

Case C-354/20 PPU**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

31 July 2020

Referring court:

Rechtbank Amsterdam (Netherlands)

Date of the decision to refer:

31 July 2020

European arrest warrant issued against:

L

Other parties to the proceedings:

Openbaar Ministerie

Subject of the action in the main proceedings

Application under Article 23(2) of the Overleveringswet (Law on the surrender of persons) concerning the treatment of a European arrest warrant (EAW) from a Polish court with a view to the arrest and surrender of L to the Republic of Poland.

Subject and legal basis of the request for a preliminary ruling

Referring, in particular, to the judgment of the Court of Justice of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018586 [the ‘*Minister for Justice and Equality (Deficiencies in the system of justice) judgment*’], the Rechtbank Amsterdam (District Court, Amsterdam) questions what influence recent developments relating to the rule of law in Poland should have on the decision on the execution of a European arrest warrant issued by a Polish court, in particular what concrete effect those developments would have on the Rechtbank’s obligation to apply the assessment framework set out in that judgment.

Questions referred

1. Do Framework Decision 2002/584/JHA, the second paragraph of Article 19(1) TEU and/or the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing an EAW issued by a court where the national legislation of the issuing Member State has been amended after that EAW was issued such that the court no longer meets the requirements of effective or actual judicial protection since that legislation no longer guarantees the independence of that court?

2. Do Framework Decision 2002/584/JHA and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing an EAW when it has established that there is a real risk in the issuing Member State of breach of the fundamental right to an independent tribunal for any suspected person — and thus also for the requested person — irrespective of which courts of that Member State have jurisdiction over the proceedings to which the requested person will be subject and irrespective of the requested person's personal situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the EAW, where that real risk is connected with the fact that the courts of the issuing Member State are no longer independent on account of systemic and generalised deficiencies?

3. Do Framework Decision 2002/584/JHA and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing an EAW when it has established that:

- there is a real risk in the issuing Member State of breach of the fundamental right to a fair trial for any suspected person, where that risk is connected with systemic and generalised deficiencies relating to the independence of that Member State's judiciary,
- those systemic and generalised deficiencies are therefore not only liable to have negative consequences, but actually do have such consequences for the courts of that Member State with jurisdiction over the proceedings to which the requested person will be subject, and
- there are therefore serious and factual grounds to believe that the requested person runs a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial,

even if, aside from those systemic and generalised deficiencies, the requested person has not expressed any specific concerns, and even if the requested person's personal situation, the nature of the offences for which he is being prosecuted and the context that forms the basis of the EAW, aside from those systemic and generalised deficiencies, do not give rise to fears that the executive and/or legislature will exert concrete pressure on or influence his trial?

Provisions of EU cited

Treaty on European Union: Article 19(1)

Charter of Fundamental Right of the European Union: Article 47, second paragraph

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Framework Decision 2009/299/JHA (OJ 2009 L 81, p. 24): Articles 1, 3 to 5 and 6

Provisions of national law cited

Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Overleveringswet) (Law of 29 April 2004 implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union (Law on the surrender of persons): Article 23

Brief summary of the facts and the procedure in the main proceedings

- 1 The Rechtbank Amsterdam must decide on the execution of an EAW relating to L, a national of the Republic of Poland. That EAW was issued on 31 August 2015 by a Polish court which is identified in the order for reference as the ‘Circuit Court in Poznań’, and seeks the arrest and surrender of L to Poland for the purpose of criminal prosecution.
- 2 On 7 February 2020, the officier van justitie (public prosecutor) filed a claim with the Rechtbank Amsterdam under Article 23 of the Overleveringswet, in which he claims, among other things, that the Rechtbank should treat the EAW.
- 3 In view of the Rechtbank’s doubts regarding the recent developments on the rule of law in Poland, in particular the concrete impact of those developments on the steps which, according to the *Minister for Justice and Equality* (Deficiencies in the system of justice) judgment, must be taken in such a case when deciding whether to execute a European arrest warrant, it invited the public prosecutor, on 12 June 2020 to address further questions to the issuing judicial authority.
- 4 Those questions were answered on 25 June and 7 July 2020, with the exception of the questions regarding the Sąd Najwyższy (Supreme Court, Poland). A question was subsequently addressed to the Sąd Najwyższy itself through Eurojust, but no answer has been forthcoming.

Main submissions of the parties to the main proceedings

- 5 According to L's statement of defence, the public prosecutor's application for treatment of the EAW should be dismissed as inadmissible. After all, it is clear that there is a risk that L will not receive a fair trial in Poland. On the basis of the *Minister for Justice and Equality* (Deficiencies in the system of justice) judgment, the Rechtbank is obliged in such a case to request all necessary information from the issuing judicial authority, but this has not yielded the desired result: of the ten substantive questions raised by the Rechtbank in its interim judgment of 12 June 2020, only two have been answered by the Polish judicial authorities. The dialogue referred to in the *Minister for Justice and Equality* (Deficiencies in the system of justice) judgment has thus not taken place. The Rechtbank therefore cannot properly assess the seriousness of the risk of breach of the fundamental right to a fair trial.
- 6 The public prosecutor is of the view that that defence does not succeed. It is not clear from the *Minister for Justice and Equality* (Deficiencies in the system of justice) judgment what the consequence of the issuing judicial authority's failure to engage (fully) in dialogue should be. Nor does this follow from the *Overleveringswet*.

Brief summary of the reasons for the referral

- 7 There is no reason to refuse surrender on the grounds referred to in Articles 3 to 5 of Framework Decision 2002/584/JHA. Nevertheless, the Rechtbank is faced with the question whether it should execute the EAW, in view of the recent legislative developments in the Republic of Poland concerning the independence of the Polish judiciary.
- 8 Following the *Minister for Justice and Equality* (Deficiencies in the system of justice) judgment, the Rechtbank assumes, in any case relating to an EAW issued by a court in the Republic of Poland for the purpose of conducting a prosecution, that there is in general a real risk in that Member State of the fundamental right to a fair trial, as guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, being breached on account of systemic or generalised deficiencies regarding the independence of the judiciary of the issuing Member State.¹ Because of the general real risk identified, the Rechtbank has investigated ever since:
- whether those systemic or generalised deficiencies are liable to have a negative impact at the level of the courts of that State with jurisdiction over those proceedings to which the requested person will be subject² and, if so,

¹ See judgment in *Minister for Justice and Equality* (Deficiencies in the system of justice), paragraph 61.

² *Ibid.*, paragraph 74.

- whether, ‘in the light of the specific concerns expressed by the individual concerned and any information provided by him, ... there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant’.³
- 9 To that end, the Rechtbank is holding a dialogue with the authority which issued the EAW. On 4 October 2018, in a case concerning another Polish EAW, the Rechtbank enquired which courts have jurisdiction over the criminal prosecution of the requested person and asked questions, in respect of those courts, on changes in staffing (II A), on allocation and handling of cases (II B), on disciplinary cases or other (disciplinary) measures (II C), on procedures to protect the right to an independent tribunal (II D) and on the ‘extraordinary appeal’ procedure (II E).
- 10 In a judgment of 27 September 2019, the Rechtbank ruled that, in the light of the responses it had received in many cases since its judgment of 4 October 2018, it was, at that point, sufficiently informed as to the impact of the systemic defects identified at the level of those courts with jurisdiction over the proceedings to which the requested persons will be subject. That impact was in fact such that, in the opinion of the Rechtbank, the systemic defects referred to *could* have a *negative* impact on those courts in *all* cases. Questions II A, B, D and E therefore no longer needed to be asked unless there were new, relevant developments. However, the questions on disciplinary cases and other (disciplinary) measures (II C) did still need to be asked.
- 11 In a judgment of 16 January 2020, the Rechtbank ruled inter alia that:
- although the information available on the overall picture of disciplinary cases and other disciplinary or non-disciplinary measures against Polish judges was very worrying, and the most recent developments were unfavourable, that overall picture was not yet sufficient in principle to assume in concrete situations that the right to a fair trial of a requested person would be compromised;
 - information on disciplinary cases and other (disciplinary) measures continued to be important in answering the question of whether there are substantial grounds to believe that a requested person will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the European arrest warrant, but that that information could not have led, as things stood at the time, to the surrender being refused without additional details about the requested

³ *Ibid.*, paragraph 75.

- person's personal situation, which would further contribute to the fear that his right to a fair trial would be compromised;
- since the requested person had not provided such information, there was no reason to wait any longer for the answers to the questions already raised concerning disciplinary cases and other (disciplinary) measures, with the Reichtbank taking the view that, if it considered it necessary in the light of new relevant developments, it would ask further questions.
- 12 In the period before and after the *Minister for Justice and Equality* (Deficiencies in the system of justice) judgment, there have been developments giving rise to serious concerns about the independence of the judiciary in Poland. For example, between 2017 and 2018, the Minister for Justice replaced more than 100 presidents and vice-presidents of courts. In addition, several Polish judges have been subject to disciplinary proceedings due to the content of their work or because they exercised the right to freedom of expression. Finally, there is a lack of independent and effective constitutional review in Poland.
- 13 According to the Reichtbank, further developments shortly before and after the ruling of 16 January 2020 are indicative of such increased pressure on the independence of the judiciary in Poland that it may have an impact on its decision regarding the surrender and on the line taken in the judgment of 16 January 2020. The Reichtbank cites, inter alia, the new law on the judiciary of 20 December 2019, which entered into force on 14 February 2020, and the fact that the board of the European Network of Councils for the Judiciary proposed in May 2020 to remove the Krajowa Rada Sądownictwa, the Polish National Council of the Judiciary, as a member. It also refers to the judgments of the Court of Justice of 19 November 2019, *A.K. and Others* (Independence of the Disciplinary Chamber of the Sąd Najwyższy), Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową* (Disciplinary regime for judges), Joined Cases C-558/18 and C-563/18, EU:C:2020:234, the Order of the Court of 8 April 2020, *European Commission v Republic of Poland*, C-791/19 R, EU:C:2020:277, and the fourth infringement procedure the Commission launched against Poland on 29 April 2020 in respect of the new law on the judiciary of 20 December 2019 referred to above.
- 14 On the basis of those developments, the Reichtbank concluded that the Krajowa Rada Sądownictwa — which appoints the members of the Disciplinary Chamber of the Sąd Najwyższy — is not a body which is impartial and independent of the legislative and executive powers and that the Disciplinary Chamber — which adjudicates disciplinary cases against judges of the Sąd Najwyższy and the ordinary courts — is not a court or tribunal within the meaning of EU law. The independence of the Disciplinary Chamber of the Sąd Najwyższy is not guaranteed nor is that of the Sąd Najwyższy and the ordinary courts — including the authority that issued the EAW in the present case. Indeed, Polish judges are

now at risk of disciplinary proceedings which could result in a case being brought before a body the independence of which is not guaranteed.

First question

- 15 In the light of those developments, the first question that arises is whether an executing judicial authority should execute an EAW issued by a court the independence of which is no longer guaranteed as a result of developments subsequent to the issuing of the EAW.
- 16 Indeed, according to the Court of Justice, Framework Decision 2002/584 is founded on the principle that decisions relating to EAWs are attended by all the guarantees appropriate for judicial decisions, inter alia those resulting from fundamental rights and fundamental legal principles. That means that the decision on issuing an EAW must also be taken by a judicial authority which meets the requirements inherent in effective judicial protection, including the guarantee of independence.⁴ The Rechtbank infers from the judgments of the Court of Justice of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, and of 24 June 2019, *Commission v Poland (Independence of the Sąd Najwyższy)*, C-619/18, EU:C:2019:531, on the requirement of independence under Framework Decision 2002/584/JHA, Article 19(1), second subparagraph, TEU and Article 47, second paragraph, of the Charter, that a court which issues an EAW must meet the requirements of effective or actual judicial protection. Rules that provide protection against external pressure or influence that could compromise independence of judgment in the cases submitted to that court are therefore necessary.
- 17 A court that has issued an EAW should, in the view of the Rechtbank, continue to meet those requirements even after the EAW has been issued. The responsibilities of such a court at that stage are, in the view of the Rechtbank, ‘responsibilities which are inherent’⁵ in the issuing of that EAW in the execution of which the issuing judicial authority must act independently. Furthermore, such tasks fall within the scope of EU law,⁶ with the result that the exercise of those responsibilities must comply with the requirements of effective judicial protection and thus the requirement of independence.
- 18 In the light of the conclusions set out in paragraph 14 above, the Rechtbank finds that, as a result of the amendment to national legislation after the issue of the EAW, the court which issued the EAW no longer meets the requirements of

⁴ *Ibid.*, paragraph 56.

⁵ Judgment of 27 May 2019, *OG and PI (The Public Prosecutor’s Office in Lübeck and in Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 74.

⁶ See judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 34.

effective or actual judicial protection, because that legislation no longer guarantees its independence vis-à-vis the legislative and/or executive powers. The Rechtbank questions whether EU law precludes it, as the executing judicial authority, from executing an EAW issued by such a court in such circumstances.

Second question

- 19 This question is raised in case Question 1 is answered in the negative. In that case, the Rechtbank considers as follows.
- 20 In paragraph 14 above it was concluded that, following recent developments in Poland, the independence of the courts is no longer guaranteed. It follows, according to the Rechtbank, that there are such systemic and generalised deficiencies with regard to the independence of the Polish judiciary that the right to an independent tribunal is no longer guaranteed for any suspected person brought to trial in the Republic of Poland, irrespective of his personal circumstances, the nature of the offence of which he is suspected and the factual context that forms the basis of the EAW. In other words: it follows from that conclusion that there is a real risk in the Republic of Poland of breach of the fundamental right to a fair trial for any suspected person — and thus also for the requested person. That real risk relates to the fact that all those courts are no longer independent on account of systemic or generalised deficiencies.⁷
- 21 That raises the question of whether that finding is sufficient — without (further) dialogue with the issuing judicial authority and without (the need for) further examination of whether the systemic deficiencies have a negative impact on the courts that will actually try the requested person and whether that person, given his personal circumstances, faces a real risk that the essence of his fundamental right to a fair trial will be compromised (see the assessment framework in paragraph 8 above) — to justify declining to execute the EAW.
- 22 According to the Rechtbank, that question must be answered in the affirmative. The Rechtbank is of the view that the *Minister for Justice and Equality (Deficiencies in the system of justice)* judgment can be read in such a way as not to apply to cases in which the systemic or generalised deficiencies relating to the independence of the judiciary are such that the legislation in the issuing Member State no longer fundamentally guarantees the independence of the courts, such that the negative impact of the deficiencies in individual cases must be regarded as a given even without further assessment.

⁷ See judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 61.

Third question

- 23 This question is raised should Question 1 be answered in the negative. In that case, the Rechtbank considers the following.
- 24 In the present case, the Rechtbank has addressed questions to the issuing judicial authority in the context of the dialogue provided for in the *Minister for Justice and Equality* (Deficiencies in the system of justice) judgment (paragraphs 75 to 77). That authority has not replied to those questions in full, even after a second request. The replies that have been received merely confirm the conclusion that the independence of the Polish judiciary is no longer guaranteed due to systemic and generalised deficiencies.
- 25 This raises the question of whether that finding is sufficient to conclude that those systemic and generalised deficiencies are liable to have negative consequences for the courts having jurisdiction in the present case and that the requested person runs a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of the right to a fair trial, irrespective of his personal situation, the nature of the offences for which he is being prosecuted and the factual context that forms the basis of the European arrest warrant.
- 26 According to the Rechtbank, that question must be answered in the affirmative. The systemic and generalised deficiencies relating to the independence of the judiciary have negative consequences not only for the Sąd Najwyższy, but also for the ordinary courts, the category to which the issuing judicial authority belongs. Moreover, it follows from the conclusion in paragraph 14 above that there is a real risk for any suspected person — and thus also for the requested person — of breach of his fundamental right to an independent tribunal and, therefore, of the essence of the right to a fair trial. That real risk stems from the fact that Polish law no longer guarantees the independence of those courts.

Request for the application of the urgent procedure

- 27 The Rechtbank requests the Court of Justice to treat this reference for a preliminary ruling under the urgent procedure laid down in Article 107 of the Rules of Procedure. The reference for a preliminary ruling relates to an area as referred to in Title V of Part Three of the TFEU and the requested person is in detention pending the decision of the Rechtbank on the surrender request. The Rechtbank cannot take that decision until the Court of Justice has answered the questions referred for a preliminary ruling. A prompt answer to the questions referred for a preliminary ruling therefore has a direct and decisive impact on the duration of the detention of the requested person pending surrender.