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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

REPUBLIC OF POLAND

v

KAMIL CZERWONOBRODA

APPLICATION FOR LEAVE TO APPEAL AGAINST EXTRADITION TO THE FULL DIVISIONAL COURT

Mr O'Donoghue QC with Mr Devine BL (instructed by Gillen and Co, Solicitors) for the Applicant
Dr McGleenan QC with Ms McDermott BL (instructed by the Crown Solicitor's Office) for the Respondent

Before: Keegan LCJ, Treacy LJ and Maguire LJ

MAGUIRE LJ (*delivering the judgment of the court*)

Introduction

[1] This is an application by the applicant, Kamil Czerwonobroda, (hereinafter the requested person, "RP"), to renew before the Divisional Court his application for leave to appeal against a decision by the appropriate judge to extradite him to Poland. The single judge in the High Court, McFarland J, on 25 May 2021 refused him leave to appeal.

Background

[2] The sequence of events giving rise to the present application was as follows:

(a) A European Arrest Warrant ("EAW") seeking the arrest of the RP was issued on 27 February 2020.

(b) The EAW which emanated from Poland was certified by the National Crime Agency on 19 November 2020.

(c) The EAW was directed to the RP and is in the form of an accusation warrant.

(d) The requesting state ("RS") is Poland.

(e) The accusation warrant facing the RP is in the form of a request to the requested state to return him to Poland to face charges relating to the alleged possession, manufacture and supply of cannabis, amphetamines and ecstasy.

(f) Each charge, according to the RS, carried a maximum sentence in the region of 15 years' imprisonment.

(g) The RP was located within Northern Ireland and was duly arrested on 24 November 2020.

(h) In the usual way, the RP was produced before Belfast Recorder's Court and was remanded into custody.

(i) It appears that the RP and his Polish partner, together with their daughter, who had been born on 28 July 2018 and was a British citizen, had been living in Northern Ireland.

(j) The case in respect of the RP's extradition to Poland was heard before the appropriate judge, His Honour Judge Miller QC, on 30 April 2021.

(k) Extradition was resisted by the RP on human rights grounds invoking article 8 of the European Convention on Human Rights ("ECHR"). It was argued on the RP's behalf that it would breach his article 8 rights if he was extradited and that he should be permitted to remain in the United Kingdom to support his family.

(l) The appropriate judge dismissed the RP's ground of appeal as above and ordered his extradition.

(m) On 6 May 2021 the RP sought to obtain leave to appeal against his extradition on the ground that it breached article 8 of the ECHR – the same ground which had been rejected before the appropriate judge.

(n) The application for leave was dealt with on paper by McFarland J in the High Court. He had received written submissions from both parties. Leave to appeal was refused in a written decision from the judge on 25 May 2021. In his view, it was not arguable that the appropriate judge's decision was not based on evidence or was otherwise incorrect.

(o) Thereafter, the RP on 8 June 2021 issued a notice of renewal application to this court. The notice was out of time. It was said to be the case that this was because the RP had at a late stage changed his legal representation. In these circumstances, a judge of this court granted permission for the notice of renewal to be filed out of time but it remained the case that leave in respect of the appeal itself would be required from this court.

(p) On 31 August 2021 the court was presented with a completely new set of grounds of appeal. The former article 8 case was specifically abandoned and, in its place, entirely new grounds of appeal were formulated. The inspiration for these new grounds appears to have been a decision made by the Irish Supreme Court on 23 July 2021 in a case called *Orlowski*[1], a case in which the High Court in Ireland had ordered the return to Poland of Mr Orlowski and another on foot of extradition warrants. This decision had been appealed to the Irish Supreme Court on the basis that return to Poland would breach the RPs rights. On 23 July 2021 the Irish Supreme Court decided that three particular issues which had been raised before the court should be made subject of a referral to the CJEU for a preliminary ruling with the result that the RP in the case now before this court adopted these issues in place of the previous case he had sought to make based on article 8 of the Convention.

(q) When the case came before this court in September 2021 for review the court was told that a judgment was shortly to be given by a Divisional Court in England and Wales which was material to the outcome of the present case and was likely to deal with some, if not all, of the issues likely to arise in the present case. The case in question was that of *Wosniak and others*[2] which was, in the English court, being treated as a test case in relation to the operation of the EAW system in respect of extraditions to Poland. The judgment in *Wosniak* was duly given on 23 September 2021. In short, the court in *Wosniak* followed existing authorities from the CJEU which had indicated that the approach to be taken by the executing judicial authority to the extradition of persons wanted by the Polish courts which had been responsible for the issue of the EAW should be that described as the "two stage approach", as will be explained later. At a later review, in or about December 2021, this court was told that it would be likely that the outcome of the Irish reference in *Orlowski* would probably not be known for a further 18 months.

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[1] *Ministry of Justice and Security v Orlowski and Another* [2021] IESC 46

[2] *Wozniak v Poland* [2021] EWHC 2557 Admin

(r) In these circumstances in January 2022 this court listed the present application for hearing on 27 April 2022.

(s) On 17 April 2022 this court received a further set of grounds of appeal which included two new grounds in addition to the three grounds above. Overall, therefore, at the hearing before the court there were five grounds of appeal, none of which had the benefit of leave to appeal. These were:

> "(i) The court should have discharged the appellant given that there is a real risk that the appellant will stand trial before courts which are not established by law.
>
> (ii) It is sufficient, for the appellant's discharge, to find that there is a real risk that he will not stand trial before a court which is established by law, since a person seeking to challenge a request under an EAW cannot at the time of his extradition hearing establish the composition of the courts before which he will be tried by reason of the manner in which cases are randomly allocated.
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> (iii) The absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the appellants cannot, at this point in time, establish that the courts before which they will be tried will be composed of judges not validly appointed, amounts to a breach of the essence of the right to a fair trial requiring the executing state to refuse the surrender of the appellant.
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> (iv) The appellant's extradition would be a disproportionate interference with his right to private/family life and therefore incompatible with his rights pursuant to article 8 ECHR (s21 Extradition Act 2003). Especially where:
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> (a) He has been in custody for more than one year and five months;
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> (b) The offences are not of the highest gravity (being involved with two others in approximately £1,750 (7000 and 3000 zloty) worth of drugs);

(c) He was in custody during the pandemic, which is recognised as being particularly challenging; and

(d) The delay in his extradition has been brought about solely by behaviour on the part of the RS.

(v) The EAW system of extradition being founded on the principle of 'mutual recognition', the court should decline to give effect to the Polish extradition request in circumstances where the Polish authorities are not recognising UK extradition requests."

(t) In the run up to the hearing the court was made aware of a further development. This took the form of a relevant judgment of the CJEU which, we were told, was promulgated in February 2022 in the case of *X and Y*[3], a reference to the CJEU by a court in the Netherlands in respect of two Polish EAW cases.

General Overview

[3] It is appropriate for the court in this case to acknowledge that the issue of extradition under an EAW to Poland has been occupying the courts throughout the European Union for some considerable time.

[4] The history of the matter is conveniently captured within the judgment of Dame Victoria Sharp in the *Wosniak* case. It is proposed to quote from this judgment but, at this stage, only for the purpose of setting the scene:

> "2. These two extradition appeals have been listed together because they raise common issues about the impact on extradition from the UK to Poland of legislative developments in Poland since 2015 affecting its judiciary.
> …
>
> 10. Since 2015 there have been a series of legislative reforms in Poland concerning the judiciary promoted by the governing Law and Justice Party … which came to power in that year. These reforms have raised concerns in

[3] *C-562/21 PPU*

C-563/21 PPU

> many quarters, including within the EU, that the independence of the Polish judiciary and fair trial rights in Poland have been undermined as a consequence."

[5] Since 2015 the concerns referred to above have escalated and have attracted numerous legal challenges in the context of extraditions based on EAWs to Poland.

[6] The challenges have arisen within the context of national decision making in respect of returns of RPs to Poland and in the form of references by national state courts to the CJEU for a preliminary ruling on how the law should be interpreted.

[7] Prior to *Wosniak*, there had been several cases which had gone before the CJEU in recent years in relation to the subject matter above. These cases may be viewed as of considerable importance for present purposes.

[8] Without seeking to record here every case of this type, the first for present purposes was the case of *Aranyosi* and *Aranyosi and Căldăraru* [2016][4]; the second was the decision of the CJEU in *LM* [2018][5]; and the third was a case called *L, P*[6] in [2021].

[9] Each of these decisions raised similar issues and each produced substantial judgments which have been published. The court will not seek to set out a summary of these decisions in detail in the interests of economy. But it is plain that a common issue arose pertaining to the approach to be taken to the mode of analysis to be deployed in cases of this type.

[10] In all of the cases the approach involved what can be described as a two stage methodology. Stage one took the form of consideration by the CJEU of the broad picture, what might be described as the general assessment. However, this general assessment of the systemic position in all of these authorities did not necessarily imply that, in a specific case, the individual concerned (the RP) could not be surrendered to the authorities in the requesting state. In order to determine this particular element it was necessary to consider a second stage directed at the individual circumstances of the RP in order to determine, applying a specific and precise process, whether there could be non-return of the RP: (see paragraphs 91-94 of *Aranyosi*[7]; *LM* at 68 and 69; and *L, P* at 66-69).

[11] In view of the position, as put forward by the European courts, national courts involved in the extradition process, at least in the United Kingdom, followed

[4] *Criminal Proceedings against Aranyosi* [2016] QB 921

[5] *Minister for Justice and Security v LM* [2019] 1 WLR 1004

[6] (2021) 2 CMLR 24

[7] See footnote 4 above

suit. An example was the leading pre-*Wozniak* case in the United Kingdom of *Lis and others*[8] (see, in particular paras 64-66 and 72).

[12] Thus, it can be seen that even before the three authorities referred to by the parties in this case are considered, a settled approach in respect of the matter at issue in this judgment had already emerged both at EU and domestic United Kingdom level.

[13] This was against the plain trend, referred to in many of the cases, that the position in Poland was getting no better and, in fact, was getting worse.

The hearing conducted on 27 April 2022

[14] On the date of the hearing above, no doubt following careful consideration of the position of the parties, as disclosed in their skeleton arguments, Mr O'Donoghue QC (for the RP) indicated that he wished to seek a stay or adjournment of the proceedings in the light of the recent decision of the CJEU in *X and Y*, which had been promulgated in February 2022. In particular, counsel announced that he accepted that the *X and Y* decision had a direct effect on the applicant's first three grounds of appeal i.e. those grounds of appeal which had been replicated from the three issues which the Irish Supreme Court had referred to the CJEU in *Orlowski*. In respect of these, which are set out in full above at [2] (s), it was pointed out by Mr O'Donoghue that in relation to the first two of them he could no longer seek to sustain the case made in them as they clearly had not found favour with the European court in *X and Y*. In effect, therefore, he abandoned issues one and two. However, counsel went on to say that this change of position still left the third issue which he argued had not been dealt with by the court and, he contended, remained unresolved. This issue embraced the essence of the right to a fair trial in a situation where the Polish court which might deal with the applicant's case if he was returned to Poland might be composed of a judge or judges who had not been validly appointed in a context in which there was no effective remedy available to cure this.

In counsel's submission the way to deal with this lacuna was that the third issue should be left to one side in this court until such time as it could be determined by the CJEU when it came to deal with the *Orlowsk*i reference.

[15] In support of his argument, Mr O'Donoghue opened to the court what he viewed as the three most salient authorities in respect of the issues which would be of value to the court in deciding what course to take. These were the cases of *Orlowski* in the Irish Supreme Court; *Wosniak* reflecting the position established in September 2021 in respect of English law; and finally, the case of *X and Y*, which was the latest decision in this area decided by the CJEU.

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[8] [2018] EWHC (Admin) 2848

[16] In the course of his submissions Mr O'Donoghue, at the instigation of members of this court, explored a number of issues which were generally pertinent to the proposal for a stay which had been advanced.

[17] While it is not necessary to set out these exchanges in detail, it was evident that counsel could see that the court in *X and Y* plainly was of the view that the two stage approach was of general application, with the second stage focussing on how the RP personally would be affected were he to be returned to Poland. In this regard, counsel frankly indicated that on this issue his client had no particular evidence available to him which could usefully be given as he could not gainsay that his client was facing common-place criminal charges and could not make the case that in some sense he was being singled out for adverse treatment on legal or political or kindred grounds. This was, therefore, an acknowledgment that if the two stage process was held to apply in this case, the applicant could not put before this court material which could measure up to the sort of precise assessment which had to be undertaken at the second stage, relating to the detail as to how he, personally, would be affected were he to be returned to Poland.

[18] Counsel also accepted that the further new grounds which he had belatedly put forward in support of the RP's case faced the difficulty that none of these points had before been advanced either before the appropriate judge or before the single judge who refused leave in the High Court. Accordingly, these were new issues altogether.

[19] The response to the application for a stay was dealt with by Dr McGleenan QC for the RS. He argued that the court should take the position that, in view of the state of the jurisprudence in respect of the issues above, the court should not stay or adjourn the proceedings to await the decision of the CJEU in *Orlowski*. In his submission, the effect of the decision in *X and Y*, taken together with the views of the municipal court in *Wosniak* was that the legal approach to be adopted in cases of this type was clear and consisted of a two stage process which had to be applied. In these circumstances it was argued that there was no basis upon which the court should conclude that it needed to await the outcome of the reference in *Orlowski* in respect of any issue.

[20] Dr McGleenan additionally made the point that *X and Y* had been heard at the level of the Grand Chamber and had been expedited in order to deal with the questions which had arisen before the court in the Netherlands. He pointed out that the questions which had been formulated in the *X and Y* case were materially similar to those questions which had been formulated in the *Orlowski* case. Indeed, the Advocate General in *X and Y* explicitly stated that "the questions referred to for a preliminary ruling in the present case are essentially identical to those asked by the Supreme Court (Ireland) in the pending case *The Minister for Justice and Equality (C-480/21)* which is not subject to the urgent preliminary ruling procedure."[9]

[9] See Footnote 3 of the opinion of the Advocate General Rantos delivered on 16 December 2021.

[21] Further, counsel contended that the decision of the Grand Chamber in *X and Y* had not neglected what was described as the "third issue", as contended for by Mr O'Donoghue. In this regard he referred to specific references within the *X and Y* decision to all of the questions being considered.

[22] It was, further, suggested that the effect of adjourning the proceedings would be to, de facto, delay the hearing of Polish cases in extradition matters in Northern Ireland for a substantial period.

[23] Dr McGleenan agreed that the judgments the court should concentrate on were those opened to it by Mr O'Donoghue and which have been referred to above.

[24] The view of the RS was that the court should determine the outcome of RP's proposed appeal forthwith, starting with whether this case should be granted leave.

The authorities opened before this court

[25] The court will set out a short summary of each of the three cases to which the parties made reference in submissions before it.

(i) Orlowski

[26] Judgment was delivered in this case by the Irish Supreme Court on 23 July 2021. This case dealt with appellants seeking to resist their extradition to Poland. The two appellants each relied on the same issues at the centre of which was the contention that the courts in Poland that might hear their cases may not have been established in accordance with the law. While the High Court had previously been involved in a similar case which involved a reference to the CJEU[10] since then, it was suggested, the situation in Poland had changed for the worse. This was exemplified by the Act on the System of Common Courts (commonly referred to as "the New Laws") which was passed on 20 December 2019 and adopted by the Polish legislature on 23 January 2020. It came into force in Poland on 24 February 2020. The appellants argued that the New Laws raised the possibility that the courts in Poland which might consider their cases may not be constituted in accordance with law. Moreover, the appellants submitted that, to add to this difficulty, no mechanism existed in Poland to challenge this illegality. They submitted that this position gave rise to a breach of the appellants' right to a fair trial and their right to an effective remedy both under articles 6 and 13 of the ECHR, and article 47 of the Charter.

[27] The particular provision giving rise to these concerns were article 26 and article 42a of the New Laws, the latter of which provided:

[10] The case of *Celmer* (2018) IEHC 119

> "Within the framework of the activity of courts or organs of courts, it is unacceptable to question the powers of courts and tribunals, constitutional state bodies and law enforcements and control bodies."

[28] The appellants further submitted that previous cases had not addressed matters concerning the appointment of judges or the right to a trial before a Tribunal established by law. Accordingly, the appellants argued that the issue of the legality of the constitution of the court was an entirely separate matter from what had been determined hitherto in the legal authorities, particularly those which had espoused the two-step analysis. In contrast, the appellants placed reliance on matters such as the decision of the European Court of Human Rights ("ECtHR") in *Ástráðsson v Iceland*[11] which supported a distinction between the independence and impartiality of the tribunal, on the one hand, and the right to a trial by a tribunal established by law, on the other hand. They argued that it is only if the court is established in accordance with law that the question of independence of the court arose and therefore a consideration of whether a court is established in accordance with law precedes any consideration of independence. In these circumstances, it was contended that the High Court in Ireland had not, contrary to the approach it had taken, been required to consider the personal situation of the appellant; the nature of the offences in question; and the factual context in which the relevant warrant had been issued. Such matters were external to the primary question of establishment and in those circumstances, the appellants contended that a reference to the CJEU was necessary to determine the applicable test.

[29] In contrast, the respondent argued that the appellants were effectively asking the court to dispense with the second stage of the established two stage test. It was submitted that there was no authority, domestic or international, to suggest that a party can complain only of a theoretical breach of their rights. On the contrary, it was argued that a party must demonstrate some nexus between the breach complained of and their individual case. Without such evidence, the appellants would fail.

[30] Furthermore, the respondent submitted that there were other reasons for maintaining the established two stage approach. These included the fact that the Framework Decision 2002/584 had stated that a warrant *shall* be executed unless one of the stated reasons for refusing surrender is proven to arise. If it was sufficient for a requested party to alone show that generalised and systemic deficiencies existed in the requesting Member State, then all EAWs issued by that Member State could be subject to objection, which would render the Framework Decision in respect of that Member State meaningless which would be problematic. To allow refusal of the EAW on general deficiencies, it was argued, would grant effective impunity to persons attempting to flee conviction or sentence from the requesting Member State,

[11] Application Number 26374/18 1 December 2020

as they could successfully challenge an EAW without any evidence relating to their specific circumstances.

[31] The CJEU, the respondent further submitted, had made it clear that the test to be applied when a ground for refusal to surrender was raised on the basis that there was a real risk of breach of a fundamental right, on account of systemic or generalised deficiencies in the issuing Member State, the executing judicial authority must determine, specifically and precisely, whether there were substantial grounds for believing that the requested person will run such a risk if surrendered to the requesting State. Accordingly, it was contended that dispensing with the second stage of the test would undermine the very objective of the EAW system.

[32] The respondent reiterated the point that the appellants had led no cogent evidence to suggest that any of the judges before whom they were likely to appear have been appointed other than in accordance with domestic Polish law.

[33] The Irish Supreme Court, in reaching its decision, considered all the evidence before it, including the decision of the High Court (which had ordered extradition) and the relevant authorities decided by the CJEU and the tests contained therein. It was also acknowledged that the function in relation to suspending the effect of the Framework Decision was one for the European Council. The court, additionally, pointed out that the trial judge in the High Court had not accepted the argument that the well-established decisions in *LM* and *L and* P did not embrace matters concerning the appointment of judges or the right to a trial before a tribunal established by law. He was of the view that "doubtful appointments" had been "in the mix" when the CJEU delivered its judgments in those cases. The High Court judge went on to conclude at paragraph 121 of *Orlowski*[12] that:

> "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."

[34] The Irish Supreme Court stated that it was necessary to consider whether the trial judge was correct in reaching that view. They said it was undoubtedly the case that the appointment of judges was "in the mix" when the question of independence and impartiality of judges was being considered in *LM* and *L and P*. Equally, as pointed out by the trial judge, it was noted in *L and P* that the adoption of the New

[12] [2018] IEHC 119

Laws led the European Commission to initiate infringement proceedings against Poland on 29 April 2020 in respect of the New Laws. The Supreme Court, however, questioned whether that meant that the two-step test had to be complied with as the trial judge concluded. In order to answer that question it was necessary to consider two matters: one, the effect of an invalid appointment and, two, the absence of an effective remedy by which to challenge an invalid appointment.

[35] The court ultimately came to the following conclusion:

> "59. The changes that have occurred in Poland concerning the rule of law are, as previously observed, even more troubling and grave than they were at the time when *LM* was decided by the CJEU. It now appears that there are significant issues with regard to the validity of the appointment process for judges in Poland. It is impossible for the appellants in this case to identify the judges before whom they are to be tried because of the manner in which cases are randomly allocated. Even if they could identify the judges and establish that the judges were not validly appointed and thus not part of a court established by law, it is clear that there is no possibility of challenging the validity of the composition of the court allocated to try them by reason of the provisions of the New Laws and, in particular, Article 26(3) thereof. That being so, the question must arise as to whether the systemic deficiencies in the Polish system are such that they, by themselves, amount to a sufficient breach of the essence of the right to a fair trial, requiring the executing authority, in this case, Ireland, to refuse surrender.
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> 60. The answer to that question is not, in the view of this court, *acte clair* and in the circumstances, this court proposes to request a ruling from the CJEU as follows:
>
> (1) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where there is a real risk that the appellants will stand trial before courts which are not established by law?
>
> (2) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where a person seeking to challenge a request under an EAW cannot by reason of the fact that it is not possible at that point in time to establish the composition of the courts before

which they will be tried by reason of the manner in which cases are randomly allocated?

(3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the appellants cannot at this point in time establish that the courts before which they will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial requiring the executing state to refuse the surrender of the appellants?"

[36] As of the time of writing the CJEU has answered the same questions as above in the case of *X and Y* but it will take a substantial period of time before the same questions will be dealt with by the court, assuming (which is an unknown) they need to be.

(ii) Wozniak

[37] Judgment in this case was given on 23 September 2021 by a Divisional Court in England and Wales. It concerned two extradition appeals which were listed together as they raised common issues about the impact on extradition from the United Kingdom to Poland of, mainly, legislative developments in Poland since 2015, *inter alia*, affecting the appointment and operation of the judiciary. It is a very detailed judgment which runs to some 58 pages. In what follows, only the main points can be touched upon. The factual background in respect of the Polish judicial reforms and developments since 2015 were set out in detail in the judgment at paragraphs 10 to 32 and 71 to 88 but it is not proposed to dwell on these.

[38] The central question in the case related to whether the evidence had established that there was a real risk that the appellants would, if extradited to Poland, suffer a breach of their fundamental right to an independent tribunal and a fair trial as guaranteed by the second paragraph of article 47 of the Charter.

[39] In approaching this case the court applied the two stage *Aranyosi* test. Firstly, it considered whether there was objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial on account of systemic or generalised deficiencies so far as concerned the independence of the issuing Member State's judiciary. In relation to this first stage of the process, the court concluded at paragraph 185:

> "The answer to this question is plainly 'yes.' There is a very considerable body of objective, reliable, specific and up-to-date material indicating that there is a real risk of breach of the values in Article 2 TEU, on account of

> systemic or generalised deficiencies relating to the independence of Poland's judiciary resulting from the reforms since 2015. This was the conclusion of the European Commission in its Reasoned Proposal of December 2017, which remains under consideration, as we have said. It was also the conclusion reached by the Court in 2018 in *Lis No 1*, [64]. We have concluded that the situation in Poland has only worsened since then."

[40] Next the court considered stage two of the *Aranyosi* test which is sometimes referred to as the 'specific and precise' assessment. In accordance with this test, the executing authority must determine, specifically and precisely, to what extent those deficiencies found in relation to the first test were liable to have an impact at the level of the courts of that Member State which had jurisdiction over the proceedings to which the requested person will be subject.

[41] This involved having regard to the RP's personal situation; to the nature of the offence or offences for which he or she was being prosecuted; and the factual context in which the arrest warrant was issued, together with any information provided by the requesting Member State pursuant to article 15(2) of the EAW Framework Decision 2002/584. The object is for the requested court to be able to determine whether there were substantial grounds for believing that that person will be at risk if he or she is surrendered to that Member State.

[42] The court, early on, rejected the submission of the RPs that it was under a mandatory duty to make enquiries of the issuing judicial authorities as part of the *Aranyosi* Stage 2 assessment of the appellants' cases. First, it was of the view that it had all of the information it needed in order to make the required assessment, and that no further information was required. Second, the court considered that it was not an executing judicial authority for the purposes of article 15(2) of the EAW Framework Decision and that their power to make enquiries arose under its inherent jurisdiction and not under article 15(2). In this regard the power to make enquires as part of *Aranyosi* Stage 2 process only arose where the executing judicial authority determined that there was a need to do so, as explained at paragraph [47] – [48] of the judgment in *Wozniak* (in a quote taken from paragraph [75] and [76] of *LM)*:

> "47. If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is

> being prosecuted and the factual context that form the basis of the European arrest warrant.
>
> 48. Furthermore, the executing judicial authority must, pursuant to article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk."

[43] The court, further, expressed the view that it was not permissible to extrapolate from the general situation in Poland and the systemic threats to independence identified in the material which was available, serious though such information might be, that there was a specific and real risk of breach of the appellants' fundamental right to a fair trial, so as to make it unnecessary to carry out a specific and precise assessment on the facts of their particular cases. It was stated that this submission on behalf of the appellants was inconsistent with a number of passages in *LM* paragraphs *68 & 72*, *Lis No 1* paragraph *36*, and *L and P* paragraphs *48–50.* Interestingly, the court also referred to the case of *Orobator v Governor of HMP Holloway*[13] which was also referred to in *Celmer No 5*. It did not concern extradition but a prison transfer case in which the appellant argued that she could no longer lawfully be imprisoned because she had been convicted and sentenced in circumstances amounting to a flagrant denial of justice and a flagrant breach of article 6 of the Convention, and so had not been convicted by a competent court for the purposes of article 5(1)(a) of the Convention. Dyson LJ stated at paragraph 99:

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

[13] [2010] EWHC 58 Admin

> the very essence of the right guaranteed by article 6." [italics added by this court]

[44] Ultimately, the court held that, in carrying out the stage 2 assessment, there was nothing in the material before them, nor any particular feature of the appellants' cases, which gave rise to a proper basis to refuse to execute their respective EAWs. In relation to the offences the court held at paragraph [217]:

> "They are ordinary criminal offences (some at a fairly low level) with no political overtones, or indeed any feature of any note. They are unremarkable and unexceptional. We are not persuaded that even if the judges who are to try the cases ruled in favour of the defence that would be a matter of any concern to the prosecutor or the Polish authorities. Their cases must be typical of hundreds, if not thousands, of cases in Poland each year. Notwithstanding the worsened situation since 2018, we consider the observation of the Court in *Lis No 1*, [69], remains relevant:
>
> > 'We see no basis why any lack of independence or bias might be likely to arise in respect of such run-of-the-mill criminal allegations.'"

[45] The court was also of the view that structural weaknesses in judicial independence arising from the reformed judicial appointment process in Poland did not lead to the conclusion that judges appointed under it lacked independence once in office. The issues were found to be separate, and that it could not be presumed that a professional judge lacked independence in carrying out his/her functions merely because of how he/she was appointed.

[46] The court made the further important point that the appellants would have (or in the case of RW, will have had) the right at their trials to be defended by lawyers; would be able to cross-examine witnesses against them; and could call evidence, make legal arguments in a trial which would be held in public. All of these, in the court's view, were key safeguards in relation to fair trial rights. The court cited the case of *Government of Rwanda v Nteziryoyo*[14], in which it was said at paragraph 97:

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

[14] [2017] EWHC 1912 (Admin)

> other adequate features of trial, so that incursion on fair trial process will fall short of a 'flagrant denial' of justice."

[47] The court in *Wozniak* refused to certify any of the proposed questions which were later submitted by the RPs as a prelude to the grant of leave to go to the United Kingdom Supreme Court. So far as the court is aware no other form of appeal has been lodged.

(iii) X and Y

[48] These proceedings involved two EAWs which had come before the District Court in Amsterdam, Netherlands. Both were Polish warrants: one, which emanated from the District Court in Lubin, sought the extradition of a Polish national for the purpose of serving a two year custodial sentence[15] while the second, which is the one this court will focus on as it substantially mirrors the position in *Orlowski* and the present case, was issued by the District Court, Zielona Gora, and sought the arrest and return to Poland of the RP for the purpose of conducting a criminal prosecution.[16]

[49] In each case the central issues related to the systemic and general deficiencies of Polish courts and included questions about the appointment of judges and the independence of the judiciary and, consequently, the risks which would arise or already had arisen in relation to the trial which was to be or had been provided in the Polish courts. The referring court, having in view what they viewed as the deteriorating situation in respect of changes to the legal system in Poland, was concerned about what they saw as the real risk that in the event of surrender to the issuing Member State the person would suffer a breach of his fundamental right to a fair trial as guaranteed in the second paragraph of article 17 of the Charter.

[50] In respect of the first case a single question arose which it is not necessary for present purposes to set out.[17] But in respect of the second case there were three questions referred which the court will set out below:

> "(1) Is it appropriate to apply the test set out in the judgment of 25 July 2018 and affirmed in the judgment of 17 December 2020, where there is a real risk that the person concerned will stand trial before a court not previously established by law?

[15] *C-562/21 PPU*

[16] *C-563/21 PPU*

[17] It relates to the test which the executing judicial authority should apply in a case involving a final custodial sentence case.

> (2) Is it appropriate to apply the test set out in the judgment of 25 July 2018 and affirmed in the judgment of 17 December 2020, where the requested person seeking to challenge his [or her] surrender cannot meet that test by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which he [or she] will be tried by reason of the manner in which cases are randomly allocated?
>
> (3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the requested person cannot at this point in time establish that the courts before which he [or she] will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial, thus requiring the executing judicial authority to refuse the surrender of the requested person?"

[51] When these three questions are compared with the *Orlowski* questions, (see paragraph [60] above), it is clear that they are virtually identical.

[52] It was agreed that the preliminary ruling should be treated under the urgent procedure and that the cases should be dealt with in the Grand Chamber.

[53] At paras [40]–[49] in the judgment of the CJEU there is discussion of what the court describes as 'preliminary observations' which the court considers should be kept in mind. These are such matters as the principle of mutual trust between Member States together with the principle of mutual recognition. The states, save in exceptional circumstances, should be viewed as complying with EU law and the fundamental rights recognised by it. Member States implementing EU law, it is noted, presume that fundamental rights have been observed. The Framework Directive is about the establishment of a simplified and effective system for the surrender of persons convicted or suspected of having infringed criminal law. There is to be judicial co-operation with a view to the attainment of the of the objective set for the European Union of becoming an area of freedom, security and justice based on a high level of trust as between Member States.

[54] The court further held that execution of an EAW by a Member State constituted the rule with the consequence that non-execution should arise only in those limited and exceptional circumstances exhaustively stated in the Framework Directive. Notwithstanding this, at paragraph 45 it is recognised that there is a need to meet the requirements inherent in the fundamental right of cardinal importance that rights deriving from EU law will be protected.

[55] The court then concentrates on the question of when the surrender of a person in respect of an EAW can occur on the ground that there is a real risk that the person would suffer a breach of his or her fundamental right to a fair trial before a tribunal established by law. In this regard, it is helpful to quote verbatim (with the court's emphasis added) some paragraphs from the court's approach to the answer of this question which runs from paras [50]–[66] of the text:

> "50. In the light, in particular, of the considerations set out … above, the court held, with regard to Article 1(3) of the Framework Decision 2002/584, that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, *it cannot, however, presume that there are substantial grounds for believing that that person runs a real risk of breach of his or her fundamental right to a fair trial if surrendered to that Member State, without carrying out a specific and precise verification which takes account of, inter alia, that person's personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements or acts by public authorities which are liable to interfere with how an individual case is handled …*
>
> 51. *Therefore, information regarding the existence of or increase in systemic or generalised deficiencies so far as concerns the independence of the judiciary in a Member State is not sufficient, in itself, to justify a refusal to execute such a warrant issued by a judicial authority of that Member State …*
>
> 52. In the context of the two-step examination referred to in paragraph 50 above and set out for the first time, in respect of the second paragraph of Article 47 of the Charter, … *the executing* judicial authority must, as a first step, *determine whether there is objective, reliable, specific and duly updated material indicating that there is a real risk of breach, in the issuing Member State, of the fundamental right to a fair trial guaranteed by that provision, on account of systemic or generalised deficiencies so far as concerns the independence of that Member State's judiciary …*
>
> *53. As a second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings in respect of the person*

> *concerned and whether, having regard to that person's personal situation, the nature of the offence for which he or she is prosecuted and the factual context in which that arrest warrant was issued, and having regard to any information provided by that Member State pursuant to Article 15(2) of the Framework Decision …, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to the latter …*
>
> 54. In the present case, the referring court asks, in essence, whether that two-step examination, which was established by the court … under the guarantees of independence and impartiality inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter, is applicable where the guarantee, also inherent in that fundamental right, of a tribunal previously established by law is at issue and, if so, what are the conditions and detailed rules for applying the said examination…
>
> *65. Therefore, it is only if the European Council were to adopt a decision and to suspend Framework Decision 2002/584 in respect of the Member State concerned that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by that Member State, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his or her fundamental right to a fair trial will be affected …*
>
> *66. It follows from the considerations set out in paragraphs 55 to 65 above that the executing judicial authority is required to carry out the two-step examination referred to in paragraphs 52 and 53 above, in order to assess whether, if the person concerned is surrendered to the issuing Member State, that person runs a real risk of breach of his or her fundamental right to a fair trial before a tribunal previously established by law, enshrined in the second paragraph of Article 47 of the Charter."*

[56] The CJEU later discusses in detail the requirements of each of the two stages of the examination to be carried out by the executing judicial authority. This reaffirmed that the first stage, in essence, was a general assessment whereas the second stage concerns the particular circumstances of the individual case.

[57] In respect of an accusation warrant, the court stated (again with the court's emphasis added):

"93. As regards … a European arrest warrant issued for the purposes of conducting a criminal prosecution, it must be pointed out that the fact, mentioned by the referring court, that the person whose surrender is sought cannot know, before his or her possible surrender, the identity of the judges who will be called upon to hear the criminal case to which the person may be subject after that surrender cannot in itself be sufficient for the purposes of refusing surrender.

94. Nothing in the system created in [the] Framework Decision … permits the inference that the surrender of a person to the issuing Member State for the purpose of conducting a criminal prosecution is conditional on the assurance that such prosecution will result in criminal proceedings before a specific court, and even less so on the precise identification of the judges who will be called upon to hear that criminal case.

95. An interpretation to the contrary would render the second step of the examination referred to … above redundant and would undermine not only the attainment of the objective of Framework Decision … but also the mutual trust between the Member States which underpins the European arrest warrant mechanism established in that framework decisions."

[58] At paragraph 102 the court's conclusion was expressed as follows:

"…the answer to the questions referred is that Article 1(2) and (3) of the Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom a European arrest warrant has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular, as regards the procedure for the appointment of the members of the judiciary, that authority may refuse surrender to that person:

- …
- in the context of a European arrest warrant issued for the purposes of conducting a criminal prosecution, *only if that authority finds that, in the particular circumstances of that case, there are substantial grounds for believing that, having regard inter alia to the information provided by the person concerned relating to his or her personal situation, the*

nature of the offence for which that person is prosecuted, the factual context surrounding the European arrest warrant or any circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person, the latter if surrendered, runs a real risk of breach of that fundamental right."

The first three grounds of appeal

[59] Having reviewed the three leading authorities referred to by the parties, the court is left in no serious doubt that the current jurisprudence, both in the CJEU and domestically, has at its centre piece the two stage analysis which must be carried out if it is claimed that an RP ought not to be returned to Poland on human rights or similar political grounds. If, as in this case, the only effective evidence before the court relates to a consideration of the first stage of the process, this will not be sufficient to establish a proper reason for non-return.

[60] In our view, the position of the CJEU has been constant over a substantial period of time and it has been persistently affirmed now as recently as February 2022 in *X and Y*. As matters stand, the court has no reason to believe that there is anything of substance in Mr O'Don0ghue's argument to the effect that the Grand Chamber had failed in *X and Y* to deal with issues before it and, at this time, the court is inclined to accept the proposition that its reasoning in that case is very likely to be applicable also to the Irish Supreme Court's reference in *Orlowski*, given that there plainly is no significant difference between the questions asked by the referring court as between those in *X and Y* and those set by the Irish Supreme Court (and indeed, those now before this court). There is nothing in the CJEU's judgment to suggest that the absence of an effective remedy by which to challenge an invalid appointment was or is to be viewed by itself and without compliance with the second stage test as sufficient to warrant a decision not to return an RP in respect of a duly issued EAW to Poland. Systemic deficiencies alone will not be enough. We do not consider that the CJEU in *X and Y* failed to address the third of the issues referred to them. Indeed, the court appears to have been well aware of that aspect of the reference which alluded to the impact of the New Laws and, in particular, the apparent absence of an effective remedy to challenge an invalid appointment. In this regard, attention is drawn to paragraphs 19, 22, 28 and 39 of the court's judgment as well as paragraph 92.[18]

[61] In addition to the above, this court is inclined to give considerable weight and respect to the judgment of the England and Wales Divisional court in *Wosniak.* The two stage approach is to the forefront of the decision in *Wosniak* which was evidently prepared as a test case in this field. As far as the court is aware, the judgment in *Wosniak,* which dealt with the matter in great detail, has now been followed not just

[18] See also Advocate General Rantos's Opinion at 77.

in England and Wales but also elsewhere in the United Kingdom.[19] While this court is not strictly bound to follow *Wosniak,* it is well established in authority that in a matter involving the operation of a statutory scheme which applies throughout the United Kingdom, there is usually a strong impetus to do so.[20]

[62] As against the matters referred to above, it seems to us that there is relatively little to place in the scales on the other side, though this is not to say that, despite the current settled position, there could not be at some point a change of direction, particularly when the courts are dealing with a worsening situation. However, on the basis of the material put before us, we are firmly of the view that at the present time there is no proper basis for refusing extradition in this sort of case.

[63] In the presence of the concession made by Mr O'Donoghue recorded at paragraph [17] above, and in the absence of material which could support a finding in the applicant's favour in respect of satisfaction of the requirements which have to be satisfied at the second stage, the court considers that there is no basis for a decision to adjourn the proceedings and no basis for the grant of leave to appeal to this court. Any such grant, in the light of the authorities, would be futile.

Other grounds of appeal

[64] In respect of ground 4 the court declines to grant leave to appeal to this court.

[65] It does so because the court is unable to discern any arguable breach of article 8 in this case.

[66] In particular, the court reminds itself of the serious nature of the charges which are faced by the applicant. It will be recalled that the applicant is believed to have been involved in three offences relating to the manufacture and supply of cannabis, amphetamines and ecstasy and is likely, as the court understands it, to be facing a substantial sentence of imprisonment. While it was suggested that the term he might face might not be as severe as that which was put forward by the RS and might be closer to what was claimed to be a substantially lesser sentence allegedly handed down to a co-accused, the court is unable to verify and assess the true meaning of the documents put before us in this regard. On the other hand, a factor which will be unlikely to assist the applicant in respect of sentence (if he is successfully convicted in Poland) is to be found in his Polish criminal record which, according to the papers before this court, discloses seven convictions between 2011-2017 including convictions for armed robbery and kidnapping committed in Poland.

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[19] See, for example, the Scottish decision of Lord Advocate v M (R) [2021] 12 WLUK.

[20] See *Re F* [2017] (Sir Paul Girvan) and *Re McKenna's Application* [2017] NIQB 96 at para 318 Note 3 (Maguire J)

[67] In these circumstances the fact that he has, it appears to date, served in the region of 1.5 years on remand in custody in Northern Ireland must be viewed in its due perspective. It seems to the court that while the offences he faces may not be of the highest gravity, they nonetheless fall within the category of serious offending. The court does not, additionally, consider any delay in this case to be of such length as to require the court not to extradite the applicant to Poland. Overall, the court would be slow to regard the contents of ground 4, including its reference to the pandemic, as being a persuasive or correct basis upon which to grant leave for a full hearing.

[68] As regards ground 5, the court also declines to grant leave. Far from the court declining to give effect to the extradition request before it on grounds of mutual recognition, in fact, as already indicated, it considers it should have regard to the views of the CJEU in *X and Y* where the emphasis is stated to be on the need within Member States for there to be co-operation when dealing with European Arrest Warrants – see paragraph [53] *supra*. The court is not deflected from approaching the matter in this way by reason of the claim, unsubstantiated within the papers, of United Kingdom extradition warrants not being recognised in Poland.

Conclusion

[69] As leave to appeal has been refused on all grounds, it must follow that the decision of the appropriate judge stands with the consequence that the applicant must be returned to Poland in accordance with the terms of the Extradition Act.