



STREAM Case Note No. [3]

[C-648/20 PPU]

Abstract

On 10 March 2021, the Court of Justice of the European Union (First Chamber) issued decision in [Case C-648/20 PPU](#). The decision originated from a request for a preliminary ruling made by the Westminster Magistrates' Court (United Kingdom). The case concerns the execution in the United Kingdom of a EAW issued by a public prosecutor of Bulgaria against *PI* for the purpose of conducting criminal prosecution. This case relates to the interpretation of Article 8(1)(c) of FD EAW in the light of the right to effective judicial protection enshrined in Article 47 of the Charter.

The Court of Luxembourg found that where both the judicial decision on which the EAW is based and the EAW issued for the purpose of criminal prosecution are adopted by a public prosecutor but cannot be reviewed by a court in the issuing Member State *before* the execution of the EAW and the surrender of the requested person, the requirements of effective judicial protection are not satisfied.

The judgment sets out the obligation of the issuing Member State to implement into domestic law procedural rules which allow a competent court to review the lawfulness of the national judicial decision on which the EAW is based, or of the EAW, where both are adopted by a public prosecutor, *before* the surrender of the requested person takes place.

Keywords:

Access of the requested person to judicial review before surrender; Effective judicial protection; Dual level of protection of fundamental rights; Judicial review before the execution of the EAW; National judicial decision and EAW issued by a public prosecutor.



Background

In this case, the public prosecutor of a Regional Prosecutor's Office in Bulgaria issued a decision ordering the detention for a maximum period of 72 hours of PI, and based on that decision, issued an EAW against him for the purpose of criminal prosecution. After being arrested on the basis of that EAW, PI challenged the validity of the EAW at issue before the executing judicial authority, the Westminster Magistrates' Court (the referring court).¹

The requested person claimed that the Bulgarian procedural system did not meet the requirements of the [Framework decision on the European arrest warrant](#) (FD EAW) as interpreted by the Court in its case-law.² Concretely, the concern was that, under Bulgarian law, neither the prosecutor's decision ordering the detention of the requested person nor the EAW issued by the same authority based on that decision, was subject to judicial review before the surrender of that person.³

Under that procedure, both the EAW and the judicial decision on which the EAW was based were issued by the public prosecutor without the involvement of a court before the surrender of the requested person.⁴ The national law envisaged that only after the surrender to the issuing Member State the requested person would be brought before a court to decide on his(her) detention.⁵ Therefore, the referring court addressed to the Court of Justice the question whether such system was in compliance with the dual level of protection that the requested person must be afforded under the FD EAW system.⁶

This judgment follows-up a recent decision taken by the Court in respect of judicial review and effective judicial protection in the [MM judgment](#).⁷ In that case, the Court ruled that, the court of the issuing Member State which is called upon to review the pre-trial detention of the person surrendered based on an EAW, has jurisdiction to review indirectly the validity of that EAW being challenged before it, where the law of the issuing Member State does not provide for a separate legal remedy against that EAW.

However, in the [MM judgment](#), the Court did not determine whether the Bulgarian procedure, which provided only for an *ex-post* judicial review of the EAW issued by the prosecutor during the pre-trial criminal proceedings, satisfied the requirements of effective judicial protection.⁸ Therefore, this issue was further elaborated by the Court in the judgment under analysis.

This [request for a preliminary ruling](#) has been made during the transitional period of [Brexit EU-UK relationship](#), after withdrawal of the United Kingdom from the European Union on 31 January 2020, while the FD EAW was still applicable. The [EU-UK trade and cooperation agreement](#) has defined new rules for the surrender procedures between the Member States and the United Kingdom.

The Court Decision

The legal issue in this case was whether a legal system where both the EAW issued for the purpose of criminal prosecution and the judicial decision on which that EAW is based are issued by a public prosecutor, but neither of them can be reviewed by a court in the issuing Member State before the surrender of the requested person, meets the requirements of effective judicial protection. This issue

¹ Judgment of 10 March 2021, *PI*, C-648/20 PPU, EU:C:2021:187, paragraphs 18 – 22 (hereafter *PI* judgment)

² *PI* judgment, paragraph 22

³ *PI* judgment, paragraph 24

⁴ *PI* judgment, paragraph 26

⁵ *PI* judgment, paragraph 23

⁶ *PI* judgment, paragraphs 26 – 27

⁷ For further analysis on *MM* judgment, refer to Case Note No.2.

⁸ *PI* judgment, paragraph 56

relates to the interpretation of Article 8(1)(c) of FD EAW and Article 47 of the [Charter of Fundamental Rights](#) (the Charter), as elaborated in the Court's case-law.⁹

The Court of Luxemburg found that, a national procedure in which both the EAW for the purpose of criminal prosecution and the judicial decision on which that EAW is based are issued by the public prosecutor, but cannot be reviewed by a court in the issuing Member State *before* the execution of the EAW and the surrender of the requested person, does not satisfy the requirements of effective judicial protection.¹⁰

The Court reiterated its settled case-law that the principles of mutual trust and mutual recognition are of fundamental importance in EU law. Especially in the Area of Freedom, Security and Justice, the principle of mutual trust requires Member States, save in exceptional circumstances, to consider that all other Member States are complying with the fundamental rights recognised by EU law.¹¹ The FD EAW, which is built upon those principles, is intended to facilitate and accelerate judicial cooperation between the judicial authorities of the issuing and the executing Member States. However, the Court highlighted that both Member States included in the procedure have the obligation to respect fundamental rights and legal principles enshrined in Article 6 TEU and in the Charter,¹² particularly the right to effective judicial protection guaranteed by Article 47 of the Charter¹³.

In respect of the EAW at issue, the Court noted that the decision of the prosecutor ordering the detention of the requested person for a maximum of 72 hours, on which that EAW was based, was covered by the concept of "any other enforceable judicial decision having the same effect" as a national arrest warrant.¹⁴ The Court referred to the interpretation of this concept within the meaning of Article 8(1)(c) of FD EAW, given in [MM judgment](#).

It was not contested that the public prosecutor of Bulgaria meets the requirements of an "issuing judicial authority" within the meaning of Article 6(1) FD EAW as set out in the [OG and PI judgment](#); first, it participates in the administration of criminal justice, and second, it acts independently while issuing the EAW.¹⁵ In addition, the Court recalled the [MM judgment](#), in which it found that judicial review of the decision to issue an EAW taken by an authority other than a court is not a condition for that authority to be classified as an "issuing judicial authority".¹⁶

Thus, the main concern in the case under analysis was that Bulgarian law provided only for *ex post* judicial review of the prosecutor's decision to issue an EAW, meaning that judicial review of that EAW could take place only after the requested person had been surrendered.¹⁷ The Court clarified that, although the Bulgarian prosecutor can be classified as an "issuing judicial authority", it cannot *per se* be concluded that the procedure for issuing an EAW by a prosecutor under Bulgarian law satisfies the requirements of effective judicial protection.¹⁸

In that regard, the Court reinstated its established case-law on the dual level of protection that the requested person must enjoy under the FD EAW, a first level, at which a national arrest warrant is adopted, and a second level, at which the EAW is issued.¹⁹ It requires that, at least at one of the two levels of protection, a decision which meets the requirements of effective judicial protection is adopted.²⁰

⁹ *PI judgment*, paragraph 34

¹⁰ *PI judgment*, paragraph 60

¹¹ *PI judgment*, paragraph 35

¹² *PI judgment*, paragraph 59

¹³ *PI judgment*, paragraph 58

¹⁴ *PI judgment*, paragraphs 39 - 40

¹⁵ *PI judgment*, paragraph 37

¹⁶ *PI judgment*, paragraph 38

¹⁷ *PI judgment*, paragraph 54

¹⁸ *PI judgment*, paragraph 38

¹⁹ *PI judgment*, paragraph 42. For further analysis on the dual level of protection, refer to case note no.2.

²⁰ *PI judgment*, paragraph 43

Following those standards, the Court of Luxemburg found that effective judicial protection must be afforded to the person who is subject of a EAW for the purpose of criminal prosecution before that person is surrendered to the issuing Member State.²¹ Accordingly, the person concerned must have available a judicial review either of the EAW or of the national judicial decision on which that warrant is based *before* the execution of the EAW.²²

The Court pointed out that such requirement is important for the functioning of the EAW mechanism based on mutual trust between Member States. Only where the EAW has been issued following a national procedure that is subject to judicial review, the executing judicial authority may be satisfied that the requested person has had the benefit of all appropriate safeguards, including those deriving from the fundamental rights and legal principles referred to in Article 1(3) of FD EAW.²³

In addition, the Court recalls that, while Member States enjoy a certain degree of discretion in the implementation of the FD EAW, they have the obligation to ensure that the adopted national rules do not violate the requirements arising from the FD EAW.²⁴ With regard to judicial protection, guaranteed by Article 47 of the Charter, the issuing Member State has the obligation to implement procedural rules which allow a court to review the lawfulness of the EAW or of the judicial decision on which that EAW is based, where both are adopted by the prosecutor, before the surrender of the requested person.²⁵

According to the Court, a national procedure such as that under Bulgarian law, in which the proportionality of the EAW issued by the public prosecutor is reviewed by a court of the issuing Member State while examining the need to impose a preventive measure against the requested person, *after* the execution of the EAW and the surrender of that person, does not satisfy the requirements of effective judicial protection.²⁶

In addition, the Court distinguished the present case from the [MM judgment](#), making clear that in that case, the legal issue and accordingly the conclusion were different. In that case, the Court affirmed the jurisdiction of a court of the issuing Member State to review indirectly the validity of the EAW, where national law does not provide for a separate judicial review of that EAW.²⁷ However, the Court did not rule whether the existence of *ex-post* judicial review under Bulgarian procedural law satisfied the requirements of effective judicial protection.²⁸ Consequently, the conclusion reached by the Court in the [MM judgment](#) does not clash with the arguments of the Court in the case under analysis.

Key findings

In the judgment under analysis, the Court clearly determined that the requested person must be afforded the possibility to challenge before a court in the issuing Member State either the judicial decision on which the EAW is based or the EAW, where both are issued by a public prosecutor without the involvement of a court, prior to the execution of the EAW and his(her) surrender. The legal systems of those Member States in which judicial review by a court of those decisions is done only *ex-post* surrender of the requested person to the issuing Member State, do not meet the standards of effective judicial protection. The conclusion reached by the Court in this judgment will presumably have a practical impact on both issuing and executing Member States.

First, the Court noted that, the obligations stemming from Article 47 of the Charter and the FD EAW and, require the issuing Member States to implement into their national law procedural rules which are in conformity with the requirements set out in this judgment. Consequently, Member States will have to, if

²¹ *PI* judgment, paragraph 47

²² *PI* judgment, paragraph 48

²³ *PI* judgment, paragraph 49

²⁴ *PI* judgment, paragraph 58

²⁵ *PI* judgment, paragraphs 57 – 58

²⁶ *PI* judgment, paragraph 55

²⁷ Judgment of 13 January 2021, *MM*, C-414/20 PPU, EU:C:2021:4, paragraph 72

²⁸ *PI* judgment, paragraph 56

needed, adapt their legislation to ensure that, in case the EAW is issued by the public prosecutor based on a judicial decision issued by the same authority, judicial review by a competent court of at least one of those decisions is provided.

Secondly, the Court highlighted that, only where such judicial review is available in the issuing Member State, the executing judicial authority can be satisfied that the requested person has been afforded the necessary safeguards, based on fundamental rights and fundamental principles to which Article 1(3) of FD EAW refers.²⁹ It follows from the arguments of the Court that, the existence of such judicial review is an inherent element of effective judicial protection, and thus, it represents a minimum requirement for the functioning of the EAW mechanism.

Therefore, it can be expected that this judgment will influence on the decisions taken by the executing judicial authorities. Although not explicitly pronounced by the Court, it can be inferred from this judgment that, where the executing judicial authority finds that the national law of the issuing Member State does not ensure a judicial review which meets the above standards, the executing judicial authority should refuse to execute that EAW. Accordingly, the Court has practically added a new refusal ground for the execution of the EAW, in the light of Article 1(3) FD EAW, which is the lack of judicial review in the issuing Member State that meets the requirements of effective double-judicial protection, as elaborated in the Court's case-law.

²⁹ *PJ* judgment, paragraph 49