

# CJEU: Relationship Between Time Limits in the FD EAW and Surrender Detention

## News

Thomas Wahl

In its judgment of 12 February 2019, the CJEU dealt with the implication of non-compliance with the time limits for the decision to execute a European Arrest Warrant on maintaining the requested person's extradition detention. The CJEU ultimately had to decide whether the Dutch law implementing Framework Decision 2002/584/JHA on the European Arrest Warrant (FD EAW) and the case law of the Amsterdam courts could be upheld against Art. 6 of the Charter of Fundamental Rights of the EU (CFR). The case is referred to as [C-492/18 PPU \(TC\)](#).

### Background of the Case and Facts

The reference for a preliminary ruling was made by the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands). According to the Rechtbank, situations may occur in which it is not able to maintain the time limits as provided for in Art. 17 FD EAW. The provision stipulates that a final decision on execution of the EAW should be taken by 90 days after the arrest of the requested person at the latest. This deadline cannot be met if a preliminary ruling must be made to the CJEU or if the court assesses possible inhuman or degrading treatment in the issuing Member State in line with the CJEU's judgment in *Arranyosi and Căldăraru* (cases C-104/15 and C-659/15 PPU).

A similar situation occurred in the case at issue, when the Rechtbank Amsterdam stayed the execution of the European Arrest Warrant issued by the United Kingdom against TC, a British national, because the Amsterdam court wanted to wait for the CJEU's response in case C-327/18 (*RO*). In this preliminary ruling procedure, the CJEU had to decide on the impact of the UK's notification of its intention to withdraw from the EU on the execution of an EAW issued by the UK authorities (see [eucriM 2/2018, 102-103](#)).

The Dutch legislator, however, considered the time limits in the FD EAW to be in favour of the individual. As a consequence, detention of the requested person must be suspended, if the 90-day period for adopting a final decision on execution of the EAW has expired (Art. 22(4) of the Overleveringswet [OLW – Law on the surrender of sentence persons]).

The referring court further noted that both the court itself and also the appeal court in Amsterdam (Gerechtshof Amsterdam) had developed case law that avoids the strict legal consequence of Art. 22(4). This case law aims at interpreting the Dutch law in conformity with the FD EAW. However, the two courts take different approaches to determining the suspension of the time period in Art. 22(4), even though both approaches have brought about the same results in practice.

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In the present case, the Rechtbank Amsterdam followed its approach and suspended the decision period until delivery of the judgment in RO. The Rechtbank also remarks that it was unable to equally suspend detention pending surrender because there was a very serious risk of TC absconding, which could not be reduced to acceptable levels.

### **Legal Questions at Issue**

Against this background, the Rechtbank Amsterdam sought clarification from the CJEU as to whether Art. 22(4) OLW, laying down a general and unconditional obligation to release a requested person after the 90-day period has elapsed, is in line with the concept of an effective surrender as set up by the FD EAW. In addition, the question was raised as to whether Art. 6 CFR, which guarantees a person's right to liberty, precludes national case law allowing suspension of the 90-day period in the aforementioned situations.

### **Ruling of the CJEU**

As regards the first question, the CJEU indicated that the Dutch legislator had apparently a misunderstanding of the provisions in the FD EAW. Neither Art. 12 FD EAW, which gives the executing authority the power to take decisions on whether a requested person must be arrested or remain in detention, nor any other provision of the FD EAW requires the release of that person *a fortiori* if the time limits stipulated in Art. 17 expire. Such an obligation to release the person would ultimately obstruct the attainment of the objectives pursued by the FD EAW, which seeks to build up an effective surrender system within the EU territory.

This effectiveness is especially undermined if, as indicated in the case at issue, the executing authority were to be obliged to carry out a provisional release, even if there is a very serious risk of absconding (which could not be reduced to an acceptable level by the imposition of appropriate measures). The material conditions necessary for the effective surrender would not be able to be maintained. Accordingly, Art. 22(4) OLW is incompatible with the provisions of FD 2002/584.

As regards the second question, the CJEU stated that Art. 12 FD EAW must be interpreted in conformity with Art. 6 CFR. However, this fundamental right to liberty is subject to limitations which in turn must fulfil several conditions, e.g., being proportionate (Art. 52(1) CFR). Since Art. 6 CFR corresponds to Art. 5 ECHR, account must be taken of the relevant interpretation by the ECtHR (Art. 52(3) CFR). In this context, the ECtHR requires not only that any lawful deprivation of liberty must have a basis in national law, but also that this law must be sufficiently accessible, precise, and predictable in its application in order to avoid all risk of arbitrariness.

In applying these parameters, the CJEU found that the given case law of the Rechtbank and Gerechtshof of Amsterdam in making exceptions to Art. 22(4) OLW does not make it possible for the person concerned to clearly and predictably determine the period of his detention. Although the approaches may not entail different results in practice, it cannot be ruled out that these divergences may lead to different periods of continued detention (notably because both courts did not proceed from the same starting point in calculating the suspension period). Furthermore, the differing interpretations cannot exclude that a person must be released even if there is a high risk of absconding – as a result of which conformity with the FD EAW cannot be achieved (see above).

In conclusion, the current practice in the Netherlands of keeping a person in detention beyond the 90-day period infringes Art. 6 CFR.

### **Put on Focus**

Although one might first think that the present judgment in TC is intertwined with the special legal situation in the Netherlands, it confirms the CJEU's approach already established in the *Lanigan* judgment of 16 July

2015 (C-237/15 PPU). Accordingly, time limits as stipulated in the FD EAW are above all addressed to the state authorities. They do not preclude keeping a requested person in custody, even if the total duration for which that person has been held in custody exceeds those time limits. The first premise is to ensure the effectiveness of the surrender. The limit is the CFR, in particular Art. 6 as interpreted in the light of Art. 5 ECHR. The duration of detention cannot be excessive and must reflect the principle of proportionality. If the executing authority is opting for provisional release, it is, however, required to attach any measures it deems necessary to prevent the person concerned from absconding and to ensure that the material conditions necessary for his/her effective surrender remain fulfilled as long as no final decision on the execution of the EAW has been taken.

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