Research Brief

The Netherlands

Dr. S.S. Buisman & F. Anzovino, LL.M[1]

This report was funded by the European Union's Justice Programme (2014-2020). It has been prepared in the context of the STREAM project (JUST AG 101007485). The content of this report represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

1 Assistant-professor of Criminal Law, respectively Lecturer/researcher of Criminal Law at the Vrije Universiteit Amsterdam.

Introduction

This STREAM Research Brief follows up on the Periodic Country Report for the Netherlands. It aims to provide an overview of how and the extent to which Rule of Law guarantees and fundamental rights and procedural safeguards that must be protected under EU and national law have been taken into consideration by the Dutch judicial authorities dealing with both the issuing and executing stages of European Arrest Warrant (EAW) proceedings.

As explained in the Country Report, the District Court of Amsterdam (*Rechtbank Amsterdam*) is the sole competent court of first instance for executing the EAW (Van Eijken & Verhoeven, 2020; Buisman & Hamelzky, 2021). Its judgments are immediately enforceable under Article 29 of the Dutch Surrender Act of 2014. The investigative judge (*rechter-commissaris*) has been the competent authority to issue EAWs since 2019. However, those cases are not published in the Netherlands, and are therefore not discussed here. Thus, this report examines case law from the perspective of the executing authority (the District Court of Amsterdam), the Court of Justice of the EU (the Court of Justice), law and parliamentary papers, and literature (cf. Buisman, 2022, p. 1-2).

This Country Report specifically examines the judgments of the District Court published on rechtspraak.nl (database of the Dutch judiciary). In total, 3,235 District Court judgments concerning the EAW have been published on rechtspraak.nl (as of 12 July 2022). A selection of case law has been made and analysed based on several themes, namely: the human rights-refusal grounds (as set out in Article 11 of the *Overleveringswet* (*OLW;* Dutch Surrender Act)), the relationship between that article and the Court of Justice's case law (*Aranyosi and Căldăraru*[2] and the application of the 'three-step' test to *LM*[3] in relation to the right to a fair trial), and the dialogue between the Dutch executing judicial authority and the issuing judicial authority of other Member States.

2 Judgment of the Court of Justice of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU,ECLI:EU:C:2016:198.

3 Judgment of the Court of Justice of 25 July 2018, *Minister for Justice and Equality*, C-216/18 PPU, ECLI:EU:C:2018:586. It must be noted that there appears to be dissension amongst scholars and practitioners alike as to whether the test, as applied in cases of a fundamental rights claim in relation to the right to a fair trial, consists of two (with an intermediate, additional step) or three steps. In this, and the Country Report for the Netherlands, the authors consider the test to consist of three distinct steps.

Section I – Fundamental rights: primarily a matter for the issuing state?

I.1 Effective judicial protection in the issuing phase in the Netherlands

In 2019, the *Overleveringswet* was amended to comply with the Court of Justice's judgment of *OG* and *PI,*[4] on the meaning of 'judicial authority' within the meaning of Article 6 of the EAW Framework Decision 2002/584/JHA (EAW FD).[5] In accordance with Article 44 OLW (the old version),[6] the prosecutor (*officier van justitie*) was the competent authority to issue an EAW. However, the Dutch prosecutor does not qualify as 'issuing judicial authority' since he may be subject to directions or instructions from the Minister of Justice in connection with the adoption of a decision to issue an EAW. After the amended law entered into force, the investigative judge (*rechter-commissaris*) rather than the public prosecutor became the competent authority to issue the EAW.[7]

This means that now the public prosecutor must make a request to the investigative judge to issue an EAW. Even though not explicitly listed in the OLW, the investigative judge must then ensure the 'observance of the conditions necessary for the issuing of the European arrest warrant' and 'examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant'.[8] To this end, the prosecutor must submit the national arrest warrant, on which the EAW request is based, as well as additional information on the case that the investigative judge needs to decide whether the conditions for issuing an EAW have been met.[9] With these revisions, effective judicial protection in the issuing phase is now guaranteed.

1.2 Observance of human rights protection of the person whose surrender is requested

In the Netherlands legal guarantees of human rights can be found in several laws and regulations, such as the *Grondwet* (Gw; Dutch Constitutional Law) and *Wetboek van Strafvordering* (Sv; Dutch Criminal Procedural Code), and specifically regarding prison conditions the Penitentiaire beginselenwet (Pbw; Dutch Penitentiary Principles Law) and the *Beginselenwet justitiële inrichtingen* (Bji; Dutch Law on Principles of Judicial Institutions).

4 Judgment of the Court of Justice 27 May 2019, *OG* and *PI*, C-508/18 and C-82/19, ECLI:EU:C2019:456.

5 *Kamerstukken II* 2018/19, 35224, no. 1-3. For more information on the old procedure see S.S. Buisman, *First Periodic Country Report: The Netherlands*, STREAM 2022, p. 3-4.

6 *Stb*. 2004, 195.

7 Article 44 OLW; *Stb.* 2019, 259.

8 Judgment of the Court of Justice of 27 May 2019, *OG* and *PI*, C-508/18 and C-82/19, ECLI:EU:C2019:456, no. 71. Judgment of the Court of Justice of 27 May 2019, *PF*, C-509/18, ECLI:EU:C:2019:457, no. 49.

9 *Kamerstukken II* 2018/19, 35224, 3, p. 3.

During the criminal trial the rights are observed by the trial judge or trial chamber. The *Wetboek van Strafvordering*, grants certain procedural rights to the suspect, such as:

- The right to be informed of the indictment (Article 27c(3)(a) Sv);
- The right to access to a lawyer (Article 27c(2) Sv);
- The right not to incriminate oneself, i.e. *nemo tenetur* (Article 29 Sv);
- The right to access to the case file (Article 30-34 Sv);
- The right to interpretation (Article 27(4) and 29b Sv)'.

In addition, the proposal to constitutionally enshrine the right to a fair trial has been adopted in the Netherlands.[10] Thus, a right to a fair trial will soon be recognised as a constitutional right.

If the rights of a suspect are breached during the investigative stage, which includes the EAW-procedure, the suspect may lodge his complaint during the trial. The judge will have to determine whether the breach qualifies as a procedural defect which cannot be repaired and which legal consequences are not apparent from the law (Article 359a Sv). If that is the case, the judge may: (1) note that there has been an irreparable procedural defect, without any legal consequences; (2) reduce the length of the sentence to be proportionate to the gravity of the procedural defect; (3) exclude the results obtained from the criminal investigation as evidence, or (4) bar the prosecution if, as a result of the procedural defect, the criminal trial does no longer meet the requirements of the right to a fair trial.[11] If the rights of a suspect are breached during the criminal proceedings at the court of first instance, the suspect has a right to appeal and cassation (Article 404 et seq. Sv and Article 427 et seq. Sv respectively).

In detention, the rights of the detainees are observed by the Commissie van Toezicht (CvT; Supervisory Committee). The Committee has four tasks:

(a) to supervise the manner in which deprivation of liberty is to be enforced in the establishment or department or to supervise the manner in which custodial sentences and measures are to be enforced in the establishment;

(b) to take cognizance of the grievances raised by detainees (…) and to mediate in this respect with young people and, if necessary, to mediate between a nurse and the head of the establishment in the case of nurses;

(c) to deal with complaints;

10 Eerste Kamer der Staten-Generaal, '35.784 Opnemen van een bepaling over het recht op een eerlijk proces in de Grondwet', www.eerstekamer.nl. See Article 17 Grondwet.

11 Hoge Raad (Dutch Supreme Court; HR), judgment of 30 March 2004, ECLI:NL:HR:2004:AM2533. HR, judgment of 1 December 2020, ECLI:NL:HR:2020:1890.

d) to give advice and information about the provisions under (a) to the Minister of Justice, the Council for the Application of Criminal Law and Youth Protection (RSJ) and the director of the institution. (Commissie van Toezicht Kenniscentrum 2022.)

Thus, complaints about the prison conditions may be submitted to the Committee.

1.3 Effective judicial remedies pre-surrender and post-surrender

The EAW is issued by the investigative judge, and, thus, by a judicial authority within the meaning of Article 6 of the EAW FD. Consequently, a possibility to appeal or opposition of the decision to issue an EAW is not required.[12] Defence arguments with regard to the EAW can be lodged during the criminal procedure.[13]

Most defences relate to a breach of the speciality rule of Article 27(2) and (3) of the EAW FD.[14] The court will then have to determine whether the suspect was surrendered for the offences in question. If that is not the case, the prosecutor's case will be declared inadmissible with regard to the offences not listed in the EAW.[15]

If the court determines that the issuance of the EAW was not legitimate, i.e. the EAW did not meet the procedural requirements, including the principle of proportionality, the EAW is vitiated by a procedural defect (Article 359a Sv). As explained above, the court may then decide to note that there has been an irreparable procedural defect, without any legal consequences; reduce the length of the sentence proportionately to the gravity of the procedural defect; exclude the results obtained from the criminal investigation as evidence; or bar the prosecution if, as a result of the procedural defect, the criminal trial no longer meets the requirements of the right to a fair trial.[16]

12 Judgment of the Court of Justice of 27 May 2019, *OG* and *PI*, C-508/18 and C-82/19, ECLI:EU:C2019:456.

13 E.g. Rb. Noord-Holland, judgment of 3 September 2019, ECLI:NL:RBNHO:2019:7537 and Rb. Limburg, judgment of 9 July 2021, ECLI: NL:RBLIM:2021:5489.

14 In the database of rechtspraak.nl 25 judgments of the courts of first instance were found (excluding the District Court of Amsterdam) which concern the specialty rule (search terms: 'EAB', 'specialiteitsbeginsel').

15 E.g. Rb. Overijssel, judgment of 16 May 2022, ECLI:NL:RBOVE:2022:1402, Rb. Noord-Holland, judgment of 19 January 2022, ECLI:NL:RBNHO:2022:274, Rb. Rotterdam, judgment of 1 October 2021, ECLI:NL:RBROT:2021:10178, Rb. Rotterdam, judgment of 8 September 2021, ECLI:NL:RBROT:2021:9244, and Rb. Limburg, judgment of 9 June 2021, ECLI:NL:RBLIM:2021:5489.

16 Hoge Raad (Dutch Supreme Court; HR), judgment of 30 March 2004, ECLI:NL:HR:2004:AM2533. HR, judgment of 1 December 2020, ECLI:NL:HR:2020:1890. Cf. Rb. Noord-Holland, judgment of 3 September 2019, ECLI:NL:RBNHO:2019:7537, in which the suspect complained about the fact that the prosecution office issued the EAW, which is not a judicial authority in the meaning of Article 6 of the EAW FD.

Section II - Protecting fundamental rights in the executing state?

II.1 Article 11 OLW: the fundamental rights clause under Dutch law

II.1.1 The history of Article 11 OLW

The EAW Framework Decision was implemented into Dutch national legislation by the OLW of 29 April 2004.[17] In its transposition, the Netherlands opted for the inclusion of a general fundamental rights clause in Article 11 (old) OLW (Glerum 2021, p. 290). The Dutch legislature contended that the basis of this provision follows from Article 1(3) of the EAW FD and that discriminatory prosecution, as regulated in Article 11 (old) OLW, 'has served for many decades as a classic ground for refusal in extradition law'.[18] In addition to discriminatory prosecution, Article 11 (old) OLW regulated that the surrender of a requested person is not allowed if granting such a request from the issuing authority would result in a flagrant violation of said person's fundamental rights as contained in the European Convention on Human Rights (ECHR).[19]

An amendment by the Law of 17 March 2021 resulted in important changes being made to the formulation of article 11 (old) OLW.[20] The Dutch legislator contended that a general fundamental rights clause as encapsulated in article 11 (old) OLW is not included in the grounds for refusal exhaustively listed in the Framework Decision. As a result – and on the basis of several judgments of the Court of Justice – the existing provision needed revision. It was maintained by the Dutch legislator that since the Charter of Fundamental Rights of the European Union became primary EU law, it is binding as such for Member States whenever they give effect to EU law. Since 2010 it could therefore be concluded that instead of the ECHR, it is EU law itself that sets the human rights standards (Glerum 2021, p. 290).

With the new implementation, and reformulation of Article 11 (old) OLW, the Dutch legislator intended to give full effect to this role of the Charter, as well as the *Aranyosi and Căldăraru*, the *ML* and the *LM*[21] judgments of the Court of Justice (Glerum 2021, p. 291).[22]

The new Article 11's first paragraph states that a European Arrest Warrant shall not be executed if there are serious and factual grounds that the requested person runs a real risk that his fundamental rights as guaranteed by the Charter will be violated after surrender. Paragraphs 2

17 Stb. 2004, no. 195.

18 *Kamerstukken II*, 2002/03, 29042, no. 3, p. 15. The Dutch legislator maintained that this is also why part 12 of the Preamble to the Framework Decision makes reference to discriminatory prosecutions.

19 *Kamerstukken II*, 2002/03, 29042, no. 3, p. 15. According to the legislator, this was in conformity with part 12 of the preamble to the Framework Decision which makes reference to Article 6 of the Treaty on European Union.

20 Stb. 2021, no. 155.

21 Judgment of the Court of Justice of 25 July 2018, *LM (or Minister for Justice and Equality)*, C-216/18 PPU, ECLI:EU:C:2018:586.

22 *Kamerstukken II*, 2019/20, 35535, no. 3 , pp. 10-13.

and 3 prescribe that the Dutch executing authority shall stay the surrender proceedings[23] (with a maximum of 60 days each time[24]) if a possibility exists that in case of a change in the circumstances, the real risk can be eliminated.[25] If the circumstances do not change and, as a result, the real risk is not eliminated within a reasonable time, the surrender procedure shall not be acted upon (Glerum 2021, p. 291).[26]

II.1.2 Application of Article 11 OLW and the Court of Justice's case law

Since its implementation, Article 11 OLW (in both its old and new versions) has been invoked several times by the defence. Between the first implementation of the EAW FD in 2004 and 5 April 2016 (when *Aranyosi and Căldăraru* was delivered by the Court of Justice), the provision was invoked approximately 100 times. After *Aranyosi and Căldăraru*, the provision was invoked approximately 180 times.[27]

Only in a few instances has the provision been invoked successfully,[28] most recently in three cases relating to detention circumstances in a prison in Thessaloniki, Greece.[29] In those cases, the District Court found – in short – that on the basis of information provided by the Greek authorities, it could be concluded that, at that time, the capacity of the prison had been exceeded significantly and was therefore not in compliance with Article 4 of the EU Charter. In addition, the District Court had been informed that the requested person would be detained in said prison.[30] It is noteworthy that the determination that the conditions of detention in the Thessaloniki prison were not in conformity with Article 4 of the Charter did not result in a refusal proper to execute the EAW. Instead, the District Court determined that 'no effect shall be given

23 It does not directly follow from Article 11, paragraphs 2 and 3, (new) OLW, but that the aim of this stay is so that both the issuing and executing authorities can consult, has been acknowledged by the Dutch legislator, *Kamerstukken II*, 2019/20, 35535, no. 3 , p. 13.

24 Article 22, paragraph 6, OLW.

25 In conformity with the *Aranyosi and Căldăraru* and the *LM/Minister for Justice and Equality* judgments of the Court of Justice, this option of staying the proceedings only exists in cases of real risks relating to detention conditions, *i.e.* possible violation of Article 4 of the Charter. See *Kamerstukken II*, 2019/20, 35535, no. 3, p. 13.

26 Article 11, paragraph 4, in conjunction with Articles 22, paragraph 6 and 28, paragraph 3, (new) OLW.

27 In this Report, judgments of the Amsterdam District Court which are published on rechtspraak.nl (database of the Dutch judiciary) are examined (reference date 28 June 2022). The actual number of cases relevant for this research is undoubtedly much higher, as is indicated by *e.g.* Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, under 5.2.2.

28 See *e.g.*: Rb. Amsterdam, judgment of 1 July 2005, ECLI:NL:RBAMS:2005:AT8580, under 7 and 10, Rb. Amsterdam, judgment of 25 November 2005, ECLI:NL:RBAMS:2005:AU7667, under 7 and 9, Rb. Amsterdam, judgment of 4 January 2006, ECLI:NL:RBAMS:2006:AU9280, under 7 and 10, Rb. Amsterdam, judgment of 12 September 2006, ECLI:NL:RBAMS:2006:AY8670, under 7 and 8. More recently, see *e.g.*: Rb. Amsterdam, judgment of 16 January 2017, ECLI:NL:RBAMS:2017:414, under 5.4.3 and 6.

29 Rb. Amsterdam, judgment of 14 April 2022, ECLI:NL:RBAMS:2022:2324, under 7 and 10, Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3096, under 7 and 9 and Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3097, under 7 and 9.

30 Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3096, under 7 and Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3097, under 7 (both refer to Rb. Amsterdam, judgment of 14 April 2022, ECLI:NL:RBAMS:2022:2324, under 7).

to the EAW'.[31] That the District Court no longer comes to a finding of a 'refusal' proper to execute an EAW also follows from other cases where the judgment was passed post-*Aranyosi and Căldăraru*.[32]

Importantly, there are more instances in which a surrender procedure was terminated based on the fundamental rights clause as contained in Article 11. In those cases, however, the District Court did not make reference to the provision with that many words,[33] but would typically make reference either to *Aranyosi and Căldăraru,*[34] or *LM*[35] as the basis for not giving effect to a European Arrest Warrant.

It can therefore be concluded that there are two distinct routes in not giving effect to a European Arrest Warrant based on a real risk of a fundamental rights violation: either via Article 11 or via jurisprudence of the Court of Justice. The test that is applied and the subsequent analysis, are however identical under both options. It has been argued that after *Aranyosi and Căldăraru*, Article 11 OLW became a 'dead letter' provision as the District Court no longer applied it, but instead applied the criteria as advanced by the Court of Justice (Glerum 2021, p. 291).

However, since the implementation of Article 11 (new), the District Court now seems to have embarked on yet another approach as it appears to choose at random either one of both options (either assessing a fundamental rights claim through Article 11 or through the Court of Justice's two-step test as provided in *Aranyosi and Căldăraru* or *LM*.

II.2 Application of the three-step test of LM in relation to the right to a fair trial

The District Court has on several occasions applied the 'three step test' developed by the Court of Justice to assess whether a requested person's right to a fair trial would be (or had been)

31 Rb. Amsterdam, judgment of 14 April 2022, ECLI:NL:RBAMS:2022:2324, under 10 ('[geeft] met toepassing van artikel 11, eerste lid, OLW geen gevolg aan het EAB'), Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3096, under 9 ('[geeft] met toepassing van artikel 11, eerste lid, OLW geen gevolg aan het EAB') and Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3097, under 9 ('[geeft] met toepassing van artikel 11, eerste lid, OLW geen gevolg aan het EAB').

32 For instance in Rb. Amsterdam, judgment of 16 January 2017, ECLI:NL:RBAMS:2017:414, under 6, the Amsterdam District Court declared the public prosecutor inadmissible in his claim ('[verklaart] de officier van justitie niet-ontvankelijk in haar vordering tot het in behandeling nemen van het EAB'). This outcome of 'inadmissibility of the public prosecutor' also follows from other recent – *i.e.* post-*Aranyosi and Căldăraru* – judgments, see *e.g.* Rb. Amsterdam, judgment of 25 May 2021, ECLI:NL:RBAMS:2021:2671, under 5 (even though in this latter case the surrender of the requested person was allowed).

33 Rb. Amsterdam, judgment of 21 November 2019, ECLI:NL:RBAMS:2019:9684 and Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420. As stated in an earlier footnote, it must be noted that there appears to be dissension amongst scholars and practitioners alike as to whether the test, as applied in cases of a fundamental rights claim in relation to the right to a fair trial, consists of two (with an intermediate, additional step) or three steps. In this, and the Country Report for the Netherlands, the authors consider the test to consist of three distinct steps.

34 In Rb. Amsterdam, judgment of 21 November 2019, ECLI:NL:RBAMS:2019:9684, under 7 reference was made only to *Aranyosi and Căldăraru*.

35 In Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, under 6.1 reference was made to the *LM/Minister for Justice and Equality* judgment well as other cases of the CJEU.

violated (Buisman 2022, p. 8).[36] To date,[37] this defence has proved successful in only one instance.[38]

In said case, the District Court found that the requested person would run a real risk of having his right to a fair trial violated if he were to stand trial in Poland. In an earlier interlocutory decision in relation to said case (of 31 July 2020) it had found that in the legal system of Poland such structural and/or fundamental deficiencies regarding the independence of the judiciary exist. It stated that the independence of the judiciary can no longer be guaranteed under Polish law and that those deficiencies – given their nature and scope – amount to systemic deficiencies[39] which may negatively impact all courts and therefore all judges in Poland.[40] The District Court had in other words already determined that the first step of the three-step test was satisfied. In line with the assessment schedule as provided by *LM*[41] and *L and P,*[42] the District Court further found that it still had to assess: (i) whether those systemic deficiencies could have consequences at the level of the judicial authorities competent to adjudicate the procedure to which the requested person would be subjected, and (ii) whether there are compelling and factual grounds that the requested person runs a real risk that his fundamental right to a fair trial will be compromised.[43] In so doing, the District Court would have to carry out a concrete and accurate verification, taking into account the requested person's personal situation, the nature of the offence and the factual context in which the EAW was issued.[44]

The District Court's earlier finding that the systemic deficiencies may negatively affect all courts and judges in Poland resulted in the conclusion that those negative consequences may also affect the judicial authorities competent to adjudicate the criminal trial against the requested person.[45] The District Court had thus satisfied the second step of the three-step test. The District Court further found that there are three ways for the Polish executive and legislative powers to interfere in the Polish judicial powers, that these possibilities have been anchored in Polish legislation and that they – in their totality and mutual coherence – have a 'chilling effect'

36 *E.g.* Rb Amsterdam, judgment of 27 January 2021, ECLI:NL:RBAMS:2021:179, Rb. Amsterdam, judgment of 7 May 2021, ECLI:NL:RBAMS:2021:2468, Rb Amsterdam, judgment of 6 April 2022, ECLI:NL:RBAMS:2022:1793 and Rb. Amsterdam, judgment of 6 April 2022, ECLI:NL:RBAMS:2022:1794.

37 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420.

38 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420.

39 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, para. 5.1.1 and 5.3.1. In that same interlocutory decision, the Amsterdam District Court had posed preliminary questions to the CJEU.

40 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, 5.3.2.

41 Judgment of the Court of Justice of 25 July 2018, *LM* (or *Minister for Justice and Equality*), C-216/18 PPU, ECLI:EU:C:2018:586.

42 Judgment of the Court of Justice of 17 December 2020, *L and P*, C-345-20 and C-412/20, ECLI:EU:C:2020:1033.

43 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, para. 5.1.5.

44 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, para. 5.1.5.

45 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, 5.3.4.

on Polish judges (including the judicial authorities competent to adjudicate the criminal trial against the requested person).[46]

Lastly, the District Court answered the test whether the requested person would run a real risk that his right to a fair trial would be violated in case of his surrender to Poland (the third step of the three-step test), also in the affirmative. It did so based on two distinct facts (Ouwerkerk & Filius 2021). The first was that the District Court had received information to the effect that at least two judges of the judicial authority that would be competent to adjudicate the requested person's criminal trial in first instance[47] were subjected to disciplinary proceedings in Poland. The second is that the requested person was under the scrutiny of other Polish authorities as well as the media in relation to his case. This was in part because it had put preliminary questions to the Court of Justice because of the EAW issued against the said requested person. Consequently, the District Court determined that the requested person was not merely any Polish suspect whose surrender had been ordered, but a person who was subjected to the particular attention of the Polish authorities, resulting in a risk that the above-mentioned 'chilling effect' would have concrete consequences in his criminal trial.[48]

The assessment of the District Court resulted in a finding that there were substantial grounds for believing that the requested person would run a real risk of breach of his right to a fair trial were he were to be surrendered[49] and the Prosecutor was found inadmissible in her claim.[50]

Section III Protecting fundamental rights through horizontal and vertical cooperation?

III.1 Protecting fundamental rights through horizontal cooperation

In general, one may conclude that the dialogue between the Dutch executing authority and the issuing authority of other Member States functions quite well. In the majority of the published cases, additional information has been requested by the District Court and usually been provided.[51] In some instances the District Court has had difficulties in obtaining the additional information. Two categories of such cases are most prominent: (1) requests regarding detention facilities in Member States where evidence exists that the detention system as a

46 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, 5.3.5.

47 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, 5.3.7.

48 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, 5.3.8.

49 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, 5.3.12.

50 Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420, under 7.

51 In the database of rechtspraak.nl there are approximately 1059 cases, which concern a request for addition information (key words: 'EAB' (EAW) and 'aanvullende informatie' (additional information). When searching, for example, for the number of cases in which the prosecutor was declared inadmissible, concerning detention facilities, there are approximately 66 cases (key words: 'EAB' (EAW), '4 Handvest' (4 Charter), 'niet-ontvankelijk' (inadmissible), 'aanvullende informatie' (additional information).

whole runs a risk of breaching Article 4 of the Charter; and (2) requests regarding the right to a fair trial in Member States with systemic or generalised deficiencies with regard to the independence of the issuing Member State's judiciary.

A current example of cases concerning systemic or generalised deficiencies in the detention system of the issuing Member State, where problems have arisen in the dialogue between the District Court and the issuing Member State, are EAW-requests from Romanian issuing authorities. The District Court has determined that evidence exists that the Romanian detention system as a whole runs a real risk of violating Article 4 of the Charter. Consequently, the District Court will request additional information or guarantees of Romania to ensure that the requested person will not be subjected to a violation of Article 4 of the Charter. In these cases, the prosecutor's case is often declared inadmissible. Often Romania does not provide for guarantees, not even after repeated requests from the Dutch prosecution office, that the rights of the requested person under Article 4 of the Charter will be upheld.[52] In cases where the Romanian authorities did provide information on the detention facilities, the information in question was often not sufficient to ensure that the rights of the requested person would not be violated, and it was not to be expected that relevant information would be provided in the foreseeable future.[53]

A current example of cases concerning systemic or generalised deficiencies with regard to the independence of the issuing Member State's judiciary, where problems have arisen in the dialogue between the District Court and the issuing authorities of another Member State, are the EAW-requests from Poland (see also Buisman, 2022, p. 8-10). In practice the dialogue between the District Court and the Polish judiciary has been 'an uncomfortable, and often laborious, and largely fruitless acquisition' (Filius & Ouwerkerk, 2020). Presumably this has also been the reason why the District Court submitted new preliminary questions to the Court of Justice in June and September 2020, questioning in particular whether the second step of *LM* should still be answered if the courts of the

52 Rb. Amsterdam, judgment of 22 February 2019, ECLI:NL:RBAMS:2019:1378: 'On June 16, 2016, the court suspended the investigation indefinitely. More than two and a half years have now passed and an individual guarantee has been requested several times – in vain – by the Internationaal Rechtshulpcentrum [International Legal Assistance Center], which guarantee could possibly be provided – according to communications from the Romanian judicial authorities in other surrender cases. Moreover, there is no concrete reason to assume that such a guarantee will be provided (soon) in this case. The Public Prosecutor has stated that contact with the Romanian authorities was still taking place in December 2018 and that no relevant developments have emerged. (…) the court is of the opinion that this means that the reasonable term has been exceeded in the present case and that the public prosecutor must therefore be declared inadmissible in its claim for processing the EAW'. Cf. Rb. Amsterdam, judgment of 22 February 2019, ECLI:NL:RBAMS:2019:1376. Cf. Rb. Amsterdam, judgment of 21 November 2019, ECLI:NL:RBAMS:2019:9684. Rb. Amsterdam, judgment of 30 November 2017, ECLI:NL:RBAMS:2017:9370.

53 Rb. Amsterdam, judgment of 18 October 2018, ECLI:NL:RBAMS:2018:8944: 'In the opinion of the court, however, these – and the other (compensatory) detention conditions mentioned in the report – are not sufficient to exclude the real danger for the requested person. The court concludes that there is a real danger that, in the event of surrender to Romania, the requested person will be subjected to inhuman or degrading treatment, as referred to in Article 4 of the Charter. In view of the information provided by the Romanian authorities, there is no reason to give them the opportunity to provide additional information concerning the requested person which shows that the existence of this danger for him can be excluded, as it is not expected that relevant additional information will be provided in the foreseeable future'. Rb. Amsterdam, judgment of 1 October 2020, ECLI:NL:RBAMS:2020:6098. Rb. Amsterdam, judgment of 27 January 2021, ECLI:NL:RBAMS:2021:463.

issuing Member States no longer meet the requirements of effective or actual judicial protection, since new legislation no longer guarantees the independence of those courts (Filius & Ouwerkerk, 2020; Buisman, 2022, p. 8-10).[54]

III.2 Protecting fundamental rights through vertical cooperation

The District Court has been an important actor in clarifying the meaning and scope of the EAW FD by requesting preliminary rulings (Glerum & Klomp, 2019; Eurojust, 2020). The questions asked by the District Court led to several important judgments, such as *Wolzenburg*,[55] *Poplawski I* and *II*,[56] *Dworzecki*[57] and *Zdziaszek*.[58] (Van Eijken & Verhoeven, 2020; Buisman, 2022).

54 Rb. Amsterdam, Judgment of 31 July 2020, ECLI:NL:RBAMS:2020:3776 and Rb. Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4328.

55 Judgment of the Court of Justice of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616.

56 Judgments of the Court of Justice of s29 June 2017, *Poplawski I*, C-579/15, ECLI:EU:C:2017:503; and of 24 June 2019, *Poplawski II*, C-573/17, ECLI:EU:C:2019:530.

57 Judgment of the Court of Justice of 24 May 2016, *Dworzecki*, C-108/16, ECLI:EU:C:2016:346.

58 Judgment of the Court of Justice of 10 August 2017, *Zdziaszek*, C-271/17, ECLI:EU:C:2017:629.

REFERENCES

National Legislation and parliamentary papers

Parliamentary papers

Kamerstukken II, 2002/03, 29042, no. 3

Kamerstukken II 2018/19, 35224, no. 1-3

Kamerstukken II, 2019/20, 35535, no. 3

Legislation

Stb. 2004, no. 195

Stb. 2019, 259

Stb. 2021, no. 155

National Judgments

Dutch Supreme Court (Hoge Raad)

Hoge Raad, judgment of 30 March 2004, ECLI:NL:HR:2004:AM2533

Hoge Raad, judgment of 1 December 2020, ECLI:NL:HR:2020:1890

District Court of Amsterdam (Rb. Amsterdam)

Rb. Amsterdam, judgment of 1 July 2005, ECLI:NL:RBAMS:2005:AT8580

Rb. Amsterdam, judgment of 25 November 2005, ECLI:NL:RBAMS:2005:AU7667

Rb. Amsterdam, judgment of 4 January 2006, ECLI:NL:RBAMS:2006:AU9280

Rb. Amsterdam, judgment of 12 September 2006, ECLI:NL:RBAMS:2006:AY8670

Rb. Amsterdam, judgment of 16 January 2017, ECLI:NL:RBAMS:2017:414

Rb. Amsterdam, judgment of 30 November 2017, ECLI:NL:RBAMS:2017:9370

Rb. Amsterdam, judgment of 18 October 2018, ECLI:NL:RBAMS:2018:8944

Rb. Amsterdam, judgment of 22 February 2019, ECLI:NL:RBAMS:2019:1376

Rb. Amsterdam, judgment of 22 February 2019, ECLI:NL:RBAMS:2019:1378

Rb. Amsterdam, judgment of 21 November 2019, ECLI:NL:RBAMS:2019:9684

Rb. Amsterdam, Judgment of 31 July 2020, ECLI:NL:RBAMS:2020:3776

Rb. Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4328

Rb. Amsterdam, judgment of 1 October 2020, ECLI:NL:RBAMS:2020:6098

Rb. Amsterdam, judgment of 27 January 2021, ECLI:NL:RBAMS:2021:179

Rb. Amsterdam, judgment of 27 January 2021, ECLI:NL:RBAMS:2021:463

Rb. Amsterdam, judgment of 10 February 2021, ECLI:NL:RBAMS:2021:420

Rb. Amsterdam, judgment of 7 May 2021, ECLI:NL:RBAMS:2021:2468

Rb. Amsterdam, judgment of 25 May 2021, ECLI:NL:RBAMS:2021:2671

Rb. Amsterdam, judgment of 6 April 2022, ECLI:NL:RBAMS:2022:1793

Rb. Amsterdam, judgment of 6 April 2022, ECLI:NL:RBAMS:2022:1794

Rb. Amsterdam, judgment of 14 April 2022, ECLI:NL:RBAMS:2022:2324

Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3096

Rb. Amsterdam, judgment of 31 May 2022, ECLI:NL:RBAMS:2022:3097

Other District Courts

Rb. Noord-Holland, judgment of 3 September 2019, ECLI:NL:RBNHO:2019:7537

Rb. Limburg, judgment of 9 June 2021, ECLI:NL:RBLIM:2021:5489

Rb. Limburg, judgment of 9 July 2021, ECLI:NL:RBLIM:2021:5489

Rb. Rotterdam, judgment of 8 September 2021, ECLI:NL:RBROT:2021:9244

Rb. Rotterdam, judgment of 1 October 2021, ECLI:NL:RBROT:2021:10178

Rb. Noord-Holland, judgment of 19 January 2022, ECLI:NL:RBNHO:2022:274

Rb. Overijssel, judgment of 16 May 2022, ECLI:NL:RBOVE:2022:1402

Literature

S.S. Buisman, 2022 *First Periodic Country Report: The Netherlands*, STREAM 2022.

Glerum, V.H., 2021, "De Overleveringswet op de helling: de herimplementatie van Kaderbesluit 2002/584/JBZ", *Nederlands Tijdschrift voor Strafrecht* 2021/76

Ouwerkerk, J. & E. Filius, 2021 "Rechtbank Amsterdam weiger Poolse verdachte over te leveren: precedent of uniek besluit?", Nederland Rechtsstaat, 24 February 2021.

Websites

Eerste Kamer der Staten-Generaal, '35.784 Opnemen van een bepaling over het recht op een eerlijk proces in de Grondwet', www.eerstekamer.nl.

Commissie van Toeicht Kenniscetrum. 'Wat doet de commissie?', www.commissievantoezicht.nl/commissie.

EU Legislation

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190, 18.7.2002, p. 1.*

Judgments of the Court of Justice of the European Union

Judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616

Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198

Judgment of 24 May 2016, *Dworzecki*, C-108/16, ECLI:EU:C:2016:346

Judgment of 29 June 2017, *Poplawski I*, C-579/15, ECLI:EU:C:2017:503

Judgment of 10 August 2017, *Zdziaszek*, C-271/17, ECLI:EU:C:2017:629

Judgment of 25 July 2018, *ML*, C-220/18 PPU, ECLI:EU:C:2018:589

Judgment of 25 July 2018, *LM (or Minister for Justice and Equality)*, C-216/18 PPU, ECLI:EU:C:2018:586

Judgment of 27 May 2019, *OG* and *PI*, C-508/18 and C-82/19, ECLI:EU:C2019:456

Judgment of 27 May 2019, *PF*, C-509/18, ECLI:EU:C:2019:457

Judgment of 24 June 2019, *Poplawski II*, C-573/17, ECLI:EU:C:2019:530

Availability of EAW-related jurisprudence

Judgments on the execution of a European arrest warrant are generally (but not all) publicly available in the Netherlands. Judgments on the issuing of a European arrest warrant are not however publicly available.

The selection criteria for those judgments that are publicly available can be found on the website where judgments of the (District) Courts are published: rechtspraak.nl (the database of the Dutch judiciary). In a nutshell, all judgments from the Dutch Supreme Court (*Hoge Raad*) are published, as well as for all cases where an Article 267 TFEU preliminary ruling has been requested from the Court of Justice of the European Union. This concerns both the judgment in which the preliminary ruling was requested and the judgment in which the national proceedings were continued after the preliminary ruling of the Court of Justice was handed down. Furthermore, judgments that have received public media attention – before, during or after the hearing in court – are published; where the judgment has been published or discussed in a medium aimed at the legal profession; the ruling is of particular importance to certain professions or interest groups; the decision also affects the interests of natural or legal persons who were not party to the proceedings; or the judgment is of particular relevance for the evolution or further development of jurisprudence on the legal issue(s) discussed in it.

On most European Arrest Warrant related judgements, a fair amount of jurisprudence is publicly available, although is it unknown to the reporters how many more verdicts are actually given but not publicly available.