



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 19 October 2016¹

Case C-477/16 PPU

Openbaar Ministerie
v
Ruslanas Kovalkovas

(Request for a preliminary ruling from the Rechtbank Amsterdam (Court of First Instance, Amsterdam, Netherlands))

(Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — The terms ‘judicial authority’ and ‘judicial decision’ — European arrest warrant issued by the Ministry of Justice of a Member State for enforcement of a custodial sentence)

The Rechtbank Amsterdam (Court of First Instance, Amsterdam, Netherlands) raises, in this request for a preliminary ruling, the same questions as it has submitted to the Court of Justice in ano

ther earlier reference,

1. ²but these questions are distinguishable from one another because the EAW³ under discussion has been issued by the Ministry of Justice of the Republic of Lithuania. In *Poltorak* the EAW came from the Swedish National Police Board, but now it must be ascertained whether the Lithuanian Ministry of Justice is included in the concept of ‘judicial authority’ contained in Article 6(1) of Framework Decision 2002/584/JHA.⁴

2. Since the questions are identical, I shall repeat here a substantial part of the considerations set out in the opinion which, on this same date, I am delivering in *Poltorak*. Furthermore, in 2014 the Lithuanian authorities revised their EAW scheme in order to make it comply, in the terms suggested by the Council, with the requirements of the Framework Decision, which means that, from a general point of view, this reference is of a distinctly ‘historical’ importance, restricted to the specific EAW enforcement concerned.

1 — Original language: Spanish.

2 — *Poltorak*, C-452/16 PPU, pending before this Court.

3 — European arrest warrant.

4 — Council 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 Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) (‘Framework Decision’).

I – Legislative framework

A – *Union law*

1. *EU Treaty*

3. According to Article 6:

‘1. The Union recognises the rights, freedoms and principles set out in the Charter of fundamental rights [‘the Charter’], which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950 (“ECHR”)]. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’

2. *The Charter*

4. Under Article 47, entitled ‘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.

...’

3. *Framework Decision*

5. Recital 5 states:

‘The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities ...’

6. Under recital 6:

‘The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.’

7. Recital 8 provides:

‘Decisions on the execution of the European arrest warrant 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.’

8. Furthermore, recital 10 emphasises that:

‘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) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.’

9. Under Article 1, entitled ‘Definition of the European arrest warrant and obligation to execute it’:

‘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.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

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.’

10. Article 6, under the heading ‘Determination of the competent judicial authorities’, provides:

‘1. 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.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.’

11. Under Article 7, relating to the central authority:

‘1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

...’

12. As regards relation to other legal instruments, Article 31(1)(a) states:

‘1. Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States:

- (a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned;

...’

B – Lithuanian law Europos arešto orderio išdavimo ir asmens perėmimo pagal Europos arešto orderį taisyklės (Rules governing the issue of an EAW and the surrender of a person pursuant to an EAW in force in 2013)⁵

13. Under Paragraph I.4, the Ministry of Justice shall issue an EAW in order to arrest a person who has been given a custodial sentence in a judgment and who has absconded in order to avoid execution of the sentence, provided that the time remaining to be served is at least four months and there are grounds for believing that the person in question may be located in a Member State.

14. Under Paragraph II.7, in the event of a conviction *in absentia*, the court will send a copy of the judgment of conviction to the Ministry of Justice, together with the draft EAW, after taking into consideration the criteria for issuing an EAW laid down in the Rules.

15. Under Paragraph II.8, in the event that the convicted person absconds, the request for issue of an EAW shall be submitted to the Ministry of Justice by the institution executing the sentence.

16. Under Paragraph III.12, the Ministry of Justice shall analyse the documents submitted by the judicial or prison authority and, if the conditions laid down in the Rules are satisfied, shall issue the EAW taking into consideration the severity and type of the offence and the personality of the convicted person. If there are no grounds for issuing the EAW, the Ministry of Justice shall return the request to the requesting institution.

17. Under Paragraph III.16, if the EAW is issued, it shall be signed by the Minister for Justice or a person delegated by him.

II – The main proceedings and the questions referred for a preliminary ruling

18. On 29 June 2016, the public prosecutor at the Rechtbank Amsterdam (Court of First Instance, Amsterdam) requested that court to process an EAW issued on an unspecified date in August 2013 by the Ministry of Justice of the Republic of Lithuania, concerning the arrest and surrender of Mr Kovalkovas, a Lithuanian national who is neither domiciled nor resident in the Netherlands and is currently being held in the Detention Centre in Zwaag (Netherlands).

19. The purpose of the EAW is to enforce the judgment of the Jonava Region District Court (Lithuania) of 13 February 2012 imposing on Mr Kovalkovas a custodial sentence of four years and six months for several assaults.

⁵ — Order n. 1R-195/I-114, of 26 August 2004, ‘the EAW Rules’.

20. The referring court wishes to know whether the EAW has been issued by a ‘judicial authority’ within the meaning of Article 6(1) of the Framework Decision and, consequently, whether it is a ‘judicial decision’ within the meaning of Article 1(1) thereof.

21. In those circumstances, the Rechtbank Amsterdam (Court of First Instance, Amsterdam) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Are the expressions “judicial authority”, within the meaning of Article 6(1) of [the] Framework Decision, and “judicial decision”, within the meaning of Article (1) of [the] Framework Decision, independent concepts of EU law?
- (2) If the answer to Question 1 is in the affirmative: what are the criteria for determining whether an authority of the issuing Member State is such a “judicial authority” and whether the EAW issued by it is consequently such a “judicial decision”?
- (3) If the answer to Question 1 is in the affirmative: is the Ministry of Justice of the Republic of Lithuania covered by the term “judicial authority”, within the meaning of Article 6(1) of [the] Framework Decision, and is the EAW issued by that authority consequently a “judicial decision” within the meaning of Article 1(1) of [the] Framework Decision?
- (4) If the answer to Question 1 is in the negative: is the designation of an authority such as the Ministry of Justice of the Republic of Lithuania as the issuing judicial authority in conformity with EU law?’

22. The referring court justifies these questions referred for a preliminary ruling by invoking the reasons set out in the order for reference in *Poltorak* (C-452/16 PPU), to which it adds a series of observations.⁶

23. Firstly, it points out that, according to the Proposal for a Council Framework Decision, the EAW system is distinguished by its primarily judicial nature, and the political phase inherent in the extradition procedure is abolished.

24. Secondly, it emphasises that, in the light of recitals 5 and 6 of the Framework Decision, the Decision aims to exclude the role of political office holders from decisions on the issuing and execution of EAWs.

25. Thirdly, the fact that the Framework Decision does not contain a definition of the term ‘judicial authority’ does not justify the conclusion that a Ministry of Justice may be described as such, whether the term is deemed to be a category specific to national laws or an autonomous term of EU law.

26. According to the referring court, the fact that the EAW derives from a court ruling may have a bearing, since it might be considered that the EAW is based on a ‘judicial decision’ within the meaning of Article 8(1)(c) of the Framework Decision and that, therefore, the Ministry of Justice issued it at the request of a Lithuanian court. In that regard, the Rechtbank Amsterdam (Court of First Instance, Amsterdam) echoes a judgment of the Supreme Court of the United Kingdom, which establishes the circumstances in which an EAW processed by a minister may be regarded as issued by a judicial authority.⁷ Since that judgment was given prior to that of the Court of Justice in

⁶ — Paragraph 4.2 of the order for reference.

⁷ — *Bucnys v. Ministry of Justice* [2013] UKSC 71 (20 November 2013), paragraph 66: ‘A European arrest warrant issued by a Ministry in respect of a convicted person with a view to his or her arrest and extradition can be regarded as issued by a judicial authority for the purposes of Council Framework Decision 2002/584/JHA and Part 1 of the Extradition Act 2003 if the Ministry only issues the warrant at the request of, and by way of endorsement of a decision that the issue of such a warrant is appropriate made by: (a) the court responsible for the sentence’.

Bob-Dogi,⁸ for the Rechtbank Amsterdam (Court of First Instance, Amsterdam) the question referred for a preliminary ruling is relevant since this latter judgment of the Court of Justice has stressed that an EAW may be issued only by an authority with status and powers enabling it to provide adequate judicial protection.

III – The proceedings before the Court of Justice

27. The reference was received at the Court of Justice on 2 September 2016, with the request that it be dealt with under the urgent preliminary ruling procedure (fourth paragraph of Article 267 TFEU).

28. At the administrative meeting on 12 September 2016, the Court of Justice decided to handle the matter under the urgent preliminary ruling procedure and simultaneously with *Poltorak* (C-452/16 PPU). It also agreed, pursuant to Article 111 of the Rules of Procedure, to omit the written part of the procedure and, in accordance with Article 109 of those rules, to invite the Republic of Lithuania to provide certain information concerning its EAW system.

29. The information requested from the Republic of Lithuania was submitted by letter from the Lithuanian Government registered at the Court of Justice on 23 September 2016.

30. On 5 October 2016 a joint public hearing was held in this case and in *Poltorak* (C-452/16 PPU); it was attended by Mr Poltorak's legal representatives, the Netherlands, German, Greek, Finnish and Swedish Governments and the Commission.

IV – Analysis

31. As I have already indicated at the beginning of this opinion, the questions raised by the Rechtbank Amsterdam (Court of First Instance, Amsterdam) are the same as those in *Poltorak*. In fact, the analogy is complete, although the new reference has a 'particular dimension', because the EAW has been issued 'by a political office holder representing the Ministry of Justice'.⁹

32. In my view, however, that circumstance is not qualitatively different from that which exists in *Poltorak*. Neither of the bodies which have issued the EAW in those cases may be attributed the status of 'judicial authority' within the meaning of the Framework Decision; either, as in the first case, because it is a 'police' authority, or, as here, because it is a 'political' body. Ultimately, they cannot guarantee respect for the fundamental rights and freedoms, the foundation of the mutual trust on which the system in the Framework Decision is based.

33. Consequently, for the reasons set out in points 27 to 30 of my opinion in *Poltorak*, I consider that first question raised by the referring court merits an affirmative reply and that, therefore, the expressions 'judicial authority' and 'judicial decision', within the meaning of Article 6(1) and Article 1(1) respectively of the Framework Decision, are independent concepts of EU law and are to be interpreted uniformly throughout the European Union.

⁸ — Judgment of 1 June 2016 (C-241/15, EU:C:2016:385).

⁹ — Paragraph 4.1, *in fine*, of the order for reference.

34. The reply to Questions 2 and 3, in line with the arguments set out in points 34 to 54 of my opinion in *Poltorak*, should be that an authority like the Ministry of Justice does not satisfy the conditions required for classification as a ‘judicial authority’, within the meaning of Article 6(1) of the Framework Decision. The arguments put forward in relation to the Swedish National Police Board may be extrapolated, *mutatis mutandis*, to the Lithuanian Ministry of Justice, which ‘defines and ... implements State policy’ in matters within its competence.¹⁰

35. According to the information provided by the referring court from a Council evaluation report of 2007,¹¹ the issue of an EAW by the Republic of Lithuania is subject to the existence of a national arrest warrant or a conviction by final judgment. The executing court or, in the case of abscondment following conviction, the Prison Department, may then apply to the Ministry of Justice for the issue of an EAW. The Ministry of Justice will issue the EAW after examining the relevant documents and ensuring that there are grounds for issuing it.

36. In my view, this system does not conform to the Framework Decision.¹² As I explain in point 60 of my opinion in *Poltorak*, the model analysed could only comply with that decision if the Lithuanian Ministry of Justice ‘satisfied the following requirements, which I consider an absolute must for maintaining the level of judicial guarantees on which the EAW system is based: (a) it would have to act by mandate and under the supervision of a judicial authority, within the meaning of Article 6 of the Framework Decision; and (b) it could not have discretionary powers or a margin of appreciation concerning the issue of the EAW, and would have to adhere to the mandate received from the judicial authority. Furthermore, if there were any doubts concerning the warrant, it would be the responsibility of the judicial authority to consult the Court of Justice concerning the interpretation of the Framework Decision, in a request for a preliminary ruling’.

37. If the procedure to issue the EAW is initiated by the Prison Department, without the intervention of the judicial authority, that means that the first of those requirements is not met.

38. If, on the other hand, the procedure is initiated by the judicial authority, the Ministry of Justice has a certain margin of appreciation to decide whether to issue the EAW, without its decision being subject to judicial review.

39. When replying to the request of the Court of Justice for the information concerned, the Lithuanian Government states that the Ministry of Justice may take a decision regarding the EAW only after the court has ascertained that its issue is in accordance with the principles of proportionality or procedural economy.¹³ If the Ministry of Justice has doubts in that regard, it may ask the judicial body to justify more specifically that the application for issue of the EAW respect those principles.¹⁴ The Lithuanian Government then explains, somewhat ambiguously, that in the event of ‘a negative reply from the court regarding the conformity of the issue of [the EAW] with the principles of proportionality and ... economy’, the application will not be granted. On the other hand, in the event of ‘a reply to the effect that the issue of [the EAW]’ respects those principles, it will be issued.¹⁵

10 — Reply of the Lithuanian Government, paragraph 15.

11 — Evaluation report on the fourth round of mutual evaluations ‘the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States’ (Council Document No 12399/1/07 REV 1, ‘evaluation report’).

12 — This was also the understanding of the Council in its evaluation report, p. 30, paragraph 7.2.1.1.

13 — Reply of the Lithuanian Government, paragraph 38.

14 — *Loc. ult. cit.*, paragraph 39. The Lithuanian Government refers to this eventuality as a ‘right’ of the Ministry of Justice. However, it would appear from EAW Rule No 12 that it is, instead, an obligation.

15 — *Loc. ult. cit.*, paragraph 40.

40. In my view, the assertion of the Lithuanian Government is somewhat ambiguous, because it might be inferred from its explanations that it is for the judicial body alone to assess proportionality. However, the crucial element is not so much the court's 'reply' as the assessment made by the Ministry of Justice of that response. Otherwise it is impossible to understand how the judicial body could give 'a negative reply ... regarding the conformity of the issue of the [EAW] with the principles of proportionality and economy'. The *negativity* in question is rather the result of the assessment of that reply by the Ministry of Justice, which, as is apparent from EAW Rule No 12, decides in the last resort whether it is expedient to issue the EAW.

41. In that situation, there is no compliance with the condition to which I refer in point 66 of my opinion in *Poltorak*, that is, that the authority issuing an EAW act subject to 'the mandate and control of a genuine judicial authority which supervises it'.¹⁶

42. That said, I must mention a circumstance which distinguishes the present case from *Poltorak*. It has nothing to do with the 'particular dimension', which is political, of the authority which has issued the EAW, but with the fact that, as the referring court has itself pointed out¹⁷ and the Lithuanian Government has confirmed, the Republic of Lithuania informed the Council, on 6 February 2014, that henceforth the EAW could be issued only by specific courts, to the exclusion, therefore, of the Ministry of Justice.

43. Although that fact does not mean, on its own, that the question referred for a preliminary ruling has become without object (since the EAW under consideration in the proceedings *a quo* had been issued in accordance with the previous system and there is no evidence that the Lithuanian judicial authorities have adopted another in its place), it is certainly relevant in that the legislative change: (a) renders unnecessary even minimal interference in the procedural autonomy of the Member State, unlike the interference which, in my view, was inevitable in *Poltorak*; and (b) the Republic of Lithuania itself has opted to adapt its model to the requirements stemming from the Framework Decision.

44. Finally, as regards the request made by the Government of Lithuania,¹⁸ and supported at the hearing by the Government of the Netherlands and by the Commission, concerning limitation of the temporal effects of the judgment of the Court of Justice if it were held therein that the EAW issued by the Ministry of Justice was not a judicial decision, I refer to points 68 to 70 of my opinion in *Poltorak*, where I explain the reasons why I believe that such a limitation is not appropriate.

V – Conclusion

45. In the light of the foregoing considerations, I propose that the Court of Justice reply to the questions referred by the Rechtbank Amsterdam (Court of First Instance, Amsterdam) as follows:

- (1) The expressions 'judicial decision' and 'judicial authority' in Article 1(1) and Article 6(1), respectively, of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, are independent concepts of EU law and are to be interpreted uniformly throughout the European Union.

¹⁶ — I think, moreover, that this is the spirit of the British precedent invoked by the referring court, to which I have referred in footnote 7.

¹⁷ — Paragraph 4.1 of the order for reference.

¹⁸ — Paragraph 48 of the replies of the Government of Lithuania to the questions put by the Court of Justice.

- (2) An authority whose powers are organised like those of the Ministry of Justice of the Republic of Lithuania does not fulfil the criteria for being classed as a ‘judicial authority’, within the meaning of Article 6(1) of Framework Decision 2002/584/JHA, nor does the European arrest warrant which it issued in this case constitute a ‘judicial decision’, within the meaning of Article 1(1) of that Framework Decision.