

Case C-402/23**Request for a preliminary ruling****Date lodged:**

28 June 2023

Referring court:

Audiencia Nacional (Spain)

Date of the decision to refer:

22 June 2023

Defendant:

Dimas

[...]

[...] [Details identifying the referring court and the proceedings]

ORDER (QUESTION REFERRED)

[...] [Composition of referring court]

In the city of Madrid, on the twenty-second of June, two thousand and twenty-three

In accordance with *Article 19(3)(b) of the Treaty on European Union* ('the TEU'), *Article 267 of the Treaty on the Functioning of the European Union* ('the TFEU') and *Article 4 bis of the Ley Orgánica del Poder Judicial* (Organic law on the judiciary; 'the LOPJ'), it is necessary for the Court of Justice of the European Union to interpret *Articles 18(1) and 21(1) TFEU* and specify the case-law established in its *judgment (Grand Chamber) of 6 September 2016, Petruhhin*, applied by this court, in a situation such as that presented in these proceedings for extradition, requested by the Kingdom of Morocco in relation to a citizen with dual Moroccan and Dutch nationality, in view of the response of the Dutch authorities, to whom the request for extradition submitted by the Kingdom of Morocco was communicated.

FACTS

- 1 On 7 August 2022, Dimas, born in [...] Morocco, on NUM000/1973, son of Eloy and of Pilar, having Moroccan nationality, with identity card number NUM001, valid until 2 March 2031, and also Dutch nationality, with Dutch passport number NUM002, was arrested in Tossa del Mar, Girona province, in response to the international arrest warrant issued by the public prosecutor before Nador Court of First Instance, Morocco, on 24 May 2016, against the defendant, in order to investigate his involvement in a drug-trafficking offence.
- 2 Dimas is not resident in Spain; he was passing through our country.
- 3 Dimas was brought before *Juzgado Central de Instrucción 5 (Central Court of Preliminary Investigation No 5)*, which initiated the extradition proceedings and remanded him in custody, by an order of 8 August 2022.
- 4 The request for extradition made by the public prosecutor before Nador Court of First Instance on 22 August 2022 was received by Spain's Ministry of Foreign Affairs, European Union and Cooperation on 6 September 2022 and, at a meeting of 4 October 2022, the Spanish cabinet agreed that the extradition proceedings in the courts should continue.
- 5 The purpose of the extradition request is to bring criminal proceedings against Dimas, who is accused of a drug-trafficking offence which would have been committed on 11 May 2016, when a vessel by the name of Almería arrived at the port of Nador. That vessel was transporting a lorry belonging to the company FELICITE OUJDA TRANS and having registration number NUM003, and hidden in it were three black suitcases containing 20 bags and, inside them, 100 000 ecstasy (MDMA) tablets. The driver of the lorry was arrested, along with another person who went to meet him at the port, and both of them stated that the ecstasy tablets had travelled from Brussels and that it was Dimas who had taken them in his car from Rotterdam to Brussels and from there they reached Morocco.
- 6 In view of the Dutch nationality of the defendant, this court contacted the Dutch judicial authorities, through EUROJUST, informing them of the extradition request made by Morocco for its national, in case they wished to issue an arrest warrant.
- 7 The response of the Dutch judicial authorities arrived in an email of 8 December 2022, sent from EUROJUST, in which they inform us that the Dutch judicial authorities are not going to issue an arrest warrant based on the facts set out in Morocco's extradition request. But they add that, if Dimas had been arrested in the Netherlands, he would not be surrendered to Morocco because of his Dutch nationality.
- 8 Dimas is challenging his surrender to Morocco, citing, among other grounds, his status as a citizen of the European Union and the fact that the Dutch authorities would not extradite him to Morocco, as well as the likely violation of his

fundamental rights. He asserts that he will be subjected to torture and that they may even kill him on account of his public opposition to Moroccan politics and the King of Morocco, because he has taken part in demonstrations held in Europe to denounce the Moroccan regime by the National Assembly of Rif ('the NAR'), headquartered in Oslo, Norway – activity which the NAR makes public on its Facebook page.

- 9 This court is yet to give its decision in these extradition proceedings or respond to the claims made by the defendant, since it considers that a decision by the Court of Justice regarding the questions which it is going to refer to it is necessary.
- 10 Dimas has been at liberty since 31 May 2023.
- 11 No decision has yet been given in the extradition proceedings [...] of this court.

LAW

1 Provisions applicable to the case

Spanish law

Article 13(3) of the Constitución Española (Spanish Constitution; 'the Constitution'): Extradition shall only be granted in compliance with a treaty or the law, according to the principle of reciprocity. Political offences are excluded from extradition; however, acts of terrorism shall not be regarded as political offences.

Article 3 of the Ley de Extradición Pasiva, of 21 March 1985 (Law on passive extradition; 'the Passive Extradition Law'): 1. Neither Spanish nor foreign nationals shall be extradited for offences which, according to national law, are to be tried by the Spanish courts. Status as a national shall be determined by the court having jurisdiction to hear the extradition case when giving its decision regarding the extradition, in accordance with the rules of the Spanish legal system and provided that such status was not acquired for the fraudulent purpose of making extradition impossible.

2. Where extradition must be refused on the grounds provided for in the previous section, if the State in which the facts took place requests it, the Spanish Government shall pass the details of the situation giving rise to the [extradition] request to the public prosecution service, so that legal proceedings may be brought against the defendant, where appropriate. If the decision is taken to bring legal proceedings, it shall ask the requesting State to send it the records of the proceedings carried out, or a copy of them, in order to continue with the criminal proceedings in Spain.

3. Where the offence was committed outside the territory of the country requesting the extradition, extradition may be refused if Spanish legislation does

not authorise the prosecution of an offence of the same type committed outside Spain.

Article 1 of the *Convenio de extradición entre el Reino de España y el Reino de Marruecos* (Extradition agreement between the Kingdom of Spain and the Kingdom of Morocco; ‘the Extradition Agreement’), done at Rabat on 24 June 2009:

The contracting Parties, in accordance with the rules and on the terms provided for in this Agreement, undertake to surrender to each other persons who are present in the territory of one of the two States and who are being prosecuted for an offence, or who are sought in order to enforce a custodial sentence handed down by the judicial authorities of the other State, as a result of an offence.

Article 3. Non-extradition of nationals under the Extradition Agreement:

1. Neither of the two States shall grant the extradition of their respective nationals.
2. Status as a national shall be assessed in relation to the moment when the offence for which extradition is requested was committed.
3. Nevertheless, the requested Party undertakes to bring legal proceedings, in so far as it has jurisdiction to try them, against its own nationals who, in the territory of the other State, have committed infractions punished as criminal offences in both States, where the other Party transmits to it, either through diplomatic channels or directly, through the central authorities of the Ministry of Justice, a request for legal proceedings to be initiated, accompanied by any files, documents, objects and information in its possession. The requesting Party shall be informed of the result of its request.

European Union law

Article 18 TFEU: Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 21(1) TFEU: Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

Article 19(2) of the Charter of Fundamental Rights of the European Union: No one may be removed, expelled or extradited to a State where there is a serious risk

that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

2 *Reasons for the referral*

2.1 *This court is aware of the judgment of the Grand Chamber of September 2016* and, applying it in practice, it informed the Dutch authorities of the extradition request which the Kingdom of Morocco had made in relation to its national. Without doubt, the case raised in these extradition proceedings has many points in common with that analysed by the Court of Justice in the above-mentioned judgment. Thus, there is no extradition treaty between the European Union and the requesting State (Kingdom of Morocco), and, therefore, the rules with regard to extradition fall within the competence of the Member States; however, in its *judgment of 6 September 2016*, the Court of Justice tells us: ‘... it must, however, be recalled that, in order to determine the scope of application of the Treaties within the meaning of *Article 18 TFEU*, that article must be read in conjunction with the provisions of the FEU Treaty on citizenship of the Union. The situations falling within their scope of application include, therefore, those involving the exercise of the freedom to move and reside within the territory of the Member States, as conferred by *Article 21 TFEU* ...’

2.2 In paragraph 32 of the judgment, it states: ‘However, national rules on extradition such as those at issue in the main proceedings give rise to a difference in treatment depending on whether the person concerned is a national of the Member State in question or a national of another Member State, in that they result in nationals of other Member States, such as Mr Petruhhin, not being granted the protection against extradition enjoyed by nationals of the Member State in question. In so doing, such rules are liable to affect the freedom of nationals of other Member States to move within the European Union.’

2.3 *The judgment of the Grand Chamber of 6 September 2016* analyses the risk of impunity in relation to the offence and states: ‘39. As the Advocate General has observed in point 56 of his Opinion, extradition is a procedure whose aim is to combat the impunity of a person who is present in a territory other than that in which he has allegedly committed an offence. As several national governments have noted in their observations to the Court, although, in the light of the maxim “aut dedere, aut judicare” (either extradite or prosecute), the non-extradition of its own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals for serious offences committed outside its territory, that Member State as a general rule has no jurisdiction to try cases concerning such acts when neither the perpetrator nor the victim of the alleged offence is a national of that Member State. Extradition thus allows offences committed in the territory of a State by persons who have fled that territory not to remain unpunished.’

2.5 ‘47. In the absence of rules of EU law governing extradition between the Member States and a third State, it is necessary, in order to safeguard EU

nationals from measures liable to deprive them of the rights of free movement and residence provided for in *Article 21 TFEU*, while combatting impunity in respect of criminal offences, to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law.’

2.6 ‘48. Consequently, in a case such as that at issue in the main proceedings, the exchange of information with the Member State of which the person concerned is a national must be given priority in order to afford the authorities of that Member State, in so far as they have jurisdiction, pursuant to their national law, to prosecute that person for offences committed outside national territory, the opportunity to issue a European arrest warrant for the purposes of prosecution. Article 1(1) and (2) of Framework Decision 2002/584 does not preclude, in such a case, the possibility for the Member State of which the alleged offender is a national of issuing a European arrest warrant with a view to the surrender of that person for the purposes of prosecution.’

2.7 All of the paragraphs of the *judgment of the Grand Chamber of 6 September 2016* highlighted above are applicable to the case raised in these extradition proceedings. However, in the opinion of this court, the differentiating fact in this case, which is not considered in that judgment, resides in the response of the Dutch authorities when they were informed of the extradition request made by the Kingdom of Morocco. The Dutch authorities inform the court that they are not going to issue an arrest warrant for Dimas, based on the facts set out in the extradition request, but they also note that, if the defendant had been arrested in the Netherlands, he would not be extradited to Morocco because of his Dutch nationality.

2.8 We therefore find ourselves in a situation where the person sought by the third State, which is not a member of the European Union, is protected in his country against extradition requests from that third State in the same way that Spanish citizens are protected in Spain against extradition requests from that same third State. However, according to Spanish national law, that prohibition on the extradition of Spanish citizens does not apply in Spain to citizens with Dutch nationality.

2.9 *The Spanish Constitution does not contain an express rule prohibiting the extradition of Spanish citizens to another State. However, such a prohibition does exist in the bilateral extradition agreement concluded with the Kingdom of Morocco, which, in Article 3, states that neither of the two States shall grant the extradition of its nationals. However, in that case, the requested State undertakes to bring legal proceedings, in so far as it has jurisdiction to try them, against its own nationals who, in the territory of the other State, have committed infractions punished as criminal offences in both States.*

2.10 The defendant is neither a Spanish national, nor resides in Spain, and the extradition request does not contain any information from which it is possible to deduce that the Spanish courts have jurisdiction to try a drug-trafficking offence

regarding the commission of which no mention is made of any place in Spanish territory, since it begins in Rotterdam, continues in Brussels and culminates in Nador, where the MDMA tablets arrive.

2.11 This court asks itself whether the prohibition existing in the Netherlands on extraditing its national to Morocco, which is identical to the prohibition on extraditing Spanish citizens to Morocco, is effective in Spain for a Dutch citizen who is present in Spain exercising the right of free movement enshrined in *Article 21 TFEU*, as part of the right not to be discriminated against on grounds of nationality contained in *Article 18 TFEU*, even if such a decision implies failing to comply with the obligations arising from the bilateral extradition agreement and may give rise to impunity in relation to the offence which brought about the extradition request.

On those grounds,

THE COURT ORDERS

That these extradition proceedings be stayed until a decision is issued in the preliminary ruling procedure.

That the following questions be referred to the Court of Justice for a preliminary ruling:

1 Must *Article 18 and Article 21(1) TFEU* be interpreted as meaning that the prohibition on the surrender of nationals contained in a bilateral extradition treaty concluded between a Member State of the European Union and a third State must be extended to the nationals of other Member States of the European Union which do not accede to an extradition requested by the third State on grounds of their nationality, when those nationals are present in the territory of the requested Member State exercising their right of free movement?

2 If the Member State of the European Union of which the person sought is a national refuses to issue an arrest warrant in order to prosecute the offence for which the extradition is requested, since, if that person had been arrested in that State, on account of his or her nationality, that person would not have been extradited, does the decision of that Member State regarding its national bind the requested Member State in the case of an extradition requested by a third State, when the national in question is present in the territory of the requested Member State exercising his or her right of free movement?

[...]

By this our Order, we thus rule, order and sign. [Closing procedural formulae]