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CASE C-158/21: A POSITIVE TURNING POINT FOR MINORITIES IN THE EU

On 31 January 2023, the European Court of Justice (“ECJ” or “the Court”), in its case C-158/21,¹ decided on the prejudicial questions brought by Judge Pablo Llarena of the Spanish Supreme Court against Lluís Puig, former Catalan Minister of Culture, Carles Puigdemont, 130th president of Catalonia, and other Catalan exiles. Judge Llarena’s intention was to issue a fourth European arrest warrant (“EAW”)² to reverse Belgium’s denial in a final sentence in 2021 to extradite Lluís Puig, who had settled in exile in that country in the aftermath of Catalonia’s independence referendum of 1 October 2017. Puig has been sought for an alleged offence of misusing public funds in relation with the said referendum.

The Catalan pro-independence movement celebrated the Court’s ruling as a “great leap forward” because, after more than five years of strenuous litigation, it allowed to fit the particularity of the Catalan case into EU legislation.³

This judgment is very auspicious for the defendants and every persecuted minority in the EU, indeed. It brings the innovative concept of an “objectively identifiable group” of persons. When a Member State requests the extradition of someone belonging to such a group, and these persons happen to suffer from judicial deficiencies affecting their judicial protection in that State, this is reason enough for a European

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¹ ECJ, 2023.

² European Council of the European Union, Framework Decision 2002/584. It created the European arrest warrant valid throughout the EU, which entered into force on 1st January 2004.

³ Casulleras, 2023.

arrest warrant to be denied by another EU country. This brand new reason creates case law which is nothing short of groundbreaking:

“(...) the executing judicial authority (...) may not refuse to execute that warrant on the ground that that person is at risk, following his or her surrender to the issuing Member State, of being tried by a court which lacks jurisdiction for that purpose unless (...) [there are] deficiencies affecting the judicial protection of an objectively identifiable group of persons to which the person concerned belongs, in the light of the requirement for a tribunal established by law”.⁴

Spain’s establishment and media initially welcomed the Court’s ruling as a triumph, too. They relied on the general principles against denial of extraditions within the EU reiterated by the Court, while the Catalan defendants focused on the crucial exceptions preceded by “*However*”⁵ and “*unless*”⁶. Several months after this supposed “first accolade for the Spanish Justice”,⁷ no new EAW has been issued against Puig or any of his co-defendants in exile. Spain’s Supreme Court’s inaction may disappoint the Spanish government, which was hoping to get Carles Puigdemont extradited before the general election in 2023.⁸ Separation of power notwithstanding, Prime Minister Pedro Sánchez promised during an electoral debate in 2019 to extradite Mr. Puigdemont.⁹ Later, when asked how he would “bring Puigdemont back to Spain”, he reminded that the Attorney General’s office depended on the government.¹⁰

⁴ ECJ, 2023, *op. cit.*, § 147.3.

⁵ ECJ, 2023, *op. cit.*, § 79, § 101, § 126, § 142, § 147.1 and § 147.4.

⁶ ECJ, 2023, *op. cit.*, § 119 and § 147.43.

⁷ Ayuso, 2023.

⁸ Garat, 2023.

⁹ Sánchez, 2019.

¹⁰ Radio Televisión Española, 2019.

1 Content

On 9 March 2021, Spain's Supreme Court, together with the Public Prosecutor, the State's Attorney and the far-right political party Vox, lodged before the Court a request for a preliminary ruling against seven Catalan politicians in exile: former Culture minister Lluís Puig, former Catalan president Carles Puigdemont, and others.¹¹ Spain's Supreme Court turned to the European Union's top tribunal after the Brussels Court of Appeal in Belgium issued on 7 January 2021¹² a final ruling rejecting Spain's third European Arrest Warrant against Lluís Puig, on the very same day the European Parliament had approved a waiver of immunity of its three Catalan members in exile Carles Puigdemont, Antoni Comín and Clara Ponsatí.

Judge Pablo Llarena of Spain's Supreme Court had referred to the Court seven questions for a preliminary ruling.¹³ They intended to clarify under what conditions he could obtain the extradition to Spain of the Catalan politicians abroad who are sought by Spanish Justice since late 2017.

As defined by the Opinion of the Advocate General of this case, Richard de la Tour, delivered in July 2022:

“The referring court asks the Court of Justice a series of questions designed, essentially, to establish whether an executing judicial authority may refuse to execute a European arrest warrant on grounds of the alleged lack of competence of the issuing judicial authority to issue such a warrant and the alleged lack of jurisdiction of the court called upon to try the person charged, and whether Framework Decision 2002/584 precludes the issue of a new European arrest warrant after the execution of a first European arrest warrant has been refused”.¹⁴

¹¹ ECJ, 2021.

¹² Kamer van Inbeschuldigingstelling (Brussels Court of Appeals) 2021/79. This decision is not public.

¹³ ECJ, 2021.

¹⁴ De la Tour, 2022.

2 Results

One of the most important results stemming from the judgment is the already mentioned recognition by the Court of Catalan pro-independence people as a specific group affected by insufficient rule-of-law guarantees. This was precisely one of the goals the defendants pursued. From this ruling on, judicial deficiencies affecting an “objectively identifiable group” of people (OIG) are as valid a ground for denial of extradition as systemic or generalised deficiencies in the issuing Member State.¹⁵

Carles Puigdemont celebrated the explicit acknowledgement of an “objectively identifiable group” of people immediately after the Court’s judgment.¹⁶ In his view, the Court’s conditions for new European arrest warrants against the Catalan exiles are so strict that, in practice, they have become unfeasible. Other points he stressed were the validation of a denial to extradite a person on risk of infringement of their individual fundamental rights¹⁷ – in a clear departure from the Advocate General’s Opinion¹⁸ – and the recognition as valid evidence of reports issued by the UN Group on Arbitrary Detention¹⁹ (“WGAD”). (Spain had asked the Court whether a WGAD report was allowed as means to identify a serious risk of infringement of a sought person’s fundamental rights).²⁰

Two WGAD reports issued in 2019 have been crucial for building the Catalans’ case.²¹ These ascertained the arbitrary detention and violation of fundamental rights of Catalan leaders in pre-trial detention, which sustained Belgium’s denial to extradite their colleague Lluís Puig. At its turn, Lluís Puig’s Belgian sentence,²² now corroborated by the

¹⁵ Vilaweb, 2023.

¹⁶ Talegón, 2023.

¹⁷ ECJ, 2023, *op. cit.*, § 78.

¹⁸ De la Tour, 2022, *op. cit.*, § 139.3.

¹⁹ ECJ 2023, *op. cit.*, § 125.

²⁰ Request for a preliminary ruling from the Tribunal Supremo (Spain), 2021, *op. cit.* Questions 4.1 and 4.2.

²¹ UN Working Group on Arbitrary Detention, 2019.

²² Vilaweb, 2021.

European Court of Justice,²³ establishes that Spain's Supreme Court is not a tribunal predetermined by law to judge the exiles in the sense of the European Convention of Human Rights²⁴. By extension, the European Court of Justice implies that the Spanish Supreme Court should not have judged the nine Catalan leaders who were sentenced to a decade or more in prison – and were partially pardoned by the Spanish government after almost four years behind bars. Carles Puigdemont's lawyer Gonzalo Boye foresees not only the future annulment by the European Human Rights Court in Strasbourg ("ECHR") of Spain's Supreme Court prison sentences in 2019 against nine Catalans, he also announced that all procedures by said court against the referendum leaders will be annulled, too,²⁵ including the 2021 waiver of European Parliament immunity of exiles Carles Puigdemont, Toni Comín and Clara Ponsatí.²⁶

Josep Costa, former Deputy Speaker of the Catalan Parliament a lawyer in the defendants' team, qualified the Court's ruling as a total, resounding victory for pro-independence Catalans, especially because a persecution as an "objectively identifiable group" may be established by a WGAD report.²⁷

The resoluteness of the Court's judgment – so well hidden by exquisite diplomatic language – was somewhat unexpected because the Advocate General Richard de la Tour's Opinion had strongly leaned towards Spain's position. He considered that, in accordance with European law, Belgium should not have refused to extradite Lluís Puig. In 2020, the Belgian court, in the first instance, based the denial of the request because it considered when questioning the competence of Llarena as a judge predetermined by law, that the risk of violating this fundamental right of Puig was substantial.²⁸ De la Tour, in contrast, pointed out that

²³ ECJ, 2023, *op. cit.*, § 100.

²⁴ European Convention of Human Rights, 1950, Art 6.1.

²⁵ Boye, 2023.

²⁶ European Parliament, 2021.

²⁷ La República, 2023.

²⁸ Le Vif, 2020, 2021.

the right to a judge predetermined by law is not absolute. His Opinion stressed all along the principles of mutual recognition and mutual trust between Member States. In De la Tour's view, any refusal of extradition based on an alleged risk of infringement of the fundamental right of the sought person to a fair trial before a tribunal previously established by law must be truly an exception, while the risk of infringement of individual fundamental rights should not be one of those exceptions:

“Unless [the refusing Member State] can show that there are systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, the executing judicial authority cannot be justified in refusing to execute a European arrest warrant on the basis of a mere allegation of an individual risk of infringement of that fundamental right”.²⁹

Finally, in order to better understand what the judgment on 31 January 2023 means for European nationalities, it is worth noting that the Grand Chamber of the European Court of Justice considered it appropriate to remind on this occasion that nothing in the Decision creating the European Arrest Warrant³⁰ may be interpreted as prohibiting refusal to surrender a person for the purpose of prosecuting or punishing this person on the grounds of his or her ethnic origin, nationality or political opinions, among others.³¹

3 Conclusion

Gonzalo Boye, lawyer of Carles Puigdemont, Lluís Puig and other exiles, had repeatedly asked Judge Pablo Llarena to lodge prejudicial questions to the ECJ on their case³² – to no avail. When Llarena once

²⁹ De la Tour, 2022, *op.cit.* § 90.

³⁰ European Union Council Framework Decision 2002/584, Recital 12.

³¹ ECJ, 2023, *op. cit.* § 3.

³² Lasalas, 2021.

and for all asked the Court about the Catalan leaders' on his own initiative, Boye expressed cautious optimism thanks to the ECJ's case law which he considered "favourable"³³. The Catalans' lawyer positive expectations persisted even after the Opinion of the Advocate General seemed to announce a ruling suited to Spain's interests. The Court, in the end, did not follow here its Advocate General's line, which is a rare occurrence.

In his multiple cases representing Catalans before the Court, Gonzalo Boye has always stressed that his clients belong to a "national minority". It is a powerful reference to Article 2 of the Lisbon Treaty, which is widely considered its most important article because it establishes the founding values of the European Union. One of the values mentioned is respect for the rights of persons belonging to minorities.³⁴

The Court's choice of denomination as "objectively identifiable group" of a collective worthy of European judicial protection has the advantage of encompassing both the concept of national minority as the Catalan defendants wanted, plus other groups that may suffer persecution or discrimination in Member States because of race, religion, nationality or whatever other reason.

Despite the "depth charges" against Spain's criminal treatment of the defendants and other Catalan pro-independence leaders, this judgment of the ECJ appears to have had very little impact on the practices of judge Llarena. For the time being, he is continuing to ignore § 100 of the judgment, which stated that his court could not be regarded as the tribunal established by law to try neither these defendants – nor the former Catalan prisoners of the process after the referendum, for that matter.³⁵ This judge continues to make decisions

³³ Solé, 2022.

³⁴ European Union, 2012.

³⁵ ECJ, 2023, *op. cit.*, § 100: "A national supreme court which decides a criminal case at first and last instance without having an express legal basis giving it jurisdiction to try all the defendants cannot be regarded as a tribunal established by law within the meaning of Article 6(1) of that convention". [referring to the European Convention on Human Rights].

about the exiles and the former political prisoners as if the ECJ had not revoked Spain's Supreme Court capacity to do so.

The increase in the protection of the rights of minorities and stateless nations by this important judgment has been reinforced by the Opinion³⁶ of the UN Committee of Human Rights of 15 May 2023 to the complaint lodged by Carles Puigdemont on 1 March 2018.³⁷ In it, Mr. Puigdemont argued that Spain had violated several provisions of the International Covenant on Civil and Political Rights ("ICCPR").³⁸ The UN Human Rights Committee establishes that Spain violated Mr. Puigdemont's right to political participation protected by art. 25³⁹ of the ICCPR, "the essence of democratic government"⁴⁰ and mandates Spain to offer him effective recourse, including integral compensation and adoption of all measures necessary to prevent similar violations in the future.⁴¹

It is worth noting that the Council of Europe, in a recent report signed by its Secretary General, Marija Pejčinović Burić, addresses the question of how far political speech can advocate fundamental changes in the structure of the state or of the constitution.⁴² This report reminds that peacefully defending a change of legal status of a territory, including a high degree of autonomy or even independence, is covered by freedom of expression and therefore does not constitute a crime. It abundantly quotes the *Cilevics Report*⁴³ by the Parliamentary Assembly of the Council of Europe, which dealt with the case of Catalonia.

³⁶ United Nations Human Rights Committee, 2023.

³⁷ Puigdemont, 2018.

³⁸ United Nations General Assembly, 1966, art. 25, 22 and 19.

³⁹ *Ibid.*, art. 25: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country".

⁴⁰ United Nations Human Rights Committee, 2023, *op. cit.*, § 16.3.

⁴¹ *Ibid.*, § 18.

⁴² Council of Europe, 2022.

⁴³ Parliamentary Assembly of the Council of Europe, 2021.

Upcoming international judicial and quasi-judicial decisions on the Catalans' case will, in all probability, continue to increase the legal possibilities for Catalonia and other minorities, traditional communities and stateless nations to defend themselves. Already now, the definition by the Court of Justice of the European Union of an "objectively identifiable group" of people who may suffer unfair treatment by the justice system of a Member State heralds a new judicial shield against their discrimination. They will be more effectively protected against abusive and politically motivated European arrest warrants than heretofore.

Bibliography

- Ayuso, Silvia: Primer espaldarazo para la Justicia española. *El País*, 31 January 2023 [online]: Available at: TJUE: El tribunal europeo dicta que Bélgica debe entregar a los líderes del 'procés' salvo que constate fallos "sistémicos" en la justicia española | España | EL PAÍS (elpais.com) Accessed on 10 April 2023.
- Boye, Gonzalo: Más dura será la caída. *El Nacional*, 17 February 2023 [online]. Available at: https://www.elnacional.cat/es/opinion/dura-caida-gonzalo-boye_972504_102.html Accessed on 12 April 2023.
- Casulleras, Josep: La sentència històrica del TJUE obre portes a Catalunya i en tanca a Espanya. *Vilaweb*, 31 January 2023 [online]. Available at: La sentència històrica del TJUE obre portes a Catalunya i en tanca a Espanya (vilaweb.cat) Accessed on 12 April 2023.
- Council of Europe, SG/Inf (2022) 36, 2, Freedom of political speech: an imperative for democracy. 6 October 2022 [online]. Available at: https://static.esquerra.cat/uploads/20221025/Informe_Secreta_Aria_General_Consell_d_Europa_llibertat_expressio_A.pdf Accessed on 10 April 2023.
- De la Tour, Richard. *Court of Justice of the European Union*. Opinion of the Advocate General, Case C-158/21, 14 July 2022 [online]. Available at: EUR-Lex - 12012P/TXT - EN - EUR-Lex (europa.eu) Accessed on 3 April 2023.
- European Convention of Human Rights, *European Court of Human Rights*. 4 November 1950 [online]. Available at: : European Convention on Human Rights (coe.int) Accessed on 3 April 2023.
- European Council of the European Union, Framework Decision 2002/584.

European Court of Justice (ECJ): Criminal proceedings against Lluís Puig Gordi and Others. Judgment of the Court (Grand Chamber) of 31 January 2023 in Case C-158/21. Criminal proceedings against Lluís Puig Gordi and Others. [online]. Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=269942&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=2525495> Accessed on: 30 March 2023.

European Parliament, Request for Waiver of the Immunity of Carles Puigdemont i Casamajó (Adopted). 9 March 2021 [online]. Available at: Texts adopted - Request for waiver of the immunity of Carles Puigdemont i Casamajó - Tuesday, 9 March 2021 (europa.eu) Accessed on 12 April 2023.

European Union, Consolidated Version of the Treaty on European Union, *Official Journal of the European Union*, C 326/1 [online]. Available at: EUR-Lex - 12012M002 - EN - EUR-Lex (europa.eu) Accessed on 3 April 2023.

Garat, Kelly: El Gobierno prevé que Puigdemont vuelva a España antes de las elecciones generales. *The Objective*, 1 February 2023 [online]. Available at: <https://theobjective.com/espana/2023-02-01/puigdemont-gobierno-extradicion/> Accessed on 12 April 2023.

Kamer van Inbeschuldigingstelling (Brussels Court of Appeals) 2021/79. (This decision is not public).

La República: Josep Costa destaca que el paràgraf 125 de la sentència del TJUE conté el motiu pel qual l'independentisme "ha guanyat per 9 a 0". *La República*. 31 January 2023 [online]. Available at:

Josep Costa destaca que el paràgraf 125 de la sentència del TJUE conté el motiu pel qual l'independentisme ha "guanyat per 9 a 0" (larepublica.cat) Accessed on 12 April 2023.

Lasalas, Marta: Repaso de Boye a Llarena por acudir ahora al TJUE y nueva batería de cuestiones. *El Nacional*. 4 March 2021 [online]. Available at: Repaso de Boye a Llarena por acudir ahora al TJUE y nueva batería de cuestiones (elnacional.cat) Accessed on 12 April 2023.

Le Vif: L'ancien ministre catalan Lluís Puig ne doit pas être remis à l'Espagne. 7 August 2020, updated on 21 January 2021 [online]. Available at:

L'ancien ministre catalan Lluís Puig ne doit pas être remis à l'Espagne (levif.be) Accessed on 12 April 2023.

Parliamentary Assembly of the Council of Europe, Resolution 2381 (2021). *Should politicians be prosecuted for statements made in the exercise of their mandates?* [online]. Available at: <https://pace.coe.int/en/files/29344/html> Accessed on 10 April 2023.

Puigdemont, Carles: Application against Spain. *Optional Protocol to the International Covenant on Civil and Political Rights*. 1 March 2018, 1 [online]. Available at: Microsoft Word - CP UNHRC Application Final.docx (parlament.cat) Accessed on 10 April 2023.

Request for a preliminary ruling from the Tribunal Supremo (Spain) – Ministerio Fiscal, Abogacía del Estado, Partido político VOX v Lluís Puig Gordi, Carles Puigdemont Casamajó, Antoni Comín Oliveres, Clara Ponsatí Obiols, Meritxell Serret Aleu, Marta Rovira Vergés, Anna Gabriel Sabaté. *Court of Justice of the European Union*. Case C-158/21, 11 March 2021 [online]. Available at: CURIA - Documents (europa.eu) Accessed on 3 April 2023.

Radiotelevisión Española: Sánchez dice cómo traerá a Puigdemont a España: ¿La fiscalía depende del Gobierno?... “Pues ya está”. *RTVE*, 6 November 2019 [online]. Available at: Entrevista a Pedro Sánchez en RNE | RTVE Accessed on 15 April 2023.

Sánchez Pedro: Electoral Debate for the General Elections of 10 November 2019 (excerpt). *GranCanariaTV*, 5 November 2019 [online]. Available at: <https://www.youtube.com/watch?v=pME368PSWIQ> Accessed on 15 April 2023.

Solé, Alba. Boye: “El TJUE no decidirá sobre el exilio pensando en la unidad de España”. *El Nacional*. 5 April 2022 [online]. Available at: Boye: “El TJUE no decidirá sobre el exilio pensando en la unidad de España” (elnacional.cat) Accessed on 15 April 2023.

Talegón, Beatriz: Valoración muy positiva desde el independentismo sobre la sentencia del TJUE: “Se reconoce que el TS no era competente para conocer de estos hechos”. *Diario 16*, 31 January 2023 [online]. Available at: <https://diario16.com/valoracion-muy-positiva-desde-el-independentismo-sobre-la-sentencia-del-tjue-se-reconoce-que-el-ts-no-era-competente-para-conocer-de-estos-hechos/> Accessed on 15 April 2023.

United Nations General Assembly: International Covenant on Civil and Political Rights. 1966 [online]. Available at: <http://www.un-documents.net/iccrp.htm> Accessed on 3 April 2023.

United Nations Group on Arbitrary Detention: Opinion No. 6/2019 concerning Jordi Cuixart i Navarro, Jordi Sánchez i Picanyol and Oriol Junqueras i Vies (Spain) [online]. Available at : <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/158/75/PDF/G1915875.pdf?OpenElement> Accessed on 3 April 2023; and Opinion No. 12/2019 concerning Joaquim Forn i Chiariello, Josep Rull i Andreu, Raül Romeva i Rueda and Dolors Bassa i Coll (Spain) [online] Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/212/78/PDF/G1921278.pdf?OpenElement> Accessed on 3 April 2023.

United Nations Human Rights Committee, Opinion on case CCPR/C/137/D/3165/2018 concerning Carles Puigdemont i Casamajó, 15 May 2023. Non edited advanced version in the original Spanish language [online]. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F137%2FD%2F3165%2F2018&Lang=en

Accessed on 24 May 2023. Excellent

Vilaweb: Bèlgica confirma que no extradirà Lluís Puig. *Vilaweb*. 7 January 2021 [online]. Available at: <https://www.vilaweb.cat/noticies/belgica-confirma-a-espanya-que-no-extradirara-el-conseller-lluis-puig/> Accessed on 15 April 2023.

Vilaweb: El TJUE crea un precedent amb els exiliats Catalans per a la denegació d'euroordres. *Vilaweb*. 31 January 2023 [online]. Available at: El TJUE crea un precedent amb els exiliats catalans per a la denegació d'euroordres (vilaweb.cat) Accessed on 15 April 2023.