

(...) This document contains translated segments of verdict ECLI:NL:RBAMS:2021:179.

5. The capacity of 'judicial authority' and Article 47 of the Charter of Fundamental Rights of the European Union

5.1 Introduction

5.1.1 In its intermediary judgment of 31 July 2020 the Court ruled that there are such structural and/or fundamental defects in the legal system of Poland concerning the independence of the judiciary that the Polish legislation no longer guarantees the independence of the Polish judiciary¹ In view of the nature and size of the observed defects it concerns systemic defects.² This judgement of the court concerns the observed systemic defects and, contrary to what the public prosecutor in court and the Advocate General of the Court of Justice in his findings seem to suggest, the court in no way passed a judgement on individual Polish judges and their attitude towards the executive branch in particular.

5.1.2 The court ruled before that the assessment framework, resulting from the *Minister for Justice and Equality (Defects in the judicial system)* judgment, also applies to execution-EAWs, in so far as these EAWs are based on judgments pronounced by Polish judicial authorities from the autumn of 2017.³ What was considered under 1 above therefore also applies when assessing execution-EAWs pertaining to such judgments, such as the EAW concerned.

5.1.3 In its interlocutory judgment of 3 September 2020 the court put the following question to the Court of Justice, referring to the above-mentioned interlocutory judgment of 31 July 2020 and the developments outlined therein under point 9, which evidence that pressure on the independence of the judicial authorities of Poland has further increased:

Do Framework Decision [2002/584], the second subparagraph of Article 19(1) [TEU] and/or the second paragraph of Article 47 of the [Charter] indeed preclude an executing judicial authority from executing a European arrest warrant issued by a court in the case where that court does not meet the requirements of effective judicial protection/actual judicial protection, and at the time of issuing the European arrest warrant already no longer met those requirements, because the legislation in the issuing Member State does not

¹ Amsterdam District Court, 31 July 2020, ECLI:NL:RBAMS:2020:4032

² Amsterdam District Court, 31 July 2020, ECLI:NL:RBAMS:2020:4032

³ I.a. Amsterdam District Court, 18 January 2019, ECLI:NL:RBAMS:2019:393

guarantee the independence of that court, and at the time of issuing the European arrest warrant already no longer guaranteed that independence?

5.1.4 On 17 December 2020 the Court of Justice gave a declaratory judgment that

“Article 6(1) and Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of ‘issuing judicial authority’ to the court which issued that arrest warrant (...).”

In this connection the Court of Justice found as follows i.a. in points 41 and 50 of the judgment:

“41. Nonetheless, an executing judicial authority which has evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State which existed at the time of issue of the European arrest warrant concerned or which arose after that issue cannot deny the status of ‘issuing judicial authority’, within the meaning of Article 6(1) of Framework Decision 2002/584, to all judges or all courts of that Member State acting by their nature entirely independently of the executive.”

“50. In those circumstances, it cannot be inferred from the judgment of 27 May 2019, OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau) (C-508/18 and C-82/19 PPU, EU:C:2019:456), that systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary, however serious, may be sufficient, on their own, to enable an executing judicial authority to consider that all the courts of that Member State fail to fall within the concept of an ‘issuing judicial authority’, within the meaning of Article 6(1) of Framework Decision 2002/584.”

5.1.5 To answer questions put at the interlocutory judgment of 31 July 2020, the Court of Justice also considered the following:

“53. It follows that the possibility of refusing to execute a European arrest warrant on the basis of Article 1(3) of Framework Decision 2002/584, (...), presupposes a two-step examination.

54. In the context of a first step, the executing judicial authority of the European arrest warrant in question must determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary (...).

55. In the context of a second step, that authority must determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraphs 74 to 77).

60. Consequently, (...), although the finding by the executing judicial authority of a European arrest warrant that there are indications of systemic or generalised deficiencies so far as concerns the independence of the judiciary of the issuing Member State, or that there has been an increase in such deficiencies, must, as the Advocate General noted, in essence, in point 76 of his Opinion, prompt that authority to exercise vigilance, it cannot, however, rely on that finding alone in order to refrain from carrying out the second step of the examination referred to in paragraphs 53 to 55 of this judgment.

61. It is for that authority, in the context of that second step, to assess, where appropriate in the light of such an increase, whether, having regard to the personal situation of the person whose surrender is requested by the European arrest warrant concerned, the nature of the offence for which he or she is being prosecuted and the factual context in which the arrest warrant was issued, such as statements by public authorities which are liable to interfere with the way in which an individual case is handled, and having regard to information which may have been communicated to it by the issuing judicial authority pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds for believing that that person will run a real risk of breach of his or her right to a fair hearing once he or she has been surrendered to the issuing Member State. If that is the case, the executing judicial authority must refrain, pursuant to Article 1(3) of that framework decision, from giving effect to the European arrest warrant concerned. (...)

66. Where a European arrest warrant is issued by a Member State with a view to the surrender of a requested person for the purposes of conducting a criminal prosecution, such as that at issue in the main proceedings in Case C-354/20 PPU, the executing judicial authority must, in order to assess specifically and precisely whether in the particular circumstances of the case there are substantial grounds for believing that following that surrender that person will run a real risk of breach of his or her fundamental right to a fair trial, examine in particular to what extent the systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which that person will be subject (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraphs 68 and 74). That examination therefore involves taking into consideration the impact of such deficiencies which may have arisen after the issue of the European arrest warrant concerned.

67. That will also be the case where a European arrest warrant is issued by a Member State with a view to the surrender of a

requested person for the purposes of executing a custodial sentence or detention order (...).

68. However, in the second case, the executing judicial authority must also examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the European arrest warrant have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of that European arrest warrant."

Herein the Court of Justice referred several times to the *Minister for Justice and Equality (Defects in the judicial system)*, i.a. in point 55 – regarding the second phase – in which reference is made to (i.a.) point 76 of this previous judgment: :

76. Furthermore, pursuant to Article 15, paragraph 2, of Council Framework Decision 2002/584 the executive judicial authority is obliged to request all additional data from the issuing judicial authority, which they find necessary for the assessment of the existence of such a risk.

5.2 Prior consideration

The substance of the judgment of the Court of Justice is not inconsistent with the judgment of this court in Polish surrender cases as mentioned above under 5.1.1. Therefore, the court upholds this judgment.

5.3 Issuing judicial authority

5.3.1 In view of the answer given by the Court of Justice to the prejudicial question put, as set out in point 5.1.5 of this judgment, the court assumes that the *Circuit Court in Sieradz* should be regarded as issuing judicial authority within the meaning of Article 6, first paragraph, of Council Framework Decision 2002/584/JHA and that this judicial authority is competent to issue the EAW.

It is true that the court has data that show structural and/or fundamental defects concerning the independence of the judiciary in Poland and that the court found that in all cases these defects may have negative consequences for these judicial authorities, but these data in themselves do not suffice to deny each Polish judge and judicial authority the capacity of "issuing judicial authority" within the meaning of Article 6, paragraph 1,

of Council Framework Decision 2002/584/JHA, as follows from point 50 of the judgment.

5.3.2 Also in view of what will be considered below under 5.4.4, there are no data available, apart from the structural and/or fundamental defects concerning the independence of the judiciary of the issuing member state, which might lead to such a disqualification.

5.4 Assessment of a possible breach of Article 47 of the Charter

5.4.1 As mentioned before, the court upholds its judgment concerning the observed structural and/or fundamental defects. It follows from the judgment (point 60) that also in this situation the court may not omit “phase 2”. The court cannot merely establish that there are data which show structural and/or fundamental defects concerning the independence of the judiciary of the issuing member state, or that such defects have grown worse, to renounce the second phase of the investigation as meant in points 53 up to and including 55 of this judgment.

5.4.2 In view of point 68 of the judgment the court should ascertain to what extent the structural and/or fundamental defects which existed in the issuing member state at the time of issuing the EAW, have in this particular case impaired the independence of the judicial authority which imposed the punishment or measure for the deprivation of liberty, the execution of which is the subject of this EAW.

In its referral decision of 31 July 2020 the court already found that the observed structural and/or fundamental defects may have consequences at the level of the judicial authorities of the issuing member state, which are competent to take cognizance of proceedings to which persons claimed are subjected. The court does not find any reason in the judgment of the Court of Justice to reconsider this decision. The systemic nature of these defects entails that at the time of the judgment on which the EAW is based, they may also have had negative effects at the level of the competent judicial authority in this case.

5.4.3 The court should therefore assess, in view of the personal situation of the person claimed, the nature of the offences for which he is prosecuted and the actual context in which the EAW was issued, and taking any data received from the issuing judicial authority into account, whether there are compelling reasons, based on facts, to assume that the person claimed did not have a fair trial in Poland, because the structural and/or fundamental defects which existed in Poland at the time of issuing

the EAW, in his concrete case have impaired the independence of the judicial authority which imposed the judgment underlying the EAW.

5.4.4 In principle it is also up to the person claimed and his lawyer to provide information - in so far as he relies on an already completed breach of his right to a fair trial – where possible which might be relevant when assessing whether such a breach occurred.

In this connection the court holds that the person claimed did not provide information concerning his personal situation and has also indicated several times that he wants to go to Poland as soon as possible.

The documents also show that he appeared in person and in the presence of his lawyer at the hearing in court, which led to the judgment underlying the EAW. The person claimed did not appeal against the judgment. During the surrender proceedings he never took the position in court that he hadn't had a fair trial.. The court also doesn't have any information otherwise which indicates this.

5.4.5 In view of the above the court finds that there are compelling reasons in this case, based on facts, that the basic right of the person claimed to an independent court of law was violated and that consequently his basic right to a fair trial was in essence affected.

6. Conclusion

Now that it has been established that the EAW complies with the requirements of Article 2 of the Surrender of Persons Act, and that there are otherwise no grounds for refusal to prevent the surrender, the surrender should be allowed.

(...)