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Judgment

Title: Minister for Justice and Equality -v- Celmer (No.4)

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[2018] IEHC 484

HIGH COURT

Record No. 2013 EXT 295

Record No. 2014 EXT 8

Record No. 2017 EXT 291

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ARTUR CELMER (No 4)

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 1st day of August, 2018

Introduction

1. On 12th March 2018, I delivered a preliminary judgment in this matter. In light of recent legislative changes made in Poland and the implications for fair trial rights in criminal proceedings, I decided to refer two questions to the Court of Justice of the European Union (CJEU) arising out of the execution of three European arrests warrants

(EAW) issued in respect of this respondent. Those questions were as follows:

"a. Notwithstanding the conclusions of the Court of Justice in *Aranyosi and Caldaru*, 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?

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?"

2. Following the adoption of the urgent preliminary ruling procedure as requested by this Court, judgment was delivered by the Grand Chamber on 25th July 2018 (Case C-216/18 *Minister for Justice and Equality v LM* [2018] OJ C190/18). On 23rd July 2018, in anticipation of the delivery of the judgment, I listed this matter for further hearing on the 30th July 2018.

3. In the course of the hearing on 30th July, 2018, it became apparent that the minister and the respondent had different interpretations of the decision of the CJEU in this case. Very briefly, the difference in interpretation pivoted on the sequencing of the stepped process for the specific and precise assessment of whether the requested person is at real risk of an unfair trial and the nature of any consequential evidential burden on the requested person. In the course of the submissions, it also became clear that the respondent was requesting, and the minister was not objecting to, an adjournment to the new term to give the respondent further time to consider the judgment with a view to putting forward any additional evidence then deemed necessary. That request for an adjournment was without prejudice to the respondent's contention that there was sufficient evidence before the Court as to the specific and precise risk the respondent faced which required this Court to revert to the Polish judicial authority for supplementary information to assess that risk.

4. I have set a trial date for the hearing of the substantive application at the beginning of next term. The only issue in this judgment is whether I should, at this time, seek supplementary information for assessing whether there is a real risk to this requested person of a breach of his fundamental right to an independent tribunal, having regard to his personal situation as well as the nature of the offence for which he is being prosecuted. It is therefore necessary to examine the substantive findings of the CJEU.

The CJEU Judgment

5. The CJEU affirmed that limitation may be placed on the principles of mutual recognition and mutual trust between Member States in exceptional circumstances (see para 43). Article 1(3) of the Framework Decision 2002/584 of 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision") does not have the effect of modifying the obligation to respect fundamental rights and the fundamental legal principles enshrined in Article 2 and 6 TEU. The CJEU went on to determine that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial. This right to a fair trial is of

cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected, and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be respected (see para 48).

6. In criminal procedures, for the purpose of prosecution, or of enforcement of a custodial sentence, or detention order, or indeed, in substantive criminal proceedings, Member States are still obliged to observe fundamental rights enshrined in the ECHR or laid down by their national law, including the right to a fair trial and the guarantees deriving from it. At para 58, the Court concluded that the high level of trust between Member States on which the European arrest warrant mechanism is based, is thus founded on the premise that the criminal courts of the other Member States will have to conduct criminal procedures that meet the requirements of effective judicial protection, which include in particular, the independence and impartiality of those courts. On that basis, the CJEU held that the existence of a real risk that the requested person will suffer a breach of his fundamental right to an independent tribunal is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that EAW on the basis of Article 1(3) of the Framework Decision.

7. At para 61, the ECJ set out that the executing judicial authority:

“must, as a first step, assess, on the basis of material that is objective, reliable and properly updated concerning the operation of the system of justice in the issuing Member State (see.....), whether there is a real risk connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment.”

8. From para 62 to 67 the CJEU addressed the nature of the guarantee of independence. Those paragraphs are of the utmost importance to the assessment of whether the evidence of the overall legislative changes in Poland demonstrate that there is a real risk of the fundamental right to a fair trial being breached because of a lack of independence of the courts. As it appears from the CJEU judgment, courts must be free to exercise functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body. Guarantees are necessary for protecting the person of those who have the task of adjudicating a dispute such as guarantees against removal from office.

9. At para 68, the CJEU stated that:

“If having regard to the requirements noted in paragraph 62 to 67 of the present judgment, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judicial of that Member State, such as to compromise the independence of that State’s courts, that authority must, as a second step assess specifically and precisely whether , in the particular circumstances of the case there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.”

10. The CJEU held at para 69 that the specific assessment is also necessary where, as in the present instance, (i) the issuing Member State has been the subject of a Reasoned Proposal adopted by the commission pursuant to Article 7(1) TEU and (ii) that the executing judicial authority considers that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in light of those values, at the level of that Member State’s judiciary.

11. In paras 70 to 72, the CJEU clarified that an executing judicial authority is only automatically to refuse to execute an EAW from an issuing Member State when there had been a finding by the European Council, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU (such as those inherent in the rule of law), and the Council suspended the Framework Decision in respect of that member State.

12. At para 73, the CJEU stated that where no such decision has been adopted by the Council, the executing judicial authority may refrain, on the basis of Article 1(3) of the Framework Decision, to give effect to an EAW issued by a Member State subject to a reasoned proposal only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that EAW has been issued will, following surrender, run a real risk of breach of their fundamental right to an independent tribunal and, therefore, of the essence of their fundamental right to a fair trial.

13. At para 74 the CJEU stated that in the course of such an assessment, the executing judicial authority must in particular examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing member State's courts, are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.

14. At para 75, the CJEU states that if that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.

15. At para 76, the CJEU stated that "[f]urthermore, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk." The CJEU at para 77 said that, in the course of such dialogue between the executing judicial authority and issuing judicial authority, the latter may, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned.

16. At para 78, the CJEU held that if the information provided does not lead the executing judicial authority to discount the existence of a real risk that the individual concerned will suffer in the issuing member State a breach of his fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the EAW relating to him.

The First Step

17. In submissions before me, there was little disagreement as to the first step which had to be addressed. Counsel for the respondent acknowledged that the assessment must be made on material that is objective, reliable, specific and properly updated. Insofar as the Reasoned Proposal was dated December 2017, counsel sought to update the Court as to the present status of the rule of law proceedings in respect of Poland. He put before the Court three documents emanating from the institutions of the European Union. The first was a press release of the Council of the European Union dated 21st June

2018, indicating that at a meeting of the General Affairs Council on 26th June 2018, the Council will hold a hearing under Article 7(1) TEU on the rule of law in Poland. This was the second step of the four step Article 7(1) procedure and involved hearing the member state by the Council.

18. The second document was a provisional version of the Outcome of the Council Meeting on 26th June 2018. This simply noted that the Council held a hearing under Article 7(1) TEU on the rule of law in Poland and that "the hearing offered a possibility for ministers to have an in-depth exchange with Poland on the concerns identified in the Commission's reasoned proposal"

19. The final document was a European Commission press release dated 2 July 2018 indicating that the European Commission has launched an infringement procedure by sending a Letter of Formal Notice to Poland regarding the Polish law on the Supreme Court. This related to the forced retirement of more than a third of the judges of the Polish Supreme Court.

20. Counsel for the respondent submitted that in effect, there had been no substantive change in the position in Poland in the interim, although he quite properly indicated that in oral submissions before the CJEU, the Polish representative had sought to argue that there were changes. Counsel for the minister did not seek to rely on any significant changes in the meantime.

21. Counsel for the respondent pointed to passages in the judgment of this Court dated 12th March 2018, in particular, the findings at paras 130 and 131 as regards the Supreme Court, and para 133 concerning the integrity and effectiveness of the Constitutional Tribunal.

22. At para 134, this Court accepted the repeated statements in the Reasoned Proposal (and the opinions of the Venice Commission) about the effect the change in Poland will have on the rule of law, and agreed with the conclusions. It is important to note that the CJEU has accepted that information in a Reasoned Proposal is particularly relevant for the purposes of assessing whether there is a real risk connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there of the fundamental right to a fair trial being breached.

23. I am satisfied that the Reasoned Proposal of the 20th December 2017 is still particularly relevant to the issue of whether there are systemic or generalised deficiencies in the independence of the courts in Poland. There is nothing to suggest at this time, the existence of any other material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in Poland that contradicts the information in the Reasoned Proposal.

24. As reflected in the judgment of this Court of 12th March 2018, that Reasoned Proposal contains specific information about changes to Polish law concerning the judiciary and the organisation of the courts that demonstrates systemic and generalised deficiencies about the lack of independence of the courts in Poland. The judgment of 12th March 2018 expressed its findings by reference to the rule of law. The basis for that finding was primarily based upon changes that had been made to the courts, the judiciary and the administration of the courts which demonstrated a real risk of an unfair trial because of the lack of independence in the courts.

25. Therefore, having been addressed on the lack of significant change to position in Poland since December 2017, having taken into account the Reasoned Proposal as per the judgment of the 12th March 2018, and having considered the tests in relation to independence of courts as set out in para 62 to 67 of the CJEU judgment, I am satisfied

that there is a real risk, connected with a lack of independence of the courts of Poland on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.

The Second Step

26. Having found as I did as regards the first step, this Court, as an executing judicial authority, is required to make a specific and precise determination as to whether in the particular case there are substantial grounds for believing that the respondent will run a real risk of breach of his fundamental right to an independent tribunal, and therefore of the essence of his fundamental right to a fair trial. The CJEU pointed to two separate matters the executing judicial authority must assess before reaching its conclusion. The first is the extent to which the systemic or generalised deficiencies as regards the independence of the issuing Member State's courts are liable to have an impact at the level of the State's courts with jurisdiction over the proceedings to which the requested person will be subject. Thereafter, the Court then has to assess, in light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk having regard to his personal situation as well as the nature of the offence and the factual context that form the basis of the EAW, to which the material available to it attests.

27. There was substantial disagreement between the parties as to the effect of the CJEU's judgment on how the Court should proceed. Counsel for the minister submitted that there was a rejection of the case that had been made by the respondent in this Court, and at the CJEU, that he did not have to have specific and precise circumstances applicable to him. Counsel for the respondent submitted that the nature of the assessment required by the CJEU was whether the respondent would run the risk of being tried by a court that was not independent. In the respondent's submission, it was still possible that a specific and precise assessment of a requested person's situation would demonstrate that the requested person, along with very many other persons appearing in the trial courts, ran a real risk of an unfair trial by virtue of the lack of independence of the courts. Counsel for the respondent submitted that even though many, if not all, of those appearing before the courts would run the same real risk of an unfair trial, this could not mean that it was therefore not possible for an individual to demonstrate that they personally were at real risk of an unfair trial.

28. Counsel for the respondent also relied on two further points that he submitted were particularly relevant to the specific and precise assessment of real risk to this respondent. In the first place he submitted that this Court had in fact made findings related to the Ordinary Courts in Poland about the risks that a person appearing before those courts ran. In particular, he relied upon paragraph 128 of that judgment wherein referring to the role of the Minister of Justice as Public Prosecutor, this Court held that as the same Minister of Justice had a disciplinary role on the Presidents of Courts, that this had the potential for a chilling effect on those presidents with consequential impact on the administration of justice. In that paragraph, this Court had then relied upon the Venice Commission Opinion to the effect that "the president of the courts in the Polish system have vast powers vis-à-vis the ordinary judges and play important role in the case-management process..., which makes the strong dependence on the presidents before the MoJ even more problematic."

29. Finally, counsel for the respondent relied upon press cutting exhibited in an affidavit of his solicitor concerning remarks recorded as having been made by Poland's Deputy Justice Minister. The first report is from The Guardian and is dated 13th March 2018 and is stated to be written by a journalist in Warsaw. He quotes from "PAP, the state press agency" that the Deputy Justice Minister stated "it is incomprehensible that general, abstract deliberations, projections and speculations become the basis of such an important decision as the handover of a criminal sought in the whole of Europe."

(emphasis added)

30. In the Irish Times dated 17th March 2018, the Deputy Justice Minister, is recorded as calling the respondent in public statements and when talking to the Irish Times "as a dangerous criminal". When questioned as to whether this was prejudicial, he is recorded as saying "I named him as a criminal because the evidence is very concrete, but I accept the principle of presumption of innocence until the final judgment."

31. In The Sunday Times (UK) dated 18th March 2018, the same Deputy Justice Minister is recorded as stating "we deplore the fact that the Irish court is suspending the *punishment of a dangerous criminal from a drug mafia* [sought] all over Europe with a European arrest warrant" (emphasis added).

32. Counsel for the respondent submitted that although he had no information on the precise legal and constitutional position of the deputy minister, he was nonetheless a deputy to the Minister of Justice. The Minister of Justice was himself the Public Prosecutor and the minister who also had specific roles in relation to the judiciary as set out in the judgment of 12th March 2018. These declarations by the Deputy Justice Minister were inconsistent with what was stated in the European Arrest Warrant i.e. that he was wanted for prosecution and not punishment and that it was inconsistent with respect for the respondent's presumption of innocence.

33. Counsel for the minister submitted that while the Deputy Justice Minister's comments may be inappropriate from the perspective of our legal system, there was no indication as to his role within the Polish executive, that the height of the comments was that he had described the respondent as a criminal or associated with the mafia and he had also appeared to row back upon his comments, and that in any event, it was difficult to see how it might affect his right to a fair trial.

34. In relation to the issue of the Court's judgment of 12th March 2018, counsel submitted that he was not entitled to rely upon that judgment as it was inconsistent with the case he had made before the CJEU, where he had submitted that, in relation to this Court's assessment of whether the respondent would be denied his fundamental right to a fair trial, such assessment did not have to be specific. He submitted that the respondent had done nothing to advance his case other than offer broad generalities.

The request for information—a third step?

35. Counsel for the minister submitted that it was only after the court had made a specific and precise assessment that there were substantial grounds for believing that this particular respondent will be a real risk of breach of his fundamental right to an independent tribunal, that the Court must seek an assurance that he is not at real risk. He submitted that para 76 must be read in the context of the judgment as a whole and that there was in essence an evidential burden on a respondent to put before the Court material that showed he was at real risk.

The Court's determination on issue of whether to seek further information from the Polish issuing judicial authority

36. In my view, it is not necessary in this case to come to a final determination whether the express words of the CJEU that the executing judicial authority may request "any supplementary information that it considers necessary for assessing whether there is such a risk" are subject to the limitation that the minister proposes. This is because in the present case specific concerns have been raised by this respondent and information provided in support of his contention that there are reasonable grounds for believing that he is at specific risk of being subject to an unfair trial. That is because he has provided evidence as to the reported words of the Deputy Minister of Justice which raise certain concerns. Those words, in particular by virtue of their repetitive nature, their reference to

the respondent as a criminal, and most importantly, the statement that he is wanted for punishment, would all appear to have considerable implications for his presumption of innocence. By referring to him as a criminal and in particular being sought for punishment, they are references to him as being guilty of the offences for which his surrender is sought apparently only for prosecution. This is particularly troubling because this Court had already expressed at para 128 of the judgment of 12th March 2018 specific concern about the role of the Minister of Justice as Public Prosecutor when combined with his disciplinary powers over the Presidents of Courts. This had been based upon evidence in addition to the Reasoned Proposal, namely that of the Venice Commission.

37. Contrary to the submissions of counsel for the minister, these reported statements are not merely inappropriate in the context of the Irish legal system. The requirement that public officials and not merely prosecutors and judges refrain from describing an accused person as guilty is a well-established requirement under Article 6(2) of the European Convention on Human Rights which states that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law." The European Court of Human Rights has addressed this issue on many occasions.

38. For example, in the case of *Khuzin v Russia* (Application 1347/02 23 October 2008), the European Court of Human Rights held that there was a violation of the presumption of innocence where state officials, including the town prosecutor, discussed on television the "crimes" of the applicant even though he was only accused at that time and stated that the only choice the court would have to make would be choice as to length of punishment. In that case, the Court held at para 93 and 94 as follows:

"The Court reiterates that Article 6 Â§ 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, Â§ 35). It prohibits the premature expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62) but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see *Allenet de Ribemont*, cited above, Â§ 41; *Daktaras v. Lithuania*, no. 42095/98, Â§ 41-43, ECHR 2000 X; and *Butkevičius v. Lithuania*, no. 48297/99, Â§ 49, ECHR 2002 II).

It has been the Court's consistent approach that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Bähler v. Germany*, no. 37568/97, Â§ 54 and 56, 3

October 2002, and *Nešáňk v. Slovakia*, no. 65559/01, ¶¶ 88 and 89, 27 February 2007)."

39. It should also be pointed out that Poland (although not Ireland) is bound by Directive (EU) 2016/343 of 9th March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Article 4 of that Directive provides:

"1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.

2. Member States shall ensure that appropriate measures are available in the event of a breach of the obligation laid down in paragraph 1 of this Article not to refer to suspects or accused persons as being guilty, in accordance with this Directive and, in particular, with Article 10.

3. The obligation laid down in paragraph 1 not to refer to suspects or accused persons as being guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest."

40. That Directive required that Member States covered by the Directive bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1st April 2018. Perhaps Poland had not implemented those laws when the Deputy Minister of Justice spoke as reported in March 2018, although it must be acknowledged that Poland was even at that time required to comply with Article 6(2) ECHR. If the words were spoken as indicated in reputable newspapers, they appear on their face to emanate from a public official and to refer to the respondent as being guilty. Even without specific evidence as to standing of the Deputy Minister of Justice in the Polish legal and political system, that is a concern. It is particularly concerning in the context of this case as there is an inference to be drawn from his title that he plays a significant role in the Ministry of Justice. The Minister of Justice in turn is the Public Prosecutor and also on the basis of the findings previously made has apparently significant control over the Presidents of the Courts, who will in turn assign the judge to try the respondent.

41. The effect of the reported remarks by the Deputy Justice Minister is that this respondent's personal circumstances are now such that he has demonstrated that he is a person who has had his presumption of innocence apparently impugned by a senior public official who is the deputy to the Minister of Justice, who in turn is the Public Prosecutor. The offences for which he faces trial are drug trafficking offences. The reference to a "drug mafia" by the Deputy Justice Minister demonstrate that these alleged offences are viewed as particularly significant, and in my view, in light of the overall tenor of the various remarks, could give rise to an apprehension that a person charged with such offences is particularly vulnerable to having his presumption of innocence affected. The suggestion that a person who is sought for trial is in fact being sought for punishment raises significant concerns about the undermining of a fair trial. The factual context of the applications for surrender has to include that he is sought for five alleged offences of drug trafficking. This heightens the concern that he is at specific

risk of not having his case heard before an independent tribunal in Poland.

42. It is clearly not in every case where the Court is asked to execute a Polish EAW that this specific concern will exist. Indeed, the Court does not have to determine at this point in this case whether the totality of the information in the Reasoned Proposal and the Venice Commission Opinion is sufficient to show the impact at the level of the State's court with jurisdiction to try persons whose surrender is being sought. Each case must be dealt with in due course on its own merits and in accordance with the decision of the CJEU. However, I am satisfied that in light of the evidence in this case, which is specific to this individual, it is necessary at this time to seek further information from the issuing judicial authority to enable me to assess the real risk to this respondent of breach of his fundamental right to an independent tribunal and therefore of the essence of his fundamental right to a fair trial.

43. I am not making a finding that any particular right of the respondent has been broken or even that he is at real risk of having his fundamental right to an unfair trial violated in the courts of Poland. The determination that I am required to make in the overall request for his surrender is whether there are substantial grounds for believing that this respondent is at real risk of a breach of his fundamental right to an independent tribunal and therefore a breach of the essence of his fundamental right to a fair trial as guaranteed by the second paragraph of the Charter of Fundamental Rights of the EU. That decision will only be made after receipt of additional information from the issuing judicial authority in Poland, of any further evidence that the respondent wishes to submit, and the hearing of further submissions at the hearing in the new term. Nonetheless, in the context of the present case, I am of the view that it is necessary to seek supplementary information for the purpose of assessing whether there is such a risk to this particular requested person. In my view, paragraph 76 of the judgment of the CJEU permits at the very least (and may indeed require) further information to be obtained from the issuing judicial authority where specific substantiated concerns are raised by a requested person that their particular right to a fair trial before an independent tribunal is at real risk. This particular case requires a dialogue between issuing and executing judicial authority to take place as envisaged by the CJEU at para 77 of their judgment.

Conclusion

44. In light of the EU Commission's Reasoned Proposal of 20th December 2017, and in the absence of any indication of significant changes to the position in Poland in the interim, I have assessed that there is a real risk connected with a lack of independence of the courts of Poland, on account of systemic or generalised deficiencies, of the fundamental right to a fair trial being breached.

45. Before surrender could be refused for this respondent, the Court has to make an assessment which is specific and precise as to whether in the particular circumstances of the case there are substantial grounds for believing that this requested person will run the risk of a breach of his right to be tried before an independent tribunal.

46. In the present case, I do not have to make a final determination on the issue raised by the minister, which was whether there must be evidence as to the specific risk to the requested person's right to a fair trial prior to seeking further information from the issuing judicial authority for the purpose of assessing that risk. Evidence relating to the specific circumstances of this respondent has been presented in this case.

47. There is evidence of reported and repeated remarks by the Deputy Minister of Justice in Poland that appear to negate the respondent's presumption of innocence. That is particularly concerning in view of the role of the Minister of Justice as Public Prosecutor as well as his apparent role in the disciplining of the Presidents of the courts, including

the Ordinary Courts.

48. In light of the evidence in this case, which is specific to this requested person, I am of the view that it is necessary at this time to seek further information from the issuing judicial authority to enable me to assess the real risk to this respondent of breach of his fundamental right to an independent tribunal and therefore of the essence of his fundamental right to a fair trial. I do not have to reach at this time, and have not reached, a specific determination that any right of his has been violated or that he is at real risk of a violation of his fundamental right to a fair trial should he be surrendered to Poland.

49. I will therefore invite counsel on both sides to submit draft questions to me for submission to the issuing judicial authority pursuant to the provisions of s. 20 of the European Arrest Warrant Act 2003, as amended, which implements Article 15 (2) of the Framework Decision. The final decision as to the precise questions to be asked of the issuing judicial authority is one which is entirely that of the Court.

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