VII. COUNTRY REPORTS ON THE NETHERLANDS

National report No 1 on the Dutch jurisprudence

1. Case-law analysis

District Court of Amsterdam, 28th May 2010, ECLI:NL:RBAMS:2010:BM6381

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: Sweden (issuing country) and the Netherlands (executing country)

National provisions: Articles 27, 28 and 29 Dutch Code of Criminal Procedure, Swedish provisions unknown

i. Main issues and court ruling

The lawyer of the defendant/requested person has stated that surrender to Sweden should be refused, because it would result in a flagrant denial of the right to a fair trial (flagrante schending van het beginsel van fair trial). At an earlier time, the Swedish authorities did not clarify that they not only wanted to hear the requested person as a witness, but also as a suspect. This was during an interrogation on 26th February 2009. Dutch police intervened during that interrogation, which took place in the Netherlands. The defence refers to the Salduz-case of the ECtHR and the rights under Article 6 ECHR that flow from this case-law.

The court decides that an appeal on the basis of Article 11 Dutch Surrender Act can only be successful if it is founded on concrete facts and circumstances that lead to the legitimate presumption that the surrender will lead to a flagrant denial of a fair trial.[1] In this case there are no such concrete facts and circumstances. It has not been established that Sweden would violate the guarantees following from the Salduz-case-law if the requested person is surrendered. Neither has it been established that no effective remedy as follows from Article 13 ECHR will be available in Sweden.

ii. Differences between national criminal procedures and reasoning

The main difference between Sweden and the Netherlands in this case concerns the fact that Sweden does not provide suspects with the same procedural guarantees in conformity with the Salduz-case-law. The Dutch court does not regard this as an obstacle. Its reasoning reflects the settled case-law of the ECtHR that “a flagrant denial of justice” is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article, and that “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated. The Dutch court explicitly states that the requested person can call upon remedies ex Article 13 ECHR during the Swedish proceedings. Thus, the systemic differences between the Netherlands and Sweden do not mean that the trial in Sweden will be contrary to Article 6 ECHR and certainly do not justify the conclusion that they would lead

[1] Article 11 Dutch Surrender Act does not transpose any provisions in the EAW Framework Decision. The Article provides: “Surrender shall not be allowed in cases in which, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950”.

(Dutch version: “Overlevering wordt niet toegestaan in gevallen, waarin naar het oordeel van de rechtbank een op feiten en omstandigheden gebaseerd gegrond vermoeden bestaat, dat inwilliging van het verzoek zou leiden tot flagrante schending van de fundamentele rechten van de betrokken persoon, zoals die worden gewaarborgd door het op 4 november 1950 te Rome tot stand gekomen Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden”).

to “a flagrant denial of justice”. The ground for refusal ex Article 11 Dutch Surrender Act is not applicable.

District Court of Amsterdam, 14th June 2011, ECLI:NL:RBAMS:2011:BQ9773

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: France (issuing country) and the Netherlands (executing country)

National provisions: Articles 27, 28 and 29 Dutch Code of Criminal Procedure

i. Main issues and court ruling

The defendant’s counsel has relied on several judgments of the ECtHR and on reports of Amnesty International regarding the prison conditions in France to contend that surrender to France should be refused. The defendant is at risk of suffering a violation of Article 3 ECHR. Moreover, the defendant’s lawyer put forward that a real risk exists that her client would be subjected to a trial contrary to Article 6 ECHR if surrendered. In France, there are systematic “Salduz”-violations during the phase of police custody. The defendant should not be surrendered to France on the basis of Article 11 Dutch Surrender Act.

The court considers that surrender cannot be refused in this case. The court decides that all Member States of the EU are party to the ECHR and, thus, are obliged to guarantee all rights therein. Article 13 ECHR ensures that an effective remedy before a national court exists. This means that it is firstly the duty and responsibility of the national – i.e. French – authorities to ensure the compliance with the ECHR. Having regard to the principle of trust between the Member States of the Union the court sees no reason to doubt that France will comply with its obligations under the ECHR. Moreover, Article 11 Dutch Surrender Act can only form an obstacle for surrender when concrete facts and circumstances lead to the presumption that surrender of the requested person would lead to a flagrant denial of his fundamental rights (flagrante schending van zijn fundamentele rechten). The arguments brought forward by the defence do not constitute such presumption of a flagrant denial.

ii. Differences between national criminal procedures and reasoning

The defence’s argument that there are systematic Salduz-violations in France implies that the French system is not in accordance with the case-law of the ECtHR and, thus, is incompatible with Article 11 Dutch Surrender Act. The rejection by the court of that argument is firmly based on the trust that governs the relation between the Member States of the ECHR and of the EU. The reasoning reflects the settled case-law of the ECtHR that “a flagrant denial of justice” is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article, and that “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated. The Dutch court also explicitly refers to the existence of remedies from Article 13 ECHR and mentions that it falls to the French authorities first to address shortcomings in the upcoming proceedings. Thus, the court shows that systemic differences between the Netherlands and France in regard to the Salduz-jurisprudence do not form an obstacle for the execution of an EAW and certainly do not justify the conclusion that they would lead to “a flagrant denial of justice”.

District Court of Amsterdam, 6th July 2011, ECLI:NL:RBAMS:2011:BR4144

Concerns: Execution of an EAW issued for prosecution and the execution of a sentence imposed upon the requested person, Framework Decision 2002/584/JHA

Countries: Poland (issuing country) and the Netherlands (executing country)

National provisions: Polish provisions unknown

i. Main issues and court ruling

The defence has argued that surrender to Poland should be refused, because surrender would constitute a flagrant denial of fundamental rights. The defence has, inter alia, pointed to the fact that the requested person has been convicted as a minor without the legal assistance of a lawyer. Furthermore, the defendant has stated that he will be convicted in Poland on the basis of forcefully obtained statements, i.e. statements extracted from him under physical or mental duress.

The court considers that the possibility that statements were forcefully obtained from the requested person does not constitute a ground for refusal on the basis of Article 11 Dutch Surrender Act. The unlawfulness of the statements can be addressed before a Polish court during the criminal trial. Poland is a party to the ECHR and, thus, the court should presume that that country will comply with its international obligations. Moreover, the court considers that the execution of a prison sentence does not constitute a flagrant denial of Article 6 ECHR. The argument that the requested person has been convicted as a minor without legal assistance is unsuccessful, because the court considers that this has not actually been proven.

ii. Differences between national criminal procedures and reasoning

Two alleged differences between Poland and the Netherlands concern the legal aid to minors and the use of forcefully made statements during the upcoming Polish trial. The reasoning of the Dutch court is firmly based on the fact that Poland is a party to the ECHR. The court emphasises that the guarantees under the ECHR are applicable and the Polish trial should be in accordance with Article 6 ECHR. In other words, the court expresses trust in the upcoming trial and guarantees in Poland. Although the court does not directly refer to judgments of the ECtHR it is clearly aware of the settled case-law of the Strasbourg court that “a flagrant denial of justice” is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article, “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated. The existence of an effective remedy ex Article 13 ECHR is also relevant.

District Court of Amsterdam, 25th October 2011, ECLI:NL:RBAMS:2011:BU2123

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: United Kingdom (issuing country) and the Netherlands (executing country)

National provisions: Article 70 Dutch Criminal Code

i. Main issues and court ruling

Surrender is requested for the prosecution of several sexual offences that took place between July – September 1977 and July – September 1980. The lawyer of the defendant has stated that surrender to the United Kingdom should be refused on the basis of Article 11 Dutch Surrender Act. The requested person suffers from a disability and is in need of specialised care. His surrender would lead to an imminent risk of a flagrant denial of a fair trial from Article 6 ECHR (dreigende flagrante schending van het bij het EVRM gewaarborgde recht op een eerlijk proces). Moreover, the right to a fair trial is at risk because the criminal acts for which the surrender is requested took place more than thirty years ago. According to the defence the existence of a statute of limitation is a fundamental principle of law, but in the United Kingdom no such statute of limitation exists. Therefore, the court cannot trust that the upcoming trial will be in accordance with Article 6 ECHR.

The court recognizes that the requested person is in need of specialised medical care, but he can receive this in the United Kingdom as well. If the defendant is unfit to travel the public prosecutor in the Netherlands can postpone the actual surrender until the health of the requested person improves. There is no real risk of a flagrant denial of a fair trial. The argument that the criminal acts for which surrender is requested took place more than thirty years ago and, thus, would obstruct truth-finding has to be assessed by an English judge. This national judge has all the results of the investigation. The fact that there is no statute of limitation in the United Kingdom cannot be considered for the (non-)execution of an EAW.

ii. Differences between national criminal procedures and reasoning

According to Dutch criminal procedural law, the prosecution of the criminal acts for which surrender was requested can be statute-barred. On the contrary, no statute of limitations exists in the United Kingdom for such acts. Statutes of limitation in the executing state can lead to the refusal of surrender in accordance with Article 4 (4) of the EAW Framework Decision if the acts fall within the jurisdiction of the executing Member State in accordance with its national law (transposed in Article 9 of the Dutch Surrender Act).

In the present case, the prosecution of the sexual offences was actually statute-barred in the Netherlands: the acts from 1977 became statute-barred in 1995 and those from 1980 became statute-barred in 2007. However, only the acts from 1980 fell within the jurisdiction of the Netherlands. On October 1st 2002 Article 5a Dutch Criminal Code came into force. This Article established jurisdiction for several sexual offences in cases where the suspect acquired a permanent home or place of residence in the Netherlands after the alleged criminal acts were committed. Offences that became statute-barred after the entry into force of Article 5a Dutch Criminal Code could not be prosecuted, because the Netherlands had jurisdiction and the Dutch statute of limitations applied. Before October 1st 2002 no jurisdiction for the prosecution of certain sexual offences existed under Dutch law in case of a foreigner with a permanent home or place of residence in the Netherlands. Because the Netherlands had no jurisdiction over the sexual offences from 1977 the refusal ground in Article 9 Dutch Surrender Act does not apply. This is different for the offences in 1980. Thus, surrender is partially refused in accordance with Article 9 Dutch Surrender Act (only for the acts from 1980).

However, the arguments of the defence under Article 11 Dutch Surrender Act did not entail that the prosecution for the criminal acts was statute-barred in the Netherlands, but focused on the aforementioned systemic difference between the two Member States. The overall absence of a statute of limitation would have a negative effect on truth-finding. In other words, the defence did not argue that the surrender of the requested person should be refused because a term of limitation applied, but that the lack of a statute of limitation in the United Kingdom constituted a violation of Article 6 ECHR. The fact that the offences could still be prosecuted after thirty years would have a negative impact of the fairness of the trial.

The Dutch court does not consider the systemic difference between the Netherlands and the United Kingdom to be an obstacle to surrender. The court gives weight to the fact that an English judge will assess the results of the investigation and decide whether the long time-lapse has an impact on truth-finding, and if so, what the implications should be for the guarantee of a fair trial. It is also important for the court that the requested person can contest the fairness in the use of the results of the investigation in the issuing state. This reasoning fits well within the settled case-law of the ECtHR that “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated, and the existence of an effective remedy from Article 13 ECHR in the issuing state is relevant. The systemic absence of a term of limitation in the English legal system as such does not constitute a “flagrant denial of a fair trial” and cannot be brought under any of the other refusal grounds in the EAW Framework Decision and the Dutch Surrender Act.

District Court of Amsterdam, 26th October 2011, ECLI:NL:RBAMS:2011:BU2956

Concerns: Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: Belgium (issuing country) and the Netherlands (executing country)

National provisions: Articles 27, 28 and 29 Dutch Code of Criminal Procedure, Article 47bis Belgian Code of Criminal Procedure

i. Main issues and court ruling

The defence has stated that the requested person was not informed about his right of access to a lawyer during the first interrogation in Belgium. During the second interrogation the defendant was not informed that he was not obliged to answer any questions. At first, the requested person used a false name. The defendant was then shown a photograph of a man and he acknowledged that he saw himself on that photograph. The photograph was then linked to the requested person's real name. The defendant has incriminated himself through his comments. Because he had not been informed of his right not to answer questions the nemo tenetur principle was violated. A judge in Belgium will conclude that a fair trial is not possible because of both violations. Therefore, the surrender should be refused.

The court does not follow the arguments of the defence and does not refuse the surrender. The Belgian judge should assess the suspicions, the alleged violations of Article 6 ECHR and the possible consequences of those violations. It has not been proven that these arguments cannot be addressed before a Belgian court. Belgium is a party to the ECHR and because of the principle of trust between Member States the court sees no reason to doubt that Belgium will comply with its obligations under the ECHR.

ii. Differences between national criminal procedures and reasoning

Two alleged differences between Belgium and the Netherlands concern the right of access to a lawyer before the first interrogation and the right not to answer questions. In the present case, the fact that the requested person was not informed of his rights to access a lawyer and not to answer questions does not lead to the refusal of the execution of the EAW. The reasoning of the Dutch court is firmly based on the fact that Belgium is a party to the ECHR. The Dutch court explicitly mentions that the principle of trust governs the relationship between Member States of the ECHR and the EU. The court emphasises that the guarantees under the ECHR are applicable and the Belgian trial should take place in accordance with Article 6 ECHR. Moreover, an effective remedy ex Article 13 ECHR will be available to contest the use of statements made during the first and second interrogation. Although the court does not directly refer to judgments of the ECtHR it is clearly aware of the settled case-law of the Strasbourg court that "a flagrant denial of justice" is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article, "the proceedings as a whole" should be assessed in order to determine whether Article 6 ECHR has been violated.

District Court of Amsterdam, 12th June 2015, ECLI:NL:RBAMS:2015:4114

Concerns: Execution of an EAW issued for the execution of a sentence imposed upon the requested person, Framework Decision 2002/584/JHA

Countries: Poland (issuing country) and the Netherlands (executing country)

National provisions: Article 12 Dutch Surrender Act, Article 132 Polish Code of Criminal Procedure

i. Main issues and court ruling

The defence contended that the surrender of the requested person to Poland should be refused because reasonable doubt exists that the requested person has actually been officially informed about the date and place of his trial. Article 12 Dutch Surrender Act (transposition of Article 4a of EAW Framework Decision) provides that it needs to have been

established unequivocally that a defendant was informed of the scheduled trial.[2] The explanation provided by the issuing judicial authority is unconvincing. According to the Polish authorities, the notice has been sent to the defendant by mail and has also been given to his mother. The requested person was not personally informed about the hearing or the verdict. The fact that the summon to attend was sent in accordance with Polish law does not mean that this is also in accordance with Article 12 Dutch Surrender Act. The ECtHR only accepts that a defendant has unequivocally waivered his right to attend the trial if he has been informed in person of the scheduled trial. In the present case, the requested person was not informed in person. Thus, surrender without any additional guarantees would entail a flagrant denial of Article 6 ECHR.

The court decides that the wording of Article 12 Dutch Surrender Act – "in accordance with the procedural rules of the issuing state" – shows that the procedural rules of the issuing state are decisive for establishing whether an exception to the obligation to refuse surrender on the basis of that Article exists. On the basis of the principle of trust between the Member States the court should presume that the laws in the issuing state are in accordance with Article 6 ECHR. In earlier case-law the court has concluded that under Article 132 of the Polish Code of Criminal Procedure a defendant has been informed of his trial if a notice has been given to an adult housemate. In that case, one of the exceptions to the obligations to refuse surrender ex Article 12 Dutch Surrender Act applies. The issuing judicial authority has informed the court that the notice has been given to the defendant's mother. Therefore, under Polish law the notice has been lawfully given to him. The fact that the requested person did not attend his trial does not lead to the refusal of surrender.

The court reiterates that Article 12 Dutch Surrender Act implements Article 4a (1) of the EAW Framework Decision. In Article 4a (1) the Union legislator provided an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered in absentia must be regarded as not infringing the rights of the defence. Referring to the judgment of the CJEU in Melloni,[3] the Dutch court decides that Article 4a is in accordance with Article 6 ECHR and Article 47 and 48 CFR. The fact that the requested person has not attended his trial cannot lead to the refusal of surrender on the basis of Article 11 Dutch Surrender Act either.

[2] Article 12 Dutch Surrender Act provides: "Surrender will not be allowed in case where the European arrest warrant is issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that, in accordance with further procedural requirements defined in the national law of the issuing Member State:

(a) the person in due time was summoned in person and was thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial and was informed that a decision may be handed down if he or she does not appear for the trial; or

(b) the suspect, being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial […]".
(Dutch version: "Overlevering wordt niet toegestaan indien het Europees aanhoudingsbevel strekt tot tenuitvoerlegging van een vonnis terwijl de verdachte niet in persoon is verschenen bij de behandeling ter terechtzitting die tot het vonnis heeft geleid, tenzij in het Europees aanhoudingsbevel is vermeld dat, overeenkomstig de procedurevoorschriften van uitvaardigende lidstaat:
a. de verdachte tijdig en in persoon is gedagvaard en daarbij op de hoogte is gebracht van de datum en plaats van de behandeling ter terechtzitting die tot de beslissing heeft geleid of anderszins daadwerkelijk officieel in kennis is gesteld van de datum en de plaats van de behandeling ter terechtzitting, zodat op ondubbelzinnige wijze vaststaat dat hij op de hoogte was van de voorgenomen terechtzitting en ervan in kennis is gesteld dat een vonnis kan worden gewezen wanneer hij niet ter terechtzitting verschijnt; of
b. de verdachte op de hoogte was van de behandeling ter terechtzitting en een door hem gekozen of een hem van overheidswege toegewezen advocaat heeft gemachtigd zijn verdediging te voeren en dat die advocaat ter terechtzitting zijn verdediging heeft gevoerd […]").

[3] Case C-399/11, Judgment of the Court (Grand Chamber), 26 February 2013 *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

ii. Differences between national criminal procedures and reasoning

The main question in this case is whether the Polish rules concerning in absentia decisions are compatible with Article 12 Dutch Surrender Act. In short, it is argued that even if the summon to attend was sent in accordance with Polish law execution of the EAW can still lead to a violation of fundamental rights and, thus, surrender should be refused. The argumentation of the court in rejecting this reasoning is twofold: (1) the Polish rules are decisive under the EAW Framework Decision and the Dutch implementation law and (2) these Polish rules are presumed to be in accordance with the ECHR and the CFR. Via its argumentation the Dutch court shows that differences between national rules on in absentia decisions and delivery of official notices form no obstacle for the recognition of an EAW in this case.

(1) Polish procedure decisive

First, the EAW Framework Decision and the Dutch implementation law explicitly provide that the procedural rules of the issuing state are decisive in establishing whether the requested person was informed about the time and place of his trial. Based on the information provided by the Polish authorities and its earlier case-law, the court concludes that the summons to attend was sent in accordance with Polish law. Thus, the exception ex Article 12 Dutch Surrender Act is applicable.

(2) Harmonisation and trust

The court then turns to the principle of trust. This principle governs the relation between Member States of the ECHR and of the EU and entails that the Dutch court should presume that Polish law is in accordance with fundamental right standards. The court explicitly states that the EAW mechanism and its rules on in absentia decisions have been fully harmonised by the Union legislator and, thus, are uniform within the EU. The Union legislator has decided that exceptions to refusal of surrender ex Article 4a (1) of the EAW Framework Decision and Article 12 Dutch Surrender Act are in accordance with the right to a fair trial. The court also refers to the influential judgment of the CJEU in Melloni to underpin that the rules are in accordance with fundamental rights.

District Court of Amsterdam, 23rd June 2015, ECLI:NL:RBAMS:2015:4325

Concerns: Execution of an EAW issued for prosecution of the requested person, Framework Decision 2002/584/JHA

Countries: Belgium (issuing country) and the Netherlands (executing country)

National provisions: Article 30 Dutch Code of Criminal Procedure, Articles 28quinquies and 57 Belgian Code of Criminal Procedure

i. Main issues and court ruling

The defence has brought forward several arguments why surrender would violate the fundamental rights of the requested person and why the prosecution should be transferred from Belgium to the Netherlands. Firstly, the requested person will not have a fair trial in conformity with Article 6 ECHR in Belgium, because of hostile media coverage in that country. Secondly, several applicable guarantees in the Netherlands are not available to the defendant in Belgium. The defence refers to the fact that the defendant will be heard in Belgium. Although this was initiated by a Belgian investigative judge, there will be no public prosecutor or investigative judge present during the interview. The defence would like to have access to

the case file (dossier), but the right to access the case file does not exist in Belgium at this stage of the proceedings. By contrast, under Dutch law the defence would have access to the case file as this is considered to be a fundamental right. Thus, a fundamental right that exists in the Netherlands would be violated if the requested person would be surrendered to Belgium. The defence contended therefore that the proceedings should be transferred to the Netherlands (presumably on the basis of European Convention on the Transfer of Proceedings in Criminal Matters, although this is not mentioned).

The court decides that the arguments of the defence are insufficient to refuse the surrender of the requested person to Belgium. It has not been established that the requested person is at risk of suffering a flagrant denial of fundamental rights (flagrante schending van fundamentele rechten); it has not been proven that the defendant will not receive a fair trial in Belgium. During the criminal proceedings in Belgium, he can use each and every guarantee and remedy available to him on the basis of the ECHR and Belgian law and he has already secured the legal assistance of Dutch and Belgian lawyers. The court follows the arguments of the Dutch public prosecutor with regards to the differences between the applicable guarantees in Belgium and in the Netherlands: the Dutch authorities cannot decide how Belgian criminal proceedings should take place and the fact that the transfer of proceedings would enhance the procedural position of the defendant does not form a ground for refusal under the EAW framework.

ii. Differences between national criminal procedures and reasoning explained

The main difference between the two national criminal procedures in this case concerns the access of the defence to the case file. Under Dutch law the suspect has the right to access his case file from the first interrogation onwards, but in Belgium such a right does not exist; the defence can only access the case file when the public prosecutor has decided that the investigation has been finished. This means that a defendant seemingly has a better position in the Netherlands during the investigative stage of the proceedings. This systemic difference between the two countries does not lead to the refusal of the surrender of the requested person. The judgment is based on two grounds: (1) insufficient evidence concerning the flagrant denial of fair trial and the non-application of a ground for non-execution of the EAW and (2) the fact that improvement of the procedural position of the defendant as a result of the transfer of proceedings does not constitute a refusal ground.

(1) It has not been shown that the defendant risks suffering a flagrant denial of fundamental rights because of the systemic differences

The court states that Belgium is a party to the ECHR and, as such, is bound to uphold Article 6 ECHR. Although the court does not directly refer to any specific judgments of the ECtHR it is clearly aware of the settled case-law of the Strasbourg court that “a flagrant denial of justice” is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article, “the proceedings as a whole” should be assessed in order to determine whether Article 6 ECHR has been violated, and the existence of an effective remedy on the basis of Article 13 ECHR is also relevant. The Dutch court explicitly states that the defendant still has every opportunity to call upon guarantees provided for by Belgian law and the ECHR; the requested person has already secured the legal assistance of a lawyer. In other words, the systemic differences between the Netherlands and Belgium do not mean that Belgian proceedings are contrary to Article 6 ECHR and certainly do not justify the conclusion that they would lead to “a flagrant denial of justice”. The ground for refusal in Article 11 Dutch Surrender Act is not applicable.

(2) The fact that the position of the defence is stronger in the executing Member State is not one of the grounds for non-execution of the EAW

The arguments that the defendant has a stronger position in the Netherlands during the investigative phase – with regards to the right to access the case file – and, as a consequence, has requested the transfer of proceedings cannot be brought under one of the limited refusal grounds of the EAW Framework Decision and the Dutch Surrender Act. In other words, the differences between the Netherlands and Belgium and the possible advantage for the defendant of a transfer of proceedings is not to be considered by the Dutch court when deciding on the execution of an EAW, unless they give rise to issues under Article 6 ECHR. That is not the case in this procedure.

District Court of Amsterdam, 30th August 2017, ECLI:NL:RBAMS:2017:6273

Concerns: Execution of an EAW issued for the execution of a sentence imposed upon the requested person, Framework Decision 2002/584/JHA

Countries: Lithuania (issuing country) and the Netherlands (executing country)

National provisions: unknown

i. Main issues and court ruling

The requested person has been tried and convicted in Lithuania. He was present during his initial trial, but launched an appeal against the imposed sanction. According to the Lithuanian authorities the requested person was informed of the time and place of the court hearing on the appeal, because a court notice was sent to him. The defendant did not attend the court hearing, but a lawyer was present. The Lithuanian authorities did not provide any information that confirmed that the requested person received the court notice or that the lawyer was authorised by the requested person to represent him during the appeal.

The defence has contended that the request for surrender should be refused. The appeal against the sanction should be assessed in accordance with Article 12 Dutch Surrender Act It cannot be established that the defendant received the summons in person and that he was informed of the time and place of the hearing. It can also not be established that he was lawfully represented by a lawyer. Lawful representation by a lawyer is only possible if the defendant has been informed of the place and time of the hearing, if the defendant authorised his lawyer and if the lawyer actually defended the defendant. It cannot be established that the lawyer present during the hearing of the appeal was authorised by the requested person who contends that he has never discussed his case with this lawyer.

The court refers to its preliminary questions posed in the cases Tupikas[4] and Zdziaszek[5] and to the answers provided by the CJEU of the EU. It follows from these judgments that cases where the final decision on the guilt and the final decision on the imposed sanction are two separate decisions as the decisions have been made in two subsequent instances, both the decision on the guilt and the decision on the imposed sanction should be assessed in accordance with the national law implementing Article 4a of the EAW Framework Decision. Article 6 ECHR applies not only to the finding of guilt, but also to the determination of the sentence. Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing leading to a decision on his sanction because of the significant consequences his presence may have on the quantum of the sentence to be imposed. The requested person must be able to effectively exercise his rights of defence in order to influence favorably the decision regarding his sanction. The court establishes that in a case such as the present one – where decisions on guilt and sanction are made separately– the decisions should both be able to pass the test in the national legislation implementing Article 4a of the EAW Framework Decision. In case one of the two decisions does not pass the test, then surrender should be refused.

[4] Case C-270/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Tadas Tupikas*, ECLI:EU:C:2017:628.
[5] Case C-271/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Sławomir Andrzej Zdziaszek*, ECLI:EU:C:2017:629.

The court accepts that the requested person has not attended the hearing of his appeal against the imposed sanction and acknowledges that there is neither information from which it can be concluded that the defendant received the writ or has been informed of the place and time of the hearing, nor that he gave his authorisation to the lawyer who was present during the hearing. Thus, on the basis of the available information the court cannot establish with sufficient certainty that the defence rights have been guaranteed during the relevant proceedings. Although Article 4a of the EAW Framework Decision provides an optional refusal ground the Dutch legislator has opted to implement that provision as a mandatory ground for non-execution of an EAW in Article 12 Dutch Surrender Act. Therefore, if a requested person has been tried in absentia and none of the circumstances from Article 12 Dutch Surrender Act apply the court should refuse the surrender of the defendant. The court concludes that it should refuse the surrender of the requested person to Lithuania.

ii. Differences between national criminal procedures and reasoning

The main question in the present case is whether both the decision on the guilt and the decision on the imposed sanction should be assessed in accordance with Article 12 Dutch Surrender Act in cases where a final decision on the guilt and a final decision on the imposed sanction have been made separately. Such a "division of decisions" is not possible in the Netherlands. In the Netherlands an appeal against a decision in first instance requires the court of appeal to assess all elements of the case – i.e. facts, guilt and the imposed sentence – again. It is not possible to launch an appeal against the sentence alone. Therefore, a decision in the Netherlands in first instance and in appeal will always constitute a decision on all elements of the case. This is different in other EU Member States. The present case shows that it is possible to launch an appeal against the imposed sentence in Lithuania; this appeal does not require the court to re-assess the merits of the case. Thus, there is a distinct difference between the legal systems of the Netherlands and Lithuania with regard to the scope of an appeal. This raises the question whether in case of a "division of decisions" (1) both proceedings should have taken place in accordance with Article 6 ECHR for the execution of an EAW and (2) what the consequence should be when that cannot be established.

(1) Both procedures in accordance with Article 6

The reasoning of the court in answering the first question builds on the case-law of the CJEU. The judgments in the cases Tupikas and Zdziaszek – both cases involved preliminary questions posed by the District Court of Amsterdam – are applied and used to interpret the EAW Framework Decision and the Dutch implementation Act. The rulings of the CJEU in Tupikas and Zdziaszek clarify that "Article 6 ECHR applies not only to the finding of guilt, but also to the determination of the sentence. Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing leading to a decision on the sanction because of the significant consequences which that decision may have on the quantum of the sentence to be imposed. Given that such proceedings determine the quantum of the sentence which the convicted person will ultimately serve, that person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard".[6] In accordance with the case-law of the CJEU the Dutch court establishes that it should ensure that both Lithuanian procedures were in accordance with fundamental rights standards.

(2) Consequences

The second question is firmly based on the facts of the case and the legal framework of the EAW. It cannot be concluded from the available information that the appeal procedure in

[6] Case C-270/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Tadas Tupikas*, ECLI:EU:C:2017:628, paragraphs 78, 83-84; Case C-271/17 PPU, Judgment of the Court (Fifth Chamber) of 10 August 2017 *Openbaar Ministerie v Sławomir Andrzej Zdziaszek*, ECLI:EU:C:2017:629, paragraphs 87 and 91.

Lithuania concerning the sanction imposed fulfills the test of Article 6 ECHR. The court turns to the EAW Framework Decision and the Dutch implementation law to establish which decision should be made on the execution of the EAW. Under Dutch law in absentia decisions should lead to the refusal of surrender, unless one of the exceptions is applicable. In the present case, they are not. Because the Dutch legislator implemented the ground for non-execution as a mandatory ground for non-execution the court must refuse the surrender to Lithuania on the basis of Article 12 Dutch Surrender Act. However, it is important to state that the systemic difference between the Netherlands and Lithuania does not form the direct obstacle in this case. It can be deduced from both the case-law of the CJEU and the Dutch court that the difference in the scope of appeal does not form a problem as long as the procedure(s) are (both) in accordance with fundamental rights. In this case, the apparent absence of the enforcement of fundamental rights guarantees in accordance with Article 6 ECHR during the appeal proceedings is the bottle-neck.