

B E T W E E N:

SVISHTOV REGIONAL PROSECUTOR'S OFFICE

Requesting Authority

-v-

PI

Requested Person

**ORDER FOR REFERENCE TO
THE COURT OF JUSTICE OF THE EUROPEAN UNION**

UPON the Court's order of 26 November 2020.

AND UPON considering the submissions of counsel for the Requested Person and for the Svishtov Regional Prosecutor's Office.

IT IS ORDERED THAT:

1. The questions set out in the Annex to this Order shall be referred to the Court of Justice of the European Union ("the Court of Justice") for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. The Annex to this Order and accompanying documents shall be sent to the Court of Justice forthwith.
2. Any further proceedings in this case shall be stayed until the Court of Justice has given its preliminary ruling on the questions set out in the Annex hereto, or until further order of the Court.

26 November 2020

IN WESTMINSTER MAGISTRATES COURT

BEFORE DISTRICT JUDGE (MAGISTRATES COURT) GRIFFITHS

B E T W E E N:

SVISHTOV REGIONAL PROSECUTOR'S OFFICE

Requesting Authority

-v-

PI

Requested Person

**REQUEST FOR A PRELIMINARY RULING
PURSUANT TO ARTICLE 267 TFEU**

THE REFERRING COURT

1. The following is the substantive text of the request for a preliminary ruling pursuant to Article 267 TFEU made by the Westminster Magistrates' Court on 26 November 2020.
2. The Address of the Referring Court: Westminster Magistrates Court, 81 Marylebone Rd, Marylebone, London NW1 5BR.

THE PARTIES TO THE MAIN PROCEEDINGS

3. PI ("the Requested Person") is a Bulgarian national, whose surrender from the United Kingdom is sought for prosecution in Bulgaria for a theft which is alleged to have taken place there on 8 December 2019.
4. His details are care of: Kayders Solicitors, 16 Upper Woburn Place, Euston, London, WC1H 0BS, England.
5. The Requesting Authority is the Prosecutor of the Regional Prosecutor's Office in Svishtov, Bulgaria.
6. By Art 136 of the Judicial Power Act, the Regional Prosecutor's Office is the lowest level in the hierarchy of prosecutors' offices in Bulgaria.
7. The Requesting Authority's address is: No. 2 Dimitar Anev Street, Veliko Tarnovo District, Svishtov, Republic of Bulgaria.

PPU PROCEDURE (ARTICLE 107) AND ANONYMITY (ARTICLE 95)

8. The Referring Court requests that the referral be considered under the PPU procedure under

Article 107 of the Rules of Procedure. The Requested Person has been arrested pursuant to a European Arrest Warrant and he is now detained in custody in the United Kingdom solely because of those proceedings. A separate document of submissions has been provided addressing this issue.

9. The Referring Court has granted anonymity to the Requested Person. The Court of Justice of the European Union ("the Court of Justice") is invited to apply the same in accordance with Article 95 of the Rules of Procedure.

PROCEEDINGS BEFORE THE REFERRING COURT

10. The proceedings before the Referring Court concern a European Arrest Warrant issued by the Requesting Authority on 28 January 2020 (certified by the National Crime Agency on 20 February 2020) seeking the surrender of the Requested Person to Bulgaria in order to be prosecuted for an offence of theft which is alleged to have taken place there on 08 December 2019. The Requested Person was arrested in England pursuant to a European Arrest Warrant on 11 March 2020.
11. The Requested Person sought to contest that decision in the context of the decisions of the Court of Justice in *OG* (C-508/18) and *PI* (C-82/19), followed by the decisions in *JR & YC* (C-566/19 PPU and C-626/19 PPU), *XD* (C 625/119 PPU), *ZB* (C 627/19 PPU), *PF* (C-509/18).
12. On 24 and 26 November 2020, the Referring Court heard argument from the parties, and ordered that a referral be made to the Court of Justice.

SUMMARY OF ISSUES

13. This case concerns the scope and definition of a "judicial authority" under Article 6(1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant ("EAW") and surrender procedures between Member States. The question is whether the Bulgarian public prosecutor amounts to a "judicial authority" for the purposes of Article 6(1).
14. Recent decisions of the Court of Justice particularly *OG* (C-508/18) and *PI* (C-82/19) have held that prior to the issue of an accusation EAW, an underlying national arrest warrant ("NAW") must be issued by an authority which is subject to judicial protection.
15. Further, the decision of the Court of Justice in *Bob-Dogi* C-241/15 clarified that the issuing of an EAW constitutes and requires a second level of protection for the Requested Person ("RP").
16. The fundamental issue is whether the required dual level of protection is provided where both the NAW and EAW are issued by the Public Prosecutor, and there is no possibility of the involvement of a court prior to the surrender of an RP to the requesting state.

QUESTION REFERRED

17. Where surrender is sought in order to prosecute a requested person, and where the decision to issue an underlying national arrest warrant ("NAW") and the decision to issue a European arrest warrant ("EAW") are both taken by a public prosecutor, without any involvement of a Court prior to surrender, does a requested person receive the dual level of protection envisaged by the Court in *Bob-Dogi* C-241/15 if:
 - a. the effect of the NAW is limited to detaining the individual for a maximum of 72 hours for the purpose of bringing him before a Court; and
 - b. on surrender, it is solely a matter for the Court whether to order release, or to continue

detention, in light of all the circumstances of the case?

RELEVANT FACTUAL CONTEXT

The Bulgarian process

18. The Constitution of the Republic of Bulgaria provides that prosecutors are part of the independent judiciary and when performing their functions, the prosecutors (as well as judges, jurors and investigative magistrates) are subservient only to the law (Constitution, Chapter Six, Article 117, paragraph 2). They are bound by the Criminal Procedure Code ("CPC").
19. At the pre-trial stage, the Bulgarian public prosecutor is the designated "issuing judicial authority" for the purposes of an EAW. The Bulgarian prosecutor issues a restraining measure, specifically a detention order or decree where there are adequate grounds, valid for a period of 72 hours, with a guarantee that upon arrest the individual will be brought before a Court to further consider his remand: Article 63 and 64 CPC.
20. The Court has made no findings about procedural guarantees, such as whether or not a lawyer is present on behalf of the Defendant at the time of issuing of the Prosecutor's decree.
21. In cases where the individual is abroad, no review before a Court takes place until after an RP is surrendered to the Member State. Where an individual is abroad, the prosecutor also makes the decision to issue an EAW in accusation cases, based upon the decree or detention order; i.e. prior to consideration by a Court.
22. During the trial phase, the relevant Court is the "issuing judicial authority" with sole power to issue an EAW.
23. At the post-conviction stage, where there is a verdict and an enforceable sentence, the prosecutor is again the "issuing judicial authority" with power to issue an EAW.
24. The decision to issue an EAW by a prosecutor cannot be subject to appeal before a Court; there are no legal provisions in the Member State providing that right to the RP.

DISPUTE IN THE NATIONAL PROCEEDINGS

25. The dispute is identical to the dispute in different national proceedings before the High Court of Justice which has already been referred to the Court of Justice (case C-206/20 referred on 15 May 2020). As explained below, and unlike case C-206/20, this is a reference in which the urgent procedure ought to be invoked because the Requested Person is in custody, and his case ought not to await the outcome of case C-206/20 which does not have the benefit of the urgent procedure.
26. On behalf of the Requested Person, it is argued that the system in Bulgaria fails to comply with the Framework Decision and with the caselaw of the Court of Justice. National law provides that a Bulgarian prosecutor may issue a detention order, valid in the Member State for a period of 72 hours; and thereafter the same prosecutor may issue an EAW. In neither case are the fundamental and procedural rights of the RP protected by being subject to judicial decision or oversight, including as to proportionality. Insofar as the detention order constitutes an NAW, it is subject to no oversight until (potentially) after the surrender of the RP to the Member State. In relation to the EAW, it is subject to no judicial oversight either before or after surrender.
27. On behalf of the Requesting Authority, it is argued that the interests of a defendant are always

protected through the involvement of a lawyer acting on his behalf. The decision to issue the EAW is based on the detention order which requires that after surrender the RP will be brought before a court in the Member State for confirmation or substitution of the arrest and restraint measures. Following surrender the RP or his legal representative has the right to make representations on his continued detention. The system is therefore in compliance with the Framework Decision and with the caselaw of the Court of Justice as it provides the dual level of protection.

APPLICABLE LAW

28. Applicable Bulgarian legislation:

- Judicial Power Act, Art.127; Art. 136
- Bulgarian Criminal Procedure Code Art.6, Art.46, Arts.55-59, Arts.63, 64, 94, Art.193, Art.212, Art.269
- Bulgarian Constitution, Chapter Six, Art 117, Art.119, Art.129-130, 130a(l) and (4), Art.130c(3)
- Extradition and the European Arrest Warrant Act, Art.3, Art 37, Art.38, Art. 56

29. Applicable EU Law:

- Council Framework Decision 2002/584/JHA
- Council Directive 2013/48/EU
- *OG* (C-508/18) and *PI* (C-82/19)
- *JR & YC* (C-566/19 PPU and C-626/19 PPU)
- *XD* (C 625/119 PPU)
- *ZB* (C 627/19 PPU)
- *PF* (C-509/18)
- *Bob-Dogi* (C-241/15)

BRIEF SUMMARY OF THE BASIS FOR THE REFERENCE

30. Framework Decision 2002/584/JHA on the European Arrest Warrant is part of a system of mutual recognition between Member States which is based on mutual trust.

31. Recital 5 refers to "a system of free movement of judicial decisions in criminal matters".

32. By Recital 8, the decision on execution "must be subject to sufficient controls which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender."

33. Recital 10 of the Framework Decision reads:

"(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles, set out in Article 6(1) [EU], determined by the Council pursuant to Article 7(1) [EU] with consequences set out in Article 7(2) EU."

34. Article 1 of the Framework Decision sets out the definition of a European Arrest Warrant thus:

"(1) The European arrest warrant is a judicial decision issued by a Member State with a view to the

arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”

35. Article 6 provides in relation to a competent judicial authority, that:

“The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.”

36. Article 8(1)(c) provides that:

“The European arrest warrant shall contain....

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;”

37. Execution of an EAW is subject only to the mandatory and optional grounds for non-execution contained within Articles 3 and 4 of the Framework Decision. For that reason, the Court of Justice has held in a number of cases that the issue of an EAW must be both subject to judicial oversight and based upon an NAW.

38. In its decision in *Bob-Dogi* C-241/15 [§56] the Court of Justice held that “The European arrest warrant system therefore entails, in view of the requirement laid down in article 8(1)(c) of the Framework Decision, a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision.”

39. On 27 May 2019 the Court of Justice gave judgment in the joined cases of *OG* (C-508/18) and *PF* (C-82/19 PPU) which concerned the question of whether or not a public prosecutor (specifically in Germany) can be considered a “judicial authority” within the meaning of Article 6(1) of the Framework Decision. In the course of considering the independence of German public prosecutors from the risk of being subject, directly or indirectly to directions or instructions from the executive, the Court gave guidance on the definition and characteristics of an “issuing judicial authority.”

40. On 12 December 2019 the Court of Justice gave judgment in further cases concerning the status of a public prosecutor as an “issuing judicial authority” in France, Sweden and Belgium, see *Parquet general du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)* (C-566/19 PPU and C-626/19 PPU) (*JR & YC*); *Openbaar Ministerie (Swedish Prosecution Authority)* (C-625/19 PPU) (*XD*); and *Openbaar Ministerie (Public Prosecutor in Brussels)* (C-627/19 PPU) (*ZB*).

41. The Court of Justice has held that where a body involved in the administration of justice, such as a prosecutor, and which is not a judge or court, issues an EAW, the underlying NAW must ensure that the RP has had the benefit of procedural safeguards and fundamental rights inherent in judicial protection.¹

42. There must be a dual level of protection in an EAW and it is for the issuing judicial authority to

¹ *OG* [66] and [69]; also *PF* (Lithuania) [46]-[47].

ensure the second level of protection; even where the NAW was issued by a Court.² The prosecutor must review the conditions and examine the proportionality of the decision before issuing an EAW.³

43. The prosecutor must not be subject to direction or instruction by the executive either directly or indirectly in a specific case.⁴ The prosecutor can be subject to internal instructions from supervisors within the hierarchy of the prosecution office.⁵
44. The conditions for the issue of an EAW and, in particular, its proportionality must be capable of being subject to review by court proceedings which meet the full requirements inherent in effective judicial protection in the issuing Member State.⁶ That can be before or after surrender.⁷ The requirement for review by a Court does not affect the qualification of an authority as an “issuing judicial authority”. However, there is a mandatory requirement for there to be a review in full of the decision of that prosecutor, complying with the requirements of effective judicial protection, in the case of issuance by a non-court authority.⁸
45. It is for the executing judicial authority to determine whether the decision to issue an EAW “may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection.”⁹
46. It is up to Member States to ensure that their legal systems guarantee effectively the judicial protection required by means of the remedies they apply, which may differ from one system to another. The establishment of a separate right of appeal against the issue of an EAW is one possibility.¹⁰
47. Therefore, prior to the issue of an EAW by a prosecutor, there must have already been protection of the procedural safeguards and fundamental rights undertaken by a judicial authority, when issuing the NAW. The EAW is the second level of protection; of procedural and fundamental rights.¹¹
48. At least one of the NAW or EAW must achieve full safeguards for the RP, especially (1) that it is a procedure subject to review by a Court; and (2) that the RP has the benefit of all safeguards appropriate to that type of decision.¹²
49. The conditions for the issue of the EAW and its proportionality can be subject to judicial review either before, at the same time as, or after its adoption.¹³

REASONS FOR THE REFERRAL

50. The concept of an “issuing judicial authority” is an autonomous one under EU law, which cannot be left for Member states to determine: judgments of *Poltorak*, C-452/16 PPU, EU:C:2016:858,

² *PF* (Lithuania) [50].

³ *OG* [71]-[72].

⁴ *OG* [73] and [90].

⁵ *JR* [56].

⁶ *OG* [75]; *PF* [53] and *JR* [62-63].

⁷ *JR* [70 - 73].

⁸ *OG* [75] and *JR* [48-49].

⁹ *PF* [57] (approved *JR* [49]).

¹⁰ *XD* [43-44].

¹¹ *OG* [66] and *Bob-Dogi* at [55]

¹² *OG* [70]

¹³ *XD* [52].

paragraph 32, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 33.

51. The Referring Court considers it necessary to refer a question to the Court of Justice as the answer to the question is not clear and its determination is necessary for the resolution of the dispute.
52. The Referring Court considers that, according to the current national legislative regime in Bulgaria, neither the national detention order nor the EAW is founded on a decision of a court; and neither is subject to the possibility of judicial oversight prior to the surrender of the RP. The prosecutor is responsible for issuing a document having power to hold an individual for 72 hours; and thereafter the prosecutor is responsible for issuing an EAW.
53. The position in Bulgaria appears distinct from any of the other cases previously referred to the Court of Justice for consideration, in that there is no possibility of the involvement of a Court in respect of the NAW or EAW in pre-trial accusation cases prior to surrender, and no possibility of a review before a court of the decision of the public prosecutor to issue an EAW.
54. The status of the public prosecutor as an issuing judicial authority in those circumstances is one which the Referring Court considers can only be settled by a ruling from the Court of Justice as to the requirements for effective judicial protection. None of the decisions of the Court of Justice have addressed the situation now before the Referring Court.

ACCOMPANYING DOCUMENTS

55. This request for a preliminary ruling is accompanied by the following documents:
 - c. All orders and decisions of this Court
 - d. European Arrest Warrant issued for the Requested Person.

IN WESTMINSTER MAGISTRATES COURT

BEFORE DISTRICT JUDGE (MAGISTRATES COURT) GRIFFITHS

B E T W E E N:

SVISHTOV REGIONAL PROSECUTOR'S OFFICE

-v-

PI

**REQUEST FOR THE PPU PROCEDURE UNDER
RULE 107 OF THE RULES OF PROCEDURE**

1. The referring Court, Westminster Magistrates Court, requests that the Court of Justice consider the referral under the PPU procedure under Article 107 of the Rules of Procedure. The referring Court does so in light of the Court of Justice's Recommendations (2019/C 380/01) published in the Official Journal of the European Union on 8 November 2019, concerning the initiation of preliminary ruling proceedings.
2. The Requested Person, PI, is a Bulgarian national, whose extradition is sought from the United Kingdom to be prosecuted in Bulgaria for a theft which is alleged to have taken place there on 8 December 2019. The Requesting Authority is the Prosecutor of the Regional Prosecutor's Office in Svishtov, Bulgaria.
3. The Requested Person has been arrested pursuant to a European Arrest Warrant and he is now detained in custody in the United Kingdom solely as a result of those proceedings.
4. His remand status is subject to periodic review; he must appear before the Referring Court every 28 days where the Court will assess his continued detention. Subject to the Referring Court concluding that the circumstances justifying his detention are no longer met, he will remain in custody until the resolution of his extradition proceedings (including any appeal proceedings).
5. The Referring Court has in mind the strict timescales for surrender in extradition matters, set out at Article 18 of Framework Decision 2002/584/JHA. Article 267(4) TFEU requires the Court of Justice to act "with the minimum of delay" where a question referred for a preliminary ruling is raised in a case with regard to a person in custody.
6. In Judgment of 25 July 2018 (Grand Chamber), *Minister for Justice and Equality (Deficiencies in the justice system)* (C-216/18 PPU, EU:C:2018:586), an Irish request for PPU was granted in a case where the person concerned was in custody, his continued detention depended on the outcome of the main proceedings, and the deprivation of liberty was ordered in the context of the execution of European arrest warrants (paragraphs 29 and 30).

7. In Judgment of 12 February 2019, *TC* (C-492/18 PPU, EU:C:2019:108), the Court of Justice recalled its settled case-law, according to which it is necessary to take into account the fact that the person concerned is being deprived of his liberty and that the question whether he may continue to be held in custody depends on the outcome of the dispute in the main proceedings; his situation must be assessed as it stands at the time when consideration is given to the request that the reference be dealt with under the PPU.
8. The extradition proceedings for this Requested Person cannot conclude until the Court of Justice has reached a determination in respect of the question referred. The decision of the Court of Justice is decisive as to the Referring Court's assessment of the Requested Person's legal situation.
9. If the answer to the question is that the Requesting Authority cannot, as an autonomous matter of EU law, amount to an "Issuing judicial authority" for the purposes of Article 6(1) of Framework Decision 2002/584/JHA, then he will be subject to immediate discharge from that warrant and released from custody.
10. On 15 May 2020, another UK court referred a question in same terms as this Referring Court; case C-206/20. However, the Court of Justice declined the application for that matter to be heard under the 'expedited procedure' given the fact that the requested person in those proceedings is on bail.
11. If the urgent procedure is not granted in this case, then the Referring Court must await the outcome of the reference in C-206/20, which is taking place under the ordinary procedure. The result is that the Requested Person may remain in custody for a period significantly longer than the timescale envisaged by Framework Decision 2002/584/JHA for the resolution of proceedings.