Neutral Citation Number: [2022] EWHC 1149 (Admin)

Case No: CO/3601/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

PETER BOGDAN	**Applicant**
- and -	
JUDGE OF LAW ENFORCEMENT AT VESZPREM REGIONAL COURT, HUNGARY	**Respondent**

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- -

Hugh Southey QC and Florence Iveson (instructed by **JD Spicer Zeb**) for the **Applicant**
James Hines QC and Amada Bostock (instructed by **CPS**) for the **Respondent**

Hearing dates: 29 March 2022

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is a renewed application for permission to appeal against the order for the Applicant's extradition to Hungary following refusal on the papers by the single judge. The Applicant's extradition was ordered by District Judge Rimmer on 15 October 2021. His extradition has been requested pursuant to an EAW issued by the Respondent in 2018 so that he can serve a sentence of imprisonment imposed in 2016 for a total of 21 offences including human trafficking, theft and robbery. The offences were committed with his late partner, Anna Lakner. The offences were committed between October 2007 and November 2009.

2. The Applicant was arrested before 11pm on 31 December 2020 and so the EA 2003 in its unamended form and the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member states of the European Union (the EAW Framework Decision) continue to apply: see *Zabolotnyi v The Mateszalka District Court, Hungary* [2021] 1 WLR 2569, [2]-[3]; *R (Polakowski) v Westminster Magistrates' Court* [2021] 1 WLR 2521, [19]-[24], [32].

3. According to the EAW, the Applicant and his late partner (and others) targeted vulnerable individuals with access to state benefits or allowances from their families and promised them a home. They persuaded the victims to hand over their allowances and/or benefits and took their bank cards and personal documents. The Applicant and his partner forced their victims to live in disused flats with no heating, no drinking water, no electricity, no toilets, no cooking or washing facilities and with poor doors and windows. They gave the victims their leftover food but frequently they went hungry. The victims were both physically and verbally assaulted and had their freedom of movement severely restricted. The victims were also threatened and forced to commit thefts for the benefit of the Applicant and his partner and also to work in their home for no pay.

4. The Applicant's offences are 'common or garden' criminal offences with no political element whatsoever. They are plainly very serious. He was present at his trial in 2016 and was sentenced to seven years' imprisonment, of which four years and one month remain to be served.

5. There are two grounds of appeal, namely: (a) the District Judge erred in finding extradition would be a proportionate interference with the Applicant's private and family life and therefore that extradition was not barred by s 21 of the Extradition Act 2003 (EA 2003), read with Article 8 of the European Convention on Human Rights (the Convention); (b) the District Judge erred in finding the EAW in this case was a valid warrant within the meaning of s 2 of the EA 2003.

6. With regards to the Article 8 ground, the Applicant was granted funding in order to instruct a psychiatric expert and that ground has been stayed. I am therefore only concerned with the second ground of appeal on this application.

7. The second ground of appeal concerns legislative changes in Hungary which, it is said, have undermined judicial independence and the rule of law to such an extent that

Hungarian judges responsible for issuing EAWs can no longer be regarded as judicial authorities for the purposes of s 2 of the EA 2003 and Article 6 of the EAW Framework Decision, and hence that the EAW in question cannot form the basis of extradition. For the same reason it is said the Applicant would be the victim of a flagrant denial of justice and thus that his extradition is barred by s 21 of the EA 2003 read with Article 6 of the Convention.

Background: the Polish 'rule of law' cases

8. These grounds of appeal mirror the grounds argued in *Wozniak v Circuit Court in Gniezno, Poland* [2021] EWHC 2557 (Admin), *Lis and others v Regional Court in Warsaw, Poland* [2018] EWHC 2848 and *Lis and another v Regional Court in Warsaw, Poland (No 2)* [2019] EWHC 674 (Admin), in relation to Poland.

9. *Wozniak* considered the position in Poland up to July 2021. It was argued that legislative changes promoted by the governing Law and Justice Party had undermined judicial independence and the rule of law in Poland so that Polish EAWs no longer provided a lawful basis for extradition. The Divisional Court (Dame Victoria Sharp, P, and Julian Knowles J) dismissed the Appellants' appeals and refused their application for certificates of law of general public importance under s 32(4) of the EA 2003, thereby foreclosing an appeal to the Supreme Court. The judgment in *Wozniak*, which was handed down on 23 September 2021, should be read alongside this judgment.

10. *Wozniak* and the earlier domestic decisions considered the judgments of the CJEU in *Criminal proceedings against LM* [2019] 1 WLR 1004 (July 2018) and *L and P* (Joined Cases C-354/20 PPU and C-412/20 PPU) (December 2020), which had considered developments in Poland and their potential effect on the EAW scheme.

11. In summary, at [52] of *LM* the CJEU said that each Member State must ensure that the courts and tribunals 'within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection'. The independence of courts and tribunals 'is essential to ensure that protection' ([53-54]). The requirement of independence attaches to the judicial body issuing an EAW, as well as the body executing such a warrant ([56]). The high level of trust between Member States, on which the EAW system rests, is founded on the premise that criminal courts of the other States 'meet the requirements of effective judicial protection' ([58]).

12. The Court went on:

> "59. 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 [EU Charter of Fundamental Rights], 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 [the EAW Framework Decision].

> 60. 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 (see, by analogy, judgment of 5 April 2016, *Aranyosi and Caldararu*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88)."

13. The following points emerge from these paragraphs (see *Lis No 1* at [36]):

    a. 'systemic … or … generalised deficiencies' in connection with independence of the judiciary are not enough, without more, to prevent extradition;

    b. where such deficiencies are relied upon by the individual, the executing judicial authority must assess in respect of that person whether there is a real risk of a 'breach' or 'compromise' of the 'essence of his fundamental right to a fair trial';

    c. the focus is therefore on whether the individual concerned, given the nature of the proceedings which he faces on return, faces a substantial risk of being denied the essence of his fundamental right to a fair trial.

14. The CJEU then further explained its two-stage test derived from *Aranyosi*.

15. The first step is to assess whether there are systemic or generalised deficiencies, by reference to the second paragraph of Article 47 of the Charter. This step must be conducted by reference to two aspects: the first, which the Court said was 'external in nature', concerns the functional or structural autonomy of the courts and their freedom from external interventions [63-64]. The second aspect, referred to by the Court as 'internal in nature', concerns impartiality, objectivity and the absence of 'any interest in the outcome of the proceedings apart from the strict application of the rule of law' [65].

16. The Court said that each aspect must be guaranteed by rules governing: the composition of the court; terms of service; appointment and dismissal; conduct and discipline of judges [66]. The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions [67].

17. At [68] the Court added that:

> "68. If, having regard to the requirements noted in paragraphs 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 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 … (see, by analogy, in the context of Article 4 of the Charter, judgment of 5 April 2016, *Aranyosi and Caldararu*, C404/15 and C659/15 PPU, EU:C:2016:198, paragraphs 92 and 94)."

18. Article 4 of the Charter provides, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. It is the analogue to Article 3 of the Convention. In *Aranyosi* at [91]-[94] (reported in this country at [2016] QB 921) the Court addressed the position under the EAW Framework Decision where an extradition defendant claims that prison conditions in the requesting state violate Article 4 of the Charter:

> "91. … a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant.
>
> 92. Whenever the existence of such a risk is identified, 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 because of the conditions for his detention envisaged in the issuing member state.
>
> 93. The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing member state does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that member state.
>
> 94. Consequently, in order to ensure respect for article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing member state, he will run a real risk of being subject in that member state

to inhuman or degrading treatment, within the meaning of article 4".

19. The general assessment referred to in [91] has come to be known as '*Aranyosi* Stage 1', and the specific and precise assessment in [92] as '*Áranyosi* Stage 2'.

20. The CJEU rejected the argument that developments in Poland could, in and of themselves and without looking at the individual's own circumstances, result in the automatic refusal by another Member State to execute a Polish EAW. The Court said at [70]-[73]:

> "70. It is apparent from recital 10 of Framework Decision 2002/584 that implementation of the European arrest warrant mechanism 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 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU.
>
> 71. It thus follows from the very wording of that recital that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State.
>
> 72. Therefore, it is only if the European Council were to adopt a decision determining, 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 were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.
>
> 73. Accordingly, as long as such a decision has not been adopted by the European Council, 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 breach

> of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial."

21. This two stage approach was upheld by the CJEU in *L and P* following further developments in Poland which were of concern. As explained in *Wozniak*, [99], the CJEU said the issue raised by the questions which had been referred to it was, in essence, whether Articles 1(3) and 6(1) and of the EAW Framework Decision must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom an EAW has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority may deny the status of 'issuing judicial authority' to the court which issued that arrest warrant and may presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the EU Charter, without carrying out a specific and precise verification which would take account of, *inter alia*, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued

22. The Court rejected the suggestion that *Aranyosi* Stage 2 need no longer be applied. It reiterated the need for a specific and precise assessment of the defendant's own personal situation. It therefore adopted an approach consistent with what it had said in *LM*.

23. The Court said at [59]-[61], [69]:

> "59. To accept that systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, however serious they may be, give rise to the presumption that, with regard to the person in respect of whom a European arrest warrant has been issued, there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial if he or she is surrendered to that Member State – which would justify the non-execution of that arrest warrant – would lead to an automatic refusal to execute any arrest warrant issued by that Member State and therefore to a de facto suspension of the implementation of the European arrest warrant mechanism in relation to that Member State, whereas the European Council and the Council have not adopted the decisions envisaged in the preceding paragraph.
>
> 60. Consequently, in the absence of such decisions, although the finding by the executing judicial authority of a European arrest warrant that there are indications of systemic or generalised deficiencies so far as concerns the independence of the judiciary of the issuing Member State, or that there has been an increase in such deficiencies, must, as the Advocate General noted, in essence, in point 76 of his Opinion, prompt that authority to

exercise vigilance, it cannot, however, rely on that finding alone in order to refrain from carrying out the second step of the examination referred to in paragraphs 53 to 55 of this judgment

61. It is for that authority, in the context of that second step, to assess, where appropriate in the light of such an increase, whether, having regard to the personal situation of the person whose surrender is requested by the European arrest warrant concerned, the nature of the offence for which he or she is being prosecuted and the factual context in which the arrest warrant was issued, such as statements by public authorities which are liable to interfere with the way in which an individual case is handled, and having regard to information which may have been communicated to it by the issuing judicial authority pursuant to Article 15(2) of [the EAW Framework Decision], there are substantial grounds for believing that that person will run a real risk of breach of his or her right to a fair hearing once he or she has been surrendered to the issuing Member State. If that is the case, the executing judicial authority must refrain, pursuant to Article 1(3) of that framework decision, from giving effect to the European arrest warrant concerned. Otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) of that framework decision."

…

"69. In the light of all the foregoing considerations, the answer to the questions referred is that Article 6(1) and Article 1(3) of [the EAW Framework Decision] must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of 'issuing judicial authority' to the court which issued that arrest warrant and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled."

See also *Wozniak*, [91]-[113], discussing *L and P*.

24. The individual appeals were dismissed in *Lis*, *Lis* (*No 2)* and *Wozniak*. The various judgments rejected the submissions that Polish judicial authorities responsible for issuing EAWs could no longer be regarded as judicial authorities for the purposes of s 2 of the EA 2003; that there was a real risk of a flagrant denial of justice so as to render extradition incompatible with Article 6 of the Convention. In *Wozniak* the specific submission was rejected that it was sufficient for the Appellants to be able to point to serious and profound, but general, structural deficiencies, and evidence of objective impairments to fair decision making (eg, the risk of disciplinary proceedings), so that she was entitled to say that because of these matters, the Appellants' specific right to a fair trial has been sufficiently eroded. Counsel submitted the requirement to provide specific and case sensitive evidence did not require proof of actual bias. She submitted the point had been reached in Poland where the external structural deficits identified in the material have ceased to be external and have become changes that are likely to effect judicial decisions. At [200] the Court said:

> "200. Turning to Ms Montgomery's principal submission, we are satisfied that it is not permissible to extrapolate from the general situation in Poland and the systemic threats to independence identified in the material we have set out, serious though they are, that there is specific and real risk of breach of the Appellants' fundamental right to a fair trial, so as to make it unnecessary to carry out a specific and precise assessment on the facts of their particular cases. In other words, it is still necessary, *per LM* at [75], to make an assessment that:
>
> > "… [has] 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."

25. In each case the Court held there was nothing in any of the appellants' individual cases which gave cause for concern, in other words *Aranyosi* Stage 2 was not satisfied. For example, in *Wozniak*, [216]-[217] the Court said:

> "216. We agree with Ms Malcolm that there is nothing in the material before us, nor any particular feature of the Appellants' cases, which gives rise to a proper basis to refuse to execute their respective EAWs.
>
> 217. We start with the nature of their offences. They are ordinary criminal offences (some at a fairly low level) with no political overtones, or indeed *any* feature of any note. They are unremarkable and unexceptional. We are not persuaded that even if the judges who are to try the cases ruled in favour of the defence, that would be a matter of any concern to the prosecutor or the Polish authorities. Their cases must be typical of hundreds, if not thousands, of cases in Poland each year."

26. Mr Southey QC for the Applicant accepted that *Wozniak* and the *Lis* judgments posed difficulties for his case but said that I should nonetheless grant permission to appeal so

that an appeal could be heard and application made (in the event the appeal was dismissed) for a certificate of law of general public importance so as to enable an appeal to the Supreme Court. He pointed out that this case had been selected as the lead Hungarian case in order to allow the s 2/rule of law ground of appeal to be ventilated. Other Hungarian extradition cases have been stayed pending the outcome of this application. He said that, post-Brexit and in light of the UK's withdrawal legislation, the Supreme Court is no longer bound by CJEU authority and that it therefore might take a different view than that Court did in *LM* and *L and P*.

The judgment of the district judge in summary

27. There was a hearing before District Judge Rimmer on the rule of law issue on 2 July 2021, followed by his judgment on 9 July 2021. The District Judge had three cases before him: the Applicant, his partner, Anna Lakner, and a third defendant, Mr Balasz Ambrozi. Mr Ambrozi was discharged, having served the remainder of his sentence. Sadly, Ms Lakner subsequently passed away of COVID-19 before judgment was given.

28. The Applicants argued that the Hungarian judicial authorities could not be considered to be sufficiently independent to be classified as judicial authorities for the purposes of s 2 EA 2003 and Article 6 of the EAW Framework Decision. In summary, they argued that the following developments in particular had undermined judicial independence in Hungary:

    a. Creation of the role of President of the National Office of the Judiciary (NOJ) as a politically elected individual empowered to oversee the administration of courts.

    b. Forced retirement of judges by reducing mandatory age of retirement from 70 to 62, allowing the constitution of courts to be fundamentally changed.

    c. Creation of a new procedure for the 'unification of jurisprudence' in Hungary as a means of establishing a mandatory interpretation of the law.

    d. Deliberate rhetorical attacks on the judiciary, particular judges and the rule of law as a whole.

    e. Disciplinary action against a member of the judiciary for referring a question on judicial independence to the CJEU.

    f. Failure of executive bodies to execute binding court decisions.

29. The Applicants invited the judge to apply the two-stage test set out in *L and P*. They argued that the approach of the CJEU in *L and P* did not rule out the possibility that evidence adduced in support of Stage 1 (the systemic problem) could also demonstrate, at Stage 2, deficiencies which presented a real risk of a lack of independence to every person extradited.

30. The Respondents argued, in summary, that:

    a. The evidence adduced by the Applicants did not establish that Hungarian courts could no longer be considered as judicial authorities;

b. In any event, the court was bound by the EAW Framework Decision and the caselaw of the CJEU, together with analogous decisions in relation to Poland, until or unless the Article 7 process in the case of Hungary concluded and a decision was taken, consequent thereon, to suspend the EAW Framework Decision in relation to Hungary;

c. That even if the court were to find that the first stage of the test in *LM* were made out, there was no evidence to suggest that the Applicants would be prejudiced in any proceedings in Hungary. The attempt to use the general to prove the particular was an impermissible attempt to get round the lack of evidence to establish the second stage of the test.

31. The District Judge heard oral evidence from Dr András Kádár, a Hungarian legal expert. The key points emerging from his evidence were (references are to the judgment of the District Judge):

a. If the Applicant was to be extradited, there were two possible ways in which Hungarian judges could be involved in the execution of his sentence. The first was that a judge may need to decide how much time the Applicant should have deducted from his sentence to reflect any time spent in detention in the UK. The second was that a judge may be involved in making a decision about the Applicant's eligibility for parole (see [90]).

b. Reforms in 2012 established the office of the President of the National Office for the Judiciary, an 'external actor' who took over the administration of the court system and who was appointed by Parliament and had wide powers [93].

c. The National Judicial Council, consisting of the President of the Kuria (Supreme Court) and 14 judges was a counterbalance to the NOJ but in practice they do not have sufficient powers to exercise this function effectively and reforms had not remedied the problem [100].

d. The system of allocation of cases is not sufficiently safeguarded against manipulation and several judges have claimed that it has been used to manipulate the outcome of a case [106].

e. The lowering of the judicial retirement age led to the retirement of approximately 200 judges which coincided with a new system whereby the NOJ was permitted to appoint judicial leaders including court presidents [109]. Dr Kádár considered this problematic because it was an important example of what he described as an attempt to slowly, incrementally, but consciously create a situation where judicial leaders are selected by someone loyal to the Government [110].

f. In response to an example provided by Counsel which appeared to show a system of checks and balances operating, Dr Kádár stated that it was not his contention that all the institutions which exist in principle to check and balance the Executive are dysfunctional all the time. He described Hungary not as a dictatorship but rather a hybrid, illiberal regime where semi-functioning of checks and balances could be seen [112] and [129].

g. In relation to the cases of Mr Baka and Mr Varga, the main concern highlighted by Dr Kádár was the use of the law to target individuals and to suit the desires of those in power [113].

h. Dr Kádár noted that in several criminal cases, politicians had made comments before the criminal cases had gotten underway, prejudging the guilt of individuals. He gave a particular example of a case in which red toxic sludge had killed ten people and a Minister had made it clear that the CEO was responsible. In fact, he was found not guilty at first instance [121] to [126].

i. In relation to the new system of precedent, which requires the agreement of five judges (out of a typical bench of eight) to agree to any changes in the law or to cases which set a precedent, Dr Kádár accepted that, due to the low numbers of decisions, he had not yet been able to analyse the decisions to see if there were any cases which he thought had been wrongly decided or decided along political lines [120].

j. In response to a survey of judges (which was only completed by 16.5% of the judiciary) which showed that 96% of judges were happy with their jobs, Dr Kádár queried why over 80% of judges had not completed the questionnaire and suggested this was due to a general feeling of mistrust [133]. He accepted judicial salaries had been increased but suggested this was less to do with improving judicial independence and more to quell dissatisfaction amongst judges to further the government's political aims [134].

k. Dr Kádár accepted that there was still some resilience in the Hungarian judiciary, as evidenced by some cases in which domestic courts had used their powers to ensure compliance with the decisions of international courts [135].

l. Following an ECtHR decision which made recommendations as to reforms to the legal system for individuals who had suffered delay, Dr Kádár commented that proposals for reform had stalled in the Hungarian legislature and that this demonstrated a failure of the Hungarian state to remedy an issue which the Council of Ministers had characterised as technical yet straightforward [137].

m. When asked about a recent law, known as *Lex NGO,* which requires NGOs to disclose who their funders are, particularly if they are abroad, Dr Kádár stated that the purpose of this law was not to improve transparency (noting that many measures were already in place) but rather to stigmatise NGOs who received foreign funding, as was confirmed by the CJEU [140] to [141].

n. There was no particular ordinary criminal case which Dr Kádár could point to where a judge had expressed themselves to be under pressure or reached a contrary conclusion due to pressure. However Dr Kádár pointed out that the general atmosphere of mistrust meant that it was hard for judges to speak out [142].

32. The District Judge concluded in summary:

> "I do find I can consider the impact of the evidence on the RPs' specific situations, but I reject the ultimate argument of Mr Southey QC and Miss Iveson, which does not lead me to the conclusion that I should refuse the extradition of any of these three RPs on the bases contended." [211].

33. He noted that Dr Kádár was experienced and doing his best to provide accurate and reliable information:

> "However, I find that his evidence, and all the evidence taken as a whole, discloses theoretical, generalised, systemic potential flaws in the Hungarian judicial system, but they do not lead me to the conclusion that there is a real risk that, considered individually, any of these three RPs will be prejudiced by those potential flaws." [211].

34. He further concluded:

> "All three RPs have already been tried, convicted and sentenced. Specifically and precisely assessing each of their particular cases, I have found no substantial grounds for believing that any of these three RPs runs a real risk of being subject to a breach of their fundamental rights. There is no evidence that the judges who issued any of the three EAWs or who may deal with any of the three RPs, should any one of them be extradited, have been or will be affected by the potential flaws identified.
>
> With reference to the test in LM, while systemic and generalised theoretical flaws within the Hungarian rule of law may exist, I have received no evidence, and I do not find, that those potential deficiencies are liable to have an impact at the level of Hungarian courts which have jurisdiction over the proceedings to which any of the three RPs have been or will be subject." [212] to [213].

35. The judge correctly set out the relevant two-stage test as enunciated in *LM* derived from *Aranyosi at* [223] to [225] and concluded at [226] that:

> "That is a two-stage process. First, does objective, reliable, specific and up to date material establish a real risk of the fundamental right to a fair trial being breached, connected to a lack of independence of the courts in the issuing Member State, on account of systemic or generalised deficiencies. Only if so, secondly, does the risk exist in the case of the particular RP under consideration, having regard to his or her personal situation, as well as to the nature of the crime prosecuted. Given that, in this instant case, all three RPs have been convicted, the answer to both questions is 'no', and in particular no evidence has been placed before this court to suggest that the particular trial, long since concluded, of any of these three RPs was unfair by dint of the concerns raised by Dr Kádár, or indeed for any other reason, or that their treatment in future (e.g. as to the

refinement or adjustment of their sentences if extradited) will be so affected." [226].

36. The judge went on to consider the Article 7 procedure, concluding that:

> "*Lis* makes clear that the only body which can determine that the JA is not a judicial authority for the purpose of the Framework Decision is the European Council. The Court in Lis rejected the challenge under section 2 and this remains the current law.
>
> The Divisional Court in *Lis* was explicit that it was only where the European Council had made the relevant decision that an executing judicial authority would be permitted automatically to refuse to surrender a requested person and not be obliged to carry out a specific assessment." [237] -[238].

37. The District Judge thus concluded, applying *Lis* and *L and P* that the argument that the JA is not a 'judicial authority' must be rejected [239]. He reaffirmed at [240] that there was no evidence in relation to any of the defendants to demonstrate that they ran a real risk that the essence of their fundamental rights, whether of their historic trials or of future judicial treatment, has been or will be affected. He commented that: '… each of the RPs' cases is a classic example of ordinary criminal offending without a political or sensitive context*'* [240]

38. He also accepted the Respondent's submission that the defendants were attempting, impermissibly, to use the general to establish the particular, which ran contrary to the authorities, which stated that: 'systemic or generalised deficiencies in connection with the independence of the judiciary are not enough, without more' [241]

39. The judge went on to consider Article 6 of the Convention, acknowledging, however, that it had not specifically been raised. He rejected any Article 6 challenge for the same reasons as given in relation to the judicial independence issue [242] to [245].

40. The District Judge held a further hearing to consider the Article 8 arguments raised by the Applicant and Ms Lakner. In a judgment dated 15 October 2021 he rejected the Article 8 ground and ordered extradition.

The single judge's permission decision

41. Sir Ross Cranston rejected the Applicant's application for permission to appeal in an order dated 17 January 2022. He only considered the s 2(2) EA 2003 ground, as consideration of the Article 8 ground had been stayed, pending provision of a psychiatric report, as I have explained.

42. As to Ground 1, the Applicant submitted that the District Judge had fallen into error in deciding that the EAW was valid under s.2(2) EA 2003 because he failed to make a separate finding in respect of whether a systemic and generalised issue was made out in relation to the rule of law within Hungary.

43. The single judge found that this took the Applicant nowhere as he accepted that he could not satisfy the second stage of the test, ie, the specific and precise impact of any

issues with judicial independence (in so far as they exist) on the individual Applicant himself. He noted that even if the Applicant was correct as to Ground 1, the appeal could only be allowed if the error would have caused the District Judge to have decided differently, i.e. to have discharged him (see s 27(3) EA 2003). The Applicant could not and therefore the ground was not reasonably arguable.

44. Ground 2 was that the District Judge erred in finding that evidence which pointed to a systemic rule of law problem within Hungary could not impact the Applicant's specific case. The judge concluded that Ground 2 was no longer open to the Applicant given the decision in *Wozniak*. He concluded that *Wozniak* established (a) that at the first stage the Court must find that there is a real risk of a breach of the rule of law in a country which requests that a person be extradited; and (b) at the second stage through a specific and precise assessment of the facts of how this bears on whether the requested person runs a real risk that the essence of his or her fundamental right to a fair trial will be affected. He noted that in *Wozniak* the Divisional Court considered the fact that the offences were ordinary criminal offences with no political overtones, nor any feature of any note; there was nothing in the Applicants' personal circumstances or the facts of the offences which might give rise to (actual or apparent) bias; no matters of concern had been reported in relation to the issuing court; and there was no evidence that the individual Polish judges were anything other than independent or were operating outside the rule of law). He concluded that the Applicant accepted that he could not show any person specific impact.

45. Ground 3 was that the District Judge erred in rejecting the contention that a court could lack sufficient independence to be an issuing judicial authority, even where there has been no final determination by the European Council under Article 7 TEU. The judge noted that the Applicant accepted that Ground 3 was not open to him in light of binding authority.

Grounds of appeal on this application

46. Mr Southey deployed a range of material in support of his argument. He said that independence is an essential characteristic of an issuing judicial authority: cf *Assange v Swedish Prosecution Authority* [2012] 2 AC 471, [153] and *Ministry of Justice, Lithuania v Bucnys* [2014] AC 480, [45]. He said that the CJEU has also affirmed, on a number of occasions, essential requirement of independence, in addressing which bodies can act as judicial authorities: *Criminal proceedings against Poltorak* [2017] 4 WLR 8, *Criminal proceedings against Özçelik* [2017] 4 WLR 9 and *Criminal proceedings against Kovalkovas* [2017] 4 WLR 10, and other cases.

47. He accepted that the two stage test developed in *LM* had been applied in *L and P* and in *Lis No 1*, *Lis No 2* and *Wozniak*.

48. Mr Southey relied on the material he had relied on below, including the reports of Dr Andras Kádár. He also applied to rely on, by way of a fresh evidence application, material which had come into existence, since the District Judge's judgment.

49. He said that as with Poland, these long-running attacks in Hungary on the rule of law have attracted scrutiny and criticism from a broad range of international bodies, including the institutions and bodies of the EU, the Council of Europe, the OSCE, the

UN, as well as numerous civil society organisations. He said, in summary, that institutions had been created and persons put in place so that there was a risk of pressure being applied to trial judges. He said the position of Poland was different.

50. In particular, the European Commission issued a Reasoned Proposal on 12 September 2018 under Article 7 of the Treaty on the European Union (TEU), inviting the European Council to determine 'the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded', a step which has only been taken once before, in relation to Poland, as discussed in *Wozniak.*

51. Mr Southey therefore submitted that the first stage of the two-stage test in *LM* was met and the judge should have clearly so found. In relation to the second stage of the test, Mr Southey submitted that the structural and systemic issues affecting the independence of the Hungarian judiciary present a real risk of affecting the independence at all levels, in consequence of which, there must exist a real risk both that the EAW in this case was issued by courts which cannot be considered sufficiently independent to be judicial authorities and that if the Applicant is returned to Hungary his sentence would be administrated by courts lacking independence.

52. Mr Southey did not take particular issue with the district judge's summary of the evidence and submissions in his lengthy and detailed judgment. However, he said that the district judge had erred in the following ways:

    a. failed to make a separate finding regarding Stage 1 of *LM/Aranyosi* but had conflated Stages 1 and 2;

    b. he erred in finding that evidence which points to a systemic problem could not also satisfy Stage 2 of *LM/Aranyosi;*

    c. the judge erred in rejecting the contention that a court could lack sufficient independence to be an issuing judicial authority, even where there has been no final determination by the European Council under Article 7 TEU.

53. In relation to Ground 1, Mr Southey noted that the Judge found that while Dr Kádár's evidence '… and all the evidence taken as a whole, discloses theoretical, generalised, systemic potential flaws in the Hungarian judicial system, … they do not lead me to the conclusion that there is a real risk that, considered individually, any of these three RPs will be prejudiced by those potential flaws' [211].

54. The judge noted that the Applicant had already been 'tried, convicted and sentenced'; he 'found no substantial grounds for believing that' the Applicant 'runs a real risk of being subject to a breach of [his] fundamental rights' and that there was 'no evidence that the judges who issued' the Applicant's EAW 'or who may deal with' the Applicant should he be extradited 'have been or will be affected by the potential flaws identified' [212].

55. Seeking specifically to apply the test in *LM*, the judge found that 'systemic and generalised theoretical flaws within the Hungarian rule of law may exist' but that he had 'received no evidence, and I do not find, that those potential deficiencies are liable

to have an impact at the level of Hungarian courts which have jurisdiction over the proceedings to which any of the three RPs have been or will be subject' [213].

56. Mr Southey's point from these findings and the tenor of [211]–[215] as a whole, in which the judge twice referred to 'generalised, systemic potential flaws' in the Hungarian judicial system, was that the judge should have concluded that Stage 1 of *LM* had been met. However, [226] the judge appears to have concluded that Stage 1 was not met because the particular trial was not 'unfair'.

57. Mr Southey said that by focusing on the individual trials, the approach of the judge conflated Stage 1 and Stage 2. The conduct of the particular trials says nothing about whether there were 'generalised, systemic potential flaws' in the Hungarian judicial system. He said there is more than enough evidence of this, not the least of which is the reasoned proposal from European Commission and the highly critical international material.

58. In relation to Grounds 2 and 3, Mr Southey accepted these had been directly decided in *Wozniak*, and that I would apply that judgment unless I was persuaded it was wrong: *R v Greater Manchester Coroner ex parte Tal* [1985] QB 67, 81B.

59. Nonetheless, he invited me to grant permission 'in order to facilitate an appeal to the Supreme Court' (his words), and he cited *LO (Jordan) v Secretary of State for the Home Department* [2011] EWCA Civ 164, [17], and *Kay v Lambeth* [2006] 2 AC 465, [43], in support of this course of action. He said the Applicant's fundamental right to a fair hearing is in issue. It would be inconsistent with the Court's duties including its duties under the Human Rights Act 1998 for this appeal to be dismissed so that the Applicant could be extradited in circumstances in which a Supreme Court judgment might demonstrate that extradition was in violation of fundamental rights

60. On behalf of the Respondent, Mr Hines QC's primary point was that whatever the merits of the Applicant's criticisms of developments in Hungary (about which he made no concessions), they do not apply in the Applicant's case. His conviction became final in 2016 and his EAW was issued in 2018. Mr Hines said much of what the Applicant complains about occurred after his conviction and after his EAW was issued. For example, the European Commission only issued its Reasoned Proposal in 2018. If the Applicant is extradited there will be limited judicial involvement: essentially he would go straight to jail to serve his sentence and there is no possibility of a trial. A 'penitentiary judge' might become involved in questions of parole, but that was it. Thus on the facts of this case the s 2/rule of law point does not arise. Mr Hines accepted that this had been selected as the lead case but queried whether it should have been. He said a better case to test the merits of the s 2 argument would have been an accusation case where extradition is being sought so the defendant can stand trial in Hungary.

61. In relation to the *LM/Aranyosi* two-stage test, Mr Hines said that I should refuse permission because even if the judge should clearly have found Stage 1 to be satisfied, the Applicant would inevitable fail at Stage 2 (as the appellants in *Lis* and *Wozniak* did despite succeeding at Stage 1) because the Applicant is accused of ordinary crimes which have no political component. Mr Hines noted that Dr Kádár accepted at [68] of his report:

> "I am not able to point to published data which would show that judges dealing with ordinary criminal cases feel under pressure to approach cases in a certain way or have had their independence compromised…".

62. Mr Hines also pointed to [196] of the District Judge's judgment:

> "196. Miss Malcolm QC [then appearing for the Respondent] relied upon Dr Kádár's oral evidence to the effect that no judge has expressed, to his knowledge, a concern about pressure being brought to bear in an ordinary criminal case. He had also given evidence that he knows of no case where objectively the decision appears to be contrary to the evidence and where, therefore, an objective and impartial observer might be able to suggest that the decision has been brought about as a result of improper pressure. In combination, Miss Malcolm QC submitted that the foregoing presents information as to the current state in Hungary. She finished by underlining her submissions that, even were the court to disagree with her position on the law, the threshold was not crossed so as to give rise to real concerns about current judicial independence in Hungary."

Discussion

63. Mr Southey was right to accept that Grounds 2 and 3 were expressly dealt with by the Divisional Court in *Wozniak*. I am not persuaded that judgment is wrong, and I therefore follow it.

64. So far as Ground 1 is concerned, I am prepared to accept – at least for the sake of argument - that the judge was wrong not to hold that *LM/Aranyosi* Stage 1 was satisfied. It seems to me there is a considerable body of material showing that this is so, not least the Reasoned Proposal by the European Commission in relation to Hungary of September 2018. This identified a number of different areas of concern, including the functioning of the constitutional and electoral system; the independence of the judiciary and of other institutions and of the rights of judges, and stated that it believed that the facts and trends mentioned in the Annex to the resolution taken together represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach of it.

65. This a serious step for the Commission to take, and so far as I know it has only been done on one other occasion, because of similar concerns in relation to Poland, as discussed in *Lis*, [64], where the Court said:

> "64. As we have noted, the Reasoned Proposal by the Commission does not have the effect of suspending the EAW system in a general way. But it does have the effect of raising the question whether or not there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU. In our view, the conclusion that there is such a breach is

> consistent with the history of events in Poland to date as summarised earlier in this judgment and set out more fully in the Reasoned Proposal itself, the supporting material, and indeed the expert evidence before us. It means that this court must consider the impact on these individual applicants of the deficiencies which may affect them (see the judgment in Luxembourg, paragraph [75]). Further, the question may arise whether supplementary information is needed to assess whether there is a risk of the necessary quality, paragraph [76]."

66. However, it is at Stage 2 where the Applicant runs into difficulties. The expert evidence, as I have already quoted, did not support his case on this aspect. And the District Judge, having heard the evidence, including live evidence from Dr Kádár, made findings of fact which were open to him and which were adverse to the Applicant. I cannot lightly depart from those findings, and in my judgment there is no basis to do so. The judge said at [226] and [240]:

> "226. That is a two-stage process. First, does objective, reliable, specific and up to date material establish a real risk of the fundamental right to a fair trial being breached, connected to a lack of independence of the courts in the issuing Member State, on account of systemic or generalised deficiencies. Only if so, secondly, does the risk exist in the case of the particular RP under consideration, having regard to his or her personal situation, as well as to the nature of the crime prosecuted. Given that, in this instant case, all three RPs have been convicted, the answer to both questions is "no", and in particular no evidence has been placed before this court to suggest that the particular trial, long since concluded, of any of these three RPs was unfair by dint of the concerns raised by Dr Kádár, or indeed for any other reason, or that their treatment in future (e.g. as to the refinement or adjustment of their sentences if extradited) will be so affected.
>
> …
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> 240. In carrying out a specific assessment of whether the three RPs run a real risk that the essence of their fundamental rights, whether of their historic trials or of future judicial treatment, has been or will be affected, I find no evidence of any such real risk for any of the three RPs. I do not accept that evidence which points to generalised systemic problems can also demonstrate a real risk to every defendant or every person extradited. Each RP, whom I have considered individually, has failed to demonstrate a specific risk which applies to them. The state of the present law is that a requested person must demonstrate, on the facts of their individual case, that there is a real risk of breach of their fundamental rights. On the basis of the evidence adduced in present proceedings, this is not so. Indeed, each of the RPs' cases is a classic example of ordinary criminal offending without a political or sensitive context."

67. Because the Applicant will not face trial, in seems to me that Article 6 of the Convention does not apply.

68. I turn to the question whether, notwithstanding the application for permission is not arguable at this level, I should nonetheless grant permission on the basis put forward by Mr Southey, namely to facilitate an application for certification and for permission to appeal to the Supreme Court.

69. I have considered the two cases referred to by Mr Southey but I am unpersuaded that establish any general proposition that assists him.

70. In *LO* the Secretary of State decided it would be conducive to the public good to deport LO for national security reasons. LO appealed to SIAC. SIAC determined as a preliminary issue that LO posed a national security risk. LO had also raised Articles 3 and 8 and these issues had not yet been determined by SIAC. Meanwhile, the Secretary of State was trying to get assurances from the Jordanian Government but these were not forthcoming. Consequently, the Secretary of State withdrew the decision to deport LO. LO nevertheless wanted to appeal the adverse national security decision because he said it had negative consequences for him (eg, his refugee status had been revoked).

71. The issue before the court was whether SIAC had made a 'final determination of the appeal' – because only a final determination was appealable to the Court of Appeal. Maurice Kay LJ found that there had been no final determination and therefore the Court of Appeal had no jurisdiction. Mr Southey relies on [17] of the judgment:

> "It follows from what I have said that I am satisfied that this Court lacks jurisdiction to consider this appeal. The question then arises as to how we should dispose of it. It is before us as an application for permission. As I do not consider that the application passes the "real prospect of success" test on the jurisdictional issue, the normal course would be simply to refuse permission. At the conclusion of the hearing we canvassed the possibility of our granting permission and dealing with the appeal substantively, albeit as a two-judge court. Both parties indicated that they would consent to that, although Mr Sheldon's position remains that the appeal is unarguable. As we are a two-judge court, I would grant permission to appeal on the "some other compelling reason" basis, the reason being that I am reluctant to impose finality on this issue without any possibility of further recourse. Accordingly, I would grant permission but dismiss the appeal. The grant of permission is limited to the jurisdiction issue. I do not propose to comment on the substantive grounds of appeal. For my part, I would be unlikely to grant permission to appeal to the Supreme Court (if such an application were made to us)."

72. What I understand the Court to have been saying was that, rather than refusing permission (from which no ability to appeal would lie) they thought it was preferable to grant permission but refuse the appeal because it would leave an option of appeal open to LO, albeit permission to appeal would probably be refused. I am not sure this really

amounts to a statement of principle and also not necessarily the principle for which the Claimant contend.

73. The other case relied upon, *Kay,* concerned two sets of possession proceedings. Both defendants raised Article 8 arguments in defence to the possession proceedings. There was an issue concerning the rules of precedent, specifically, whether a lower court was bound by the decision of a superior domestic court if the domestic court's decision was inconsistent with a Strasbourg court decision ([40]). Lord Bingham gave judgment and reaffirmed the rule of precedent. Various parties had made submissions to the effect that a lower court could decline to follow the ruling of a higher domestic court if its judgment was clearly inconsistent with a Strasbourg decision. Lord Bingham said at [43], which was relied on by Mr Southey:

> "43. The present appeals illustrate the potential pitfalls of a rule based on a finding of clear inconsistency. The appellants, the First Secretary of State and the Court of Appeal in the Leeds case find a clear inconsistency between Qazi and Connors. The respondents and the Court of Appeal in the Lambeth case find no inconsistency. Some members of the House take one view, some the other. The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed (ibid, p 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here."

74. Again, I am not sure that this really establishes exactly what the Applicant is arguing for. It seems to be quite specific to the context of what to do when there is Strasbourg authority saying one thing and binding domestic authority saying another. That is not the situation here.

75. I accept as a general proposition that there may be cases where it is appropriate for a lower court to grant permission to appeal, notwithstanding the appeal is very likely to fail at the level of that court, with a view to the matter going forward to a higher court. But there must be a sound and proper basis for doing so, and everything will always turn on the precise circumstances and the judge's individual assessment. I am reluctant to give hypothetical examples of what such a basis might be, but one example that springs to mind is where there is a body of material casting doubt over the correctness of otherwise binding authority and convincingly suggesting that a higher court might correct the position.

76. Mr Southey was unable to show me any such material. There is nothing to suggest that the correctness of any of *LM*, *L and P*, *Lis* or *Wozniak* has been doubted. The possibility that this court, whilst dismissing the appeal, *might* certify and grant leave (even though it did not do so in *Wozniak*), or that the Supreme Court *might* grant leave, and then *might* be persuaded to depart from settled CJEU authority (even if it can do so, a question which is not free from difficulty, as noted in *Wozniak*, [181]-[183]), seems to me to pile speculation upon speculation. It provides far too insubstantial a basis for allowing this case to proceed by way of a grant of permission to appeal.

77. I therefore refuse the renewed application on each of Grounds 1, 2 and 3.

78. It follows that this renewed application is dismissed on these grounds. As I have said, the Article 8 application for permission remains to be determined.