



EUROPEAN COMMISSION

Brussels, 30 April 2018
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**TO THE COURT OF JUSTICE
OF THE EUROPEAN UNION**

WRITTEN OBSERVATIONS

submitted by the **EUROPEAN COMMISSION** represented by Karen BANKS, Deputy Director-General of its Legal Service, Hannes KRAEMER, Bernd MARTENCZUK, Rudi TROOSTERS, Legal Advisers, and Jonathan TOMKIN, a Member of its Legal Service, acting as Agents, with an address for service at the Legal Service, *Greffe contentieux*, BERL 1/169, 1049 Brussels, and consenting to service by e-Curia, in

Case C-216/18 PPU,

THE MINISTER FOR JUSTICE AND EQUALITY

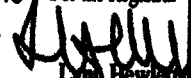
Applicant

- and -

LM

Respondent

concerning the interpretation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1; “the Framework Decision”).

Registered at the Court of Justice under No. <u>1078824</u>
Luxembourg, <u>02. 05. 2018</u> For the Registrar
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1. THE LEGAL FRAMEWORK

1. Article 47 of the Charter appears under Chapter VI “Justice” and is entitled “Right to an effective remedy and to a fair trial”. Pursuant to its paragraph 2, “*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*”.
2. The Commission also refers to Council Framework Decision 2002/584/JHA¹ cited by the national court at paragraphs 32 and 33 of the Reference for a Preliminary Ruling, and in particular, Articles 1(3) and 15 of the Framework Decision.

2. THE FACTS AND THE PROCEDURE

3. The Respondent in the main proceedings, LM, is a Polish national resident in Ireland. By European Arrest Warrants dated 4 June 2012, 1 February 2012 and 26 September 2013, Poland sought the surrender of the Respondent for the purposes of prosecuting him for various offences connected with the trafficking of narcotics and other illicit substances. The application for the execution of the warrants was brought before the High Court.
4. The Respondent sought to oppose the execution of the warrants on a number of grounds. Such grounds included the claim that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 ECHR. In this context, the Respondent argued that the effect of recent and proposed legislative changes in Poland criticised by the Commission (see below) as well as by the European Commission for Democracy through law (the “Venice Commission”) exposed him to the risk of facing an unfair trial in the issuing State should he be surrendered.
5. On 20 December 2017, the Commission adopted a reasoned proposal in accordance with Article 7(1) TEU regarding the rule of law in Poland (the “Reasoned Proposal”)². The proposal was adopted following extensive dialogue with the

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1; “the Framework Decision”).

² COM (2017) 835 final.

Polish authorities, since early 2016, under the “Rule of Law Framework”,³ in the context of which the Commission had delivered an Opinion⁴ and four Recommendations.⁵ The Reasoned Proposal sets out concerns of the Commission with regard to the rule of law in Poland and invites the Council to determine the existence of a clear risk of a serious breach by Poland of the rule of law which is one of the values referred to in Article 2 TEU. The detailed factual and procedural background of the Reasoned Proposal are set out in paragraph 6 and onward of the proposal. The main substantive concerns of the Commission are summarised at paragraph 175 of the Reasoned Proposal. Since the adoption of the proposal, a dialogue has been ongoing between the Polish authorities and the Commission concerning the issues identified. However, this dialogue has not to date removed the concerns of the Commission.

6. Considering that the determination of the Respondent’s grounds for opposing surrender required an interpretation of Union law, the High Court (Ireland) decided to stay the main proceedings and refer two questions to the Court of Justice for a preliminary ruling, in which it essentially seeks guidance on whether the European arrest warrants at issue should be executed and, if so, under what conditions.

3. THE PRELIMINARY REFERENCE

3.1. Introduction

7. At the outset, the Commission observes that the questions referred for a preliminary ruling are premised on the assumption that “*there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law*”.

³ Communication from the Commission to the European Parliament and the Council of 11 March 2014, “A new EU Framework to Strengthen the Rule of Law”, COM(2014) 158 final.

⁴ Commission Opinion of 1 June 2016 regarding the rule of law in Poland.

⁵ (1) Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland (OJ L 217, 12.8.2016, p. 53); (2) Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 (OJ L 22, 27.1.2017, p. 65); (3) Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146 (OJ L 228, 2.9.2017, p. 19) (4) Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 (OJ L 17, 23.1.2018, p. 50).

8. However, the Commission submits that such an assumption exceeds the scope of the findings made by the Commission in the Reasoned Proposal. In this regard, it is recalled that the proposal was made under Article 7(1) TEU which concerns a situation in which the Commission considers that there exists a “clear risk” of a serious breach of the fundamental values referred to in Article 2 TEU. The proposal to make such a finding forms part of the preventive part of the mechanism established in Article 7 TEU, and is distinct from any finding under Article 7(2) TEU of the existence of a “serious and persistent breach” of the values concerned.
9. The Commission also considers that the question before the referring court arises in a very specific, exceptional situation, characterised by the fact that findings of systemic deficiencies as regards judicial independence in a Member State are contained in a reasoned proposal submitted by the Commission pursuant to Article 7(1) TEU.
10. In these conditions, the Commission proposes that the questions, which may be considered together, be reformulated as follows:

“Is Article 1(3) of the Framework Decision 2002/584/JHA to be interpreted as meaning that, where the judicial authority of a Member State is requested to order the execution of European arrest warrants issued pursuant to the Framework Decision for the surrender of an individual to another Member State for prosecution, and where there is objective, reliable, specific and up-to-date evidence, based, in particular, on findings contained in a reasoned proposal submitted by the European Commission pursuant to Article 7(1) TEU, such as the reasoned proposal of 20 December 2017, demonstrating systemic or generalised deficiencies capable of impacting upon the independence of the judiciary, may the executing authority order the execution of the European arrest warrants issued by the judicial authorities of such Member State and, if so, under which conditions?”

3.2. Reply to the question asked

11. The Commission recalls that the adoption of a reasoned proposal in accordance with Article 7(1) TEU, does not, in itself, have the effect of suspending the operation of the Framework Decision as regards the Member State in respect of

which the proposal was adopted. As the tenth recital to the Framework Decision clarifies, such a suspension could only be triggered where a Member State has been found by the European Council to be in “serious and persistent breach” of one of the principles laid down in (what is now) Article 2 TEU.

12. Nevertheless, the Commission submits that it does not follow that, where there is a clear risk of a serious breach of the rule of law in an issuing Member State, an executing Member State may continue to execute warrants without having regard to the existence of such a situation.
13. As the Court has observed in *Aranyosi and Căldăraru*,⁶ while the system established by the EAW is based on the principle of mutual trust between Member States, that principle is not absolute.⁷ Rather, the principle expresses a presumption which, in the light of Article 1(3) of the Framework Decision, and albeit in exceptional circumstances, is capable of rebuttal on the basis of objective, reliable, specific and up-to-date evidence demonstrating, among others, systemic or generalised deficiencies.⁸ In such a situation, a further assessment, specific and precise, must be conducted into whether there are substantial grounds to believe that the individual concerned would, as a result of surrender, be exposed to a real risk of a breach of Article 4 of the Charter.⁹
14. The Commission submits that the exceptional ground for not surrendering an individual under Article 1(3) of the Framework Decision is not limited to potential breaches of Article 4 of the Charter. It must also apply in circumstances where there are substantial grounds to believe that the execution of a warrant would result in an individual being exposed to a real risk of a breach of the right to a fair trial enshrined in Article 47 of the Charter.
15. Such a conclusion may be considered to derive from the fundamental nature of the right to effective legal protection in the Union legal order and the right to a fair hearing by an independent and impartial tribunal as provided for in Article 47 of

⁶ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198.

⁷ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, paragraphs 78 and 82 to 88.

⁸ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, paragraph 89.

⁹ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, paragraph 104.

the Charter¹⁰ as well as from the very serious nature of the consequences of a breach of those rights.

16. In this context, it is recalled that the Court has recognised the importance of judicial independence, underlining that such a concept is composed of both internal and external aspects.¹¹ In particular, the Court has clarified that the external aspect of independence presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The internal aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. The Court underlined that such guarantees of independence and impartiality require rules concerning, among others, the composition of the body and the appointment of its members that serve to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.¹²
17. This case-law echoes the case law of the European Court of Human Rights, which has emphasised that judicial independence does not merely concern the exercise of judicial functions in concrete cases but also the organisation of the judiciary and whether the body presents an “appearance of independence” which is crucial to maintaining the confidence which tribunals in a democratic society must inspire in the public.¹³ Moreover, that Court has also recognised the obligation on contracting parties not to place individuals in situations where they may be exposed to violations of the right to a fair trial as enshrined in Article 6 ECHR. In the context of extradition, the Court has consistently held that the surrender of an individual is

¹⁰ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

¹¹ Case C-506/04, *Wilson*, EU:C:2006:587.

¹² Case C-506/04, *Wilson*, paragraphs 50 to 53.

¹³ ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984, Series A No 80, §§ 78 and 85; *Findlay v. The United Kingdom*, App no. 22107/93, 25 February 1997 § 76; *Grievés v. The United Kingdom*, App No. 57067/00 of 16 December 2003 § 69, and *Baka v. Hungary*, App no.20261/12, 23 June 2016 §§ 150-151.

prohibited where such surrender would run the risk of a flagrant denial of a fair trial in the State in which prosecution was to take place.¹⁴

18. It follows, in the view of the Commission, that the approach outlined by the Court in *Aranyosi* is of relevance in a situation where there is a clear risk of serious breach of the rule of law in a Member State due to the adoption of measures affecting the independence of the judiciary as described in the Commission's Reasoned Proposal of 20 December 2017. Such an approach would, however, require adaptation to the present situation, in particular as regards reliance on further information provided by the issuing authority (considered further below).
19. Applying the approach taken in *Aranoyosi*, it is apparent that the fact that a Member State has been subject to a reasoned proposal in accordance with Article 7(1) TEU, does not, in and of itself, mean that there are necessarily substantial grounds to consider that the surrender of an individual would expose him or her to a real risk of a breach of the right to a fair trial in a Member State. Despite findings showing serious risks to the rule of law in the issuing Member State due to measures affecting judicial independence such as in the present case, it cannot be excluded that there may be contexts where the capacity for courts to conduct a trial with the independence necessary to ensure respect for the fundamental right guaranteed by Article 47(2) of the Charter is preserved.
20. Accordingly, in a situation such as the present one, the executing court must perform a specific and precise analysis in order to determine whether, in the concrete case, there is a risk of a flagrant denial of the right to a fair trial. This will, in particular, be the case where there would be a real risk that the proceedings regarding the person concerned would be heard by courts lacking the independence necessary to ensure respect for the person's fundamental right guaranteed by Article 47(2) of the Charter.
21. In order to assess the existence of such a risk, national authorities are required to consider the nature of the rule of law concerns present in the issuing Member State

¹⁴ ECtHR - *Othman (Abu Qatada) v. the United Kingdom*, Application No. 8139/09. See also, *Soering v. the United Kingdom*, 7 July 1989, Series A no.161, § 113, *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, 4 February 2005 §§ 90 and 91; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 149, ECHR 2010.

and the extent to which they are liable to affect the right to a fair trial of the individual concerned. At the same time, the authorities should also take into account all the specific circumstances of the case.

22. In this context, the Commission submits that even in a judicial system affected by systemic deficiencies as regards the safeguards necessary to protect judicial independence, the determination as to whether there is a real risk of a trial in contravention of Article 47 of the Charter will still require an assessment of specific factors, such as the extent to which there is a risk that courts competent to deal with a criminal case, such as that of LM, may be exposed to external influences and, if so, whether such a risk appears real or, on the contrary, entirely remote. The foreseeability of such risk and the circumstances relevant for the assessment needed may also be different depending on the judicial instance concerned.
23. As regards the assessment of all the specific circumstances, an executing judicial authority should consider whether an accused has raised any specific concerns, or identified any elements that would give cause to consider that he would be exposed to a risk of an unfair trial. Moreover, an executing judicial authority ought, in any event, to have regard to the identity of the individual whose surrender is requested as well as the nature and circumstances of the offence at issue. In this context, relevant considerations may include whether there are any grounds to consider that the individual concerned by the warrant is a person in whose prosecution the executive may have a particular interest. The risks of external influence may be considered more likely where an accused is, for example, a political opponent of the governing party or known for having expressed dissenting political views, or finds himself exposed to a media campaign, or is a member of a particular social or ethnic group susceptible to being discriminated against.
24. As regards the nature of the offence alleged to have been committed, consideration should also be given to whether and to what extent it has a political dimension, or has been committed in connection with the exercise of a fundamental right (such as the freedom of expression or the freedom of association) or belongs to a category of offences in respect of which representatives of the executive or governing party have made public declarations regarding the modalities of their prosecution, for

example as regards their sanctioning. As part of its assessment, an executing judicial authority may have regard, *inter alia*, to reports, complaints from NGOs or documents produced by bodies of the Council of Europe or under the aegis of the UN.

25. The Commission submits that such assessments must be carried out in the light of the specific deficiencies which have been identified in relation to judicial independence, and the risks they are likely to pose in concrete cases. In the context of the present case, relevant risks identified in the Reasoned Proposal include for instance those linked to the situation of judges approaching retirement age, for whom the possibility to stay in office is dependent on the discretion of the executive, or risks connected with judicial advancement (owing to new rules on the composition of the National Council for the Judiciary).¹⁵ Thus, in these circumstances, a national court should in addition make inquiries regarding the courts of the issuing Member State that could be seized, their composition and the concrete circumstances of their functioning.
26. While an executing judicial authority may assess these factors by reference to available evidence, it may also engage in dialogue similar to that required by the Court in the *Aranyosi* judgment on the basis of Article 15(2) of the Framework Decision. That said, the analogy to the *Aranyosi* case is limited. Where the executing court, in the light not only of systemic concerns but also of specific circumstances, has reasonable doubts whether the person, if surrendered, will be tried by a court possessing the degree of independence necessary to ensure respect for the person's fundamental right guaranteed by Article 47(2), additional information from the issuing authority is less likely to dispel such doubts than in a case where the information exchange concerns matters such as detention conditions. Nonetheless, such dialogue may provide further objective elements completing the executing judicial authorities' knowledge of relevant circumstances. It may also be the occasion for the issuing authorities to provide information about any imminent legislative developments that may remove the systemic concerns contained in a reasoned proposal such as that of 20 December 2017.

¹⁵ See Sections 4.2 and 4.3 of the Reasoned Proposal.

27. The Commission therefore submits that if, on the basis of a specific and precise assessment, taking into account all relevant concrete circumstances, a national court arrives at the conclusion that there are substantial grounds to consider that the execution of a European arrest warrant would give rise to a real risk of a trial by a court that did not possess the degree of independence necessary to ensure respect for the person's fundamental right guaranteed by Article 47(2), the European arrest warrant should not be executed.

4. CONCLUSION

28. For the reasons set out above, the Commission considers that the questions referred to the Court of Justice for a preliminary ruling by the High Court (Ireland), should be answered as follows:

Article 1(3) of Council Framework Decision 2002/584/JHA is to be interpreted as meaning that, where a judicial authority of a Member State is requested to order the execution of a European arrest warrant for the surrender of an individual to another Member State for prosecution, and where there is objective, reliable, specific and up-to-date evidence based, in particular, on findings contained in a reasoned proposal submitted by the European Commission pursuant to Article 7(1) TEU, such as the reasoned proposal of 20 December 2017, demonstrating systemic or generalised deficiencies capable of impacting upon the independence of the judiciary, the executing judicial authority may not order the execution of the European arrest warrant if, on the basis of a comprehensive assessment of the legal and factual situation in the issuing Member State and of all relevant circumstances of the individual case, it determines, specifically and precisely, that there are substantial grounds to believe that criminal proceedings concerning the person to be surrendered would not be dealt with by independent courts.

In determining whether such substantial grounds exist, the executing judicial authority shall, where appropriate, request supplementary information from the issuing judicial authority and take such information into account in its determination.


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