

THE HIGH COURT

[2019 No. 349 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

JAKUB LYSZKIEWICZ

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 4th day of February, 2021

1. By this application the applicant seeks an order for the surrender of the respondent to Poland pursuant to a European arrest warrant dated 27th May, 2019 ("the EAW"). The EAW was issued by The Regional Court in Rzeszów, as issuing judicial authority ("IJA").
2. The EAW was endorsed by the High Court on 21st October, 2019. The respondent was arrested and brought before the Court on 8th November, 2019. The application opened before the Court on 16th January, 2020, and was then adjourned until 5th February, 2020, following upon a direction by this Court, pursuant to s. 20 of the European Arrest Warrant Act 2003 (as amended) (hereinafter "the Act of 2003") to seek further information from the IJA. On 5th February, 2020 the matter was again adjourned for the provision of additional information by the IJA, to 4th March, 2020.
3. At the opening of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW is issued.
4. I was further satisfied that none of the matters referred to in ss. 21 A, 22, 23 and 24 of the Act of 2003 arise, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.
5. At para. B of the EAW, it is stated that the decision on which it is based is an enforceable decision of detention on remand of the District Court in Rzeszów of the 27th April, 2016, "*to use detention on remand for the period of 3 months from the date of apprehension and to issue an arrest warrant*". A case file reference X K 232/15 is provided.
6. At para. C of the EAW, information regarding the length of sentence that may be imposed for the offences to which the EAW relates is provided, by reference to the relevant provisions of the Polish Criminal Code, as follows:
 - i. Offence under Article 286 - 1 carries a penalty of up to 8 years of imprisonment.
 - ii. Offence under Article 287 - 1 carries a penalty of up to 5 years of imprisonment.
 - iii. Offence under Article 191 - 1 carries a penalty of up to 3 years of imprisonment.
 - iv. Offence under Article 191a - 1 carries a penalty of up to 5 years of imprisonment.

Accordingly, minimum gravity is established in relation to all offences.

7. At para. E of the EAW, it is stated that the warrant relates to five offences, particulars of which are set out at para. E (2), and may be summarised as follows:
- i. In the period between 1st January, 2013 until 28th February, 2013, the respondent gained unauthorised access to an online account of an auction portal and replaced the email address and phone number of that account, for the purpose of material gain. (An offence under Article 287 § 1 of the Criminal Code)
 - ii. On 9th March, 2013 the respondent conducted multiple transactions of cosmetics and dietary supplements causing the “disadvantageous” disposal of purchasers’ property and misleading the purchasers regarding the actual delivery of the items. Seven transactions are then set out. (An offence under Article 286 § 1 , in relation to Article 12 of the Criminal Code)
 - iii. In the period between 17th December, 2013 until 7th January, 2014, “with premeditated intent”, the respondent threatened to post indecent pictures of two named women online. The EAW states that the respondent was forcing one of these women to transfer 30 000 000 ‘gold’ (circa 9000 PLN) worth of virtual currency within a video game and as a consequence, that named woman transferred 20 000 000 ‘gold’ (circa 600 PLN [sic]). (An offence under Article 191 § 1 in relation to Article 12 of the Criminal Code)
 - iv. On 18th December, 2013 the respondent again threatened to post indecent pictures of the woman, forcing the other named woman to transfer virtual content in the same video game, equivalent to circa 1000 PLN. (An offence under Article 191 § 1 of the Criminal Code)
 - v. On 18th December, 2013 the respondent circulated the image of the second named woman on Facebook without her consent. (An offence under Article 191a § 1)

The provisions of the Criminal Code referred to above are then set out in full.

8. At para. E.1 boxes referring to “fraud” and “crime against protection of data collected, stored, processed and transferred within an IT system” are ticked.
9. By letter dated 20th September, 2019 the central authority in this jurisdiction sought clarification of para. E of the EAW, in particular the boxes ticked, as the second box indicated does not correspond with the wording of Article 2.2 of the Framework Decision. In its response dated 23rd September, 2019 the IJA clarified that the offences relied upon under Article 2.2 of the Framework Decision are “computer-related crime” and “swindling”. Having been provided with that clarification, I am satisfied that Article 2.2 of the Framework Decision has been invoked as regards all offences described in the EAW. In any case, no objection to surrender was made in this regard, although in his first point of objection, the respondent did plead that the offences with which the respondent is charged do not correspond to offences in this jurisdiction. Quite properly however, this

objection was not pursued at hearing, in light of the reliance placed by the IJA on the ticking of the boxes for computer related crime and swindling.

10. The respondent's solicitor swore an affidavit dated 27th November, 2019, seeking adjournment of proceedings at that time in order to obtain information of the respondent's Polish lawyer, Mr. Damian Przekwas. In this affidavit it is stated that the respondent believes that he has been convicted of two of the offences outlined in the EAW and received a non-custodial sentence. It is then averred that contact had been made with Mr. Przekwas who advised that he was unsure as to whether the respondent's assertion was correct. It was stated in the affidavit that without clarification of this issue, the respondent would be at risk of being surrendered for prosecution of offences for which he has already been convicted.
11. The respondent subsequently provided a letter to the Court of Mr. Przekwas dated 13th January, 2020 (the letter was incorrectly entitled "Affidavit of Laws"). This letter states that Mr. Przekwas was taking steps before the District Court in Rzeszów to apply to change the order for the respondent's pre-trial detention to bail, coupled with a ban on leaving the country during the trial. Mr. Przekwas says that the respondent instructed him that, at the time the decision on pre-trial detention was issued by court order of 27th April, 2016, he had not lived in Poland for a long time and did not know he was subject to an arrest warrant. Mr. Przekwas further states that the respondent was not informed of the letters delivered to his previous Polish address. Mr. Przekwas also mentions that the respondent has health problems and that pre-trial detention is not mandatory. He also claims that the use of pre-trial detention in Poland has been criticised in many judgments of the European Court of Human Rights (the "ECtHR").
12. Points of objection were delivered on behalf of the respondent on 18th November, 2019. Six points were raised, just one of which was pursued at the hearing of this application. This was as follows:

"At para. C.2 of the EAW, the requesting state seeks the return of the respondent for the purpose of three months pre-trial detention. It appears that the pre-trial detention has been pre-determined against the respondent without any right to be admitted to bail. It is therefore repugnant to the constitutional imperatives of Bunreacht na hÉireann 1937 to return the respondent to the requesting state."

13. In light of this objection, further information was sought by the Court of the IJA, by letter of 17th January, 2020. The following question was asked:

"In relation to the order for detention of three months, is it possible for the respondent to apply to the court on his surrender to be released while awaiting trial, subject to such restrictions as the court considers appropriate?"

The IJA replied by letter dated 28th January, 2020, in which the IJA stated that:

"the hearing regarding the examination of the request of the defender of the accused Jakub stated Lyszkiewicz to change the preventive measure was appointed by the District Court in Rzeszów on 03.02.2020 at 15:20."

14. Further information was sought by letter of 6th February, 2020 as to the outcome of the hearing of the District Court in Rzeszów. In its response to this inquiry the IJA stated that *"by invalid decision of 03.02.2020 the District Court in Rzeszów don't accepted the request of the defender of the accused Jakub Lyszkiewicz to change the preventive measure of pre-trial detention."* The Court interprets this letter as meaning that the respondent's application to the Polish court to set aside the pre-trial detention order was unsuccessful. Mr. Przekwas had been retained by the respondent for the purpose of that application, and counsel for the respondent confirmed, at the hearing of this application, that this interpretation of the IJA's letter is correct - i.e. his application to the District Court in Rzeszów to vacate the pre-trial detention order was unsuccessful.
15. A second letter of Mr. Przekwas, dated 1st February, 2020, was also opened to the Court. This was a letter responding to questions asked of him by the respondent's solicitors. Although the questions are not repeated in his response, it is clear that Mr. Przekwas is advising, *inter alia*, on the procedures available to revoke or vary a pre-trial detention order. He outlines that such applications may be brought no sooner than three months from the date of the pre-trial detention order, and that the appeal is heard by the same court composed of three judges. Mr. Przekwas also details the relevant sections of the Polish Code of Criminal Procedure that describe the circumstances in which pre-trial detention or other preventative measures may be ordered by a court. These include: flight risk, interference with witnesses and the risk, in exceptional cases, of the accused committing other offences. This latter circumstance is stated to apply only where there is good reason for believing the accused may offend, particularly where he has threatened to do so. Mr. Przekwas states that he is unaware of the statistical success of appeals from pre-trial detention orders, but notes that the ECtHR has emphasised *"for years"* the structural problems of pre-trial detention in Poland. Finally, Mr. Przekwas summarises the problems he claims have been recognised by the ECtHR and refers to several decisions of the ECtHR. I refer to these matters again below.

Discussion and Decision

16. The respondent's sole objection to surrender as pursued at the hearing of this application (and quoted in full at para. 12 above) was, to an extent, dealt with during the course of these proceedings through the submission, on behalf of the respondent, of an appeal to the District Court in Rzeszów, against the order of pre-trial detention. It was clear from the information received that the respondent had an entitlement to apply to vacate or vary the order of pre-trial detention, contrary to his plea that he had no such entitlement (although the plea is worded differently, referring as it does to there being no entitlement to apply for bail). The Court was informed that this appeal was pending at the resumed hearing on 5th February, 2020 and adjourned this application pending the outcome of the same. The Court again wrote to the IJA requesting the outcome of this appeal, and by

letter dated 11th February, 2020, the IJA responded in terms to the effect that the appeal against the order of pre-trial detention was rejected.

17. When the hearing of this application resumed, the focus of this objection shifted, and it was submitted on behalf of the respondent that the application of pre-trial detention in Poland is excessive and disproportionate, and has given rise to adverse findings by the ECtHR. This argument, it was submitted, was supported by the correspondence received from the respondent's Polish lawyers, dated 13th January, 2020 and 1st February, 2020. The first of these letters mainly deals with the exercise by the respondent of his right of appeal against the order of pre-trial detention, but towards the end of the letter, the lawyer, Mr. Przekwas, states:

"By the way, I point out that the use of detention on remand in Poland was criticised in many judgments of the European Court of Human Rights. Review of the European Court of Human Rights database shows over 300 cases concerning the issue of detention in (sic) Poland was a defendant country. In most judgments, the court recognised the Polish Government guilty of violating the Convention in this respect."

18. In the second of his two letters, Mr. Przekwas analyses the issue in some detail. He refers to the case of *Kauczor v. Poland*, a judgment of the ECtHR of 3rd February, 2009 in which case the ECtHR determined that there had been a violation of the rights of the applicant in that case under both Article 5 § 3 and Article 6 of the European Convention on Human Rights (the "Convention"). The ECtHR also noted that, more generally, there had been numerous cases over the years in which it had found that there had been an excessive length of pre-trial detention in Poland, revealing a structural problem consisting of "a practice that is incompatible with the Convention". The court went on to say:

"It is true that the respondent State has already taken certain steps to remedy the structural problems related to pre-trial detention (see paragraphs 27 and 30-33 above). The Court welcomes these developments and considers that they may contribute to reducing the excessive use of detention as a preventive measure. However, as already noted by the Committee of Ministers (see paragraph 34 above), in view of the extent of the systemic problem at issue, consistent and long-term efforts, such as adoption of further measures, must continue in order to achieve compliance with Article 5 § 3 of the Convention."

19. In response to this argument, the applicant relies on a number of authorities: *Minister for Justice & Equality v. WB* [2016] IECA 347, a decision of Edwards J. in the Court of Appeal, and *Minister for Justice & Equality v. Gray* [2016] IEHC 128, a decision of Donnelly J. in this Court, and also *Minister for Justice & Equality v. Meegan* [2016] IEHC 129, also a decision of Donnelly J. in this Court.
20. The case of *WB* was concerned with an application for the surrender of the respondent/appellant in that case to the Kingdom of Sweden. In both the High Court (per Donnelly J., [2015] IEHC 805) and the Court of Appeal, they concluded that there is a

system that allows for bail/pre-trial release in Sweden, while at the same acknowledging that in most cases a person suspected of a serious crime will be remanded in custody. Significantly, there have been no findings by the ECtHR or other human rights monitoring bodies (other than the UK based NGO, Fair Trials International) of the Swedish pre-trial remand system.

21. In his judgment, Edwards J., at para. 67, also attached significance to the fact that the appellant/respondent in that case had not raised, before the Swedish courts, his apprehension that his rights under Article 5 of the Convention would be breached, if he were to be surrendered. Since Convention rights apply in the requesting state, that state is obliged to enforce a person's rights under the Convention, and, indeed, is best placed to do so. Edwards J. also considered it to be highly relevant that the appellant in that case did not seek to appeal the decision of the District Court to remand him in custody pending trial (unlike in this case).
22. The Court of Appeal agreed that Donnelly J., in the High Court, was correct in placing reliance on the presumption set forth in s. 4A of the Act of 2003 which provides that it is to be presumed, unless the contrary is shown, that the requesting state (Sweden) will comply with the Framework Decision, which expressly states that the Framework Decision does 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 the European Union which, in turn, provides that the European Union shall respect fundamental rights as enshrined in the Convention.
23. In this case, the requesting state, Poland, is of course entitled to be accorded the same presumption. As Donnelly J. noted at para. 43 of her judgment in WB, the presumption is rebuttable but:

"...The burden rests on the respondent to adduce evidence that there were substantial grounds for believing that he would be at real risk of being exposed to a flagrant denial of justice (see Minister for Justice, Equality and Law Reform v. Rettinger [2010] 3 IR 783, and Attorney General v. Damache [2015] IEHC 339)."

In this regard, the respondent in this case relies upon the decision of the ECtHR in *Kauczor*, as well as the advices received from Mr. Przekwas, to rebut the presumption in s. 4A of the Act of 2003. The question for the Court in this case is whether those factors constitute substantial grounds for believing that the respondent is at a real risk of being exposed to a flagrant denial of justice, if he is surrendered to Poland.

24. As far as *Kauczor* is concerned, the first observation to make is that the case is now eleven years old. As already noted above, in the concluding paragraph of its judgment, the ECtHR welcomed developments taken by Poland with a view to remedying the structural problems related to pre-trial detention. While the ECtHR emphasised the need for these developments to continue, as well as the need for the adoption of other measures, this Court was not provided with any information regarding such

developments, and in particular whether or not they were successful, or information as to whether or not there were any other developments, good or bad, in the intervening years.

25. In his opinion of 1st February, 2020, Mr. Przekwas refers to more recent authorities of the ECtHR which he says confirm that in Poland there remain problems with pre-trial detention, such as prolonged use of the same, a failure to consider alternatives to pre-trial detention and "*no individualisation of the conditions for pre-trial detention in decisions on the application and extension of the measure*", by which I understand him to say that applications for release are not given individual consideration.
26. The cases referred to by Mr. Przekwas were not opened to the Court. If it is contended that those cases support the respondent's objection, then they should have been opened to the Court, and both parties could then have made such submissions as might have been appropriate. Since that did not occur, however, in support of the respondent's objection, the Court is left with nothing more than an eleven year old decision of the ECtHR, which itself indicates that steps have been taken to remedy the "*structural problems related to pre-trial detention*", and a short paragraph in what is otherwise a detailed letter replying to questions received from the solicitors for the respondent. This is not sufficient evidence such as to constitute substantial grounds for believing that the respondent is at a real risk of being exposed to a flagrant denial of justice, so as to rebut the presumption set forth in s. 4A of the Act of 2003.
27. Moreover, in his letter of advices of 1st February, 2020, Mr. Przekwas undertakes a detailed analysis of the procedure, in the Code of Criminal Procedure of Poland, whereby an accused person may at any time request that a preventative measure of detention may be revoked, and, if unsuccessful, the accused person may appeal the decision after three months. The appeal must be determined within three days thereafter. It may well be true of course that the substantive complaint of the respondent is not so much about the availability of the procedure, but more about how it operates in practice. However, if that is so, there is quite simply no evidence before the Court in this regard (other than the decision of the ECtHR in *Kauczor*). Unlike in *WB*, the respondent in this case did exercise his right of appeal against the order for pre-trial detention, and was unsuccessful. That in itself, however, is not indicative of a structural problem.
28. In summary, while the respondent produced some evidence that there were, historically, structural problems related to excessive use of pre-trial detention in Poland, and more recent evidence in the form of an opinion from a lawyer in Poland that those problems are continuing, the latter amounted to no more than three lines and cross references to three decisions of the ECtHR that were not opened to the Court. Indeed, it is more accurate to say that the opinion of Mr. Przekwas is not so much expressed to be one drawn from his own experience, but is one drawn from his analysis of ECtHR decisions, but only the decision in *Kauczor* was opened to this Court. In those circumstances, I am not satisfied that the respondent has adduced before the Court evidence that comes even close to rebutting the presumption set forth in s. 4A in the Act of 2003. This objection must, therefore, be rejected.

Objection Based Upon Rule of Law Concerns in Poland

29. Following the conclusion of the hearing of this application, it was brought to the attention of the Court in another application that a German court in Karlsruhe had refused an application for surrender submitted by an issuing judicial authority in Poland, apparently on the grounds that there had been legislative developments in Poland towards the end of 2019 and early 2020 (the “new laws”) which had the effect of further eroding the independence of the judiciary in that country. I say further eroding because of course it will be recalled that legislative measures intruding on the independence of the judiciary had already given rise to international criticism, and had been the subject of analysis and decisions in this country, in the High Court and Supreme Court in the case of *Celmer*, which case had been the subject of a referral by the High Court here to the Court of Justice of the European Union (“CJEU”). That court delivered a decision on the reference in the case entitled *L.M.* (C-216/18 PPU).
30. It was submitted to me in the other application to which I have referred that I should defer decision on that application in order to establish the basis for the refusal of the application by the court in Karlsruhe, in case it might be of any assistance to this Court, and I agreed to do so. Since that application was contemporaneous to this application, I considered it appropriate to defer a decision on this application for the time being also.
31. It transpired that the court in Karlsruhe had directed a series of questions to the issuing judicial authority in Poland in connection with the legal effect of the new laws, but, before a response had been delivered to those questions, it had declined the application because it was satisfied on the basis of the information before it that there were specific and precise reasons amounting to substantial grounds for believing that the requested person in the case would not receive a fair trial, if surrendered. It was then submitted to me that, having regard to the new laws, I should seek further information from the issuing judicial authority with a view to determining whether the new laws, by themselves or taken together with earlier legislative changes in Poland, constitute substantial grounds for believing that the respondent’s entitlement to a fair trial will be violated, if surrendered. Initially, I decided against ordering a request for further information, because it seemed to me that the questions to be asked would be of such a general nature as could only give rise to a general response. Inevitably, this would be mean that, whatever the answers might be, they could hardly provide information that would be specific and precise to the respondent’s case.
32. Subsequently however, I changed my mind and directed that certain questions should be put to the IJA. I changed my mind for two reasons; firstly, there was another development brought to the attention of the Court, that is that a Dutch court had made a referral to the CJEU in relation to the new laws (the “Dutch referral”), and while details of this were at the time unclear, I took the view that it would be appropriate to await the decision of the CJEU on the Dutch referral in case it impacted on these and other proceedings. Accordingly, while awaiting the decision of the CJEU on the Dutch referral, it seemed to me to be appropriate to seek further information as regards the new laws, in case the replies might assist the Court in its determination, following upon the decision of

the CJEU. Secondly, on reflection, I considered it appropriate to seek further information having regard to the decision of the CJEU in *L.M.*, and subsequently the Supreme Court here in *Minister for Justice & Equality v. Celmer* [2019] IESC 80.

33. Accordingly, on 14th October, 2020 I directed that further information be sought from the IJA under s. 20 of the Act of 2003. By letter dated 20th October, 2020 the central authority in this jurisdiction sent six questions to the IJA and a reply to those questions was received by letter dated 19th November, 2020. The questions and answers received are as follows:

Question 1: "Do the laws of Poland as summarised in the High Court judgment of *Minister for Justice v. Celmer* [2018] IEHC 153, para. 28 [...] and the reasoned proposal of the European Commission pursuant to Article 7 of the TEU apply to the courts before which Mr. Lyszkiewicz will stand trial, including any courts to which he may appeal after the first instance decisions?"

Answer 1: "The law of Poland, as it was summarized in the decision by the Supreme Court of Ireland in the case: *Minister for Justice v Celmer* (2018) IEHC, paragraph 28, and in the justification of a motion by the European Commission, pursuant to Art. 7 of TEU, applies to the courts where the proceedings concerning Mr. Jakub Łyszkiewicz will take place, also in the appellate court with which he can lodge an appeal after he has received the decision of the court of first instance,"

Question 2: "Does the law dated 20th December 2019, being an Act on the system of common courts, including the Act on the Supreme Court, and published in the Journal of Laws 2019, No. 190, apply to the courts before which Mr. Lyszkiewicz will stand trial, including any courts to which he may appeal after the first instance decision?"

Answer 2: "The Act of 20 December 2019 on the Amendment of the Law on the System of Common Courts Act, of the Supreme Court Act as well certain other acts, published in the Journal of Laws of 2020 under the number 190, applies to the courts where the proceedings concerning Mr. Jakub Łyszkiewicz will take place, also in the appellate court with which he can lodge an appeal after he has received the decision of the court of first instance,"

Question 3: "Have any judges assigned to the courts before which the respondent will stand trial - including any appellate court judges - been subjected to disciplinary proceedings since the above laws came into force?"

Answer 3: "from the information sent by the Deputy President of the Regional Court in Rzeszów and the President of the Regional Court in Rzeszów it follows that in the years 2018 - 2020 no disciplinary proceedings were pending against any judge assigned to the courts where the defendant's trial will take place, including the appellate court, and specifically none has been initiated until the time the Act indicated in item 2 became effective,"

Question 4: "If so, please provide details of the disciplinary charges and the outcome of such proceedings including any penalties imposed."

Answer 4: "because of the answer in item 3, the question in item 4 has lost validity,"

Question 5: "Is it possible for a judge before whom the respondent may stand trial, including any appellate court judges, to be disciplined on account only of any decisions that he or she may make in the ordinary performance of his or her duties?"

Answer 5: "considering the actions undertaken by the Disciplinary Proceedings Representative of the Common Court Judges, it cannot be explicitly excluded that the judge who will be examining the criminal case of Mr. Jakub Łyszkiwicz will not be subject to a disciplinary penalty only due to the decision they will make while performing their ordinary duties,"

Question 6: "Is it possible for an accused person who has concerns about the (a) appointment and/or (b) impartiality before whom he/she may stand trial to challenge and/or request that judge to recuse him or herself i.e. to request the judge not to preside over or participate in the trial in any way? If so, will that challenge or request be decided on before the trial proceeds any further?"

Answer 6: "the accused who has concerns regarding the appointment and/or impartiality of the judge who will be examining their case in court has the right to motion for disqualification of the judge, should there exist a circumstance which could raise reasonable doubt as to the judge's impartiality in the case. A motion for disqualification of a judge submitted on this basis after the court proceedings have commenced shall not be considered unless the reason for disqualification arose or became known to the party only after the proceedings commenced (Art. 41 par. 1 and 2 of the Code of Criminal Procedure)."

34. It is clear from the replies received that the new laws to apply to the courts at the level with jurisdiction over the proceedings to which the respondent will be subject, on his surrender. It was not argued that anything else of significance arises out of the answers provided by the IJA.
35. The CJEU then delivered its decision on the Dutch referral on 17th December, 2020 (joined cases C-354/20 PPU and C-412/20 PPU). In the concluding paragraph of its decision, it held:

"Article 6(1) and Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, 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 of Fundamental Rights of the European Union, 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 the warrant was issued, such as the statements by public authorities which are liable to interfere with how an individual case is handled."

36. In effect, this is a re-statement of the test prescribed by the CJEU in *L.M.* It is a test that requires the Court to consider and answer two questions:
- 1) Is there objective, reliable, specific and properly updated material indicating that there is a real risk of a breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary? There can be little doubt but that the answer to this question is that such material is available and confirms that real risk. Donnelly J. identified the risk in *Celmer (No.5)* [2018] IEHC 639, and it is clear that far from having improved in the intervening period, the situation has deteriorated further following the introduction of the new laws. That this is so is apparent not just from international commentary concerning the new laws, but also from the opinion of Advocate General Campos Sánchez-Bordona, who in his opinion in the Dutch referral case noted that the position in Poland appears to be worsening (see para. 57 of his opinion).
 - 2) The second limb of the test requires the executing judicial authority to determine specifically and precisely, the extent to which the general deficiencies identified are liable to have an impact at the level of the courts of the Member State having jurisdiction over the proceedings, to which the requested person will be subject and, whether, having regard to his or her personal situation, the nature of the offence for which he or she is being prosecuted and the factual context in which the arrest warrant was issued, and in the light of any information provided by the Member State pursuant to Article 15(2), there are substantial grounds for believing that that person will run such a risk if surrendered to that Member State.
37. The replies to the request for further information confirm that the new laws do apply to the court before which the respondent will be tried. The nature of the offences for which the surrender of the respondent is sought do not give rise to any specific concern i.e.

there is no reason to believe that the respondent will not receive a fair trial simply because of the nature of the offences involved, and nor has this been argued. There is nothing unusual about the factual context in which the arrest warrant was issued. Nor has any information been provided as regards the personal situation of the respondent to give rise to a concern that he will not receive a fair trial.

38. All of the grounds relied upon, in relation to this ground of objection, are general grounds arising out of generalised and systemic deficiencies in the rule of law in Poland. However, it has now been stated twice by the CJEU that such generalised and systemic deficiencies in the rule of law of a requesting Member State are not in and of themselves a sufficient basis upon which to refuse an application for surrender. To justify a refusal of surrender, such general and systemic deficiencies must be linked to the personal situation of the requested person. It must be demonstrated that, for reasons associated with the requested person specifically, or the nature of the offences for which his surrender is sought or the factual context in which the warrant is issued, that there are substantial grounds for believing the requested person will not receive a fair trial. No argument was advanced to this effect in this case, and nor was any information provided to the Court that could support such an argument. This objection to surrender must therefore be dismissed, in so far as it is concerned with issues relating to the independence of the judiciary and fair trial rights.

Court “Established by Law”

39. There is, however, another limb to the objection grounded on legislative changes in Poland, and their impact on the rule of law, which, the respondent submits, has not been addressed by the Supreme Court decision in *Celmer* or by the CJEU decisions in *L.M.* and *L and P* and, accordingly, the test posited by those cases have no application to this objection. This relates to the lawfulness of appointment of judges, and the possibility of challenging the composition of a court. It is submitted on behalf of the respondent that one of the matters that has been giving rise to concerns about the rule of law in Poland is the appointment of judges. There are concerns that judges may be appointed or have been appointed contrary to law, and furthermore that some provisions of the new laws prohibit any challenge to validity of a judge’s appointment. Article 42a of the new law provides: “*Within the framework of the activity of the courts or organs of the courts, it is unacceptable to question the powers of courts and tribunals, constitutional state bodies and law enforcement and control bodies*”. It is hardly surprising that such a provision has given rise to concern. Amongst the sources relied upon as expressing this concern is the Polish Commissioner for Human Rights who, referring to Article 42a of the new law the Act stated:-

“The real purpose of the Act and of the definition in question [definition of judge] is to legalise the legal status of persons who have been appointed as judges, even if their appointment was in gross violation of the law.”

40. Counsel for the respondent acknowledged that his concerns about the validity of a judge’s appointment would be assuaged if it were possible to challenge his/her appointment. However, it is submitted that that entitlement has, for all practical purposes, been

abolished by Article 26 of the New Laws. It is submitted that all of this gives rise to a risk of a violation to the respondent's right under Article 6 of the Convention which provides, *inter alia*, that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Reliance is also placed upon Article 47 of the Charter which provides, *inter alia* that there is a right to "an independent and impartial tribunal previously established by law". In so far as there is no longer a procedure available to challenge the lawfulness of a judge's appointment, it is submitted that that also constitutes a violation of the respondent's rights to an effective remedy under Article 47 of the Charter.

41. It is submitted on behalf of the respondent that this issue has not been addressed either in L.M. or in the more recent decision of the CJEU in *L and P*. Those cases it is submitted, were concerned with the independence of the judiciary and the right to a trial before an independent and impartial tribunal and related issues. It is submitted that the question of whether a court has been established in accordance with law however, is a separate and distinct matter. An accused person is entitled to trial before a properly constituted court, established by law.
42. It is submitted that any proceedings before a court that has not been established by law are in violation of those rights. Since the manner of appointment of judges has been to the fore in the controversy surrounding rule of law issues in Poland in recent years, and since it is clear that an accused person cannot hope to challenge the composition of the court before which he or she stands trial, these matters together must lead the Court to a conclusion that there are substantial grounds to believe that if the respondent is surrendered, his right to a fair trial before a court established by law, as guaranteed by Article 6 of the Convention and Article 47 of the Charter will be violated.
43. I will first address the question as to whether or not it is possible to challenge the composition of a trial court. The applicant submits that it is far from clear from the evidence that an accused person does not have the right to challenge the composition of a court on the grounds of a defect in the appointment of a judge. This was addressed in a report provided by a Polish lawyer, a Ms. Dabrowska, in another case, namely *Minister for Justice and Equality v. Orłowski*, which proceedings have been "travelling" at all material times with these proceedings, and upon whose advice the respondent relies with the permission of the Court. The issue was also addressed in replies to the request for information made to the issuing judicial authority in October 2020, which I have set out above. Having reviewed all of that documentation, I think it likely that the submissions of the respondent in this regard are correct. Articles 26(2) and (3) of the Act on the System of Common Courts of 20th December, 2019 provide:-

"(2) *The competence of the Extraordinary Control and Public Affairs Chamber includes consideration of motions or statements concerning the exclusion of a judge or the designation of the court before which the proceedings are to be conducted, including the allegation of lack of independence of the court or lack of impartiality of the judge. The court examining the case shall immediately forward the motion*

to the President of the Extraordinary Control and Public Affairs Chamber in order to give it further course of action under the rules specified in separate regulations. The submission of the motion to the President of the Extraordinary Control and Public Affairs Chamber does not stop the ongoing proceedings.

(3) *The motion referred to in paragraph 2 shall be left unprocessed if it involves determining and assessing the legality of the appointment of a judge or his authority to perform judicial tasks."*

44. I think it is reasonably clear from this text and the opinion of Ms. Dabrowska that, even if a person can issue a motion to challenge the validity of a judge's appointment, that motion will not be heard. The position may well be different where the motion concerns issues relating to impartiality, but that is a separate matter. However, while that conclusion may strengthen the respondent's objection, it is only one element of it, advanced in support of his central contention that he will not receive a trial before a court established by law, if surrendered.
45. I have great difficulty in accepting the argument that neither of the decisions in *L.M.* nor *L and P* embraced matters concerning the appointment of judges or the right to a trial before a Tribunal established by law. In *L.M.*, the CJEU was considering the objections of the respondent in that case which revolved around legislative changes in Poland since 2015. At para. 21, it identifies some of the changes under consideration (which had given rise to a reasoned proposal on the part of the European Commission pursuant to Article 7(1) of the Treaty on the European Union), and amongst the matters about which concern was expressed were compulsory retirement and future appointments in the Supreme Court and the composition of the National Council for the Judiciary. The issue of appointment and dismissal of judges is referred to on numerous occasions in the reasoned proposal of the Commission, for example, at paras. 57, 68, 141, 144, 155, 157, 161 and 175. In *L.M.*, the CJEU addresses the reasoned proposal at paras. 18 - 20. It is clear, in my opinion, that the decision of the CJEU in *L.M.* was concerned with all of the legislative changes, including those relating to appointment of judges, that had taken place up to the time that Donnelly J. in this Court referred questions to the CJEU for consideration in that case.
46. In *L and P* at para. 14, the CJEU sets out those developments which caused the referring court in that case to seek a ruling from the CJEU. Included in these developments were the adoption of the law of 20th December, 2019 which, it is noted in the decision in *L and P*, has led the European Commission to initiate infringement proceedings on 29th April, 2020, against Poland, concerning the new laws. In the course of an exchange with the Court on this issue, counsel for the respondent stated that there have been "*doubtful appointments*" to the courts in Poland, and that this has been a feature of the information available concerning the courts in Poland from the very outset. This, it seems to me, may reasonably be interpreted as an acceptance that matters concerning the regularity of the appointment of judges were very much "in the mix" when the CJEU delivered its decisions in both *L.M.* and *L and P*. That being so, I find it difficult to comprehend the argument

that a person such as the respondent, who wishes to raise objection to his surrender to Poland on this ground, does not have to meet the test that has in effect been pronounced twice by the CJEU in *L.M.* and *L and P*, and applied in this jurisdiction by both the High Court in *Celmer (No. 5)* and, on appeal, in the Supreme Court. For this reason alone, this objection must be rejected, but there are also other reasons to reject the same.

47. The possibility that judges may be appointed otherwise than in accordance with law is a systemic and generalised deficiency in the rule of law, but it is not open to this Court to refuse surrender of a requested person on the basis of a systemic or generalised deficiency. The Framework Decision provides for a limited number of grounds for the refusal of an application for surrender. Some of these are mandatory and some are optional. But it has been recorded many times, and was repeated again in *L and P* at para. 37, "*execution of the European Arrest Warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly*". One of the exceptions permitted by the Framework Decision is where surrender would give rise to a violation of fundamental rights recognised by Article 6 of the Treaty on European Union and as reflected in the Charter (Recital 12 of the Framework Decision). In turn, this is reflected in s. 37 of the Act of 2003 which states that a person shall not be surrendered under the Act if his or her surrender would be incompatible with the State's obligation under the Convention or the protocols to the Convention.
48. While the general and systemic deficiencies that have been identified and addressed in *L.M.* and *L and P* are of profound concern, it does not follow that all appointments made pursuant to the new laws will be contrary to law. Before the Court may refuse surrender on the basis of this objection, it must be satisfied that there are substantial grounds for believing that the requested person will, if surrendered, run a real risk of breach of his or her fundamental right to a fair trial, before a tribunal established in accordance with law. Those substantial grounds in turn can only be established by reference to a specific and precise examination of the personal situation of the respondent.
49. There is no information available to suggest that there are substantial grounds to believe that the respondent will stand trial before a judge who has not been appointed in accordance with law. The furthest that the matter can be put is that this is a possibility. Such specific evidence as is available has been provided by Ms. Dabrowska who, in a report of 17th July, 2020 and in answer to a question as to whether or not she is aware of any irregularities in the appointment to the common courts [of judges] states: "*The author has no knowledge of any irregularities other than the appointment of judges at the request of the National Council of the Judiciary in a changed form...*". While I am unclear as to exactly what this means, there is nothing in the two reports provided by Ms. Dabrowska to indicate that she has any concerns regarding the regularity of the appointment of judges at the level of court in the district where the respondent will face trial.
50. The respondent relies upon a decision of the European Court of Human Rights in the case of *Ástráosson v. Iceland* (Application No. 26374/18, 1st December, 2020). In that case,

the applicant had been convicted of road traffic offences and appealed against that conviction to the Court of Appeal in Iceland. The appellate court was made of a panel of judges, the appointment of one of whom, it subsequently transpired, was defective. The ECtHR drew a distinction between the independence and impartiality of the tribunal on the one hand, and the right to a trial by a tribunal established at law on the other. At paras. 280 and 285, the court stated:

"280. The Court has no reason to doubt that the appointments at issue had, technically, not been 'markleysa' (a nullity) under Icelandic law or that, once appointed, the individual judges would endeavour to observe the fair trial requirements. However, none of those findings address as such the question whether the irregularities in the process leading to the appointment of A.E. had, by and of themselves, interfered with the applicant's right to a 'tribunal established by law' as a distinct Article 6 safeguard, as interpreted by the Court. ...

285. Moreover, the question whether the irregularities at issue had any actual implications for A.E.'s independence or impartiality, this being at the centre of the Supreme Court's examination of the applicant's case, did not as such have a direct bearing on the assessment of his separate complaint under the 'tribunal established by law' requirement, as already noted in paragraph 280 above."

51. On the facts of the case the ECtHR found that there had been a flagrant breach of the applicable rules relating to judicial appointments which were specifically designed to serve the important public interest of safeguarding judicial independence vis-à-vis the executive branch. This failure, the ECtHR concluded, amounted to a violation of the right to trial before a court established by law. It was accepted by the State parties in *Ástráosson* that the appointment of the judge in question had been irregular under domestic law. The applicant in these proceedings submits that there has been no evidence adduced in these proceedings to suggest that any of the judges appointed pursuant to the changes in legislation in Poland dating back as far as 2015 have been appointed other than in accordance with domestic Polish law. I think there is significant merit in that submission. Moreover, in *Ástráosson* the ECtHR held that the fact that a court is both independent and impartial in the discharge of its functions, does not in and of itself mean that the judge or judges sitting on the court were appointed in accordance with law. The opposite is also true, and the fact that legislative changes in Poland have given rise to serious concerns about the independence or impartiality of the courts in Poland generally, does not mean that all courts, or any particular court, have been established contrary to law.
52. Through no fault of his own, the respondent is unable to advance any evidence regarding the legality of the appointment of the judges who will be in charge of the proceedings that he faces, if surrendered. So the furthest that the respondent can put this argument is to say that there is a possibility that, if surrendered, he will be put on trial before a court that has not been established in accordance with law. A mere possibility that this might occur is not sufficient to refuse an application for surrender. If authority were needed for this proposition, it can be found in *Minister for Justice, Equality and Law Reform v.*

Rettinger [2010] IESC 45. That case was concerned with the possibility that the respondent might be subjected to treatment contrary to Article 3 of the Convention, if surrendered (as it happens, also to Poland). At para. 27 of her judgment, Denham J. sets out the principles applicable to the consideration of such an objection and at para. (VII) she expressly states that “*the mere possibility of ill treatment is not sufficient to establish an applicant’s (sic) case*”.

53. For all of these reasons, therefore, this objection must also be rejected. Having concluded that all of the objections of the respondent must be rejected, it is appropriate for the Court to make an order under s. 16 of the Act of 2003, directing the surrender of the respondent.
54. I should add that a final decision on this application was deferred pending the determination of objections raised in other cases, arising out of objections grounded on concerns relating to generalised and systemic deficiencies in the rule of law in Poland. Ultimately, it was not possible to resolve those objections until the Court of Justice of the European Union handed down a decision in the case of *L and P* (C 354/20 PPU and C 412/20 PPU), on 17th December, 2020, and thereafter it was necessary to receive and consider submissions arising out of that decision. Those objections are addressed in the case of *Minister for Justice and Equality v. Orłowski* (record no.s 2015/145, 2015/159, 2015/160, 2017/50 EXT).