AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000018

Birmingham P.

Dunne J.

Charleton J.

O'Malley J.

Baker J.

Between/

WOJCIECH ORLOWSKI

Appellant

AND

MINISTER FOR JUSTICE AND EQUALITY

Respondent

S:AP:IE:2021:000020

Between/

JAKUB LYSZKIEWICZ

Appellant

AND

MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgment of Ms. Justice Dunne delivered on the 4th day of August 2022

1. This Court delivered judgment in the above-entitled appeals on the 23rd day of July 2021 in respect of the request for surrender of the two appellants to Poland on foot of a number of European arrest warrants (EAWs). It is not necessary to set out again the background to these proceedings as that is set out in the earlier judgment of this Court and in the judgments of the High Court in each case (*Minister for Justice and Equality v Orlowski* [2021] IEHC 109 (Binchy J.); *Minister for Justice and Equality v Lyszkiewicz* [2021] IEHC 108 (Binchy J.)), which were delivered on the same day and each of which involved the same issue. The issue before this Court concerned the test to be applied when a respondent who is the subject of an EAW seeks to resist surrender on the basis that there is a risk of violation of their rights under EU law. At issue was the extent to which the test which arose from the case of *Celmer v Minister for Justice and Equality* [2019] IESC 80, [2020] 1 ILRM 121, as set out in the decision of the Court of Justice of the European Union in *LM (Minister for Justice and Equality (Deficiencies in the system of justice) Case C-216/18 PPU, ECLI:EU:C:2018:586*, as *Celmer* is identified by the CJEU, could be applied given the changes that had occurred in relation to the appointment of judges in Poland subsequent to the decision in *LM*.

2. Having considered the issues raised in the arguments before this Court, it was concluded as follows:

> *"59. The changes that have occurred in Poland concerning the rule of law are, as previously observed, even more troubling and grave than they were at the time when LM was decided by the CJEU. It now appears that there are significant issues with*

regard to the validity of the appointment process for judges in Poland. It is impossible for the appellants in this case to identify the judges before whom they are to be tried because of the manner in which cases are randomly allocated. Even if they could identify the judges and establish that the judges were not validly appointed and thus not part of a Court established by law, it is clear that there is no possibility of challenging the validity of the composition of the court allocated to try them by reason of the provisions of the new laws and, in particular, Article 26(3) thereof. That being so, the question must arise as to whether the systemic deficiencies in the Polish system are such that they, by themselves, amount to a sufficient breach of the essence of the right to a fair trial, requiring the executing authority, in this case, Ireland, to refuse surrender.

60. The answer to that question is not, in the view of this Court, acte clair and in the circumstances, this Court proposes to request a ruling from the CJEU as follows:

> *(1) Is it appropriate to apply the test set out in LM and affirmed in L and P where there is a real risk that the appellants will stand trial before courts which are not established by law?*
>
> *(2) Is it appropriate to apply the test set out in LM and affirmed in L and P were a person seeking to challenge request under an EAW cannot by reason of the fact that it is not possible at that point in time to establish the composition of the court before which they will be tried by reason of the manner in which cases are randomly allocated?*
>
> *(3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the appellants cannot at this point in time establish that the courts before which*

they will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial requiring the executing state to refuse the surrender of the appellants?"

3. Following the reference, the CJEU engaged in correspondence with this Court referring to its judgment of 22 February 2022, *X and Y v Openbaar Ministerie (Tribunal established by law in the issuing Member State) Joined Cases C-562/21 PPU and C-563/21 PPU ECLI:EU:C2022:100*, and asking whether in the light of that judgment, this Court wished to maintain its reference. This Court accepted that it was appropriate to drop the request for a preliminary ruling in respect of the first two questions as they were, in effect, dealt with by the *Openbaar* judgment. However, this Court maintained its request for a response to the third question. The CJEU decided to furnish its response by way of reasoned order, saying:

"Under Article 99 of its Rules of Procedure, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order, in particular where the reply to a question referred for a preliminary ruling may be clearly deduced from existing case law or where it admits of no reasonable doubt."

A copy of the order is included in the documents published with this judgment.

4. The CJEU then proceeded to outline aspects of its judgment in *Openbaar* concerning the two-step examination previously identified in *LM*. Thus, at paragraphs 35 and 36 of the judgment it was stated as follows:

"35. In the context of that two-step examination, the executing judicial authority must, as a first step, determine whether there is objective, reliable, specific and duly updated material indicating that there is a real risk of breach, in the issuing Member State, of the fundamental right to a fair trial guaranteed by that provision, on account of

systemic or generalised deficiencies so far as concerns the independence of that Member State's judiciary (first step of the examination) (see, to that effect, judgment in Openbaar Ministerie (Tribunal established by law in the issuing Member State), paragraph 52 and the case-law cited).

36. As a second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact at the level of the courts of that Member State, which have jurisdiction over the proceedings in respect of the person concerned and whether, having regard to that person's personal situation, the nature of the offence for which he or she is prosecuted and the factual context in which that arrest warrant was issued, and having regard to any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to the latter (second step of the examination) (judgment in Openbaar Ministerie (Tribunal established by law in the issuing Member State), paragraph 53 and the case law cited)."

The CJEU went on to say at paragraph 40 as follows:

"It is for the person in respect of whom a European arrest warrant has been issued to adduce specific evidence to suggest, in the case of a surrender procedure for the purposes of executing a custodial sentence or detention order, that systemic or generalised deficiencies in the judicial system of the issuing Member State had a tangible influence on the handling of his or her criminal case and, in the case of a surrender procedure for the purposes of conducting a criminal prosecution, that such deficiencies are liable to have such an influence. The production of such specific evidence relating to the influence, in his or her particular case, of the above-mentioned

systemic or generalised deficiencies is without prejudice to the possibility for that person to rely on any ad hoc factor, specific to the case in question, capable of establishing that the proceedings for the purposes of which is her surrender is requested by the issuing judicial authority will tangibly undermine his or her fundamental right to a fair trial (judgment in Openbaar Ministerie (Tribunal established by law in the issuing member state), paragraph 83)."

A number of other passages from the reasoned order of the CJEU are of relevance.

5. Thus, it was pointed out that it was for the executing judicial authority to assess whether there are in the particular case substantial grounds for believing that the applicant, once surrendered to the issuing Member State will run a real risk of breach of their fundamental right to a fair trial before a tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter (see paragraph 47). The CJEU went on to point out that it was for the referring court rather than the CJEU to assess whether the evidence relied on is capable of revealing a ground justifying a refusal to execute the European arrest warrants at issue. However, it pointed out that refusal to execute is intended to be an exception which must be interpreted strictly (see para. 48).

6. It seems to me that the next passage from the reasoned order of the CJEU is of particular relevance. I therefore propose to quote it in full:

"As regards, in the second place, the situation in which a European arrest warrant is issued for the purposes of conducting a criminal prosecution, the Court held in paragraph 93 of the judgment in Openbaar Ministerie (Tribunal established by law in the issuing Member State) that the fact, which is the subject matter of the referring court's questions, that the person whose surrender is sought cannot know, before his or her possible surrender, the identity of the judges who will be called upon to hear the

criminal case to which that person may be subject after that surrender cannot in itself be sufficient for the purposes of refusing that surrender."

The CJEU then set out the information that should be considered by the executing Member State in carrying out an overall assessment as to whether there are substantial grounds for believing that the person concerned, in the event of surrender runs a real risk of breach of the fundamental right to a fair trial. In that regard, a number of factors to be taken into consideration are set out. See paras. 53 to 55 of the reasoned order.

7. The CJEU concluded its reasoned order by saying at para 58 as follows:

"... that authority may refuse to surrender that person:

...

in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard inter alia to the information provided by the person concerned relating to his or her personal situation, the nature of the offence for which the person is prosecuted, the factual context surrounding that European arrest warrant or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter, if surrendered, runs a real risk of breach of that fundamental right."

8. As can be seen from the reasoned order, the CJEU has provided further clarification as to the two-step examination to be carried out in accordance with the decisions of that court in *LM* and in *Openbaar.* Even though the challenge to surrender in these cases is based on systemic failures in the Polish system, it is clear that a refusal to surrender can only take place

where there are substantial grounds for believing that the person to be surrendered runs a real risk of breach of the fundamental right to a fair trial.

9. This Court has had the benefit of further written and oral submissions from counsel for the Minister and for the two appellants. At the heart of this case is the system of appointment of judges in the issuing state. It is not necessary in this judgment to rehearse at length the concerns which have arisen as that has been previously set out in the judgment of this Court and the High Court in these proceedings and indeed in a number of decisions of the CJEU.

10. The case made on behalf of the appellants that there is no effective remedy available in Poland by which they can challenge, if necessary and appropriate, the composition of the court that is ultimately assigned or allocated to preside over the criminal proceedings against each of them. They will not know the composition of the courts concerned prior to surrender and as such they cannot point to specific prejudice at this time. However, it is contended that if there is no effective remedy that this would give rise to a real risk of a trial before a court which is either not properly established by law and/or independent. In that regard, reliance was placed on a decision of the European Court of Human Rights in the case of *Grzęda v Poland,* Grand Chamber, ECtHR, 15 March 2022, Application Number 43572/18, in which it was found that *"on account of the lack of judicial review in this case the respondent state impaired the very essence of the applicant's right of access to a court."*

11. As has been accepted by Counsel on behalf of the appellants it is a matter for the executing judicial authority to assess the risk. They argued that the removal of the right to challenge a judge is something that an executing judicial authority can take into account. It was added that even more judges have been appointed under the process that has given rise to the concerns as to the systemic deficiencies in the appointment of judges in the issuing state. Therefore, it is contended on behalf of both appellants that in carrying out the assessment

required of the executing state, this Court should raise further queries and seek additional evidence and/or information pursuant to section 20 of the 2003 Act.

12. The Minister's submissions emphasised a number of passages from *Openbaar* which were referred to in the reasoned order. Thus, reference was made to para. 98 of *Openbaar* where it was stated that:

> *"...information relating to the appointment, on application of the body made up, for the most part, of members representing or chosen by the legislature or the executive, as is the case with the KRS since the entry into force of the law of 8 December 2017, of one or more judges sitting in the competent court or, where it is known, in the relevant panel of judges, is not sufficient to establish that the person concerned, if surrendered, runs a real risk of breach of his or her fundamental right to a fair trial before a tribunal previously established by law. Such a finding presupposes, in any event, a case-by-case assessment of the procedure for the appointment of the judge or judges concerned."*

It was contended therefore that the fact that the judge or panel may be regarded as not having been appointed in accordance with law was not of itself sufficient to refuse surrender, as the second step of the test still had to be undertaken. The point was made that the appellants have shifted the focus away from the question as to whether or not they will get a fair trial to the subsidiary question as to whether they will have an effective remedy in respect of their right to a fair trial by reason of complaints that might arise in relation to the constitution of the trial court they may face upon surrender and their inability to apply for recusal.

13. Counsel on behalf of the Minister summarised the effect of the reasoned judgment of the CJEU as follows:

> *"a. It is insufficient to establish a generalised defect;*

b. it must be shown that the defect impacts on the fair trial rights of the person whose surrender is sought by reference to the circumstances of his or her particular case;

c. the fact that the composition of the trial court is not known is irrelevant and does not alleviate the executing judicial authority of the obligation to undertake a case-specific analysis;

d. the fact that the person may not be entitled to apply for recusal may be a relevant part of the overall assessment but does not relieve the executing judicial authority of the obligation to undertake a case specific analysis."

14. Finally, it was pointed out that in circumstances where neither of the appellants sought to address any case specific impact arising from the personal circumstances and/or the nature of the respective cases it was submitted that no question of a refusal of surrender can logically arise.

Decision

15. It is clear from the evidence that each of the appellants, prior to surrender, are not in a position to identify the judge or panel of judges who will be allocated to the conduct of their trials. It may be that the judges so allocated may have been appointed under the new laws in Poland which have been the subject of much criticism and concern and give rise to a concern as to systemic or generalised deficiencies in that jurisdiction. What cannot be said, however, with any certainty is that the judges dealing with their cases will have been appointed under the new laws. It is clear from the reasoned order of the CJEU that there must be, as was stated therein, objective, reliable, specific and duly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial. As the CJEU went on to point out it is for the person in respect of whom a European arrest warrant has been issued to adduce specific evidence to suggest that such deficiencies are likely to have a tangible influence on the handling

of his or her criminal case. A generalised complaint as to the possibility that the court dealing with either of the appellants may contain a judge or judges who have been appointed under the new laws is clearly not, in and of itself, sufficient to give rise to a real risk of breach of the right to a fair trial. It might be said that the present position places the appellants in something of a "Catch-22" situation. Until they are surrendered they will not know the identity of the judges dealing with them. Therefore, issues such as recusal or the lack of an effective remedy to bring about a challenge to the validity of the appointment of a judge allocated to try their cases cannot be said to arise at this stage. In other words, the evidence does not go so far as to show that there is a specific risk to either of the appellants at this stage in relation to their right to a fair trial.

16. It does not seem to the Court that there is any point in any further process that could be usefully engaged in by this Court in terms of gathering further evidence or information which would advance the matter so far as the appellants are concerned. It is hard to envisage what further evidence or information could be obtained as to the situation they are likely to face upon surrender. Apart from the systemic and generalised deficiencies identified in Poland, there is nothing specific to these appellants that can be pointed to which could prevent their surrender. The CJEU made the position very clear in *Openbaar* and in particular in para. 98 cited above. Even if the appellants could establish that one or more of the judges assigned to the panels likely to hear their cases was appointed under the new system in Poland which has been the cause of so much concern, that alone is not sufficient to establish that the appellants concerned, if surrendered, run a real risk of breach of their fundamental right to a fair trial before a tribunal previously established by law. They must show that there is a real likelihood that the specific judge or judges assigned to hear their cases have in fact been appointed under the new system by adducing evidence as to the circumstances of their appointment. The appellants have not been able to establish that in their cases the systemic deficiencies that have been identified in

relation to the appointment of judges in Poland will have an impact specific to them, notwithstanding that it seems that there may not be an effective remedy to seek the removal of any judge in respect of whom there is a concern. That being so, and despite the concerns of this Court in relation to issues as to the rule of law in Poland, it seems that there is no alternative at this stage but to direct the surrender of the appellants to the issuing state.