Case comment: The case of *PI v Svishtov Regional Prosecutor's Office* (C-648/20 PPU)

By Helen Malcolm QC and Joshua Kern

On 10 March 2021, the Court of Justice of the European Union (CJEU) delivered its judgment in the case of *PI v Svishtov Regional Prosecutors' Office*. The Decision resulted in PI's immediate discharge, as well as the discharge of all persons wanted pursuant to accusation European Arrest Warrants (EAWs) issued by the Republic of Bulgaria in England & Wales. The legality of Bulgarian accusation EAWs across the EU was put into question by the Judgment.

This post examines the legal issues which arose in the case, how they were argued by the parties and participants before the CJEU (PI, Bulgaria and the Commission), and how they were decided by the Advocate General and the Court.

The urgent procedure

Once Westminster Magistrates' Court had referred PI's case to the CJEU (on 26 November 2020), it was decided within just under three months. The speed of the process resulted from the fact of PI's continuing remand in custody in HMP Wandsworth. Given that PI's continued detention depended on the Court's decision, in that its answer would have an immediate effect on the execution of the EAW at issue and on the continuation of PI's remand in custody, on 17 December 2020, the Court decided to grant Westminster Magistrates' Court's request that the reference be dealt with under the so-called "urgent preliminary ruling procedure."

The issues

In Bulgaria, a European arrest warrant (EAW) issued for the purposes of a criminal prosecution could not (as at the date of the Court's judgment) be reviewed by a Bulgarian court prior to the surrender of a requested person. PI had been arrested pursuant to such an EAW following an allegation of theft in Bulgaria and argued before Westminster Magistrates' Court that this failed to provide him with effective judicial protection, as understood under EU law, as the decision to issue the European arrest warrant was not subject to judicial scrutiny until after he would be returned to Bulgaria.

The question before the Court was whether Article 8(1)(c) of Framework Decision 2002/584, read in light of Article 47 of the Charter and the case-law of the Court, must be interpreted as meaning that the requirements inherent in the effective judicial protection (afforded to a person subject to a European arrest warrant for the purposes of a criminal prosecution) are satisfied where, under the law of the issuing Member State, both the EAW and the national judicial decision on which it is based are (i) issued by an authority that, whilst participating in the administration of criminal justice in that Member State (and therefore may be classified as an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision), is not itself a court, and (ii) where those requirements cannot be reviewed by a court in that Member State prior to the surrender of the person concerned: AG Opinion, para. 26; Judgment, para. 34.

Applicable law

In *Bob-Dogi* (C-241/15, EU:C:2016:385) [56], the Court had ruled that the EAW system entails, in light of Article 8(1)(c) of the Framework Decision, a "dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision."

PI relied on a line of authority resulting from the judgments of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456), and of 27 May 2019, *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457), followed by the judgments of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)* (C-566/19 PPU and C-626/19 PPU), and of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)* (C-625/19 PPU) to argue that the dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection.

What did the Court decide?

The Court agreed, and held that the requirements inherent in effective judicial protection mean that the executing judicial authority must have the assurance that a decision to issue an EAW for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court and, applying *OG*, that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, including those derived from the fundamental rights and fundamental legal principles: Judgment, para. 45.

Advocate General de la Tour explained that this result was consistent with European human rights law, in particular Article 6 of the Charter (corresponding with Article 5 ECHR), as well as Article 47 of the Charter (corresponding with Article 13 of the ECHR): AG Opinion, paras. 85, 89, 95. It was also consistent with the principle of mutual recognition, which requires mutual confidence between Member States that their national legal systems are capable of providing equivalent and effective protection of fundamental rights, particularly those contained in the Charter: see AG Opinion, para. 86. The Court, in its Judgment, emphasised that the principle of mutual trust between Member States requires an executing judicial authority to be satisfied that an EAW has been issued following a national procedure that is subject to judicial review in which the requested person has had the benefit of all safeguards appropriate to the adoption of that type of decision: Judgment, para. 49.

Both the Advocate-General and the Court agreed with PI that the possibility of having a court in an issuing Member State review the national procedure leading to the issue of an EAW only *after* the person concerned has been surrendered to that Member State does not meet the requirements inherent in effective judicial protection: AG Opinion, para. 59.

Such protection presupposes, therefore, that judicial review of either the European arrest warrant (or the judicial decision on which it is based) is possible *before* that warrant is executed: Judgment, para 48.

Finally, both the Advocate General (at [100]-[101]) and the Court agreed with PI's submission that the importance of a remedy at the execution stage is emphasised by the availability of legal assistance for a requested person in an issuing Member State under Article 10(4) of Directive 2013/48 (on legal assistance). That legal assistance would be ineffective in the absence of judicial challenge prior to surrender.

What the Court did not decide

The CJEU's Judgment in *PI* does *not* relate to the question of whether the Bulgarian public prosecutor can properly be considered to be an "issuing judicial authority" for the purposes of Article 6(1) of the Framework Decision. Neither Westminster Magistrates' Court (in its referral) nor PI argued that point before the Court. The CJEU's criteria for that classification, namely, that the issuing authority must participate in the administration of criminal justice (per *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 60), and act independently in the execution of their responsibilities which are inherent in the issuing of an EAW (Opinion of Advocate General de la Tour in *MM* (C-414/20 PPU, EU:C:2020:1009), paras. 59-62), were not disputed.

With respect to the requirements inherent in effective judicial protection, the Court was clear that *MM Parquet Général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)* and *Openbaar Ministerie (Swedish Public Prosecutor's Office)* did not decide this case. In *MM*, the Court did not rule directly on the question at hand, and it cannot be inferred from that case that a possibility of judicial review *after surrender* satisfied the requirements inherent in effective judicial protection of the rights of the requested person: see e.g. Judgment, para. 56.

Conclusion

On 10 March, PI's legal team made an immediate application to Westminster Magistrates' Court for his discharge. That afternoon, Senior District Judge Goldspring discharged PI from the EAW, together with ten other Requested Persons who had been wanted for prosecution pursuant to Bulgarian European arrest warrants, on the basis that the EAWs were invalid under section 2(1) and 2(4) of the Extradition Act 2003.

PI's case represents a landmark as it will remain the first (and only) reference from a UK extradition court to be decided by the Luxembourg Court.

PI's case also gives rise to a number of interesting questions. For example, how might the case have been decided (procedurally and substantively) if it had been governed by the new treaty arrangements between the UK and the EU? And how has the concept of "effective judicial protection" been applied in other areas of EU law? What does the future hold for the concept in UK courts? All of these questions are put in issue by *PI's* case, and – in the post-Brexit era – it is possible that its implications will form the subject of further litigation in years to come.