HIGH COURT

Record No. 2013 EXT 295

Record No. 2014 EXT 8

Record No. 2017 EXT 291

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ARTUR CELMER

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 12th day of March, 2018

1. Introduction

1. The surrender of the respondent is sought by the Republic of Poland ("Poland") pursuant to three European Arrest Warrants ("EAW") issued by Polish judicial authorities for the purposes of conducting a criminal prosecution. The respondent objects to his surrender primarily on the ground that the legislative changes to the judiciary, to the courts, and to the Public Prosecutor brought about within the last two to three years in Poland undermines the possibility of him having a fair trial. The respondent also opposes his surrender on the basis of prison conditions in Poland, in particular, that his safety cannot be guaranteed there. The minister was also put on formal proof of all matters, including whether the details of the alleged offences comply with the provisions of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003").

2. The respondent has been in custody since he was arrested on foot of the first two warrants on 5th May, 2017. There was some delay in the case caused by legal aid issues,

change of solicitors, the fact that he was arrested on the third EAW on the 14th November 2017, requests for adjournment to put in further evidence, and requests for adjournments to put forward new information about recent legislative changes in Poland. Finally, on 1st and 2nd February, 2018, the hearing for this application came before this Court and the matter was adjourned until this day, 12th March, 2018 for judgment.

2. Formal Proofs

3. Before dealing with the specific points raised by the respondent in objecting to his surrender, I will address the formal requirements of the Act of 2003 with which this Court must be satisfied if it is to make an order of surrender.

2.1. A Member State that has given effect to the framework decision

4. The surrender provisions of the Act of 2003 apply to Member States of the European Union ("EU") that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European Arrest Warrant and the surrender procedures between Member States ("the Framework Decision"). By the European Arrest Warrant Act, 2003 (Designated Member States) (No. 3) Order, 2004 (S.I. 206 of 2004), the Minister for Foreign Affairs designated Poland as a Member State for the purposes of the Act of 2003.

2.2. Section 16(1) of the Act of 2003

5. Under the provisions of s. 16(1) of the Act of 2003, the High Court may make an order directing that a requested person be surrendered to the issuing state provided that;

> "(a) The High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,
>
> (b) The EAW has been endorsed in accordance with s. 13 of the Act of 2003 for execution of the warrant,

(c) The EAW states, where appropriate, the matters required by s. 45 of the Act of 2003,

(d) The High Court is not required under ss. 21A, 22, 23 or 24 of the 2003 Act as amended to refuse surrender,

(e) The surrender is not prohibited by Part 3 of the 2003 Act."

2.2.1. Identity

6. I am satisfied, on the basis of the information contained in the EAW dated 4th June, 2012 in proceedings 2013/295 EXT (the first EAW), and the affidavit of Daragh Keogh, member of An Garda Síochána, that Artur Celmar, who is before the Court, is the person in respect of whom the first EAW has issued.

7. I am satisfied, on the basis of the information contained in the EAW dated 1st February, 2012 in proceedings 2014/8 EXT (the second EAW), and the affidavit of Daragh Keogh, member of An Garda Síochána, that Artur Celmar, who is before the Court, is the person in respect of whom the second EAW has issued.

8. I am satisfied on the basis of the information contained in the EAW dated 26th September 2013 in proceedings 2017/291 EXT (the third EAW), and the affidavit of Jim Kirwan, member of An Garda Síochána, that Artur Celmar, who is before the Court, is the person in respect of whom the third EAW has issued.

2.2.2. Endorsement

9. I am satisfied that each EAW was endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

2.2.3. Sections 21A, 22, 23 and 24 of the Act of 2003

10. I am satisfied that it is not required to refuse to surrender the respondent under any of the above sections in relation to the European arrest warrant.

2.2.4. Part 3 of the Act of 2003

11. Subject to further consideration of s. 37, s. 38 and s.44 of the Act of 2003, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the 2003 Act. As the respondent is sought for the purpose of prosecution on each EAW, s.45 does not have any application to these proceedings and his surrender is not thereby prohibited.

3. Points of Objection

12. In relation to each EAW the respondent objected to surrender on the basis of a lack of correspondence of offences. The true issue is whether surrender is prohibited by s. 38 of the Act of 2003.

3.1. Section 38 of the Act of 2003

3.1.1. The first EAW

13. The surrender of the respondent is sought for the purpose of prosecuting him for two offences. Both offences are certified by the issuing State as falling within Article 2.2 of the Framework Decision. The offences have been categorised as "illicit production, processing, smuggling of intoxicants, precursors, surrogates or psychotropic substances or trafficking in same" and "participation in an organised criminal group or association whose aim is to commit offences".

14. The alleged involvement of the respondent is described in the EAW as follows:

> "in the period between 2002 and the spring of 2006 in Poznan and Wioclawak, acting contrary to provisions of the drug addiction prevention act, [the respondent] participated in an organised criminal group…whose aim was to commit offences of trading in large amounts of intoxicants and psychotropic substances in Poznan and elsewhere in Poland as well as committing other offences with the aim of gaining financial profits…the respondent committed offences of trading in considerable amounts of psychotropic substance in the

> form of at least 50 kilograms of amphetamine valued at least 225.00 zlotys, 200.000 ecstasy pills valued at at least 290.000 zlotys and intoxicants in the form of at least 3.5 kilograms of marihuana valued at at least 47.950 zlotys" .

15. The EAW goes on to describe the alleged participation of the respondent in trading in the psychotropic substances.

16. With regard to the degree of minimum gravity required in accordance with section 38(1)(b) of the EAW Acts, what is required is that the offences carry a maximum sentence of at least 3 years. I am satisfied from paragraph C of the EAW that one offence carries a potential maximum sentence of 5 years imprisonment and the other carries a maximum potential sentence of 10 years imprisonment. The respondent's surrender is not prohibited under s. 38 on the first EAW.

17. In view of the foregoing, I am satisfied that there is no manifest error in the certification of the offences. The respondent's surrender is therefore not prohibited under s. 38 on the first EAW.

3.1.2. The second EAW

18. This EAW also seeks the surrender of this respondent for the purpose of standing trial for two offences. The EAW is accompanied by additional information dated the 24/2/2017. Both offences are certified by the Issuing State as falling within Article 2.2 of the Framework Decision. These offences have been categorised as "illicit trafficking in narcotic drugs and psychotropic substances".

19. The alleged involvement of the respondent is described on the face of the EAW as follows:

> "…in summer 2007 in Holland, acting to achieve property benefit, against provisions of law upon counteraction against drug addiction,…[the respondent] made a delivery…of substantial quantity of intoxicants such as

> marihuana in the quantity not less than 6000 gram net in such a way that [named persons], acting within the organised group, purchased and gave away with profit to [the respondent] the aforementioned drugs for the further distribution – making an income source of such procedure."

20. The EAW goes on to state "[the respondent] made a delivery…of substantial quantity of intoxicants such as marihuana in the quantity not less than 5000 gram net…making an income source of such procedure". The additional information from the issuing judicial authority clarifies that the marihuana was sold to the respondent for further distribution in Poland.

21. It is apparent from paragraph C of the EAW, that both offences attract a potential maximum sentence of 15 years imprisonment. The minimum gravity requirements set out in the Framework Decision and s. 38 of the Act of 2003 have been met.

22. I am satisfied therefore, that there is no manifest error in the certification of the offences as coming with Article 2 para 2 of the Framework Decision.

3.1.3. The third EAW

23. This EAW also seeks the surrender of this respondent to Poland, for the purpose of standing trial for one drug trafficking offence.

24. This offence is certified by the Issuing State as falling within Article 2.2 of the Framework Decision. The offence has been categorised as "illicit production, processing, smuggling of intoxicants, precursors, surrogates or psychotropic substances or trafficking therein".

25. The alleged involvement of the respondent is described on the face of the EAW as follows:

> "in the period of time from July, 2006 to November, 2007, in Wloclawek, in Kujawsko-Pomorskie Province, acting in order to implement his premeditated

intent, for his private financial gain, against the provisions of the Act on counteracting drug addiction, he participated in trafficking of significant quantities of psychotropic substances and narcotic drugs in the amounts not smaller than 30 000 grams of amphetamine of a Value not smaller than PLN 150 000, 55 000 pieces of ecstasy pills of a value not smaller than PLN 81 000 and not less than 7 500 grams of marijuana worth not less than PLN 105 250".

26. Further occurrence of the offence is recorded in the EAW as the trafficking of the same substances during the period of July 2006 to November 2007 when he purchased and later sold amphetamine, ecstasy pills, and marijuana. The same occurred during the period of September 2006 to April 2007.

27. It is apparent from paragraph C of the EAW, that both offences attract a potential maximum sentence of 12 years imprisonment which meets the minimum gravity requirements of the Framework Decision and s.38 of the Act of 2003.

28. Accordingly, I am satisfied that there is no manifest error in the certification of the offences.

3.2. Section 44 of the Act of 2003

29. The respondent did not raise an objection to surrender based upon s. 44 on the basis that these offences, in particular the offences set out in the second EAW, are extraterritorial offences which would not constitute an offence in this state. This is quite proper because, although the offences refer to Holland, the additional information clarifies that this respondent's alleged involvement was the distribution in Poland. In those circumstances, the first leg of the test in s. 44 has not been met; they are not offences alleged to have been committed in a place other than the issuing State. Therefore, his surrender is not prohibited under the provisions of s. 44 of the Act of 2003.

3.3. Non-compliance with Section 11(1A)(f) of the Act of 2003

30. The respondent claims there has been non-compliance with s. 11(1A)(f) of the Act of 2003. Section 11(1A)(f) provides that the EAW must specify:

> "the circumstances in which the offence was committed or is alleged to have been committed, including the time and place of its commission or alleged commission, and the degree of involvement or alleged degree of involvement of the person in the commission of the offence".

31. According to Edwards J. in *Minister for Justice and Equality v Cahill* [2012] IEHC 315, the requirement for a description of the circumstances in which the offences were committed has, according to Irish law, three broad objectives:

> "The first is to enable the High Court, in its capacity as executing judicial authority, to be satisfied that it is appropriate to endorse the warrant for execution in this jurisdiction."
>
> Edwards J cited Peart J. in *Minister for Justice, Equality and Law Reform v. Hamilton* [2008] 1 I.R. 60 as follows: "*My view of the matter is that the purpose of the warrant is not simply that the respondent might be aware of why his extradition is requested, but that this court, when asked to endorse the warrant for execution, might be satisfied that there is an offence alleged in which the proposed respondent is implicated in some way. When the application for endorsement of the warrant is made initially under s. 13 of the Act, the court must be satisfied that the warrant is in the proper form before it can endorse it for execution. At that stage, the court itself must be in a position, from the manner in which the warrant is completed, to see in what way the offence alleged involves the person named therein.*"
>
> The second objective is to enable the executing judicial authority to be satisfied as to correspondence in cases in which double criminality is required

to be demonstrated. In such cases, the Court must, per *Attorney General v. Dyer* [2004] 1 IR 40 (as approved in the European arrest warrant context in ***Minister for Justice, Equality and Law Reform v. Fil*** [2009] IEHC 120 (unreported, High Court, Peart J., 13th March, 2009), and applied in many subsequent cases) have regard to the underlying facts as disclosed in the warrant itself, and any additional information furnished, to see if the factual components of the offence specified in the warrant, in their entirety or in their near-entirety, would constitute an offence which, if committed in this State, could be said to be a corresponding offence of the required gravity. In the present case, this Court does not need to concern itself with correspondence in circumstances where the issuing judicial authority has invoked paragraph 2 of Article 2 of the Framework Decision.

The third objective, and the critical one in the circumstances of the present case, is to enable the respondent to know precisely for what it is that his surrender is sought. A respondent is entitled to challenge his proposed surrender and in order to do so needs to have basic information about the offences to which the warrant relates. Among the issues that might be raised by a respondent are objections based upon the rule of specialty, the *ne bis in idem* principle and extra-territoriality to name but some. In order to evaluate his position, and determine whether or not he is in a position to put forward an objection that might legitimately be open to him to raise, he (and also his legal advisor in the event he is represented) needs to know, in respect of each offence to which the warrant relates, in what circumstances it is said the offence was committed, including the time, place, and degree of participation in the offence by the requested person."

32. The respondent has raised this matter specifically with respect to the second EAW. I have considered each of the EAWs before the Court. The offences for which the respondent is sought are set out clearly on the EAW. The offences are clear in respect of the value of each offence, the nature of the narcotic substance seized, the place and time of the alleged offence, and the degree of his involvement. It is a matter for the Polish authorities to decide how the offences are described and how the charges are laid so long as there is sufficient detail to meet the broad objectives of Irish law as set out above. There is no requirement to set out the evidence upon which the prosecution will seek to prove the charges, so long as the respondent knows the charge which he faces.

33. Accordingly, I am satisfied that there is sufficient detail set out in each of the EAWs to enable this Court to adjudicate upon all matters required to be adjudicated upon, such as the rule of specialty or a matter of *ne bis in idem* (double jeopardy) if these were raised (which they are not). The Court is also satisfied that there is sufficient detail in each of the EAWs to ensure that the respondent knows the reason for his arrest and the charge against him. There is no ambiguity or lack of clarity in the EAWs before the Court.

34. I am therefore satisfied that there is compliance with s. 11(1A)(f) in respect of each EAW before the Court.

3.4. Abuse of Process

35. The respondent has not adduced any evidence of an abuse of the process and did not address this at the hearing of the application. I therefore reject this point of objection.

3.5. Section 37 of the Act of 2003

36. Section 37 prohibits surrender where surrender would be incompatible with the State's obligations under the European Convention on Human Rights ("ECHR") or would contravene the Constitution. The respondent's objections are that his right to fair trial (Article 6 ECHR) would be violated; his right pursuant to Article 3 not to be inhumanly and

degradingly treated would be violated and; his right to respect for family and personal life pursuant to Article 8 would also be violated.

3.5.1. Article 8 ECHR

37. The respondent made some references to his private and family life in his affidavit. The argument under Article 8 ECHR was not addressed in oral or written submissions. I am satisfied having regard to the decision of the Supreme Court in *Minister for Justice v JAT (No. 2)* [2016] IESC 17 that it is unnecessary to deal with this point in any great detail. This respondent is sought for very serious offences of drug trafficking and participation in organised crime. There is undoubtedly a very high public interest in his surrender. His personal circumstances are not such that would make it disproportionate to surrender him. I reject this point of objection.

3.5.2. Article 3 ECHR

38. The respondent shared a prison cell with three other inmates and was subjected to 23-hour lockdown in a small cell with those prisoners. He had limited family visits or access to television or telephone calls. There was limited contact with other prisoners and he shared all outdoor spaces with the prisoners from his cell. He also complained that the prison he was in was very dangerous and, like most prisons in Poland, certain criminal gangs had a lot of influence and control. He says he was badly assaulted whilst in prison, as were members of his family. He says he did not think they were ever recorded but they were known to have occurred by prison staff. He says he had suffered from Post-Traumatic Stress Disorder ("PTSD") as a result of the inhuman and degrading treatment, and that he had attended a general practitioner at Cloverhill in relation to this and had repeatedly sought the services of a prison psychiatrist. No medical report to substantiate this claim of PTSD is relied upon by the respondent.

39. The respondent also states that he believes that he is at risk of attack and harm from criminal gangs in and outside prison if surrendered to Poland. He said that his brother had been imprisoned for drugs offences following his arrest in 2009. That brother became a police informant and state witness in 2010, which he understood, led to the arrest and prosecution of nearly 20 gang members. Those cases involved some of Poland's most notorious drug traffickers and several of the proceedings are still before the courts. He says that he has no doubt if he was in Poland that he would be in danger from other individuals and their associates whether he was in custody or not.

40. The respondent did not put before the Court any reports from international or internal organisations or tribunals concerning Polish prison conditions. His own evidence as to his safety is quite dated at this time and perhaps self-serving. More importantly, I was not addressed on current conditions in Poland or why the legislative changes in Poland required this Court to make a different decision from previous judgments, except in the general sense that the principles of mutual trust and mutual recognition could not apply. In the absence of specific evidence as to the prevailing conditions in Poland's prisons, together with cogent grounds as to why the recent legislative changes in the justice system affected the earlier decisions on prison conditions, I cannot be satisfied that there is a real risk that the respondent's Article 3 ECHR rights will be violated should he be surrendered. I therefore reject his Article 3 point.

3.5.3. Article 6 ECHR

Poland's Legislative Changes

41. The respondent's submissions under these headings were virtually exclusively based upon recent changes in Polish legislation concerning the judiciary, the courts and the Public Prosecutor. The evidence submitted to the Court has focused primarily on the issue of fair

trials and the respondent's apprehension in regards to same as a result of the cumulative legislative changes in Poland. I will now discuss this objection in detail.

The objection

42. The respondent's principal contention is that recent legislative changes and proposed legislative changes in Poland create a real risk of a flagrant denial of justice if he is surrendered for trial in Poland. The principal submission is that these changes fundamentally undermine the basis of mutual trust between the issuing and executing judicial authorities such that the operation of the EAW system is called into question.

43. Counsel for the respondent submits that this is appropriately termed an unprecedented case. He submits that the issue went to the heart of the basis of which all EAW cases are adjudicated. Counsel points to the tests, predicated upon legal principles, which the courts must use to decide whether fundamental rights are at real risk of being violated should a person be surrendered to another Member State of the European Union. Counsel submits that those tests rely upon the principles of mutual trust and confidence that exists between the issuing state and the executing state. In counsel's submission, the present circumstances meant that the assumption of mutual trust and confidence could no longer be relied upon. Due to the legislative changes in Poland, the principles of mutual trust and confidence were no longer operative and the validity of the tests regarding fundamental rights was called into question. This, the respondent submits, is particularly relevant, as the minister is submitting that surrender should not be prohibited as this respondent has not demonstrated a specific risk to him.

The evidence

The respondent's

44. The evidence before the Court in respect of this matter consists mainly of affidavit evidence from the respondent, concerning his treatment while previously in prison in Poland

as set out above. He also made complaints about a fair trial but there was nothing specific raised by him in respect of his own situation. He did however rely upon various reports as to those changes which are discussed below.

The respondent's solicitor

45. Mr. Ciarán Ó Maolchallann, solicitor for the respondent, has sworn an affidavit in which he states that he has made meaningful efforts to seek further evidence in order to collaborate the instructions from the respondent. He exhibits various correspondences with a number of law schools in both Ireland and Poland, and with other institutions. He says it has not been possible to engage an expert to submit a report. He did receive a particular response which appears to be from an official Polish body. This states that the courts and tribunals are a separate power and shall be independent of other branches of power. It says that the judges are independent and governed solely by the constitution and laws. The Minister of Justice exercises only administrative supervision of common courts. It says that the Minister does not interfere with the independence of judges and that the Ministry of Justice does not comment on speculations or opinions presented in public debate of Polish institutional system. It is not entirely clear who has made this response but it appears to be a response from an official Polish source, possibly the Ministry of Justice itself.

Reasoned Proposal of the European Commission

46. The respondent relied mainly upon a document of the European Commission entitled "Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland" (hereafter "the Reasoned Proposal"), dated 20th December, 2017. The subheading for that document is "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". The contents of the Reasoned Proposal will be discussed further below.

Opinions of the Venice Commission

47. The respondent also relied on several Opinions from the European Commission for Democracy through Law ("the Venice Commission"), an advisory body of the Council of Europe, on the situation in Poland. The Venice Commission is a highly regarded consultative body on constitutional matters, made up of experts, and provides legal advice to states regarding issues of democracy law, and human rights. Since 2002, its Opinions have been referred to by the European Court of Human Rights ("ECtHR") in over 90 cases.

48. These Opinions are referenced throughout the Reasoned Proposal and, where especially relevant, they are discussed in this judgment. It is of particular note that, in its Opinion dated 8th December, 2017 on the legislative changes as to the Public Prosecutor's Office, the Venice Commission, when referring to the cumulative changes in legislation in Poland, stated at para 115:

> "Taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary (Act on the organisation of Common Courts) and the weak position of checks to these powers (National Council of Public Prosecutors) result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland."

The Treaty on European Union

49. In order to understand the genesis and importance of the Reasoned Proposal, it is necessary to consider the provisions of the Treaty on European Union (TEU) and Article 7(1) thereof.

Article 2 TEU states:

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

Article 6 TEU states:

> "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Article 7 TEU, in so far as relevant, provides:

> "1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
>
> The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
>
> 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations."

The European Commission's Reasoned Proposal on Article 7 TEU

(a) The guidelines for Article 7 procedures

50. The parameters of the European Commission's engagement with Poland are based upon the principles set out in a European Commission communication to the European Parliament and the Council entitled "A new EU Framework to strengthen the rule of law (COM) (2014) 158 Final/2." In that document, the European Commission states that "[t]he rule of law is the backbone of any modern constitutional democracy. It is one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based."

51. The European Commission acknowledge that the precise contents of the principles and standards stemming from the rule of law may vary at national level depending on each Member State's constitutional system. There are however, certain principles that define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU. These principles are quoted in section 2, Annex I of the European Commission's communication as including:

> "…legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law."

52. The framework provides guidance for a dialogue between the European Commission and the Member State concerned to prevent the escalation of systemic threats to the rule of law. It is in that context that the European Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law. The European Commission then sends a rule of law opinion to the Member State and gives the Member State the possibility to respond. Thereafter, the European Commission can issue a rule of law recommendation if they are satisfied that the matter has not been satisfactorily resolved. The European Commission has to indicate the reasons for its concerns and recommends that the Member State solves the problem. There is then a monitoring system in terms of the recommendation. Thereafter, a reasoned proposal for European Council action may be sent.

53. Prior to issuing its Reasoned Proposal, the European Commission made extensive use of the possibilities provided by the rule of law framework for constructive dialogue with the Polish authorities. The European Commission had issued a rule of law opinion, and four rule

of law recommendations (the final one was issued on the same day as the Reasoned Proposal). The European Commission have stated that they exchanged more than 25 letters with the Polish authorities on the matter. There had been little engagement by the Polish authorities with the substantive recommendations made by the European Commission. The Reasoned Proposal was then issued in December 2017.

(b) The contents of the Reasoned Proposal

54. The decision by the European Commission to send a reasoned proposal to the European Council under Article 7(1), in respect of Poland, is the first time that this has occurred in respect of any Member State. The nature of, and reasoning behind, the four rule of law recommendations are set out in the Reasoned Proposal.

55. The Reasoned Proposal is a comprehensive and lengthy document. It records the history of the Commission's involvement with developments relating to the rule of law in Poland since November 2015. The Reasoned Proposal also sets out in considerable detail the background to, and history of, the legislative changes. It is not feasible to itemise the full contents of the Reasoned Proposal and I propose to concentrate on those parts which appear to have the most relevance. The fact that so many different legislative changes have been made by Poland is itself relevant to this issue.

56. The Reasoned Proposal records that prior to general elections for the Sejm (the Polish lower house of parliament) in October 2015, five judges were nominated by the outgoing legislature to the Polish Constitutional Tribunal. Three of those nominated judges were to take the seats vacated during the mandate of the outgoing legislature, while two were to take seats vacated during the incoming legislature. The Sejm amended that law following the general election and ultimately passed a motion annulling those five judicial nominations.

57. The Constitutional Tribunal delivered two relevant judgments in December 2015. In its first judgment, it ruled that the previous legislature had been entitled to nominate three

judges replacing those whose terms expired during the mandate of the outgoing legislature. They also clarified that the previous legislature had not been entitled to elect two new judges for the new term. In a subsequent judgment, the Constitutional Tribunal also invalidated the legal basis for the nominations by the new legislature of the three judges for the vacancies for which the Tribunal said there had been lawfully nominated judges.

58. On 22nd December, 2015, the Sejm adopted a law concerning the functioning of the Constitutional Tribunal as well as the independence of the judges. During the period December 2015 and January 2016, several other controversial new laws were also implemented. The Polish government asked for an Opinion of the Venice Commission on the law of 22nd December, 2015, but did not await the view of the Venice Commission before implementing that law. The Venice Commission adopted its Opinion in March 2016 on that law. As regards the appointment of judges, the Opinion called on the Polish parliament to find a solution on the basis of the rule of law, respecting the judgments of the tribunal. The Venice Commission also considered that the high attendance quorum, the requirements of two-thirds majority for adopting judgments and the strict rule making it impossible to deal with urgent cases, especially in their combined effect, would have made the Constitutional Tribunal ineffective.

59. On 9th March, 2016, the Constitutional Tribunal ruled that the law adopted on 22 December, 2015, regarding the Tribunal, was unconstitutional. That judgment has not been published to date in the Official Journal, with the consequence being that it does not have legal effect. Certain subsequent judgments of the Constitutional Tribunal have also not been published.

60. Between February 2016 and July 2016, the European Commission and the Polish government exchanged a number of letters and met on different occasions. On 1st June, 2016, the European Commission gave a rule of law Opinion. The rule of law Opinion set out the

concerns of the European Commission and sought to focus the dialogue with Poland. On 22nd July, 2016 a further law dealing with the Constitutional Tribunal was also passed by the Sejm.

61. On 27th of July, 2016, the European Commission adopted a recommendation regarding the rule of law in Poland. In that first recommendation, the European Commission explained the circumstances in which it had decided to do so. In its recommendations, the European Commission found that "there was a systemic threat to the rule of law in Poland and recommended that the Polish authorities take appropriate action to address this threat as a matter of urgency." The European Commission recommended as follows:

> "(a) implement fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which requires that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected;
>
> (b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016 and its subsequent judgments and ensure that the publication of future judgments is automatic and does not depend on any decision of the executive or legislative powers;
>
> (c) ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 December 2015 and the judgment of 9 March 2016, and takes the opinion of the Venice Commission fully into account; ensure that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by requirements, whether separately or through their combined effect, such as

those referred to above relating to the attendance quorum, the handling of cases in chronological order, the possibility for the Public Prosecutor-General to prevent the examination of cases, the postponement of deliberations or transitional measures affecting pending cases and putting cases on hold;

(d) ensure that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect;

(e) refrain from actions and public statements which could undermine the legitimacy and efficiency of the Constitutional Tribunal."

62. In response, the Polish government disagreed on all points and did not announce any new measures to alleviate the rule of law concerns. The law of the 22nd July, 2016 was signed into force in Poland. On 11th August, 2016, the Constitutional Tribunal rendered a judgment on the law of 22nd July, 2016, holding that a number of provisions of that law, all of which were also identified as a concern by the European Commission's first recommendation were unconstitutional. The Polish government did not recognise the validity of this judgment and did not publish it in the official journal. The failure to publish meant the judgment did not have legal effect.

63. The Reasoned Proposal records that in October 2016, the Venice Commission adopted its own Opinion on the law of 22nd July, 2016 on the Constitutional Tribunal. That Opinion of the Venice Commission considered that the Polish parliament and government continued to challenge the Constitutional Tribunal's position as the final arbiter of constitutional issues. They were taking this authority for themselves. The Polish parliament and government created new obstacles to the effective functioning of the Tribunal, and acted to further undermine its independence. According to this Opinion, by prolonging the

constitutional crisis, the Polish parliament and government obstructed the Constitutional Tribunal, which then could not play its constitutional role as the guardian of democracy, the rule of law, and human rights.

64. The Reasoned Proposal also refers to the concerns expressed in October 2016 by the United Nations Human Rights Committee about the negative impact of legislative reforms on the Constitutional Tribunal, the disregard of the judgments of that tribunal, the functioning and independence of the Tribunal and the implementation of the International Covenant on Civil and Political Rights. The UN Committee urged Poland to immediately publish officially all the judgments of the Tribunal, to refrain from introducing measures that obstruct its effective functioning and to ensure a transparent and impartial process for the appointment of its members and for security of tenure which meets all requirements of legality under domestic and international law.

65. Further developments in December 2016 included new laws governing the functioning of the Constitutional Tribunal as well as the appointment of a judge elected by the new Sejm to the position of Acting President of the Constitutional Tribunal. This judge admitted the three judges, who had been nominated by the Sejm without a valid legal basis according to the ruling of the Constitutional Tribunal, to take up their function in that Tribunal and convened a meeting of the General Assembly for the same day.

66. On 21st December, 2016, the European Commission adopted a second recommendation regarding the rule of law in Poland. The European Commission concluded that there continued to be a systemic threat to the rule of law in Poland and invited the Polish government to resolve the problems identified as a matter of urgency within two months. Again, there was disagreement by the Polish government with the assessment set out in the recommendation and no new action was announced to address those issues.

67. In January 2017, the vice president of the Constitutional Tribunal was obliged by the newly appointed president of the Tribunal to take his remaining leave. The leave was subsequently prolonged despite the request of the vice president to resume his work as a judge. The Minister of Justice also launched a procedure before the Constitutional Tribunal to review the constitutionality of the election in 2010 of three judges of the Tribunal. Later in January 2017, the Polish government announced a comprehensive reform of the judiciary comprising a set of laws including draft laws on the National Council for the Judiciary and on Ordinary Courts Organisation.

68. In June 2017, the European Council generally endorsed the Country Specific Recommendations addressed to the Member States in the context of the 2017 European semester. The recommendations addressed to Poland contain a recital underlining that:

> "[l]egal certainty, trust in the quality and predictability of regulatory, tax and other policies and institutions are important factors that could allow an increase in the investment rate. The rule of law and an independent judiciary are also essential in this context. The current systemic threat to the rule of law creates legal uncertainty".

69. On 26th July, 2017, the European Commission adopted a third recommendation regarding the rule of law in Poland. The concerns of the commission related to the following issues:

> "(1) the lack of an independent and legitimate constitutional review;
>
> (2) the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland:
>
> (a) the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and

certain other laws ('law on the National School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and which entered into force on 20 June 2017;

(b) the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'); approved by the Senate on 15 July 2017; this law was referred back to the Sejm on 24 July 2017.

(c) the law amending the law on the Ordinary Courts Organisation ('law on Ordinary Courts Organisation'); approved by the Senate on 15 July 2017 and signed by the President on 25 July;

(d) the law on the Supreme Court; approved by the Senate on 22 July 2017; this law was referred back to the Sejm on 24 July 2017."

70. In its third recommendation, the European Commission considered that the systemic threat to the rule of law in Poland had seriously deteriorated. The European Commission made reference to the unlawful appointment of the president of the Constitutional Tribunal of the three additional judges. The European Commission considered that the independence and legitimacy of the Constitutional Tribunal was seriously undermined and consequently the constitutionality of Polish laws can no longer be effectively guaranteed. The European Commission was of the view that the law on the National School of Judiciary already in force, and the law on the National Council for the Judiciary, the law in the Ordinary Courts Organisation and the law on the Supreme Court, should they enter into force, structurally undermine the independence of the judiciary in Poland and would have an immediate and concrete impact on the independent functioning of the judiciary as a whole. The dismissal of Supreme Court judges, their possible reappointment and other measures contained in the law on the Supreme Court would very seriously aggravate the systemic threat to the rule of law.

The new laws raised serious concerns as regards their compatibility with the Polish Constitution, and the European Commission referred to a number of statements by relevant stakeholders in Poland including the Polish Supreme Court, the Polish Ombudsman, the National Council for the Judiciary, and associations of judges and lawyers. Finally, the European Commission referred to the actions and public statements against judges and courts in Poland made by the Polish government and by members of parliament from the ruling majority, which they said had damaged the trust in the justice system as a whole.

71. The European Commission invited the Polish government to solve the problems within one month of receipt of the recommendations. Ultimately, the Polish government disagreed with the assessments set out in the recommendations and did not announce any new action to address the concerns identified by the European Commission.

72. The Reasoned Proposal records a number of developments in Poland from that time onwards. These included a decision by the Constitutional Tribunal in a panel of five judges to declare unconstitutional certain provisions of the Code of Civil Procedure that allowed Ordinary Courts and the Supreme Court to assess the legality of the appointment of the President and the Vice President of the Constitutional Tribunal. That decision was criticised by the National Council for the judiciary. The Minister of Justice started exercising powers to dismiss courts presidents and vice presidents pursuant to the law on Ordinary Courts Organisation.

73. In October 2017, the Supreme Court published two opinions on two new draft laws on the Supreme Court and the National Council for the Judiciary. The Supreme Court stated that the draft law on the Supreme Court would substantially curb independence. The opinion on the draft law on the Council for the Judiciary stated that it cannot be reconciled with the concept of a democratic state governed by the rule of law.

74. In October 2017, the parliamentary assembly of the Council of Europe adopted a resolution on new threats to the rule of law in Council of Europe Member States, expressing concerns also about developments in Poland, which put at risk respect for the rule of law and in particular the independence of the judiciary and the principle of the separation of powers.

75. On 13th October 2017, the European Network of Councils for the Judiciary issued an opinion on the new draft law of the National Council for the Judiciary underlining its inconsistency with European standards on councils for the judiciary.

76. On 24th October, 2017, the Constitutional Tribunal, in a panel including two unlawfully appointed judges, declared the unconstitutionality of provisions of the law on the Supreme Court, on the basis of which, *inter alia,* the current First President of the Supreme Court had been appointed. The Constitutional Tribunal, on the same date, in a panel comprising two unlawfully appointed judges, declared the constitutionality of provisions of the three laws on the Constitutional Tribunal of December 2016. These included the provisions on the basis of which the two unlawfully appointed judges adjudicating in the case had been allowed to adjudicate in the Constitutional Tribunal. The motion of the Polish Ombudsman on recusal of the two unlawfully appointed judges from this case had been rejected by the Constitutional Tribunal.

77. On 15th November, 2017, the European Parliament of the EU adopted a resolution on the situation of the rule of law and democracy in Poland, expressing support for the recommendations issued by the European Commission as well as for the infringement proceedings. They considered that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the Treaty on European Union. The Reasoned Proposal refers to the conclusions of the Venice Commission in its Opinion of 8th December, 2017, as set out above.

78. In its Reasoned Proposal, the European Commission dealt with two areas of particular concern; the lack of an independent and legitimate constitutional review, and the threats to the independence of the ordinary judiciary. In relation to the first area, the European Commission underlines that where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.

79. In the Reasoned Proposal, the European Commission drew particular attention to the composition of the Constitutional Tribunal where lawfully nominated judges have not been allowed take up their function but that those judges nominated without a valid legal basis had been admitted to take up their function by the acting president of the Tribunal. The Polish authorities have still not implemented fully the judgments of the Constitutional Tribunal of 3rd and 9th December, 2015.

80. With respect to publication of judgments, the European Commission states at para 100 of its Reasoned Proposal that:

> "[t]he refusal of the Government to publish judgments of the Constitutional Tribunal raises serious concerns in regard of the rule of law, as compliance with final judgments is an essential requirement inherent in the rule of law. In particular, where the publication of a judgment is a prerequisite for its taking effect and where such publication is incumbent on a State authority other than the court which has rendered the judgment, an *ex-post* control by that state authority regarding the legality of the judgment is incompatible with the rule of law. The refusal to publish the judgment denies the automatic legal and operational effect of a binding and final judgment, and breaches the rule of law principles of legality and separation of powers."

81. The European Commission also pointed to the appointment of the President of the Constitutional Tribunal and the subsequent developments on that Tribunal. In the view of the

European Commission, "[t]hese developments have *de facto* led to a complete recomposition of the Constitutional Tribunal outside the normal constitutional process for the appointment of judges."

82. The European Commission considered that as a result of the laws adopted in 2016 and subsequent developments following the appointment of the acting President, the independence and legitimacy of the Constitutional Tribunal is seriously undermined and the constitutionality of Polish laws can no longer be effectively guaranteed. This, according to the Reasoned Proposal, is particularly concerning because of sensitive new legislative Acts which have been adopted by the Polish parliament, such as a new Civil Service Act, a law amending the law on the police, laws on the Public Prosecution Office, a law on the Ombudsman, a law on the National Council of Media, and an anti-terrorism law.

83. In part 4 of the Reasoned Proposal, the European Commission referred to threats to the independence of the Ordinary Judiciary. The law on the Supreme Court lowers the general retirement age of Supreme Court judges from 70 to 65. This applies to all judges currently in office. Judges who have already attained 65 years of age, or will attain that age within three months of the entry into force of the law, will be retired. It is stated that such compulsory retirement of a significant number of the current Supreme Court judges allows for a far-reaching and immediate recomposition of the Supreme Court. Para 116 of the Reasoned Proposal states: "[t]hat possibility raises particular concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary."

84. The European Commission notes that judicial independence requires guarantees sufficient to protect the person of those who have the task of adjudicating a dispute. It is stated at para 117 that "[t]he irremovability of judges during their term of office is a consequence of their independence and thus included in the guarantees of Article 6(1)

ECHR". Para 117 goes on to state: "[t]he above guarantees and safeguards are lacking in the present case and the provisions concerned constitute a flagrant violation of the independence of judges of the Supreme Court and of the separation of powers, and therefore of the rule of law."

85. An opportunity exists for those judges affected by the lower retirement age to make a request to the President of Poland to prolong their active mandate. The European Commission notes however, that there is no timeframe for taking a decision, and no judicial review provided for in law. The Venice Commission had concluded that the President of Poland, as an elected politician, should not have the discretionary power to extend the mandate of the Supreme Court judge beyond the retirement age. The Reasoned Proposal notes that this also raises constitutionality concerns in Poland with respect to the principle of legality and separation of powers.

86. The Reasoned Proposal also refers to a new form of judicial review of final and binding judgments and decisions called "Extraordinary Appeals". In an Extraordinary Appeal, within three years from the entry into force of the law, the Supreme Court will be able to overturn completely or in part any final judgment delivered by a Polish court in the past twenty years (although for crime this appears to be limited to one year), including judgments delivered by the Supreme Court, subject to some exceptions. The power to lodge the appeal is vested, *inter alia*, in the Prosecutor General and the Ombudsman. The Reasoned Proposal notes that this raises concerns as regards the principle of legal certainty that is a key component of the rule of law. The Venice Commission had underlined that the Extraordinary Appeal procedure is dangerous for the stability of the Polish legal order.

87. They also referred to the new disciplinary regime for Supreme Court judges. An Extraordinary Disciplinary Officer can now be appointed by the President of Poland on a case-by-case basis from among Supreme Court judges, ordinary judges, military court judges

and prosecutors. The Reasoned Proposal states that the fact that the President of Poland, and in some cases also the Minister of Justice, has the power to exercise influence over disciplinary proceedings against Supreme Court judges, creates concerns regarding the principle of separation of powers and may affect judicial independence.

88. The law also removes a set of procedural guarantees and disciplinary proceedings conducted against ordinary judges and Supreme Court judges, and the new disciplinary regime also raises concerns as to its compliance with the due process requirement of Article 6(1) ECHR, which are applicable to disciplinary proceedings against judges.

89. According to the Polish Constitution, the independence of judges is safeguarded by the National Council for the Judiciary. The new law on the National Council for the Judiciary increases the concerns regarding the overall independence of the judiciary by providing for the premature termination of the mandate of all judges/members of the National Council for the Judiciary and by establishing an entirely new regime for the appointment of its judges/members, which allows a high degree of political influence.

90. As regards the law on Ordinary Courts Organisation, a new retirement regime requires that the retirement regime applicable to ordinary judges be reduced from 67 to 60 for female judges, and from 67 to 65 for male judges, and that the Minister of Justice would be granted the power to decide on the prolongation of judicial mandates until the age of 70 on the basis of vague criteria. Pending this decision, the judges concerned remained in office. The new law on Ordinary Courts Organisation includes rules on the dismissal of courts presidents and vice presidents. The Minister of Justice is granted the power to dismiss Presidents of Courts without being bound by concrete criteria, with no obligation to state reasons, and with no possibility for the judiciary to block these decisions. There is no judicial review against a dismissal decision of the Minister of Justice. The Minister of Justice may address to a president of a lower court written remarks concerning the alleged

mismanagement by the latter of the court. As a result of those written remarks, the president of the lower court may suffer a deduction of up to fifty percent of the post allowance for up to six months.

91. The law on the National School of Judiciary allows for assistant judges to be appointed to act as single judges in District Courts. Under the Polish legal system, assistant judges do not have the same status as judges. They are term-limited but after 36 months can start applying for new proceedings to become judges. The ECtHR has held that the previous regime regarding assistant judges in Poland did not meet the criteria of independence.

92. The laws on the Public Prosecution Office in 2016 merged the office of the Minister of Justice and that of the Public Prosecutor General. This increased significantly the powers of the Public Prosecutor General in the management of the prosecutorial system, including new competences enabling the Minister of Justice to directly intervene in individual cases. The Reasoned Proposal at para 170 states as follows:

> "As underlined by the Venice Commission, while recognising that the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts, taken together, the merger of the office of the Minister of Justice and that of the Public Prosecutor General, the increased powers of the Public Prosecutor General vis-à-vis the prosecution system, the increased powers of the Minister of Justice in respect of the judiciary pursuant to the law on the Organisation of Ordinary Courts and the weak position of checks to these powers, result in the accumulation of too many powers for one person. This has direct negative consequences for the independence of the prosecutorial system from political sphere, but also for the independence of the judiciary and hence the separation of powers and the rule of law in Poland."

93. In Part 5 of the Reasoned Proposal, under the heading "Finding of a Clear Risk of a Serious Breach of the Values Referred to in Article 2 of the Treaty on European Union", at para 170, the European Commission were "…of the opinion that the situation described in the previous sections represents a clear risk of a serious breach by the Republic of Poland of the rule of law referred to in Article 2 TEU. The Commission comes to this finding after having considered the facts set out above".

94. The European Commission made various other observations in its Reasoned Proposal, including that within the period of two years, more than thirteen consecutive laws had been adopted, affecting the entire structure of the judicial system in Poland: The Constitutional Tribunal, the Supreme Court, the Ordinary Courts, the National Council for the Judiciary, the Prosecution Service and the National School of the Judiciary. The European Commission stated at para 173:

> "The common pattern of all these legislative changes is that the executive or legislative powers have been systematically enabled to interfere significantly with the composition, the powers, the administration and the functioning of these authorities and bodies. The legislative changes and their combined effects put at serious risk the independence of the judiciary and the separation of powers in Poland which are key components of the rule of law. The Commission also observes that such intense legislative activity has been conducted without proper consultation of all the stakeholders concerned, without a spirit of loyal cooperation required between state authorities and without consideration for the opinions from a wide range of European and international organisations."

95. The European Commission also referred to the deteriorating position despite the issuing of the three recommendations. The Reasoned Proposal records at para 178 that:

> "Given that the independence of the judiciary is a key component of the rule of law, these new laws, notably their combined effect, will increase significantly the systemic threat to rule of law as identified in the previous Recommendations. In this respect the Venice Commission underlined that the combination of the changes proposed amplifies the negative effect of each of them to the extent that it puts at serious risk the independence of all parts of the judiciary in Poland."

96. The European Commission again points out that the consequences of the situation are particularly serious. The European Commission points in particular to the fact that the constitutionality of Polish laws can no longer be effectively guaranteed and that the situation is particularly worrying for the respect of the rule of law since particularly sensitive new legislative Acts have been adopted by the Polish parliament in recent times. At para 180(2), the European Commission states:

> "Respect for the rule of law is not only a prerequisite for the protection of all the fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States."

At para 180(3) the European Commission also states that:

> "Respect for the rule of law is also essential for mutual trust in the area of justice and home affairs, in particular for effective judicial cooperation in civil and criminal matters which is based on mutual recognition. This cannot be assured without an independent judiciary in each Member State."

97. In the Reasoned Proposal, the European Commission also noted that a wide range of actors at European and international level have expressed their deep concern about the

situation of the rule of law in Poland, and that the European Parliament stated that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 TEU. In light of the findings that the European Commission made, it sent the Reasoned Proposal to the Council inviting the Council to determine that there is a clear risk of a serious breach by Poland of the rule of law which is one of the values referred to in Article 2 TEU, and to address appropriate recommendations to Poland in this regard. The European Commission attached a proposal for a Council decision regarding such a determination.

The Framework Decision, Fundamental Rights and the Court of Justice of the European Union

98. The EAW scheme is based upon the 2002 Framework Decision. Recital 10 of the 2002 Framework Decision provides as follows:

> "The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof."

99. The CJEU, in its judgment in the joined cases of *Aranyosi and Caldararu (Joined Cases C-404/15 and C-659/15)* [2016] E.C.L.I. 198, dealt with the question of whether the principle of mutual trust was unconditional in the operation of the EAW mechanism. The CJEU reiterated that mutual trust and mutual recognition are of fundamental importance and stated at para 80 that:

> "[i]t follows that the executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of obligatory non-execution, laid

down in Article 3 of the Framework Decision, or of optional non-execution, laid down in Articles 4 and 4a of the Framework Decision. Moreover, the execution of the European arrest warrant may be made subject only to one of the conditions exhaustively laid down in Article 5 of that Framework Decision (see, to that effect, judgment in *Lanigan*, C‑237/15 PPU, EU:C:2015:474, paragraph 36 and the case-law cited)".

100. The CJEU noted that it was in that context that Recital 10 stated that "implementation of the mechanism of the European arrest warrant as such may be suspended only in the event of serious and persistent breach by one of the Member States of the principles referred to in Article 2 TEU, and in accordance with the procedure provided for in Article 7 TEU."

101. The CJEU went on to state that the Court had recognised the limitations to those principles of mutual trust and mutual recognition may be made in exceptional circumstances. In that regard, the CJEU observed that, as is stated in Article 1(3), the 2002 Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights, *inter alia*, contained in the Charter.

102. The CJEU went on to confirm that Article 4 of the Charter of Fundamental Rights of the European Union ("the Charter"), which prohibits inhuman and degrading treatment, is absolute and enshrines one of the fundamental values of the European Union. At para 88, the CJEU stated:

> "It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in *Melloni*, C‑399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13,

EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment."

The European Arrest Warrant Act 2003 and the case of Rettinger

103. The Act of 2003, which implemented the 2002 Framework Decision, had provided expressly for protection of fundamental rights. Section 37 provides:

"A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38 (1)(b) applies)".

104. The Supreme Court in the case of *Minister for Justice v Rettinger* [2010] IESC 45 held that:

"Thus national law mandates that a person not be surrendered if his surrender would be incompatible with the State's obligations under the ECHR or its protocols… Consequently, a court hearing an application to surrender is required to consider and apply this mandate. A court is required to consider the law of, and arising from, Article 3 of the ECHR, and relevant case law of the ECtHR, within the context of the Constitution and the law." (per Denham J as she then was at para 22).

105. Denham J, as she then was, laid down the principles to be applied when an issue regarding a violation of Article 3 ECHR arises. In most vital respects, these principles are similar to those set out in the later decision of the CJEU in *Aranyosi and Caldararu* referred to above (see *Minister for Justice v McLaughlin* [2017] IEHC 598). Denham J stated at para 31 of *Rettinger*:

> "(i) a court should consider all the material before it, and if necessary material obtained of its own motion;
>
> (ii) a court should examine whether there is a real risk, in a rigorous examination;
>
> (iii) the burden rests upon a respondent, such as the respondent in this case, to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention;
>
> (iv) it is open to a requesting state to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from a respondent as to conditions in the prisons of a requesting state with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting state may present evidence which would, or would not, dispel the view of the court;
>
> (v) the court should examine the foreseeable consequences of sending a person to the requesting state;

(vi) the court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the State Department of the United States of America.

(vii) the mere possibility of ill-treatment is not sufficient to establish a respondent's case;

(viii) the relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary".

106. Those principles have also been applied where a threat to Article 3 rights has been raised in a request for extradition to non-EU member states under the provisions of the Extradition Act, 1965.

107. It is important to note that there is a necessary divergence in the test that applies when considering whether fair trial rights will be violated. As this Court stated in para 6.4.3. to 6.4.5 of *Attorney General v Damache* [2015] IEHC 339:

"The Court of Appeal of England and Wales stated at para. 19 that:-

"The courts have drawn a distinction between (i) alleged violations of Articles 2 and 3 (which require 'real risk' of violation) and (ii) alleged violations of other Convention rights (which require a 'flagrant' violation)."

That quote captures the distinction between the tests to be applied to different claims of violations of rights in extradition cases also. The European Court of Human Rights ("the ECtHR") held in *Othman (Abu Qatada) v. United Kingdom* (Application No. 8139/09, 17th January, 2012) (2012) 55 E.H.R.R. 1, [2012] E.C.H.R. 56 that Article 6 only required a refusal to extradite where

there would be a flagrant denial of justice in the requesting state. The term "flagrant denial of justice" is synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein. In the view of the ECtHR, a stringent test of unfairness requires a breach of the Article 6 fair trial guarantees which is so fundamental as to amount to a nullification or destruction of the very essence of the right guaranteed by that Article. While that case refers to violations of ECHR rights, it will be seen that the distinction applies in the case of claims of violation of constitutional rights.

6.4.5. The language of flagrant violation mirrors that in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 24. The Supreme Court (Murray C.J.) held that it would take egregious circumstances, "*such as a clearly established and fundamental defect in the system of justice of a requesting state*", for surrender under the European Arrest Warrant Act 2003 ("the Act of 2003") to be refused on the basis of a breach of fundamental criminal justice rights. That test in *Brennan* is the test which must apply to considerations of whether extradition or surrender will constitute a breach of constitutional rights. Certain rights enshrined in our Constitution specifically address rights that arise in our own system for the administration of justice. An example is our constitutional imperative of trial by jury for non-minor offences. There is no constitutional right subsisting in a requested person to have the same rights and procedures applied to him or her in the requesting state as would be applied to him or her if facing trial in this jurisdiction. The constitutional right is not to be extradited to a jurisdiction where there will be a flagrant violation of the right to a fair trial."

The respondent's requests to the Court

108. The respondent submits that the situation was unprecedented within the EU. It was a systemic threat to the entire system of the rule of law and in that sense it was not possible or even necessary to isolate the respondent's circumstances in order to establish a violation. The respondent relied upon the duty of this Court, as a Court bound to respect fundamental human rights when applying the EAW system, to prohibit surrender where there was a real risk of such a violation.

109. In his written submissions, the respondent submits that the only ways in which this Court, as a Court of the European Union bound to respect fundamental human rights principles and to ensure an effective remedy, can satisfy itself that the surrender of the respondent can be ordered without violation of those fundamental principles are:

> "A. Having regard to the existence of a real risk of a flagrant interference with the Respondent's right to a fair trial by virtue of the undermining of the rule of law, seek extensive further information from the issuing judicial authority pursuant to the principles set out in *Aranyosi and Caldararu*
>
> B. Adjourn the hearing of the application for surrender and await the outcome of the Article 7(1) process, at least insofar as it provides an alternative means of securing some or all of the further information that the court would need to alleviate the concerns identified in the Commission's reasoned proposal;
>
> C. Refer the question of the applicability of the Framework Decision and the role of this Court in that regard, or in the alternative the validity of the restriction on suspension of the EAW system contained in Recital 10 of the Framework Decision for determination by the Court of Justice of the European Union."

110. In oral submissions the respondent relied mainly on option C. The respondent submitted that with respect to option A, there was little further information that might be expected, especially when considered with the requests for a response by the European Commission and the relative lack of engagement by the Polish State with those requests.

The Minister's submissions

111. In very careful oral submissions made on behalf of the Minister, counsel says he is not suggesting that the Court was not entitled to have regard to the Reasoned Proposal or that it should disregard that material. Counsel submits that the mere *invocation* of the Article 7 procedure did not diminish the obligation to surrender the respondent if there was no other legitimate objection to surrender. In so far as the respondent seeks to have the case adjourned until after the resolution of the Article 7 procedure, this would be a breach of EU law as it would be the suspension of surrender procedures before a determination of a breach.

112. Counsel accepts that the High Court had a duty to engage in a rights-based assessment but that the correct approach for this Court was to assess this matter through the s. 37 of the Act of 2003 procedure. In that regard, counsel emphasises that there is no real risk that this particular respondent would suffer a breach of his rights. He submits that the appropriate test is the *Rettinger* test. He submits also that the Framework Decision contained no express provision for refusing surrender on rights-based grounds but that Ireland had included s. 37 so as to ensure in an appropriate case this Court could refuse surrender.

113. The minister relies upon ECtHR case-law to support the contention that "separation of powers" matters are not relevant to fair trial rights. The sole issue in an Article 6 case was whether *in any given case* the procedures had been Article 6 compliant. The minister submits that many of the issues raised were "separation of powers" matters e.g. the Act on the National Council of the Judiciary. Counsel submits that the Supreme Court amendments had no impact on the Ordinary Courts. While it was accepted that the merger of the Public

Prosecutor General with the Minister of Justice would affect the proceedings, counsel submits that the Venice Commission imply that the Minister of Justice has not abused his powers as Prosecutor General. Similarly, it is accepted that the Act on the Organisation of Ordinary Courts may be relevant to the respondent's trial, but that the changes are primarily limited to the role of the Minister *vis-a-vis* Courts' Presidents. There was no direct disciplinary role on judges. Counsel further submits that the issue of gender discrimination is not relevant.

114. Counsel relies upon this Court's findings in the case of *Minister for Justice v Bukoshi* [2016] IEHC 296, to the effect that, while issues of systemic corruption or systemic injustice in the criminal justice system of a requesting state are matters a requested person is entitled to raise, there remained a heavy onus on him to discharge the obligation that his Article 6 rights will be flagrantly denied. The minister contrasted the facts of the *Bukoshi* case with that of *Attorney General v NSS* [2015] IEHC 349, which concerned an extradition to Russia, where the evidence as to systemic injustice was "all one way."

Analysis and Determination by the Court

(a) Article 7 TEU

115. It is important to distinguish between the Article 7 process and the evidence before the Court in the form of the Reasoned Proposal of the European Commission. The Court agrees with the submissions that the process set out in Article 7 is ultimately political and not legal. The final determination is made at head of state/head of government level by the European Council and not by a judicial body. That is not in any way to diminish the importance of the Article 7 process, but merely to emphasise that it will not be a judicial determination.

116. On the other hand, the Reasoned Proposal, as a document of the European Commission, which lays out the evidence of the Polish legislative changes and gives opinions

as to the effects of those changes, carries great evidential weight. So too do the Opinions of the Venice Commission; it is a body of considerable stature. The nature of the information and the strength of the concerns expressed by these august bodies, about the rule of law and democracy in Poland, demands a careful consideration of whether there is a real risk to the respondent's fundamental rights should he be surrendered there.

117. The minister submits that this case should be determined on the basis of s. 37 of the Act of 2003, which protects fundamental rights, and not on the basis of awaiting the outcome of the Article 7 TEU proceedings. In the minister's submission, Poland is a designated state in accordance with the Act of 2003 and there is an obligation to surrender unless there is a valid objection. The Court notes that the High Court would be obliged to consider whether the evidence before it disclosed a real risk of a breach of fundamental rights, even if the European Council did not conclude, in accordance with Article 7(2) TEU, that there was a serious and persistent breach by Poland of the common values of Member States of the European Union.

118. The respondent submits that the request to adjourn based upon Article 7 was made "at least in so far as it provides an alternative means of securing …information" that the court might require. An adjournment pending the Article 7 procedure was not therefore being urged on the Court by the respondent as a logically coherent end in itself but as an adjunct to its decision making.

119. In light of the fact that the Article 7 procedure is primarily a political rather than a judicial process, and the fact that this Court has a power and indeed a duty to ensure that the respondent's fundamental rights are not at risk on surrender, it is not appropriate to adjourn this case pending the outcome of the Article 7 process. The Court will determine the issues based upon the evidence before it and in accordance with its duties and responsibilities under the Act of 2003 and the 2002 Framework Decision.

(b) Section 37 of the Act of 2003

120. The duty and responsibility on this Court, pursuant to s. 37 of the Act of 2003, is to refuse the surrender of the respondent, if surrender would be incompatible with the State's obligations under the ECHR and its protocols, or contravene any provision of the Constitution. Furthermore, the duty and obligation under the 2002 Framework Decision, to secure fundamental rights when determining surrender cases, was recognised by the CJEU in *Aranyosi and Caldararu,* although, it should be noted, that case concerned the absolute right of freedom from torture and inhuman and degrading treatment.

121. As set out earlier in this judgment, the test for determining, in a s.37 context, whether the respondent is at real risk of being surrendered to face an unfair trial, is whether there would be a flagrant denial of his fair trial rights or, in the words of the Supreme Court in *Brennan,* whether there are egregious circumstances "such as a clearly established and fundamental defect in the system of justice of a requesting state". For the Court to assess the impact on fair trial rights, it is necessary to reach conclusions on the evidence contained in the Reasoned Proposal and the Opinions of the Venice Commission.

(c) Conclusions on the evidence

122. The Reasoned Proposal and the Opinions of the Venice Commission set out in considerable detail the legislative changes in Poland and the impact of those changes on the rule of law. It should also be emphasised that the veracity of the contents of those documents as to the legislative changes is not in question in these proceedings; the sole issue has been the effect those changes have on the proposed surrender of this respondent. In the view of the Court, the Reasoned Proposal and the Venice Commission Opinions amount to specific, updated, objective and reliable information as to the situation regarding the threat to the rule of law in Poland.

123. The Reasoned Proposal of the European Commission is, by any measure, a shocking indictment of the status of the rule of law in a European country in the second decade of the 21st Century. It sets out in stark terms what appears to be the deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law. Even "the constitutionality of Polish laws can no longer be effectively guaranteed" because the independence and legitimacy of the Constitutional Tribunal are seriously undermined (para 180(1) of the Reasoned Proposal).

124. This Court concludes, based upon the information before it, that the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years. This Court acknowledges that certain changes, when viewed in isolation, may not self-evidently appear to violate the rule of law. Indeed, certain Polish legislative changes might lead to a result not too far different from the position in this jurisdiction. For example, in this jurisdiction, judges do not have the determinative voice in judicial appointments (although through the Judicial Appointments Advisory Board the judiciary plays a role); judicial appointments are the prerogative of government under our legislation. The involvement of judges in the appointment of judges is an important European Standard acknowledged at both EU and Council of Europe level. The Council of Europe's Committee of Ministers in its Recommendation to Member States of the Council of Europe on "Judges: independence, efficiency and responsibilities" has stated that the body selecting judges should be independent of the executive and legislative powers and at least half the members of the body should be judges chosen by their peers. The Committee of Ministers went on to say:

> "However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent

> authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice" (CM/Rec(2010)12).

In line with these European standards, the Venice Commission has also stated that a judicial council should have a decisive influence on the appointment and promotion of judge.

125. The fact that a particular change might be acceptable in Ireland is not conclusive or even necessarily relevant to whether the rule of law has been damaged in Poland because:

> a) the constitutionality of those changes within Poland cannot be guaranteed because the composition and independence of the Constitutional Tribunal has been compromised and;
>
> b) they come within a concerted legislative package to politicise the judiciary and to take away its independence;
>
> c) European standards should be adhered to.

126. As the European Commission has correctly observed "where a constitutional justice system has been established, its effectiveness is a key component of the rule of law." A violation of the constitutional order in Poland is a violation of the rule of law in Poland.

127. The totality of changes in Poland, especially as regards the constitutional role in safeguarding independence of the judiciary by the National Council for the Judiciary, combined with the Polish government persisting with invalid appointments to the Constitutional Tribunal and refusing to publish certain judgments, also amounts to an undermining of the rule of law. It is a basic principle underpinning democracy that the state will function in accordance with law.

128. If the respondent is surrendered, he will be returning to face trial in a jurisdiction where the Minister of Justice is now the Public Prosecutor and is entitled to play an active

role in prosecutions. The same Minister of Justice has a disciplinary role over the Presidents of Courts. This has the potential for a chilling effect on those Presidents, with consequential impact on the administration of justice. As the Venice Commission notes at para 103 of Opinion No. 904/2017: "the president of the courts in the Polish system have vast powers *vis-a-vis* the ordinary judges and play important role in the case-management process …, which makes the strong dependence on the presidents before the MoJ even more problematic."

129. Counsel for the minister quite understandably has not sought to undermine the contents of the Reasoned Proposal, instead he submits that no specific threat of fair trial to this individual has been identified. In so doing, the minister highlighted some aspects that would not affect the fairness of any trial e.g. the discrimination in retirement ages for judges. In my view, while the fact that female judges are discriminated against may not necessarily affect any individual trial, by legislating for gender discrimination amongst the judiciary, despite the clear reference to equality between men and women in Article 2 and Article 3 TEU, Poland shows a significant disregard for what is recognised in the TEU as an important common value of the EU and its Member States. That disregard simply emphasises that Poland appears no longer to accept that there are common European values which must be respected.

130. The minister submits that other parts of the legislative changes do not affect trial rights. The minister suggests that the reforms to the Supreme Court have no apparent impact on the organisation and procedures before the Ordinary Courts in Poland and are similarly not relevant to the current matter. That contention does not bear scrutiny in circumstances where the Supreme Court plays a role in criminal cases as indicated by the Extraordinary Appeal process; that process also applies to criminal matters although with a different limitation period. The Supreme Court also has a role to play in giving opinions on draft laws and thereby plays a significant role in the overall protection of the rule of law.

131. The Supreme Court has been affected by compulsory retirement and future appointments, and by the newly composed National Council for the Judiciary, which will be largely dominated by political appointees. It is important to point out that early compulsory retirement is not an issue of concern simply because of its impact on individual judges. As the Venice Commission noted it may also "undermine the operational capacity of the courts and affect continuity and legal scrutiny and might also open the way for undue influence on the composition of the judiciary." Security of tenure for judges is an aspect of independence of the judiciary, which is of course a key component of the rule of law.

132. The integrity and effectiveness of the Constitutional Tribunal has been greatly interfered with as set out above. There is no guarantee that laws in Poland will comply with the Polish Constitution. That fact alone must have an effect throughout the criminal justice system. The changes to the system are so immense that I am also satisfied that cherry-picking individual changes in the legislation is neither necessary nor helpful because it is the impact of the cumulative changes on the rule of law that is particularly concerning.

133. The minister has also submitted that the Venice Commission shows no support for the view that the Minister of Justice in Poland has abused his powers as Prosecutor General. The quote from the Venice Commission relied upon by the minister is as follows:

> "97. Even if the current Public Prosecutor General (Minister of Justice) may not have misused his competencies, since the entry into force of the 2016 Act, a system with such wide and unchecked powers is unacceptable in a state governed by the rule of law as it could open the door to arbitrariness."

In my view, that finding of the Venice Commission demonstrates that there is a risk to this respondent being subjected to arbitrariness in the course of his trial, precisely because the system's wide and unchecked powers is inconsistent with a democratic state subject to the rule of law.

134. This Court accepts the repeated statements in the Reasoned Proposal and the Opinions of the Venice Commission about the effect these changes will have on the rule of law and agrees with the conclusions reached by those bodies. The rule of law is a fundamental value listed in Article 2 of the Treaty on European Union.

135. The recent changes in Poland have been so damaging to the rule of law that this Court must conclude that the common value of the rule of law in Poland has been breached. Indeed both the common values of the rule of law and democracy in Poland have been breached by these changes. As is apparent from the foregoing, the common values, set out in the TEU, are no longer accepted by Poland.

136. Respect for the rule of law is also essential for mutual trust in the operation of the European arrest warrant.

(d) The effect of the breach of common values

137. What then is the effect of those breaches of the common value of the rule of law for this respondent who faces surrender to Poland for trial? Does a failure to abide by the rule of law amount to a flagrant denial of justice? Does it amount to egregious circumstances which amount to a clearly established and fundamental defect in the system of justice in Poland?

138. The minister has relied upon ECtHR case-law regarding the sole issue for determination as to whether the procedures *in any given case* are Article 6 reliant. In the cases, cited in this judgment, before the ECtHR, that court was dealing with a trial that had actually taken place. It was in those circumstances that compliance with "theoretical constitutional concepts" (as per *Urban v Poland* App no23614/08 (ECHR, 30 November 2010)) was not the relevant issue before the Court. In the present case, the threats to constitutional concepts such as rule of law are not theoretical but very real and quite systemic. The question is whether the breaches of the common value of the rule of law are so

egregious that they amount to a fundamental flaw in the system of justice in Poland, and thereby place this respondent at real risk of an unfair trial.

139. The minister has contrasted the High Court decisions in *Minister for Justice and Equality v NSS* and *Minister for Justice and Equality v Bukoshi*. In *Bukosh*i, the High Court gave consent to the UK to surrender that respondent to Albania, as the Court accepted that there was no evidence that the level of corruption in the Albanian judicial system was at a systemic level such that extradition could not take place. The evidence in *Bukoshi* was that trial guarantees are generally respected in Albania. There was no evidence that all Albanian judges were corrupt but that sometimes corruption can be a problem. In *NSS*, the High Court refused surrender where the weakness and deficiencies identified included concerns about the independence of the judiciary, biases and unfairness in the system, disproportionately high conviction rates, and scant regard for the presumption of innocence.

140. The reality in the present case is that the factual situation is far closer to the situation that pertained in the *NSS* case than to the situation in *Bukoshi*. While individual statistics may not be available as they were with respect to Russia, and the Polish legislation does not deal with the presumption of innocence directly, the situation in Poland points towards systemic breaches of the rule of law. There has been an interference with the independence of the judiciary, with respect for the rule of law, and a merger of the Minister of Justice and the Public Prosecutor which risks arbitrariness in the system. In my view, where fundamental values such as independence of the judiciary and respect for the Constitution are no longer respected, those systemic breaches of the rule of law are by their nature fundamental defects in the system of justice in Poland.

141. The test posited in *Aranyosi and Calararu* is premised upon the principles of mutual trust, mutual recognition, and the confidence that Member States repose in each other, being states with common values of "respect for human dignity, freedom, democracy, equality, the

rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (Article 2 TEU). Where there is such a fundamental defect in a system of justice that the rule of law in the Member State has been threatened, it is difficult to see how the principles of mutual trust and mutual recognition may operate. Furthermore, where these are such egregious defects in the system of justice, it appears unrealistic to require a requested person to go further and demonstrate how, in his individual case, these defects will affect his trial.

142. The judgment of the CJEU in *Aranyosi and Caldararu*, proposes a two-step approach in determining whether fundamental rights have been breached. An initial finding of general or systemic deficiencies in the protections in the issuing state must be made, and the executing judicial authority must then seek all necessary supplementary information from the issuing state as to the protections for the individual concerned. These tests have been predicated on mutual trust and mutual recognition. A problem with adopting that approach in the present case is that the deficiencies identified are to the edifices of a democracy governed by the rule of law. In those circumstances, it is difficult to see how individual guarantees can be given by the issuing judicial authority as to fair trial when it is the system of justice itself that is no longer operating under the rule of law.

(e) ***Conclusion***

143. I am satisfied that the conclusions I have reached on the effect of the legislative changes in Poland, and the impact on fair trial rights, raise issues with respect to the interpretation of the 2002 Framework Decision in the context of a finding by an executing judicial authority that a member state has breached the common values of rule of law and democracy as set out in Article 2 of the Treaty on European Union.

144. Article 267 of the Treaty on the Functioning of the European Union (TFEU) provides:

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

145. In my view, it is necessary for this Court, before a final determination can be made in these proceedings, to request a ruling from the CJEU on the following matters:

a. Is the *Aranyosi and Caldararu* test, which relies upon principles of mutual trust and mutual recognition, the correct test to apply where the High Court, as an executing judicial authority under the Framework Decision, has found that the common value of the rule of law set out in Article 2 TEU has been breached in Poland?

b. If the test to be applied is whether the requested person is at real risk of a flagrant denial of justice, does the High Court, as an executing judicial authority, have to revert to the issuing judicial authority for any further necessary information about the trial that this requested person will face, where the High Court has found that there is a systemic breach to the rule of law in Poland?

146. The Court invites the parties to make submissions on the final version of the questions that should be referred to the CJEU in accordance with the Article 267 TFEU procedure. The Court emphasises that this respondent is in custody and all matters should be finalised without any delay so that the CJEU can be invited to give a ruling using the urgent preliminary ruling procedure as soon as possible.