



**According to Advocate General Tanchev, the execution of a European arrest warrant must be postponed where the competent judicial authority finds not only that there is a real risk of flagrant denial of justice on account of deficiencies in the system of justice of the issuing Member State but also that the person who is the subject of the warrant is exposed to such a risk**

*In order to determine whether the individual concerned is exposed to such a risk, the executing judicial authority must take account of the particular circumstances relating both to that person and to the offence in respect of which he is being prosecuted or has been convicted*

LM, a Polish national, is the subject of three European arrest warrants issued by Polish courts for the purpose of prosecuting him for illicit trafficking in narcotic drugs. After being arrested in Ireland on 5 May 2017 he did not consent to his surrender to the Polish authorities, on the ground that, on account of the reforms of the Polish system of justice, he runs a real risk of not receiving a fair trial in Poland.

The Court of Justice held in its judgment in *Aranyosi and Căldăraru*<sup>1</sup> that, where the executing judicial authority finds that there exists, for the individual who is the subject of a European arrest warrant, a real risk of inhuman or degrading treatment within the meaning of the Charter of Fundamental Rights of the European Union, the execution of that warrant must be postponed. However, such postponement is possible only after a two-stage examination. First, the executing judicial authority must find that there is a real risk of inhuman or degrading treatment in the issuing Member State on account, inter alia, of systemic deficiencies. Second, that authority must ascertain that there are substantial grounds for believing that *the individual concerned* by the European arrest warrant will be exposed to such a risk. The existence of systemic deficiencies does not necessarily imply that, *in a specific case*, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered.

The High Court (Ireland), which is dealing with the present case, has asked the Court of Justice whether, in order for the executing judicial authority to be required to postpone the execution of a European arrest warrant, it must, in accordance with the judgment in *Aranyosi and Căldăraru*, find, first, that there is a real risk of breach of the right to a fair trial on account of deficiencies in the Polish system of justice and, second, that the person concerned is exposed to such a risk, or whether it is sufficient for it to find that there are deficiencies in the Polish system of justice, without having to ascertain that the individual concerned is exposed to them. The High Court has also asked the Court of Justice what information and guarantees it must, as the case may be, obtain from the issuing judicial authority in order to discount that risk.

Those questions fall within the context of the development and reforms of the Polish system of justice which led the Commission to adopt, on 20 December 2017, a reasoned proposal inviting the Council to determine, on the basis of Article 7(1) TEU, that there is a clear risk of a serious breach by Poland of the rule of law.<sup>2</sup>

<sup>1</sup> Joined Cases [C-404/15 PPU](#) and [C-659/15 PPU](#), see Press Release No. [36/16](#).

<sup>2</sup> 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 of 20 December 2017, COM(2017) 835 final.

In today's Opinion, Advocate General Evgeni Tanchev observes first of all that it is for the executing judicial authority to rule on whether there is a real risk of breach of the right to a fair trial on account of deficiencies in the Polish system of justice. He explains in this regard that it does not matter that the Council has not, to date, adopted the decision which the Commission's reasoned proposal invited it to. The assessment which will, as the case may be, be carried out by the Council under Article 7(1) TEU does not have the same object as the assessment carried out by the executing judicial authority. The former relates to a risk of breach of the rule of law and the latter to a risk of breach of the right to a fair trial. The risk of breach of the right to a fair trial may be established although the risk of breach of the rule of law is not. Furthermore, determination by the Council that there is a clear risk of a serious breach of the rule of law could result in the matter coming before the European Council and, ultimately, in suspension of the Framework Decision on the European arrest warrant<sup>3</sup> in respect of Poland, which is certainly not the case where the executing judicial authority finds that there is a real risk of breach of the right to a fair trial.

The Advocate General then states that a real risk of breach not of the prohibition of inhuman or degrading treatment which was at issue in the judgment in *Aranyosi and Căldăraru* but of the right to a fair trial is capable of giving rise to an obligation to postpone the execution of a European arrest warrant. The mutual recognition of European arrest warrants presupposes that the prosecutions for the purpose of which they have been issued will be conducted in the issuing Member State before an independent and impartial judicial authority. Consequently, if there is a real risk of the procedure conducted in the issuing Member State not satisfying that requirement, the premiss forming the basis of the obligation to execute any European arrest warrant is absent.

The Advocate General considers, however, that, in order for the execution of a European arrest warrant to have to be postponed, there must be a real risk not of breach of the right to a fair trial but of a flagrant denial of justice. Limitations on the principle of mutual trust must be interpreted strictly. Furthermore, the right to a fair trial may be subject to limitations, provided that, *inter alia*, they respect the essence of that right. Accordingly, the executing judicial authority is required to postpone the execution of a European arrest warrant only if there is a real risk of breach of the *essence* of the right to a fair trial.

According to the Advocate General, it cannot be ruled out that lack of independence of the courts of the issuing Member State may, *in principle*, amount to a flagrant denial of justice. However, in order for that to be the case, the lack of independence must be so serious that it destroys the fairness of the trial. It is for the Irish court to determine, on the basis of those considerations, whether, *in the case in point*, the alleged lack of independence of the Polish courts is so serious that it destroys the fairness of the trial and accordingly amounts to a flagrant denial of justice. The Irish court must, to that end, rely on information which is objective, reliable, specific and properly updated and demonstrates that the deficiencies affecting the Polish system of justice exist. In that regard, the Commission's reasoned proposal can be taken into account, provided that the Irish court informs itself of any changes in the situation in Poland subsequent to that document.

The Advocate General states next that the executing judicial authority is required to postpone the execution of a European arrest warrant only where it finds not only that there is a real risk of flagrant denial of justice on account of deficiencies affecting the system of justice of the issuing Member State but also that the *individual concerned* by the warrant will be exposed to such a risk. Even assuming that there is, in Poland, a real risk of flagrant denial of justice on account of the recent reforms of the system of justice, this cannot be taken to mean that *no* Polish court is capable of hearing *any case whatever* in compliance with the right to a fair trial. Accordingly, in order to show that the individual concerned is exposed to the risk of flagrant denial of justice that is at issue, it is necessary to establish that there are particular circumstances relating either to that person or to the offence in respect of which he is being prosecuted or has been convicted which expose him to such a risk. It is for the individual concerned to establish that there are substantial grounds for believing that he runs a real risk of suffering a flagrant denial of justice in the issuing

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<sup>3</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ 2002 L 190, p. 1).

Member State. The national court has the task of determining whether, in the case in point, LM has demonstrated in what way the deficiencies in the Polish system of justice, assuming that they are proven, would prevent *his case* from being heard by an independent and impartial tribunal.

Finally, the Advocate General explains that, where the executing judicial authority finds that there is a real risk of flagrant denial of justice in the issuing Member State, it is required to request from the issuing judicial authority all the necessary supplementary information concerning, first, legislative changes subsequent to the details which it possesses for finding that there is such a risk and, second, the particular features relating to the person who is the subject of the European arrest warrant or to the nature of the offence in respect of which he is being prosecuted or has been convicted.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

*Press contact: Holly Gallagher ☎ (+352) 4303 3355*

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