Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 9 March 2023 [1]

**Case C-142/22**

**OE**
**v**
**The Minister for Justice and Equality**

(Request for a preliminary ruling from the Supreme Court (Ireland))

(Reference for a preliminary ruling – Police and judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 27 – Speciality rule – Prosecution for an offence committed prior to surrender other that for which the person concerned was surrendered – Consent of the executing judicial authority – Invalid European arrest warrant – Consequences for the request for consent – Matter definitively determined in the surrender decision)

## I. Introduction

1. Article 27(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2] as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [3] sets out the speciality rule, under which 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.

2. It follows from Article 27(3)(g) of Framework Decision 2002/584 that the speciality rule provided for in paragraph 2 of that article does not apply where the executing judicial authority which surrendered the person concerned gives its consent, in accordance with paragraph 4 thereof, for that person to 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. The present request for a preliminary ruling calls on the Court, in essence, to decide whether the finding that a European arrest warrant, on the basis of which a person has been surrendered, was issued by an authority which did not constitute an 'issuing judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584, and should therefore have been

1 Original language: French.

2 OJ 2002 L 190, p. 1.

3 OJ 2009 L 81, p. 24; 'Framework Decision 2002/584'.

regarded as invalid on that ground, is such as to prevent the executing judicial authority, when assessing a request for consent to allow the judicial authorities of the issuing Member State to prosecute or sentence that person for an offence committed prior to his or her surrender other than that for which he or she was surrendered, from giving such consent.

4. In this Opinion, I will propose that the Court answer to the effect that such a ground for invalidity of a European arrest warrant cannot prevent the executing judicial authority from giving the consent requested.

## II. Legal framework

### *A. European Union law*

5. Article 1(1), Article 6(1) and (2), Article 8(1) and Article 27 of Framework Decision 2002/584 are relevant to this case.

### *B. Irish law*

6. Framework Decision 2002/584 was transposed into Irish law by the European Arrest Warrant Act 2003, as amended.

7. Section 2(1) of that act sets out, inter alia, the following definitions:

– 'judicial authority' is 'the judge, magistrate or other person authorised under the law of the Member State concerned to perform functions the same or similar to those performed under section 33 by a court in the State'. The Supreme Court (Ireland) clarifies that the function at issue here is that of issuing European arrest warrants;

– 'issuing judicial authority' is 'the judicial authority in the issuing State that issued the relevant warrant concerned', and

– 'issuing Member State' is 'a Member State … a judicial authority of which has issued that European arrest warrant'.

8. Section 22 of the European Arrest Warrant Act 2003, as replaced by section 80 of the Criminal Justice (Terrorist Offences) Act 2005, provides, in subsection 7 thereof:

'The High Court [(Ireland)] may, in relation to a person who has been surrendered to an issuing State under this Act, consent to

(a) proceedings being brought against the person in the issuing state for an offence,

(b) the imposition in the issuing state of a penalty, including a penalty consisting of a restriction of the person's liberty, in respect of an offence, or

(c) proceedings being brought against, or the detention of, the person in the issuing state for the purpose of executing a sentence or order of detention in respect of an offence,

upon receiving a request in writing from the issuing state in that behalf.'

9. Section 22(8) of the European Arrest Warrant Act 2003, as replaced by section 15 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, provides that the consent referred to in section 22(7) of the European Arrest Warrant Act 2003 is to be refused if the offence concerned is one for which a person could not, by virtue of Part 3 thereof, be surrendered. Part 3 of that act contains provisions concerning fundamental rights, correspondence, double jeopardy, prosecutions against the requested person within the State based on the same alleged acts, the age of criminal responsibility, extraterritoriality and trials in absentia.

## III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

10. In the course of 2016, OE was the subject of three European arrest warrants: two of those warrants were issued by the Amsterdam public prosecutor's office (Netherlands) and the third by a unit of the Netherlands national prosecutor's office. Those warrants sought the surrender of OE for prosecution for a series of offences relating, inter alia, to money laundering, assault and attempted murder.

11. As the objections raised by OE were rejected by the High Court and he did not appeal the High Court's judgment, he was surrendered to the Netherlands authorities in 2017. It is common ground that none of those objections related to the fact that the European arrest warrants had been issued by public prosecutors. OE was subsequently sentenced to 18 years' imprisonment, a sentence which he is currently serving in the Netherlands.

12. On 1 May 2019, the Netherlands national prosecutor sent to the High Court, in its capacity as executing judicial authority, a request for consent, in accordance with the provisions of Article 27(3)(g) and Article 27(4) of Framework Decision 2002/584, to allow proceedings to be brought against OE for offences committed prior to his surrender other than those for which he had been surrendered. That request was submitted to the High Court on 23 July 2019. OE was tried, convicted and sentenced to life imprisonment on the new charges, but the consent of the executing judicial authority is necessary before that further sentence of deprivation of liberty can be executed.

13. The said request for consent was, however, withdrawn following the delivery of the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*,[4] from which it follows that public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive in connection with the adoption of a decision to issue a European arrest warrant cannot come within the scope of the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584.

14. A new request for consent was thereupon submitted to the High Court, but this time originating from an investigating judge in Amsterdam.

[4] C-508/18 and C-82/19 PPU, EU:C:2019:456.

15. OE opposed that request for consent before the High Court, arguing that the authorities that had issued the European arrest warrants were not 'issuing judicial authorities' for the purposes of Article 6(1) of Framework Decision 2002/584. In that regard, it should be made clear that OE does not contest his surrender to the Netherlands authorities under those European arrest warrants, but considers that the consent to the prosecution of offences other than those for which he was surrendered cannot be given if the original European arrest warrants have not been validly issued by an issuing judicial authority.

16. Taking the view that the decision on his surrender is *res judicata*, however, the High Court dismissed OE's action. OE appealed to the Court of Appeal (Ireland).

17. In the meantime, on 24 November 2020, the Court handed down, in relation to the Netherlands public prosecutor, the judgment in *Openbaar Ministerie (Forgery of documents)*,[5] according to which Article 6(2), Article 27(3)(g) and Article 27(4) of Framework Decision 2002/584 must be interpreted as meaning that the public prosecutor of a Member State who, although he or she participates in the administration of justice, may receive in exercising his or her decision-making power an instruction in a specific case from the executive, does not constitute an 'executing judicial authority' within the meaning of those provisions.[6]

18. The Court of Appeal dismissed OE's appeal, finding, in line with the argument put forward by the Minister for Justice and Equality ('the Minister'), that it was necessary to apply the national procedural rule on the principle of estoppel, which precluded both a direct challenge to the surrender order made by the High Court and a collateral attack on that order.[7] In that regard, the Court of Appeal relied on the case-law of the Court that emphasised, subject to compliance with the principles of equivalence and effectiveness breach of which had not been alleged in the case in the main proceedings, the importance of the principle that judicial decisions that had become definitive, after all rights of appeal had been exhausted or the time limits for appeal had expired, could not be called into question.[8]

19. On 22 September 2021, the Supreme Court granted leave for a further appeal.

20. According to that court, OE accepts that the decision to order his surrender in 2017 is, as a matter of Irish law, *res judicata* and that EU law would not require that decision to be reopened. His primary objection to the giving of consent is based on the statutory terms governing the consent procedure. Under section 22(7) of the European Arrest Warrant Act 2003, the request for consent must come from the 'issuing State', which is defined as the State whose 'judicial authority' issued the original European arrest warrant. OE claims, however, that, since the public prosecutors who issued the original European arrest warrants were not, as a matter of EU law, 'judicial authorities', it follows that the Kingdom of the Netherlands cannot be regarded as the 'issuing State'.

5 C-510/19, EU:C:2020:953.

6 Paragraph 70. See also judgment of 8 December 2022, *CJ (Decision to postpone surrender due to criminal prosecution)* (C-492/22 PPU, EU:C:2022:964, paragraph 55).

7 The referring court states that the principle of estoppel must be applied, in principle, in a case where: (i) a judgment has been given by a court having jurisdiction; (ii) the decision was a final decision on the merits; (iii) the judgment determined a question which a party is attempting to raise in the subsequent proceedings; and (iv) the parties were the same persons (or their privies) as the parties in the proceedings in which the estoppel point is argued.

8 The referring court cites the judgment of 6 October 2009, *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615).

21. Nevertheless, the Minister continues to argue before the referring court that any issue that might have arisen concerning the Netherlands prosecutors' ability to act as issuing judicial authorities for European arrest warrants must be regarded as having been definitively determined by the High Court in its surrender order of 2017 and that the principle of estoppel applies to that definitive determination, such that it can no longer be reopened on that point.

22. In the view of the referring court, the answer to the question whether OE should be permitted, in the context of a request for consent under Article 27(3)(g) and Article 27(4) of Framework Decision 2002/584, to raise an argument based on the fact that the original European arrest warrants were not issued by an 'issuing judicial authority', within the meaning of Article 6(1) of that framework decision, depends on the correct legal classification of the relationship between the surrender procedure and the consent procedure.

23. That court considers that, if they should be regarded as separate, stand-alone procedures, such that any objection that was open to the person concerned to raise in the context of the request for surrender may be relied on as a new argument or further argument in the context of the request for consent, then the principle of estoppel cannot apply.

24. If, on the other hand, those procedures must be regarded as being so closely linked that an issue that was necessarily determined in the surrender decision must be taken as having been determined for the purposes of the consent decision, OE will not be permitted to rely at this stage on an argument concerning the status of the issuing judicial authority.

25. In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should Article 27 of [Framework Decision 2002/584] be interpreted as meaning that a decision to surrender a person creates a legal relationship between him, the executing State and the requesting State such that any issue taken to have been finally determined in that decision must also be taken to have been determined for the purposes of the procedure for obtaining consent to further prosecution or punishment for other offences?

(2) If the answer to Question 1 is that Article 27 does not require that interpretation, does a national procedural rule breach the principle of effectiveness if it operates so as to prevent the person concerned from relying, in the context of the consent application, upon a relevant judgment of the [Court] delivered in the period of time after the order for surrender?'

26. The referring court requested that this case be determined pursuant to the expedited preliminary ruling procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice or to the urgent preliminary ruling procedure laid down in Article 107 of those rules of procedure.

27. By decision of 15 March 2022, the Second Chamber decided not to grant the referring court's request that this case be dealt with under the urgent preliminary ruling procedure. By decision of 23 March 2022, the President of the Court rejected the referring court's request for the case to be determined pursuant to the expedited preliminary ruling procedure.

28. OE, the Minister and the Irish Government, the Hungarian, Netherlands and Polish Governments and the European Commission submitted written observations.

29. At the hearing held on 14 December 2022, OE, the Minister and the Irish Government, the Netherlands Government and the Commission presented oral argument and answered oral questions put by the Court.

## IV. Analysis

30. As is apparent from the order for reference, the question underlying those referred for a preliminary ruling concerns the relationship between the surrender procedure and the subsequent request, pursuant to Article 27(3)(g) and Article 27(4) of Framework Decision 2002/584, to obtain the consent of the executing judicial authority for a person already surrendered to 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.

31. More specifically, the referring court seeks to ascertain whether the invalidity of a European arrest warrant, owing to the fact that it was not issued by an 'issuing judicial authority', within the meaning of Article 6(1) of that framework decision, can prevent the executing judicial authority from giving the consent that has been requested of it.

32. The examination of this substantive problem in the context of a dispute concerning the proper response to a request for consent appears, however, to turn in this case on a question of national procedural law, consisting in determining whether the principle of estoppel is applicable in the context of the case in the main proceedings.

33. In my view, the resolution of the dispute in the main proceedings does not require the Court to rule on the compatibility with EU law of the application of that national procedural rule in the circumstances described by the referring court. Indeed, that question becomes irrelevant from the moment it is established that, regardless of whether or not it is possible for the person concerned to rely, in the context of a request for consent, on a ground relating to the invalidity of a European arrest warrant that has been the subject of a final decision with a view to being executed, such a ground is not, in any event, capable of justifying a refusal by the executing judicial authority to give such consent.

34. I am likewise of the view that the substantive problem relating to the possible consequences of the invalidity of a European arrest warrant for the examination of a subsequent request for consent under Article 27(3)(g) and Article 27(4) of Framework Decision 2002/584 must be dealt with per se, without it being necessary to rule, contrary to what the Commission submits, on the merits of the argument raised by OE to demonstrate that there is no 'issuing State', within the meaning of section 22(7) of the European Arrest Warrant Act 2003. Aside from the fact that that argument is focused on the interpretation of a rule of national law, I take the view that the referring court's central concern is indeed about the relationship existing, under EU law, between an initial surrender and a request for consent. That relationship also underpins OE's line of argument in the dispute in the main proceedings.

35. In that regard, it is apparent from the order for reference that OE contests the granting of the consent requested on the ground that the Netherlands authorities that issued the original European arrest warrants did not have the status of 'issuing judicial authorities', within the meaning of Article 6(1) of Framework Decision 2002/584. OE does not call into question the surrender decision or the status of the judicial authority that made the request for consent, but does argue that the consent requested pursuant to Article 27(3)(g) and Article 27(4) of that

framework decision cannot be given if the European arrest warrants leading to his surrender were not issued validly. OE therefore relies on the invalid nature of the original European arrest warrants to object to the executing judicial authority giving the consent requested.

36. Such a line of argument is, in my opinion, flawed.

37. Even though a request for consent is necessarily linked to a specific, previously executed European arrest warrant, that request must, in my view, be examined separately and independently on its own merits by the executing judicial authority. Thus, a defect affecting a European arrest warrant that has been executed cannot constitute a ground for refusing the consent requested.

38. It should be noted, in that regard, that the Court has already held that, where the requested person has been arrested and then surrendered to the issuing Member State, the European arrest warrant has, in principle, exhausted its legal effects, with the exception of the effects of the surrender expressly provided for in Chapter 3 of Framework Decision 2002/584. [9]

39. The effects of the surrender provided for in that chapter include potential prosecution for other offences the conditions of which are laid down in Article 27 of that framework decision.

40. Under the speciality rule set out in Article 27(2) of the said framework decision, which is linked to the sovereignty of the executing Member State, a person surrendered has the right not to be prosecuted, sentenced or otherwise deprived of liberty except for the offence for which he or she was surrendered. [10]

41. According to the Court, that rule requires the issuing Member State which wishes to prosecute or sentence a person for an offence committed before he or she was surrendered under a European arrest warrant other than that for which he or she was surrendered to obtain the consent of the executing Member State, in order to prevent the first Member State from encroaching upon the competences which the executing Member State might exercise and exceeding its powers in relation to the person concerned. [11]

42. It is only in the cases provided for in Article 27(3) of Framework Decision 2002/584, inter alia where consent has been given in accordance with Article 27(3)(g) and Article 27(4) thereof, that the judicial authorities of the issuing Member State are authorised to prosecute or sentence that person for an offence other than that for which he or she was surrendered. [12]

43. The Court has made clear that the speciality rule is closely linked to the surrender resulting from the execution of a specific European arrest warrant. [13] This implies that compliance with that rule can be assessed only in the light of the surrender effected under a specific European arrest warrant. [14]

9 See judgment of 13 January 2021, *MM* (C-414/20 PPU, EU:C:2021:4, paragraph 77).

10 See, inter alia, judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)* (C-195/20 PPU, EU:C:2020:749, paragraph 39 and the case-law cited).

11 See judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)* (C-195/20 PPU, EU:C:2020:749, paragraph 40).

12 See judgment of 24 November 2020, *Openbaar Ministerie (Faux en écritures)* (C-510/19, EU:C:2020:953, paragraph 63).

13 See judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)* (C-195/20 PPU, EU:C:2020:749, paragraphs 37, 38 and 40).

14 See, to that effect, judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)* (C-195/20 PPU, EU:C:2020:749, paragraph 45).

44. However, despite the link between the implementation of Article 27 of Framework Decision 2002/584 and the existence of a previously executed European arrest warrant, it is important to point out that the Court has already held that the decision to grant the consent provided for in Article 27(4) of that framework decision is distinct from that relating to the execution of a European arrest warrant and produces, for the person concerned, effects distinct from those of the latter decision. [15]

45. The surrender of a person pursuant to a European arrest warrant and the request for consent to permit the judicial authorities of the issuing Member State to prosecute or sentence that person for an offence committed prior to his or her surrender other than that for which he or she was surrendered are therefore two distinct stages in a process meant to ensure that the commission of offences does not go unpunished within the European Union.

46. Although it is liable, like the decision on the execution of a European arrest warrant, to prejudice the liberty of the person concerned, [16] the consent decision thus has a subject matter specific to it and must, for that reason, be taken by the executing judicial authority following an examination separate from and independent of the examination prompted by the European arrest warrant.

47. That examination must be carried out in accordance with what Article 27(4) of Framework Decision 2002/584 provides, in order that the request for consent be assessed on its own merits.

48. Accordingly, the executing judicial authority must determine whether the request for consent submitted to it is accompanied by the information mentioned in Article 8(1) of that framework decision and by a translation, as indicated in Article 8(2) of the framework decision. That authority must also ascertain whether the offence for which consent is requested itself subject to the surrender obligation under the same framework decision.

49. In accordance with what Article 27(4) of Framework Decision 2002/584 provides, the executing judicial authority must moreover assess, having regard to the grounds for mandatory or optional non-execution referred to in Articles 3 and 4 of that framework decision, whether extending prosecution to offences other than those for which the person concerned was surrendered can be authorised.

50. It must be pointed out, however, that none of those provisions provides that a defect affecting an original European arrest warrant can allow the executing judicial authority to refuse to give the consent requested.

51. A decision to the contrary would, in my opinion, jeopardise the stated objectives of Framework Decision 2002/584.

52. I note, in that regard, that it follows from the Court's case-law that Article 27 of Framework Decision 2002/584, since it lays down rules derogating from the principle of mutual recognition set out in Article 1(2) of that framework decision, cannot be interpreted in a way which would

[15] See, inter alia, judgment of 26 October 2021, *Openbaar Ministerie (Right to be heard by the executing judicial authority)* (C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 49 and the case-law cited).

[16] See, inter alia, judgment of 26 October 2021, *Openbaar Ministerie (Right to be heard by the executing judicial authority)* (C-428/21 PPU and C-429/21 PPU, EU:C:2021:876, paragraph 51 and the case-law cited).

frustrate the objective pursued by the 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. [17]

53. That need for speed underpinning Framework Decision 2002/584 is reflected in Article 27(4) of that framework decision, which provides that the decision on consent to the extension of prosecution must be taken no later than 30 days after receipt of the request.

54. Accepting that a defect affecting an original European arrest warrant can prevent the executing judicial authority from giving the necessary consent would mean accepting that the circumstances in which the surrender was carried out are subject to review in the context of a request for consent made pursuant to Article 27(3)(g) and (4) of Framework Decision 2002/584. Such a review would cause a delay in the decision on consent, which would run counter to the need for speed underpinning that framework decision. That review also seems to me to be incompatible with legal certainty, since it could call into question the definitive nature of the judicial decision by which the execution of a European arrest warrant has been ordered.

55. Furthermore, it is appropriate to adopt an interpretation which contributes to another objective pursued by Framework Decision 2002/584: combatting impunity. [18] Accepting that an executing judicial authority may refuse to give the consent requested of it pursuant to Article 27(3)(g) and Article 27(4) of that framework decision would undermine that objective by preventing the judicial authorities of the issuing Member State from prosecuting, sentencing or otherwise depriving a person 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.

56. For all those reasons, I consider that Article 27(3)(g) and Article 27(4) of Framework Decision 2002/584 should be interpreted as meaning that the finding that a European arrest warrant, on the basis of which a person has been surrendered, was issued by an authority which did not constitute an 'issuing judicial authority', within the meaning of Article 6(1) of that framework decision, and should therefore have been regarded as invalid on that ground is not such as to prevent the executing judicial authority, when assessing a request for consent to allow the judicial authorities of the issuing Member State to prosecute or sentence that person for an offence committed prior to his or her surrender other than that for which he or she was surrendered, from giving such consent.

## V. Conclusion

57. In the light of all the foregoing considerations, I propose that the Court answer the questions referred by the Supreme Court (Ireland) for a preliminary ruling as follows:

Article 27(3)(g) and Article 27(4) 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,

[17] See, inter alia, judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)* (C-195/20 PPU, EU:C:2020:749, paragraph 35 and the case-law cited).

[18] See, inter alia, judgments of 8 December 2022, *CJ (Decision to postpone surrender due to criminal prosecution)* (C-492/22 PPU, EU:C:2022:964, paragraph 74 and the case-law cited), and of 31 January 2023, *Puig Gordi and Others* (C-158/21, EU:C:2023:57, paragraph 141).

must be interpreted as meaning that the finding that a European arrest warrant, on the basis of which a person has been surrendered, was issued by an authority which did not constitute an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, and should therefore have been regarded as invalid on that ground is not such as to prevent the executing judicial authority, when assessing a request for consent to allow the judicial authorities of the issuing Member State to prosecute or sentence that person for an offence committed prior to his or her surrender other than that for which he or she was surrendered, from giving such consent.