SUPREME COURT

S:AP:IE:2021:000018 and S:AP:IE:2021:000020

IN THE MATTER OF ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION AND IN THE MATTER OF A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

THE PRESIDENT OF THE COURT OF APPEAL

MS JUSTICE DUNNE

MR JUSTICE CHARLETON

MS JUSTICE O'MALLEY

MS JUSTICE BAKER

High Court 2015 No. 145 EXT, 2015 No. 159 EXT, 2015 No. 160 EXT, 2017 No. 50 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003 (AS AMENDED)

AND IN THE MATTER OF W O (DOB: 23rd day of September 1983)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

W O

RESPONDENT

AND

High Court 2019 No. 349 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT

ACT 2003 (AS AMENDED)

AND IN THE MATTER OF J L (DOB: 27th October 1993)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

J L

RESPONDENT

ORDER DATED THE 30th DAY OF JULY 2021
FOR REFERENCE TO THE
COURT OF JUSTICE OF THE EUROPEAN UNION PURSUANT TO
ARTICLE 267 OF THE TREATY

The Notice of Appeal by the Respondent WO filed on the 5th day of March 2021 by way of appeal from the Judgment of the High Court (Mr Justice Binchy) given on the 4th day of February 2021 and the Order made on the 17th day of February 2021 that the Respondent WO be surrendered to the Republic of Poland and for an Order setting aside the said Judgment and Order on the grounds and as set forth in the said Notice of Appeal having come on for hearing before this Court on the 30th day of June 2021 together with the Notice of Appeal by the Respondent JL filed on the 19th day of April 2021 by way of appeal from the Judgment of the High Court (Mr Justice Binchy) given on the 4th day of February 2021 and the Order made on the 17th day of

February 2021 that the Respondent JL be surrendered to the Republic of Poland and for an Order setting aside the said Judgment and Order on the grounds and as set forth in the said Notice of Appeal

Whereupon and having read the Determinations of this Court the 9th day of March 2021 and the 6th day of May 2021 granting leave to appeal herein the said Notices of Appeal the said Orders the documents therein referred to the judgments of the High Court and the written submissions filed on behalf of the respective parties and having heard Counsel for the Respondent WO and Counsel for the Respondent JL and Counsel for the Applicant

IT WAS ORDERED that the case should stand for judgment

And the matter having been listed for judgment on the on the 23rd day of July 2021 and judgment having been delivered on that date in the presence of Counsel for the respective parties and the parties having been given an opportunity to make observations on a draft Order of Reference

And It Appearing that the facts and proceedings are as set forth and included in the Order for Reference annexed hereto

And it further appearing to this Court that the determination of the issues between the parties on this application raise questions concerning the correct interpretation of certain provisions of European Union Law namely questions arising in respect of the Council Framework Decision 2002/584/JHA as amended by Council Framework Decision 2009/299/JHA and the appropriate test to be applied when an objection is raised pursuant to s. 37 of the European Arrest Warrant Act 2003 that ordering the surrender of a respondent who is the subject of an EAW would potentially lead to a violation of their rights under the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union

THE COURT HAS DECIDED TO REFER to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union as set out in the said Order for Reference the questions:

(1) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where there is a real risk that the appellants will stand trial before courts which are not established by law?

(2) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where a person seeking to challenge a request under an EAW cannot meet that test by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which they will be tried by reason of the manner in which cases are randomly allocated?

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

AND IT IS ORDERED that the Respondents remain on continuing bail there being liberty to apply in the High Court in this regard and that the further hearing of these Appeals do stand adjourned until after the said Court of Justice shall have given its preliminary ruling on the said questions or until further Order in the meantime

And the Court noting that application having been made at the outset the Court doth in the circumstances of this case recommend the payment by the State of the costs of the Respondents including Solicitor and Senior and Junior Counsel in accordance with the Legal Aid - Custody Issues Scheme.

JOHN MAHON

REGISTRAR

GEORGE BIRMINGHAM

PRESIDENT OF THE COURT OF APPEAL

Perfected this 30th day of July, 2021

AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000018

Birmingham P.

Dunne J.

Charleton J.

O'Malley J.

Baker J.

Between/

W O

Appellant

AND

MINISTER FOR JUSTICE AND EQUALITY

Respondent

S:AP:IE:2021:000020

Between/

J L

Appellant

AND

MINISTER FOR JUSTICE AND EQUALITY

Order of Reference of the Court of the 30th July 2021

Introduction

1. The Supreme Court has decided to refer to the Court of Justice, pursuant to Article 267 of the Treaty on the Functioning of the European Union, questions arising in respect of the Council Framework Decision 2002/584/JHA as amended by Council Framework Decision 2009/299/JHA and the appropriate test to be applied when an objection is raised pursuant to s. 37 of the European Arrest Warrant Act 2003 that ordering the surrender of a respondent who is the subject of an EAW would potentially lead to a violation of their rights under the European Convention on Human Rights ("ECHR") or the Charter of Fundamental Rights of the European Union ("the Charter"). In *Celmer*, following a reference to the Court of Justice, it was decided that Member State courts were required to undertake a two-step analysis when a respondent seeks to resist surrender on the suggestion that there is a risk of violation of their rights pursuant to EU law: firstly, the court should identify whether generalised and systemic deficiencies exist in the requesting Member State that give rise to a breach of rights under the ECHR or the Charter, and secondly, the Court must identify a real risk on substantial grounds that the essence of the fundamental right will be breached. (see *Minister for Justice and Equality (Deficiencies in the system of justice)* Case C-216/18 PPU, ECLI:EU:C:2018:586, **"LM"** herein, as *Celmer* was identified in the CJEU). This test was more recently affirmed by the CJEU in Joined Cases C-354/20 PPU and C-412/20 PPU, *L&P*, ECLI:EU:C:2020:1033, **"L and P"** herein).**The Facts**

2. Mr. O and Mr. L are the subject of a number of EAWs which seek their extradition to the Republic of Poland ("Poland"). The first-named appellant is the subject of four EAWs, two of which were issued by the regional court of Lublin, and the remaining two issued by the District Court in Zdzislaw Lukasiewicz and Zamość respectively. Three of these EAWs seek his surrender to face trial for a number of specific offences and one seeks his surrender so that he can be imprisoned for convictions already handed down by the Polish courts. The second-named appellant is the subject of an EAW issued by the regional court of Rzeszów, and it relates to five offences.

The Proceedings in Ireland

3. The ordinary procedures for the execution of the warrants against Mr. O and Mr. L were followed with the applicant/respondent (the Minister) applying for enforcement of the warrants. The cases were considered together in the High Court. The EAWs were challenged on a number of grounds in both cases, and while separate judgments were given for each of them, the judgments concern the same core issue, and were decided in the same way. The judgments of the High Court in each case found in favour of the Minister and ordered the surrender of Mr. O and Mr. L (See *Minister for Justice & Equality v. O,* [2021] IEHC 109, and *Minister for Justice & Equality v. L* [2021] IEHC 108). The appellants applied for and were granted leave to appeal to this Court by determinations dated the 9th of March 2021 (*O v. Minister for Justice and Equality* [2021] IESCDET 28) and the 6th of May 2021 (*L v. Minister for Justice and Equality* [2021] IESCDET 48) respectively.

4. The core contention of the appellants is that, since the decision of *Celmer*, the situation in Poland has changed. The Act on the System of Common Courts ("the New Laws") was passed on the 20th December 2019 and adopted by the Polish legislature on the 23rd January 2020, and came into force in Poland on the 24th February 2020, which the appellants say raises the possibility that the courts in Poland which would consider their cases may not be constituted in accordance with law in the manner recently referred to by the Court of Justice in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* Case C-824/18 ECLI:EU:C:2021:153. Moreover, the appellants say that no mechanism exists in Poland to challenge this illegality. The respondent argues that the appellants are effectively asking the Court to dispense of the second stage of the *LM* test. The respondent says that there is no authority, domestic or international, to suggest that a party can complain only of a theoretical breach of their rights. A party must demonstrate some nexus between the breach complained of and their individual case, and without such evidence, the appellants must fail.

The Position of the parties

5. In the course of arguments before the Supreme Court, the appellants' central argument was that the decision in *LM,* which set out a two-step approach as to whether a rule of law objection to surrender should succeed, does not apply to the facts of this case, on the basis that it was concerned only with questions of the independence of the judiciary, which they said is a distinct consideration from whether a court is one that is established by law. They made the point that if the court in Poland is not established in accordance with law, then, the requested person will have no effective remedy. In this case, the concern relates not to independence but

the legality of the court. Therefore, they said that it is only if the court is established in accordance with law that the question of independence of the court arises. The appellants said that there is a real risk that any court before which they will appear will not be established by law by virtue of the New Laws and other changes brought in since 2015, contrary to the requirements under Article 47 of the Charter and Arts. 6 and 13 of the ECHR. In those circumstances, they will have no effective remedy as required by the ECHR and the Charter. The appellants said that the decision in *LM* concerned questions pertaining to independence, whereas in this case, there is an identifiable, fundamental right i.e. the right to an effective remedy, which has been removed from the appellants as a result of recent legislative changes in Poland. The appellants argue that this distinction is significant, as the right to an effective remedy is less subjective than the question of independence and therefore less referable to factors personal to the requested person.

6. The respondent argued that the appellants seek a radical departure from the settled principle that a party must show that their specific and precise circumstances create a real risk of a breach of a Convention and/or Charter right. She said that the appellants proffer no reason as to why the right to an effective remedy should be treated any differently than any other Convention right, and that the jurisprudence of the Court of Justice and the ECtHR has consistently adopted the approach that there must be a real risk of a breach of a right to the requested person in relation to the right not to be subject to degrading and/or inhuman treatment (*Aranyosi and Căldăraru* Joined Cases C-404/15 and C-659/15 PPU ECLI:EU:C:2016:198, *Saadi v. Italy* Application No. 37201/06 [2009] 49 E.H.R.R. 30), or there must be a real risk of a breach of the essence of a right to a fair trial (*LM*; *L and P*). The respondent submitted that there is no basis for the suggestion that the same test should not apply in respect of the right to an effective remedy. She relied on *Minister for Justice v. Brennan* [2007] 3 I.R. 732 in stating that the principle that a party must show a nexus between the breach of the right and their own specific circumstances is also a principle of domestic law. The matter complained of must impact on the person whose surrender is sought. It was further noted that to require a party to show individualised risk where they claim a potential breach to their right to be free from degrading and inhuman treatment but not require the same individualised risk where there is a potential breach of the right to an effective remedy would be anomalous.

7. The respondent said there are other reasons for maintaining the *LM* approach: firstly, the Framework Decision 2002/584 states that a warrant *shall* be executed unless one of the stated reasons for refusing surrender is proven to arise. The respondent further argued that, if

it were sufficient for a requested party to alone show that generalised and systemic deficiencies exist in the requesting Member State, then all EAWs issued by that Member State could be subject to objection and it would render the Framework Decision in respect of that Member State meaningless. The respondent submits that such a conclusion would be problematic. Firstly, it was pointed out that under Article 7 of the TEU, where the European Council believe there has been a serious and persistent breach in the issuing Member State of Article 2 principles, Framework Decision 2002/584 can be suspended in respect of that Member State, and refusal to execute any warrants pursuant to the Framework Decision can be made without specific assessment (See *LM* at paras. 72 and 73). Secondly, the respondent argued that to allow refusal on general deficiencies would grant effectual impunity to persons attempting to flee conviction or sentence from the requesting Member State, as they could successfully challenge an EAW without any evidence relating to their specific circumstances. The respondent said that this is a position which would contradict the purpose underlying the Framework Decision, which is to combat impunity of a requested person who is present in a territory other than that in which they have committed the offence (See *L and P* at paras. 59 and 60). The respondent has emphasised that the CJEU has made it clear that the test to be applied when a ground for refusal to surrender is raised to the effect that there is a real risk of breach of the fundamental right concerned, on account of systemic or generalised deficiencies in the issuing Member State, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds for believing that the requested person themselves will run such a risk if surrendered to that State. (See *Aranyosi* and *LM*). Accordingly, it is contended that dispensing with the second stage of the test would undermine the very objective of the EAW system.

8. The appellants said that the principle of "effective judicial protection" at issue in Article 19(1) TEU has a relationship with Arts. 6 and 13 ECHR and Art. 47 of the Charter so that while the organisation of justice is a matter in which Member States have competence, Member States must comply with EU law, including Article 19(1) TEU. The appellants cited *European Commission v. Poland (Independence of the ordinary courts)* Case C-192/18 ECLI:EU: C:2019:924 as authority for this proposition. The appellants also argued that the CJEU have recognised that Art. 47 includes the right to invoke a breach of the right to a fair trial and that courts must be able to scrutinise irregularities in the appointment of judges, and to this end they rely on *HG & Simpson* Joined Cases C-542/18 RX-II and C-543/18 RX-II ECLI:EU:C:2020:232. The appellants said that the decision in *Simpson* provides a mandate for

domestic Member State courts to review any irregularity in relation to the appointment of judges in order to satisfy compliance with Art. 47. The appellants further relied on *Ástráðsson v. Iceland* in maintaining that, even when a review mechanism is provided, the quality of the review is of importance. In that case, the ECtHR found that the review of the irregularities in appointment was deficient in that it failed to consider the question of whether the court was *established by law*. The respondent argued that the right to an effective remedy can arise only where there is first established some other right or entitlement which the claimant alleges has been breached or is likely to be breached having regard to the specifics of this case and which therefore requires a remedy. The ECtHR has confirmed on a number of occasions that the right to an effective remedy has no independent existence. It merely complements the other effective clauses of the Convention and its protocols. Similarly, the CJEU has held in relation to the right to an effective remedy set out in the first paragraph of Article 47 that *"... the recognition of that right, in a given case, presupposes, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law."* (*A.B. and Others* Case C-824/18 at para. 88). The respondent argued that there is no basis in principle, and none in domestic case law or that of the CJEU the ECtHR, to suggest that the right to an effective remedy has some elevated status such that generalised deficiencies in the remedies available in a requesting State would result automatically in a refusal to surrender.

9. The appellants said that the establishment of a court or tribunal in accordance with law is an uncontroversial component of the rule of law and has been recognised as such by the Strasbourg Court and the Court of Justice. They submitted that the case law demonstrates that the rule of law entails, *inter alia*, the process of appointing judges in a proper manner. They relied on *Ástráðsson v. Iceland* and *L and P* in arguing that a consideration of whether a court is one "established by law" is a distinct question from whether the court is impartial or independent in its exercise following that establishment, and therefore, different considerations apply to it.

10. Fundamentally, the appellants submitted that a consideration of whether a court is established in accordance with law precedes any consideration of independence; in other words, the first step is the question of whether the court concerned is one established by law. Essentially it is contended that the question of whether the court before which the appellants will stand trial is established by law is a separate complaint to that determined by the CJEU in *LM* and confirmed recently in *L and P*. If it does not meet the criteria of Article 6 ECHR and

Article 47 of the Charter, the examination of the Court comes to an end as there is nothing further to examine. In other words, if the court is not established by law then the question of independence or impartiality does not arise. In those circumstances it is contended that the High Court does not have to consider the personal situation, the nature of the offence in question and the factual context in which the relevant warrant was issued as such matters are external to the primary question of establishment.

11. The respondent said that the distinction between independence and establishment is artificial where both the right to be heard in front of a tribunal established by law, and the right to be heard by an independent and impartial court, are different aspects of the same right pursuant to Article 47 of the Charter, and that to apply two different tests to two parts of the same right would be contrived. It is said that this distinction has never been noticed by any court in the past. The right to an independent tribunal and one established by law are part of the same fundamental right. That this is so has been recognised in the past. (*HG & Simpson).* Further, it was observed that the CJEU has explained that the objective of the requirement that tribunals be established by law *"is to guarantee the independence of judicial power with respect of the executive"* (*FV v. Council of the European Union*, Case T-639/16P). The respondent argued that the discussion of the distinction between independence and establishment in *Ástráðsson* needs to be contextualised. While the Court made a distinction between impartiality and independence in that case, bearing in mind that it was common case that the appointment of a judge to the Icelandic court of appeal was irregular under domestic law, the ECtHR went on to examine whether the irregularity had any impact on the applicant. The respondent said that the applicant in that case could only complain about a breach of his rights under Article 6 because he could show that there was an irregularity in the appointment of one of the judges who dealt with his case. In other words, he could show that the irregularity affected his individual case. The respondent reiterated the point that the appellants have led no cogent evidence to suggest that any of the judges before whom they are likely to appear have been appointed other than in accordance with domestic Polish law. Accordingly, the respondent says that in order to succeed, the appellants must show that the establishment right is radically different to the right to be heard before an independent tribunal, or indeed any other right. There is nothing in the case law to ground such a proposition.

12. This Court, in the course of its consideration, has had regard to the evidence before the High Court from Ms. Dąbrowska, a Polish lawyer, who provided a number of reports on behalf

of the appellants. It is relevant to note that it is not possible at this stage to identify the composition of the courts before which the appellants will be tried by reason of a random case allocation system. Reliance was also placed on a number of documents put before the High Court, including an opinion on the New Laws delivered by the Polish Commissioner for Human Rights, Dr. Bodnar, reports from the Organisation for Security & Co-operation in Europe (the OSCE), and a report of the Venice Commission of the 30th December, 2019 together with the Resolution of the Supreme Court of Poland of the 23rd January 2020. This Court also had regard to the conflict highlighted by Ms. Dąbrowska between the Supreme Court of Poland and the Constitutional Tribunal of Poland on the new laws.

13. Further information was sought by the High Court judge from the issuing authority in respect of Mr. O which confirmed that pursuant to Article 26(3) of the new laws, a motion challenging the composition of a court will not be heard if it relates to establishing or assessment of the legality of the appointment of the judge or his legitimacy to perform tasks concerning the justice system.

Observations

14. This Court is acutely aware of the systemic deficiencies apparent in the rule of law previously identified in this jurisdiction in the *Celmer* case in its various iterations and in the jurisprudence of the CJEU in cases such as *LM* and more recently in *L and P,* which are now even more troubling and of deeper concern following the introduction of the New Laws. The Supreme Court of Poland in its Resolution of the 23rd January 2020 has said that a Court formation "is unduly appointed" where the court formation includes a person appointed to the office of a judge of a common court (and other courts) on application of the National Council for the Judiciary formed in accordance with the Act of 8th December 2017 and certain other Acts, if the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of the Constitution of Poland, Article 47 of the Charter and Article 6(1) of the ECHR (See Resolution No. 2). It is hard to imagine a more severe condemnation of the system of appointment of judges from a country's Supreme Court. It is the view of this Court that the position in Poland in respect of the rule of law is even more troubling and grave than it was when *LM* was decided by the Court of Justice. This Court previously observed (O'Donnell J.) in *Celmer v. Minister for Justice and Equality* [2019] IESC 80 at para. 85:

"I would tend to agree with the trial judge that the possibility that systemic deficiencies in a particular system could, by themselves, amount to a sufficient breach of the essence of the right to a fair trial, requiring an executing authority to refuse surrender, cannot and should not be ruled out in the abstract. That could occur, for example, where the deficiency identified at a systemic level is so far-reaching and pervasive as it would plainly and unavoidably take effect in the requesting court, and on any individual trial on a particular charge. However, I also agree with the trial judge that it is clear from the judgement of the C.J.E.U., that the systemic changes in Poland, while undoubtedly both serious and grave, cannot themselves be seen as sufficient to reach that point in this case."

15. It now appears that there are significant issues with regard to the validity of the appointment process for judges in Poland. It is impossible for the appellants in this case to identify the judges before whom they are to be tried because of the manner in which cases are randomly allocated. Even if they could identify the judges and establish that the judges were not validly appointed and thus not part of a court established by law, it is clear that there is no possibility of challenging the validity of the composition of the court allocated to try them by reason of the provisions of the New Laws and, in particular, Article 26(3) thereof. That being so, the question must arise as to whether the systemic deficiencies in the Polish system are such that they, by themselves, amount to a sufficient breach of the essence of the right to a fair trial, requiring the executing authority, in this case, Ireland, to refuse surrender. The answer to that question is not *acte clair*.

16. This Court is aware of a further decision of the Court of Justice in European *Commission v Republic of Poland*, Case C-2021:596 concerning the rule of law, the independence of the judiciary and the effect of disciplinary proceedings against judges. This decision was delivered after the hearing in this Court and whilst it was not part of the consideration of this Court, it has to be said that it adds to our concerns as to the rule of law in Poland and the consequences for individuals before those courts.

The Questions

17. In the circumstances, this Court proposes to request a ruling from the CJEU as follows:

(1) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where there is a real risk that the appellants will stand trial before courts which are not established by law?

(2) Is it appropriate to apply the test set out in *LM* and affirmed in *L and P* where a person seeking to challenge a request under an EAW cannot meet that test by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which they will be tried by reason of the manner in which cases are randomly allocated?

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

Request for the Reference to be dealt with by way of Expedited Procedure

18. The Supreme Court requests the CJEU to deal with the reference under Article 105 of its Rules of Procedure dealing with its expedited procedure. The Supreme Court considers that the appeals raise fundamental issues of national and EU law having regard to the matters set out above and thus comes within the expedited procedure and requires to be dealt with as a matter of urgency. In particular, the following matters are relied on:

a. The Appellants, although not in custody, are the subject of bail orders which amounts to a restriction of their liberty;

b. The answers to the questions posed will be decisive to the determination of whether or not the Appellants will be surrendered – in that regard it might be pointed out that the Irish Courts cannot make a final decision in relation to surrender until the reference is determined;

c. The answers to the questions posed may be decisive to the determination of whether or not others sought pursuant to EAWs by Poland will be surrendered;

d. In the event that other persons who are sought pursuant to EAWs by Poland are not surrendered to Poland pending the determination of the reference this may

amount to a de facto suspension of the operation of the Framework Decision as between Ireland and Poland during such period;

e. Given that EAWs from Poland represent slightly less that half of the number of EAWs executed annually by the State this would have significant implications for Ireland's operation of the Framework Decision;

In the circumstances, the Supreme Court considers that the criteria for an expedited procedure have been met.

George Birmingham
President of Court of Appeal
30th July 2021