

# THE EFFECT OF CJEU CASE LAW CONCERNING THE RULE OF LAW AND MUTUAL TRUST ON NATIONAL SYSTEMS

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*Forthcoming in Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano (eds.), The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis, Hart Publishing, 2019*

The EU is founded on a number of values enshrined in Art. 2 of the Treaty on the European Union (TEU), of which democracy, the rule of law and fundamental rights are overarching.

The principle of mutual recognition at the heart of EU criminal law is intrinsically linked to the concept of the rule of law and the protection of fundamental rights. This principle in surrender proceedings prescribes that ‘the Member States are in principle obliged to give effect to a European Arrest Warrant.’<sup>1</sup>

In its Opinion 2/13 on the draft accession agreement of the EU to the European Convention on Human Rights (ECHR),<sup>2</sup> the Court of Justice emphasized that a Member State shall presume all other Member States to be in compliance with EU law including the respect for fundamental rights. The Court of Justice also referred to ‘exceptional circumstances’, which would warrant deviating from the mutual trust principle,<sup>3</sup> but the exact nature of these was left open. In the cases of *Aranyosi* and *Căldăraru*<sup>4</sup> and in *LM*<sup>5</sup> the CJEU had an opportunity to clarify what those exceptional circumstances might be and what they would entail for the role of the judicial authorities, and the individual subject to a surrender procedure.

In the following, the two judgments will be briefly discussed, with a special emphasis on the rule of law aspects of the case-law, then their potential consequences for national judiciaries and for suspects will be summarized, before analysing the national implementation of the judicial tests developed by the Luxembourg forum.

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<sup>1</sup> Case C-237/15 PPU, *Lanigan*, [2015] ECR 474, para. 36; Judgment in *Aranyosi*, para. 79.

<sup>2</sup> Court of Justice of the European Union, Opinion 2/13 of 18 December 2014, not yet published. Opinion pursuant to Article 218(11) TFEU - draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties.

<sup>3</sup> *Id.* at para. 192.

<sup>4</sup> Judgment of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Requests for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen, Joined Cases C-404/15 and C-659/15 PPU; W. van Ballegooij, P. Bárd, ‘Mutual recognition and individual rights, Did the Court get it right?’ in *New Journal of European Criminal Law*, Vol. 7, Issue 4, 2016, p. 439-464.

<sup>5</sup> Judgment of the Court (Grand Chamber) of 25 July 2018, *Minister for Justice and Equality v LM*, Requests for a preliminary ruling from the High Court (Ireland), Case C-216/18 PPU, ECLI:EU:C:2018:586.

## The *Aranyosi* and *LM* jurisprudence

In the surrender cases *Aranyosi* and *LM*, the CJEU reserves the task of suspending mutual trust exclusively to the Member States, and only if the sanctioning prong of Article 7 TEU was successfully invoked.<sup>6</sup> Judicial authorities, in contrast, may only suspend individual surrenders on a case-by-case basis.<sup>7</sup> The question is under what conditions.

The CJEU first answered this question in *Aranyosi*, which concerned the surrender of individuals to countries with detention conditions that amounted to violations of Article 4 EU Charter (3 ECHR) prohibiting torture, inhuman, degrading treatment or punishment. The CJEU established a two-prong-test for checking the fundamental rights situation in and the potential risks of human rights violations by the issuing Member State, and for potentially allowing the postponement of surrender. As a first step, the executing judicial authority must assess whether there are deficiencies in general. Once a risk of fundamental rights violation is established, as a second step, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the person concerned by a European Arrest Warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions of his or her detention in the issuing Member State, to a real risk of inhuman or degrading treatment or punishment, within the meaning of Article 4 EU Charter, in the event of his surrender to that Member State.<sup>8</sup> To that end, the executing judicial authority must request supplementary information to be provided by the issuing judicial authority. The executing authority may further rely on any other information available.<sup>9</sup> If the risk of a human rights violation in general and in the specific case is established, the execution of the warrant must be postponed.<sup>10</sup>

Certain other features of the *Aranyosi* case made it questionable whether it would make a strong precedent. The fact that an absolute right was at stake and that its violation was established beyond doubt made the case a relatively easy one. A further element that made the case easy is that the evidence presented substantiating the general fundamental rights violations was a solid one, namely a pilot judgment vis-a-vis one of the issuing states,<sup>11</sup> and a series of ECHR judgments against the other.<sup>12</sup> Importantly, it remained unclear whether and to what extent the case-law would be applicable if not merely a potential (absolute) fundamental rights violation was at stake, but also an element of the rule of law was in jeopardy in the issuing state. In the case of Artur Celmer referred to as *LM*, the CJEU got a chance to answer these questions.<sup>13</sup>

The issue concerned whether *LM*, a crime suspect, should be surrendered from Ireland to Poland when the executing judicial authority has serious doubts as to whether the suspect would receive a fair trial in the issuing state, due to the lack of independence of the judiciary resulting from changes to the Polish judicial system.<sup>14</sup> The CJEU had a chance – and we have previously

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<sup>6</sup> FD EAW, recital 10.

<sup>7</sup> *LM*, para. 73.

<sup>8</sup> *Id.* at para. 92.

<sup>9</sup> *Id.* at para. 95-97.

<sup>10</sup> *Id.* at para 98.

<sup>11</sup> ECtHR of 10 March 2015, Application Nos: 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and others v Hungary*

<sup>12</sup> ECtHR of 24 July 2012 in Case Nr. 35972/05, *Stanciu v Romania*.

<sup>13</sup> See *LM*.

<sup>14</sup> High Court of Ireland decision of 12 March 2018, *Minister for Justice and Equality v Celmer* [2018] IEHC 119. For the final version of the preliminary reference see High Court of Ireland decision of 23 March 2018, *Minister for Justice and Equality v Celmer* [2018] IEHC 119.

argued<sup>15</sup> for making use of it – to go beyond its case law and frame the case primarily as a rule of law problem. The CJEU however constructed the case as a possible violation of a fundamental right, in this case the right to a fair trial ex. Article 47 EU Charter, the essence of which includes the requirement that tribunals are independent and impartial.<sup>16</sup> The CJEU ruled that the two-step test in *Aranyosi* needs to be followed by the executing judicial authority when making decisions on surrenders. When discussing the first prong of test in relation to judicial independence, the CJEU relied on the case *Associação Sindical dos Juizes Portugueses*<sup>17</sup>, and emphasised that both judicial independence and impartiality are crucial for the right to fair trial to be respected.<sup>18</sup> Second, if the first element of the test is satisfied, the executing judiciary must specifically and precisely assess whether, in the case at hand, there are substantial grounds for believing that the requested suspect will run the real risk of being subject to a breach of the essence of the right to a fair trial.<sup>19</sup> When making this assessment, the executing court must first check the extent to which the systemic or generalized deficiencies of the judiciary in the issuing Member State have an impact on the court that will decide the surrendered individual's case.<sup>20</sup> Second, the executing court must also assess whether the individual concerned will run a real risk of breach of his fundamental right to an independent tribunal, having regard to his personal situation, the nature of the offence and the factual context.<sup>21</sup>

## Potential consequences for national judiciaries and suspects

It is submitted that shifting the responsibility for fundamental rights protection to the issuing judicial authority requires first and foremost adequate safeguards and enforcement mechanisms on democracy, the rule of law and fundamental rights protection in the Member States and the development of further minimum standards at EU level, including as regards pre-trial detention.<sup>22</sup> One should also not forget to ensure the proper enforcement of EU measures already adopted, ensuring dual representation and legal aid for those subject to a judicial cooperation measure within the EU.

A monitoring mechanism could address problems, be it with detention conditions or threats to judicial independence, before they escalate. We have sought to tie this idea with that of a

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<sup>15</sup> Petra Bárd and Wouter van Ballegooij, *Judicial Independence as a Pre-Condition for Mutual Trust? The CJEU in Minister for Justice and Equality v LM*, New Journal of European Criminal Law, Volume 9, Issue 3, 2018, 353-365, P. Bárd and W. van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust', *Verfassungsblog*, 10 April 2018 <<https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/>>; P. Bárd and W. van Ballegooij, 'The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue', *Verfassungsblog*, 2 July 2018, <<https://verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue/>>, W. van Ballegooij and P. Bárd, 'The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU', *Verfassungsblog*, 29 July 2018, <<https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>>."

<sup>16</sup> *LM*, paras. 47-48.

<sup>17</sup> Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, Request for a preliminary ruling from the Supremo Tribunal Administrativo, Case C-64/16, ECLI:EU:C:2018:117.

<sup>18</sup> *LM*, paras. 64-67.

<sup>19</sup> *LM*, para. 68. Cf. Judgment of the Court (Grand Chamber) of 5 April 2016, *Aranyosi*, paras. 92 and 94.

<sup>20</sup> *LM*, para. 74.

<sup>21</sup> *LM*, para. 75.

<sup>22</sup> W. van Ballegooij, The cost of non-Europe in the area of procedural rights and detention conditions, European Parliamentary Research Service, PE 611.008, December 2017.

mechanism, allowing executing judicial authorities to ‘freeze’ judicial cooperation<sup>23</sup> in the event that doubts arise as to respect for the rule of law in the issuing Member State.<sup>24</sup> Such a measure should stay in place until the matter is resolved in accordance with the procedure provided for in Article 7 TEU or a permanent mechanism for monitoring and addressing Member State compliance with democracy, the rule of law and fundamental rights (DRF) as proposed by the European Parliament.<sup>25</sup>

Second, we have warned against the CJEU’s tendency to limit the discretion of executing judicial authorities. Beyond misinterpreting the principle of mutual recognition, this negates the fact that fundamental rights are also a direct source of EU law.<sup>26</sup>

Third, relying on assurances from issuing judicial authorities creates two classes of EU citizens: those that are treated ‘better’ because they ‘benefit’ from free movement and those that apparently do not have the right to an independent judge or adequate detention conditions because they remained inside their Member State.<sup>27</sup>

Fourth, an inverse problem might occur. Certain national constitutions offer a higher level of protection than the EU standard, sometimes limited to their own citizens, sometimes not. Distinguishing between those who remain within and those who come from outside will lead to a direct conflict with those constitutions, thereby reinvigorating the conflict over primacy of EU law, and the degree to which higher protections offered by national constitutional provisions may be maintained in accordance with article 53 of the Charter.<sup>28</sup>

Fifth, there is a wider problem a lack of judicial independence raises for the EU constitutional construct, which relies on national judges to enforce EU law on behalf of individuals, if need be setting aside conflicting national law. In this regard it would have been more logical for the

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<sup>23</sup> See the Verfassungsblog entries by Bárd and van Ballegooij. The need for a freezing mechanism has also been shared by Professors Carrera and Mitsilegas. See: S. Carrera and V. Mitsilegas, ‘Upholding the Rule of Law by Scrutinising Judicial Independence: The Irish Court’s request for a preliminary ruling on the European Arrest Warrant’, *CEPS*, 11 April 2018, <<https://www.ceps.eu/publications/upholding-rule-law-scrutinising-judicial-independence-irish-courts-request-preliminary>>.

<sup>24</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409; W. van Ballegooij, T. Evas, An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in ‘t Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex I, L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova, ‘Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights’; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, ‘Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights’.

<sup>25</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA-PROV(2016)0409; Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, adopted by the Commission on 17 January 2017, SP(2017)16.

<sup>26</sup> W. van Ballegooij, The Nature of Mutual Recognition in European Law, Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area, Intersentia, 2015, p. 356: ‘Limiting the discretion of executing judicial authorities, claiming that it is good for mutual recognition fails to understand the need to recognise judicial decisions as opposed to enforcing them directly based on compliance with the standards of the home state (home state control).’

<sup>27</sup> W. van Ballegooij, P. Bárd, *New Journal of European Criminal Law* 2016, op. cit, at p. 456.

<sup>28</sup> Case C-399/11, *Melloni* [2013]; German Constitutional Court, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - paras. (1-126), [http://www.bverfg.de/e/rs20151215\\_2bvr273514en.html](http://www.bverfg.de/e/rs20151215_2bvr273514en.html).

CJEU to rely on article 19 TEU directly on the one hand, like in its earlier *Associação Sindical dos Juizes Portugueses* case and the interim measure inflicted on Poland in the controversy around judicial independence.<sup>29</sup> The contradiction in the two sets of cases may be explained by the fact that in cases involving mutual recognition based instruments, the CJEU can share responsibility with domestic courts – notably the judicial authority of the executing Member State – in determining the health status of the issuing state’s judiciary, whereas in the cases targeting judicial independence as such, the CJEU is the ultimate judicial body in the EU setting to address the placing in jeopardy of judicial independence. Also, in *LM* the CJEU entered into a judicial dialogue with a national court, which specifically asked whether the previous jurisprudence in *Aranyosi* was to be followed, and whether it had to move to the second prong of the test in case the issuing court had a rule of law deficiency, whereas in the other (infringement) case it was not bound by questions formulated in a preliminary reference.

Nevertheless, the deference of the CJEU towards the European Council and the distinction between infringement proceedings to uphold the rule of law and surrender proceedings is unjustified.<sup>30</sup> We have furthermore argued that the second prong of which raises Herculean hurdles for both the defence in terms of proving such violations and on judicial authorities to accept them in individual cases. In our view, once the first step of test is satisfied, the onus should shift to the stronger party, that is, the state accused of rule of law violations, in the light of the bedrock of the principle of equality of arms.<sup>31</sup> Furthermore, we severely doubt whether a captured court could engage in a proper dialogue with the executing judicial authority on its judicial independence, as the issuing court would thereby risk destroying its own reputation and / or criticising the state’s executive upon which it is dependent.<sup>32</sup>

## **National follow-up to *Aranyosi* and *LM*: proving the need for an EU mechanism on democracy, the rule of law and fundamental rights**

At the time of writing, several executing judicial authorities in the Member States have engaged with the two-prong test prescribed by the CJEU. Even in light of the very recent and therefore yet limited case law we can already notice some worrying signs confirming the concerns raised in our previous writings and summarized in the above subchapter.

In Hungary, there are still severe concerns with regard to prison conditions, nevertheless as will be further discussed/ argued below the Court’s heavy reliance on Council of Europe standards makes it more difficult for executing judicial authorities to postpone surrender cases on that ground.

In the case of Poland, the national courts that have expressed themselves on the matter so far all came to the conclusion that there are general deficiencies concerning the judiciary following

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<sup>29</sup> Case C-619/18 R, *Commission v Poland*

<sup>30</sup> Cf. M. Krajewski, ‘Who is afraid of the European Council? The Court of Justice’s cautious approach to the independence of domestic judges, ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v LM’, in *European Constitutional Law review*, 20118, p. 1-22 at p. 19: ‘The competence of the Court under Article 19(1) TEU and 47 of the Charter and the competence of the European Council under Article 2 and 7 TEU are parallel.’

<sup>31</sup> European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, p. 29-31, <[https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf)>

<sup>32</sup> Bárd and van Ballegooij, *New Journal of European Criminal Law*, *op. cit.*, 360-363; M. Krajewski, *European Constitutional Law review*, *op. cit.*, p. 14: ‘Clearly, any judge who provided a foreign court with information about political pressure being exerted would face disciplinary action.’

recent legislative changes as evidenced by various sources, including the Commission's Reasoned Proposal for a Decision of the Council on the determination of a clear risk of a serious breach of the rule of law of 20 December 2017.<sup>33</sup> There are several pending cases where national courts currently apply the test laid down in *LM*,<sup>34</sup> whereas in others the assessment already took place and surrender was ordered.

## Higher Regional Court of Bremen: ML

Two aspects of the *Aranyosi* jurisprudence's impact on national courts deserve greater attention. Both issues have been extensively dealt with in *ML*, another surrender case, where – similarly to *Aranyosi* – a German court had doubts as to whether the convict shall be handed over to Hungary with still substandard prison conditions. The Higher Regional Court of Bremen asked the CJEU what information it needs to obtain about the conditions in which ML would be detained in Hungary.<sup>35</sup>

First, when assessing the effects of potential cramped and substandard prisons on the individual suspect, the executing judicial authorities are only required to assess the conditions of detention in the prisons in which the suspect is intended by the issuing authorities to be detained. In means that the application of the second prong of the *Aranyosi* test will in practice not necessarily lead to effective protection of detainees.<sup>36</sup>

Second, in *ML* the difficulties of the *Aranyosi* test took their toll. *Aranyosi* placed too much of a burden on executing authorities to check possible systemic fundamental rights violations in the issuing Member States. Among others, it was left open what pieces of evidence need to be used to prove the general problem.

The judgment in *Aranyosi* heavily depended on the ECtHR judgment *Varga and Others v. Hungary*,<sup>37</sup> holding that prison conditions in Hungary violated Article 4 EU Charter (Article 3 ECHR). But after the judgment in *Aranyosi* had been rendered, Hungary adopted a new law,<sup>38</sup> which provided a combination of preventive and compensatory remedies, guaranteeing in principle genuine redress for ECHR violations originating from cramped prisons and other unsuitable detention conditions. Therefore, the question in *LM* was whether surrender still had to be postponed in light of the new Hungarian law. To make matters more complicated, in *Domján v. Hungary*<sup>39</sup> the ECtHR declared another Hungarian detainee's application – and all others' in his position – complaining about prison conditions premature and therefore inadmissible, saying that Mr. Domján should make use of the remedies introduced by the new domestic law before turning to the Strasbourg court.

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<sup>33</sup> COM (2017)0835, 20.12.2017.

<sup>34</sup> The Audiencia Nacional of Spain and District Court of Amsterdam sent questions to Polish issuing judicial authorities. See District Court of Amsterdam, 4 October 2018, ECLI:NL:RBAMS:2018:7032; and [https://wiadomosci.onet.pl/tylko-w-onecie/sad-w-madrycie-pyta-o-niezawislosc-sedziowska-w-polsce-w-tzw-sprawa-celmera/9vh20ef?utm\\_source=wiadomosci\\_viasg&utm\\_medium=nitro&utm\\_campaign=allonet\\_nitro\\_new&srcc=ucs&utm\\_v=2](https://wiadomosci.onet.pl/tylko-w-onecie/sad-w-madrycie-pyta-o-niezawislosc-sedziowska-w-polsce-w-tzw-sprawa-celmera/9vh20ef?utm_source=wiadomosci_viasg&utm_medium=nitro&utm_campaign=allonet_nitro_new&srcc=ucs&utm_v=2) for a copy of the questions asked by the Madrid court.

<sup>35</sup> Judgment of the Court (First Chamber) of 25 July 2018, Case C-220/18 PPU *ML*.

<sup>36</sup> Cf. <https://www.fairtrials.org/publication/beyond-surrender>

<sup>37</sup> *Varga and others*, *op. cit.*

<sup>38</sup> Act No. CX of 2016 amending Act No. CCXL of 2013 on the enforcement of punishments, measures, certain coercive measures and confinement for regulatory offences

<sup>39</sup> ECtHR of 14 November 2017, Application no. 5433/17, *Domján v. Hungary*

The ECtHR's decision in *Domján* led the AG believe in the *ML* case that surrender cannot be postponed any longer on the grounds of poor prison conditions in Hungary.<sup>40</sup> In contrast, the CJEU realized that procedures enabling authorities to grant redress for fundamental rights violations cannot rule out the existence of a real risk of a violation, and it is this latter aspect that the executing authority needs to assess. Even though the *Domján* decision is no ultimate proof that detention conditions changed for the better in Hungary, the CJEU also noted that the existence of the new proceedings of preventive and compensatory remedies may be taken into account when deciding on surrender.<sup>41</sup> Despite this refined reliance on ECtHR case law, the Court implies that “in the absence of minimum standards under EU law regarding detention conditions”<sup>42</sup> the ultimate bar for determining the potentiality of human rights violations remains to be determined by the Strasbourg court.

Instead of this heavy reliance of Strasbourg jurisprudence, we propose a regular, context-specific, objective, equal and scientifically sound evaluation, possibly in the form of the above-mentioned DRF mechanism, which would not only alleviate the burden from the national judiciaries to assess each other's legal systems, but also be tailored to the expedited intra-EU judicial cooperation based on the principle of mutual recognition requiring higher standards than those established by the Council of Europe, an entity incorporating a number of States with dismal human rights records.

## High Court of England and Wales: Pawel Lis et al.

A judgment by the High Court of England and Wales dated 31 October 2018 in the case of three Polish citizens<sup>43</sup> contesting their surrender to Poland illustrates just how difficult it is for the defence to prove that the wanted person will be individually affected by the current threats to the independence of the Polish judiciary to the extent that they would pose a real risk of a breach of their (fair trial) right to an independent tribunal.

First, the High Court accepted the reasoning of the respondents that the second prong of the test developed by the CJEU; ‘a real risk of being subject to a breach of the essence of the right to a fair trial’,<sup>44</sup> should be understood as the ‘flagrant denial of justice’ test developed by the European Court of Human Rights.<sup>45</sup> The High Court reasoning that this should be the case because the CJEU did not explicitly state otherwise is not convincing. At the very least the High Court could have raised preliminary questions to obtain further clarity from the CJEU on the standard of proof required for executing judicial authorities to accept that the individual ‘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’<sup>46</sup>. In any event, AG Sharpston's opinion in *Radu*

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<sup>40</sup> Opinion of Advocate General Campos Sánchez-Bordona of 4 July 2018, Case C-220/18 PPU *ML*, paras. 51-54.

<sup>41</sup> Judgment of the Court (First Chamber) of 25 July 2018, Case C-220/18 PPU *ML*, para. 117.

<sup>42</sup> Id. at para. 90. Cf. Wouter van Ballegooij, “Procedural Rights and Detention Conditions: Cost of Non-Europe Report”, PE 611.008, European Parliamentary Research Service, European Added Value Unit, Brussels (2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS\\_STU\(2017\)611008\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf)

<sup>43</sup> *Pawel Lis et al*, EWHC 2848(Admin) 31 October.

<sup>44</sup> *LM*, para. 68.

<sup>45</sup> *Pawel Lis et al*, para 62-63.

<sup>46</sup> *LM*, para. 75

should be recalled: ‘such a test [...] seems to me unduly stringent. [...] a trial that is only partly fair cannot be guaranteed to ensure that justice is done.’<sup>47</sup>

After assessing the individuals’ personal situation, nature of the offence and factual context the High court concludes that their individual cases would likely establish any real risk of breach of their fundamental rights to an independent trial.<sup>48</sup> In particular, the individuals are to be surrendered (the High Court still talks about extradition in accordance with the domestic transposition of the Framework decision on the European Arrest Warrant) ‘for ordinary criminal offences, with no political or other sensitive content’ which ‘would seem unlikely to be able to establish the necessary risk.’<sup>49</sup>

## District Court of Amsterdam

In an interim ruling of 4 October 2018,<sup>50</sup> the District Court of Amsterdam stayed surrender proceedings regarding a Polish suspect in view of obtaining answers by Polish judicial authorities (the Circuit Court in Poznań). The District Court was particularly persuaded that the first prong was met by evidence ‘during first 6 months since the law on composition of common courts was amended, that is until 12 February 2018, the Minister of Justice dismissed 18,6% court presidents and vice-presidents’<sup>51</sup> as well as the lowering of the pension age of Polish supreme court justices, shorten the tenure of the justices including the president of the supreme court by 40 %. On this basis, the District Court also found a real risk of breach of an individual’s fundamental right to an independent tribunal. To establish whether in this specific case there would be such a risk, the District Court wished more details on the protection and maintenance of independence at the level of the judicial authorities that will be competent in the proceeding the wanted person will be subject to. It decided to engage in a ‘dialogue’ with the issuing judicial authority on the matter by requesting more information regarding any recent changes in personnel since the law regarding the composition of common courts entered into force, notably the replacement of (vice) presidents and judges, rules and procedures regarding the allocation of cases to divisions of judges within the competent court and their treatment, disciplinary measures against (vice) presidents and judges, including as regards their remuneration, the procedures that will be open to the wanted person to claim violations of his right to an independent tribunal and the safeguards surrounding these procedures, possibilities for extraordinary appeal to the Supreme Court.

## Irish High Court: Celmer

Following the CJEU ruling in *LM*, the controversy was returned to the Irish High Court to apply the test developed by the Luxembourg court.

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<sup>47</sup> Opinion of Advocate General Sharpston delivered on 18 October 2012 in Case C-396/11, *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța. v. Ciprian Vasile Radu*, ECLI: EU: C:2012:648, para. 83.

<sup>48</sup> Pawel Lis et al, para 67-70.

<sup>49</sup> Pawel Lis et al, para 71.

<sup>50</sup> ECLI:NL:RBAMS:2018:7032

<sup>51</sup> The Chancellery of the Prime Minister, White paper on the reform of the Polish Judiciary, [https://www.premier.gov.pl/files/files/white\\_paper\\_en\\_full.pdf](https://www.premier.gov.pl/files/files/white_paper_en_full.pdf), 38.



In its judgment of 1 August 2018, the High Court determined the general concern with regard to judicial independence in Poland and requested the councils to submit questions so as to satisfy the second prong of the text in *LM*, as is required by the Court of Justice.<sup>52</sup> The judicial dialogue went on for some time, until in case *Celmer (No. 5)* on 19 November 2018 the Irish court ordered the surrender of Mr Celmer.<sup>53</sup> Even though the outcome of the proceeding may take a turn as his lawyers are considering appeal,<sup>54</sup> it is worth looking at the judgment in greater detail, since it illustrates the problems we summarised earlier.

As a preliminary point, it should be stated that in relation to the first prong of the *LM* test the generalized and systemic violations to the independence of Poland's judiciary were not contested. The High Court noted on the basis of expert opinions that there were no core changes in the Polish judicial system since the Reasoned Proposal of the Commission<sup>55</sup> had been published, therefore all the criticism enshrined there still holds true.<sup>56</sup> It also stated that the replies of the issuing authorities were contradictory<sup>57</sup> – and that there was a dispute between two judges as to who is to represent the Warsaw court<sup>58</sup> –, but that did not change the Irish Court's assessment.

As to the second prong, it shall be remembered that we argued against following the *Aranyosi* test in case rule of law violations, due to the difficulties, if not impossibility, of proving how the suspect would be individually effected by rule of law violations. We also argued that at the minimum the onus should shift to the state in question to prove that the suspect's will not be infringed. The High Court seemed to have shared our concern in the referral.<sup>59</sup> In *Celmer (No. 5)* the High Court restated the Court of Justice's opposing stance in the form of the *LM* test, where the CJEU clarified that systemic deficiencies in themselves do not establish a real risk to the suspect's right to a fair trial.<sup>60</sup> Then the High Court diligently adhered to its EU law obligations applying the two-prong test.<sup>61</sup>

Just like the High Court of England and Wales in *Pawel Lis et al.*, the High Court in *Celmer (No. 5)* also set the threshold in determining the breach of fair trial very high equating the real risk of a breach of the essence of the applicant's right to a fair trial with the ECtHR's 'flagrant denial of justice', suggesting that this is what the CJEU judgment entails. The Irish Human Rights and Equality Commission (IHREC) in an *amicus curiae* reminded the High Court of the facts that on the one hand the ECtHR treats 'flagrant denial of justice' as a stringent test of unfairness and that the court never found an expulsion to be in contradiction with the ECHR on that ground, and on the other it also recalled that the Court of Justice avoided the use of this test unlike AG Tanchev in his Opinion in the *LM* case.<sup>62, 63</sup> The Irish Court rejected these arguments,

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<sup>52</sup> *Minister for Justice v. Celmer, (No. 4)* [2018] IEHC 484, 1 August 2018.

<sup>53</sup> *Minister for Justice v. Celmer, (No. 5)* [2018] IEHC 639, 19 November 2018.

<sup>54</sup> <https://www.irishtimes.com/news/crime-and-law/courts/high-court/court-orders-surrender-of-polish-man-after-concerns-over-fair-trial-1.3702875>

<sup>55</sup> Commission's Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, para. 180 (2–3).

<sup>56</sup> *Celmer (No. 5)*, paras. 72-84, 92-93.

<sup>57</sup> *Celmer (No. 5)*, paras. 85-89.

<sup>58</sup> *Celmer (No. 5)*, paras. 88.

<sup>59</sup> *Minister for Justice v. Celmer, (No. 3)* [2018] IEHC 153, 23 March 2018.

<sup>60</sup> *Celmer (No. 5)*, paras. 65 and 69.

<sup>61</sup> *Celmer (No. 5)*, para. 71.

<sup>62</sup> Opinion of Advocate General Tanchev, delivered on 28 June 2018 in *Minister for Justice and Equality v LM*, Requests for a preliminary ruling from the High Court (Ireland), Case C 216/18 PPU.

<sup>63</sup> *Celmer (No. 5)*, paras. 13-14.

and was satisfied to use the ‘flagrant denial of justice’ test first because this is how the council for Mr. Celmer positioned the case right from the outset.<sup>64</sup> This argument seems somewhat unfair given that the CJEU did not yet come up with its ‘essence of the right to a fair trial’ requirement only developed as a result of the preliminary reference. Second, the Irish Court noted that the CJEU did not expressly distance itself from the test in the AG Opinion.<sup>65</sup> Third and related to that, the Court of Justice relied on Article 6(1) ECHR (and the corresponding Article 47 of the Charter of Fundamental Rights<sup>66</sup>), whereas the test in the Strasbourg setting is the flagrant denial of justice.<sup>67</sup> In the Irish High Court’s view, “it is inconceivable that the CJEU were amending the well settled test by implication.”<sup>68</sup> If the CJEU were to depart from the flagrant denial of justice test, the High Court is satisfied that it would have expressly stated so.<sup>69</sup> Fourth, the High Court also noted that this reading corresponds to the Court of Justice’s earlier case law referring to ‘exceptional circumstances’ to be demonstrated in order to deny surrender.<sup>70</sup>

The High Court then assessed the evidence as to whether the fair trial rights of Mr. Celmer individually were threatened, more specifically whether he would face a flagrant denial of justice. The High Court notes that the general rule of law concerns might, but will not automatically lead to a flagrant denial of justice<sup>71</sup> – a statement which is obvious, otherwise the *LM* test would become meaningless. The suspect however could not show individual concerns. Even his lawyers admitted that there is a probability for having Mr. Celmer’s rights respected, since his fair trial rights will depend on the person who renders the judgment in the case.<sup>72</sup> The High Court also noted that thus far “there has been no production of statistics or even anecdotal evidence of trials lacking in fairness since the changes regarding the judiciary in Poland.”<sup>73</sup> The High Court concluded that statements against the presumption of innocence could be remedied, or shall be disregarded by the national court respectively.<sup>74</sup>

In sum, the High Court concluded that the systemic and generalised deficiencies in the judicial system of Poland did not amount to a real risk that Mr. Celmer’s individual right to a fair trial would be endangered. The High Court emphasized that the threshold created by *LM* was a high one and, in light of evidence before the court, has not been reached.

In *Celmer (No. 5)* the Irish High Court essentially stated that it saw the problems of judicial independence, but there was nothing it could do about preventing the potential effects of the problem on the individual suspect, once the Court of Justice came out with an inoperable judicial test in relation to proving the specific risks. In other words, the High Court gave a chance to the CJEU to alleviate the tensions between quasi automatic execution of judicial decisions and Member States’ obligation to protect and promote the rule of law, but once the

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<sup>64</sup> *Celmer (No. 5)*, para. 18.

<sup>65</sup> *Celmer (No. 5)*, para. 14.

<sup>66</sup> Explanations to the Charter of Fundamental Rights expressly refer to the fact that the second paragraph of Article 47 corresponds to Article 6(1) of the ECHR, see <http://fra.europa.eu/en/charterpedia/article/47-right-effective-remedy-and-fair-trial>

<sup>67</sup> Examples of flagrant denial of justice could amount to a violation of Article 48 Charter of Fundamental Rights. See e.g. *Al-Moayad v. Germany*, para. 101 on deliberate and systematic refusal of access to a lawyer.

<sup>68</sup> *Celmer (No. 5)*, para. 24.

<sup>69</sup> *Celmer (No. 5)*, para. 67.

<sup>70</sup> *Celmer (No. 5)*, para. 31 referring to the High Court in England and Wales in *Pawel Lis*, and subsequent paragraphs, especially para. 45.

<sup>71</sup> *Celmer (No. 5)*, para. 100.

<sup>72</sup> *Celmer (No. 5)*, para. 102.

<sup>73</sup> *Celmer (No. 5)*, para. 103.

<sup>74</sup> *Celmer (No. 5)*, paras. 105, 107 and 108, 111, 114.

Court of Justice failed to make use of it, it was beyond the control of the referring court to remedy the problem.

At the time of writing it is unclear where the next stage of this rule of law crisis will play out. Will the CJEU get another chance to refine or revisit its test based on another set of preliminary questions having in mind that 'judicial cooperation in criminal matters, where individual fundamental rights are directly at stake, *cannot* function when there are serious concerns regarding the independence of judicial authorities'<sup>75</sup> or will a national court, such as the German Constitutional Court have to do the job for it on the basis of its constitution?

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<sup>75</sup> Cf. COM (2014) 158 of 19.03.2014 at p. 2.