Case C-235/24 PPU [Niesker][i]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

2 April 2024

Referring court:

Gerechtshof Arnhem-Leeuwarden (Netherlands)

Date of the decision to refer:

29 March 2024

Defendant:

S.A.H.

Subject matter of the main proceedings

The main proceedings are proceedings relating to the recognition and enforcement in the Netherlands of a judgment in criminal matters delivered by a Swedish court.

Subject matter and legal basis of the request

The first point at issue within the context of this request under Article 267 TFEU is whether the Gerechtshof Arnhem-Leeuwarden (Arnhem-Leeuwarden Court of Appeal, Netherlands) can be regarded as a court or tribunal within the meaning of Article 267 TFEU and is therefore competent to refer questions for a preliminary ruling. If this question is answered in the affirmative, the Court of Appeal then asks whether Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') applies to the main proceedings, in which it has to consider the legal questions addressed in Article 8(2) to (4) and Article 9 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union ('Framework Decision 2008/909'), and,

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

if so, what consequences this will have. Lastly, the Court of Appeal asks questions concerning the interpretation of Article 8(4) of Framework Decision 2008/909.

Furthermore, the Court of Appeal asks that this reference for a preliminary ruling be dealt with under the urgent procedure as referred to in the fourth paragraph of Article 267 TFEU and Article 107(1) of the Rules of Procedure. The Court of Appeal points out that the questions referred relate to the area of freedom, security and justice, and that the sentenced person has currently been deprived of his liberty. The answers given to the questions may render it necessary to terminate the deprivation of liberty in the Netherlands, as recognition of the foreign sentence has to be refused or the sentence has to be converted to one that does not involve deprivation of liberty.

Questions referred for a preliminary ruling

1. Should the term ‘court or tribunal’, as referred to in Article 267 TFEU in conjunction with Article 8(2) to (4) and Article 9 of Framework Decision 2008/909/JHA, be interpreted as meaning that it also covers a designated regular court, other than the competent authority referred to in Article 8(1) of the Framework Decision, that rules in written proceedings exclusively on the legal questions referred to in Article 8(2) to (4) and Article 9 of the Framework Decision, in principle without any submissions from the sentenced person?

2. Should Article 47 of the Charter be interpreted as meaning that, when, in recognition proceedings under Framework Decision 2008/909/JHA, the assessment of the aspects referred to in Article 8(2) to (4) and Article 9 of that Framework Decision is entrusted to a specifically designated regular court in the executing State, in addition to the opportunity for the sentenced person to state his or her opinion in the issuing State on the basis of Article 6(3) of Framework Decision 2008/909/JHA, there should also be an effective remedy for the sentenced person in the executing State?

In the event that this question is answered in the affirmative:

3. In the light of Framework Decision 2008/909/JHA, should Article 47 of the Charter be interpreted as meaning that, as regards the effective remedy in the executing State, it is sufficient to give the sentenced person the opportunity to submit written observations, either prior to the court ruling and the recognition decision or after the recognition decision has been taken, in the form of a reassessment of the original ruling?

And

4. In the light of Framework Decision 2008/909/JHA, should Article 47 of the Charter be interpreted as meaning that a sentenced person who does not have sufficient financial resources and requires legal aid to ensure effective access to

justice should be provided with such legal aid in the executing State, even if this is not provided for by law?

5. Should the criterion set out in Article 8(3) of Framework Decision 2008/909/JHA be interpreted as meaning that, if the punishment or measure is adapted because, in terms of its nature, it is incompatible with the law of the executing State, it is necessary to assess which measure would in all likelihood have been imposed by the court in the executing State if the trial had been conducted in the executing State, or should an assessment be carried out, requesting additional information as necessary, to examine how the measure is actually implemented in the issuing State?

6. How and to what extent should the executing State take into account developments and information subsequent to the recognition decision in the event of a possible reassessment of the prohibition on aggravating the sentence under Article 8(4) of Framework Decision 2008/909/JHA?

Provisions of European Union law relied on

Article 47 of the Charter

Article 267 TFEU

Articles 6, 8 and 9 of Framework Decision 2008/909

Provisions of national law relied on

Articles 2:11 and 2:13 of the Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (Law on the mutual recognition and enforcement of custodial and suspended sentences, 'the WETVVS')

Succinct presentation of the facts and procedure in the main proceedings

1 The sentenced person is an Iraqi national. He has been living in the Netherlands since 1996 and was granted a permanent residence permit in 2001.

2 In a judgment of 26 February 2015 the Göta Hovrätt (Court of Appeal, Sweden) convicted him of criminal offences committed in Sweden. To summarise, these concerned the illegal possession of weapons, illegal threats, harassment and grievous bodily harm. The Court of Appeal in Sweden ruled that the sentenced person could not be deemed responsible for the offences due to the limited development of his mental faculties or a mental disorder and imposed a measure involving deprivation of liberty, namely a forensic psychiatric treatment of unspecified duration with a special examination upon discharge from the clinic.

3 The sentenced person asked the Swedish authorities to transfer the imposed sentence to the Netherlands, upon which these authorities asked the Dutch Minister for Justice and Security ('the Minister') to recognise and enforce the Swedish judgment.

4 In a ruling of 18 January 2019, after the Minister had forwarded the request, the Court of Appeal in the Netherlands found that the sentenced person had himself requested or consented to the forwarding of the judgment in which he had been convicted and held that there were no grounds for non-recognition and that the offences for which the sentence had been imposed are also punishable under Dutch law. The Court of Appeal subsequently ruled that there were grounds to adapt the imposed measure involving deprivation of liberty and converted it to a hospital order with treatment provided by the government, without setting a maximum duration. The Court of Appeal did not consider this to constitute an aggravation of the sentenced person's penal position.

5 As the competent authority within the meaning of Framework Decision 2008/909, on 18 February 2019 the Minister recognised the Swedish judgment, with due consideration for the Court of Appeal's ruling, adapting the sentence to the Dutch hospital order with compulsory treatment (without any maximum duration). The sentenced person was placed in a Forensic Psychiatric Centre in the Netherlands and has been there ever since. Following recognition of the judgment, in a decision of 6 August 2020 in which the residence permit issued to persons granted asylum was revoked, the State Secretary for Justice and Security declared the sentenced person an undesirable alien.

6 The sentenced person subsequently contested the lawfulness of the Minister's recognition decision in civil proceedings. He argued, amongst other things, that the Court of Appeal's ruling of 18 January 2019, on which the Minister's decision was based, was reached in proceedings that did not satisfy the requirements of Article 47 of the Charter. In these civil proceedings the gerechtshof Den Haag (The Hague Court of Appeal, Netherlands) upheld the claim (on appeal) in its judgment of 5 September 2023 and ordered the Minister to reconsider his decision of 29 January 2019.

7 In a letter of 15 September 2023 the Minister asked the Arnhem-Leeuwarden Court of Appeal to reassess its ruling, in proceedings that satisfied the requirements of Article 47 of the Charter. As part of this reassessment the Court of Appeal has decided, after consulting with the parties, to submit this request for a preliminary ruling.

The essential arguments of the parties in the main proceedings

8 The sentenced person argues that the Court of Appeal should reassess its ruling in proceedings that comply with Article 47 of the Charter, which in this case means that:

- the proceedings must be conducted in a public sitting, which the sentenced person should be able to attend;

- the case must be dealt with within a reasonable time;

- the sentenced person must have the possibility of being assisted by a lawyer, if necessary paid for by means of government aid;

- the arguments of both parties must be heard, and

- the ruling must be delivered publicly.

9 In addition, the sentenced person believes that in this case the sentence has been aggravated and – with effective legal protection in mind – he considers it necessary that he should be able to present further evidence in this respect.

Succinct presentation of the reasoning in the request for a preliminary ruling

Admissibility of the reference for a preliminary ruling

10 To date, the Court of Appeal has assumed that the question as to whether it is a court or tribunal within the meaning of Article 267 TFEU, and therefore whether it is competent to refer questions to the Court of Justice for a preliminary ruling, should be answered in the negative. That is because the task that the Court of Appeal performs within the context of proceedings concerning the recognition of court judgments from other EU Member States differs significantly from the ordinary tasks and procedures of a court. For example, there is no public hearing. Moreover, under the legislation, the Court of Appeal does not rule on the person's interest in the area of social rehabilitation, which is accorded a central role under Framework Decision 2008/909, nor does it rule on the grounds for refusal that are designated as optional in the WETVVS or on the interpretation of the grounds for refusal that are compulsory by law, against the background of the judgment of the Court of Justice of 29 April 2021, *X (Mandat d'arrêt européen – Ne bis in idem)* (C-665/20 PPU, EU:C:2021:339). The Court of Appeal is also unable to rule on cases in which the Minister refuses the request to take over the enforcement of a sentence without referring it to the Court of Appeal.

11 However, it can be concluded from the Dutch legislative history that the legislator explicitly wanted a court to rule on the legal questions addressed in Article 8(2) to (4) and Article 9 of Framework Decision 2008/909 and that a court has been designated for this purpose that, by law, delivers a binding ruling.

12 In accordance with the settled case-law of the Court of Justice, to assess whether a referring body is a 'court or tribunal' within the meaning of Article 267 TFEU, and therefore to assess whether the request for a preliminary ruling is admissible, a number of factors must be taken into account, such as: whether the body in question is established by law, whether it is permanent, whether its jurisdiction is

compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 29 March 2022, *Getin Noble Bank*, C-132/20-REC, EU:C:2022:235, paragraph 66 and the case-law cited).

13 The Court of Appeal's provisional opinion is that it is a body established by law, that it is permanent, that its rulings within the context of decisions based on the WETVVS are limited to a number of points, but are nevertheless compulsory, that although the legal procedure does not include the possibility for the sentenced person to be heard, any arguments of the sentenced person are taken into account, in so far as they are submitted within the context of an opinion or a subsequent reassessment, that the Court of Appeal applies rules of law and that it is independent. In the Court of Appeal's provisional opinion, the question as to whether it must be regarded as a court or tribunal therefore depends on whether its procedure can be considered to be *inter partes*.

14 It is in view of the above considerations that the Court of Appeal is referring the first question for a preliminary ruling. The answer to this question may, however, depend on the answer to the second question referred, which relates to the applicability of Article 47 of the Charter.

Article 47 of the Charter

15 According to Article 47 of the Charter, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.

16 The Court of Appeal is faced with the question as to whether, with its ruling on the basis of Article 2:11 of the WETVVS, it has violated rights and freedoms guaranteed by the law of the Union. Within this context it is wondering whether the ruling 'falls within the scope of European Union law' (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105), or whether it is a question of 'a situation governed by EU law' (judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373). It is clear that, in the case of this ruling, Article 8(2) to (4) and Article 9 of Framework Decision 2008/909 are applied, given that they were transposed into Articles 2:11 and 2:13 of the WETVVS. On the other hand, if the sentenced person is in the issuing State, he or she is given an opportunity to state his or her opinion orally or in writing, while Framework Decision 2008/909 emphatically does not include the possibility of an effective remedy for a sentenced person in the executing State, which means that it could also be argued that a legal situation applies that falls outside the scope of European Union law. As there is doubt about this point, the Court of Appeal is referring the second question for a preliminary ruling.

17 If this question must be answered in the affirmative, the question arises as to whether the requirements of Article 47 of the Charter are satisfied by means of the possibility of stating an opinion in the issuing State, in accordance with Article 6 of Framework Decision 2008/909. On the basis of Article 6(3) of that Decision,

this opinion is then available to the executing State in written form, which seems to suggest that the EU legislature is expecting the matter to be subsequently dealt with in writing in the executing State.

18 If this possibility does not satisfy the requirements of Article 47 of the Charter or does not extend to situations in which the sentenced person is not (or is no longer) in the issuing State and therefore cannot provide an opinion, the Court of Appeal wonders whether, in such a situation, Article 47 of the Charter requires the sentenced person to be heard in a public sitting in the executing State, with the possibility of accessing legal aid, and when this hearing should take place. More specifically, the question arises as to whether the fact that the convicted person can request a reassessment satisfies the requirements of Article 47.

19 Within this context the Court of Appeal notes that the assessment prescribed by Article 2:11 of the WETVVS is of a technical legal nature and relatively limited in scope. In many cases the interests of States tally with those of the sentenced person, namely social rehabilitation in the country with which this person has the closest ties. In this case it was necessary to adapt the foreign measure, but in most cases the measure involving deprivation of liberty takes the form of a prison sentence, which means that the (nature of the) sentence will not need to be adapted. If the consequence of applying Article 47 of the Charter is that every sentenced person has to be heard in a public sitting in the executing State, this will have practical complications. For example, there is the question of how the hearing in the executing State should be achieved if the sentenced person is still in the issuing State. Based on the case-law of the Court of Appeal, the sentenced person has the option of submitting a written opinion, which the Court of Appeal takes into account. This can be done either prior to the ruling and the recognition decision or afterwards in the form of a reassessment request. The sentenced person is free to obtain legal assistance in this regard, but is not able to receive financial support for this.

20 It is in view of the above considerations that the Court of Appeal is referring the third and fourth questions for a preliminary ruling.

Adaptation of the sentence

21 Article 8(3) of Framework Decision 2008/909 – and by extension Article 2:11(5) of the WETVVS – stipulates that if the sentence is incompatible with the law of the executing State in terms of its nature, it will be converted to a punishment or measure that corresponds as closely as possible to the sentence imposed in the issuing State. The Court of Appeal interpreted this criterion as meaning that the sentence must be converted to a measure that would in all likelihood have been imposed on the sentenced person if the trial had been conducted in the Netherlands. For this reason it opted to convert the sentence to a hospital order with compulsory treatment, the end of which, as in the case of the Swedish measure, is not predetermined and depends on the progress of the treatment.

22 The sentenced person argues that the Swedish measure involving deprivation of liberty is less far-reaching in nature than the Dutch measure. In the case of the Swedish measure, the need to terminate the measure is assessed after six months and the average duration is around four years, whereas under the Dutch measure it is assessed in principle every two years, the average duration is much longer and, moreover, the person concerned has been declared an undesirable alien.

23 In the light of these arguments the Court of Appeal is referring the fifth question for a preliminary ruling.

Assessment of information dating from after the recognition decision

24 Lastly, the Court of Appeal is wondering to what extent it needs to take account of information that only became available after the ruling or of developments that only occurred at a later point, where this information or these developments could be relevant to the assessment within the context of the ban on aggravating the sentence under Article 8(4) of Framework Decision 2008/909. In this case the sentenced person referred in particular to the development whereby he had been declared an undesirable alien after the recognition decision. The Court of Appeal considers that this could be a relevant factor when assessing whether the sentence or measure involving deprivation of liberty has been aggravated. However, it concerns information and developments dating from after the recognition decision. As the Court of Appeal has doubts about whether it can take this information into account, it is referring the sixth question for a preliminary ruling.