

Case C-562/21 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:

X

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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 19 May 2021 and concerns, inter alia, the examination of a European arrest warrant (‘EAW’).

This EAW was issued on 6 April 2021 by *the Regional Court [Sąd Okręgowy] in Lublin* (Poland) and seeks the arrest and surrender of:

X

[...] detained in the Penitenciaire Inrichting Zuid-Oost (South-East 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 OLV read as follows in so far as is relevant here:

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 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. The Amsterdam District Court must decide on the execution of a European arrest warrant ('EAW') issued by a Polish judicial authority on 6 April 2021 for the purpose of executing a custodial sentence of two years. This sentence was imposed by final judgment on 30 June 2020 for (1) coercing someone to do something by means of violence or threat of

violence and for (2) threat of violence. The person concerned has not consented to his surrender to Poland.

- 2 The District Court sees no grounds that could prevent the surrender of the requested person, except for the issue raised in the question referred for a preliminary ruling.
- 3 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 of the conviction to which this EAW relates. Those deficiencies have been further exacerbated since autumn 2017. 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.
- 4 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.¹ 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 independence² results in deficiencies in 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

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

² 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 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 – ()’).

Resolution or to judgments due to be delivered in proceedings that were already pending before a court formation at the date of the Resolution.³ 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 2018.⁴ It is likely that, with the passage of time, this number of appointments has only increased.

There is therefore a real risk that the trial of a requested person surrendered to Poland for the purpose of executing a custodial sentence or detention order may have involved one or more judges appointed on the application of the KRS under the legislation which entered into force in 2018.

- 5 Unlike the case of a requested person whose surrender to Poland is sought for the purpose of conducting a criminal prosecution, in the case of a requested person whose surrender to Poland is sought for the purpose of executing a custodial sentence or detention order, it is actually possible to specify which judges in the issuing Member State were involved in his or her trial. As in the case of a requested person whose surrender to Poland is sought for the purpose of conducting a criminal prosecution, a requested person whose surrender to Poland is sought for the purpose of executing a custodial sentence or detention order cannot – as of 14 February 2020 – 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 2020,⁵ Polish courts may not consider such a defence.⁶
- 6 The District Court cannot, from what it has considered under grounds 4 and 5, necessarily draw the conclusion that, in the event of surrender to the issuing Member State, there is a real risk (whether general or individual) of a surrendered person being subjected to a definitive 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 that right has already been 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

³ 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_English.pdf.

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

⁵ 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*.

⁶ Article 26(3).

breach of that right, the ECtHR applies a three-step test.⁷ It is unclear whether this test should also be applied in the transnational context of a decision on surrender for the purpose of the execution of a custodial sentence or detention order.

- 7 By decision of 30 July 2021, the *Supreme Court* of Ireland referred certain questions for a preliminary ruling. That reference for a preliminary ruling, which was received by the Court of Justice of the European Union ('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 wording of the questions referred for a preliminary ruling by the *Supreme Court* indicates that they relate to an EAW that was issued for the purpose of *conducting a criminal prosecution*, although one of the EAWs pending before the Irish courts relates to the execution of a custodial sentence. The present EAW also relates to the execution of a custodial sentence. The final conviction on which that EAW is based is dated after 14 February 2020. Although, in such a case, the requested person is able to identify the judges who have dealt with his or her criminal case and although such a case therefore differs in that respect from a case involving a prosecution, even in a case involving the execution of a sentence in which the final sentence was pronounced after 14 February 2020, there is no effective remedy in Poland against a possible breach of the right to a tribunal previously established by law. This raises the question of the test to be applied by an executing judicial authority adjudicating on the execution of an EAW entailing the execution of a custodial sentence or detention order when examining whether the right to a court previously established by law has been breached in the issuing Member State.
- 8 The answer to this question is not '[acte] clair' and does not follow automatically from the previous case-law of the Court of Justice.
- 9 The District Court will therefore refer the following question to the Court of Justice for a preliminary ruling.

[See paragraph 4 below] [...]

2.3 Request for the application of the urgent procedure

- 10 The District Court considers a prompt reply to the question to be desirable. In the Netherlands, EAWs issued by Polish judicial authorities account for a large part of the total workload of the executing judicial authority.⁸

⁷ 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.

⁸ 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,

- 11 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 of Article 267 of the Treaty on the Functioning of the European Union ('the TFEU') and Article 107 of the Rules of Procedure.
- 12 The question referred for a preliminary ruling concerns an area referred to in Title V of Part 3 of the TFEU. The requested person is in detention in the Netherlands pending extradition. The District Court cannot make the decision on surrender until the Court of Justice has answered the question referred for a preliminary ruling. The prompt reply of the Court of Justice to the question referred for a preliminary ruling will therefore have a direct and decisive influence on the duration of the requested person's detention pending extradition.

3. Conclusion

The hearing must be reopened in order to refer the question 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 question:

What test should an executing judicial authority apply when deciding whether to execute an EAW for the purpose of executing a final custodial sentence or detention order when examining whether, in the issuing Member State, the trial resulting in the conviction was conducted in breach of the right to a tribunal previously established by law, where no effective remedy was available in that Member State for any breach of that right?

[Closing formula and signatures] [...]