Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 14 October 2021 [1]

Joined Cases C-428/21 PPU and C-429/21 PPU

HM (C-428/21 PPU)
TZ (C-429/21 PPU)
intervener
Openbaar Ministerie

(Requests for a preliminary ruling from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands))

(Reference for a preliminary ruling – Police and judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 27(3)(g) and (4) – Request for consent to extension of the offences – Article 28(3) – Request for consent to subsequent surrender – Article 47 of the Charter of Fundamental Rights of the European Union – Effective judicial protection – Right to be heard of the person surrendered – Place where that right is exercised – Procedures)

I. Introduction

1. The two requests for a preliminary ruling made by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) concern, in essence, the procedures for applying the right to be heard in relation to a person surrendered to the judicial authorities of a Member State further to the issuing of a European arrest warrant (EAW) in the context, in the first case, of a request for the executing judicial authority's consent to the extension of the offences for the purposes of Article 27(3)(g) and (4) of Framework Decision 2002/584/JHA [2] and, in the second, of a request for that judicial authority's consent to subsequent surrender, within the meaning of Article 28(3) of that framework decision. [3]

2. More specifically, the Court is called upon to rule on the following questions: in which Member State and according to which procedures may a person surrendered further to an EAW exercise his or her right to be heard before the executing judicial authority gives its additional consent?

[1] Original language: French.

[2] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

[3] I would point out that consent to extension of the offences or to subsequent surrender (to which I refer, interchangeably, as 'additional consent') is one of the exceptions to the rule under which a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered ('the speciality rule').

Those questions are not explicitly answered in Framework Decision 2002/584 or in other EU legislation. The primary goal of these cases is therefore to clarify the extent, and the procedures for the exercise, of that right to be heard, striking a balance between, on the one hand, the effectiveness of the EAW mechanism, which is primarily based on the principle of mutual recognition, and, on the other hand, respect for the fundamental rights of the surrendered person.

3. After interpreting the relevant provisions of EU law, read in the light of the Charter of Fundamental Rights of the European Union ('the Charter'), I will come to the conclusion that, first of all and as a preliminary point, the person surrendered has the right to be heard before the executing judicial authority gives its additional consent; next, that right must be exercised in relation to the executing judicial authority and according to the law of the executing Member State and may be exercised either in the executing or the issuing Member State; and, finally, that right may be exercised in accordance with the arrangements mutually agreed between the competent authorities of the issuing Member State and of the executing Member State, on the basis of the applicable national legislation, provided that its effective exercise is ensured.

II. Legal context

A. EU law: Framework Decision 2002/584

4. Recitals 5, 6, 10 and 12 of Framework Decision 2002/584 read as follows:

'(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The [EAW] provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation.

…

(10) The mechanism of the [EAW] is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [TEU], determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

…

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected in [the Charter], in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom [an EAW] has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.'

5. Article 1 of that framework decision, which is entitled 'Definition of the [EAW] and obligation to execute it', provides:

'1. The [EAW] is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].'

6. Articles 3 to 4a of the framework decision lay down the grounds for mandatory or optional non-execution of the EAW by the executing judicial authority.

7. Chapter 2 of the same framework decision, which is entitled 'Surrender procedure', comprises Articles 9 to 25.

8. Article 11 of Framework Decision 2002/584, which is entitled 'Rights of a requested person', states:

'1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the [EAW] and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority.

2. A requested person who is arrested for the purpose of the execution of [an EAW] shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.'

9. Article 13 of that framework decision, which is entitled 'Consent to surrender', provides:

'1. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express renunciation of entitlement to the "speciality rule", referred to in Article 27(2), shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State.

2. Each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel.

3. The consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be formally recorded in accordance with the procedure laid down by the domestic law of the executing Member State.

…'

10. Article 14 of that framework decision, which is entitled 'Hearing of the requested person', reads as follows:

'Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.'

11. Article 15 of the same framework decision, which is entitled 'Surrender decision', states:

'1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

12. Article 18 of Framework Decision 2002/584, which is entitled 'Situation pending the decision', provides:

'1. Where the [EAW] has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must:

(a) either agree that the requested person should be heard according to Article 19;

(b) or agree to the temporary transfer of the requested person.

2. The conditions and the duration of the temporary transfer shall be determined by mutual agreement between the issuing and executing judicial authorities.

3. In the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.'

13. Article 19 of that framework decision, which is entitled 'Hearing the person pending the decision', provides, in paragraphs 1 and 2 thereof:

'1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.'

14. Chapter 3 of that framework decision, which is entitled 'Effects of the surrender', comprises Articles 26 to 30.

15. Article 27 of the same framework decision, which is entitled 'Possible prosecution for other offences', states:

'1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;

(b) the offence is not punishable by a custodial sentence or detention order;

(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;

(d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;

(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;

(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.'

16. Article 28 of Framework Decision 2002/584, which is entitled 'Surrender or subsequent extradition', provides:

'1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States which have given the same notification, the consent for the surrender of a person to a Member State other than the executing Member State pursuant to [an EAW] issued for an offence committed prior to his or her surrender is presumed to have been given, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. In any case, a person who has been surrendered to the issuing Member State pursuant to [an EAW] may, without the consent of the executing Member State, be surrendered to a Member State other than the executing Member State pursuant to [an EAW] issued for any offence committed prior to his or her surrender in the following cases:

(a) where the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it;

(b) where the requested person consents to be surrendered to a Member State other than the executing Member State pursuant to [an EAW]. Consent shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's national law. It shall be drawn up in such a way as to make clear that the person concerned has given it voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel;

(c) where the requested person is not subject to the speciality rule, in accordance with Article 27(3)(a), (e), (f) and (g).

3. The executing judicial authority consents to the surrender to another Member State according to the following rules:

(a) the request for consent shall be submitted in accordance with Article 9, accompanied by the information mentioned in Article 8(1) and a translation as stated in Article 8(2);

(b) consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision;

(c) the decision shall be taken no later than 30 days after receipt of the request;

(d) consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4.

For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein.

4. Notwithstanding paragraph 1, a person who has been surrendered pursuant to [an EAW] shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law.'

B. Netherlands law

17. The Overleveringswet (Law on surrender) of 29 April 2004[4] transposes Framework Decision 2002/584 into Netherlands law.

18. Article 14 of the Law on surrender, which is part of Chapter II, entitled 'Surrender by the Netherlands', section 1, entitled 'Conditions of surrender', which transposes, in paragraphs 1 and 3 thereof, Article 27(2), (3) and (4) of Framework Decision 2002/584, states:

'1. Surrender shall only be granted subject to the general condition that the requested person will not be prosecuted, sentenced or otherwise deprived of his or her personal liberty for offences committed prior to the time of his or her surrender and for which he or she has not been surrendered, unless:

…

(f) the prior consent of the court has previously been requested and granted by that court.

…

3. At the latest on the third day after receipt of a request from the issuing judicial authority for the consent referred to in paragraph 1(f) or paragraph 2(c), the public prosecutor shall require the District Court to consider the request. To that end, the public prosecutor shall submit the request to the court with an accompanying translation. The court shall give the consent referred to in paragraph 1(f) or paragraph 2(c) in respect of the offences for which surrender could have been granted under this law. The decision on a request shall in any event be taken within 27 days of its receipt. The public prosecutor shall notify the issuing judicial authority of the court's decision without delay.'

19. Article 25(1) and (3) of that law, which is part of Chapter II, section 2, entitled 'Surrender procedure', title C, entitled 'Decision on surrender', provides:

'1. The hearing of the requested person shall be public, unless that person requests that the case be heard in camera or the court orders that the proceedings take place in camera on serious grounds stated in the record of the hearing.

…

4 Stb. 2004, No 195.

3. At that hearing, the requested person may be assisted by his or her lawyer.

…'

III. The disputes in the main proceedings and the questions referred for a preliminary ruling

A. Case C-428/21 PPU

20. On 13 April 2021, the Fővárosi Törvényszék (Budapest High Court, Hungary) submitted to the Netherlands authorities a request for consent to the extension of the offences for the purposes of Article 27(3)(g) and (4) of Framework Decision 2002/584 concerning HM, a Nigerian national surrendered to the Hungarian authorities pursuant to an EAW executed on 25 May 2020 and placed in detention in Hungary. The purpose of that request was to allow his prosecution for an offence which he allegedly committed prior to his surrender other than that which had formed the grounds of the EAW.

21. At his hearing, HM stated that he did not wish to renounce the protection afforded by the speciality rule laid down in Article 27(3)(f) of that framework decision.

22. In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam), seised in the context of the request to extend the offences, after granting HM the right to be heard with regard to the consent to the extension of the offences, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 27(3)(g) and (4) of [Framework Decision 2002/584], read in the light of the right to effective judicial protection, be interpreted as meaning that:

– a surrendered person must be able to exercise his or her right to heard in relation to a request for an extension of the offences in the issuing Member State when a judicial authority of that Member State grants him or her a hearing relating to the possible renunciation of the entitlement to the speciality rule as referred to in Article 27(3)(f) of [that] [f]ramework decision, or

– must that person be able to exercise his or her right to be heard in the Member State which previously surrendered him or her to the executing judicial authority in the proceedings relating to the request for consent to extend the offences?

(2) If a surrendered person must be able to exercise his or her right to be heard in relation to the decision on a request for consent to extend the offences, as referred to in Article 27(4) of [Framework Decision 2002/584], in the Member State which previously surrendered him or her, in what way must that Member State enable him or her to do so?'

B. Case C-429/21 PPU

23. On 3 May 2021, the Procureur des Konings van het Parket van Brussel (Crown Prosecutor's Office, Brussels, Belgium) submitted to the Netherlands authorities a request for consent to subsequent surrender, within the meaning of Article 28(3) of Framework Decision 2002/584,

concerning TZ, a Netherlands national surrendered to the Belgian authorities pursuant to an EAW and placed in detention in Belgium. The purpose of that request was to allow TZ's surrender to the German authorities for the purposes of the prosecution of an offence which he allegedly committed prior to his surrender other than that which had formed the grounds of the Belgian EAW.

24. In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam), seised in the context of the request for subsequent surrender, after granting TZ the right to be heard with regard to the subsequent surrender, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 28(3) of [Framework Decision 2002/584], read in the light of the right to effective judicial protection, be interpreted as meaning:

– that a person who has been surrendered to the issuing Member State and in respect of whom a third Member State has subsequently issued an EAW for offences committed prior to that surrender must be able to exercise his or her right to be heard in relation to the request for consent for subsequent surrender, as referred to in Article 28(3) of [Framework Decision 2002/584], in the issuing Member State before a judicial authority of that Member State during proceedings on the execution of the EAW issued by the third Member State; or

– that that person must be able to exercise his right to be heard in the Member State which previously surrendered him to the executing judicial authority during the proceedings on the giving of consent for subsequent surrender?

(2) If a surrendered person must be able to exercise his or her right to be heard in relation to the decision on a request for consent for subsequent surrender, as referred to in Article 28(3) of [Framework Decision 2002/584], in the Member State which previously surrendered him or her, in what way must that Member State enable him or her to do so?'

IV. The urgent procedure before the Court

25. The referring court requested that these references for a preliminary ruling be dealt with under the urgent procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice. In support of that request, it argued that the questions referred for a preliminary ruling concern the interpretation of a framework decision, which comes under Title V of Part Three of the FEU Treaty.

26. As regards the criterion relating to urgency, in the context of Case C-428/21 PPU, the referring court stated that, on the date on which the request for a preliminary ruling was made, HM was in pre-trial detention in Hungary. That court observed that, if it were to give its consent to the extension of the offences, he could also be held in pre-trial detention for additional offences, which could entail an extension of that period of detention and a heavier sentence in the event of a conviction. However, if that court were to refuse the request to extend the offences, the competent authority of the issuing Member State would not, in principle, be permitted to place HM in pre-trial detention for the offences to which that request relates and, in the event of a conviction, would not, in principle, be entitled to execute a custodial sentence imposed in respect of those

offences. Accordingly, the referring court took the view that the Court's answers to the questions referred for a preliminary ruling had a direct and decisive influence on the duration of HM's detention in Hungary.

27. In the context of Case C-429/21 PPU, the referring court stated that TZ was being detained in Belgium pending the latter's decision on the request for consent to subsequent surrender to Germany with a view to executing the EAW issued against him by the German authorities. It observed that the Court's ruling had an impact on that person's continued detention in Belgium.

28. In those circumstances, the First Chamber of the Court decided, on 29 July 2021, to grant the referring court's request for these two cases to be dealt with under the urgent preliminary ruling procedure. It also decided to join those cases for the purposes of the written and oral stages of the procedure and the judgment and to put questions for a written reply to the Netherlands Government.

29. Written observations were lodged by the Openbaar Ministerie (Public Prosecutor's Office, Netherlands), the Netherlands Government and the European Commission. The Netherlands Government also replied in writing to the questions put by the Court. The Public Prosecutor's Office, the Netherlands Government, Ireland, the French and Hungarian Governments and the Commission presented oral argument at the hearing which was held on 8 September 2021.

V. Analysis

30. Having observed that a surrendered person's right to be heard in relation to a request for additional consent is one of his or her rights of defence inherent in the right to obtain effective judicial protection,[5] the referring court submits, in these two cases, two questions for a preliminary ruling: by the first, it asks the Court in which Member State that person must be able to exercise his or her right to be heard and, by the second, it seeks to ascertain how that right may be exercised if it is a matter for the executing Member State.

31. In that connection, I would point out at the outset that Framework Decision 2002/584 does not explicitly grant a surrendered person the right to be heard in relation to a request for additional consent, and that that question has not yet been addressed in the case-law of the Court.[6]

32. Therefore, before examining the two questions referred for a preliminary ruling, I will consider whether the relevant provisions of that framework decision, read in the light of the right to effective judicial protection enshrined in Article 47 of the Charter, are to be interpreted as meaning that a surrendered person has the right to be heard in relation to a request for additional consent.

[5] In this regard, the referring court makes reference to Opinion of Advocate General Campos Sánchez-Bordona in *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:494, point 87).

[6] Although that right was recognised, in the interest of completeness, by Advocate General Campos Sanchez-Bordona in his Opinion in *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:494, points 84 to 89), the Court did not rule on that question in the judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:953).

A. A surrendered person's right to be heard in relation to a request for additional consent

33. I note that although, in the context of the issuing of an EAW, Framework Decision 2002/584 provides, in Article 14 thereof, that the arrested person has the right to be heard by the executing judicial authority where that person does not consent to his or her surrender, that framework decision is silent on the right of a person who has already been surrendered to be heard in relation to a request for additional consent.

34. That said, it is my view that an interpretation of the relevant provisions of Framework Decision 2002/584, read in the light of the objectives of that framework decision and of the right to effective judicial protection enshrined in Article 47 of the Charter, allows a surrendered person to be afforded the right to be heard in respect of a request for additional consent.

35. In the first place, I would point out that, although Framework Decision 2002/584 establishes a system of free movement of judicial decisions in criminal matters based on the principle of mutual recognition and a high level of confidence between Member States,[7] it respects fundamental rights and observes the principles recognised in Article 6 TEU and reflected in the Charter,[8] in particular the second paragraph of Article 47 thereof.

36. In that regard, the Court has held that the right to be heard in any procedure, inherent in respect for the rights of the defence, which is a general principle of EU law enshrined in Article 47 of the Charter, guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely.[9]

37. In the second place, first and foremost, the Court has already held that the decision to grant consent to extend the offences is distinct from that relating to the execution of an EAW and leads, for the person concerned, to effects distinct from those of the latter decision.[10] The same is true, in my view, as regards the decision to grant consent to subsequent surrender.

38. Next, in accordance with Article 27(4) and Article 28(3)(b) and (d) of Framework Decision 2002/584, additional consent is to be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of that framework decision and refused on the same grounds for mandatory or optional non-execution as those provided for in relation to the EAW in Articles 3 and 4 of the framework decision.

39. Finally, as in the case of the proceedings relating to the execution of an EAW, those relating to the extension of the offences and to a subsequent surrender are, as the referring court observes and contrary to the position taken by the Hungarian Government at the hearing, also liable to prejudice the liberty of the surrendered person, given that they concern an offence other than that for which he or she was surrendered and that is liable to lead to a heavier sentence for that person.[11]

7 See recitals 5, 6 and 10 of Framework Decision 2002/584.

8 See recital 12 of Framework Decision 2002/584.

9 See, to that effect, judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 34 and the case-law cited).

10 Judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:953, paragraph 60).

11 See judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:953, paragraph 62).

40. A parallel should therefore, in my opinion, be drawn between, on the one hand, the right afforded at the time of an initial surrender and, on the other, that applied in the event of an extension of the offences or the subsequent surrender, and it should be concluded that the need to hear the surrendered person in relation to a request for additional consent is based on the same requirements as those justifying his or her right to be heard in relation to his or her initial surrender. [12]

41. In conclusion, I am of the view that Article 27(3)(g) and (4) and Article 28(3) of Framework Decision 2002/584, read in the light of the principle of effective judicial protection enshrined in Article 47 of the Charter, are to be interpreted as meaning that a surrendered person must be able to be heard in relation to a request for additional consent.

42. That said, the questions referred for a preliminary ruling by the national court ask in which Member State and in accordance with which procedures the surrendered person's right to be heard may be exercised.

B. The first question referred

43. The first question referred for a preliminary ruling asks in which Member State a surrendered person must be able to exercise his or her right to be heard in relation to a request for additional consent.

44. After observing that Framework Decision 2002/584 does not contain any rules in this regard, the referring court, in Case C-428/21 PPU, essentially envisages two situations. The first involves the surrendered person being able to exercise his or her right to be heard in the issuing Member State, where the judicial authority of that Member States grants that person a hearing concerning a possible renunciation of entitlement to the speciality rule referred to in Article 27(2) of that framework decision. Under the second, that person can exercise his or her right to be heard in the executing Member State in the context of the proceedings relating to the giving of consent. In the latter situation, the executing judicial authority could, according to that court, either simply take note of a record of the hearing (in the issuing Member State) or hold a hearing.

45. In Case C-429/21 PPU, the referring court again envisages two situations. The first involves the surrendered person being able to exercise his or her right to be heard in the issuing Member State in the context of the proceedings concerning the execution of the second EAW. Under the second, that person can exercise his or her right to be heard in the executing Member State.

46. I note, at the outset, that the question referred for a preliminary ruling is not limited to ascertaining in which Member State, understood as a physical location, the surrendered person must be able to exercise his or her right to be heard, but rather primarily concerns the question of the court of the Member State in respect of which the surrendered person must be able to exercise his or her right to be heard. [13]

[12] Furthermore, an interpretation of Articles 27 and 28 of Framework Decision 2002/584 as not affording the surrendered person the right to be heard in relation to a request for additional consent, whereas Article 14 of that framework decision grants that same right to an arrested person in relation to an (initial) request for surrender, would give rise to unjustified disparities between two comparable – and also punitive – situations for the person concerned, and could cast doubt upon the compatibility of those provisions with the fundamental rights of the surrendered person.

[13] This is likewise – implicitly – clear from the description of the alternative scenarios envisaged by the referring court, when it envisages the possibility, in Case C-428/21 PPU, of the surrendered person being able to be heard 'in the Member State which surrendered him or her' and of that right being exercised 'if the executing judicial authority is able to take account of the official record of the hearing' (in the issuing Member State).

47. In that connection, in the first place, I would observe that, within the meaning of Articles 3 and 4 of Framework Decision 2002/584, to which Article 27(4) and Article 28(3)(d) of that framework decision refer, it falls to the executing judicial authority to determine that none of the grounds for mandatory non-execution of the EAW pertain; those grounds include the refusal to grant the additional consent. Even taking account of the principle of mutual recognition, the judicial authority of the issuing Member State is not competent to rule on the grounds for refusal of the additional consent. The obligation to hear the surrendered person in that regard, in accordance with the law of the executing Member State, therefore falls to the executing judicial authority. [14]

48. Accordingly, it seems to me to be crucial that the executing judicial authority (here: the Netherlands judicial authority) is, at the very least, involved in the proceedings in which the surrendered person exercises his or her right to be heard, where those proceedings take place in the issuing Member State (here: in Cases C-428/21 PPU and C-429/21 PPU, respectively, Hungary and Belgium), in accordance with the procedures examined in reply to the second question referred for a preliminary ruling.

49. In the light of that interpretation and contrary to what was envisaged by the referring court in its first scenario, I doubt that the surrendered person is able, *sic et simpliciter*, to exercise his or her right to be heard in the issuing Member State when the judicial authority of that Member State grants him or her a hearing concerning a possible renunciation of entitlement to the speciality rule or when the second executing judicial authority rules on the execution of the second EAW.

50. In view of the fact that the executing judicial authority remains competent as regards the proceedings relating to the additional consent, which are governed by the law of the executing Member State, it seems clear to me that, in order to exercise his or her right to be heard, the surrendered person must be able to submit to that authority his or her views on the extension of the offences or the subsequent surrender in accordance with the law of the executing Member State. As the referring court rightly observes, in Case C-428/21 PPU, the judicial authority of the issuing Member State is not competent to rule on the extension of the offences and, in Case C-429/21 PPU, the context in which the second executing judicial authority rules on the execution of the second EAW is not necessarily the same as that in which the first executing judicial authority rules on the subsequent surrender. [15]

51. Furthermore, the fact that, in certain situations, Framework Decision 2002/584 allows the surrendered person to renounce the speciality rule after his or her surrender or to give his or her consent to subsequent surrender before the competent judicial authorities of the issuing Member

[14] As Advocate General Cruz Villalón observed in his Opinion in *West* (C-192/12 PPU, EU:C:2012:322, point 87), the essential purpose of the requirement for the executing Member State to consent to any onward surrender, in the simple scenario as explicitly set out in Article 28(2) of Framework Decision 2002/584, is to allow that Member State to retain control over the meaning and the purpose of the surrender of a person to another Member State, particularly its capacity as the initial guarantor of respect for the rights and freedoms of the person being surrendered and the restrictions which that surrender inevitably entails. Although that view concerns consent to a subsequent surrender, the same principle applies, in my opinion, to the situation of consent to the extension of the offences.

[15] For the same reasons, I take the view that the position taken by Advocate General Campos Sánchez-Bordona in his Opinion in *Openbaar Ministerie (Forgery of documents)* (C-510/19, EU:C:2020:494, point 90), namely that respect for the rights of defence in the context of a request for additional consent could take the form of a hearing held in the issuing Member State as part of the proceedings provided for in Article 27 of Framework Decision 2002/584 or the opportunity to raise an objection to that extension with the issuing authority, as a step that must be taken before the issuing authority sends the request to the executing judicial authority, must be understood as meaning that, since the executing judicial authority remains competent as regards the proceedings relating to the additional consent, the surrendered person's right to be heard cannot simply be exercised before the competent authorities of the issuing Member State, but rather requires, at the very least, some involvement of the executing judicial authority.

State and in accordance with the law of that Member State [16] does not, in my view, preclude that finding. That possibility, which derogates from the rule that, normally, the speciality rule is renounced or consent to surrender given before the competent judicial authority of the executing Member State, [17] is justified by that person's presence in the issuing Member State and by the fact that, in such situations, where the 'decision' rests with the surrendered person alone, the EU legislature has allowed that person, in the interests of efficiency, to exercise before the competent authorities of the issuing Member States the rights that he or she would normally exercise before the executing judicial authority.

52. With regard, in the second place, to the question of establishing the place in which the surrendered person must be able to be heard, I note, as a preliminary point, that, pursuant to the first paragraph of Article 267 TFEU, the Court is to have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. By contrast, the application of EU law to specific cases, a fortiori the application of national rules adopted in the exercise of the discretion enjoyed by the Member States when implementing the EU legal framework, is primarily the task of the national courts. [18] It is, however, for the Court to specify the general framework and to provide, where appropriate, guidance vis-à-vis the compatibility of the legal instruments available with EU law.

53. That said, I am of the view that, in the absence of rules to that effect in Framework Decision 2002/584, the practical arrangements concerning the surrendered person's exercise of the right to be heard should be established by an agreement between the competent judicial authorities of the executing Member State and of the issuing Member State, in compliance with the principle of procedural autonomy, in view of the fact that the executing judicial authority is competent to adopt a decision on the additional consent requested and that any arrangement between the judicial authorities concerned must respect the fundamental rights of the surrendered person and, in particular, the right to effective judicial protection.

54. Framework Decision 2002/584 itself provides examples of cooperation between the competent judicial authorities. Thus, under Article 19(2) of that framework decision, a requested person is to be heard pending a decision on an EAW in accordance with the law of the executing Member State and 'with the conditions determined by mutual agreement between the issuing and executing judicial authorities', and Article 31(2) of that framework decision provides that Member States may continue to apply bilateral or multilateral agreements or arrangements in force when that framework decision was adopted or conclude bilateral or multilateral agreements or arrangements after Framework Decision 2002/584 has come into force in so far as those existing or new agreements or arrangements allow the prescriptions of that framework decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of EAWs.

55. Moreover, the possibility of leaving the determination of practical implementing arrangements to an agreement between the executing and issuing judicial authorities is consistent with the nature and the logic of the system of judicial cooperation in criminal matters

[16] See, respectively, Article 27(3)(f) of Framework Decision 2002/584, which applies if a person has not already renounced the speciality rule before the executing judicial authority pursuant to Article 13(1) and Article 28(2)(b) of that framework decision.

[17] See Article 13(1) of Framework Decision 2002/584.

[18] See inter alia, to that effect, Opinion of Advocate General Bobek in *Van Ameyde España* (C-923/19, EU:C:2021:125, points 49 and 50).

in the Union,[19] and with the spirit of Framework Decision 2002/584, which establishes a system of free movement of judicial decisions in criminal matters based on the principle of mutual recognition and on a high level of confidence between Member States.[20]

56. With regard, more specifically, to situations envisaged by the referring court, first, I take the view that nothing in the relevant EU legislation precludes, in accordance with the second situation envisaged by the referring court, the surrendered person from being heard by the executing judicial authority in the executing Member State, in the context of the proceedings relating to the grant of additional consent, even though the presence of that person in the issuing Member State and his detention, as in the cases in the main proceedings, make that solution, which from an abstract perspective would be the most immediate,[21] particularly onerous in practice for the authorities and the person concerned.

57. Second, in my view, nor does the relevant EU legislation preclude the surrendered person from also being heard in the issuing Member State. The fact that the executing judicial authority is competent to deal with a request for additional consent and that the law of the executing Member State applies to that request does not mean that the surrendered person must be able to exercise his or her right to be heard necessarily in the territory of the latter Member State.

58. Whilst respecting the fundamental rights of the persons concerned, Framework Decision 2002/584, as I have already observed, establishes a system of free movement of judicial decisions in criminal matters based on the principle of mutual recognition and on a high level of confidence between Member States. In addition, the Court has already held that Articles 27 and 28 of that framework decision, where they lay down rules derogating from the principle of mutual recognition, cannot be interpreted in a way which would frustrate the objective pursued by the framework decision, which is to facilitate and accelerate surrenders between the judicial authorities of the Member States in the light of the mutual confidence which must exist between them.[22] A solution to the contrary would entail, de facto, the re-introduction of very onerous procedures, such as those applicable in matters of extradition, jeopardising the effectiveness of the mechanism introduced by that framework decision.

59. In that context, I am likewise of the view that EU law does not preclude the surrendered person from being heard in relation to a request for additional consent in the course of the proceedings relating to the potential renunciation of the speciality rule or to the consent to the subsequent surrender,[23] provided that the two sets of proceedings are clearly differentiated and that person is informed that his or her position on the request for additional consent is put to the executing judicial authority and will be dealt with according to the law of the executing Member State.

60. In those circumstances, I propose that the first question referred for a preliminary ruling is answered to the effect that Framework Decision 2002/584, in particular Article 27(3)(g) and (4) and Article 28(3) thereof, read in the light of Article 47 of the Charter, is to be interpreted as meaning that a person surrendered further to the execution of a first EAW must be able to

19 See, for example, Article 22(5) and Article 24(3) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1).

20 See recitals 6 and 10 of Framework Decision 2002/584.

21 In view of the fact that the executing judicial authority is competent and the law of the executing Member State applies.

22 See, to that effect, judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)* (C-195/20 PPU, EU:C:2020:749, paragraph 35).

23 Under, respectively, Article 27(3)(f) and Article 28(2)(b) of Framework Decision 2002/584.

exercise his or her right to be heard in relation to a request for additional consent in respect of the executing judicial authority competent to deal with that request, regardless of whether that person is heard in the executing Member State or in the issuing Member State.

C. The second question referred

61. The second question referred for a preliminary ruling asks how the surrendered person is to be able to exercise his or her right to be heard in relation to a request for additional consent if that person must be able to exercise that right in the executing Member State.

62. In the two cases in the main proceedings, the referring court states that the surrendered persons were not summoned and were not present when the requests for additional consent were dealt with, and that a lawyer was not involved to represent them. In Case C-428/21 PPU, that court further explains that the request for consent to extend the offences was accompanied by a record of a hearing, by a judicial authority of the issuing Member State (Hungary), of the surrendered person, who allegedly stated that he did not wish to renounce his entitlement to the speciality rule.

63. As a preliminary point, I would point out that the application of EU law to specific cases is primarily the task of the national courts, with the Court being able to furnish, where appropriate, guidance vis-à-vis the compatibility of the legal instruments available with EU law. [24]

64. That said, in line with my comments in reply to the first question, [25] I am of the view that, in the absence of a specific rule, the arrangements for exercising a surrendered person's right to be heard in respect of a request for additional consent should be governed by an agreement between the relevant judicial authorities of the executing and issuing Member States, in compliance with the principle of procedural autonomy, in view of the fact that the executing judicial authority is competent to adopt a decision on the additional consent sought and that any arrangement between the judicial authorities concerned must respect the fundamental rights of the surrendered person and, in particular, the right to effective judicial protection.

65. With regard, more specifically, to the specific arrangements for exercising a surrendered person's right to be heard in respect of a request for additional consent, in the first place, I take the view that the competent national authorities can find support, to the extent permitted by the national legislation, in other instruments that make up the legal framework for judicial cooperation in criminal matters in the Union. That framework could provide a point of reference for those authorities and prevent the diversity of the applicable rules or the – inappropriate and time-consuming – duplication of the safeguards enjoyed by the surrendered person in the two Member States concerned by a request for additional consent from jeopardising the effectiveness of the EAW mechanism. [26]

[24] See point 52 of this Opinion.

[25] See points 53 to 55 of this Opinion.

[26] I note, in this connection, that, for the purposes of Article 27(4) and Article 28(3)(c) of Framework Decision 2002/584, the decision on the request for additional consent is to be taken no later than 30 days after receipt of that request.

66. Amongst those instruments, I would draw attention, first of all, to the temporary transfer of the surrendered person, as provided for inter alia in Articles 22 and 23 of Directive 2014/41 for the purpose of carrying out a European investigative measure in criminal matters, [27] even though this is a particularly onerous measure for the authorities concerned. The same is true, in my view, as regards the possibility of representatives of the executing judicial authority going to the issuing Member State in order to hear the surrendered person.

67. Next, I would raise the option of audiovisual transmission methods, and in particular videoconferencing. The use of such methods is provided for inter alia in Article 24 of Directive 2014/41, which allows a judicial authority to issue a European investigation order in order to hear, as a suspect or accused person, a person located in the territory of another Member State. Without wishing to encroach upon the prerogatives of the national authorities, that method appears to me to be particularly appropriate to enable a surrendered person located in the issuing Member State to exercise his or her right to be heard by the executing judicial authority before the latter rules on the request for additional consent, thus precluding the need to transfer him or her to the executing Member State. [28]

68. Finally, it is my view that, in situations such as those at issue here, nor does EU law preclude the surrendered person's right to be heard from being exercised through the use of a written procedure. Provision is made for that procedure inter alia in Article 8 of Directive (EU) 2016/343 [29] which, whilst establishing, in paragraph 1 thereof, that Member States are to ensure that suspects and accused persons have the right to be present at their trial, states, in paragraph 6 thereof, that that article is to be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.

69. In my opinion, such a procedure could enable the person concerned to express his or her views and the executing authority to give an informed ruling on the request for additional consent, without prejudice to the possibility that is available to that authority of requesting additional information from the competent judicial authority of the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584.

70. An interpretation of Framework Decision 2002/584 to that effect appears to me, moreover, to be consistent with the case-law of the European Court of Human Rights ('the ECtHR') on Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), to which the second paragraph of Article 47 of the Charter corresponds. [30]

[27] I consider that, regardless of the applicability of that directive in the present cases, which is contested by the Netherlands authorities and by the Commission in their observations, nothing prevents the national authorities from borrowing from that instrument in their procedures to implement the EAW mechanism.

[28] I note that the digitalisation of justice, including the use of distance communication technology, such as videoconferencing, is one of the objectives pursued by the European Union with a view to further strengthening the resilience of the justice systems and boosting their capacity to work online, and that the Commission proposes making the digital channel the default option in EU cross-border judicial cooperation (see in particular Communication from the Commission COM(2020)710 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 2 December 2020, Digitalisation of justice in the European Union – A toolbox of opportunities). Furthermore, the 2019-2023 Action Plan European e-Justice (OJ 2019 C 96, p. 9) lists, as one of its priorities, the use of videoconferencing in cross-border proceedings.

[29] Directive of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

[30] See explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

71. According to the ECtHR, extradition proceedings, which are, in essence, the origin of the EAW system, do not involve determining an applicant's civil rights and obligations and do not relate to the merits of a criminal charge against him or her within the meaning of Article 6(1) ECHR. [31] In any case, the ECtHR has stated that Article 6(1) ECHR does not impose an absolute obligation to hold a public hearing and does not necessarily require that a hearing is held in all proceedings. [32] In that connection, whilst it is true that EU law can, in accordance with Article 52(3) of the Charter, offer more extensive protection than that derived from Article 6(1) ECHR, the Court has taken note of that case-law of the ECtHR, whilst making clear that, similarly, neither the second paragraph of Article 47 of the Charter nor any other provision thereof imposes such an obligation. [33]

72. In the second place, I would add that, regardless of the practical arrangements for implementing the surrendered person's right to be heard, it is crucial that safeguards are put in place to ensure that, under all circumstances, the effective exercise by the surrendered person of his or her right to be heard is guaranteed. Those safeguards concern primarily, in my view, the right of access to a lawyer, as well as access to an interpreter or to the translation of the main procedural documents, [34] when the exercise of those rights is necessary.

73. In particular, the right of access to a lawyer is provided for inter alia, in EAW proceedings, in Article 10 of Directive 2013/48/EU. [35] That provision includes, first and foremost, the actual right of access to a lawyer; next, the right to meet and communicate with that lawyer; and, finally, the right for that lawyer to be present and participate during a hearing of the person concerned.

74. In addition, it is important, in my view, that, if the surrendered person exercises his or her right to be heard before the competent authorities of the issuing Member State in the absence of the executing judicial authority, that person's statements are recorded in an official record, which is to be communicated to the executing judicial authority, from which it is clear that the person concerned was expressly invited to take a view on the request for additional consent. [36]

75. In those circumstances, I propose that the second question referred for a preliminary ruling is answered to the effect that Article 27(4) and Article 28(3) of Framework Decision 2002/584, read in the light of Article 47 of the Charter, are to be interpreted as meaning that, where the surrendered person exercises his or her right to be heard, in relation to a request for consent to extend the offences or to a subsequent surrender, in the executing Member State, that right may be exercised in accordance with arrangements mutually agreed between the competent authorities of the issuing Member State and of the executing Member State, on the basis of the applicable national legislation, provided that effective exercise of that right is ensured.

[31] See inter alia, to that effect, ECtHR, 4 September 2014, *Trabelsi v. Belgium* (EC:ECHR:2014:0904JUD000014010, § 160 and the case-law cited).

[32] This is so, inter alia, in cases where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (ECtHR, 23 November 2006, *Jussila v. Finland* (EC:ECHR:2006:1123JUD007305301, § 41).

[33] See judgment of 4 June 2015, *Andechser Molkerei Scheitz* v *Commission* (C-682/13 P, not published, EU:C:2015:356, paragraph 44).

[34] In the present case, specifically, the new charges upon which the request for extension of the offences or the request for subsequent surrender are based.

[35] Directive of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1). That directive, as is stated in Article 1 thereof, lays down inter alia minimum rules concerning the rights of persons subject to EAW proceedings to have access to a lawyer.

[36] In this regard, I take the view that EU law does not preclude that record from being the same as the record concerning the proceedings relating to the potential renunciation of the speciality rule or to the consent to subsequent surrender, provided that the two matters are duly differentiated.

VI. Conclusion

76. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) as follows:

(1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, in particular Article 27(3)(g) and (4) and Article 28(3) thereof, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that a person surrendered further to the execution of a first European arrest warrant must be able to exercise his or her right to be heard, in relation to a request for the consent of the executing judicial authority to the extension of the offences or the subsequent surrender, in respect of the executing judicial authority competent to deal with that request, regardless of whether the surrendered person is heard in the executing Member State or in the issuing Member State.

(2) Article 27(4) and Article 28(3) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, read in the light of Article 47 of the Charter of Fundamental Rights, are to be interpreted as meaning that, where the surrendered person exercises his or her right to be heard in relation to a request for consent to extend the offences or to a subsequent surrender in the executing Member State, that right may be exercised in accordance with arrangements mutually agreed between the competent authorities of the issuing Member State and of the executing Member State, on the basis of the applicable national legislation, provided that effective exercise of that right is ensured.