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Ruling

Title: The Minister for Justice and Equality -v- Celmer

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THE HIGH COURT

Record No: 2013 EXT 295

2014 EXT 8

2017 EXT 291

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ARTUR CELMER

RESPONDENT

Request for Preliminary Ruling Pursuant to Article 267 TFEU dated the 23rd day of March, 2018

The following is the substantive text of the Request for Preliminary Ruling pursuant to Article 267 TFEU made by the High Court (Donnelly J) on 12th March, 2018:

SUBJECT MATTER OF THE DISPUTE

1. The surrender of the respondent is sought by the Republic of Poland ("Poland") pursuant to three European Arrest Warrants ("EAW"). The particulars of the European Arrest Warrants are as follows:
 - o An EAW dated 4th June, 2012 in proceedings 2013/295 EXT (the first EAW) issued for the purpose of prosecuting him for two offences. Both offences are certified by the issuing State as falling within Article 2.2 of the Framework Decision. The offences have been categorised as "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".
 - o An EAW dated 1st February, 2012 in proceedings 2014/8 EXT (the second EAW) issued for the purpose of prosecuting him for two offences. The EAW is accompanied by additional information dated the 24/2/2017. Both offences are certified by the Issuing State as falling within Article 2.2 of the Framework Decision. These offences have been categorised as "illicit trafficking in narcotic drugs and psychotropic substances".
 - o An EAW dated 26th September 2013 in proceedings 2017/291 EXT (the third EAW) issued for the purpose of prosecuting him for one offence. This offence is certified by the Issuing State as falling within Article 2.2 of the Framework Decision. The offence has been categorised as "illicit production, processing, smuggling of intoxicants, precursors, surrogates or psychotropic substances or trafficking therein".
2. The respondent objected to his surrender on the basis that he would be subject to a breach of his Article 3 European Convention on Human Rights ("ECHR") rights because of prison conditions in Poland, and on the basis of his Article 8 ECHR rights. He also required the minister to prove compliance with the European Arrest Warrant Act 2003. The referring Court (the executing judicial authority) has rejected these objections by decision of 12th March 2018. The respondent also objected to his surrender on the basis that it would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Convention on Human Rights. It is this objection that grounds the within request for a preliminary ruling, which is required to enable the referring Court to deliver final judgment.
3. The respondent's contention is that surrender would contravene Article 6 ECHR on the grounds that recent legislative changes and proposed changes in Poland create a real risk of a flagrant denial of justice. The principal submission on behalf of the respondent is that these changes fundamentally undermine the basis of mutual trust between the issuing and executing judicial authorities such that the operation of the EAW system is called into question.
4. In support of that objection, the respondent relied particularly 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" ("the Reasoned Proposal"), dated 20th December, 2017, and the documents therein referred to, in particular, the Opinions of the European Commission for Democracy through Law ("the Venice Commission"), as evidence of the legislative changes in Poland and their effect on the judicial system. The veracity of the contents of the Reasoned Proposal, and the Opinions of the Venice Commission, as regards the legislative changes in Poland, was not in question. The issue was the effect those changes had on the risk of the respondent facing an unfair trial in the issuing state should he be surrendered.

The European Commission's Reasoned Proposal on Article 7 TEU

5. On 20th December 2017, the European Commission issued a Reasoned Proposal

under Article 7(1) TEU to the European Council requesting it determine that there is a clear risk of a serious breach by a Poland of the values referred to in Article 2 TEU and to address appropriate recommendations to Poland in this regard.

6. Prior to issuing its Reasoned Proposal, the European Commission made extensive use of the possibilities provided by the rule of law framework for constructive dialogue with the Polish authorities. The European Commission had issued a rule of law opinion, and four rule of law recommendations (the final one was issued on the same day as the Reasoned Proposal). The European Commission exchanged more than 25 letters with the Polish authorities on the matter. The European Commission has stated there was little engagement by the Polish authorities with the substantive recommendations made by the European Commission.

7. The decision by the European Commission to send a reasoned proposal to the European Council under Article 7(1), in respect of Poland, is the first time that this has occurred in respect of any Member State. The nature of, and reasoning behind, the four rule of law recommendations are set out in the Reasoned Proposal. It is a comprehensive and lengthy document and it is not feasible to itemise the full contents in this request for a preliminary ruling. It records the history of the Commission's involvement with developments relating to the rule of law in Poland since November 2015. The Reasoned Proposal also sets out in considerable detail the background to, and history of, the legislative changes.

8. It should be noted that the Venice Commission, an advisory body of the Council of Europe, had also provided Opinions in respect of the situation in Poland, prior to the issuing of the Reasoned Proposal. Their findings are recorded in the Reasoned Proposal.

9. The European Commission recorded the serious concerns expressed, in the period leading up to the issuing of the Proposal, by the following bodies: the United Nations Human Rights Committee, the European Council, the European Parliament, the European Network of Councils for the Judiciary; and at a national level, the Polish Constitutional and Supreme Courts, the Ombudsman, the National Council for the Judiciary and associations of judges and lawyers.

The contents of the Reasoned Proposal

10. In its Reasoned Proposal, the European Commission dealt with two areas of particular concern; the lack of an independent and legitimate constitutional review, and the threats to the independence of the ordinary judiciary.

11. In relation to the first area, the European Commission underlined that where a constitutional justice system has been established, its effectiveness is a key component of the rule of law. The Commission drew particular attention to the composition of the Constitutional Tribunal where lawfully nominated judges have not been allowed take up their function, but those judges nominated without a valid legal basis had been admitted to take up their function by the acting president of the Tribunal. The Polish authorities have still not implemented fully the judgments of the Constitutional Tribunal of 3rd and 9th December, 2015 which had sought to remedy this state of affairs. With respect to publication of judgments, the European Commission noted that certain Supreme Court judgments had not been published by the Government and commented that such a "refusal to publish the judgment denies the automatic legal and operational effect of a binding and final judgment, and breaches the rule of law, principles of legality and separation of powers."

12. The European Commission also pointed to the appointment of the President of the Constitutional Tribunal and the subsequent developments on that Tribunal. The law on the Supreme Court lowers the general retirement age of Supreme Court judges from 70

to 65. It is stated that such compulsory retirement of a significant number of the current Supreme Court judges allows for a far-reaching and immediate recomposition of the Supreme Court. In the view of the European Commission, "[t]hese developments have de facto led to a complete recomposition of the Constitutional Tribunal outside the normal constitutional process for the appointment of judges."

13. The European Commission considered that as a result of the laws adopted in 2016 and subsequent developments following the appointment of the acting President, the independence and legitimacy of the Constitutional Tribunal is seriously undermined and the constitutionality of Polish laws can no longer be effectively guaranteed. This is particularly concerning because of sensitive new legislative Acts which have been adopted by the Polish parliament, such as a new Civil Service Act, a law amending the law on the police, laws on the Public Prosecution Office, a law on the Ombudsman, a law on the National Council of Media, and an anti-terrorism law.

14. The European Commission noted that judicial independence requires guarantees sufficient to protect the person of those who have the task of adjudicating a dispute. Para 117 goes on to state: "[t]he above guarantees and safeguards are lacking in the present case and the provisions concerned constitute a flagrant violation of the independence of judges of the Supreme Court and of the separation of powers, and therefore of the rule of law."

15. An opportunity exists for those judges affected by the lower retirement age to make a request to the President of Poland to prolong their active mandate. The European Commission noted however, that there is no timeframe for taking a decision, and no judicial review provided for in law. The Venice Commission had concluded that the President of Poland, as an elected politician, should not have the discretionary power to extend the mandate of the Supreme Court judge beyond the retirement age.

16. The Reasoned Proposal referred to a new form of judicial review of final and binding judgments and decisions called "Extraordinary Appeals". In an Extraordinary Appeal, within three years from the entry into force of the law, the Supreme Court will be able to overturn completely or in part any final judgment delivered by a Polish court in the past twenty years (although for crime this appears to be limited to one year), including judgments delivered by the Supreme Court, subject to some exceptions. The power to lodge the appeal is vested, inter alia, in the Prosecutor General and the Ombudsman. The Reasoned Proposal noted that this raises concerns as regards the principle of legal certainty that is a key component of the rule of law.

17. The European Commission also referred to the new disciplinary regime for Supreme Court judges. The Reasoned Proposal stated that the fact that the President of Poland, and in some cases also the Minister of Justice, has the power to exercise influence over disciplinary proceedings against Supreme Court judges, creates concerns regarding the principle of separation of powers and may affect judicial independence.

18. According to the Polish Constitution, the independence of judges is safeguarded by the National Council for the Judiciary. The new law on the National Council for the Judiciary increases the concerns regarding the overall independence of the judiciary by providing for the premature termination of the mandate of all judges/members of the National Council for the Judiciary and by establishing an entirely new regime for the appointment of its judges/members, which allows a high degree of political influence.

19. As regards the law on Ordinary Courts Organisation, a new retirement regime requires that the retirement regime applicable to ordinary judges be reduced from 67 to 60 for female judges, and from 67 to 65 for male judges, and that the Minister of Justice would be granted the power to decide on the prolongation of judicial mandates until the

age of 70 on the basis of vague criteria. The new law on Ordinary Courts Organisation includes rules on the dismissal of courts presidents and vice presidents. The Minister of Justice is granted the power to dismiss Presidents of Courts without being bound by concrete criteria, with no obligation to state reasons, and with no possibility for the judiciary to block these decisions. The Minister of Justice may address to a president of a lower court written remarks concerning the alleged mismanagement by the latter of the court. As a result of those written remarks, the president of the lower court may suffer a deduction of up to fifty percent of the post allowance for up to six months.

20. The laws on the Public Prosecution Office in 2016 merged the office of the Minister of Justice and that of the Public Prosecutor General. This increased significantly the powers of the Public Prosecutor General in the management of the prosecutorial system, including new competences enabling the Minister of Justice to directly intervene in individual cases. The Reasoned Proposal at para 170 states as follows:

“As underlined by the Venice Commission, while recognising that the independence or autonomy of the prosecutor’s office is not as categorical in nature as that of the courts, taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary pursuant to the law on the Organisation of Ordinary Courts and the weak position of checks to these powers, result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland.”

21. In Part 5 of the Reasoned Proposal, under the heading “Finding of a Clear Risk of a Serious Breach of the Values Referred to in Article 2 of the Treaty on European Union”, at para 170, the European Commission were “...of the opinion that the situation described in the previous sections represents a clear risk of a serious breach by the Republic of Poland of the rule of law referred to in Article 2 TEU. The Commission comes to this finding after having considered the facts set out above”.

22. The European Commission noted that within the period of two years, more than thirteen consecutive laws had been adopted, affecting the entire structure of the judicial system in Poland. The European Commission stated at para 173:

“The common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law. The Commission also observes that such intense legislative activity has been conducted without proper consultation of all the stakeholders concerned, without a spirit of loyal cooperation required between state authorities and without consideration for the opinions from a wide range of European and international organisations.”

23. The European Commission also referred to the deteriorating position despite the issuing of the three recommendations. The Reasoned Proposal records at para 178 that: “Given that the independence of the judiciary is a key component of the rule of law, these new laws, notably their combined effect, will increase significantly the systemic threat to rule of law as identified in the previous Recommendations. In this respect, the Venice Commission underlined that the combination of the changes proposed amplifies the negative effect of

each of them to the extent that it puts at serious risk the independence of all parts of the judiciary in Poland.”

24. At para 180(2), the European Commission stated:

“Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.”

25. At para 180(3) the European Commission also stated that:

“Respect for the rule of law is also essential for mutual trust in the area of justice and home affairs, in particular for effective judicial cooperation in civil and criminal matters which is based on mutual recognition. This cannot be assured without an independent judiciary in each Member State.”

RELEVANT FINDINGS OF FACT AS DETERMINED BY THE REFERRING COURT

26. The referring Court has accepted that the Reasoned Proposal and the Venice Commission Opinions amount to specific, updated, objective and reliable information as to the situation regarding the threat to the rule of law in Poland.

27. The referring Court has concluded that the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes which have taken place over the last two years. The recent legislative changes have been so damaging to the rule of law that the referring Court concluded that the common value of the rule of law in Poland has been breached. The referring Court acknowledged that certain changes, when viewed in isolation, may not self-evidently appear to violate the rule of law. Of particular relevance to whether the rule of law in Poland has been violated is the totality of the legislative changes. The referring Court accepted the repeated statements in the Reasoned Proposal and the Opinions of the Venice Commission about the effect those changes will have on the rule of law and agreed with the conclusions reached by those bodies.

28. Without prejudice to the relevance of the totality of the changes made in Poland, the following changes were viewed as particularly significant by the referring Court in arriving at this conclusion:

- The changes to the constitutional role in safeguarding independence of the judiciary by the National Council for the Judiciary, in combination with the Polish government persisting with invalid appointments to the Constitutional Tribunal and refusing to publish certain judgments.
- The Minister of Justice is now the Public Prosecutor and is entitled to play an active role in prosecutions. The same Minister of Justice has a disciplinary role over the Presidents of Courts. This has the potential for a chilling effect on those Presidents, with consequential impact on the administration of justice.
- The Supreme Court has been affected by compulsory retirement and future appointments, and by the newly composed National Council for the Judiciary, which will be largely dominated by political appointees.
- The integrity and effectiveness of the Constitutional Tribunal has been greatly interfered with. There is no guarantee that laws in Poland will comply with the Polish Constitution. This fact alone

must have an effect throughout the criminal justice system.

29. The referring Court has determined that there is a real risk of the respondent being subjected to arbitrariness in the course of his trial because the system's wide and unchecked powers is inconsistent with a democratic state subject to the rule of law. The Court determined that where fundamental values such as independence of the judiciary and respect for the Constitution are no longer upheld, those systemic breaches of the rule of law are, by their nature, fundamental defects in the system of justice.

30. The context and the reasons for this request are set out more fully in this Court's judgment of the 12th March, 2018, a copy of which is annexed to this request.

THE RELEVANT LEGAL PROVISIONS

31. The European Arrest Warrant Act of 2003, which implemented the 2002 Framework Decision, provides expressly for protection of fundamental rights. Section 37 provides: "A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution..."

32. The Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States provides at recital (10):

"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".

33. The Framework Decision further provides:

"Article 1

Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".

34. Accordingly, under Irish law and in compliance with the Framework Decision, surrender is prohibited where it would amount to a violation of the respondent's rights

under the European Convention on Human Rights.

35. The test for determining whether surrender is prohibited on Article 6 ECHR grounds is well settled in national jurisprudence, namely that the individual concerned will be exposed to a real risk of a flagrant denial of justice. In *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 24 the Supreme Court held that it would take egregious circumstances, “such as a clearly established and fundamental defect in the system of justice of a requesting state”, for surrender under the Act of 2003 to be refused on the basis of a breach of Article 6 ECHR rights.

36. In *Aranyosi and Căldăraru* (2016) C-404/15, the Court of Justice determined, in the context of prohibiting surrender on Article 3 ECHR grounds, that if a finding of general or systemic deficiencies in the protections in the issuing state is made by the executing judicial authority, it is then necessary that the executing judicial authority makes a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. In *Aranyosi and Căldăraru*, the Court of Justice further established a two-step procedure to be applied by an executing judicial authority in such circumstances. An initial finding of general or systemic deficiencies in the protections in the issuing state must be made and the executing judicial authority must then seek all necessary supplementary information from the issuing state as to the protections for the individual concerned.

THE GROUNDS FOR A REFERENCE

37. The respondent’s contention is that surrender would contravene Article 6 ECHR on the grounds that recent legislative changes and proposed changes in Poland create a real risk of a flagrant denial of justice. The principal submission on behalf of the respondent is that these changes fundamentally undermine the basis of mutual trust between the issuing and executing judicial authorities such that the operation of the EAW system is called into question and the requirement to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to a risk of breach of their fundamental rights, *per Aranyosi and Căldăraru*, cannot be applicable.

38. The principal submission on behalf of the applicant is that the recent legislative changes in Poland, or a finding by the executing judicial authority that the common values in Article 2 TEU have been breached by the issuing State, do not affect the test to be applied as a matter of European Union law when considering an objection to surrender on Article 6 ECHR grounds. The applicant asserts that a general or systemic deficiency in the judicial system of Poland, even to the extent it has been determined by the executing judicial authority as a fundamental and egregious deficiency, does not take away from the requirement to establish that the individual concerned will be exposed to a real risk of a flagrant denial of justice.

39. This request for a preliminary ruling asks the Court of Justice to clarify the test and procedure required to be applied in respect of an objection to surrender based upon Article 6 ECHR where the High Court, as an executing judicial authority under the Framework Decision, has found that the common value of the rule of law set out in Article 2 TEU has been breached by the issuing State. As such, it relates only to the requirements of European Union law and not national legislation.

40. The request for a preliminary ruling also asks whether, in the event that such an individualised assessment must be made as to the exposure of the individual concerned to a real risk of a flagrant denial of justice, the executing judicial authority must revert to the issuing judicial authority for any further necessary information about the particular trial that the requested person will face. If so, the national court asks what the nature and extent of those guarantees, in light of the systemic nature of a finding of

a breach of the rule of law. Article 1(3) of the Framework Decision provides that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. In circumstances where there has been a finding by the national court of a breach of the common value of the rule of law set out in Article 2 TEU, the nature and extent of guarantees that might satisfy the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU is at issue. This relates to European Union law and not national legislation.

QUESTIONS REFERRED FOR PRELIMINARY RULING

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?

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?

REQUEST TO AVAIL OF THE URGENT PROCEDURE OR THE EXPEDITED PROCEDURE

41. This reference raises questions in an area covered by Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU), i.e. judicial cooperation in criminal matters (Chapter 4).

42. The respondent has been in custody, solely in respect of these EAW proceedings, since the 5th of May, 2017. In support of the request to avail of the urgent preliminary ruling procedure, the High Court relies on para 4 of Article 267 TFEU which refers to the obligation to "act with the minimum of delay" in respect of a person in custody who is the subject-matter of a preliminary reference.

43. In accordance with para 33 of the Court of Justice's Recommendations in respect of the preliminary reference procedure (25th November 2016), it can be confirmed that the answers to the questions raised herein will "be decisive as to the assessment of the respondent's legal status", and in particular, will impact on whether the respondent will be released from custody or surrendered to Poland.

44. Use of the ordinary, or even the expedited, preliminary reference procedure would significantly add to the period that the respondent will spend in custody. Given that the Court of Justice may rule at the conclusion of this preliminary reference that further engagement by the High Court with the Polish authorities is required, the EAW proceedings may not be concluded for some time. It is therefore highly desirable that the urgent procedure would be permitted in this case. Urgency is especially highly desirable where the respondent is in custody solely on these EAWs which were issued for the purpose of conducting a criminal prosecution and in respect of which he has a presumption of innocence.

45. Other persons wanted for prosecution in Poland have EAW cases pending before the referring Court, some of whom are in custody. Since the referring Court delivered judgment on 12th March, 2018, all those persons coming before it, whose surrender is sought for prosecution, have sought a stay on their EAW proceedings pending the determination of this preliminary reference. Given the nature of the issues raised, it is possible that the outcome of this preliminary reference will be decisive as to the assessment of their legal status as well.

46. It can be noted that the respondent is in receipt of legal aid, in respect of the EAW proceedings, and that such legal aid applies also to the reference proceedings before the Court of Justice.

47. The referring Court acknowledges that it is a matter for the designated Chamber of the Court of Justice to decide on the Urgent Procedure. That decision may take into account the parties entitled to participate in the hearing conducted under the Urgent Procedure. The facts set out above demonstrate the urgent need for an early decision of the Court of Justice in this reference.

THE PRELIMINARY VIEWS OF THE REFERRING COURT ON THE QUESTIONS REFERRED

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?

48. The principles of mutual trust, mutual recognition and the confidence that Member States repose in each other, derive from the position that Member States are states with common values of "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (Article 2 TEU).

49. In *Aranyosi and Caldaru*, the Court of Justice, albeit in a case concerning the absolute right to freedom from inhuman and degrading treatment, determined that if an initial finding of general or systemic deficiencies in the protections in the issuing state is made, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The referring Court interprets that two step test in *Aranyosi and Caldaru* as a) deriving from the principles of mutual trust, mutual recognition, and the confidence that Member States repose in each other but b) recognising limitations arise to those principles in exceptional circumstances and because, as stated in Article 1(3), the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in Article 6 TEU which refers to the rights and freedoms set out in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

50. The referring Court has accepted that the specific, updated, objective and reliable information as to the situation regarding the threat to the rule of law in Poland amounted to exceptional circumstances justifying the limitation on the mutual trust that

the respondent's Article 6 ECHR rights will be respected in the issuing Member State.

51. Where the principles of mutual trust and mutual recognition have been limited in the exceptional circumstances of a finding by the national court of a breach of the common value of the rule of law, the premise of the *Aranyosi and Căldăraru* test is arguably flawed. Where there are such egregious defects in the system of justice, it appears unrealistic to require a requested person to go further and demonstrate how, in their individual case, these defects will affect their specific trial.

52. This can be contrasted with the situation as regards conditions of detention in an issuing Member State. There may be general and systemic difficulties in a Member State which affect certain groups or certain places of detention. That does not lead to the inevitable conclusion that the individual requested will be subject to inhuman and degrading treatment as it may well be possible to give sufficient information that the individual will not be subjected to that risk, by for example, indicating a specific location in which they will be detained or provided other information as to the particular conditions that will apply to their detention.

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?

53. The referring Court acknowledges that the answer to this question may depend on the answer that the Court of Justice gives to the first question. If the Court of Justice adapts the test in *Aranyosi and Căldăraru*, it may hold that in the exceptional circumstances where a national court determines that the systemic breaches of the rule of law are by their very nature fundamental defects in the system of justice in Poland, that the existence of such a general and systemic risk in the system of justice itself permits the national court to conclude that there is thereby a risk to the fundamental right to a fair trial of the individual in the issuing Member State. In those circumstances, it can be readily understood that no specific guarantee as to a fair trial for this individual could ever be given by any individual issuing authority, given the systemic nature of the breach of the rule of law.

54. Even if the Court of Justice holds that the two step test still applies, and that an individualised assessment of the impact on the requested person's right to a fair trial is required, the question nonetheless arises as to whether that impact can be resolved by individual guarantees from an issuing judicial authority as to the requested person's right to a fair trial.

55. This question also raises issues of the nature and extent of the guarantees that could be given by an issuing judicial authority in those circumstances. While recognising that it is for the national court itself to be satisfied whether sufficient guarantees have been given to allow the national court discount the risk to the fundamental right to a fair trial, in the context of the exceptional circumstances of a finding of a breach of the common value of the rule of law by a national court, the Court of Justice may conclude that there is a European Union law aspect to the nature and extent of the guarantees that must be provided before the national court could discount the risk of unfair trial for the individual concerned. The referring Court refers to Article 1(3) of the Framework Decision and Article 6 TEU and to the recognition of the rights and freedoms protected by the Charter and the European Convention on Human Rights.

56. If the Court of Justice concludes that it should address the nature and extent of the guarantees that may be required from an issuing judicial authority, a serious issue arises as to how precise and concrete those guarantees must be. Must they include guarantees as to who will conduct the prosecution of the trial and the particular judges who will hear the case and any appeal? Or a guarantee to respect any ruling by a lawfully constituted Constitutional Tribunal as to the unconstitutionality of any laws or rules of procedure that might impact on the individual's trial? In light of the obvious difficulties of giving guarantees specific to the trial of an individual where the rule of law itself has been systemically breached, the Court of Justice may conclude that no realistic purpose can be served by requesting those types of individual guarantees. The Court of Justice may conclude that the type of guarantee required is one that demonstrates systemic compliance with the rule of law in the issuing state.