

Court of Justice of the European Union

(Case C-216/18 PPU)

THE MINISTER FOR JUSTICE AND EQUALITY

-and-

LM

**WRITTEN OBSERVATIONS ON BEHALF OF THE MINISTER FOR JUSTICE
AND EQUALITY AND IRELAND**

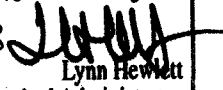
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Luxembourg, <u>02. 05. 2018</u> For the Registrar
Fax/E-mail: <u>30/04/2018</u>  Lynn Hewlett
Received on: Principal Administrator

INTRODUCTION

1. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Union, the Minister for Justice and Equality (the Minister) and Ireland submit the following observations on the questions referred for preliminary ruling by the Honourable Ms. Justice Donnelly of the High Court (Ireland) (the request for preliminary reference) lodged on the 27th March 2018.

2. Those questions have arisen in proceedings where LM objects to his surrender to Poland pursuant to three European Arrest Warrants. LM's surrender to Poland is sought for the prosecution of various offences categorised as the "illicit production, processing, smuggling of intoxicants, precursors, surrogates or psychotropic substances or trafficking in same" and "participation in an organised criminal group or association whose aim is to commit offences".

3. The EU Council Framework Decision 2002/584/JHA is transposed into Irish law by the European Arrest Warrant Act 2003. Section 37 of that Act provides, *inter alia*, that a person shall not be surrendered if such surrender would be incompatible with the State's obligations under the European Convention on Human Rights. The referring Court is the executing judicial authority for the purposes of that Framework Decision. In the proceedings before the referring Court, LM objected to his surrender on, *inter alia*, the ground that it would be incompatible with his fundamental right to a fair trial under Article 6 of the

European Convention on Human Rights. As a matter of Irish law, a person relying on Article 6 grounds to prevent surrender or extradition must put forward evidence of a risk of a flagrant denial of justice in the requesting State¹. A requested person may argue that there are general or systemic defects in the requesting State², however, it will still be necessary to show that the person will not receive a fair trial in the event of surrender³. This requirement to go beyond pointing out generalised objections and make a factual and case specific objection, is also apparent from the caselaw of the European Court of Human Rights – *Saadi v. Italy* (App. No. 37201/06) (2009) 49 EHRR 30.

4. LM did not base his objection on matters specific or peculiar to himself but rather based his objection on the ground that recent legislative changes in Poland create a real risk of a flagrant denial of justice. LM relied principally upon a document of the European Commission entitled “Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland” (hereafter “the Reasoned Proposal”), dated 20th December, 2017, and the documents therein referred to, in particular, the Opinions of the Venice Commission as evidence of the legislative changes in Poland and their effect on the Polish judicial system. The referring Court considered that the Reasoned Proposal and the Venice Commission Opinions amounted to specific, updated, objective and reliable information as to the situation regarding the threat to the rule of law in Poland. The referring Court has concluded that the rule of law in Poland has been systematically damaged by the cumulative impact of the legislative changes which have taken place over the last two years and that there is a real risk of LM being subjected to arbitrariness in the course of his trial.

5. The Question referred to this Court in essence, is what is the correct test to apply to an objection to surrender where a national court considers general and systemic fundamental rights protections are deficient in the requesting Member State and that the circumstances in that Member State are inconsistent with a democratic State which is subject to the rule of law. The Minister suggests that the two-stage test espoused by the Court of Justice in *Aranyosi and Căldăraru* (2016) C-404/15 applies.

THE FIRST QUESTION REFERRED

A. Notwithstanding the conclusions of the Court of Justice in Aranyosi and Căldăraru, where a national court determines 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, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

¹ *Minister for Justice, Equality & Law Reform v Gardener* [2007] IEHC 35

² *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 IR 732

³ *Minister for Justice and Equality -v- Bukoshi* [2017] IEHC 113

Aranyosi test

6. In *Aranyosi* the Court of Justice determined, in the context of prohibiting surrender on Article 3 ECHR and Article 4 Charter grounds, that where the executing judicial authority makes a finding of general or systemic deficiencies in fundamental rights protection in the issuing state, it is then necessary that the executing judicial authority make a further assessment, specific and peculiar to the case under consideration, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The referring Court asks whether the second step of the *Aranyosi* test is required where it has concluded there is a risk that the prosecution of LM will be incompatible with his right to a fair trial and the situation pertaining in the issuing State is inconsistent with a democratic State subject to the rule of law.

7. It is submitted the same test applies *mutatis mutandis* to an objection to surrender that is based on an apprehended breach of Article 6 ECHR. As is evident from the decision of the Court of Justice in *Aranyosi* (para.83), the Framework Decision does not have the effect of modifying the obligation to respect fundamental rights. While it is not immediately evident how Article 47 or the other Articles contained in Chapter 6 of the Charter are engaged in respect of LM, it is evident from the decision of the Court of Justice decision in *Associação Sindical dos Juizes Portugueses -v- Tribunal de Contas* (Case C-64/16) that the bodies entrusted with responsibility for upholding the rule of law within the EU - i.e. 'courts or tribunals' within the meaning of Article 267 TFEU and Article 47 of the Charter - must meet the requirements of effective Judicial protection which include individual protection for the judiciary in the fields covered by Union law under Article 19 TEU, i.e. broader than when implementing European Union law.

Suspension of EAW procedures

8. It is submitted the *Aranyosi* test must continue to apply to prevent the *de facto* suspension of the EAW process between Ireland and Poland. Framework Decision 2002/584/JHA envisages the suspension of EAW procedures between Member States only where there has been a determination under Article 7(2) TEU by the European Council that there has been a serious and persistent breach of the values set-out in Article 2 TEU. Thus, the application of the two-stage *Aranyosi* test is required under the terms of the Framework Decision.

9. The Union legislature provided in art.1(2) of the Framework Decision for the principle on which the execution of the European arrest warrant is based, namely the principle of mutual recognition of judicial decisions, itself based on the principle of mutual confidence between the Member States (Recital 10). This must be read in tandem with art.1(3) and the obligation to respect fundamental rights which is a general principle of Union law and addressed to all States. Article 1(3) cannot, therefore, be interpreted as aiming to introduce an exception to the general rule of execution of EAWs. This Court has already held that Ireland is in principle obliged to give effect to the European Arrest Warrant, subject to

exceptions listed exhaustively in Articles 3, 4 and 4A of the Framework Decision, *per paras* 79 & 80 of *Aranyosi*.

10. If the *Aranyosi* test was not applied, it would have the effect of introducing a ground for the systematic non-execution by Ireland of EAWs issued by Poland other than the ground expressly mentioned in recital 10 of the Framework Decision. Recital 10 of the Framework Decision provides:

*The mechanism of the European arrest warrant 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) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.*⁴

11. The Union legislature expressly provided for the possibility of suspending the EAW procedures with another Member State only in the event that that Member State commits a serious and persistent breach of the principles set out in Article 2 TEU. Through Recital 10, the Union legislature advocates the ultimate intervention of the Union's political leaders to suspend the European arrest warrant system, since only the European Council, in accordance with the procedure referred to in 7(3) TEU, may initiate the procedure to suspend the rights of the Member State in question. The Council was aware of this procedure when drafting the Framework Decision and it must, therefore, be the case that the suspension of the EAW mechanism can only follow on foot of an Article 7(3) TEU decision by the Council.

12. In this regard, the situation at play in *Aranyosi* must be set out in more detail. The European Court of Human Rights, in its judgment in *Iavoc Stanciu -v- Romania* (App. No. 35972/05) [2012] ECHR 35972/05 and in its pilot-judgment in *Varga -v- Hungary* (App no 14338/03) [2006] ECHR 14338/03, concluded there was a general malfunctioning of the Romanian and Hungarian penitentiary systems resulting, *inter alia*, in generalised prison overcrowding as a consequence of which imprisoned individuals are or risk being exposed to

⁴ Article 6(1) of the Treaty at the time of Framework Decision provided:

'1 The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

The equivalent provision is, therefore, to be found in Article 2 TEU.

Article 7 of the Treaty at the time of Framework Decision provided:

1. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article F(1), after inviting the government of the Member State in question to submit its observations.

2. Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

Thus, its equivalent provisions are now to be found in Article 7(2) and 7(3) TEU.

inhuman or degrading treatment during their detention, contrary to arts 2, 3 and 5 ECHR. As Advocate General Bot concluded, *Aranyosi* dealt with what could only be described as a serious and persistent breach of fundamental rights, para.85. In spite of the Advocate General's explicit conclusion that there was a serious and persistent breach of the most fundamental and absolute of rights, it was properly considered that the Framework Decision was clear and a further individualised assessment was required under its terms.

13. In the domestic proceedings, the referring Court concluded there were exceptional circumstances justifying its consideration of whether Poland was complying with the protection of fundamental rights and the evidence put forward by LM was sufficient to conclude there was a real risk of a flagrant denial of justice. On a level of principle this is the same circumstance that pertained in *Aranyosi* in that the conclusion was based on general or systemic conditions in the issuing Member State amounted to a serious and persistent breach of the values expressed in Article 2 TEU. However, it is still necessary to proceed to make a specific and precise assessment as to whether those general or systemic conditions will give rise to a breach of rights. To do otherwise would be tantamount to suspension of the operation of the European arrest warrant between two Member States.

14. The fact that a determination is made that there are general or systemic problems in a given Member State cannot lead to an assumption that the rights of a person whose surrender is sought will be breached. In the case of prison conditions a specific and precise assessment may lead to the conclusion that there is no risk that the person will be detained in the conditions complained of. In the case of the general and systemic issues identified by the referring Court in this present case it is similarly necessary to carry out a specific and precise analysis as to how the issues complained of will affect the person. For example, if the person was convicted and is sought for imposition of sentence he or she will be in a different position to a person whose trial is sought. Similarly a person who has already been convicted and sentenced will generally not have a trial right that is capable of being infringed by surrender. Where a person is sought for prosecution only a fact specific analysis is still required in order to assess the impact of the conditions or issues complained of on that person's particular circumstances.

15. It can be said that the need to carry out such an analysis underlines the essential difference between the role of an executing judicial authority on the one hand and the Council under Article 7 on the other. The former must, by definition, engage in a case specific analysis whereas the latter must engage in a systemic consideration. It is only by means of the latter procedure that the operation of the European arrest warrant as regards a Member State may be suspended. The possibility of executing judicial authorities expressing binding determinations as regards compliance with the rule of law by Member States also raises the very real possibility of such determinations being in conflict with a contrary determination made in due course by the Council.

Mutual trust as a constitutional construct

16. Before the referring Court, LM argued that no mutual trust and confidence could repose in the justice system of Poland because the referring Court concluded Poland was no longer operating under the rule of law, a fundamental principle espoused in Article 2 TEU. It was argued that if the executing judicial authority could not have mutual trust and confidence in the justice system of the issuing Member State, the premise of the *Aranyosi* test is undermined and the test should not be applied. While there is an attractive simplicity to LM's argument, it is incorrect as it fails to distinguish between mutual trust as a legal construct arising out of the Treaties and the operative impact of mutual trust.

17. Recital 10 of the Framework Decision states that the "mechanism of the European arrest warrant is based on a high level of confidence between Member States". As such it is built into the system of mutual recognition of judicial decisions. It is not optional. It is also submitted that the concept of "mutual trust" is an autonomous concept of EU law and cannot be left to the assessment of each member state but require an autonomous and uniform interpretation across all member States. The position is analogous to that in *Poltorak*, (2016) Case C-452/16 PPU, where the Court interpreted the "judicial decision" (Article 4.1) and "judicial authority" (Article 6.1) (paras 31 & 32 - *Poltorak*) to ensure uniformity of interpretation.

18. The constitutional principle of mutual trust operates so as to impose two obligations on Member States. First, they may "*not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law.*" Second, save in exceptional cases, Member States are prevented from "*check[ing] whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU*", *Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU* (Opinion 2/13), para.192.

19. Mutual trust is a fundamental principle upon which the legal structure of the European Union, and particularly the AFSJ, is premised. The Court of Justice held in *Opinion 2/13* that failing to recognise the mutual trust reposed in each Member State would upset the fundamental balance of the Union, para.194:

Insofar as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

20. While mutual trust is not absolute in its application, it is a fundamental constitutional principle and as such, any limitations on its operation must be strictly construed and circumscribed.

21. The referring Court has determined that exceptional circumstances pertained such that it is permissible to limit the full force of the operation of mutual trust and confidence and look behind whether Poland is complying with its obligation to protect the fundamental right to a fair trial. This cannot, however, mean that the fundamental principle of mutual trust and confidence is set aside. It continues to exist and must be balanced against legitimate objections to surrender. Looked at in this respect, the limitation on mutual trust as permitted in *Aranyosi* balanced the protection of fundamental rights against the obligations of mutual trust because it circumscribed mutual trust only where a specific risk to the requested person is identified and also operated in a manner that would restore the full operation of mutual trust between Member States so as to continue the uninhibited operation of the EAW system with maximum haste.

22. The referring Court's conclusion that the courts of Poland do not have sufficient safeguards of independence and impartiality cannot be taken as a finding that they are not bodies in which mutual trust is vested. Mutual trust operates as between the courts of Member States in accordance with the Framework Decision.

23. It must also be questioned whether the executing judicial authorities of Member States can properly make a determination that mutual trust can be limited or set aside because of a purported breach of the value of rule of law as opposed to the protection of fundamental rights. The very essence of the role of an executing judicial authority is to consider the particular facts of a particular case. Any consideration of the breach or impairment of fundamental rights must also occur in a fact specific manner. Fundamental rights do not exist in a vacuum. They exist in the specific context of a particular person and a particular case. When considered from this perspective it might be said that a finding in relation to the breach of the value of the rule of law is no more than the first step in what must become a case specific analysis as to whether the person faces a real risk of a breach of rights in the event of surrender.

24. There can be no dispute that the principle of the rule of law set-out in Article 2 TEU and the right to a fair trial are not coterminous. The right to a fair trial and the rule of law are related but quite separate matters, indeed Article 2 TEU distinguishes between the two: "*the rule of law and respect for human rights*". The Courts of Member States are accustomed to determining the requirement for protecting human rights, indeed they are entrusted with being the primary protectors of the human rights set down in the Charter. In contrast, it is clearly envisaged by Article 7 TEU, the Commission's Rule of Law Framework, and, indeed Article 49 TEU on accession to the Union, that determining the value of the rule of law is primarily a political process. It might be reasonably said that this is why Recital 10 of the Framework Decision envisages suspension of the EAW procedures only upon an Article 7 determination whereas postponement on human rights ground may take place if the *Aranyosi test* is met and adequate information is not provided. That is to say, the determination that the legal system of a Member State is one in which other Member States cannot have any mutual trust and confidence because it does not conform to the rule of law must be made on a

European wide basis and not by individual Member States. To do otherwise would inevitably lead to non-uniform and wholly differential application of varying degrees of mutual trust and confidence by different executing judicial authorities as regards the same Member State.

25. It might also be noted that it is entirely conceivable, perhaps even likely, that this would lead to a scenario where a Member State is not subject to a determination that it is in serious and persistent breach of the values in Article 2 TEU but would, in respect of the fundamental principle of mutual trust, not be on an equal footing with other Member States. Such a scenario would appear to be contrary to the principle of equality between Member States as espoused in Article 4 TEU.

26. In light of the above, it is respectfully submitted that the *Aranyosi* test must be applied by an executing judicial authority where it concludes there are systemic problems in the issuing State that give rise to a risk of a flagrant denial of justice. It is submitted that this test is mandated by the express terms of the Framework Decision and there is no reason to depart from this.

THE SECOND QUESTION REFERRED

B. If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?

27. The judgment of the Court of Justice in *Aranyosi* requires that after an initial finding of general or systemic deficiencies in the protections in the issuing State is made, the executing judicial authority must then seek all necessary supplementary information from the issuing State as to the protections for the individual concerned. The procedure was expressed in the following terms, para.95 ff.:

[P]ursuant to art 15(2) of the Framework Decision, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State.

That request may also relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons.

28. It is submitted that there is no need to depart from this procedure. The opportunity for the issuing State to provide information is predicated and necessitated by the need to have due regard to the constitutional principle of mutual trust and confidence.

29. In respect of the information which might be provided to enable the executing judicial authority discount the existence of a breach of fundamental rights, it is respectfully suggested that this can only be answered on a case by case basis. Moreover, there is an obvious danger in being overly prescriptive about the types of information which might discount the risk at issue insofar the assessment of the requirements for a fair trial, indeed any right which is not absolute, is necessarily predicated on an individual assessment of the case. As the European Court of Human Rights held in *Urban -v- Poland* (23614/08):

The question is always whether, in a given case, the requirements of the Convention are met and in the present case the Court has to determine whether the assessor B.R.-G. who tried the applicants in the first-instance court had the required "appearance" of independence (see McGonnell v. the United Kingdom, no. 28488/95, § 51, ECHR 2000-II).

30. In this regard, it is to be observed that the identification of a specific and precise ground to believe that the requested person will be exposed to the risk of an unfair trial will inevitably elucidate what information may or may not alleviate that risk.

31. It is submitted the sole requirement imposed by European Union law in respect of the information to be obtained is that it is afforded due weight, having regard to executing judicial authority's determination on the generalised risk, the evidence upon which same was based and the principle of mutual trust and confidence.

32. It is further submitted that it would be wholly inappropriate, indeed largely irrelevant, to require evidence of systemic compliance with the rule of law. As noted above, the objection to surrender is properly predicated on a risk of an unfair trial, not on compliance with the rule of law which is left to the Council under Article 7 of the Treaty. In *Urban -v- Poland* (23614/08) the European Court of Human Rights noted the principles as follows:

46. Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see Stafford v. the United Kingdom [GC], no. 46295/99, § 78, ECHR 2002-IV), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction (see Kleyn and Others v. the Netherlands [GC], nos.39343/98, 39651/98, 43147/98 and 46664/99, § 193, ECHR 2003-VI, and Sacilor-Lormines v. France, no. 65411/01, § 59, ECHR 2006-XIII).

Summary

33. It is respectfully submitted that the procedure put forward by the Court of Justice in *Aranyosi* in respect of obtaining information under art.15(2) of the Framework Decision should apply where the risk is of an unfair trial. It is further submitted that any information provided by the issuing judicial authority in accordance with art.15(2) of the Framework Decision be afforded due weight having regard to executing judicial authority's determination on the generalised risk, the evidence upon which same was based and the principle of mutual trust and confidence. Finally, it is submitted that the type of information which may discount a risk of an unfair trial cannot be prescribed in general terms and must be assessed on a case by case basis.