

**Case C-563/21 PPU**

**Request for a preliminary ruling**

**Date lodged:**

14 September 2021

**Referring court:**

Rechtbank Amsterdam (Netherlands)

**Date of the decision to refer:**

14 September 2021

**Applicant:**

Openbaar Ministerie

**Defendant:**

Y

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C-563/21 PPU – 1

**RECHTBANK AMSTERDAM  
(AMSTERDAM DISTRICT COURT)**

**INTERNATIONALE RECHTSHULPKAMER  
(CHAMBER FOR INTERNATIONAL COOPERATION IN LEGAL  
MATTERS)**

[...]

**Date of judgment: 14 September 2021**

**INTERIM JUDGMENT**

on the claim under Article 23 of the Overleveringswet (the Dutch Law on Surrender; ‘the OLW’) lodged by the officier van justitie (public prosecutor) with this rechtbank (District Court). This claim is dated 30 June 2021 and concerns, inter alia, the examination of a European arrest warrant (‘EAW’).

The EAW was issued on 7 April 2020 by *the District Court of Zielona Góra*, Poland, and seeks the arrest and surrender of:

**Y**

[...]

with no fixed place of abode or residence in the Netherlands,

[...] detained in the Penitentiare Inrichting Alphen aan den Rijn (Alphen aan den Rijn Prison) [...]

‘the requested person’.

## **1. Procedure**

[The course of the national proceedings] [...]

[...]

## **2. Reference for a preliminary ruling**

### **2.1 Applicable law**

#### **European Union law**

##### **I. Charter of Fundamental Rights of the European Union (‘the Charter’)**

The first and second paragraphs of Article 47, Article 51(1) and Article 52(3) of the Charter of Fundamental Rights of the European Union (‘the Charter’) read as follows:

#### Article 47

##### **Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

#### Article 51

## **Field of application**

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

## Article 52

### **Scope and interpretation of rights and principles**

...

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

II. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ('Framework Decision 2002/584/JHA') (OJ 2002 L 190, p. 1), as amended by Framework Decision 2009/299/JHA (OJ 2009 L 81, p. 24).

Article 1(3) and Article 15(1) of Framework Decision 2002/584/JHA read as follows:

### Article 1

#### **Definition of the European arrest warrant and obligation to execute it**

...

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

## Article 15

### **Surrender decision**

1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

### **Netherlands law**

### III. Overleveringswet (Law on Surrender; ‘the OLW’)

The OLW (wet van 29 april 2004 (Law of 29 April 2004), *Stb.* 2004, 195), as most recently amended by the wet van 17 maart 2021 (Law of 17 March 2021), *Stb.* 2021, 155, implements Framework Decision 2002/584/JHA. Article 1(g), Article 11(1), Article 26(1) and Article 28(1) to (3) of the OLW read, in so far as is relevant here, as follows:

#### **Article 1**

For the purposes of the present law:

...

g. rechtbank (District Court): means the rechtbank Amsterdam (Amsterdam District Court);

...

#### **Article 11**

1. A European arrest warrant shall not be executed in cases where, in the opinion of the District Court, there are substantial grounds, based on facts, to believe that, after surrender, the requested person will face a real risk that his fundamental rights, as guaranteed by the Charter of Fundamental Rights of the European Union, will be violated.

#### **Article 26**

1. The District Court shall examine ... the possibility of surrender. ...

#### **Article 28**

1. No later than fourteen days after the conclusion of the hearing, the District Court shall deliver its judgment on the surrender. The judgment shall state the reasons on which it is based.
2. If the District Court finds ... that the surrender cannot be authorised ..., it must refuse that surrender in its judgment.
3. In cases other than those provided for in paragraph 2, the District Court shall authorise the surrender in its judgment, unless it considers that the European arrest warrant should not be executed pursuant to Article 11(1). ...

## 2.2 Grounds

- 1 The requested person is a Polish national. Six European arrest warrants ('EAWs') have been issued against him by Polish judicial authorities, (in two EAWs) for the purposes of executing custodial sentences and (in the other four EAWs) for the purposes of conducting criminal prosecutions. The Amsterdam District Court must decide on the execution of those EAWs. The person concerned has not consented to his surrender to Poland.
- 2 The case in which the rechtbank (District Court) is submitting questions to the Court of Justice of the European Union ('the Court of Justice') for a preliminary ruling concerns an EAW issued on 7 April 2020 for the purpose of conducting a criminal prosecution and which relates to the suspicion that the requested person is guilty of, in short, fraud. The other EAWs for the purposes of conducting criminal prosecutions concern a large number of identical suspicions.
- 3 The District Court sees no grounds that could prevent the surrender of the requested person, except for the issue raised in the questions referred for a preliminary ruling.
- 4 The District Court finds that since autumn 2017 there have been systemic or generalised deficiencies relating to the independence of the judiciary in the issuing Member State, deficiencies which therefore already existed at the time that the present EAW was issued and which still exist now and which since autumn 2017 have been exacerbated further. Because of those deficiencies, there is, in general, a real risk in the issuing Member State of a breach of the essence of the fundamental right to a fair trial guaranteed in the second paragraph of Article 47 of the Charter, namely, a real risk of a breach of the right to an independent tribunal.
- 5 Those systemic or generalised deficiencies also affect (in part) the fundamental right to a tribunal previously established by law, guaranteed by the second paragraph of Article 47 of the Charter. Those deficiencies result from a law of 8 December 2017 which entered into force on 17 January 2018 and which concerns the position of the *Krajowa Rada Sądownictwa* (the Polish National Council for the Judiciary; 'the KRS') and its role in the appointment of members of the Polish judiciary.<sup>1</sup> The *Sąd Najwyższy* (the Polish Supreme Court dealing with civil and criminal matters; 'the SN'), in its Resolution of 23 January 2020 in Case No BSA I-4110-1/20, found that, under the legislation that entered into force in 2018, the KRS is not an independent body but a body subordinated directly to political authorities and that this lack of independence<sup>2</sup> results in deficiencies in

<sup>1</sup> *Ustawa z dnia 8 grudnia 2017 o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw.*

<sup>2</sup> Cf. the judgment of the Court of Justice of 15 July 2021, C-791/19, ECLI:EU:C:2021:596 (*Commission v Poland (Disciplinary regime applicable to judges)*), paragraph 108 ('It must be held that the factors highlighted in paragraphs 104 to 107 of the present judgment are such as to give rise to legitimate doubts as to the independence of the KRS and its role in an appointment

the procedure for the appointment of judges. With regard to tribunals other than the SN, the Resolution concludes that a court's formation is unduly appointed within the meaning of the Polish Code of Criminal Procedure where that formation includes a person appointed to the office of judge on application of the KRS in accordance with the legislation that entered into force in 2018, in so far as the deficiency in the appointment procedure leads, in the circumstances of the case, to a breach of the guarantees of independence and impartiality within the meaning of the Polish Constitution, Article 47 of the Charter and Article 6 ECHR. This conclusion does not apply to judgments delivered before the date of the Resolution or to judgments due to be given in proceedings that were already pending before a court formation at the date of the Resolution.<sup>3</sup>

From another EAW case, the District Court is ex officio aware of a list dated 25 January 2020 containing the names of 384 judges appointed on application of the KRS under the legislation that entered into force in 2018.<sup>4</sup> It is likely that, with the passage of time, this number of appointments has only increased.

There is therefore a real risk that a requested person who is surrendered to Poland for the purpose of conducting a criminal prosecution will, at his or her criminal trial, be faced with one or more judges appointed on the application of the KRS under the legislation which entered into force in 2018.

- 6 A requested person whose surrender to Poland is requested for the purpose of conducting a criminal prosecution cannot, however, specify in the surrender proceedings which judges in the issuing Member State should hear his or her case after his or her surrender, because in Poland cases are allocated randomly to the judges of a court. It is therefore factually impossible for such a requested person to bring an individual claim alleging irregularities in the appointment of one or more judges. Furthermore, following his or her surrender to Poland, a requested person cannot effectively challenge the validity of the appointment of a judge or the lawfulness of the performance of his or her judicial functions. Under legislation which entered into force on 14 February 2020,<sup>5</sup> Polish courts may not consider such a defence.<sup>6</sup>

process such as that resulting in the appointment of the members of the Disciplinary Chamber') and paragraph 110 ('Those factors, taken in the context of an overall analysis including the important role played by the KRS – a body whose independence from the political authorities is questionable, as is apparent from paragraph 108 of the present judgment – ( )').

<sup>3</sup> An English translation of the Resolution is available on the website of the SN: [http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wvdarzenia/AllItems/BSA%20I-4110-1\\_20\\_English.pdf](http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wvdarzenia/AllItems/BSA%20I-4110-1_20_English.pdf).

<sup>4</sup> Source: <https://oko.press/lista-dla-obywateli-384-sedziow-zarekomendowanvch-przez-neo-krs/>.

<sup>5</sup> Amendments to the laws on the judiciary, including *the Act on the organisation of the common courts, the Act on the supreme court and the Act on the National Council of the Judiciary*.

<sup>6</sup> Article 26(3).

- 7 The District Court is also unable automatically to draw the conclusion, from what it has considered under 5 and 6, that, in the event of surrender to the issuing Member State, there is a real risk (whether general or individual) of the breach of the right to a tribunal previously established by law, if only because it is unclear what test it must apply in assessing whether there is a risk of that right being breached. In that regard, it is also relevant that the European Court of Human Rights ('the ECtHR') considers that, although the right to a tribunal established by law, as guaranteed by Article 6 of the ECHR, is a 'stand-alone' right, there is nevertheless a very close interrelationship between that right and the guarantees of independence and impartiality. In assessing whether irregularities in a judicial appointment entail a breach of that right, the ECtHR applies a three-step, retrospective test.<sup>7</sup> It is unclear whether this test should also be applied in the transnational context of a decision on surrender for the purpose of conducting a criminal prosecution – which by its nature implies a prospective test.
- 8 The foregoing raises the questions:
- of whether the 'two-step examination' in the judgments in *Minister for Justice and Equality (Deficiencies in the system of justice)*<sup>8</sup> (also known by the designation *LM*) and in *Openbaar Ministerie (Independence of the issuing judicial authority)*<sup>9</sup> (also known by the designation *L and P*), which relates to an assessment of whether, in the case of surrender, the right to an independent tribunal risks being breached, applies to an assessment of whether, in the case of surrender, the right to a tribunal previously established by law risks being breached;
  - if so, how the two 'steps' of that examination are to be applied, having regard also to the findings that the requested person in the surrender procedure cannot in fact identify which judges will hear his case in Poland and that, in any event, he will have no effective remedy in Poland against a possible breach of the right to a tribunal previously established by law;
  - if not, what test should be applied in a case in which the requested person in the surrender procedure cannot in fact identify which judges will hear his case in Poland and in which, in any event, he will have no effective remedy in Poland against a possible breach of the right to a tribunal previously established by law.
- 9 By a decision of 30 July 2021, the *Supreme Court* of Ireland referred certain questions for a preliminary ruling. That reference for a preliminary ruling, which

<sup>7</sup> See ECtHR (Grand Chamber) 1 December 2020, ECLI:CE:ECHR:2020:1201JUD002637418 (*Guðmundur Andri Ástráðsson v Iceland*), § 243-252 and ECtHR 22 July 2021, ECLI:CE:ECHR:2021:0722JUD004344719 (*Reczkowicz v Poland*), § 221-224.

<sup>8</sup> CJEU 25 July 2018, C-216/18 PPU, ECLI:EU:C:2018:586.

<sup>9</sup> CJEU 17 December 2020, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033.

was received by the Court of Justice on 3 August 2021, has been registered by the Court of Justice as Case C-480/21 (*Minister for Justice and Equality*). The District Court construes the order for reference in that case to mean that, in essence, the Irish court also wishes to address the questions raised in ground 8 above. In particular, the District Court construes the first question posed by the Irish court as seeking to address the applicability of the ‘two-step examination’ referred to in the judgments of the *Minister for Justice and Equality (Deficiencies in the system of justice)* and *Openbaar Ministerie (Independence of the issuing judicial authority)* to an examination of whether there is a risk of a breach of the right to a tribunal previously established by law.

- 10 The District Court agrees with the *Supreme Court* that the answer to these questions is not ‘[acte] clair’ and does not follow automatically from the previous case-law of the Court of Justice.
- 11 Like the *Supreme Court*, the District Court considers a prompt reply to the questions to be desirable. As is the case in Ireland,<sup>10</sup> EAWs issued by Polish judicial authorities account for a large part of the total workload of the executing judicial authority in the Netherlands.<sup>11</sup> Unlike the referred Irish cases, the person concerned in the present case is in detention pending extradition, awaiting the decision on the surrender. The District Court therefore endorses the questions posed by the *Supreme Court* and requests the application of the urgent procedure.
- 12 The District Court will therefore – against the background of what has been considered under 8 above – refer the following questions to the Court of Justice for a preliminary ruling:<sup>12</sup>

[See paragraph 4 below] [...]

[...]

### **2.3 Request for the application of the urgent procedure**

- 13 The District Court requests the Court of Justice to deal with this reference for a preliminary ruling under the urgent procedure referred to in the fourth paragraph

<sup>10</sup> See paragraph 18(e) of the Irish order for reference: “Given that EAWs from Poland represent slightly less than (*sic*) half of the number of EAWs executed annually by the State this would have significant implications for Ireland’s operation of the Framework Decision”.

<sup>11</sup> According to the most recent available statistics, the data for 2019, the Netherlands received 1077 EAWs in that year. Of those EAWs, 379 were from Poland. Source: Openbaar Ministerie, Internationaal Rechtshulpcentrum Amsterdam, *Jaarrapportage Europees aanhoudingsbevel 2019*, p. 9.

<sup>12</sup> The District Court has itself translated the questions posed by the *Supreme Court* into Dutch and, as regards question 1, has replaced the words ‘the appellants’ with ‘the person concerned’.

of Article 267 of the Treaty on the Functioning of the European Union ('the TFEU') and Article 107 of the Rules of Procedure.

- 14 The questions referred for a preliminary ruling concern an area referred to in Title V of Part 3 of the TFEU. The requested person is in detention in the Netherlands pending extradition on the basis of an EAW seeking the execution of a custodial sentence pending the decision on surrender (see grounds 1 and 2 above). From the point of view of procedural economy, a joint examination of and decision on those six EAWs would be appropriate. The District Court cannot make the decision on surrender until the Court of Justice has answered the questions referred for a preliminary ruling. The prompt reply of the Court of Justice to the questions referred for a preliminary ruling will therefore have a direct and decisive influence on the duration of the detention pending extradition of the person concerned.

### 3. Conclusion

The hearing must be reopened in order to refer the questions to the Court of Justice of the European Union for a preliminary ruling.

### 4. Decision

**REQUESTS** the Court of Justice of the European Union to answer the following questions:

- (1) Is it appropriate to apply the test set out in the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)* and affirmed in the judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)*, where there is a real risk that the person concerned will stand trial before a court not previously established by law?
- (2) Is it appropriate to apply the test set out in the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)* and affirmed in the judgment in *Openbaar Ministerie (Independence of the issuing judicial authority)* where the requested person seeking to challenge his surrender cannot meet that test by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which he will be tried by reason of the manner in which cases are randomly allocated?
- (3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the requested person cannot at this point in time establish that the courts before which he will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial, thus requiring the executing judicial authority to refuse the surrender of the requested person?

[Closing formula and signatures] [...]

[...]

WORKING DOCUMENT