

Case C-428/21 PPU

Request for a preliminary ruling

Date lodged:

14 July 2021

Referring court:

Rechtbank Amsterdam (Netherlands)

Date of the decision to refer:

14 July 2021

European arrest warrant issued against:

HM

Other party to the proceedings:

Openbaar Ministerie

RECHTBANK AMSTERDAM

(AMSTERDAM DISTRICT COURT)

INTERNATIONALE RECHTSHULPKAMER

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

[...]

Date of judgment: 14 July 2021

**INTERIM
JUDGMENT**

on the request for consent to extend the prosecution as referred to in Article 14(1)(f) of the Overleveringswet (Law on Surrender; ‘OLW’). This request was submitted by the *Budapest Metropolitan Court* (Hungary) on 13 April 2021 and concerns the extension of the prosecution of:

HM

born in *** (***) on ***

currently residing in Hungary

hereinafter referred to as the surrendered person.

1. Procedure

The request was heard in chambers on 27 May 2021, in the presence of the officier van justitie (public prosecutor), C.L.E. McGivern.

On 10 June 2021, the District Court delivered an interim judgment reopening the investigation and staying it indefinitely, as the District Court needed more time to deliberate on its decision.

On 14 July 2021, the District Court in open court closed the investigation and delivered its judgment immediately thereafter.

2. Assessment of the request; rights of defence of the surrendered person

Applicable European Union law

I. Framework Decision 2002/584/JHA (‘the Framework Decision’) 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.

Article 11(2) and Article 14 of that Framework Decision are contained in Chapter II (‘Surrender Procedure’) and read as follows:

Article 11

Rights of a requested person

(...)

2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

Article 14

Hearing of the requested person

Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.

Article 27(2), (3) and (4) of the Framework Decision is contained in Chapter 3 ('Effects of the surrender') and, in so far as is relevant here, reads as follows:

Article 27

Possible prosecution for other offences

(...)

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(...)

f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.

Applicable national law

II. The 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 Surrender')), *Stb.* 2004, 195, as last amended by the wet van 17 maart 2021 (Law of 17 March 2021), *Stb.* 2021, 155 ('the OLW') transposes the provisions of the Framework Decision.

Article 1(g) of the OLW reads as follows:

Article 1

For the purposes of the present law:

(...)

g. rechtbank (District Court) shall mean the rechtbank Amsterdam (Amsterdam District Court);

(...).

Article 14(1) and (3) of the OLW is contained in Chapter II ('Surrender by the Netherlands'), Section 1 ('Conditions of surrender'), transposes Article 27(2), (3) and (4) of the Framework Decision and, in so far as is relevant here, reads as follows:

Article 14

1. Surrender shall only be granted subject to the general condition that the person sought shall not be prosecuted, punished or otherwise restricted in his or her personal liberty for offences committed prior to the time of his or her surrender and for which he or she has not been surrendered, unless:

(...)

f. prior consent to do so has been sought and obtained from the District Court.

(...)

3. At the latest on the third day after receipt of a request from the issuing judicial authority for the consent referred to in paragraph 1(f) or paragraph 2(c), the public prosecutor shall request in writing that the District Court consider the request. To that end, the public prosecutor shall submit the request to the District Court with an accompanying translation. The District Court shall give the consent referred to in paragraph 1(f) or paragraph 2(c) in respect of offences for which surrender could have been granted under this law. The decision on a claim shall in any event be taken within twenty-seven days of its receipt. The public prosecutor shall notify the issuing judicial authority of the District Court's decision without delay.

Article 25(1) and (3) of the OLW is contained in Chapter II, Section 2 ('Surrender Procedure'), Paragraph C ('Decision on surrender') and reads as follows:

Article 25

1. The hearing of the person sought shall take place in public, unless the latter requests that the case be heard *in camera* or the District Court orders that the proceedings take place behind closed doors for important reasons to be stated in the record of the hearing.

(...)

3. At the hearing, the person sought may be assisted by his or her legal counsel.

(...)

Questions referred for a preliminary ruling

2.1 The person concerned is a national of Nigeria. On 25 May 2020, the Amsterdam District Court granted his surrender to Hungary for the purpose of prosecution for, in brief, 'the laundering of the proceeds of crime'. The person concerned was actually surrendered to Hungary on 25 June 2020 and has been in detention there ever since.

2.2 On 13 April 2021, a Hungarian judicial authority requested consent to extend the offences as referred to in Article 27(3)(g) and (4) of the Framework Decision. That request was received by the District Court on 4 May 2021. The request relates to other offences constituting 'the laundering of the proceeds of crime' and that are alleged to have been committed prior to the actual surrender to Hungary. The request contained the information referred to in Article 8(1) of the Framework Decision. The request was accompanied by a record of the hearing of the surrendered person before a Hungarian judicial authority. At that hearing, the surrendered person, who was assisted by a lawyer, stated that he did not wish to renounce his entitlement to the speciality rule as referred to in Article 27(3)(f) of the Framework Decision.

2.3 On 1 April 2021, the wet van 3 maart 2021 tot herimplementatie van onderdelen 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 (wijziging van de Overleveringswet) (The Law of 3 March 2021 on the reimplementation of parts of the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union (amendment of the Law on surrender))¹ entered into force.

2.4 Prior to that date, the competence to decide on a request for consent as referred to in Article 27(3)(g) and (4) of the Framework Decision rested with the Amsterdam District Public Prosecutor’s Office (officier van justitie bij het arrondissementsparket Amsterdam) (Article 14(1)(f) and (3) of the (old) OLW). However, that authority cannot be regarded as an ‘executive judicial authority’ within the meaning of Article 6(2) of the Framework Decision because, in exercising its decision-making power, it may receive an instruction in a specific case from the Minister van Justitie en Veiligheid (Minister for Justice and Security). Following the judgment in *Openbaar Ministerie (Valsheid in geschrifte)*,² the currently applicable OLW delegates the competence to the Amsterdam District Court (Article 14(1)(f) and (3) (new) of the OLW).

2.5 Apart from rules on the information to be provided, the translation and the time limit for taking a decision, neither Article 27 of the Framework Decision nor any other provision of that Framework Decision lays down any rules on the procedure to be followed by the executing judicial authority when deciding on the request.³

2.6 The same applies to the provisions of the OLW. The provisions on the processing of a European arrest warrant (EAW) by the Amsterdam District Court ensure the right of the person sought to be heard and to be assisted by legal counsel at a hearing before the District Court takes a decision on the execution of the EAW, but those provisions, contained in Section 2 (‘Surrender procedure’) of Chapter II of the OLW (‘Surrender by the Netherlands’), have not been made applicable mutatis mutandis to Article 14(3) (new) of the OLW, contained in Section 1 (‘Conditions of surrender’) of Chapter II of the OLW.

2.7 A decision by which the executing judicial authority gives the consent as referred to in Article 27(3)(g) and (4) of the Framework Decision is liable to prejudice the liberty of the person surrendered, ‘given that it concerns an offence

¹ *Stb.* 2021, 125.

² CtJEU 24 November 2020, C-510/19, ECLI:EUC:2020:953 (*Openbaar Ministerie (Valsheid in geschrifte)*).

³ Opinion of Advocate General M. Campos Sánchez-Bordona of 25 June 2020, C-510/19, ECLI:EU:C:2020:494 (*Openbaar Ministerie (Valsheid in geschrifte)*), point 86.

other than that for which he or she was surrendered and it is liable to lead to a heavier sentence for that person'.⁴

2.8 Since the Framework Decision is founded on the principle that decisions relating to European arrest warrants 'are attended by all the guarantees appropriate for decisions of such a kind, inter alia those resulting from the fundamental rights and fundamental legal principles' and since this means that the decisions must be taken 'by a judicial authority that meets the requirements inherent in effective judicial protection',⁵ the District Court assumes that the procedure by which the executing judicial authority decides on a request as referred to in Article 27(3)(g) and (4) of the Framework Decision must also meet the requirements for effective judicial protection.

2.9 The right to be heard is one of the rights of defence inherent in the right to obtain effective judicial protection.⁶

2.10 The present request is the first to be decided by the District Court under the currently applicable OLW.

2.11 As previously mentioned, the person concerned is now in detention in Hungary. He was not summoned and was not present when the Amsterdam District Court dealt with the request. The same applies to the lawyer who assisted the person concerned in the earlier surrender proceedings. No other lawyer has appeared on behalf of the person concerned.

2.12 Against this background, the question arises in which Member State and in what manner the surrendered person must be able to exercise his/her right to be heard in relation to a request for consent as referred to in Article 27(3)(g) and (4) of the Framework Decision.

2.13 One possible interpretation could be that it is sufficient for the surrendered person to be able to exercise his/her right to be heard in the Member State to which he/she has been surrendered – in this case, Hungary – and to put forward any objections he/she may have to the extension of the offences in the procedure in which a judicial authority of that Member State hears him/her on the subject of a possible renunciation of entitlement to the speciality rule as referred to in Article 27(3)(f) of the Framework Decision. This interpretation appears to be in line with one of the two possibilities suggested by Advocate General M. Campos Sánchez-Bordona for respecting the right to be heard, namely, that 'a person who has already been surrendered could be given the opportunity to raise an objection

⁴ CtJEU 24 November 2020, C-510/19, ECLI:EU:C:2020:953 (*Openbaar Ministerie (Valsheid in geschrifte)*), paragraph 62.

⁵ CtJEU 24 November 2020, C-510/19, ECLI:EU:C:2020:953 (*Openbaar Ministerie (Valsheid in geschrifte)*), paragraph 49.

⁶ Opinion of Advocate General M. Campos Sánchez-Bordona of 25 June 2020, C-510/19, ECLI:EU:C:2020:494 (*Openbaar Ministerie (Valsheid in geschrifte)*), point 87.

to the extension with the issuing authority, as a step that must be taken before the issuing authority sends the request to the executing authority.⁷ It could be argued against this interpretation that the judicial authority does not check in these proceedings whether an extension of the offences is permitted. After all, if the person surrendered does not renounce the entitlement to the speciality rule – as in the present case – that assessment is made by the executing judicial authority.

2.14 Another interpretation could be that the surrendered person must be able to exercise his/her right to be heard in the Member State which surrendered him/her – in this case, the Netherlands – in the proceedings in which the executing judicial authority which surrendered him/her decides whether or not to grant the requested consent and that, if the executing judicial authority is able to take account of the official record of the hearing referred to in the preceding paragraph, the surrendered person has been able to exercise that right satisfactorily. It could be argued against this interpretation that the purpose of such a hearing is not to assess a request for an extension of the offences, but to decide whether or not to renounce the entitlement to the speciality rule, so that the right of the surrendered person to be heard is not sufficiently guaranteed by taking account of such an official record.

2.15 Finally, a further interpretation could be that the surrendered person must be able to exercise his/her right to be heard in the Member State which surrendered him/her, at a hearing to be organised by the executing judicial authority which surrendered him/her, in the course of the proceedings in which that authority decides whether to grant the requested consent. That is the other possibility proposed by Advocate General M. Campos Sánchez-Bordona for respecting the right to be heard.⁸ This interpretation raises practical problems. The person concerned is in fact not in the Member State that surrendered him earlier. Neither the Framework Decision nor any other provision of EU law provides a legal basis for hearing the person concerned by video conference or telephone conference. The experience of the public prosecutor at the Amsterdam District Public Prosecutor's Office – who, before 1 April 2021, was competent to take the decision on the request – has shown that the lawyer who assisted the person sought in the surrender procedure generally no longer considers himself to be that person's counsel, whether authorised or not, after the actual surrender. Summoning this lawyer to deal with the request is therefore of little use. The official appointment of a lawyer to represent the absent surrendered person is problematic from the point of view of the possibilities for consultation between that lawyer and the person concerned, who is in detention abroad. In those circumstances, the interpretation that the person concerned must be able to exercise his/her right to be heard at a hearing in the Member State which

⁷ Opinion of Advocate General M. Campos Sánchez-Bordona of 25 June 2020, C-510/19, ECLI:EU:C:2020:494 (*Openbaar Ministerie (Valsheid in geschrifte)*), point 90.

⁸ Opinion of Advocate General M. Campos Sánchez-Bordona of 25 June 2020, C-510/19, ECLI:EU:C:2020:494 (*Openbaar Ministerie (Valsheid in geschrifte)*), point 90.

previously surrendered him/her could lead to complications and delays, whereas the rules of Article 27 of the Framework Decision cannot be interpreted in a way which ‘would frustrate the objective pursued by that Framework Decision, which is to facilitate and accelerate surrenders between the judicial authorities of the Member States in the light of the mutual confidence which must exist between them.’⁹ In addition, pursuant to Article 27(4) of the Framework Decision, the decision on the request to extend the offences must be taken within 30 days of receipt of the request.

2.16 The question raised under 12 above is neither ‘clair’ nor ‘éclairé.’

2.17 The District Court will therefore refer the questions [formulated in paragraph 4] to the Court of Justice[.]

[text of questions] [...]

Request for the application of the urgent preliminary ruling procedure

2.18 The District Court requests the Court of Justice to deal with this request 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 (‘TFEU’) and Article 107 of the Rules of Procedure.

2.19 The questions referred for a preliminary ruling concern an area covered by Title V of Part Three of the TFEU. The person sought is currently in detention in Hungary. The District Court cannot take a decision on the request for an extension of the offences referred to in Article 27(4) of the Framework Decision for so long as it remains unclear in which Member State and in what manner the person concerned should be able to exercise his right to be heard in relation to that request. The decision on the request may prejudice the right to liberty of the person sought. If the District Court were to consent to an extension of the offences, the surrendered person could be placed in pre-trial detention for the additional offences – which could lead to a longer period of pre-trial detention – and, in the event of a conviction, to a heavier sentence being imposed. If the District Court were to refuse the request, the issuing Member State would – in principle – not be entitled to place him in pre-trial detention for the offences to which the request relates and, in the event of a conviction, would – in principle – not be able to execute a custodial sentence imposed for those offences.¹⁰ Consequently, the promptness with which the Court of Justice answers the questions referred for a preliminary ruling will have a direct and decisive influence on the duration of the detention of the person concerned in Hungary.

⁹ CtJEU 28 June 2012, C-192/12 PPU, ECLI:EU:C:2012:404 (*West*), paragraph 77.

¹⁰ CtJEU 1 December 2008, C-388/08 PPU, ECLI:EU:C:2008:669 (*Leymann and Pustovarov*), paragraph 73.

3. Conclusion

In view of the foregoing, the District Court takes the following decision.

4. Decision

REOPENS and STAYS the hearing indefinitely;

REQUESTS the Court of Justice to answer the following questions:

I. Must Article 27(3)(g) and (4) of Framework Decision 2002/584/JHA, read in the light of the right to effective judicial protection, be interpreted as meaning that:

- *a surrendered person must be able to exercise his or her right to be heard in relation to a request for an extension of the offences in the issuing Member State when a judicial authority of that Member State grants him or her a hearing relating to the possible renunciation of the entitlement to the speciality rule as referred to in Article 27(3)(f) of the Framework Decision, or*
- *must that person be able to exercise his or her right to be heard in the Member State which previously surrendered him or her to the executing judicial authority in the proceedings relating to the request for consent to extend the offences?*

II. If a surrendered person must be able to exercise his or her right to be heard in relation to the decision on a request for consent to extend the offences, as referred to in Article 27(4) of Framework Decision 2002/584/JHA, in the Member State which previously surrendered him or her, in what way must that Member State enable him or her to do so?

[composition of chamber] [...]