THE HIGH COURT

[RECORD NO. 2013 295 EXT]

[RECORD NO. 2014 8 EXT]

[RECORD NUMBER 2017 291 EXT]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ARTUR CELMER (No.5)

RESPONDENT

AND BY ORDER

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Ms. Justice Donnelly delivered on the 19th day of November, 2018.

1. In these proceedings, the Court is required to make a determination as to whether the respondent's right to a fair trial under the Constitution, under the European Convention on Human Rights ("ECHR") and under the EU Charter on Fundamental Rights ("the Charter"), prohibits his surrender to the Republic of Poland ("Poland") for prosecution in light of the recent changes in legislation concerning the judiciary in that Member State. This Court must make a factual determination on the information before it, in accordance with the principles set out by the Court of Justice of the European Union ("CJEU") in *Reference for a preliminary ruling from the High Court (Ireland) made on 27 March 2018 — Minister for Justice and Equality v L.M.* (Case C-216/18) and in accordance with the provisions of the European Arrest Warrant Act, 2003 as amended ("the Act of 2003").

2. Following the decision of the CJEU in *L.M.*, this Court requested further information from the issuing judicial authorities in Poland (see *Minister of Justice and Equality v Celmer (No.4)* [2018] IEHC 484). Subsequent to that judgment, the respondent also submitted his own expert report from three lawyers in Poland. As a result of that further information, and arising from the omission by one of the issuing judicial authorities to send over a translated document of its response, this Court adjourned the matter and sought further information.

3. The request for additional information made pursuant to Article 15 of the 2002 Framework Decision on the 13th June, 2002 ("the 2002 Framework Decision") and s. 20 of the Act of 2003 referred to the expert report furnished on behalf of the respondent. Each issuing judicial authority was asked that they would comment specifically on the following issues:

(a) The general situation of the rule of law in Poland as set out in the report;

(b) The removal of presidents and vice – presidents of the Ordinary Courts in general;

(c) The part of the report dealing specifically with the removal of the presidents and vice – presidents of the Regional Courts in Wloclawek, Poznan and Warsaw, which are the relevant issuing judicial authorities;

(d) The nexus between the removal of the court's presidents and the remarks of the Deputy Minister for Justice relating to the respondent;

(e) How the removal of the court presidents might have any effect on the trial of Mr. Celmer if he was to be surrendered.

4. On the 2nd October, 2018, this Court made an order joining the Irish Human Rights and Equality Commission ("the IHREC") as an *amicus curiae*. Although the IHREC had offered assistance in a number of areas, the Court sought their specific assistance on the assessment of evidence.

The remaining legal issues

5. The initial judgment of this Court had finalised all issues arising in the application for surrender pursuant to s. 16 of the Act of 2003 apart from those arising from the Polish legislative changes concerning the courts. The CJEU ruling in *L.M.* answered the questions referred by this Court. It is now for the Court to adjudicate on his surrender in light of the answers to those questions and having regard to the evidence presented and submissions made subsequent to that decision.

The concerns of the parties

6. At the hearing on 31st October, 2018, a legal issue arose as to the applicable threshold in determining the breach of fair trial rights that would prohibit surrender. This test is to be distinguished from the standard of proof. This test refers to the degree or extent of the denial of a fair trial that must be established in accordance with the standard of proof before surrender will be prohibited. It is important, therefore, to distinguish between that test and the concept of standard of proof itself. The IHREC raised issues around the standard of proof and the burden of proof.

The standard of proof

7. As regards the standard of proof, the IHREC made detailed submissions on the relevant standard. This was not put in issue by either the respondent or the minister. This Court considers that the appropriate standard in extradition cases, when dealing with the prospective risk of a breach of rights contained in the Convention or Constitution or Charter, is long established. That standard was articulated by the Supreme Court in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45. Although that case concerned the prohibition of surrender based on the real risk of inhuman and degrading treatment (Article 3 ECHR), the standard of proof has been applied in other cases where a breach of a Convention or Constitutional right is claimed. The standard of proof is one of real risk based on substantial grounds that a right will be violated. A requirement to prove the real risk on substantial grounds is the standard set in the jurisprudence of the European Court of Human Rights.

8. Section 37 of the Act of 2003, which prohibits surrender where surrender would be incompatible with the ECHR or the Constitution, also contains a specific subsection prohibiting surrender where there are reasonable grounds of believing that the person would, inter alia, be tortured or subjected to other inhuman or degrading treatment. In Rettinger, Fennelly J. was of the view that there was no distinction to be made between substantial or reasonable grounds. As the Supreme Court (McKechnie J.) observed in *Attorney General v. Davis* [2018] IESC 27 (para 86): -

> *"Some authorities say that "substantial grounds" must be established such as would give rise to a real risk; others say "reasonable grounds". Given the difficulty of obtaining credible evidence which is current at the time of hearing, I would prefer the latter, though in substance there may be no difference between the two."*

This Court will proceed on the basis that there is no distinction between the two words 'reasonable' or 'substantial'.

9. The Court is grateful to the IHREC for their detailed submissions, but the Court does not consider, in light of the arguments submitted by the parties in this case, the issues raised and the evidence before the Court, that it is necessary to address any further the possibility that the *Rettinger* standard of proof may, or does, vary according to the circumstances of the particular case.

The burden of proof

10. The IHREC made submissions concerning the burden of proof. This was not placed in issue between the minister and respondent. Indeed, in this case the respondent placed evidence before the Court as to the situation in Poland and as to his personal situation. It is not necessary therefore to deal with this aspect. It suffices to say that in *Rettinger*, the Supreme Court confirmed that a burden rests upon a requested person to adduce evidence capable of proving the substantial grounds that the person would be exposed to treatment contrary to Article 3 of the Convention. It has been repeatedly accepted by the courts in this jurisdiction that this burden applies to a claimed breach of any Constitutional or Conventional right. Moreover, in *L.M*. the CJEU required the executing judicial authority to make its assessment as to a breach of fair trial "in the light of the specific concerns expressed by the individual concerned and any information provided by him."

The test of flagrant denial

11. In the course of the hearing an issue arose as to the correct test or threshold in establishing the breach of fair trial that would prohibit surrender. This arose because the CJEU in *L.M*. referred in their answer to the questions posed by this Court to breach "of the essence of his fundamental right to a fair trial." A significant part of the oral hearing was taken up by the whether this was setting a standard which was different to that set down in the jurisprudence of the European Court of Human Rights. To a certain extent that discussion may not have been entirely necessary, as the respondent's main submission was that in light of the particular concern being the independence of the judiciary, the essence of his right had been violated. The respondent nonetheless suggested at the oral hearing that there may be a difference in the threshold that has to be reached. In these circumstances, the Court will address the correct test applicable in this case.

12. Of note is that in his supplemental submissions filed subsequent to the decision in *L.M.*, the respondent claimed that it was open to the executing court to conclude where the trial court is not independent, that a real risk had been made out that the right to a fair trial would be breached in a "flagrant way". The respondent submitted that there was no basis for holding that the CJEU intended to limit the possibility of a finding of a real risk of a flagrant breach of fair trial rights to those who are particularly likely to be the subject of hostility from the executive branch.

13. The IHREC referred in their written submissions, to the decision of the ECtHR in *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1. They relied upon the following paragraphs::

> *"258. It is established in the Court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country. That principle was first set out in Soering v. the United Kingdom, 7 July 1989, § 113, Series A no. 161 and has been subsequently confirmed by the Court in a number of cases (see, inter alia, Mamatkulov and Askarov, cited above, §§ 90 and 91; Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, § 149, ECHR 2010 ...).*
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> *259. In the Court's case-law, the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (Sejdovic v. Italy[GC], no. 56581/00, § 84, ECHR 2006 II; Stoichkov, cited above, § 56, Drozd and Janousek cited above, § 110). Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:*
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> > *- conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge (Einhorn, cited above, § 33; Sejdovic, cited above, § 84; Stoichkov, cited above, § 56);*
> >
> > *- a trial which is summary in nature and conducted with a total disregard for the rights of the defence (Bader and Kanbor, cited above, § 47);*
> >
> > *- detention without any access to an independent and impartial tribunal to have the legality the detention reviewed (Al-Moayad, cited above, § 101);*
> >
> > *- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (ibid.).*
>
> *260. It is noteworthy that, in the twenty-two years since the Soering judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.*
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> *261. In assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that*

there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see, mutatis mutandis, Saadi v. Italy, cited above § 129)." (Emphasis added in IHREC submissions).

14. In the course of the oral hearing before me, the IHREC submitted that it was noteworthy that the CJEU in *L.M*. had not used the language of flagrant breach when such language had been used by the Advocate General in his Opinion. The IHREC submitted that the CJEU's requirement that the "essence" of the right be breached rather than merely that the right itself be breached indicated a higher threshold. In the absence of a clear indication from the CJEU that this threshold is lower than the well-established "flagrancy" threshold, there does not appear to be a basis for drawing any meaningful distinction between the 'flagrant' breach of a right and the breach of the 'essence' of a right. It was submitted at the hearing that it was a matter for this Court to consider whether the CJEU may well be indicating a new test.

15. The Minister urged upon the Court the original test was that set out in the *Soering v. UK* (1989) 11 EHRR 439 decision of the European Court of Human Rights. That had set the test of a flagrant denial of human rights. Counsel submitted that the phrase "the essence of the right" was synonymous with a "flagrant denial of justice". He referred to a number of UK decisions which had reviewed the law in terms of ECHR protection as regards fair trial rights. These cases were *Orobator v Governor of HMP Holloway & Anor, Brown v. Government of Rwanda* [2009] EWHC 770 (Admin) and *Government of Rwanda v. Nteziryayo* [2017] EWHC 1912. This latter case had also been referred to by the IHREC in their submissions.

16. I have considered also the recent decision of the High Court of England and Wales in *Lis v Regional Court in Warsaw* [2018] EWHC 2848 (Admin), which was brought to my attention after the conclusion of the oral hearing. I gave the parties, who appeared at the oral hearing, the opportunity to address the case. The respondent and the IHREC availed of the opportunity.

17. In *Lis*, the High Court of England and Wales observed "that if the Luxembourg Court were seeking to draw a qualitative distinction between that concept and the oft-repeated formation of the Strasbourg Court of a "flagrant denial of justice" it would have said so…" That authority is not binding on this Court. It is noteworthy that the respondent only addressed his submission to the finding that "exceptional circumstances" must be shown. The IHREC submissions did not disagree with the flagrancy test but submitted that the use of the word essence is more readily understood as pertaining to the nature of the right protected as opposed to the evidential standard required to establish the breach.

Decision on legal test of "flagrant denial"

18. I conclude that the CJEU in *L.M*. did not amend the test of a "flagrant denial of justice". I will set out in more detail the reason for reaching that conclusion but I must emphasise that this issue was not truly live in the case. From the outset of the case before me, the respondent had posited his case on the basis that the lack of independence of the Polish judiciary amounted to a "flagrant denial of justice." This was maintained before the CJEU and in his written submissions subsequent to the delivery of the decision on the referral. Any suggestion to the contrary at the oral hearing may well be better understood as a focus on what the CJEU meant by the use of the word 'essence'. That will be addressed later in this judgment.

19. In *Minister for Justice v. Brennan* [2007] IESC 21, the Supreme Court rejected the principle that extradition would not be permitted to foreign countries where their legal system and system of trial differed from that envisaged by our Constitution. The Supreme Court (Murray CJ) held that this did not mean that the court had no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. The Supreme Court held that: -

> *"There may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights."*

20. That high standard has been repeatedly followed by the courts when considering extradition and surrender matters to date. It has been expressed as a test of a flagrant denial of justice. See for example *Attorney General v. Damache* [2015] IEHC 339 in particular at Part 6.4 of the judgment and *Attorney General v. Marques* [2013] IEHC 415.

21. There is also no dispute that it is well settled law that the test provided by the ECtHR for the prohibition on extradition because of a feared violation of Article 6(1) ECHR is a threshold of a flagrant denial of justice. Unsurprisingly, it also represents the test applied in our neighbouring jurisdiction as indicated in the cases provided to me.

22. The decision of the CJEU in *L.M*. referred to Article 47 of the Charter on Fundamental Rights. However, the CJEU, at para. 33, noted that the fundamental right to a fair trial before an independent tribunal as enshrined in Article 6(1) of the ECHR corresponds with the second paragraph of Article 47 of the Charter. To the extent that the case concerned extradition, it would seem that the CJEU made no distinction between the rights provided under Article 6(1) of the ECHR and Article 47(2) of the Charter. In *Aranyosi and Caldararu* (C 404/15 and C 659/15), the CJEU had made a similar observation about Article 3 of the ECHR corresponding to Article 4 of the Charter.

23. The CJEU referred frequently in the course of its judgment to the potential breach of the "essence of the applicant's right to a fair trial". That must be seen in the context of the case itself. As is noted in *L.M.*, this Court had referred to the requested person's real risk of a flagrant denial of justice in its second question when it asked whether a specific assessment of that risk was required. It has also to be noted that the CJEU decision recites the case the respondent made on the basis of the Reasoned Proposal of the EU Commission concerning the situation on the rule of law in Poland: -

> *"That his surrender would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of the courts of the issuing Member State resulting from the implementation of the recent legislative reforms of the system of justice in that Member State."* (Para. 46).

24. In the view of this Court, it is inconceivable that the CJEU were amending the well settled test by implication. This is because of the CJEU's finding that Article 6(1) and Article 47(2) of the ECHR and Charter respectively have corresponding provisions. It is also clear that this Court had posed its question to the CJEU by referring to the test of flagrant denial, and that the respondent's case was being made by reference to that standard, any diversion from that standard would have been highlighted in its judgment. The case law emanating from the ECtHR as to the test being one of a flagrant denial of justice is well settled and it must be understood on the basis that the CJEU took that that aspect of the law as settled. Therefore, the essence of the right and the flagrant denial of the right are to be understood as one and the same.

25. It can also be said that such a test would accord with the primacy given to mutual trust within the Framework Decision and to

the CJEU's conclusion that it is only in exceptional cases that a check can be made on whether fundamental rights have been guaranteed in the requesting Member State. This is referred to by the CJEU at para. 37 relying on the opinion in the Accession of the European Union to the ECHR of 18th December, 2014. This was also referred to at para. 43 of the judgment in *L.M.*, relying on its earlier decision in *Aranyosi and Caldararu*.

Is there a flagrant denial of justice where there is a finding of systemic and generalised deficiencies in the independence of the courts in a Member State?

26. In written submissions, the IHREC suggested that it did not appear to be disputed by the Minister, by the Polish Government in their observations to the Court of Justice, or by the Polish issuing judicial authorities that trial by a court which is not independent and impartial would amount to a flagrant denial of justice. This Court rejects such an interpretation of the positions of those institutions. The minister has always been clear in his submission that the test was a flagrant denial. The minister was also clear that such a test had to be specific to the individual; i.e. it was the minister's position that relying on what may be termed a systemic lack of independence was insufficient (see para 114 of *Minister of Justice and Equality v Celmer* [2018] IEHC 119).

27. In truth, the Polish issuing judicial authorities have given no views on that issue. Indeed, it may not be appropriate for them to so do. In the context of our legal procedures for European arrest warrant surrender, they are not a party to the proceedings. They have issued the European arrest warrants and have provided information as requested by this Court pursuant to the Act of 2003 and the Framework Decision.

28. The submissions of the Polish government in *L.M.* were sent to this Court by the curia of the Court of Justice. I do not accept that in those submissions there was an acceptance that a lack of independence would amount to a flagrant denial. Indeed, it seems to me that those submissions primarily addressed the jurisdiction of the executing judicial authority to question the judicial system in another member state because of the principles of mutual trust and mutual recognition. It cannot be the case that because there was no explicit denial of the proposition that trial by a non-independent and non-impartial court would amount to a flagrant denial that they were accepting that situation.

29. The IHREC went on to say that perhaps it is unsurprising the proposition was not explicitly denied "given the prominence and emphasis given to the right to be heard by "an independent and impartial tribunal" by both Article 47 of the Charter of Fundamental Rights and Article 6(1) of the ECHR." (para 2.19). I must again reject the submission that there has been an implicit acceptance that findings of systemic breaches of the independence of the judiciary amounts to a flagrant denial of justice. Indeed, the IHREC in a footnote in this part of its written submission said it was interesting to note the decision of the High Court of England and Wales in *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin). That decision will be discussed further below but suffice to say that the decision confirmed that in general lack of independence on the part of a tribunal may be sufficiently mitigated by other adequate features of fair trial so that the incursion into fair trial will fall short of a flagrant denial of justice. Indeed, the *Nteziryayo* case is relied upon by the minister in support of his submission that something more than systemic deficiencies in independence must be present in the case before surrender must be prohibited.

30. The first case referred to by counsel for the minister was *Orobator v. Governor of HMP Holloway & Anor* [2010] EWHC 58. That case did not concern extradition, rather it was a prison transfer case. Following the transfer of the applicant from prison in Laos to serve her sentence in the UK, she claimed that she could no longer be imprisoned because she had not had a fair trial in Laos. Counsel relied upon the case because it contained a detailed survey of the case law from the ECtHR and the UK.

31. The England and Wales High Court referred to the Court of Appeal judgment in the case of *(Othman) v Secretary of State for the Home Department* [2008] EWCA Civ 290. The *Othman* case concerned the independence of a Jordanian court; the majority of whom were senior military officers without security of tenure and who could be replaced by executive decision. The Court of Appeal in *Othman* concluded that the lack of institutional independence meant that any trial would involve a breach of Article 6, but that the breach would not amount to a flagrant denial of justice.

32. It is to be noted that the ECtHR in *Othman*, although holding that there was a flagrant denial of justice where there was a real risk that statements obtained in violation of Article 3 would be used in a trial, upheld the test to be applied. The underlined portions of para 260 from *Othman* contained in para 13 above are particularly relevant. It is only where the breach is so fundamental as to amount to a nullification or destruction of the very essence of the right guaranteed by Article 6, that extradition must be prohibited.

33. The court in *Orobator* referred to *Brown v. Government of Rwanda* [2009] EWHC 770 (Admin). In *Brown*, having applied the flagrant denial of justice test, the court held that there would be a real risk of such a flagrant denial. That was not based however on a single proposition that lack of judicial independence and impartiality would of itself involve a flagrant denial of justice. Instead, the court took a more calibrated approach and in particular took into account the fact that there was evidence of actual governmental interference in particular cases.

34. In *Orobator*, the UK High Court held at para. 99, that: -

> *"It is a striking fact that there is no case of which we are aware in which this test has been successfully invoked in any context in relation to Art. 6 on the grounds of lack of independence and impartiality of a court. We recognise that judicial independence and impartiality are cornerstones of a democratic society and that their absence will without more, involve a breach of Article 6. But we cannot accept that lack of judicial independence and impartiality will necessarily involve a flagrant denial of justice or the "nullification or destruction of the very essence of the right guaranteed" by Art. 6. Whether the lack of independence and impartiality has that effect must depend on the particular facts of the case, examined critically as a whole. Regrettably, there are many states throughout the world where judges are less independent and less impartial than they are in the UK and other democratic societies which are fully committed to the rule of law. But even where the judiciary are not fully independent and impartial, it is possible for a trial to take place which does not involve the complete nullification or destruction of the very essence of the right guaranteed by Art. 6."*

35. The Minister also relied upon the more recent decision of *Government of Rwanda v. Nteziryayo*. That case also concerned extradition to Rwanda, but unlike Brown in this case the court was satisfied that there would be no flagrant denial of a fair trial in Rwanda.

36. In *Government of Rwanda v Nteziryayo*, the England and Wales High Court did not accept that a lack of independence or impartiality could not *on its own* establish a flagrant denial of justice. They did say however, that where proper procedure, arrangements for witnesses and representation are all available, it may often be that the effects of a lack of independence on the part of the tribunal will be sufficiently mitigated by such other adequate features of trial so that incursion on fair trial process will fall far short of a flagrant denial of justice. It was held that all the aspects of the trial have to be weighed together and an overview

reached.

37. The IHREC has placed much emphasis on the dicta by the High Court of England and Wales. The UK High Court stated that it "cannot accept that prejudice or bias in a tribunal or judiciary, no doubt almost always arising from political or other pressure, can never amount to a flagrant denial of justice." The High Court held that it would seem to be an unwise proposition to hold otherwise, as it would eventually be bound to be confounded by a bad case. By that statement, the High Court of England and Wales were expressing how it might be possible that impartiality and bias, on its own, could amount to a flagrant denial of justice, but that it would only be in the rarest circumstances of a case that might eventually arise.

The Lis decision

38. The High Court in England and Wales concluded at para. 71:

> *"We grant each applicant permission to appeal. However, we reject the submissions made to date against extradition in each of the three cases. As matters stand at present, in our judgment there exists no general basis to decline extradition to Poland. However, by reason of the matters contained in the Commission's Reasoned Proposal and in the other material to which we have referred, there is sufficient concern about the independence of the Polish judiciary to mean that these applicants and others in a similar position should have the opportunity to advance reasons why they might have an exceptional case requiring individual "specific and precise assessment" to see whether there are substantial grounds for believing they individually might run a real*

risk of a breach of their fundamental rights to a fair trial. We make it clear, following the approach of the Grand Chamber of the Luxembourg Court, that exceptional circumstances must be demonstrated. We indicate, on the basis of the limited material available to us, that these cases would appear unlikely to fulfil that test and that those sought to be extradited for ordinary criminal offences, with no political or other sensitive content, would seem unlikely to be able to establish the necessary risk."

39. The respondent and IHREC submit that this judgment is not to be followed. The respondent submits that the court in *Lis* has fallen into error in its assessment of the test in *L.M.*. Counsel submits that the court has misunderstood the reference to the term exceptional used by the CJEU in para 73 of its decision. In the respondent's submission the exceptional nature of a finding that a Member State has departed so completely from the common values of the rule of law means that it is possible to conclude in an individual case that a requested person runs a real risk of a breach of his right to an independent tribunal. The respondent submits that the findings in *L.M.* beginning at paras 36 and 37 that such a finding would be the exceptional situation where the principle of mutual trust does not require surrender. The respondent also submitted that the CJEU had never concluded that it was only political or otherwise sensitive cases that could conceivably run the risk of facing a trial before a tribunal that was no independent.

40. The respondent submitted that when applying the test in *L.M.*, an executing judicial authority could find, based on the evidence available in respect of conditions in Poland, that there is a real risk that judges hearing trials and appeals on serious charges would be influenced in their conduct of proceedings by a concern not to provoke the dissatisfaction of the Public Prosecutor, especially given the structural overlap between the role of the Public Prosecutor and that of the Minister of Justice with responsibility for judicial discipline. If that conclusion is reached, no further exceptional circumstances are required to be shown.

41. The IHREC submitted that the focus on the "flagrant breach" versus "breach of the essence of the right" tests in *Lis* serves to obscure what is considered to be the real significance of the ratio of the CJEU's decision in *L.M.*. In this submission, the IHREC interprets the ratio as relating to the importance of the independence of the courts to the European system of mutual trust, recognition and co-operation. The IHREC refer to the origins of Article 6 which is the ECHR and Article 47 which is a Charter right. The Charter rights are limited in their application to matters of EU competence and therefore represent a standard agreed between members of the EU upon which the system of mutual trust, co-operation and recognition is anchored, accordingly deriving meaning and substance from the common purpose and intention of the Member State of the European Union.

42. The IHREC refer to the judgment in *L.M.* where the CJEU refers to "the requirement that courts be independent which form parts of the essence of [the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter] (See paras 62 and 63). It is submitted that this identification of independence as being of the right to a fair trial cannot be said in respect of the Article 6 jurisprudence considered in Lis and at the hearing before this Court.

43. The submission is that the CJEU in *L.M.* clearly seeks to identify the independence of the courts as integral to or "of the essence of" the fair trial rights protected in Article 47 of the Charter. They particularly rely upon para 48 of the judgment where the CJEU states that "the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded." They also refer to para 49 where the CJEU states that "the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act." They highlight para 54 in which the CJEU states "the independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system..."

The judgment in L.M.

44. In light of the arguments made in this case, it is necessary to look in little detail at the judgment in *L.M.*. Having followed its usual format in setting the context, the CJEU considered the questions referred from para 33 onwards. The CJEU at para 34 identified the essence of what this court was asking:

> *"Thus, by its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, 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, that authority must determine, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State. If the answer is in the affirmative, the referring court asks the Court of Justice to specify the conditions which such a check must satisfy."*

45. In the following paragraphs the CJEU recalls the fundamental set of common values on which the EU is founded. They restate the fundamental importance of mutual trust and mutual recognition in that they allow an area without internal borders to be created and

maintained. Mutual trust requires all Member States to consider all other Member States to be complying with EU law and fundamental rights save in exceptional circumstances. It is only in *exceptional cases* that they may check whether a member state has actually observed fundamental rights in a *specific case* (emphasis added).

46. The CJEU then refers to the 2002 Framework Decision and to the mandatory or non-mandatory grounds for non-execution of the European arrest warrant. The CJEU recognised that limitations may be placed on the principles of mutual recognition and mutual trust in exceptional circumstances and refer back to *Aranyosi and Caldararu*. In that case, the court acknowledged that the executing judicial authority, subject to certain conditions, had the power to bring the surrender procedures to an end where surrender may result in the person being subjected to inhuman and degrading treatment.

47. There being no similar decision in respect of fair trial rights, the CJEU stated that the first issue to be determined was whether a real risk of a breach of the fundamental right of an individual to an independent tribunal was capable of permitting the executing judicial authority to refrain, by way of exception from giving effect to a European arrest warrant on the basis of Article 1(3) of the 2002 Framework Decision. This states that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 (EU).

48. It was at that point, starting at para 48, that the CJEU made its references to judicial independence forming part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Members States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. From paras 49 to para 54, the CJEU addressed the importance of Member States ensuring that bodies, which as courts or tribunals within the meaning of EU law come within its judicial system in the fields covered by the EU, meet the requirements of effective judicial protection. At para 55, the CJEU said that maintaining the independence of such authorities is also essential in the context of the European arrest warrant mechanism.

49. At para 56, the CJEU held that the 2002 Framework Decisions is founded on the principle that decisions relating to European arrest warrants are attended by all the guarantees appropriate for judicial decision, *inter alia* those resulting from the fundamental rights and fundamental legal principles referred to in Article 1(3) of the Framework Decision. They also refer, at para 57, to the obligation for Member States to apply fundamental right guarantees set out in ECHR or in national law, including the right to a fair trial.

50. At para 58, the CJEU said that the high level of trust between Member States on which the European arrest warrant mechanism is based is thus founded upon the premise that the criminal courts of other Member States which will have to conduct, *inter alia*, the criminal procedure for the purpose of prosecution so as to meet the requirements of an effective judicial protection. These requirements include in particular the independence and impartiality of those courts.

51. The CJEU concludes, therefore, "*that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued, will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and therefore of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that warrant on the basis of Article 1(3) of the Framework Decision 2002".* Therefore, where a person opposes surrender on the basis of systemic deficiencies or generalised deficiencies which are liable to affect the independence of the judiciary in the issuing Member State, and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on their surrender.

52. From paragraph 61 onwards, the CJEU sets out the process by which that assessment must take place. The first step is to assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a Reasoned Proposal addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment. At para 62 it is stated that the assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter.

53. In paras 63 to 65 the CJEU deals with the two aspects of the requirement that courts be independent. There is an external factor to independence that ensures a court exercises its functions wholly autonomously. This includes protections from removal of office and certain aspects of judicial remuneration. The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of the proceedings.

54. At para 66 and 67, the CJEU refer to the guarantees of independence and impartiality as requiring rules in respect of various matters including the composition of the body and the appointment, length of service etc. of its members to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. Disciplinary procedures cannot be used as a system of political control of the content of judicial decisions.

55. At para 68, the CJEU stated:

> *If, having regard to the requirements noted in paragraphs 62 to 67 of the present judgment, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk (see, by analogy, in the context of Article 4 of the Charter, judgment of 5 April 2016,* Aranyosi and Căldăraru, C *404/15 and C 659/15 PPU, EU:C:2016:198, paragraphs 92 and 94).*

56. The CJEU, at para 69, said that such an assessment was necessary even where there was a Reasoned Proposal pursuant to Article 7(1) *and* where the executing judicial authority considers that it possesses, on the basis in particular of such a proposal, material showing that there are systemic deficiencies in the light of those values, at the level of that member State's judiciary (emphasis added).

57. In paras 70 to 72, the CJEU specifically state that it is only where there has been a decision by the European Council as provided

for in Article 7(2) TEU, that there is a serious and persistent breach of the principles set out in Article 2 TEU, that an executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.

58. The CJEU at para 73 to 75 held:

> *"Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, 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."*
>
> *In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.*
>
> *If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether 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."*

59. Paragraphs 76 and 77 deal with the dialogue that the executing judicial authority must enter into with the issuing judicial authority. At para 78, the CJEU states that if the information received does not lead the executing judicial authority to discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and therefore, of the essence of his fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the European arrest warrant relating to him.

60. At para 79, the CJEU answered the questions asked as follows:

> *" In the light of the foregoing considerations, the answer to the questions referred is that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, 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, that authority must determine, specifically and precisely, whether, 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, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the framework decision, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State."*

Conclusion on whether systemic deficiencies of themselves amount to a flagrant denial of justice

61. The manner in which the CJEU systematically dealt with the issues in *L.M.* is instructive in understanding the decision. The CJEU's recital of the legal position as regards EU law, the Framework Decision, mutual trust and the centrality of fundamental rights lead that court to reach its conclusion at para 59 that a real risk that a person will suffer a breach of the fundamental right to an independent tribunal and therefore of the essence of his fundamental right to a fair trial is capable of permitting an executing judicial authority to refrain, by way of an exception, from surrendering a person requested on a European arrest warrant. The right to refrain from executing a European arrest warrant can only be exercised on the grounds laid down by the Court of Justice of the European Union.

62. It is clear that in answering the questions asked by this Court, the CJEU expressly did not accept that a finding of systemic and generalised breaches was sufficient to establish that the individual concerned will run the risk of a breach of the essence of the fundamental right to a fair trial (in its findings at para 69). Neither the respondent's nor the IHREC's submissions address that vital finding in the judgment of the Court of Justice of the European Union. In my view, the meaning of para 69 is copper fastened later in the judgment by the statement that even if the deficiencies are found to operate at the level of the proposed trial court, the executing judicial authority was still required to assess, in light of specific concerns and information expressed and provided by the individual, whether there were 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. This assessment has to have regard to his personal situation, as well as to the nature of the offence for which he is being prosecute and the factual context that form the basis of the European arrest warrant.

63. Furthermore, it should be recalled that this Court, in its referral to the CJEU (see *Minister of Justice and Equality v. Celmer (No. 3),* [2018] IEHC 153) had raised these issues as part of this Court's preliminary views on the questions referred. In a referral which requests that the application by the CJEU of the Urgent Procedure, the referring court is asked, in so far as possible, to indicate the answers to the question referred. This Court had set out that "[w]here the principles of mutual trust and mutual recognition have been limited in the exceptional circumstances of a finding by the national court of a breach of the common value of the rule of law, the premise of the *Aranyosi and Caldararu* test is arguably flawed. Where there are such egregious defects in the system of justice, it appears unrealistic to require a requested person to go further and demonstrate how, in their individual case, these defects will affect their specific trial."

64. In the referral this Court contrasted the situation of fair trial with conditions of detention where it may not be every place of detention, or even every section of each place of detention that is affected by systemic deficiencies. In the suggested answer to the second question, this Court asked what, if any, guarantees could be given to an individual given the systemic nature of the breach of the rule of law. This Court, in its own putative answer, recognised that the sufficiency of any guarantee that was given was a matter for the national court to determine, suggested that given the European Union law aspect to the nature and extent of the guarantees

that must be provided. This Court then raised the concrete nature of those guarantees.

65. From the contents of this Court's referral, it is abundantly clear that the CJEU was being asked whether individual assessments that went beyond a finding of systemic breaches should or could be required. In answering the questions as the CJEU did, in particular when they expressly indicated that the enquiry must go beyond whether the issues affected the court level at which the requested person would be tried, the CJEU clarified that these systemic and generalised deficiencies were not of themselves sufficient to establish that there was a real risk to the individual's right to a fair trial. That assessment must be made in each individual case having regard to such factors as the personal situation of the individual, the nature of the offence and the factual context that form the basis of the European arrest warrant.

66. I must reject therefore the submission of the IHREC that the earlier references in the judgment to the importance of the independence of the judiciary in the context of the common values on which the EU was based and the unique place of those values in the context of mutual trust, was to be understood that a breach of independence of the judiciary was itself a breach of the essence of the right. For reasons similar to those set out above, it is inconceivable that if the CJEU were making such a finding, it would not have expressed it in a clear and obvious manner. The issue had been raised clearly by this Court but expressly rejected.

67. Indeed, the finding of the CJEU sits more readily with the assessment of fair trial rights in the context of extradition that have been identified by the European Court of Human Rights. That too, is in line with their finding at para 62 that the assessment is to be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter. As stated above, the CJEU found that Article 6 of the ECHR corresponds to the second paragraph of Article 47 of the Charter. The ECtHR set out in *Othman* at para 258 "A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article." If the CJEU were disputing the jurisprudence of the ECtHR, I am satisfied that it would have been expressly stated.

68. The IHREC has referred to a dicta of the ECtHR in *Al-Moayad v Germany*, (Appl. No. 35854, Decision on Admissibility, 20th February 2007) where that Court, in the context of a decision rejecting the admissibility of the applicant's claim that surrender to the US would violate his rights had stated that "A flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release." The IHREC submit that if such an independent tribunal is required on detention matters than the requirement of an independent and impartial tribunal must be even greater for a trial. In my view, that dicta must be read in the context in which it occurred. The applicant's case was that if surrendered he would be held indefinitely in detention on a Presidential order. In principle, the Court was clear that if such a thing were to happen there would be a flagrant denial of justice but that the applicant had produced no substantial grounds for believing that he ran that risk. I am satisfied that the case does not lend any support for the overall position of the ECtHR that the flagrancy test is a high threshold. The threshold goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State.

69. Moreover, although not necessary to do so, it can be observed that at para 63 the CJEU refers to the requirement that courts be independent which forms part of the essence of fair trial rights. Thus, the right is part of the essence of fair trial right. The CJEU makes clear in later paragraphs in the judgment, the test is one of the essence of his fundamental right to a fair trial. That right is to be assessed specifically and precisely with regard to the individual concerned and must go beyond a finding that because of systemic and generalised breaches of the independence of the judiciary that there is per se a breach of the essence of his fundamental right to a fair trial. In short the CJEU did not find that systemic and generalised breaches of independence of the courts, even at the court of trial, *of themselves* amount to a flagrant denial of the right to a fair trial.

70. I would, however, agree with the observations of the UK High Court in *Government of Rwanda v Nteziryayo*, that it is probably unwise to say that lack of independence and impartiality can *never of itself* amount to a flagrant denial. All would depend on the particular circumstances of the case. It would still be necessary to point to specific concerns about the lack of impartiality and independence as they may affect the particular requested person. Such an interpretation is consistent with the CJEU decision, as it would involve a specific assessment of the circumstances of the requested individual and the real risk to the essence of their trial. Thus, while lack of independence and impartiality might possibly be sufficient of itself to establish a flagrant denial of justice, it would still be dependent on the facts of the case, the nature and degree of the lack of independence and impartiality and thus the impact on the essence of the fundamental right of the individual concerned. I would also add that where the two aspects of independence identified by the CJEU at para 63 are both lacking, namely the external and internal factors, then an executing judicial authority may more readily find that there is a flagrant denial of justice or a breach of the essence of the right of fair trial.

71. Finally, I do not consider it necessary to comment on the precise formulation of the conclusion by the High Court of England and Wales of what must be demonstrated before surrender will be prohibited. From the foregoing review of the CJEU's decision, it is an exception to the principle of mutual trust to refuse surrender on the basis that fundamental rights will be violated. It may well be that it is only exceptionally that surrender to another Member State will be refused on that basis. Exceptionality is not in itself the test but can be a useful description, to borrow from the dicta of O'Donnell J used in a different context in *Minister for Justice and Equality v J.A.T. No. 2* [2016] IESC 17. The duty of the executing judicial authority is to complete the first and second steps of the assessment of whether there is a real risk of a breach of the essence of the fundamental right to a fair trial as set out in the decision of the CJEU in *L.M.*.3.

The evidence before this Court

The expert report on behalf of the respondent

72. Subsequent to the hearing that took place before this Court in the immediate aftermath of the decision in *L.M.*, this Court received further evidence. In particular, I have received a report from Polish lawyers from the law firm of Pietrzak Sidor & Partners. It is accepted that they are experts in the area of Polish law. They draw particular attention to the changes of law in Poland since the Reasoned Proposal was published in December 2017. I will briefly refer to the main changes.

73. The legal experts say that the law of the Supreme Court was amended to increase the number of judges. This was aimed at accelerating the procedure of appointment of the First President of that court. There have been changes to the disciplinary regime. The law now permits existing Supreme Court judges to sit in the Disciplinary Chamber but that change is limited by the need to have consent of various Presidents of Chambers, the opinion of the National Council of the Judiciary and ultimately the decision is made by the President of Poland. It does not seem that there were core changes to the mechanisms set out in the Reasoned Proposal.

74. The changes to the National Council of the Judiciary had been criticised in the Reasoned Proposal. Since December 2017, the rules concerning the appointment of the members of the National Council have not changed. The original changes to the National Council of the Judiciary have a direct impact on the independence of judges, in particular as regards their promotion, transfer, disciplinary proceedings, dismissal and early retirement.

75. As regards the Law on the Ordinary Courts Organisation, it has been amended 15 times since it entered into force in July 2017. In terms of new retirement dates, it seems that the power to decide on the prolongation of judicial mandates up to the age of 70 now lies with the National Council of the Judiciary (but see above for difficulties with the National Council of the Judiciary). The criteria for prolonging mandates remain vague although the amended law now permits it if it is justified by the interest of justice or an important social interest, in particular human resources needs or workloads of individual courts. There is no time frame within which the National Council has to make a decision. The uncertainty for the judiciary due to the lack of a time frame causes was noted in the Reasoned Proposal and makes a judge more susceptible to possible indirect pressure.

76. The law gave power to the Minister of Justice to dismiss presidents of courts for six months following the entry into force of the amended law. There were no concrete criteria, no obligation to state reasons and no possibility of judicial review governing the exercise of those powers. After those six months were up, he could dismiss presidents of courts in consultation with the National Council of the Judiciary. The Council could block a dismissal by two thirds majority. There has been no change to those powers.

77. According to the data obtained from the Ministry of Justice by the Association of Polish Judges, the Minister of Justice exercised his power to dismiss presidents and vice president of courts in at least 130 instances during the six month time limit.

78. At present the Minister can dismiss presidents and vice-presidents for (i) gross or persistent failure to perform official duties; (2) when continued performance of the function cannot be reconciled with the interest of administration of justice for other reasons; (3) particularly low effectiveness of activities in the field of administrative supervision or work organisation in a court or lower courts is determined; (4) submission of a resignation from the performed function.

79. The mechanism to dismiss presidents after this initial six month period was amended. There is now a two-step process that involves the obtaining a positive opinion of the board of the court that authorizes the Minister of Justice to dismiss the president/vice-president in question. However, even a negative opinion does not prevent the Minister from presenting his request to the National Council for the Judiciary.

80. The Polish experts submit that despite the amendments introduced since December 2017, the concerns expressed in the Reasoned Proposal about the dismissals in the first six month period remain valid. The powers to dismiss after the first six month period also raise concerns due to the vague criteria and the position of the National Council of the Judiciary in particular due to its own election process and the need for a two third majority.

81. The power to appoint presidents remains with the Minister. The experts outline the importance of the tasks of the presidents and vice-presidents. They are tasked with heading the court as an institution and representing the court externally (except of matters with the jurisdiction of the court director). The president is also the superior of the judges, the courts assessors, court référendaires and assistants in the court over which she or he presides. The president most importantly conducts internal supervision and in this capacity controls among others the efficiency of court proceedings in individual cases.

82. Other concerns as to external administrative supervision over courts remain the same as set out in the Reasoned Proposal. These are the possibility of "quasi" disciplinary punitive measures to courts presidents which may result in reduction in allowances to that president.

83. An amendment to the law on Ordinary Courts Organisation set out in the law of the Supreme Court of 8th December, 2017 gives the Minister for Justice important powers in relation to the disciplinary proceedings of judges. These allow him set the number and appoint disciplinary judges for ordinary court judges, to personally control disciplinary cases conducted against ordinary court judges through disciplinary officers and an extraordinary disciplinary officer of the Minister of Justice. The law on the Supreme Court of 8 December, 2017 removed certain procedural guarantees in disciplinary proceedings concerning judges. The concerns raised in the Reasoned Proposal have not been addressed.

84. In the view of the Polish experts relied upon by the respondent, the conclusions of the Reasoned Proposal are still valid.

The replies of the issuing judicial authorities

85. The most detailed response was given by the President of the Warsaw Regional Court, Judge Joanna Bitner. Madam President Bitner provides certain information about the fundamental constructs of the Polish legal system. It is unnecessary to set out in great detail what she states. She sets out that the Republic of Poland is a democratic legal state operating under law and the Constitution. Madam President Bitner describes the legal system there in terms of the court structure including the appellate jurisdictions. She outlines the duties of courts and in particular the role of the Constitutional Tribunal.

86. She details the situation with regard to the appointment of judges and acknowledges that there has been dispute even within Poland about the constitutionality of such changes. She gives the argument in favour of constitutionality, namely that the Constitution does not provide expressly who is to elect the fifteen judges of the National Council of the Judiciary.

87. Madam President Bitner states that, no matter which view will prevail in the end, Polish law provides for guarantees of independence of judges regardless of how the council participating in their election process is created. She says that the guarantees of fair trial are provided for in the Constitution and also in international treaties ratified by Poland, including in EU Law and in the European Convention on the Protection of Human Rights and Fundamental Freedoms. She says there is no risk of a violation by Polish courts of those highest values.

88. This Court has also received a reply from the Warsaw Regional Court from a Judge Piotr Gaciarek. He was named on the warrant issued by the Warsaw Regional Court as the representative of the issuing judicial authority. It was in that context that the central authority had addressed correspondence to him. There is a clear dispute between Madam President Bitner and Judge Gacierek as to who is to represent the Warsaw issuing authority. In the context of this case it is unnecessary for me to resolve that issue. Indeed, it can only be observed that it is difficult for an executing judicial authority to adjudicate among competing claims as to who actually represents an issuing judicial authority in another Member State. Suffice to say that this dispute only highlights the considerable tensions that the recent legislative changes have wrought amongst the Polish judiciary.

89. Judge Gaciarek does not dispute the quoted provisions of the Constitution and the Acts as set out by Madame President Bitner.

He asserts however that it is not true that there are no risks for independence of judges and courts in Poland. He goes on to set out concerns about the independence of judges. Most of these mirror the concerns set out in the Reasoned Proposal of the EU Commission. He has also set out examples where judges have been summoned for disciplinary proceedings arising from politically controversial rulings. He also raised concerns about evidence that might be admitted at disciplinary hearings.

90. I have also considered the two pieces of additional evidence from the Regional Court in Poznan and the single additional evidence issued by the Regional (in translation described as the Circuit) Court in Wloclawek. These add very little to the understanding of the general situation in Poland. More particularly, the information does not indicate that the legislative changes which were of concern to this Court, based primarily upon the facts contained in the Reasoned Proposal, have been altered in any meaningful manner.

91. One further development that must be noted is that on the 24th September, 2018, the European Commission decided to refer Poland to the CJEU claiming that the new Polish law on the Supreme Court violated principles of judicial independence and had asked for interim measures. This law had entered into force on the 3rd April, 2018 and had lowered the retirement age of Supreme Court judges from 70 to 65, putting 27 out of 72 sitting Supreme Court judges at risk of being forced to retire. It applied to the first president whose six – year mandate set out in the Polish Constitution would be prematurely terminated. On the 19th October, 2018, the Vice – President of the Court of Justice of the EU ordered that Poland must immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges. At present, I have no indication as to whether Poland will comply with these interim measures or not.

Are there systemic and generalised deficiencies as regards the independence of the Polish judiciary?
92. In light of all of the information I have before me, and having considered the replies of all the issuing judicial authorities as to the state of the rule of law in Poland, I am satisfied that there is no significant change to the facts as outlined in the Reasoned Proposal and in my decision of the 12th March, 2018. Indeed, the law on the Supreme Court which subsequently came into force has been applied and a number of Supreme Court judges were forced to retire unless they complied with certain conditions including that they had the consent of the President of Poland to so continue.

93. In light of the objective, reliable, specific and properly undated evidence before me, I now conclude that there is a real risk connected with a lack of independence of the courts of Poland on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. There is no necessity for me to repeat fully the reasons why this is so. Those reasons, *mutatis mutandi*, are clear from the decision in *Celmer (No. 1).*

94. The question of whether those systemic and generalised threats to the independence of the judiciary in Poland are such that there is a real risk that the respondent will suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundament right to a fair trial, must now be addressed.

Do the deficiencies apply to the court level before which the respondent would be tried if surrendered?
95. I have specific evidence before me establishing that on at least 130 instances since the new law on the Ordinary Courts organisation, the Minister of Justice has exercised his power to dismiss presidents and vice – presidents of courts. The experts from Poland state that there is information in the media about connections that many of those newly appointed persons had with the Minister of Justice or with executive power. It was also pointed out that the president of each of the courts before which this respondent would face trial if he was surrendered to Poland had been changed by the Minster for Justice. It was only the case of the Regional Court in Wloclawek that it was a change on the basis of the discretionary decision of the Minister for Justice. In the other two courts, the changes were made following expiration of mandates of former presidents. However, the vice – presidents of the Regional Court for Warsaw responsible for criminal, commercial and civil departments, were changed before the expiration of their mandates.

96. It must also be noted that the other provisions in relation to the ordinary courts and how they are managed including new disciplinary provisions for court presidents and for judges generally, will apply to judges of these ordinary courts. These concern questions of retirement age and power to prolong the mandate of the judges. As set out above, there are also issues arising out of the power of the Minister of Justice to set the number and appoint disciplinary judges for ordinary court judges and his control of those disciplinary cases. Furthermore, certain procedural guarantees in disciplinary procedures concerning judges have been removed.

97. The evidence before me establishes that the deficiencies in the independence of the judiciary will affect the court level before which this respondent will be tried if he is surrendered.

Specific and precise assessment of the respondent's situation
98. The next issue then is whether this respondent will face a flagrant denial of justice should he be surrendered. His counsel submits that: -

> (a) The facts of the situation in Poland are of themselves sufficient to establish the flagrant denial or the breach of the essence of his fundamental right;
>
> (b) That his case involving as it does serious offences, is sufficient in the circumstances to show that in the circumstances he is at real risk of a flagrant denial of justice;
>
> (c) That in any event given his particular situation, especially and most pertinently with regard to the personalised nature of the Deputy Minister of Justice's comments about him as a dangerous criminal, thereby violating his presumption of innocence, show that he is at real risk of a flagrant denial of rights should he be surrendered. The nature of those comments are set out in the decision of this Court in *Minister for Justice v. Celmer, (No. 4)* [2018] IEHC 484.

***Does the general situation amount to a flagrant denial*?**
99. Under this point the respondent claims that the situation itself amounts to a flagrant denial of justice, it is necessary to recall the law as dealt with above and also the state of the evidence before me. It is clear that generalised and systemic violations of independence are generally of themselves insufficient to amount to a flagrant denial of justice.

100. The respondent's case is that because a Member State has departed so completely from the common values of the rule of law that it is possible to conclude that in his individual case that he runs a real risk of a breach of his right to an independent tribunal. For the reasons set out previously in this judgment, this submission is not consistent with what has been ruled by the CJEU. A more individualised assessment must be made. While the Court accepts that it might be possible in a certain circumstances, to hold that

the lack of independence and impartiality might of itself amount to a breach of the essence of the fundamental right to a fair trial, it will only be in very particular situations that would occur.

101. The evidence presented to this Court has been almost wholly directed towards the institutional nature of the changes to the Polish judicial system and in particular towards the appointment, retention and discipline of judges and court presidents. The factors to which the respondent points, are almost all they type of external factors identified by the CJEU in *L.M*. The internal factor to which the respondent points as demonstrating lack of independence, is the indirect pressure these changes may put on judges to decide in a particular manner. An additional factor to which the respondent points is that the Minister for Justice is also the Public Prosecutor.

102. Neither before nor subsequent to the decision of the CJEU in *L.M*. has the respondent placed any evidence before this Court to show that any other aspect of the fair trial right (with the exception of the presumption of innocence in particular as applied to him, a matter to which I will return) are at risk in Poland. In that regard I note that even his Polish experts, confirm that the Constitution and the Code of Criminal Procedure in Poland provide guarantees of fair trial such as the presumption of innocence, independence of a judge or right to the court. His own lawyers stated that "in practice implementation of those guarantees depends on a person judging the case".

103. Notwithstanding their reference to the guarantees depending on the person judging the case, there has been no production of statistics or even anecdotal evidence of trials lacking in fairness since the changes regarding the judiciary in Poland. Moreover, it has never been suggested that fair trial rights, such as the right to know the nature of the charge, the right to counsel, the right to an interpreter, the right to challenge evidence and the right to present evidence, have in any way been affected. Furthermore, Judge Gaciarek, upon whose report the respondent relies, has stated that he and other judges adjudicating in the Warsaw Regional Court "try to perform our obligations to the best of our abilities and administer justice impartially and free from any pressures."

104. It is perhaps worthy of some note that the issuing judicial authority in Poznan has stated that his case will be randomly assigned to be examined by one of the judges in the Criminal Division. The other issuing judicial authorities have not stated how cases are to be assigned, whether randomly or otherwise. The Polish government in its submissions to the CJEU stated that these matters were assigned by lot. If this was not the case, one would have expected that the experts relied upon by the respondent would have addressed that issue in their report.

105. All the other indices of fair trial rights in Poland remain intact. The nature of the systemic deficiencies in this case, which on the respondent's own evidence amounts to a risk that an individual judge will not grant him his rights to a fair trial or that there will be indirect pressure on individual judges not to respect his right to a fair trial, are not in themselves sufficient to demonstrate that there is a breach of the essence of his fundamental right to a fair trial. This is so, even where the Minister of Justice is the Public Prosecutor and also plays a significant role in the disciplining of the judiciary. The threshold for the refusal of surrender on the basis of real risk on substantial grounds that the essence of the fundamental right to a fair trial will be breached is not reached on the basis of the systemic and generalised deficiencies in the independence of the courts in Poland, when the totality of the evidence is taken into account.

a) Flagrant denial because of the serious charges he faces

106. The respondent's complaint that he will face an unfair trial because he faces serious charges in Poland can also be rejected on the same basis. There is no evidence to support the contention that persons facing serious trials have particular risks over and above the concerns that have already been set out.

b) Flagrant denial because of comments of the Deputy Minister of Justice

107. The respondent points to a further specific fact which relates to his personal situation. He submits that the comments of the Deputy Minister of Justice, set out in my judgment of 1st August, 2018 *(Minister for Justice v. Celmer, (No. 4)* [2018] IEHC 484) at para 36 demonstrate that there will be a violation of the essence of his fundamental right to a fair trial. This is at particular risk by virtue of the comments of the Deputy Minister of Justice and is of sufficient seriousness that when combined with the generalised and systemic deficiencies amount to substantial grounds that there will be a flagrant denial of his rights to a fair trial.

108. The respondent has also referred to the comments made by the current Minister of Justice / Public Prosecutor, when he was previously Minister of Justice / Public Prosecutor in 2007. It appears that the Minister of Justice had made very public comments that violated the presumption of innocence of an accused. The accused, who was subsequently acquitted of the most serious offence brought proceedings to the ECtHR claiming a breach of rights arising from totality of the court proceedings including issues regarding bail. A specific part of his claim related to proceedings that had been taken in Poland against the Minister of Justice as a result of his comments. The applicant claimed the result of those proceedings was an insufficient remedy for the breach of his rights. Ultimately, the ECtHR held that the domestic courts had properly acknowledged the damage to the presumption of innocence that had been committed in that case (Garlicki v Poland Appl. No. 36921/07)

109. The respondent brought the judgment of the ECtHR to the attention of this Court as a matter of background to the overall situation in Poland. In my view, the case is of limited relevance. Indeed, it seems most relevant in demonstrating that the domestic courts in Poland acted on the contentious statement and that was held to be a sufficient vindication of the right. Furthermore, it is noted that there is no evidence before me that the Minister of Justice has said anything untoward in the present case.

110. More fundamentally, it does not appear to be in dispute that statements of public officials are not to be taken into account in the decision making process in Poland. Only the facts and evidence collected and taken in the trial under law can be utilised in determining a case. Madam President Bitner states that a person affected by the comments of a public official has remedies against such an official or the State Treasury who the official represents. An example is a remedy in defamation.

111. It is concerning to hear from both Madam President Bitner and Judge Garcierek as to how regularly comments are made about ongoing cases. Madam President Bitner states that "Various statements have been published almost on a daily basis, also by politicians (both government and opposition ones), to comment on proceedings still pending before a court, and adjudications already handed down." Judge Gaciarek says that the statements by the Deputy Minister of Justice "should be perceived as a typical rhetoric of politicians currently in power, who build their position among voters based on illegitimate and unjust attacks on courts and judges." Such adverse comments, if persistent and calculated, have a tendency to undermine public trust in the rule of law. Legitimate criticism of judicial decisions is part and parcel of a healthy functioning democracy. Wildly inaccurate and wholly personalised attacks on courts and judges serve no interests other than the interests of those who wish to tear down the edifices of the rule of law.

112. It is even more concerning where adverse comments undermining the presumption of innocence of persons facing trial are made by those in positions of power. This is particularly so where it is a senior figure in the Minister of Justice making those comments, even if it is not the Minister of Justice himself. Of course it is even more concerning where the Minister of Justice is in fact the Public

Prosecutor. The level of power that the Minister of Justice has in relation to the courts and court presidents in particular has been identified previously in this decision. Even if these kind of statements do not have a direct effect on how judges will decide a particular case, they are being made against a background of control over the Court Presidents in particular by the Minister of Justice who can dismiss them in their term of office for particular low effectively in the field of administrative supervision or work organisation.

113. It has not been disputed in any of the information I have received from the issuing judicial authorities that the Deputy Minister of Justice made these comments. There has been no suggestion that any apology or withdrawal of this claim has been made. It has not been claimed by the respondent that civil remedies do not exist, his focus has been on the implications of the comments for his fair trial in light of the other independence issues.

114. There is evidence before me in the statement of Madame President Bitner on behalf of the Warsaw Regional Court and of Judge Borowczak of the Regional Court in Poznan that these comments will not have any significance in establishing whether or not the respondent is an offender who committed the acts. It is clear also that Judge Gaciarek of the Warsaw Regional Court did not see a direct effect of such statements or of the way of appointing court presidents on court rulings in this or other cases. Judge Gaciarek did make a more indirect link between the control of the Minister of Justice over presidents and vice – presidents of a court. It seems to me that an indirect link, is, for the reasons set out above when dealing with general deficiencies, insufficient to amount to a flagrant denial of this respondent's Article 6 rights.

115. It is unfortunate that the Regional Court in Wloclawek did not reply to the last request made by this Court. Nonetheless, they had replied earlier on the 30th August, 2018. In that statement, it was said that the court saw no grounds to refer in any form to the statement of politicians, ministerial officials included in pursuance of the principle that politics should be left behind the door of the courtroom. The chairman of the II Criminal Division, Przemyslaw Wileniec, stated that: -

"No authority may absolve a judge from their obligation to respect the presumption of innocence and adhere to the chief principles of the criminal trial and rights of the defendant, including the right to be defended, the right to challenge the decision of the court at first instance, etc. Every judge is personally responsible to keep the defendant's right to a fair hearing. In that context there is no reason to confirm the operation of this principle before other courts – each and every judge can speak only on his/her own behalf. The right of the defendant to a fair trial is respected once the rules described in detail in the Code of Criminal Procedure complied with, as those comprehensively regularise that issue. The comments of public officials are irrelevant here and they do not affect the proceedings before the court."

116. I also have evidence from the Polish experts relied upon by the respondent that, in the absence of conducting an analysis and monitoring each of the proceedings against him, it is impossible to answer whether his right to a fair trial has been or will be infringed in the course of proceedings. As regards the specific statement of the Deputy Minister of Justice, what they state is that it raises serious concerns due to the current legal framework in which the Polish judicial system operates and which offers many avenues through which the executive may influence the judiciary. From their evidence, the concerns as to this respondent exist at a generalised level and despite the comments which question his innocence by the Deputy Minister of Justice, there is no specific concern to his risk to a fair trial that can be discerned at present over and above the general concerns as to the independence of the judiciary.

117. In light of all the evidence before me, I conclude that despite concerns about the statements by the Deputy Minister of Justice, which are heightened by virtue of the role of the Minister of Justice in both the prosecution and the control of courts presidents and vice – presidents, and his role in the disciplinary process, the making of these comments about this respondent, even when taken in the context of the deficiencies relating to the independence of the judiciary in Poland, does not give rise to a real risk that this respondent will face a flagrant denial of his right to a fair trial on his surrender to Poland.

Conclusion

118. The manner in which the Republic of Poland governs itself is a matter for the Polish people. It is the entitlement of those who are elected in Poland to enact laws in accordance with the Constitution of Poland. The constitutionality of any laws enacted in Poland is a matter for the judiciary of Poland to rule upon in accordance with their own laws and Constitution. The only reason that the legislative changes in Poland have become a concern to a court in this Member State of the European Union is because the Court, as an executing judicial authority under the 2002 Framework Decision, has been asked to give effect to European arrest warrants issued by Polish judicial authorities.

119. The execution of those European arrest warrants is a matter of applying European Union law as it has been implemented in this Member State. It is not a matter of applying Polish law. European arrest warrants are executed on the basis of the principle of mutual recognition of judgments and decisions of judicial authorities in other Member States. They are executed on the basis of the mutual trust that each Member State places in another Member State's sharing of common values on which the EU is founded as stated in Article 2 of the Treaty on European Union.

120. The right, and indeed the duty in certain circumstances, for executing judicial authorities to question the independence of the Polish judiciary in determining whether a requested person can receive a fair trial in Poland has been confirmed by the Court of Justice of the European Union. Where systemic deficiencies in the common values of the rule of law arising from a lack of independence of the judiciary are found to exist, then executing judicial authorities may not be bound by the principles of mutual trust. Before surrender may be prohibited, the executing judicial authority has to carry out a specific and precise assessment whether in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.

121. In the exercise of its functions under Irish law implementing the 2002 Framework Decision, this Court had originally found that there were generalised and systemic violations of the independence of the judiciary in Poland that gave rise to a real risk of the breach of the fundamental right to a fair trial. This was based upon the more recent legislative changes that had been well detailed in the Reasoned Proposal of the European Commission. While there have been some changes to the legislative provisions in Poland, this Court has again found that there are systemic and generalised deficiencies as regards the independence of the judiciary in Poland that give rise to a real risk of a breach of the fundamental right to a fair trial as guaranteed by the second paragraph of Article 47 of the Charter. These changes will affect the level of court before which the respondent would be tried should he be surrendered.

122. In accordance with the decision of the CJEU in *L.M.*, this Court is obliged to determine, specifically and precisely, whether having regard to this respondent's personal circumstances, the nature of the offence for which he is prosecuted and the factual context that forms the basis of the European arrest warrants and in light of information from the issuing judicial authorities, there are substantial grounds for believing that he will run that risk if he is surrendered.

123. In the course of this judgment, the Court has found that the threshold for finding the breach of the right is one of the essence of the right. This threshold is the same as the concept of a flagrant denial of justice. This Court has concluded that, the systemic and generalised deficiencies in the independence of the judiciary in Poland of themselves do not reach the threshold of amounting to a real risk there will be a flagrant denial of this individual's right to a fair trial. This Court has also concluded that, despite the adverse comments on his presumption of innocence by the Deputy Minister of Justice, the real risk of a flagrant denial of justice has not been established by this respondent. On that basis, this Court must order his surrender on each of the three European Arrest Warrants.

124. Finally, it is important to state that it is the courts of Poland and, perhaps if he were to be convicted and have that conviction upheld on appeal, the European Court of Human Rights, that will have to decide whether any trial of this respondent actually meets the Polish and ECHR standards respectively of right to a fair trial before an independent and impartial judiciary. This Court has been concerned only with whether the relevant threshold preventing surrender has been reached, in accordance with the principles laid down by the Court of Justice of the European Union. That threshold, which is a high one under the law of extradition/surrender, has not been reached on the evidence before this Court.