Neutral Citation Number: [2021] EWHC 2557 (Admin)

Case Nos: CO/4299/2019 and CO/4976/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/09/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE JULIAN KNOWLES

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Between :

ROBERT WOZNIAK	**Appellant**
- and -	
THE CIRCUIT COURT IN GNIEZNO, POLAND	**Respondent**
WOJCIECH CHLABICZ	**Appellant**
-and-	
REGIONAL COURT IN BIALYSTOK, POLAND	**Respondent**

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Clare Montgomery QC and Émilie Pottle for Mr Wozniak
(instructed by **J.D Spicer Zeb Solicitors)**
Clare Montgomery QC and Saoirse Townshend for Mr Chlabicz (instructed by **Lawrence and Co Solicitors**)

Helen Malcolm QC and Alexander dos Santos (instructed by **the CPS**) for the **Respondents**

Hearing dates: 18 May 2021

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Approved Judgment

Dame Victoria Sharp, P:

Introduction

1. This is the judgment of the Court to which we have both contributed.

2. These two extradition appeals have been listed together because they raise common issues about the impact on extradition from the UK to Poland of legislative developments in Poland since 2015 affecting its judiciary. Poland is a Category 1 territory for the purposes of the Extradition Act 2003 (EA 2003). Both Appellants were 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].

Robert Wozniak

3. The extradition of the Appellant Robert Wozniak (RW) is sought so he can serve a sentence of eight months and 28 days of the nine-month sentence that was imposed on him. The EAW in his case was issued on 13 February 2019 and certified by the NCA under s 1 of the EA 2003 on 21 August 2019. He was arrested on 4 September 2019. The EAW is based upon a default judgment of the District Court in Gniezno (the Respondent to his appeal) dated 8 March 2016. The particulars of the offence set out in the EAW allege that he caused damage to a door using a ladder in January 2014, the offence being committed within five years of having served at least six months for a similar offence.

4. RW's extradition was ordered by a district judge on 30 October 2019. RW lodged an appeal relying on Article 8 of the European Convention on Human Rights (the ECHR/the Convention). He made an application to amend his grounds of appeal to argue that the Respondent is no longer a judicial authority within the meaning of Article 6(1) of the EAW Framework Decision because of the legislative changes in Poland, and thus that his EAW was therefore not a valid Part 1 warrant pursuant to s 2 of the EA 2003, which requires such warrants to have been issued by a judicial authority.

5. RW was refused permission by Thornton J on the Article 8 ground on 12 March 2020. He was granted permission to appeal by Fordham J on 3 June 2020 on the s 2 ground.

6. RW is also subject to a second EAW, for which extradition was ordered on 18 March 2021. This is a mixed accusation and conviction warrant which was issued in Poland in January 2020. It contains three offences: obstructing a police officer; false accounting in relation to VAT returns; and VAT fraud. Permission to appeal had been sought but not determined as at the date of the hearing before us.

Wojciech Chlabicz

7. The extradition of Wojciech Chlabicz (WC) is sought so he can stand trial in Poland for two offences of assault allegedly committed in June 2014. The maximum sentence for the first offence is three years and the second offence is two years. The EAW in his case was issued by the Regional Court in Bialystok on 13 June 2019 and certified by the NCA on 9 July 2019. He was arrested on 13 September 2019.

8. WC's extradition was ordered by a district judge on 13 December 2019. He lodged an appeal relying on Article 8 of the ECHR. He later applied to amend his grounds of appeal to include a ground that his extradition would violate Article 6 of the ECHR and is thus barred by s 21A of the EA 2003 because of the legislative changes in Poland.

9. Saini J refused WC permission on the Article 8 ground on 20 March 2020. Permission to appeal was granted by Lewis J (as he then was) on 3 June 2020 on the s 21/Article 6 ECHR grounds."

Factual background: Polish judicial reforms

10. Since 2015 there have been a series of legislative reforms in Poland concerning the judiciary promoted by the governing Law and Justice Party (*Prawo i Sprawiedliwość* (PiS)), which came to power in that year. These reforms have raised concerns in many quarters, including within the EU, that the independence of the Polish judiciary and fair trial rights in Poland have been undermined as a consequence.

11. In *Lis and others v Regional Court in Warsaw, Poland and others* [2018] EWHC 2848 (*Lis No 1*) the Divisional Court (Lord Burnett of Maldon CJ, Irwin LJ and Ouseley J) considered applications for permission to appeal which raised the issue whether these reforms were such that, without more, the applicants, who were all subject to EAWs issued by Polish judicial authorities, should be discharged and thus protected from extradition. The hearing in that case took place on 7 June 2018 and judgment was delivered on 31 October 2018.

12. The applications followed the judgment of Donnelly J in the High Court in Ireland in *Minister of Justice and Equality v Celmer* [2018] IEHC 119, which had also considered developments in Poland affecting the judiciary. Artur Celmer challenged his extradition to Poland in the High Court in Dublin on the basis that the legislative reforms in Poland undermined the possibility of him having a fair trial. Having considered the evidence, Donnelly J concluded that there had been a 'deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law' ([123]), and that 'the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years' ([124]). She concluded that the common values set out in the Treaty on European Union (TEU) were no longer accepted by Poland ([135]).

13. Donnelly J then considered the impact of those conclusions on Mr Celmer's appeal in the light of the decision of the Court of Justice of the European Union (CJEU) in *Criminal Proceedings against Aranyosi* [2016] QB 921, [80]. That decision emphasised the very limited grounds on which the execution of an EAW can be refused under the EAW Framework Decision. The judge concluded that there was

such a fundamental defect in the Polish system of justice that it was 'difficult to see how the principles of mutual trust and mutual recognition may operate' ([141]). She therefore concluded that, before a final determination could be made, it was necessary to request rulings from the Luxembourg Court. The learned judge referred two questions to the CJEU. The questions are set out in *Lis No 1* at [30]:

> "(1) Notwithstanding the conclusions of the Court of Justice in [the judgment of 5 April 2016,] *Aranyosi and Caldararu* [(C-404/15 and C-659/1 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 [to?] discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?"

14. The Grand Chamber's judgment following the Irish court's reference was delivered on 25 July 2018 and is reported as *Criminal proceedings against LM* [2019] 1 WLR 1004 (it is also sometimes referred to as *Minister for Justice and Equality (Deficiencies in the system of justice)*).

15. The developments in Poland considered in *Lis No 1* and *LM* are described in detail in the former decision at [6]-[25] and so it is not necessary to give more than a summary here. The Polish reforms led, in December 2017, to the European Commission's *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland* (the Reasoned Proposal). The proposal was for a Council decision on the determination of a clear risk of a serious breach by Poland of the rule of law.

16. Article 7(1) of the Treaty on European Union (TEU) provides that, once a Reasoned Proposal is presented to the Council by the Commission (or the European Parliament or one third of the Member States), the Council acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may make a determination that there is a clear risk of a serious breach by the Member State of the common set of values referred to in Article 2 TEU. This provides:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

17. Before making such a determination, Article 7(1) provides that the Council shall hear the Member State in question and may address recommendations to it.

18. A Reasoned Proposal is a measure of last resort. Before making such a Proposal, the EU's Rule of law Framework (Com 2014 158) provides that the Commission must (a) make an assessment; (b) make a Rule of Law Recommendation; and (c) monitor the follow-up to the Recommendation by the Member State. It is only after that, if dialogue fails to resolve the difficulty, that the Commission presents a Reasoned Proposal.

19. Once a Reasoned Proposal has been presented under Article 7(1), Article 7(2) provides that the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

20. Article 7(3) provides that where a determination under Article 7(2) has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council has to take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

21. In this instance, following those preliminary steps, the Reasoned Proposal was issued on 20 December 2017. So far as we are aware: (a) this is the first time the Reasoned Proposal process has been adopted; (b) as at the date of this judgment, it remains under consideration by the Council.

22. The events which led to the Commission taking action were as follows.

23. The Law and Justice Party achieved an outright majority in the Sejm, (the Lower House in the Polish Parliament) on 25 October 2015. The new legislature amended the law on the Polish Constitutional Tribunal; passed a motion which annulled five judicial nominations to the Constitutional Tribunal, and nominated five different new judges. The Constitutional Tribunal subsequently delivered two judgments which invalidated the legal basis for the appointment of three of the newly proposed judges. The Polish Government refused to publish those judgments, a step necessary for them to have legal effect.

24. On 22 December 2015 the Sejm amended the law affecting the functions of the Constitutional Tribunal. On 23 December 2015 the European Commission wrote to the Polish Government expressing concerns about judicial independence. Further decisions of the Constitutional Tribunal led to the Government refusing to publish any of the Tribunal's judgments.

25. The Commission and the Polish Government engaged in exchanges through the early part of 2016. On 22 July 2016 the Sejm adopted a new law on the Constitutional Tribunal. On 27 July 2016 the Commission, following the procedure under the EU Rule of Law Framework, adopted a Recommendation, beginning with a finding that there was a systemic threat to the rule of law in Poland, and recommending urgent action to the Polish authorities.

26. The Polish Government rejected the Commission's concerns, and the Polish President signed the 22 July 2016 measure into law. On 11 August 2016 the Constitutional Tribunal determined that a number of provisions of that law were unconstitutional.

27. In the autumn of 2016, the Venice Commission, (the Council of Europe's advisory body for Democracy through Law), and the United Nations Human Rights Committee, set out detailed concerns about the impact of the changes on the rule of law in Poland. In September and December 2016, the European Parliament also expressed its concerns, including about laws affecting criminal proceedings and the status of judges. Nevertheless, these were signed into effect by the Polish President on 19 December 2016.

28. In the same month there were important events affecting the Constitutional Tribunal involving the appointment of judges which raised further concerns about the rule of law and led to another Resolution by the European Commission. This was rejected by the Polish Government.

29. In January 2017, the newly appointed President of the Constitutional Tribunal instructed the Vice President to go on leave and prolonged it until June 2017, despite his wish to return. Around the same time, the Minister of Justice took steps which had the effect that three long-standing judges on the Constitutional Tribunal were no longer assigned cases.

30. 2017 saw a range of legal reforms by the Government, including a law approved in July 2017 on the Supreme Court which stipulated the dismissal and forced retirement of all Supreme Court judges, save for those approved by the Minister of Justice. The same month the European Commission issued a third Recommendation, saying that the rule of law had 'seriously deteriorated' since December 2016. This Recommendation was referenced in the Reasoned Proposal, which referred *inter alia* to the Constitutional Tribunal having been recomposed outside the normal constitutional process for the appointment of judges. The Commission considered that the independence and legitimacy of the Constitutional Tribunal had been seriously undermined and, consequently, the constitutionality of Polish laws could no longer be effectively guaranteed. It said that the judgments rendered by the Tribunal under these circumstances could no longer be considered as providing an effective constitutional review. It also said that a number of the new laws would

structurally undermine the independence of the judiciary in Poland and would have an immediate and concrete impact on the independent functioning of the judiciary as a whole. It said that given that the independence of the judiciary is a key component of the rule of law, these new laws increased significantly the systemic threat to rule of law as identified in its previous Recommendations. In particular, the dismissal of Supreme Court judges, their possible reappointment, and other measures contained in the law on the Supreme Court, would very seriously aggravate the systemic threat to the rule of law.

31. In August 2017 the Government replied, disagreeing with all the assessments and proposing no new actions to address the Commission's concerns.

32. In September 2017, the Minister of Justice began to exercise new legal powers to dismiss court presidents and vice-presidents. The National Council of the Judiciary (*Krajowa Rada Sądownictwa* (NCJ)) (the body established under the Polish Constitution to safeguard the independence of courts and judges) rejected the exercise of these powers as arbitrary and liable to affect judicial impartiality. Also in that month, the Supreme Court said that further proposed draft laws would substantially curb its independence. In the same month a range of international bodies including the Parliamentary Assembly of the Council of Europe; the United Nations High Commissioner for Human Rights; and the United Nations Special Rapporteur for the Independence of Judges and Lawyers all issued statements of concern and disagreement with the developments in Poland. Further concerns were expressed about proposals to reform the Supreme Court and the NCJ. However, on 8 December 2017 the two redrafted laws were adopted by the Polish Parliament.

The CJEU's decision in *LM* (25 July 2018)

33. The Divisional Court in *Lis No 1* summarised *LM* at [33]-[44] of its judgment. In the following paragraphs, numbers refer to the judgment in *LM* unless otherwise indicated.

34. The Luxembourg Court recorded that the principle of mutual respect of legal systems laid down by the EAW Framework Decision means that executing judicial authorities may refuse to execute an EAW only on the grounds listed in the EAW Framework Decision ([41-42]). It nevertheless recognised that in 'exceptional circumstances' limitations may be placed on the principles of mutual recognition and trust: see *Aranyosi and Caldararu*, [82] ([43]).

35. The Court said it first had to be determined whether a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in 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 an EAW, on the basis of Article 1(3) of the EAW Framework Decision.

36. The second paragraph of Article 47 provides:

> "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal

> previously established by law. Everyone shall have the possibility of being advised, defended and represented."

37. This provision has an obvious parallel in Article 6(1) of the Convention.

38. Article 1(3) provides:

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

39. At [52] the Court 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]).

40. 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)."

37. 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.

38. The CJEU then further explained this approach in the paragraphs which followed.

39. 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].

40. 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].

41. 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)."

42. 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] 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.
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> 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."

43. We will refer to the general assessment referred to in [91] as '*Aranyosi* Stage 1' and the specific and precise assessment in [92] as '*Áranyosi* Stage 2'.

44. The Court in *LM* made clear at [69] that an *Aranyosi* Stage 2 specific assessment is also necessary where the 'Member State has been the subject of a reasoned proposal adopted by the Commission', and 'the executing judicial authority considers … that there are systemic deficiencies … at the level of that Member State's judiciary'.

45. The Court said at [70] that implementation of the EAW mechanism may only be suspended in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 of the TEU, and that it followed that 'it is for the European Council to determine a breach' with a view to the suspension of the warrant mechanism ([71]).

46. The Court concluded at [72]:

> "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."

47. The Court stressed that in the absence of such a decision, an executing judicial authority could only refrain from giving effect to an EAW in exceptional circumstances, where the requesting state is subject to a Reasoned Proposal (emphasis added):

> "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 [the EAW Framework Decision], 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.
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> 74. In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.
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> 75. If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal

> situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant."

48. The Court added at [76]-[78]:

> "76. Furthermore, the executing judicial authority must, pursuant to article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk.
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> 77. In the course of such a dialogue between the executing judicial authority and the issuing judicial authority, the latter may, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing member state, material which may rule out the existence of that risk for the individual concerned.
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> 78. If the information which the issuing judicial authority, after having, if need be, sought assistance from the central authority or one of the central authorities of the issuing member state, as referred to in article 7 of Framework Decision 2002/584 (see *Aranyosi's* case [2016] QB 921, para 97), has sent to the executing judicial authority does not lead the latter to discount the existence of a real risk that the individual concerned will su›er in the issuing member state a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, the executing judicial authority must refrain from giving e›ect to the European arrest warrant relating to him."

49. The Court concluded:

> "79. In the light of the foregoing considerations, the answer to the questions referred is that Article 1(3) 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 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."

The decision in *Lis No 1* (31 October 2018)

50. In *Lis No 1* the applicants submitted to the Divisional Court that the Polish judicial reforms had resulted in such destruction of the independence of the Polish judiciary that there was self-evidently a clear risk of a serious breach of the rule of law which fell to be judged by reference to Article 6 of the ECHR as well as EU law (the second paragraph of Article 47 of the Charter). They argued that the developments in Poland represented a flagrant breach of Article 6 standards, that being the Strasbourg test in this context (cf *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin)). However, they also contended that Articles 47 – 48 of the EU Charter did not impose such a high threshold standard of flagrancy, and they relied on the opinion of Advocate General Sharpston in *Curtea de Apel Constanta (Romania) v Radu* [2013] QB 1031, [82]-[83]. They therefore argued that the Charter afforded a higher level of protection than does the ECHR.

51. The applicants also argued that the lack of independence of the Polish judiciary meant that courts and tribunals in Poland no longer constituted 'judicial authorities' within the meaning of s 2 of the EA 2003 Act.

52. In response, the respondents submitted that the test of a 'flagrant denial' of justice remained in the context of Article 6 arguments and that there was no proper basis for any suggested lesser test under EU law. They therefore said that the effect of the Grand Chamber's decision was that the relevant threshold had not been crossed, especially for the applicants before the Divisional Court.

53. The respondents also argued that the applicants' submissions in relation to s 2 were misconceived and that the applicants' proposition could only succeed if it could be established as a matter of fact that the rule of law had broken down in Poland and that there was not a single judge in Poland who remained independent of the state, which was not a finding that was open to the Court on the material before it. Further, and even if, contrary to their primary position, there was established evidence of systemic or generalised deficiencies concerning the Polish judiciary, then there was nevertheless no evidence that any such difficulties would affect the applicants before the Court.

54. The Court's analysis and conclusions are set out at [50] *et seq* of its judgment.

55. It began with the question of whether Polish courts remained judicial authorities. The applicants had submitted that the decision in *LM* was in accordance with their

submissions. At [56] the Court noted the respondents' submission that the Luxembourg Court had considered closely the question of judicial independence but reached no conclusion that ordinary Polish judges no longer possess impartiality or the ability to try cases fairly. The respondents had also submitted that, having concluded that suspension from the EAW system only arises after the implementation of the Article 7 TEU process, and by their description of the necessary two-stage process, the CJEU's decision was inconsistent with the proposition that no Polish judge could be regarded as an independent judicial authority.

56. At [57] the Court concluded:

> "57. On this issue we reject the argument of the applicants. The meaning of the phrase "judicial authorities" must be an autonomous meaning within European law since it is derived from the [EAW] Framework Decision. The 2003 Act falls to be construed consistently. To accept the applicants' argument on this point would be to subvert the central thrust of the decision of the Luxembourg Court. It is inconceivable that it would have reached the conclusions it did, if it were already established that the Polish courts lacked independence to the degree which required them no longer to be treated as constituting judicial authorities within the scheme. On the contrary, such a general suspension of the scheme is reserved to the Article 7 process and to the European Council. For the English courts to conclude to the contrary would be a contradiction of European Union law."

57. The Court then turned to Article 6 of the ECHR, the 'flagrancy' test, and EU law.

58. At [59] it noted that Advocate General Sharpston's Opinion had previously been considered on two occasions by an English court. In *Arranz v Third Section of the National High Court of Madrid, Spain* [2013] EWHC 1662 (Admin), Sir John Thomas P (as he then was) observed that at that time the EAW Framework Decision was not within the scope of ss 2 and 3 of the European Communities Act 1972 and therefore the judgments of the Luxembourg Court were not directly applicable and binding on UK courts in this area. That position has since changed: *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin), 14-18. He pointed out that he was not entitled to disregard the well settled line of authority in removal cases that the test in Article 6 cases was 'flagrant denial'. Additionally, s 21 of the EA 2003 Act, which prevents extradition on human rights grounds, refers to ECHR rights, not to European law or Charter rights. He went on to observe that although it was clear that the Advocate General did not approve of the 'flagrant breach' test, she still considered that a very high test was required.

59. Advocate General Sharpston's Opinion was considered further in *Lezon v Regional Court in Tarnow, Poland* [2015] EWHC 1908 (Admin). In that case the Court declined to apply the approach set out by the Advocate General, both on the ground that the 'flagrantly unfair' test was well-established as the correct test, and on the ground of the facts in that case.

60. The respondents submitted that the Luxembourg Court in *LM* had not ruled that a 'flagrancy' test did not apply to Article 47, nor did it adopt a different test. They argued that was not an authority by which the long-established test of a flagrant denial of justice should be regarded as reduced or altered. At [63] the Court concluded:

> "63. We accept that submission. The Court referred frequently in the course of its judgment to the potential breach of the 'essence' of the applicant's right to a fair trial: see paragraphs [59], [60], [68], [72], [73], [75] and [78]. We are bound to observe that if the Luxembourg Court were seeking to draw a qualitative distinction between that concept and the oft-repeated formulation of the Strasbourg Court of a 'flagrant denial of justice' it would have said so in answering question 2. In our judgment there is no sensible distinction to be made between a breach of the essence of a right to a fair trial and the flagrant denial test."

61. At [64]-[66] under the heading 'the *Aranyosi* process' the Court said this:

> "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 [LM], 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].
>
> 65. The respondents agree that where the executing court considers that the Reasoned Proposal, or any evidence supporting it, gives rise to the relevant level of concern at an individual level then the extraditing judicial authority
>
> > 'has the right to make, and should indeed consider making, a further request for specific information as to whether the requested person will face a real risk of the essence of his fundamental right of fair trial ... having regard to his personal situation, to the nature of the offence for which he is being prosecuted and to the factual context of the EAW'.

> 66. There should be no need for expert evidence of a general nature to be adduced in Polish extradition cases pending the resolution of the Article 7 TEU process. The relevant matters are sufficiently explored in materials available in the public domain and, in particular, in those generated in that process."

62. In respect of the individual applicants, the Court said at [70] that whilst it saw no reason why further information bearing on them individually would be likely to establish any real risk of breach of their fundamental rights to an independent trial, because the hearing had been structured to consider the general question of extradition to Poland in the then current circumstances, it would give them the opportunity to formulate applications and individual submissions.

63. It is notable, for reasons we will return to later in this judgment, that the Court did not itself seek further information from the issuing judicial authorities despite its undoubted inherent jurisdiction to do so: *FK v. Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin), [39].

64. At [71] the Court concluded:

> "71. We grant each applicant permission to appeal. However, we reject the submissions made to date against extradition in each of the three cases. As matters stand at present, in our judgment there exists no general basis to decline extradition to Poland. However, by reason of the matters contained in the Commission's Reasoned Proposal and in the other material to which we have referred, there is sufficient concern about the independence of the Polish judiciary to mean that these applicants and others in a similar position should have the opportunity to advance reasons why they might have an exceptional case requiring individual 'specific and precise assessment' to see whether there are substantial grounds for believing they individually might run a real risk of a breach of their fundamental rights to a fair trial. We make it clear, following the approach of the Grand Chamber of the Luxembourg Court, that exceptional circumstances must be demonstrated. We indicate, on the basis of the limited material available to us, that these cases would appear unlikely to fulfil that test and that those sought to be extradited for ordinary criminal offences, with no political or other sensitive content, would seem unlikely to be able to establish the necessary risk."

The decision in *Lis No 2* (21 March 2019)

65. Two of the three applicants in *Lis No 1* advanced such grounds, and their cases came back before the Divisional Court (Irwin LJ and Ouseley J) in *Lis and another v Regional Court in Warsaw, Poland (No 2)* [2019] EWHC 674 (Admin) (*Lis No 2*). In a judgment handed down on 21 March 2019, the Court rejected the applications.

66. At [2] of his judgment, Irwin LJ noted that on 19 November 2018 Donnelly J had handed down her judgment in *Minister for Justice and Equality v Artur Celmer (No 5)* [2018] IEHC 639, following the judgment in *LM*. He said that the learned judge's conclusions were same as those reached by the Court in *Lis No 1.* At [122] she said:

> "122. In accordance with the decision of the CJEU in *LM*, this Court is obliged to determine, specifically and precisely, whether having regard to this respondent's personal circumstances, the nature of the offence for which he is prosecuted and the factual context that forms the basis of the European arrest warrants and in light of the information from the issuing judicial authorities, there are substantial grounds for believing that he will run that risk if he is surrendered."

67. The cases advanced by the appellants were summarised by Irwin LJ at [5]: (a) the first appellant (Lis) argued that the relevant risk was established by consideration of the nature of the specific court before whom he would be tried; and (b) the second appellant (Lange) argued the risk was established by consideration of the particular nature of the proceedings that he was to face.

68. The first appellant relied on evidence about the removal and replacement of judges at the Warsaw District Court, which he said established that he was 'at real risk of being tried before a judge hand-picked by his prosecutor'. The second appellant made no submissions as to the effects of changes in the judicial system affecting the Court in Zielona Gora, to which he would be extradited. He accepted there was no evidence that the judges there had actually been threatened, sanctioned, removed or replaced in the same manner as in Warsaw. However, his extradition being sought so he could serve an aggrgated sentence, his submission was that the 'compromised Polish Court might not disaggregate his sentence'.

69. At [11]-[12], Irwin LJ discussed the CJEU's reference in *LM*, [73], to the need for 'exceptional circumstances':

> "11. In his oral submissions (and Speaking Note), having adopted the written submissions, Mr Fitzgerald began by emphasising that if there was a general risk for all defendants before the Warsaw Regional/Circuit Court, there would be a flagrant breach of their Article 6 rights, and that must form a bar to such extradition. In that sense, it was wrong and potentially misleading to impose an 'exceptionality' element to the test.
>
> 12. So far as that submission goes, I would be prepared to accept it. If it could be established that ordinary criminal defendants as a category were at real risk of flagrant breaches of Article 6 standards then that would constitute a bar to extradition, and there could be no requirement of 'exceptionality' within such a cohort. However, it should be clear that the term was used by the CJEU (and by this Court) in the context where no such general risk had been established. It does not seem to me fruitful

> to continue any debate about the terms 'exceptional' or 'exceptionality'."

70. The Court rejected both appellants' cases in fairly short order, holding that the evidence did not establish the necessary risk of a flagrant denial of justice (see [17] and [22]).

Effects of the legislative changes 2015-2017: summary

71. At this point it is convenient to go back to the Commission's Reasoned Proposal of 20 December 2017. At [172]-[175] under the heading 'Finding of a clear risk of a serious breach of the values referred to in Article 2 of the Treaty on European Union' the Commission summarised its view of the reforms from 2015-2017:

> "172. The Commission is of the opinion that the situation described in the previous sections represents a clear risk of a serious breach by the Republic of Poland of the rule of law referred to in Article 2 TEU. The Commission comes to this finding after having considered the facts set out above.
>
> 173. The Commission observes that within a period of two years more than 13 consecutive laws have been adopted affecting the entire structure of the justice system in Poland: the Constitutional Tribunal, the Supreme Court, the ordinary courts, the national Council for the Judiciary, the prosecution service and the National School of Judiciary. The common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law. The Commission also observes that such intense legislative activity has been conducted without proper consultation of all the stakeholders concerned, without a spirit of loyal cooperation required between state authorities and without consideration for the opinions from a wide range of European and international organisations.
>
> 174. The Commission has carried out an extensive dialogue with the Polish authorities since January 2016 in order to find solutions to the concerns raised. Throughout this process the Commission has always substantiated its concerns in an objective and thorough manner. In line with the Rule of Law Framework, the Commission has issued an Opinion followed by three Recommendations regarding the rule of law in Poland. It has exchanged numerous letters and held meetings with the Polish authorities. The Commission has always made clear that it stood ready to pursue a constructive dialogue and has

repeatedly invited the Polish authorities for further meetings to that end. However, in spite of these efforts, the dialogue has not removed the Commission's concerns.

175. Despite the issuing of three Recommendations by the Commission, the situation has deteriorated continuously. In particular:

(1) The unlawful appointment of the President of the Constitutional Tribunal, the admission of the three judges nominated by the 8th term of the Sejm without a valid legal basis, the fact that one of these judges has been appointed as Vice-President of the Tribunal, the fact that the three judges that were lawfully nominated in October 2015 by the previous legislature have not been able to take up their function of judge in the Tribunal, as well as the subsequent developments within the Tribunal described above have de facto led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges. For this reason, the Commission considers that the independence and legitimacy of the Constitutional Tribunal are seriously undermined and, consequently, the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review.

(2) The law on the National Council for the Judiciary and the law on the Supreme Court, also in combination with the law on the National School of Judiciary, and the law on the Ordinary Courts Organisation significantly increase the systemic threat to the rule of law as identified in the previous Recommendations. The main concerns are summarised as follows:

(a) As regards the Supreme Court,

– the compulsory retirement of a significant number of the current Supreme Court judges combined with the possibility of prolonging their active judicial mandate, as well as the new disciplinary regime for Supreme Court judges, structurally undermine the independence of the Supreme Court judges, whilst the independence of the judiciary is a key component of the rule of law;

– the compulsory retirement of a significant number of the current Supreme Court judges also allows for a far reaching and immediate recomposition of the Supreme Court. That possibility raises concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary. In fact all new Supreme Court judges will be appointed by the

> President of the Republic on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by the political appointees. As a result, the current parliamentary majority will be able to determine, at least indirectly, the future composition of the Supreme Court to a much larger extent than this would be possible in a system where existing rules on the duration of judicial mandates operate normally – whatever that duration is and with whichever state organ the power to decide on judicial appointments lies;
>
> – the new extraordinary appeal procedure raises concerns in relation to legal certainty and, when considered in combination with the possibility of a far reaching and immediate recomposition of the Supreme Court, in relation to the separation of powers.
>
> (b) As regards ordinary courts,
>
> – by decreasing the retirement age of judges while making prolongation of the judicial mandate conditional upon the discretionary decision of the Minister of Justice, the new rules undermine the principle of irremovability of judges which is a key element of the independence of judges;
>
> – the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts without being bound by concrete criteria, with no obligation to state reasons, with no possibility for the judiciary to block these decisions and with no judicial review available may affect the personal independence of court presidents and of other judges.
>
> (c) As regards the National Council for the Judiciary,
>
> the concerns concerning the overall independence of the judiciary are increased by the termination of the mandate of all judges-members of the National Council for the Judiciary and by the reappointment of its judges-members according to a process which allows a high degree of political influence."

72. The effects of reforms in 2017 were summarised by the Venice Commission in a Joint Urgent Opinion dated 16 January 2020. The Opinion was requested by the Marshal of the Polish Senate, Mr Tomasz Grodzki on 30 December 2019, in relation to amendments to the Law on Organisation of Common Courts, the Act on the Supreme Court and some other Acts, adopted by the Sejm on 20 December 2019 (the 2019 Reforms). These amendments were to be examined by the Senate at its upcoming January 2020 session. For this reason, the Bureau of the Venice Commission authorised the preparation of an Urgent Opinion by the rapporteurs. A Venice Commission delegation visited Warsaw on 9 and 10 January 2020 and met with the requesting authority and others and published its Opinion on 16 January 2020.

73. The Commission said at [8]:

> "8. … As a result of the 2017 reform:
>
> • The judicial community in Poland lost the power to delegate representatives to the National Council of the Judiciary (the NCJ), and hence its influence on recruitment and promotion of judges. Before the 2017 reform 15 (out of 25) members of the NCJ were judges elected by their peers. Since the 2017 reform those members are elected by Parliament. Taken in conjunction with the immediate replacement, in early 2018, of all the members appointed under the old rules, this measure led to a far reaching politicisation of the NCJ;
>
> • Changes in the method of nomination of candidates to the position of the First President of the Supreme Court deprived the participation of the judges in the selection procedure of any meaningful effect and put the decision in the hands of the President of the Republic. At the same time, the Minister of Justice (who is, in the Polish system, also the Prosecutor General) obtained the power to appoint/dismiss court presidents of the lower courts at his discretion during the transitional period of six months. In 2017-2018 the Minister of Justice replaced over a hundred court presidents and vice-presidents. After this period, removal of court presidents remained in the hands of the Minister, with virtually no effective checks attached to this power.7 The Minister of Justice also obtained other "disciplinary" powers vis-à-vis court presidents, and presidents of higher courts, in turn, have now large administrative powers vis-à-vis presidents of lower courts. That created a hierarchical structure of subordination within the judiciary, in administrative matters, with the Minister of Justice/Prosecutor General at its top;
>
> • These measures were coupled with the reinforcement of the mechanisms of control within the judiciary: two new chambers within the Supreme Court were created in 2017: the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs (the Extraordinary Chamber). These new chambers were staffed with newly appointed judges, selected by the new NCJ, and entrusted with special powers – including the power of the Extraordinary Chamber to quash final judgments taken by lower courts or by the Supreme Court itself by way of extraordinary review, or the power of the Disciplinary Chamber to discipline other judges. That put these new chambers above all others and created de facto a 'Supreme Court within a Supreme Court'."

74. At [10] it concluded:

> "10. The simultaneous and drastic reduction of the involvement of judges in the work of the National Council for the Judiciary, filling the new chambers of the Supreme Court with newly appointed judges, mass replacement of court presidents, combined with the important increase of the powers of the President of the Republic and of the Minister of Justice/Prosecutor General – and this was the result of the 2017 reform – was alarming and led to the conclusion that the 2017 reform significantly reduced the independence of the Polish judiciary vis-à-vis the Government and the ruling majority in Parliament."

The 2019 reforms

75. The effects of the 2019 reforms were summarised by the Venice Commission in its Joint Urgent Opinion at [11]-[17]. At [7] the Commission commented that the 2019 amendments were the latest link in the series of reforms, starting from the reform of the Constitutional Tribunal in late 2015 and early 2016, which were followed by the amendments to the laws on the judiciary of 2017. Section B ([11] et seq) is entitled 'Developments in 2018 – 2019'. At [11] the Commission said:

> "11. In the 2017 Opinion the Venice Commission noted that 'the Polish authorities were open to dialogue' ([132]). Despite that, the reform was adopted and implemented without any major changes. Reorganisation of the NCJ and mass replacement of court presidents by the Minister of Justice was followed by an intensification of the disciplinary procedures against ordinary judges. Inquiries ('explanatory proceedings') were opened by the disciplinary officers in respect of more than forty judges who were vocal in criticizing the reform or who questioned the legitimacy of the newly created judicial chambers or of other judges appointed under the new rules."

76. At [13] the Commission noted that on 19 November 2019 the CJEU gave judgment in *AK and others (Independence of the Disciplinary Chamber of the Supreme Court* (C 585/18, C 624/18 and C 625/18) [2020] 2 CMLR 10 following a request for preliminary ruling by the Supreme Court's Chamber of Labour Law and Social Insurance (the Labour Chamber) ((*Sąd Najwyższy (Izba Pracy i Ubezpieczeń Społecznych)*). The issue before the CJEU was whether Article 47 of the EU Charter precluded cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not independent and impartial (in that case, the newly established Disciplinary Chamber of the Supreme Court, created as part of the 2017 reforms). The CJEU noted that although one or other of the factors it outlined at [146]-[151] in relation to the Disciplinary Chamber (eg, relating the appointment of new judges and the lowering of the retirement age) might not lead to the conclusion that the Disciplinary Chamber lacked independence and impartiality:

> "152. … that may, by contrast, not be true once they are taken together, particularly if the abovementioned assessment as

> regards the [NJC] were to find that that body lacks independence in relation to the legislature and the executive."

77. The CJEU reaffirmed the principle of the primacy of EU law in EU member States and ruled that national courts had not only the right but the obligation to disapply provisions of national law granting jurisdiction to such a court (judgment, [166]). The CJEU considered that a court is not an independent and impartial tribunal when 'the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts […] as to the direct or indirect influence of the legislature and the executive and its neutrality […]' ([171]).

78. At [15] the Venice Commission noted that in *AK and others* the CJEU did not decide itself on the matter of independence of either the Disciplinary Chamber or the NCJ but had left this decision to the referring court (i.e., the Labour Chamber), to be taken based on the guidance provided by the CJEU judgments. In doing so, the CJEU stated that national courts applying EU law have a duty to disregard provisions of the national law if the body, which has, under the national rules, jurisdiction to hear a case where the EU law may be applied, does not meet the requirements of independence and impartiality, according to the test proposed by the CJEU.

79. Following the CJEU's judgment, on 5 December 2019 the Labour Chamber concluded that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial tribunal and that the NCJ was also not independent and impartial. The Venice Commission noted that despite this judgment, the Disciplinary Chamber had continued its activities ([16]). It said at [17]:

> "17. In sum, the Polish legal order faces a schism between the old judicial institutions and judges, on one side, and, on the other, those bodies and judges who were created/appointed on the basis of the new rules introduced by the legislative amendments of 2017. There is a risk of legal chaos with the decisions of some courts not recognised as valid by other courts."

80. The Venice Commission then turned to the 2019 legislative amendments. The legislation in question has been dubbed in certain quarters 'the Muzzle Act', because of its perceived likely effect on the ability of judges to speak out on various topics. The effect of the legislative amendments considered in the opinion were summarised by the Commission at [19] as follows:

    a. they prohibit any political activity of judges and oblige them to disclose publicly their membership in associations;

    b. they declare that any person appointed by the President of the Republic is a lawful judge, and it is prohibited to question his/her legitimacy. Doing so is a disciplinary offence punishable, potentially, with dismissal. Only the Chamber of Extraordinary Control and Public Affairs (created in 2017 and having the power to quash final judgments taken by lower courts or by the Supreme Court itself by

way of extraordinary review) can decide whether a judge is independent and impartial;

c. they introduce new disciplinary offences and sanctions in respect of judges and court presidents;

d. they transfer some competencies of the assemblies of judges to the colleges composed of the court presidents appointed by the Minister of Justice;

e. they change the process of the election of the First President of the Supreme Court, lowering the quorum to 32 judges (out of approximately 120) in the third round of voting.

81. At [24] the Commission explained that amended Article 107(1) of the Act on the Common Courts makes it a disciplinary offence to question the legitimacy of the appointment of other judges, and the validity of the 'constitutional mandate of an organ of the Republic of Poland" (p3). It also makes it an offence for judges to be involved in 'public activities that are incompatible with the principle of judicial independence and the impartiality' (p4 of Article 107(1)). New Article 9d provides that the bodies of judicial self-government cannot deliberate on 'political matters', in particular, to adopt 'resolutions undermining the principles of functioning of authorities of the Republic of Poland and its constitutional bodies'.

82. At [26] the Commission said that given the context in which the amendments were introduced, and the language of the new provisions, it was clear that they were aimed essentially at suppressing criticism of the manner in which the new NCJ was formed, and of the composition and powers of the newly created chambers. It commented that the formula used in Article 107 was very broad and did not take into account the fact that the criticism of the recent legislative amendments (if that is what new Article 107 was aiming at) contributed to matters of public interest. Thus, Article 107, as formulated, might lead to results incompatible with Article 10 of the ECHR

83. The Commission then considered the amendments prohibiting the questioning of the lawfulness of an appointment and said they eliminated the competence of the Polish courts to examine whether another court decision was issued by a person appointed as a judge in compliance with the Constitution, European law and other international legal standards. It said at [31] that these amendments were seemingly designed to have a nullifying effect on the CJEU ruling of 19 November 2019 in *AK and others* and the Labour Chamber's judgment of 5 December 2019, and on other pending proceedings where the competence of the newly appointed judges has been challenged. At [37] it said this represented a serious challenge to the principle of the primacy of EU law and that Polish courts dealing with the consequences of the CJEU judgment of 19 November 2019, or those confronted with an issue of judicial independence in a different context, would be put in an impossible position of choosing between following the requirements of the EU law as interpreted by the CJEU, or using legal avenues provided by the Treaty on the Functioning of the European Union (TFEU), and abiding by the new law.

84. At [41] the Commission said that some of the amendments would make it impossible to challenge a judge on the ground that the case has been allocated to him/her

unlawfully and/or arbitrarily, or that the rules on territorial and substantive jurisdiction were breached. This provision may lead to abusive redistribution of cases to 'loyal' judges. Such arbitrary allocation of cases is further facilitated by new provisions on the distribution of work-load in the courts which would increase the discretion of the court presidents.

85. In relation to new disciplinary offences and sanctions, at [44] the Commission said that some of the changes prohibited 'acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary' and 'an infringement of the dignity of the office'. It said both of these invited very subjective interpretations and 'could easily be abused to interfere improperly in judicial roles'. It also noted that the Minister would have a virtually unrestrained power to dismiss court presidents

86. At [58] the Commission recalled the conclusion from its 2017 Opinion that the reforms initiated by the Government had enabled the legislative and executive branches to interfere in a 'severe and extensive manner' in the administration of justice and thereby 'posed a grave threat to the judicial independence'. It expressed its conclusions at [59]-[62]:

> "59. Unfortunately, some of the December 2019 amendments may be seen as further undermining the independence of the judiciary, while trying to resolve problems resulting from the reform of 2017. Thus, by virtue of those amendments, the judges' freedom of speech and association is seriously curtailed. Polish courts will be effectively prevented from examining whether other courts within the country are 'independent and impartial' under the European rules. The participation of judges in the administration of justice is further reduced: bodies of judicial self-governance are replaced, in important matters, with the colleges composed of the court presidents appointed by the Minister of Justice. New disciplinary offences are introduced and the influence of the Minister of Justice on disciplinary proceedings is increased further. Appeal courts will no longer be able to assess the correct composition of lower level court chambers, depriving litigants of an important guarantee. Provisions are introduced which could further reduce the role of the judges of the Supreme Court in the process of selection of the First President. Finally, some of those provisions may be interpreted as having a nullifying effect in respect of the judgments which are already final.
>
> 60. The Venice Commission understands that Polish legal order faces a difficult situation: as a result of the controversial reform of 2017, "old" judicial institutions de facto refused to recognise the legitimacy of the "new" ones. This "legal schism" should be quickly resolved, which will certainly require further legislative amendments. The amendments of December 2019, however, are not suitable to achieve this goal. They diminish judicial independence and put Polish judges into the impossible situation

> of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments. Thus, the Venice Commission recommends not to adopt those amendments.
>
> 61. Other solutions have to be found. In order to avoid further deepening of the crisis, the Venice Commission invites the Polish legislator to seriously consider the implementation of the main recommendations contained in the 2017 Opinion of the Venice Commission, namely:
>
> • to return to the election of the 15 judicial members of the National Council of the Judiciary (the NCJ) not by Parliament but by their peers;
>
> • to significantly revise the composition and internal structure of the two newly created 'super-chambers', and reduce their powers, in order to transform them into normal chambers of the Supreme Court;
>
> • to return to the pre-2017 method of election of candidates to the position of the First President of the Supreme Court, or to develop a new model where each candidate proposed to the President of the Republic enjoys support of a significant part of the Supreme Court judges;
>
> • to restore the powers of the judicial community in the questions of appointments, promotions, and dismissal of judges; to ensure that court presidents cannot be appointed.
>
> 62. Further legislative measures will be required to implement those recommendations, and the Venice Commission remains at the disposal of the Polish authorities for further assistance in this matter."

87. The reforms took effect on 14 February 2020 and resulted in the European Commission beginning infringement proceedings against Poland with the sending of Letter of Formal Notice to Poland on 29 April 2020. In its press release the Commission said:

> "The new law on the judiciary undermines the judicial independence of Polish judges and is incompatible with the primacy of EU law. Moreover, the new law prevents Polish courts from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice. After carrying out an analysis of the legislation concerned, the Commission concluded that several elements of the new law violate EU law."

88. The Commission issued further Letters of Formal Notice later in December 2020.

Other evidence relied on by the Appellants

89. The Appellants also relied on a report from the Polish organisations Iustitia and Lex Super Omnia, 'Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019'. Iustitia describes itself as the largest association of judges in Poland, with over 3500 members. In the report's preamble Iustitia declares its main mission to be the defence of the principles of a democratic state of law, namely, freedom, rights and civil liberties. Lex Super Omnia is an association of independent prosecutors. The report is a collection of suggested examples of action being taken against judges and prosecutors who have opposed the judicial reforms. The report runs to over 200 pages. It is sufficient to quote from the Introduction:

> "In 2017, as part of a package of legal changes to the judiciary, a disciplinary system was created in Poland to ensure that judges were subservient to the political will of the authorities. Piotr Schab and his deputies, Przemysław W. Radzik and Michał Lasota, the disciplinary prosecutor of common court judges, appointed by the Minister of Justice and Prosecutor General, almost from the moment of their appointment, have targeted judges who opposed unconstitutional changes in the judiciary. There can be many pretexts: a public statement, putting on a T-shirt with the inscription 'Constitution', asking the Court of Justice of the European Union for a preliminary ruling, or a verdict which does not in line with the intention of the prosecution or political authority. Disciplinary proceedings are by no means the only repressions that affect judges who demand that other authorities respect the rule of law in Poland. Such judges either have their departments closed or the scope of their activities is changed so that they have to rule on cases with which they have not previously been in contact. It is easier in such a situation to make a mistake and give a pretext for disciplinary proceedings. This is a report which is a compilation of the most blatant cases of repression against Polish judges."

90. The Appellants also relied on expert evidence from two Polish advocates. In their first report of 18 August 2020 at [48] they noted a growing tendency on the part of the Polish authorities to institute disciplinary proceedings against judges in connection with their judicial activities, and they give a number of examples.

The CJEU judgment in *L and P* (17 December 2020)

91. The CJEU again considered the operation of the EAW scheme in relation to Poland, and in particular in light of developments since 2018 in its judgment in *L and P* (Joined Cases C-354/20 PPU and C-412/20 PPU). Advocate General Campos Sánchez-Bordona delivered his Opinion on 12 November 2020 and the Court gave its judgment on 17 December 2020.

92. The Court's judgment concerned the interpretation of Article 19(1) of the TEU; the second paragraph of Article 47 of the EU Charter; and the EAW Framework Decision. It was made following requests for a preliminary ruling in proceedings in the Netherlands concerning the execution of two Polish EAWs in connection with criminal proceedings against L for drug and other offences, and for the purposes of executing a custodial sentence imposed on P for threatening behaviour and other offences.

93. Article 19(1) of the TEU provides:

> "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

94. At [14] the CJEU summarised events that had occurred since the judgment in *LM* in 2018, which had caused the Dutch referring court to doubt the independence of the judiciary in Poland:

a. The CJEU's judgment in *AK and others* and its judgment of 26 March 2020 in *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18). The latter judgment concerned references for a preliminary ruling by two Polish courts. The CJEU said that the requests for a preliminary ruling expressed concern that disciplinary proceedings could be brought against the single judge in charge of each case in the main proceedings if that judge were to give particular rulings ([5]). Those concerns had been prompted, in essence, by reforms which meant 'the objectivity and impartiality of disciplinary proceedings concerning judges are no longer guaranteed and the independence of the referring courts is thereby affected'.

b. the judgment of the Labour Chamber of 5 December 2019, referred to earlier, concerning the independence and impartiality of the NCJ and the Disciplinary Chamber;

c. the action brought by the European Commission against Poland for infringements of EU law in relation to the Disciplinary Chamber and other matters, *Commission v Poland* (Case C-791/19). We consider this case in detail later.

d. the December 2019 reforms, discussed in the Venice Commission's Urgent Opinion, which came into force on 14 February 2020, and which led to infringement proceedings against Poland by the Commission (see above);

e. a hearing on 9 June 2020 before the Disciplinary Chamber concerning the lifting of the criminal immunity of a Polish judge and the delivery of a judgment on the same date.

95. The Court said at [15]:

> "15. The referring court considers, on the basis, inter alia, of those new matters, that the independence of the Polish courts, including of the court which issued the European arrest warrant at issue in the main proceedings, is not ensured. In the opinion of the referring court, Polish judges run the risk of being the subject of disciplinary proceedings before a body whose independence is not ensured, in particular where those judges determine whether a judge or a court satisfies the safeguards of independence required by EU law."

96. The questions referred to the CJEU in the case of L were as follows:

> "(1) Do [the EAW Framework Decision], the second paragraph of Article 19(1) TEU and/or the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing a [European arrest warrant] issued by a court where the national legislation of the issuing Member State has been amended after that [European arrest warrant] was issued such that the court no longer meets the requirements of effective or actual judicial protection since that legislation no longer guarantees the independence of that court ?
>
> (2) Do [the EAW Framework Decision] and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing a [European arrest warrant] when it has established that there is a real risk in the issuing Member State of breach of the fundamental right to an independent tribunal for any suspected person – and thus also for the requested person – irrespective of which courts of that Member State have jurisdiction over the proceedings to which the requested person will be subject and irrespective of the requested person's personal situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the [European arrest warrant], where that real risk is related to the fact that the courts of the issuing Member State are no longer independent on account of systemic and generalised deficiencies ?
>
> (3) Do [the EAW Framework Decision] and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing a [European arrest warrant] when it has established that:
>
> – there is a real risk in the issuing Member State of breach of the fundamental right to a fair trial for any suspected person, where that risk is connected with systemic and generalised deficiencies relating to the independence of that Member State's judiciary,

> – those systemic and generalised deficiencies are therefore not only liable to have negative consequences, but actually do have such consequences for the courts of that Member State with jurisdiction over the proceedings to which the requested person will be subject, and
>
> – there are therefore serious and established grounds for believing that the requested person runs 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,
>
> even though, aside from those systemic and generalised deficiencies, the requested person has not expressed any specific concerns, and even though the requested person's personal situation, the nature of the offences for which he is being prosecuted and the context that forms the basis of the [European arrest warrant], aside from those systemic and generalised deficiencies, do not give rise to fears that the executive and/or legislature will exert concrete pressure on or influence his trial ?"

97. In the case of *P*, at [24] the Court referred to the view expressed by the Dutch referring court that a court which issues an EAW must satisfy the conditions necessary to ensure effective judicial protection both where the surrender of the requested person is sought for the purpose of criminal prosecution and where it is sought for the purpose of the execution of a custodial sentence.

98. The question referred was as follows:

> "Do Framework Decision [2002/584], the second subparagraph of Article 19(1) [TEU] and/or the second paragraph of Article 47 of the [Charter] indeed preclude an executing judicial authority from executing a European arrest warrant issued by a court in the case where that court does not meet the requirements of effective judicial protection/actual judicial protection, and at the time of issuing the European arrest warrant already no longer met those requirements, because the legislation in the issuing Member State does not guarantee the independence of that court, and at the time of issuing the European arrest warrant already no longer guaranteed that independence ?"

99. The Court said it was appropriate to consider the questions in both cases together. It said the issue raised by the questions was, in essence, whether Article 6(1) and Article 1(3) 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.

100. Article 6(1) of the EAW Framework Decision provides:

> "1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State."

101. The Court said the first issue was whether Article 6(1) must be interpreted as meaning that an executing judicial authority may deny the status of 'issuing judicial authority', within the meaning of that provision, to the court which issued a EAW on the sole ground that it has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which existed at the time of the issue of that arrest warrant or which arose after that issue ([34]).

102. The Court said that executing judicial authorities may, in principle, refuse to execute an EAW only on the grounds for non-execution exhaustively listed in the EAW Framework Decision, and that execution of the warrant may be made subject only to one of the conditions exhaustively laid down in Article 5. Accordingly, while execution of the EAW constitutes the rule, refusal to execute it is intended to be an exception which must be interpreted strictly (*LM*, [41]). That was because the principle of mutual trust between Member States requires all Member States to consider that all the other Member States are complying with EU law. Further the EAW Framework Decision makes clear that Member States are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the EAW Framework Decision ([35]-[37]).

103. However, the principle of mutual recognition proceeds from the assumption that only EAWs, within the meaning of Article 1(1) of the EAW Framework Decision, must be executed in accordance with the provisions of that decision, which requires that such a warrant, which is classified in that provision as a 'judicial decision', be issued by a 'judicial authority' within the meaning of Article 6(1). The latter term implies that the authority concerned acts independently in the execution of those of its responsibilities which are inherent in the issuing of an EAW ([38]).

104. The Court said that an executing judicial authority which has evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State which existed when the EAW was issued, or which arose after it was issued, cannot deny the status of 'issuing judicial authority', within the meaning of Article 6(1) of the EAW Framework Decision, to all judges or all courts of that Member State acting by their nature entirely independently of the executive. The existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case ([41], [42]). An interpretation to the contrary would amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond exceptional

circumstances,, by leading to a general exclusion of the application of those principles in the context of EAWs issued by the courts of the Member State concerned by those deficiencies ([43]).

105. The Court then turned to the second issue. It said it had to determine whether Article 1(3) of the EAW Framework Decision should be interpreted as meaning that, where the executing judicial authority, has evidence of a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the EU Charter, because of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, it may *presume* that there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State, 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.

106. The Court noted that in *LM*, [79], it had said that where there was material, such as a Reasoned Proposal under Article 7(1) of the TEU, indicating that there was a real risk of breach of the fundamental right to a fair trial on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, such a specific and precise personal determination had to be made ([52]).

107. At [53]-[55], the Court said that the possibility of refusing to execute an EAW on the basis of Article 1(3), as interpreted in *LM*, required a two-step examination:

    a. firstly, whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary (*LM*, [61]);

    b. second, if so, the executing authority had to determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State pursuant to Article 15(2) of the EAW Framework Decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State (*LM*, [74]-[77]).

108. At [57]-[58] the Court re-affirmed what it had said in *LM at* [72], namely that the implementation of the EAW 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, including that of the rule of law, determined by the European Council pursuant to Article 7(2), with the consequences set out in Article 7(3). It is only if the European Council were to adopt a decision such as this, and the Council were then to suspend the EAW Framework Decision in respect of the Member State concerned that the executing judicial authority would be required to refuse automatically to execute any EAW 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 or her fundamental right to a fair trial will be affected (*LM*, [72]).

109. At [59]-[61] the Court said:

> "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."

110. As regards the question whether the executing judicial authority must, where appropriate, take account of systemic or generalised deficiencies so far as concerns the independence of the judiciary in the issuing Member State which may have occurred after the issue of the EAW whose execution is sought, the Court recalled that, under Article 1(1) of the EAW Framework Decision, an EAW may be issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, both for the purposes of conducting a criminal prosecution and for the purposes of executing a custodial sentence or detention order.

111. In making the necessary specific and precise individual determination of risk, the executing authority can take into account events occurring after the EAW has been issued, in both accusation and conviction cases, in the latter situation, where the person involved will be subject to new court proceedings, on account of the bringing of an action relating to the execution of that custodial sentence or that detention order or of an appeal against the judicial decision the execution of which is the subject of that EAW, as the case may be. In conviction cases the executing judicial authority must also examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the EAW have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of the EAW ([65]-[68]).

112. At [69] the Court concluded:

> "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."

113. On 10 February 2021 the referring Dutch court in L's case refused to order his extradition, finding that surrender would be contrary to his fundamental rights (ECLI: NL: RBAMS: 2021: 420).

The CJEU's judgment in *AB and others* (C-824/18)

114. Recommendations for appointment to the Supreme Court generated much litigation in Poland. In particular, a candidate, AB, whom the NCJ had not recommended for appointment to the Civil Chamber, challenged the NCJ's decision. On 26 June 2019 the Supreme Administrative Court made a final reference for a preliminary ruling to the CJEU.

115. The CJEU gave judgment on 2 March 2021: *AB and others v Krajowa Rada Sądownictwa and others* (C-824/18). The reference concerned changes to Polish law which, in effect, prevented future challenges to decisions of the NCJ not to recommend candidates for appointment, and discontinued existing appeals. At [269] of its judgment the CJEU ruled, in summary, that where amendments are made to the national legal system which, firstly, deprive a national court of its jurisdiction to rule in on appeals lodged by candidates for positions as judges at a court such as the Supreme Court against decisions of the NCJ not to put forward their application, but to put forward those of other candidates to the President for appointment to such positions; and, second, declare such appeals to be discontinued by operation of law while they are still pending, ruling out the possibility of their being continued or lodged again; and, third, in so doing, deprive such a national court of the possibility of obtaining an answer to the questions that it has referred to the CJEU for a preliminary ruling then:

> "- Article 267 TFEU [Treaty on the Functioning of the European Union] and Article 4(3) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put to it by that court and of precluding any possibility of a national court repeating in the future questions similar to those questions;
>
> - the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed, by the President of the Republic of Poland, on the basis of those decisions of the Krajowa Rada Sądownictwa (National Council of the Judiciary), to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence

> of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law."

116. Article 267 of the TFEU provides:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

Recent material

117. In late July 2021, whilst we were preparing this judgment, counsel for the Appellants sent us further material for us to consider. This consisted of: the judgment of the European Court of Human Rights (ECtHR) in *Reczkowicz v Poland*, Application 43447/19 (22 July 2021); the decision of the CJEU in *Commission v Poland* (C791-19) (15 July 2021); a press release dated 19 July 2021 from the Registrar to the ECtHR concerning the application to the Court in *Tuleya v Poland (No 2)*, Application 51751/20; the decision of the Polish Constitutional Tribunal in Case P 7/20 (15 June 2021); and a collection of press articles about these events in Poland, mainly taken from the 'Rule of Law' website (www.ruleoflaw.pl).

118. We can summarise the salient parts of this material as follows.

Reczkowicz v Poland

119. In this case the applicant, who is a barrister, was suspended from practice in 2017 for three years by a Bar Chamber Disciplinary Court in Gdańsk for disciplinary offences relating to the services she had provided to clients, and for breaches of an earlier disciplinary sanction. She appealed, but the appellate tribunal dismissed her appeal. She then lodged a cassation appeal with the Supreme Court. On 14 February 2019 a panel of three judges of the Disciplinary Chamber dismissed her appeal without giving reasons. She complained that the Disciplinary Chamber of the Supreme Court

that dealt with her cassation appeal following the imposition of sanctions upon her by a Bar Disciplinary Court had not been an independent and impartial 'tribunal established by law', and alleged a breach of Article 6(1) of the ECHR.

120. At [177] of its judgment the ECtHR noted that the case belongs to a group of thirty-eight applications against Poland lodged in 2018-2021, concerning various aspects of the reorganisation of the Polish judicial system. As at the date of judgment, the Court had given notice of twenty-two applications to the Polish Government, in accordance with Rule 54(2)(b). In most cases, the applicants' complaints either relate to the issue of whether the newly established chambers of the Supreme Court, in particular the Disciplinary Chamber, have attributes required of a 'tribunal established by law' within the meaning of Article 6(1) of the ECHR, or to the questions linked with the jurisdiction of the Disciplinary Chamber in disciplinary proceedings concerning judges, prosecutors and members of the legal profession. Some cases also concern allegations that judicial formations including judges of the ordinary courts appointed by the President of Poland following a recommendation from the new NCJ, as composed by virtue of the 2017 reforms, fail to meet the requirements of a 'tribunal established by law'. The Court emphasised that:

> "177. … Having regard to the variety of legal and factual issues arising in the above group of cases, the Court would emphasise at the outset that its task in the present case is not to consider the legitimacy of the reorganisation of the Polish judiciary as a whole but to assess the circumstances relevant for the process of appointment of judges to the Disciplinary Chamber of the Supreme Court following the entry into force of the 2017 Act on the Supreme Court establishing that Chamber."

121. At [178] it added:

> "178. The Court further notes that it is a matter of common knowledge that the reorganisation of the judiciary in Poland initiated by the Government in 2017 and implemented by the successive amending laws … has, since then, been the subject not only of intense public debate in Poland and at European level but also of numerous proceedings before the Polish courts and the CJEU, of other actions before the European Union's institutions, including the procedure under Article 7(1) TEU before the European Commission, of European Parliament resolutions, of the PACE monitoring procedure and its resolutions, and of various reports of the Council of Europe's bodies, the UN, the OSCE/ODIHR and the European Networks of Councils for the Judiciary] ..."

122. The Court's judgment is lengthy and describes in considerable detail the legislative judicial reforms in Poland since 2015, some of which we have already addressed. In the following paragraphs we deal with some additional matters. Except where noted, paragraph numbers refer to the ECtHR's judgment.

123. At [48] onwards the Court considered decisions of the Polish Supreme Court following the CJEU's ruling in *AK and others* on 19 November 2019 (see above). It noted that on 23 January 2020 three joined Chambers of the Supreme Court issued a joint resolution that the NCJ was not an independent and impartial body, and that this had led to defects in the procedures for the appointment of judges carried out on the basis of the NCJ's recommendations. With respect to the Disciplinary Chamber, in the same decision, the Supreme Court took into account its organisation, structure and appointment procedure and concluded that it structurally failed to fulfil the criteria of an independent court. Accordingly, the judgments given by the Disciplinary Chamber were not judgments given by a duly appointed court.

124. In consequence, according to the Supreme Court's resolution, court formations including Supreme Court judges appointed through the procedure involving the NCJ were 'unduly composed' within the meaning of the relevant provisions of the domestic law.

125. In the wake of this decision, the Ministry of Justice issued a press release calling it 'ineffective' and 'invalid' ([106]).

126. On 24 February 2020 the Prime Minister referred to the Constitutional Court the question of the compatibility of the Supreme Court's resolution of 23 January 2020 with several provisions of the Polish Constitution, the Charter, and the ECHR.

127. On 20 April 2020 the Constitutional Court issued a judgment declaring that the Supreme Court's resolution of 23 January 2020 was incompatible with various Articles of the Constitution, Articles 2 and 4(3) of the TEU and Article 6(1) of the ECHR. The kernel of its reasoning, as set out in [117] of the ECtHR's judgment, is that it is incompatible with the CJEU's approach to independence, and Article 6(1) of the ECHR, for one set of judges to be able to decide whether other judges have been properly appointed or not.

128. In a decision given on 21 April 2020, the Constitutional Court affirmed the competence of the President to appoint judges on the recommendation of the NCJ ([118]-[120]).

129. On 6 May 2021 the Supreme Administrative Court gave judgments in five cases in which it held that the NCJ did not offer sufficient guarantees of independence from the legislative and executive powers and that the President of Poland's announcement of vacant positions in the Supreme Court in May 2018, as having been done without the Prime Minister's countersignature, was contrary to Article 144(2) of the Constitution and had resulted in a deficient procedure for judicial appointments [(122)].

130. At [126] et seq the Court surveyed international material on the situation in Poland, including from: the UN Special Rapporteur on the Independence of Judges and Lawyers; the OSCE's Office for Democratic Institutions and Human Rights (ODIHR); Council of Europe (including the Venice Commission); the EU; and the CJEU.

131. The Court then turned to the merits of the applicant's case. At [185] it concluded that Article 6(1) of the ECHR under its civil head applied to the impugned proceedings before the Disciplinary Chamber which the applicant complained about. The applicant submitted that her case had not been heard by an impartial and independent 'tribunal established by law' and that this constituted a breach of Article 6(1). That was because, first, the judges who had dealt with her case had been selected on a political basis and had not been independent or impartial. Second, the entire Disciplinary Chamber was of a political character, as shown by its activity against the judges who had opposed the reforms of the judicial system. She also said that the process of appointment of Supreme Court judges had not been transparent or independent, and was in breach of domestic law, including the Constitution. The applicant further pointed to the CJEU's interim ruling of 8 April 2020, ordering the suspension of relevant provisions governing the activity of the Disciplinary Chamber in the disciplinary proceedings concerning judges. She also relied on the decision of the Polish Supreme Court of 5 December 2019 following the CJEU's judgment of 19 November 2019 in *AK and others* and the resolution of the joined Chambers of 23 January 2020.

132. The Government submitted that the court which dealt with the applicant's case had been a 'tribunal established by law' as required by Article 6(1) of the Convention. In particular, there had been no manifest breach of domestic law in the process of appointment of judges to the Supreme Court.

133. It stressed that all judges in Poland, including those sitting in the Disciplinary Chamber, were appointed by the President, upon a proposal of the NCJ, for an indefinite period of time, and the mere fact that the judges were appointed by an executive body, the President, did not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality if once appointed they were free from influence or pressure when carrying out their role ([194]). The Government also referred to systems of judicial appointments in Europe and concluded that the Polish approach did not differ from other countries. The fact that the judges were appointed by the executive seemed to be a rule in European States. Furthermore, the Convention did not imply an obligation to apply a specific mode of appointment of judges to the highest courts of the Contracting States and States enjoyed a margin of appreciation [(196]). According to the Government, the reform of the NCJ and Supreme Court had been carried out in accordance with the Constitution and national legislation ([200]). The Government reiterated that even in its judgment of 19 November 2019 in *AK and others* the CJEU had not challenged the legitimacy of the NCJ or the Disciplinary Chamber. It had merely pointed out that the national court could assess, in an individual case, whether the national authority – competent under national law – was an independent and impartial tribunal within the meaning of Article 47 of the Charter of Fundamental Rights. Thereby, the CJEU had confirmed that it respected the areas reserved for the member States ([201]).

134. The Court's assessment begins at [216] of its judgment. At [221]-[224] it set out the three-stage test established by the Grand Chamber in *Guðmundur Andri Ástráðsson v Iceland* ([GC], Applcn 26374/18, GC, 1 December 2020), in order to assess whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law:

> "222. In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right. If this is the case, the Court must pursue its examination under the second and third limbs of the test set out below, as applicable, in order to determine whether the results of the application of the relevant domestic rules were compatible with the specific requirements of the right to a 'tribunal established by law' within the meaning of the Convention (*Ástráðsson*, [244]-[245]).
>
> 223. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a 'tribunal established by law', namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment or breaches that may otherwise undermine the purpose and effect of the 'established by law' requirement must be considered to be in violation of that requirement (ibid., [246]).
>
> 224. Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a 'tribunal established by law', and thus forms part of the test itself. The assessment by the national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom (Ibid, [248] and [250])."

135. At [225]-[226] it said:

> "225. In the present case the alleged violation of the right to a 'tribunal established by law' concerns the Disciplinary Chamber of the Supreme Court, constituted following the recent reorganisation of the Polish judicial system. In particular, the applicant alleged that the judges of that Chamber were appointed by the President of Poland upon the NCJ's recommendation in manifest breach of the domestic law and the

> principles of the rule of law, separation of powers and independence of the judiciary.
>
> 226. Accordingly, the Court will examine whether the fact that the applicant's case was heard by the Disciplinary Chamber of the Supreme Court – a court to which all the sitting judges were appointed in the impugned procedure – gave rise to a violation of the applicant's right to a 'tribunal established by law'. It will do so in the light of the three-step test formulated by the Court in the case of *Guðmundur Andri Ástráðsson* (ibid., § 243)."

136. After a lengthy analysis, at [264] the Court concluded:

> "264. Having regard to all the above considerations, and in particular to the convincing and forceful arguments of the Supreme Court in the judgment of 5 December 2019 and the resolution of 23 January 2020, and that court's conclusions as to the procedure for judicial appointments to the Disciplinary Chamber being contrary to the law – conclusions reached after a thorough and careful evaluation of the relevant Polish law from the perspective of the Convention's fundamental standards and of EU law, and in application of the CJEU's guidance and case-law – the Court finds it established that in the present case there was a manifest breach of the domestic law for the purposes of the first step of the *Ástráðsson* test."

137. At [276]-[277] the Court went on:

> "276. Assessing all the above circumstances as a whole, the Court finds that the breach of the domestic law that it has established above, arising from non-compliance with the principle of the separation of powers and the independence of the judiciary, inherently tarnished the impugned appointment procedure since, as a consequence of that breach, the recommendation of candidates for judicial appointment to the Disciplinary Chamber – a condition *sine qua non* for appointment by the President of Poland – was entrusted to the NCJ, a body that lacked sufficient guarantees of independence from the legislature and the executive. A procedure for appointing judges which, as in the present case, discloses an undue influence of the legislative and executive powers on the appointment of judges is per se incompatible with Article 6(1) of the Convention and as such, amounts to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of judges so appointed.
>
> 277. In sum, the breaches in the procedure for the appointment of judges to the Disciplinary Chamber were of such gravity that

> they impaired the very essence of the right to a 'tribunal established by law'".

138. At [280]-[282] the Court set out its overall conclusion on the issue of whether the Disciplinary Chambers was a 'tribunal established by law':

> "280. The Court has established that there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court, since the appointment was effected upon a recommendation of the NCJ, established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers. The irregularities in the appointment process compromised the legitimacy of the Disciplinary Chamber to the extent that, following an inherently deficient procedure for judicial appointments, it did lack and continues to lack the attributes of a "tribunal" which is "lawful" for the purposes of Article 6(1). The very essence of the right at issue has therefore been affected.
>
> 281. In the light of the foregoing, and having regard to its overall assessment under the three-step test set out above, the Court concludes that the Disciplinary Chamber of the Supreme Court, which examined the applicant's case, was not a 'tribunal established by law'.
>
> 282. Accordingly, there has been a violation of Article 6(1) of the Convention in that regard."

139. At [283]-[284] the Court concluded that it was not therefore necessary to consider the questions of independence and impartiality.

140. Accordingly, the Court found there had been a breach of Article 6(1) in respect of the disciplinary proceedings against the applicant.

The CJEU's judgment in Commission v Poland (C-791/19) (15 July 2021)

141. As we noted earlier, in this case the European Commission brought an action before the CJEU seeking a declaration that, in adopting the new disciplinary regime applicable to judges of the Polish Supreme Court and to judges of the ordinary courts, Poland had failed to fulfil its obligations under EU law.

142. Specifically, the Commission claimed that the Court should declare that:

a. by allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts;

b. by failing to guarantee the independence and impartiality of the Disciplinary Chamber, which is responsible for reviewing decisions issued in disciplinary proceedings against judges;

c. by conferring on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts, and, therefore, by failing to guarantee that disciplinary cases are examined by a tribunal 'established by law'; and

d. by conferring on the Minister for Justice the power to appoint a Disciplinary Officer of the Minister for Justice and, therefore, by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time, and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect on the course of the disciplinary proceedings and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel and, therefore, by failing to guarantee respect for the rights of defence of accused judges of the ordinary courts,

Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

143. The Commission also submitted that by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the CJEU to be restricted by the possibility of disciplinary proceedings, Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU.

144. In response to an application by the Commission on 23 January 2020 for interim measures under Article 279 TFEU and Article 160(2) of the Rules of Procedure of the Court of Justice, in an order dated 8 April 2020 the Court ordered that Poland:

a. suspend the application of the provisions of Polish law forming the basis of the jurisdiction of the Disciplinary Chamber to rule, both at first instance and on appeal, in disciplinary cases concerning judges;

b. to refrain from referring the cases pending before the Disciplinary Chamber before a panel that does not meet the requirements of independence defined, inter alia, in the judgment of *AK and others*, 19 November 2019; and

c. inform the European Commission, at the latest one month after being notified of the Court's order, of all the measures it has adopted in order to comply fully with it.

145. Poland failed to obey this order and the Disciplinary Chamber continued in operation.

146. Advocate General Tanchev gave his Opinion on 8 May 2021, to which Ms Montgomery referred us, in which he proposed that the Court make the declarations sought by the Commission.

147. In its judgment of 15 July 2021 the Court upheld the Commission's complaints. It held that the Disciplinary Chamber was neither independent nor impartial. At [113] it said:

> "… by failing to guarantee the independence and impartiality of the Disciplinary Chamber which is called upon to rule, at first instance and at second instance, in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and, depending on the case, either at second instance or both at first instance and at second instance, in disciplinary cases concerning judges of the ordinary courts and by thereby undermining the independence of those judges at, what is more, the cost of a reduction in the protection of the value of the rule of law in that Member State for the purposes of the case-law of the Court referred to in paragraph 51 of the present judgment, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU."

148. In relation to (a) above the Court held at [157]:

> "Having regard to all the foregoing considerations, the Court considers it to be established that, in the particular context resulting from the recent reforms that have affected the Polish judiciary and the disciplinary regime applicable to judges of the ordinary courts, and in particular having regard to the fact that the independence and impartiality of the judicial body with jurisdiction to rule in disciplinary proceedings concerning those judges are not guaranteed, the definitions of disciplinary offence contained in Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not help to avoid that disciplinary regime being used in order to create, with regard to those judges who are called upon to interpret and apply EU law, pressure and a deterrent effect, which are likely to influence the content of their decisions. Those provisions thus undermine the independence of those judges and do so, what is more, at the cost of a reduction in the protection of the value of the rule of law in Poland within the meaning of the case-law referred to in paragraph 51 of the present judgment, in breach of the second subparagraph of Article 19(1) TEU."

149. In relation to (c) above, the Court held at [176]:

> "176. It follows from all of the foregoing that Article 110(3) and Article 114(7) of the Law on the ordinary courts, inasmuch as they confer on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear disciplinary proceedings in respect of judges of the ordinary courts, that is to say, judges who may

> be called upon to interpret and apply EU law, do not meet the requirement derived from the second subparagraph of Article 19(1) TEU that such cases must be examined by a tribunal 'established by law'."

150. The Court also upheld the Commission complaint in (d), supra, at [202] and [213]:

> "202. It follows from all of the foregoing that the second sentence of Article 112b § 5 of the Law on the ordinary courts, inasmuch as it undermines the independence of judges of the Polish ordinary courts by failing to ensure that their case concerning disciplinary proceedings can be heard within a reasonable time, does not meet the requirements derived from the second subparagraph of Article 19(1) TEU. Consequently, the first part of the fourth complaint must be upheld inasmuch as it relates to that provision of national legislation.
>
> …
>
> 213. National procedural rules, such as those covered by the second part of the present complaint, may, especially where, as in the present case, they are applied in the context of a disciplinary regime displaying the shortcomings referred to in paragraph 188 of the present judgment, prove to be such as to increase still further the risk of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions. The judges concerned may be led to fear, if they rule in a particular way in the cases before them, that disciplinary proceedings will be brought against them which thus fail to provide guarantees capable of meeting the requirements of a fair trial and, in particular, the requirement relating to respect for the rights of the defence. In this way, the restrictions on the rights of the defence arising from those procedural rules undermine the independence of judges of the Polish ordinary courts and thus do not meet the requirements derived from the second subparagraph of Article 19(1) TEU."

151. The Court also upheld the Commission's complaint concerning Article 267 TFEU. At [229]-[230] it said:

> "229. In the present case, it must be borne in mind that it is already apparent from the examination which led the Court to uphold the first complaint brought by the Commission that the definitions of the disciplinary offence contained in the provisions of Article 107(1) of the Law on the ordinary courts and Article 97(1) and (3) of the new Law on the Supreme Court do not meet the requirements derived from the second subparagraph of Article 19(1) TEU, since they give rise to the risk that the disciplinary regime at issue might be used for the

> purpose of creating, in respect of judges of the Polish ordinary courts, pressure and a deterrent effect which are likely to influence the content of the judicial decisions which those judges are called upon to give.
>
> 230. Such a risk also concerns the decisions by which a national court is called upon to choose to exercise its discretion under Article 267 TFEU to submit a request for a preliminary ruling to the Court of Justice or, where appropriate, to comply with its obligation to make such a reference for a preliminary ruling under that provision.
>
> 231. As attested to by the examples highlighted by the Commission … the practice initiated by the Disciplinary Officer confirms that such a risk has, to date, materialised through the opening of investigations concerning decisions whereby Polish ordinary courts have submitted requests for a preliminary ruling to the Court of Justice; investigations which have included, in particular, interviewing the judges concerned and sending those judges questionnaires concerning the question whether the references for a preliminary ruling which had thus been made by those judges were likely to have given rise to disciplinary offences."

152. Accordingly, the Court concluded at [233]-[234]:

> "233. It must be borne in mind, in that regard, first, that strict compliance with Member State obligations derived from Article 267 TFEU is required in respect of all State authorities and, therefore, in particular, in respect of a body which, like the Disciplinary Officer, is responsible for investigating, if necessary under the authority of the Minister for Justice, disciplinary proceedings that may be brought against judges. Second, as has been argued by both the Commission and the Member States intervening in support of the form of order sought by that institution, the mere fact that the Disciplinary Officer conducts investigations under the conditions referred to in paragraph 231 of the present judgment is sufficient to give concrete expression to the risk of forms of pressure and of a deterrent effect referred to in paragraph 229 of the present judgment and to undermine the independence of the judges who are the subject of those investigations.
>
> 234. It follows that the fifth complaint, alleging that the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, must be upheld."

The decision of the Polish Constitutional Tribunal in Case P 7/20

153. This was taken in respect of an application by the Polish Commissioner for Human Rights (the Ombudsman) to remove a judge of the Constitutional Tribunal, Judge JP, from participating in the case. The grounds were that he had been invalidly appointed under Polish law. In *Xero Flor w Polsce sp zoo v Poland*, Application 4907/18, 7 May 2021, the ECtHR held the Constitutional Tribunal in the applicant company's case was not a tribunal established by law, and hence there had been a violation of Article 6(1), because a member of the Tribunal, Judge MM, had been invalidly appointed. At [290] the ECtHR said that Judge MM's election had been 'vitiated' by 'grave irregularities'. The Ombudsman argued that Judge JP's election was similarly unlawful.

154. The Constitutional Tribunal dismissed the Ombudsman's application on both procedural and substantive grounds. At [1.4] of its decision the Tribunal said of Article 6(1) of the Convention and Article 19(1) TEU that 'they do not apply to the Polish Constitutional Tribunal' and that this assessment 'is not changed by the principle of precedence of a ratified international agreement over the provisions of the rank of a statute.'

155. At [2.2]-[2.3] of its decision the Tribunal said:

> "2.2 According to the Constitutional Tribunal, the ECtHR judgment of 7 May 2021, to the extent to which it refers to the Constitutional Tribunal, is based on arguments testifying to the Court's ignorance of the Polish legal system, including the fundamental constitutional assumptions specifying the position, system and role of the Polish constitutional court. To this extent, it was issued without legal grounds, overstepping the ECtHR's jurisdiction, and constitutes unlawful interference in the domestic legal order, in particular in issues which are outside the ECtHR's jurisdiction; for these reasons it must be considered as a non-existent judgment (sententia non existens).
>
> 2.3 In its judgment of 7 May 2021, the ECtHR unreasonably overstepped its jurisdiction by assessing the legality of the formation of the membership of the Constitutional Tribunal. This is an unprecedented encroachment onto the jurisdiction of the constitutional authorities of the Republic of Poland – the Sejm, which elects the judge, and the President, before whom the elected judge takes the oath.
>
> …
>
> … any attempt to undermine the status of Constitutional Tribunal judges, either by domestic or international bodies, constitutes a material breach of the rights of the Sejm and the President, as well as an infringement of the constitutional principle of the separation and balancing of powers."

156. The Tribunal added at [2.4]-[2.6] that it was not a body to which Article 6(1) of the Convention applied, on the basis that it did not decide criminal or civil matters:

> "2.4. The standard of examination in the proceedings before the ECtHR, which ended in the judgment of 7 May 2021, was Article 6(1) ECHR … The ECtHR considered this provision to be an adequate standard of examination for assessing whether the proceedings before the Constitutional Tribunal in the case that lay at the foundations of the judgment of 7 May 2021 satisfied the Convention standard of the right to a tribunal previously established by law set out therein. The above assumption is a result of the ignorance of the Polish legal order, including the provisions of constitutional rank, determining the establishment and powers of the Constitutional Tribunal. Article 6(1) ECHR unequivocally provides for the right to a court in an individual civil or criminal case. 'There is no doubt that proceedings before the Constitutional Tribunal are neither criminal nor civil proceedings in the meaning of Article 6 ECHR' (L. Bosek, M. Wild, komentarz do art. 79 Konstytucji [in:] Konstytucja RP. Tom I. Komentarz do art. 1–86, ed. M. Safjan, L. Bosek, Warsaw 2016, Legalis, Nb 13). Therefore, deciding on such matters does not lie within the competence of the Constitutional Tribunal, which is not a court in the meaning of Article 6(1) ECHR. This unambiguously arises from the constitutional position of the Tribunal and its constitutional competences.
>
> 2.5 In view of the clear instruction contained in Article 10(2) of the Constitution, the Constitutional Tribunal is a body of the judicial authority, although it does not exercise the administration of justice in the sense of adjudicating on individual civil, criminal or administrative cases. In accordance with Article 175(1) of the Constitution, the exclusive competence in this respect rests with the Supreme Court, the ordinary courts, the administrative courts and the military courts, which exercise the administration of justice in the Republic of Poland …
>
> 2.6 … the competence of the Tribunal does not allow it to be considered to be a court adjudicating on individual disputes in the meaning of Article 6(1) ECHR …"

Further proceedings by the Commission v Poland

157. On 31 March 2021 the Commission began a second set of proceedings against Poland, this time in respect of the Muzzle Law (see above) and the continued operation of the Disciplinary Chamber (*Commission v Poland*, C/204/21). The Commission seeks declarations that the Muzzle Law infringes EU law.

158. The Commission's press release stated:

> "The Commission considers that the Polish law on the judiciary undermines the independence of Polish judges and is incompatible with the primacy of EU law. Moreover, the law prevents Polish courts, including by using disciplinary proceedings, from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice.
>
> In addition, the Commission considers that Poland violates EU law by allowing the Disciplinary Chamber of the Supreme Court – the independence of which is not guaranteed – to take decisions which have a direct impact on judges and the way they exercise their function. These matters include cases of the lifting of immunity of judges with a view to bringing criminal proceedings against them or detain them, and the consequent temporary suspension from office and the reduction of their salary. The mere prospect for judges of having to face proceedings before a body whose independence is not guaranteed creates a 'chilling effect' for judges and can affect their own independence. The Commission considers that this seriously undermines judicial independence and the obligation to ensure effective legal protection, and thus the EU legal order as a whole."

159. On 14 July 2021 the Court's Vice-President made an interim order requiring Poland immediately to suspend the application of its laws relating to the powers of the Disciplinary Chamber. The following day, in a further decision in case P 7/20, the Polish Constitutional Tribunal ruled that the Court's interim orders, insofar as they entail 'the obligation of an EU Member State to implement interim measures pertaining to the organisational structure and functioning of constitutional authorities within the judicial branch of government of that Member State', are inconsistent with the Polish Constitution, and thus declined to implement the Court's order.

160. In a response the same day, the Commission issued a statement reiterating the primacy of EU law and making clear it would use its powers to safeguard the integrity of EU law.

161. Having reviewed this recent material, we did not consider it necessary to ask for further written submissions. For reasons we will explain later in the judgment, although it adds to the picture already established by the material put before us at the hearing about whether there is currently the clear risk of a serious breach by the Republic of Poland of the rule of law referred to in Article 2 TEU, as put forward by the Commission in its Reasoned Proposal, it does not alter the analysis we have to undertake, nor the application of the test in *LM* and *L and P* which we are bound to apply in the Appellants' particular cases.

Submissions on these appeals

162. We turn to the parties' cases in the matters before us.

The Appellants' submissions

163. Ms Montgomery QC began with submissions on the status of decisions of the CJEU following the UK's exit from the EU. She and Ms Malcolm QC were agreed that such decisions prior to 31 December 2020 are binding upon us, and that we are entitled to have regard to decisions after that date, in particular the Opinion of the Advocate General of 6 May 2021 in *Commission v Poland* (C-791/19) (and, we would add, the Court's judgment of 15 July 2021).

164. Ms Montgomery QC accepted that some arguments she would otherwise have wished to pursue were therefore closed off by the judgments in *LM* and *L and P*, but she reserved the right to argue before the Supreme Court (if permitted) that those cases were wrongly decided or should not be followed. The two arguments identified in her Skeleton Argument at [55(1)] and [55(2)] are: (a) that the Respondent courts cannot be issuing judicial authorities for purposes of the EAW Framework Decision or the EA 2003 because they lack the requisite independence; (b) whether a body is to be regarded as a judicial authority cannot depend solely on the outcome of the Article 7 TEU process, but that sufficient structural erosion by way of legislative changes affecting independence could produce the same outcome.

165. Turning to the merits, Ms Montgomery said (referencing *Aranyosi* Stage 1) that we would first have to determine whether there is objective and reliable information that there is currently a clear risk of a serious breach of the rule of law in Poland in relation to judicial independence and impartiality, and the right a fair trial under Article 47 of the Charter and Article 6 of the Convention. She said that there was a wealth of material supporting that conclusion. In particular, it was established by: the Commission's Reasoned Proposal under Article 7(1) TEU; *Lis No 1,* in which the Court had concluded that there was sufficient evidence of systemic and generalised deficiencies to engage *Aranyosi* Stage 2, and that further general evidence was unnecessary; and *LM*¸ [69], where the Court said that *Aranyosi* Stage 1 would be satisfied where a Member State has been the subject of a Reasoned Proposal adopted by the Commission under Article 7(1) TEU, and the executing judicial authority considers that there are systemic deficiencies at the level of that Member State's judiciary, which Ms Montgomery said there plainly were.

166. Ms Montgomery said that that the situation had only worsened since 2018. She referred us to *AK and others*, in which the Court at [147]-[152] had identified a number of structural deficits in the Disciplinary Chamber which could lead the Polish referring court to conclude that it was not independent and impartial (as in due course it did). She also relied on the loss of independence in the NCJ, the Muzzle Law and the Venice Commission's Joint Urgent Opinion about it, and to the disciplinary regime now in place for Polish judges. She pointed out, for example, that it was now a disciplinary offence for a Polish judge to question the appointment of another judge, or to make a reference to the CJEU. She pointed to passages in the Advocate General's Opinion in *L and P* at [57] and [76] and the Court's judgment at [60] regarding the need for increased vigilance, given the worsening situation, on the part of the referring court when considering whether the necessary risk to a fair trial had

been established. She also referred us to the Advocate General's Opinion of 6 May 2021 in *Commission v Poland* (C-791/19) in which he proposed that the Court declare that Poland had failed to fulfil its obligations under Article 19(1) TEU by allowing the content of judicial decisions to be treated as a disciplinary offence, as well as for other reasons (as it did in its judgment of 15 July 2021). She said the failure by Poland to abide by the Court's interim order of 9 April 2020 demonstrated how far the rule of law had been eroded.

167. Ms Montgomery then took us to a number of passages in the Advocate General's Opinion of 6 May 2021 in *Commission v Poland* (C-791/19). However, as we have said, that has now largely been superseded by the Court's judgment of 15 July 2021, which upheld all of the Commission's complaints. The Court referred, at [213], to the possibility of a disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions. It said the judges concerned may be led to fear, if they rule in a particular way in the cases before them, that disciplinary proceedings will be brought against them and which would thus fail to provide guarantees capable of meeting the requirements of a fair trial and, in particular, the requirement relating to respect for the rights of the defence. The Advocate General reached a similar conclusion in his Opinion at [80]-[81].

168. Ms Montgomery therefore said she easily satisfied *Aranyosi* Stage 1, and that we were therefore bound to carry out an *Aranyosi* Stage 2 'specific and precise' assessment. As part of that, she said we were bound to make our own inquiries of the issuing judicial authorities. She referred us to *LM*, [79], where she said the Court had made it a matter of obligation for the executing judicial authority to make enquiries under Article 15(2). (In fact, as we have said, our power to enquire arises from our inherent powers rather than Article 15(2), but the point is the same). For example, she said we should enquire as to the identity of the judge who would conduct the trial (where there was to be a trial) or impose sentence; ascertain that there would be a right of appeal, if so advised, to an independent and impartial Constitutional Tribunal; and require assurances that the judges involved would not be subjected to disciplinary measures for taking what she called these 'basic steps'. Ms Montgomery candidly accepted, however, that given we would be making enquiries of an authority which on her case was neither independent nor impartial in a country where the rule of law had been seriously eroded, she would be unlikely to accept at face value whatever replies came back (save, no doubt, in the unlikely event that the authority admitted to potential unfairness). As she put it, we would be asking for 'an island of legality within a sea of procedural illegality'.

169. On the core issue of what assessment was required, Ms Montgomery said that the issue between the parties was whether it was sufficient for her 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. She 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. She said that there was a 'specific and precise' risk, but not one she was able to say in concrete terms will arise in the Appellants' case

because they do not know who the judge will be or, in relation RW's conviction warrant, whether he will need to appeal, or what issues would arise. She said all judges would now be feeling the chilling effect of the Muzzle Law. It was therefore no longer necessary to consider the Appellant's personal situation or the nature of their offending. Distilled down, Ms Montgomery's submission was that the situation in Poland is now so grave that we can take a view on level of risk to fair trial rights, and that we should conclude that that risk has significantly increased as a result of all of the changes since 2015, so that they are liable to have a personal, specific and direct effect on the Appellants, notwithstanding the evidence is generic and systemic.

170. Ms Montgomery submitted in light of the developments we have outlined, that the Respondents cannot negative the risk that their decision-making power would be subject to external directions or instructions in particular from the executive. She said they were capable of imposing indirect pressure on judges sufficient to preclude their independence. She argued (Skeleton Argument, [73]) that the cumulative effect of the reforms has been to erode impartiality or independence at all levels of the Polish justice system. For example, by reference to the potential disciplining of judges, she said this could have a knock-on effect on ordinary criminal trials, some of which involve no political or exceptional element because if judges fear that they will be sanctioned for taking unpopular decisions (i.e., ones in favour of the defence), they are less likely to take them.

171. Finally, Ms Montgomery said there was an issue about whether the deficit in the rule of law in Poland could ever become so extreme that it could properly be held that an issuing judicial authority was not, in fact, a judicial authority for the purposes of Article 6(1) of the EAW Framework Decision and s 2 of the EA 2003. She acknowledged that a different analysis was required when one was analysing the position of judges as judicial authorities, as opposed to other types of judicial authorities such as public prosecutors. She also acknowledged that at the level of this Court her argument was foreclosed by *LM* and *L and P*. However, she said she was raising it because in two decision of the ECtHR since *L and P*, namely *Guðmundur Andri Ástráðsson v Iceland* and *Xero Flor w Polsce sp zoo v Poland* (see above), the Strasbourg court had concluded that the tribunals in question (in the latter case, the Disciplinary Chamber) were not judicial tribunals established by law for the purposes of Article 6(1) of the Convention, and thus that there was no need to investigate the question of impartiality at all. (To these two cases can be added *Reczkowicz v Poland*, which we discussed earlier).

The Respondents' submissions

172. On behalf of the Respondents, Ms Malcolm QC agreed that we were bound by pre-31 December 2020 decisions of the CJEU and were entitled take into account decisions after that date. She disagreed with some of Ms Montgomery's analysis of the EU withdrawal legislation, as we will set out later, but they were agreed on that principal issue.

173. Turning to the merits, Ms Malcolm indicated that she was not able to concede that *Aranyosi* Stage 1 was satisfied, in particular, because she did not have instructions to do so. She said in *Lis No 1* the Court had not found there to be a serious breach of the rule of law and the values in Article 2 TEU in Poland, but only a risk. She also said

that there was a body of defence for the reforms, in favour of the 'new guard' coming in, who were less likely to be influenced by what had gone before, and for the retirement of older judges who were perhaps a hold-over from the Communist era. (This is something the Venice Commission referred to at [12] of its Joint Urgent Opinion). She said there were genuinely differing views. But she accepted that whatever the merits either way, the method by which Poland had carried out the reforms had not found favour and she accepted, realistically, that there is an increasing body of concern at the international level about them. She left it for our determination whether the evidence before us demonstrates that the relevant threshold had been crossed.

174. Ms Malcolm concentrated her submissions, therefore, on *Aranyosi* Stage 2. She asked, rhetorically, whether there was any material showing that *these* particular Appellants in *their* particular circumstances which demonstrated substantial grounds for believing that that they will run a real risk of breach of their right to a fair hearing once they have been surrendered. She said the question arose whether there is there any evidence of specific problems regarding these two Appellants, in other words, any evidence which needed to be rebutted or amplified. In answer to that, she said there was not. She emphasised that they were accused or had been convicted of ordinary criminal offences; in RW's case, in relation to his conviction warrant, there was no suggestion there would be any appeal and so he would simply be returned to serve his sentence. (She accepted, however, there is a second mixed accusation/conviction EAW for RW involving offences for which he would be tried if returned).

175. Although Ms Malcolm said we had the right to make enquiries of the issuing judicial authority as part of the *Aranyosi* Stage 2 process, she said it was a submission that had come late from the Appellants. She also said that it was not a mandatory step, and that in *Lis No 1* the Court had not made any enquiries but had left it to the applicants to formulate submissions and submit evidence in support of their cases that there was a specific and precise risk in their cases. In this case, she said that the evidence which the Appellants had submitted had not identified any specific risks to them, nor any problems in the Respondent issuing judicial authorities.

176. In relation to making enquiries, for example, as to the identity of the judge who would hear the Appellants' cases, Ms Malcolm said there could be real practical problems in identifying a judge in advance, such as ill-health or other unexpected issues such as non-availability through a case overrunning. She said it would be an unwarranted intrusion into Poland's judicial system. She pointed out that it would be unlikely to find favour here if Poland made it a condition of extradition that the defendant be tried by a specific judge at Southwark Crown Court. She said there were safeguards in the random assignment of judges because it made the possibility of interference in advance of the hearing less likely. In essence, Ms Malcolm said if we asked ourselves whether there was anything which had alerted us to the position of these Appellants, so it would be necessary and useful to ask questions of the Polish authorities, then the answer was that there was no such material.

177. On the sort of evidence which might establish the necessary risk, Ms Malcolm referred us to the decision on 10 February 2021 of the Dutch referring court (the Amsterdam District Court (*Rechtbank*)) in the *L* case following the CJEU's decision in *L and P*, in which it refused extradition. L was accused of drug offences in Poland.

The translation is not especially clear, but at [5.2.1] of its judgment the Court referred to the fact that L had come to national attention and had been mentioned in a general memo to prosecutors in Poland. It was therefore submitted by L that he would not receive a fair trial in Poland. It would appear from [5.2.2] that the reference to L in the memo was in the context of a general instruction to prosecutors to look for reasons for not surrendering defendants from Poland on Dutch EAWs. This issue was addressed in the Supplementary Expert report of 10 May 2021 relied on by the Appellants. In October 2020 there were press reports that the National Prosecutor had ordered prosecutors to conduct a thorough analysis of Dutch EAWs in order to find grounds for refusing to execute them, especially in relation to the independence of the Dutch judiciary. This order was reportedly given in retaliation for the references by Dutch courts to the CJEU in *L and P*.

178. At [5.3.7] the Dutch Court noted that disciplinary proceedings had been taken against two judges at the Regional Court in Poznań, which was the issuing judicial authority in L's case. The Court also said at [5.3.8] that L's case had caught the attention of the media and politicians in Poland, so that he could not be regarded as an 'arbitrary Polish suspect', which we understand to mean an ordinary criminal defendant, but as one who had come to the 'special attention' of the authorities. At [5.3.11] the Court noted that requests for further information from Poland had either not been answered, or not been answered fully. Accordingly, for these reasons, at [5.3.12] and [6.1] the Court concluded that there were compelling grounds to conclude that L was in real danger of losing his fundamental right an independent court in Poland, and therefore that his fundamental right on a fair trial would be compromised.

179. In response to Ms Montgomery's core submission, Ms Malcolm said it was not permissible to take general systemic deficiencies affecting independence concerning, for example, judicial appointments and judicial discipline, and seek to extrapolate from them a specific risk to these individual Appellants. She said this was forbidden circular reasoning which was inconsistent with the two-stage analytical process established in *LM* and with what the CJEU had expressly said in *L and P* at [53]-[56] and [63]-[64], to the effect that the two stages had to be kept separate. She said the effect of this submission, if upheld, would be to lead to the very same end position which the CJEU held was impermissible, namely a general refusal to execute EAWs.

180. Overall, Ms Malcolm said there was no evidence that there were any features of either Appellant's specific cases that would give rise to a proper basis to refuse to execute their respective EAWs.

The status of CJEU decisions

181. As we have explained, the parties were agreed that we are bound by pre-31 December 2020 CJEU case law, and are entitled to take account of decisions after that date. Ms Montgomery reserved the right, however, to argue before the Supreme Court that the decisions in *LM* and *L and P* were wrongly decided and/or should not be followed. This was on the basis that they are 'retained EU case law' for the purposes of s 6(4)(a) and s 6(5) of the European Union (Withdrawal) Act 2018, which provides that the Supreme Court is not bound by any retained EU case law and may depart from it on the same basis that it may depart from its own previous decisions. 'Retained EU case law' is defined in s 6(7).

182. We invited and received detailed notes from the parties on this question. In her note Ms Malcolm argued that such decisions remain binding in domestic law. Her arguments were complex and were based on the interaction of the EU-UK Withdrawal Agreement (2019/C 384 I/01) with the UK's domestic withdrawal legislation.

183. However (and perhaps fortunately), given the common ground on the central issue, and the parties' agreement that the status of CJEU decisions fell to litigated elsewhere on another occasion, we need say no more about the issue.

Discussion

184. The central question is whether the evidence establishes that there is a real risk that the Appellants will, if extradited to Poland, suffer a breach of their fundamental right to an independent tribunal and, therefore, of the essence of their fundamental right to a fair trial as guaranteed by the second paragraph of Article 47 of the Charter: *LM*, [59]. This is the same as the Strasbourg test of 'a flagrant denial of justice' in relation to Article 6(1): *Lis No 1*, [63]. We note that in *Lis No 2* the Court applied a 'flagrancy' test in respect of the applicants' specific cases.

Is Aranyosi Stage 1 satisfied?

185. The answer to this question is plainly 'yes'. There is a very considerable body of objective, reliable, specific and up-to-date material indicating that there is a real risk of breach of the values in Article 2 TEU, on account of systemic or generalised deficiencies relating to the independence of Poland's judiciary resulting from the reforms since 2015. This was the conclusion of the European Commission in its Reasoned Proposal of December 2017, which remains under consideration, as we have said. It was also the conclusion reached by the Court in 2018 in *Lis No 1*, [64]. We have concluded that the situation in Poland has only worsened since then.

186. As to this, we highlight the following matters that have occurred since 2018:

a. the CJEU's decision of November 2019 in *AK and others* concerning the lack of independence and impartiality of the Disciplinary Chamber, and the primacy of EU law;

b. the subsequent decision of the Labour Chamber on 5 December 2019 concluding in the light of *AK and others* that the Disciplinary Chamber did not fulfil the requirements of an independent and impartial tribunal, and that the NCJ was also not independent and impartial, and the subsequent joint resolution of the Supreme Court's Chambers;

c. the Muzzle Law, which came into force in February 2020. As we have described, this generated cogent criticism from the Venice Commission, and from many other bodies, and has resulted in further proceedings against Poland by the Commission in case C-204/21;

d. Poland's refusal to suspend the operation of the Disciplinary Chamber despite two interim orders of the CJEU in 2020 and 2021 requiring it to do so. Judges continuing to be disciplined for taking judicial decisions;

e. the Constitutional Tribunal's refusal in July 2021 to accept the primacy of EU law (notwithstanding the decision in *AK and others*);

f. the CJEU's judgment in *Commission v Poland* of 15 July 2021, in which the disciplinary regime for judges was found to breach EU law;

g. the decision of the ECtHR in *Reczkowicz v Poland* that the Disciplinary Chambers is not a 'tribunal established by law' for the purposes of Article 6(1) of the Convention.

187. Our conclusion is consistent with the Advocate General's Opinion in *L and P* of 12 November 2020. At [57] he wrote:

> "57. I agree with the referring court that, while the situation obtaining at the time when judgment was given in *Minister for Justice and Equality (Deficiencies in the system of justice)* [25 July 2018] was concerning, the subsequent data appear to point to the worsening of that situation.[25]"

188. Footnote 25 stated:

> "In its report of September 2020 on the situation regarding the rule of law in the EU, the Commission notes that, in Poland, 'the reforms, impacting the Constitutional Tribunal, the Supreme Court, ordinary courts, the National Council for the Judiciary and the prosecution service, have increased the influence of the executive and legislative powers over the justice system and therefore weakened judicial independence'. Commission Staff Working Document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland (SWD(2020) 320 final)."

189. At [76] he said:

> "In the light of increased systemic or generalised deficiencies, and in the absence of a formal determination by the European Council, the *Rechtbank* Amsterdam (District Court, Amsterdam) must, therefore, be even more rigorous in its examination of the circumstances pertaining to the EAW which it has been requested to execute, but it is not exempt from the duty to carry out that examination in particular."

190. Furthermore, real concerns continue to exist at the EU level in relation to Poland. In the Commission's statement of 15 July 2021 following the Constitutional Tribunal's decision, it said:

> "The Commission is deeply concerned by the decision of the Polish Constitutional Tribunal, which states that the interim measures ordered by the Court of Justice of the European Union in the area of the functioning of the judiciary, are inconsistent with the Polish Constitution. This decision reaffirms our concerns about the state of the rule of law in Poland.
>
> The Commission has always been very clear on this matter and reaffirms once more:
>
> - EU law has primacy over national law;
> - All decisions by the European Court of Justice, including
>
> orders for interim measures, are binding on all Member States' authorities and national courts.
>
> The rights of EU citizens and businesses must be protected in the same way across all Member States.
>
> The European Commission expects Poland to ensure that all decisions of the European Court of Justice are fully and correctly implemented. This includes also yesterday's Court order to impose the interim measures on Poland to immediately suspend the application of certain provisions of the law of December 2019 on the judiciary, including on the functioning of the Disciplinary Chamber of the Supreme Court.
>
> The Commission will not hesitate to make use of its powers under the Treaties to safeguard the uniform application and integrity of Union law."

191. For all of these reasons, we are satisfied that *Aranyosi* Stage 1 is satisfied.

Aranyosi Stage 2: *specific and precise assessment*

192. We reject at the outset Ms Montgomery's submission that we are under a mandatory duty to make enquiries of the issuing judicial authorities as part of our *Aranyosi* Stage 2 assessment of the Appellants' cases. We consider that we have all of the information we need in order to make the required assessment, and that we do not need any further information.

193. Article 6(3) of the EAW Framework Decision requires each Member State to notify the General Secretariat of the Council which judicial authority is competent to execute EAWs. In England and Wales, the designated executing authority is a district judge (magistrates' court) designated by the Lord Chancellor: see *FK*, [21]. Article 15(2) of the EAW Framework Decision empowers the designated executing authority to seek additional information from the issuing judicial authority. Article 15 is entitled 'Surrender Decision' and provides (emphasis added):

> "1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
>
> 2. *If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender*, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.
>
> 3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

194. Thus, the duty or power to request further information only arises where the executing judicial authority needs further information to decide on surrender. If it does not, then there is no such duty.

195. The CJEU in *LM*, [75]-[76], also made clear that the need to make enquiries under Article 15(2) as part of *Aranyosi* Stage 2 only arises where the executing judicial authority determines there is a need to do so (emphasis added):

> "75. If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.
>
> 76. Furthermore, the executing judicial authority must, pursuant to article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information *that it considers necessary* for assessing whether there is such a risk"

196. We are not an executing judicial authority for the purposes of the EAW Framework Decision and our power to make enquiries arises under our inherent jurisdiction and not under Article 15(2), as we have explained. However, as with Article 15(2), we consider that our power only need be exercised where we consider that we need further information.

197. We do not read [79] of *LM*, relied on by Ms Montgomery, as imposing a mandatory duty of enquiry in all cases irrespective of what material is already before the Court. Although the Court said the specific and precise assessment at *Aranyosi* Stage 2

should be undertaken in 'the light of the information provided by the issuing member state pursuant to Article 15(2) of the Framework Decision', we consider that statement must be read as being premised on a situation where the court has determined such enquiries are necessary because the evidence before it is incomplete.

198. There is nothing in *L and P* which mandates an enquiry. At [61] the Court referred to the specific and precise assessment needing to take place 'having regard to information which *may* have been communicated to it by the issuing judicial authority pursuant to Article 15(2) of Framework Decision 2002/584' (emphasis added). That, it seems us, implicitly recognises that there may, or may not, be such information. Paragraph 55 is to the same effect, '… and in the light of any information provided by that Member State pursuant to Article 15(2) …'.

199. Finally, we note that in *Lis No 1* the Court did not feel the need itself to make enquiries, but instead left it to the applicants to present whatever submissions and evidence they wished in support of their individual cases (see at [70]). It is clear the Court had its power of enquiry well in mind because it referred to it at [64]-[66] under the heading 'The *Aranyosi* Process'. If *LM* had imposed a mandatory duty to enquire then the Court in *Lis No 1* would have said so, and it would have made its own enquiries, rather than leaving it to the applicants to make their case.

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."

201. Ms Montgomery's submission is inconsistent with a number of passages in *LM*, *Lis No 1*, and *L and P*.

202. In *LM*, [68], [72] the Court said (emphasis added):

> "68. If, having regard to the requirements noted in paras 62-67 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, *Aranyosi*'s case [2016] QB 921, paras 92 and 94.
>
> …
>
> 72. Therefore, it is *only* if the European Council were to adopt a decision determining, as provided for in article 7(2)EU, that there is a serious and persistent breach in the issuing member state of the principles set out in article 2EU, 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."

203. In *Lis No 1*, the Court said at [36]:

> "36. … the 'systemic … or … generalised deficiencies' in connection with independence of the judiciary are not enough, without more, to prevent extradition. The executing judicial authority must assess in respect of the individual sought to be extradited whether there is a real risk of "breach" or "compromise" of the "essence of his fundamental right to a fair trial." The focus becomes 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."

204. The point arose acutely in *L and P* because one of the questions posed by the Dutch referring Court raised the very argument now made by Ms Montgomery (see Question 3, in [21] of the judgment, set out above). That argument was rejected both by the Advocate General and the Court.

205. In his Opinion at [48]-[50], the Advocate General said:

> "48. What the national court is now asking is whether, on account of the increased systemic or generalised deficiencies in the issuing Member State, it may forego the second stage of that two-part examination.
>
> 49. If that is the case, there would be no need for the executing judicial authority to examine the circumstances of the case: it would simply be able to bring the surrender procedure to an end if the deficiencies are of such a magnitude that they equate to the absence in the issuing Member State of a judicial authority worthy of that name.

> 50. No matter how thought-provoking the solution proposed by the referring court may be, it is not compatible with that already provided by the Court …"

206. The Luxembourg Court's 'solution' referred to by the Advocate General is the two-stage analysis explained in *LM* to which we referred earlier.

207. In its judgment the Court said at [53]-[55] (emphasis added):

> "53. … the possibility of refusing to execute a European arrest warrant on the basis of Article 1(3) of Framework Decision 2002/584, as interpreted in [LM] presupposes a two-step examination.
>
> 54. In the context of a first step, the executing judicial authority of the European arrest warrant in question must determine whether there is objective, reliable, specific and properly updated material 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 (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 61).
>
> 55. In the context of a second step, that authority must determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of 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 that Member State (see, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 74 to 77).
>
> 56. *It should be pointed out that, as was noted in paragraphs 53 to 55 of this judgment, the two steps of that examination involve an analysis of the information obtained on the basis of different criteria, with the result that those steps cannot overlap with one another."*

208. At [59], the Court added:

> "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 [ie, suspension under Article 7 TEU]."

209. We also note that a similar submission to that made by Ms Montgomery was advanced before Donnelly J in the Irish High Court in *Celmer (No 5)*, at [26]. The learned judge rejected the submission. It is worth quoting [62] of her judgment because it was she who referred the questions which led to the CJEU's judgment in *LM*. Under the heading 'Conclusion on whether systemic deficiencies of themselves amount to a flagrant denial of justice' she wrote:

> "62. It is clear that in answering the questions asked by this Court, the CJEU expressly did not accept that a finding of systemic and generalised breaches was sufficient to establish that the individual concerned will run the risk of a breach of the essence of the fundamental right to a fair trial (in its findings at para 69). Neither the respondent's nor the IHREC's submissions address that vital finding in the judgment of the Court of Justice of the European Union. In my view, the meaning of para 69 is copper fastened later in the judgment by the statement that even if the deficiencies are found to operate at the level of the proposed trial court, the executing judicial authority was still required to assess, in light of specific concerns and information expressed and provided by the individual, whether there were substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and therefore of the essence of his fundamental right to a fair trial. This assessment has to have regard to his personal situation, as well as to the nature of the offence for which he is being prosecute and the factual context that form the basis of the European arrest warrant."

210. In her judgment in *Celmer No 5*, [30]-[34], Donnelly J discussed the Divisional Court's decision in *Orobator v Governor of HMP Holloway* [2010] EWHC 58 (Admin). It seems to us that case provides additional reasons why Ms Montgomery's submission must be rejected. It did not concern extradition, rather it was a prison transfer case. Following the transfer of Ms Orobator from prison in Laos to serve her

sentence in the UK following her conviction for drugs offences, she claimed that she could no longer lawfully be imprisoned because she had been convicted and sentenced in circumstances amounting to a flagrant denial of justice and a flagrant breach of Article 6 of the Convention, and so had not been convicted by a competent court for the purposes of Article 5(1)(a). Dyson LJ (as he then was) said at [63]:

> "63. Mr Fitzgerald accepts that the bar of 'flagrant denial of justice' is set very high, but he submits that it is reached on the facts of this case. He submits that there are a number of features of what occurred in Laos which, taken together, lead to this conclusion. But he says that there is one feature which stands out and which alone suffices. This is the fact that the court which convicted and sentenced the claimant was neither independent nor impartial. Mr Fitzgerald submits that this fact alone necessarily means that the claimant suffered a flagrant denial of justice such that the conviction was not by a 'competent court' within the meaning of article 5 of the ECHR."

211. The meaning of the phrase 'flagrant denial of justice' was explained in the partly dissenting opinion of Judges Bratza, Bonello and Hedigan in *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, 537, [O-III14] as conveying 'a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article. This formulation was endorsed by Lord Bingham and Lord Hope in *EM (Lebanon) v Secretary of State for the Home Department* [2009] AC 1198, [3], [33]. and adopted by the ECtHR in *Othman v United Kingdom* (2012) 55 EHRR 1, [260].

212. At [94]-[95] Lord Dyson said:

> "94. We can now return to express our conclusions on this central issue. There is no doubt that a conviction by a court which is not independent and not impartial involves a breach of article 6 … It has been said by the ECtHR many times that "in order to establish whether a tribunal can be considered as 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence … It is also well established in the case law of the ECtHR that there are two aspects to 'impartiality'. First, the tribunal must be subjectively impartial, that is no member of the tribunal should hold any personal prejudice or bias. Secondly, the tribunal must be impartial from an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt in this respect …
>
> 95. The independence of a court has often been recognised as a fundamental characteristic of a court …"

213. The key paragraph for present purposes is [99], where Dyson LJ said this (emphasis added):

> "99. It is a striking fact that there is no case of which we are aware in which this test has been successfully invoked in any context in relation to article 6 on the grounds of lack of independence and impartiality of a court. *We recognise that judicial independence and impartiality are cornerstones of a democratic society and that their absence will without more involve a breach of article 6. But we cannot accept that lack of judicial independence and impartiality will necessarily involve a flagrant denial of justice or the "nullification or destruction of the very essence of the right guaranteed" by article 6. Whether the lack of independence and impartiality has that effect must depend on the particular facts of the case, examined critically as a whole*. Regrettably, there are many states throughout the world where judges are less independent and less impartial than they are in the UK and other democratic societies which are fully committed to the rule of law. But even where the judiciary are not fully independent and impartial, it is possible for a trial to take place which does not involve the complete nullification or destruction of the very essence of the right guaranteed by article 6."

214. It seems to us that this passage undermines the premise of Ms Montgomery's argument. The foundation of her argument is the proposition that systemic deficiencies leading to a lack of independence which can be taken to have specifically infected the Appellants' individual cases, *ipso facto*, give rise to the real risk of a breach of the essence of their fundamental right to a fair trial as guaranteed by the second paragraph of Article 47 of the Charter, and a flagrant denial of justice. This paragraph shows that proposition to be unsound. Even where a tribunal is not independent and impartial, there may not be a flagrant denial of justice. All of the facts have to be considered as part of an overall assessment. The Court in *Orabator* went on to consider the evidence and concluded at [108] that 'to the extent that the court lacked independence and impartiality, this did not of itself give rise to a flagrant denial of justice.'

215. We turn, then, to the required specific and precise assessment having regard to the Appellants' personal situation; the nature of the offences for which their return is sought and the factual context that form the basis of the European arrest warrant. We are satisfied that the Appellants have been aware of what it is they need to demonstrate, and have had the fullest opportunity to place evidence before us in support of their cases. They have put forward a large quantity of material including three expert reports dealing with their particular cases. It is principally for this reason that we do not regard it as necessary for us to make our own enquiries. Also, as Ms Malcolm said, there are a number of practical reasons why such enquiries would be unlikely to yield much by way of assistance, even if the Polish authorities were to reply, which the evidence before us shows is not a given.

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. Notwithstanding the worsened situation since 2018, we consider the observation of the Court in *Lis No 1*, [69], remains relevant:

> "We see no basis why any lack of independence or bias might be likely to arise in respect of such run-of-the-mill criminal allegations."

218. In *L and P*, [61], the Court gave as an example of the sort of evidence at *Aranyosi* Stage 2 which might give cause for concern, 'statements by public authorities which are liable to interfere with the way in which an individual case is handled'. There have been no such statements in either of the Appellants' cases so far as we know. Overall, there is nothing in the Appellants' personal circumstances or the facts of the offences for which they are sought which might give rise to (actual or apparent) bias in <u>their</u> specific cases. To suggest otherwise would be to engage in unfounded speculation.

219. Further, no matters of concern have been reported in relation to the Respondent issuing courts. As we have said, the Appellants rely on three expert reports from two Polish advocates, dated 10 August 2020, 15 January 2021 and 10 May 2021. Although in their first expert report the authors expressed the opinion at [56] that the right to a fair trial in Poland is 'structurally endangered', they were unable to evidence a direct effect in criminal trials as a matter of their experience or first-hand observation. They were specifically asked to provide 'statistical or other evidence from your own experience conducting criminal trials or appeals, or from your own research which demonstrate the effect of the reforms on ordinary criminal trials, which may constitute a breach of fair trial rights and/or judicial independence'. To this they said:

> "55. It is very difficult to comment on this issue. We do not run statistics. We do not notice the effects of the reforms on our practice and criminal trials. It is also difficult to state whether in any other case, which we do not know personally, such an effect occurred. We were not involved in a trial during which we would have any doubts regarding judge's independence, therefore we did not question his/ her nomination by NJC."

220. In their second report of 15 January 2021 the authors were asked for information regarding disciplinary proceedings or replacement of judges and prosecutors and any other irregularities in particular in relation to the courts which issued the EAWs in RW's and WC's cases. They replied that:

> "No relevant events took place in courts in Gniezno and Białystok in respective period. Also, there is no new statistical data to supplement the previous report."

221. We are not surprised by these conclusions. The Appellants did not argue that the individual Polish judges who issued their EAWs were not independent judicial authorities. There is no evidence bearing on these specific judges; no evidence to show that each of them is other than independent; or that they were operating outside the rule of law when they issued the EAWs or would do so in future.

222. Structural weaknesses in judicial independence arising from the reformed judicial appointment process in Poland do not lead to the conclusion that judges appointed under it lack independence once in office. The issues are separate, and it cannot be presumed that a professional judge lacks independence in carrying out his/her functions merely because of how he/she was appointed. We also agree with the Respondents' observation (Skeleton Argument, [32]) that a lack of independence is not demonstrated merely because an individual was unsuccessful in securing appointment as a judge prior to the reforms, and has since been appointed.

223. Further, although we accept that there is evidence that individual lower court judges have been disciplined for their decision making, the recent material referred to above was concerned primarily with the Disciplinary Chamber. In *Reczkowicz* the ECtHR was at pains at [177] of its judgment to emphasise that its decision was only concerned with the Disciplinary Chambers, and that it was *not* concerned with 'the legitimacy of the reorganisation of the Polish judiciary as a whole'. In *Lis No 2* at [14] Irwin LJ recorded that the evidence in that case showed that:

> "14. The critical disputes between the judiciary and the Government … have not affected the standards of justice for criminal defendants."

224. We conclude that the evidence relied on by the Appellants is insufficient to demonstrate that systemically and generally there is interference in cases before the Polish criminal courts. As the CJEU observed in [42] of *L and P*, even where deficiencies are proven, this 'does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case.'

225. Finally, it is important to stress that the Appellants will have (or in the case of RW, will have had) the right at their trials to be defended by lawyers (and we know from our experience that legal aid is available in Poland); they will be able to cross-examine witnesses against them; they can call evidence; they can make legal arguments; and their trials will be held in public. All of these are key safeguards in relation to fair trial rights. As this Court said in *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin), [97]:

> "… where proper procedure[s], arrangements for witnesses, and representation are all available, it may often be that the effects of a lack of independence on the part of the tribunal will be sufficiently mitigated by such other adequate features of trial, so

> that incursion on fair trial process will fall short of a 'flagrant denial' of justice.'"

226. For these reasons, having carried out a specific and precise assessment of the Appellants' cases, we are not satisfied the evidence shows there is a real risk of the breach of the essence of their right to fair trial under Article 47 of the Charter, or of a flagrant denial of justice.

Other matters

227. Ms Montgomery's concession that it is not open to her to pursue before this Court her submissions that reforms in Poland mean that the Respondent courts are no longer judicial authorities for the purposes of Article 6(1) of the EAW Framework Decision (and s 2 of the EA 2003) and her allied argument that the status of a judicial authority cannot depend on the Article 7 TEU process, was correctly made (see [164] above).

228. The substance of these submissions was rejected in *Lis No 1*, [56]-[57]. *L and P* confirms the correctness of those conclusions. The argument would, if accepted, lead to the suspension the EAW mechanism in respect of Poland. The rejection of that submission is mandated by the wording of recital 10 to the EAW Framework Decision which expressly provides the EAW can *only* be suspended in relation to a Member State in the event of a determination by the Council following the Article 7 TEU process. This point was made by the Advocate General in his Opinion in *Aranyosi*, [86]-[87], [120]; by the Court in *Aranyosi*, [80]-[81]; by the Advocate General in his Opinion in *LM*, [106]; by the Court in *LM*, [70]-[72]; by the Advocate General in his Opinion in *L and P*, [54]-[56]; and by the Court in *L and P*, [57]-[60]. Decisions on the need for independence in respect of non-curial judicial authorities, such as *Minister of Justice and Equality v OG and PI* (Joined Cases Case C-508/18 and C-82/19 PPU), where a lack of independence from the Ministry of Justice on the part of German public prosecutors led the Court to conclude they were not judicial authorities within Article 6 of the EAW Framework Decision, do not assist on this issue, as Ms Montgomery accepted. That is because a different method of analysis is necessary in respect of such entities. This point was made by the Advocate General in *L and P*, [72] and footnote 29, and by the Court in the same case at [48]-[50].

Conclusion

229. It follows that these appeals are dismissed.