the first hearing, none of the parties considered that the way in which the Netherlands transposed Framework Decision 2002/584/JHA and Framework Decision 2008/909/JHA required an interpretation of those framework decisions; instead, the District Court raised that question of its own motion in its interim decision. In such a case, the requested person and the Openbaar Ministerie (Public Prosecution Service) are given the

opportunity to express their views on the questions referred for a preliminary ruling. To that end, the District Court held a further hearing in the present case. Finally, formulating the questions referred for a preliminary ruling and drafting the order for reference also require time. In short, it is not uncommon for questions to be referred for a preliminary ruling only after the expiry of the 90-day time limit for taking a decision, even if there was already the intention to do so before the expiry of that time limit.

- 8 Article 22(4) of the OLW is the only national legal basis for extending the time limit of 90 days for taking a decision in connection with questions referred to the Court of Justice for a preliminary ruling. That provision provides for the possibility of an extension ‘if, in exceptional circumstances, the court has not yet been able to give a judgment within the time limit referred to in the third paragraph [the time limit of 90 days for taking a decision] because it is awaiting a decision of the Court of Justice of the European Union on questions referred for a preliminary ruling relevant to its decision’. Having regard also to the explanation of that provision in the *travaux préparatoires*, the District Court interprets that provision as meaning that it is possible to extend the time limit of 90 days for taking a decision in connection with questions referred for a preliminary ruling only if the District Court has in fact referred those questions before the expiry of that time limit.
- 9 It seems to the District Court that Article 22(4) of the OLW does not comply with EU law, since it prevents the District Court from referring questions for a preliminary ruling if the time limit of 90 days for taking a decision has already expired.
- 10 In its judgment in *F.*, the Court of Justice held that Member States are required to comply with the time limits laid down in Article 17 of Framework Decision 2002/584/JHA for taking a final decision ‘unless the competent court decides to make a reference to the Court for a preliminary ruling’.¹ Such a case involves ‘exceptional circumstances’ within the meaning of Article 17(7) of Framework Decision 2002/584/JHA, which may result in the surrender procedure lasting more than 90 days.²
- 11 Since the decision of the District Court on the execution of the EAW is not open to ordinary appeal, the third paragraph of Article 267 of the Treaty on the Functioning of the European Union (TFEU) requires the District Court to refer questions for a preliminary ruling. In a case such as the present, however, the wording of Article 22(4) of the OLW precludes the District Court from complying with the obligation to make a reference for a preliminary ruling concerning the interpretation of Framework Decision 2002/584/JHA and Framework Decision 2008/909/JHA. Nevertheless, national procedural rules such as Article 22(4) of

¹ Judgment of 30 May 2013, *F.*, C-168/13 PPU, EU:C:2013:358, paragraphs 64 to 65.

² Judgment of 12 February 2019, *TC*, C-492/18 PPU, EU:C:2019:108, paragraph 43.

the OLW cannot release the District Court from its obligations under Article 267 TFEU.³

- 12 Therefore, in order to determine whether the District Court is entitled to refer the substantive questions for a preliminary ruling, it must first refer the formal question of whether EU law precludes legislation of a Member State which limits the executing judicial authority's obligation to refer questions for a preliminary ruling in such a way. If the answer to the formal question is in the affirmative, the District Court may refer the substantive questions for a preliminary ruling.

Question II

- 13 If Question I is answered in the affirmative, the District Court wishes to know whether the manner in which the Netherlands has transposed Article 5(3) of Framework Decision 2002/584/JHA is consistent with EU law.
- 14 In the present case, failure to comply with the obligation to pay maintenance for a minor child in accordance with an order made by the court is not an offence under Netherlands law (paragraph 2). The District Court interprets the Netherlands provision transposing Article 4(1) of Framework Decision 2002/584/JHA as constituting a ground for optional non-execution. It may therefore refrain from non-execution of surrender on the ground that the act does not constitute an offence in the Netherlands and considers that this should be done in the present case because the acts were committed in Poland by a Polish national.
- 15 YM requested that he be treated in the same way as a Netherlands national and that the Netherlands provision transposing Article 5(3) of Framework Decision 2002/584/JHA (Article 6 of the OLW) be applied to him. Two of the three conditions laid down for this in Article 6(3) of the OLW are fulfilled. YM has shown that he has resided legally in the Netherlands for at least five years without interruption (first condition). An opinion of the Immigratie- en Naturalisatiedienst (Immigration and Naturalisation Service) drawn up in respect of YM shows that he is not expected to lose his right of residence in the Netherlands as a result of a penalty or measure imposed on him after surrender (third condition). In addition, the District Court found that he has such economic, social and linguistic ties with the Netherlands as to give him better chances of social rehabilitation in the Netherlands than in the issuing Member State. There is therefore sufficient reason to make YM's surrender subject to a guarantee of return.
- 16 However, the second condition for treatment as a Netherlands national is not fulfilled in the present case. That condition requires that the person concerned 'can be prosecuted in the Netherlands for the acts on which the [EAW] is based', that is to say, the Netherlands can exercise jurisdiction over those acts. The act in respect of which surrender is sought in the present case is alleged to have been committed outside the Netherlands. For extraterritorial jurisdiction to apply,

³ Judgment of 15 March 2017, *Aquino*, C-3/16, EU:C:2017:209, paragraph 47.

Article 7(1) and (3) of the Sr requires that the act constitutes *an offence* under Netherlands law, specifically *a criminal offence*. Since this act does not in any way constitute an offence under Netherlands law, the Netherlands cannot exercise any jurisdiction over it. In accordance with the wording of Article 6(3) of the OLW, the District Court cannot therefore make the surrender of YM to Poland for the purpose of prosecution subject to a guarantee of return to the Netherlands.

- 17 The question arises, however, as to whether the condition that a requested person ‘can be prosecuted in the Netherlands for the acts on which the [EAW] is based’ is consistent with EU law, in particular Article 18 TFEU and Articles 20 and 21(2) of the Charter of Fundamental Rights of the European Union. According to the District Court, with that condition for foreign nationals (nationals of Member States other than the Netherlands), Article 6(3) of the OLW introduces discrimination on grounds of nationality. Article 6(1) of the OLW does not lay down such a condition for Netherlands nationals. The District Court may therefore make the surrender of a Netherlands national for the purpose of prosecution subject to a guarantee of return, even if the Netherlands does not have jurisdiction over the act in respect of which surrender for the purpose of prosecution is sought, but the surrender of a foreign national who is a resident of the Netherlands for the purpose of prosecution can be made subject to that guarantee only if the Netherlands has jurisdiction over the act in respect of which surrender for the purpose of prosecution is sought.
- 18 That discrimination is not attributable to the rules governing extraterritorial jurisdiction. Under Article 7(1) and (3) of the Sr, the Netherlands may exercise jurisdiction over offences committed abroad by Netherlands nationals and foreign nationals who have their fixed place of abode or residence in the Netherlands (such as YM). If the act committed abroad does not constitute an offence under Netherlands law, the Netherlands may not exercise its jurisdiction either in the case of a Netherlands national or in the case of a foreign national who has their fixed place of abode or residence in the Netherlands.
- 19 The condition that a foreign national ‘can be prosecuted in the Netherlands for the acts on which the [EAW] is based’ is taken from the Netherlands declaration annexed to the European Convention on Extradition (Paris, 13 December 1957) and the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union.⁴ The condition is intended to avoid impunity of the requested person in cases where the executing judicial authority makes surrender subject to a guarantee of return, but where the issuing Member State does not provide a guarantee of return, or does not offer sufficient assurances of return.
- 20 According to the District Court, those efforts to avoid impunity do not provide an objective justification for the discrimination.

⁴ Dublin, 27 September 1996 (OJ 1996 C 313, p. 12).

- 21 The Court of Justice has defined the guarantees provided for in Article 5 of Framework Decision 2002/584/JHA as ‘guarantees to be given by the [issuing Member State] in particular cases’.⁵ The issuing Member State is therefore required to provide such a guarantee when its issuing judicial authority requests the surrender for the purpose of prosecution of a national or resident of the executing Member State. That conclusion is supported by the fact that failure to provide that guarantee does not constitute one of the grounds for non-execution laid down in Articles 3 to 4a of Framework Decision 2002/584/JHA. Article 27(4) and the introductory sentence and subparagraph (d) of Article 28(3) of Framework Decision 2002/584/JHA also support that conclusion. Under those provisions, in the event of a request for additional consent for the situations referred to in Article 5 of Framework Decision 2002/584/JHA, the issuing Member State must give the guarantees provided for therein.
- 22 While the issuing Member State is indeed obliged to provide a guarantee of return in respect of a national or resident of the executing Member State, the requirement that a foreign national ‘can be prosecuted in the Netherlands for the acts on which the [EAW] is based’ takes into account the possibility that the issuing Member State may not comply with EU law. However, since EU law is based on mutual trust that the other Member States respect EU law, the executing Member State may not, save in exceptional cases, check whether the issuing Member State has, in a specific case, complied with EU law.⁶ The condition thus anticipates such exceptional cases.
- 23 The present case illustrates the disadvantages of such an approach. Indeed, even before the decision of the District Court on whether YM could be treated in the same way as a Netherlands national, the Public Prosecution Service requested and obtained a guarantee of return from the issuing judicial authority. Therefore, the risk of impunity that the condition aims to prevent cannot materialise in this case. Nevertheless, in the present case, the OLV precludes making the surrender subject to a guarantee of return.

Question III

- 24 If the answer to Question II is in the affirmative, the District Court will have to determine whether it is in a position to interpret Article 6(3) of the OLV in conformity with the framework decision and, if that is not the case, it will have to disapply the condition at issue on the ground that it is contrary to directly applicable EU law. The District Court does not rule out an interpretation of

⁵ Judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 42; of 15 October 2019, *Dorobantu*, C-128/18, EU:C:2019:857, paragraph 48; and of 11 March 2020, *SF (European arrest warrant – Guarantee of return to the executing State)*, C-314/18, EU:C:2020:191, paragraph 40.

⁶ See, for example, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 35 to 37.

Article 6(3) of the OLW in conformity with the framework decision. If the answer is in the affirmative, that condition does not therefore preclude a surrender for the purpose of prosecution with a guarantee of return.

- 25 In a situation such as that in the present case, where the lack of jurisdiction results from the fact that the act on which the EAW is based does not constitute an offence under Netherlands law, the question arises, following the decision to make the surrender of a resident for the purpose of prosecution for such an act subject to a guarantee of return, as to whether the manner in which the Netherlands has implemented Article 25 of Framework Decision 2008/909/JHA complies with EU law.
- 26 The Minister van Justitie en Veiligheid (Minister for Justice and Security; ‘the Minister’) decides on the recognition and enforcement in the Netherlands of a custodial sentence imposed in the issuing Member State following surrender for the purpose of prosecution subject to a guarantee of return (Article 2:10(1) of the WETS) ‘taking into account the opinion of the specialised chamber of the Gerechtshof [Arnhem-Leeuwarden] (Court of Appeal, Arnhem-Leeuwarden)’ (Article 2:12(1) of the WETS). Unless the Minister directly refuses recognition and enforcement, the Court of Appeal, Arnhem-Leeuwarden assesses, inter alia, whether there are any grounds for mandatory non-execution that preclude recognition, including the mandatory ground that ‘the act in respect of which the penalty involving deprivation of liberty was imposed, if committed in the Netherlands, would not constitute an offence under Netherlands law’ (the introductory sentence and subparagraph (b) of Article 2:11(3) of the WETS, read in conjunction with the introductory sentence and subparagraph (f) of Article 2:13(1) thereof). The fact that the act in respect of which the custodial sentence was imposed does not constitute an offence under Netherlands law therefore entails, according to the letter of the law, an outright refusal to recognise the custodial sentence imposed in the issuing Member State in respect of that act, with the result that, despite the guarantee of return, the person concerned will not serve his or her custodial sentence in the Netherlands.
- 27 The District Court considers that this is contrary to EU law. First, the ground for non-recognition and non-enforcement provided for in the introductory sentence and subparagraph (d) of Article 9(1) of Framework Decision 2008/909/JHA constitutes a ground for *optional* non-recognition and non-enforcement, as is apparent from the use of the verb ‘may’. Second, Framework Decision 2008/909/JHA is based on the principle of mutual recognition. In accordance with that principle, non-recognition or non-enforcement is the exception to the general rule of recognition and enforcement of custodial sentences imposed in the issuing State, and this must be interpreted strictly.⁷ That is why a Member State should, when transposing the introductory sentence and subparagraph (d) of Article 9(1) of Framework Decision 2008/909/JHA, leave its competent authorities a certain

⁷ Judgment of 11 January 2017, *Grundza*, C-289/15, EU:C:2017:4, paragraph 46.

margin of discretion to apply that ground for non-recognition and non-enforcement.⁸

- 28 However, in the context of a guarantee of return in respect of an act that does not constitute an offence under the law of the executing Member State, the question arises as to whether such discretion is compatible with EU law.
- 29 Under Article 25 of Framework Decision 2008/909/JHA, no provision of that framework decision can affect the scope of Article 4(1) and Article 5(3) of Framework Decision 2002/584/JHA, or the way in which they are applied.⁹ Those provisions therefore ‘take precedence’ over the provisions of Framework Decision 2008/909/JHA. First, the guarantee provided for in Article 5(3) of Framework Decision 2002/584/JHA entails that the person concerned, ‘after being heard, *is returned* to the executing Member State in order to serve there the [custodial sentence] passed against him in the issuing Member State’. Second, the Court of Justice has repeatedly held that Article 5(3) of Framework Decision 2002/584/JHA is one of the provisions of that framework decision that allows, in specific situations, the executing judicial authority ‘to decide that a sentence imposed in the issuing Member State must be enforced in the territory of the executing Member State’.¹⁰ Where the executing judicial authority has authorised surrender subject to a guarantee of return (after refraining to apply the ground for optional non-execution that the act does not constitute an offence under the law of its Member State) and has ruled that the person concerned must serve any custodial sentence in the executing Member State, the District Court considers that EU law precludes the competent authorities of that Member State from still being able or obliged to consider that the fact that the act is not a criminal offence constitutes an obstacle to the recognition and enforcement of that sentence.
- 30 While it is true that, pursuant to Article 5(3) of Framework Decision 2002/584/JHA, unlike Article 4(6) of Framework Decision 2002/584/JHA, there is no risk of impunity where the executing Member State (as the Member State in which enforcement is sought) does not enforce the custodial sentence imposed in the issuing Member State, non-enforcement in the executing Member State thwarts the objective, pursued by the guarantee of return, of improving the chances of social rehabilitation. Mandatory or optional non-recognition and non-enforcement on the ground that the act does not constitute a criminal offence under the law of the executing Member State therefore renders Article 5(3) of Framework Decision 2002/584/JHA entirely ineffective.

⁸ See judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, EU:C:2021:339, paragraph 44.

⁹ Judgment of 13 December 2018, *Sut*, C-514/17, EU:C:2018:1016, paragraph 48.

¹⁰ Judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return to the executing State)*, C-314/18, EU:C:2020:191, paragraph 41.

- 31 The answer to question III is relevant to the decision of the District Court. If the answer is in the affirmative, the District Court could reconsider its intention to refrain from non-execution of surrender on the ground that the act does not constitute an offence under Netherlands law, in the light of the fact that there is no guarantee that the person concerned will be allowed to serve any custodial sentence in the Netherlands. If the answer is in the negative, the District Court could assume that recognition and enforcement of any sentence imposed will not conflict with the fact that the act does not constitute an offence under Netherlands law, since the Court of Appeal and the Minister are required to interpret the WETS, to the greatest extent possible, in conformity with the framework decision,¹¹ and Article 4(1) and Article 5(3) of Framework Decision 2002/584/JHA ‘take precedence’ over the provisions of Framework Decision 2008/909/JHA.

WORKING DOCUMENT

¹¹ See judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 94.