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**Lawfulness in Poland vs the application
of the European arrest warrant.
Commentary on the judgement of the Court of Justice
of the European Union of 25 July 2018, C-216/18¹**

1. The discussed case refers to an extremely important issue, namely the practical application of the European arrest warrant (EAW). There is also a much broader significance, as opening of the case is related to the doubts referring to the judiciary reforms which have been taking place in Poland since 2015. Assessing the reforms the court of a foreign country was in doubt – following the objection of the suspect to whom the EAW was to be applied – whether the case of the suspect may be handled in Poland in a manner guaranteeing the suspect the basic rights, including the right to a fair trial. The question is whether in the event of doubt as to the autonomy and independence of judges there is a possibility to refuse the execution of the Polish EAW or surrendering a Polish citizen detained in a State other than Poland².

In that regard it must be mentioned that the EAW is an instrument of cooperation between the EU Member States, enabling considerably fast mutual surrendering of the requested citizens of the respective States. The operation of the EAW is based on the mechanism of mutual recognition of court adjudications. The EAW is issued by the judicial authority of the pursuing State and submitted directly to the judicial authority of a Member State, in the territory of which the requested person is staying. The judicial authorities of the latter State decide about the EAW execution and surrendering of the requested person³.

¹ ECLI:EU:C:2018:586.

² Cf. R. Grzeszczak, S. Terret, The EU's Role in Policing the Rule of Law: Reflections on Recent Polish Experience, *Northern Ireland Legal Quarterly* 2018, No. 3, p. 347–366.

³ Cf. O. Bures, European Arrest Warrant: Implications for EU Counterterrorism Efforts, *Central European Journal of International and Security Studies* 2009, No. 1, p. 21–46.

The obligatory and optional reasons for the refusal to execute the EAW have been listed in the Council Framework Decision (2002/584/JHA)⁴.

2. The discussed case was adjudicated based on the below described facts. On 1 February 2012, 4 June 2012 and 26 September 2013, Polish courts issued three European arrest warrants against the person concerned, in order for him to be arrested and surrendered to those courts for the purpose of conducting criminal prosecutions. On 5 May 2017 the person concerned was arrested in Ireland on the basis of those EAWs and brought before the referring court, the *High Court*. He informed the court that he did not consent to his surrender to the Polish judicial authorities. In support of his opposition to being surrendered, the person concerned submitted, inter alia, that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Convention of Human Rights (ECHR). In this connection, he contended, in particular, that the recent legislative reforms of the system of justice in the Republic of Poland denied him his right to a fair trial. In his submission, those changes fundamentally undermined the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority, calling the operation of the European arrest warrant mechanism into question. On the basis of the information in the reasoned proposal and of the findings of the Commission for Democracy through Law of the Council of Europe relating to the situation in the Republic of Poland and to the effects of the recent legislative reforms on its system of justice, the referring court concluded that, as a result of the cumulative impact of the legislative changes that have taken place in the Republic of Poland since 2015 concerning, in particular, the Constitutional Court (Trybunał Konstytucyjny), the Supreme Court (Sąd Najwyższy), the National Council for the Judiciary (Krajowa Rada Sądownictwa), the organisation of the ordinary courts (sądy powszechne), the National School of Judiciary (Krajowa Szkoła Sądownictwa) and the Public Prosecutor's Office (Prokuratura), the rule of law has been breached in that Member State. The referring court bases that conclusion on changes found by it to be particularly significant, such as:

- the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Constitutional Court and its refusal to publish certain judgements;
- the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary

⁴ Official Journal L 190, 18/07/2002, p. 1–20.

role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice;

- the fact that the Supreme Court is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and
- the fact that the integrity and effectiveness of the Constitutional Court have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system.⁵

That being so, the referring court considered, on the ground that the ‘wide and unchecked powers’ of the system of justice in the Republic of Poland are inconsistent with those granted in a democratic State subject to the rule of law, that there is a real risk of the person concerned being subjected to arbitrariness in the course of his trial in the issuing Member State. Thus, surrender of the person concerned would result in breach of his rights laid down in Article 6 of the ECHR and should, accordingly, be refused. In those circumstances, the *High Court* decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Notwithstanding the conclusions of the Court of Justice in [the judgement of 5 April 2016,] *Aranyosi and Căldăraru* [(C-404/15 and C-659/15 PPU, EU:C:2016:198)], 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?

(2) 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?

At the same time, the referring court requested that the present reference be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

⁵ See the justification to the CJEU decision of 25 July 2018 – C-216/18, ECLI:EU:C:2018:586.

3. Deciding in the case, the Court pointed out specifically that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which 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 Treaty of the European Union (TEU), in particular the value of the rule of law, will be safeguarded. In accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. It follows that every Member State must ensure that the bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection. In order for that protection to be ensured, maintaining the independence of those bodies is essential, as confirmed by the second paragraph of Article 47 of the Charter [of Fundamental Rights of the European Union], which refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy. The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 Treaty on the Functioning of the European Union (TFEU), in that, in accordance with the Court’s settled case-law, that mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence. The high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded on the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts. It must, accordingly, be held that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of

exception, from giving effect to that European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584⁶. Thus, where, as in the main proceedings, the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State. To that end, the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, 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. Such an assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter. If 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 judiciary 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. The executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU 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 European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of

⁶ Cf. N. Subic, Executing a European Arrest Warrant in the Middle of a Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality (LM/Celmer), *Irish Journal of European Law* 2018, No. 1, p. 98 et seq.

breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial⁷.

4. In the light of the foregoing considerations, in the opinion of the Court of Justice, the answer to the questions of the Irish court referred is that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, 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, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the framework decision, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

5. The discussed case is an example of how the reforms of the judiciary, which have not been broadly discussed or justified, may affect the external perception of the standing of the national system of justice. Even the most legitimate reform of courts made by way of a 'shortcut' may raise and usually raises doubts⁸. Therefore, any change of the system of justice organisation must be made in compliance with certain standards binding in that regard. Signalling the possibility of affecting these standards, particularly by the courts of other countries, is a situation which should not be allowed when making any reforms, or at least should be limited. This has to be taken into account when introducing further changes to the judiciary.

⁷ *Ibidem*.

⁸ Cf. T. Trotman, Taking Judicial Independence Seriously?, *TREMA: Tijdschrift voor de Rechterlijke Macht* 2018, No. 5, *passim*.