AN CHÚIRT UACHTARACH
THE SUPREME COURT

Birmingham P.
Dunne J.
Charleton J.
O'Malley J.
Baker J.

S:AP:IE:2021:000018

BETWEEN/

WOJCIECH ORLOWSKI

APPELLANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

S:AP:IE:2021:000020

BETWEEN/

JAKUB LYSZKIEWICZ

APPELLANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

Judgment of Ms. Justice Elizabeth Dunne delivered on the 23rd day of July, 2021

1. The surrender of each of the appellants is sought by the Republic of Poland ("Poland") pursuant to a number of European Arrest Warrants ("EAWs"). These two cases raise the same issues and were dealt with by Binchy J. in the High Court together, with judgments delivered in each case on the same day. Both the appellants were given leave to appeal to this Court on the same grounds. The first in time to be listed before the Court was *Orlowski*. When the second case was listed, it was indicated that the second appellant was satisfied to rely on the written submissions furnished by Counsel on behalf of Mr. Orlowski as they comprehensively dealt with the same issues that arose in his case and further that he did not intend to furnish oral submissions on behalf of his client but would be available in court to assist the Court, if necessary. For that reason, reference will be made to the submissions on behalf of the appellants as if they were joint submissions, unless the context otherwise requires.

2. The judgment of this Court in *Celmer v. Minister for Justice and Equality* [2019] IESC 80 engaged with the challenges faced by Member States when an objection is raised

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

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

Proceedings in the High Court

4. The judgments of Binchy J. in the High Court (*Minister for Justice and Equality v. Orlowski* [2021] IEHC 109; *Minister for Justice and Equality v. Lyszkiewicz* [2021] IEHC 108) succinctly describe the factual circumstances giving rise to this appeal. Mr. Orlowski and Mr. Lyszkiewicz are the subject of a number of EAWs which seek their extradition to Poland. The first-named appellant is the subject of four EAWs, two of which were issued by regional court of Lublin, and the remaining two issued by the District Court in Zdzislaw Lukasiewicz and Zamość respectively. Three of these EAWs seek his surrender to face trial for a number of specific offences and one seeks his surrender so that he can be imprisoned for convictions already handed down by the Polish courts. The second-named appellant is the subject of an EAW issued by the regional court of Rzeszów, and it relates to five offences.

5. These cases, as previously indicated, travelled together in the High Court. The EAWs were challenged on a number of grounds in both cases, and while separate judgments were given for each of them, for the purposes of this appeal, they are based on the same core issue, and were decided in the same way. The focus of this appeal relates to the challenge pursued by both appellants at hearing, summarised in both judgments under the sub-heading "*Court "Established by Law""* in the same terms. The judgments on this issue are in almost identical terms.

6. In the High Court, the appellants argued that the new laws passed in Poland have given rise to concerns that judges have been or may be appointed otherwise than in accordance with law and further, that the validity of these appointments cannot be challenged. They submitted that this position gives rise to a breach of the appellants' right to a fair trial and their right to an effective remedy under Arts. 6 and 13 of the ECHR, and Art. 47 of the Charter. The particular provision giving rise to these concerns is Article 42a of the new laws, which provides:

> *"Within the framework of the activity of courts or organs of courts, it is unacceptable to question the powers of courts and tribunals, constitutional state bodies and law enforcements and control bodies."*

In support of this objection, the appellants furnished evidence as to a number of sources expressing concern about the impact that Article 42a would have on the rule of law, including the Venice Commission, The Polish Commissioner for Human Rights, and provided expert evidence from Ms. Katarzyna Dąbrowska, a Polish lawyer. The principle concern of the appellants is that they are, in practical terms, deprived of the right to challenge the validity of the appointment of a judge by virtue of the provisions of Article 26 of the new laws which provides as follows:

"*(2) The competence of the Extraordinary Chamber of Control and Public Affairs includes consideration of motions or statements concerning the exclusion of a judge or the designation of the court before which the proceedings are to be conducted, including the allegation of lack of independence of the court or lack of impartiality of the judge. The court examining the case shall immediately forward the motion to the President of the Chamber of Extraordinary Control and Public Affairs in order to give it further course of action under the rules specified in separate regulations. The submission of the motion to the President of the Chamber of Extraordinary Control and Public Affairs does not stop the ongoing proceedings.*

(3) The motion referred to in paragraph 2 shall be left unprocessed if it involves determining and assessing the legality of the appointment of a judge or his authority to perform judicial tasks."

Binchy J. found that taking Article 26 of the new laws together with the expert evidence of Ms. Dąbowska, a motion challenging the validity of a judge's appointment will not be heard in Poland, even if a party can issue such a motion.

7. The appellants further submitted that the test set out in *LM* and affirmed in *L and P* does not address matters concerning the appointment of judges or the right to a trial before a Tribunal established by law. The appellants argued that the legality of the constitution of the court is an entirely separate consideration, and therefore the two-step analysis espoused in *LM* does not apply to the facts of this case. The appellants relied on the decision of the European Court of Human Rights ("ECtHR") in *Ástráðsson v. Iceland* (Application No. 26374/18, 1st December 2020) to support this distinction between the independence and impartiality of the tribunal, and the right to a trial by a tribunal established by law.

8. Binchy J. rejected these arguments. First, Binchy J. considered that the appellants' proposal that *LM* and *L and P* were not concerned with the legality of the court was incorrect. In concluding that the Court of Justice in *LM* was concerned with all legislative changes, including those relating to judicial appointments, up until the time that Donnelly J. made a reference to it, the trial judge relied on the reference made to compulsory retirement and future judicial appointments in *LM* at paragraph 21, as well as the many references in the European Commission's reasoned proposal pursuant to Article 7(1) on the determination of a clear risk of a serious breach by Poland of the rule of law which was referred to at paras. 18-20 of *LM*. In discussing *L and P*, Binchy J. said at paragraph 121 of his judgment in *Orlowski v. Minister for Justice and Equality* and paragraph 46 of *Lyszkiewicz*:

> *"In the course of an exchange with the Court on this issue, counsel for the [appellant] stated that there have been "doubtful appointments" to the courts in Poland, and that this has been a feature of the information available concerning the courts in Poland from the very outset. This, it seems to me, may reasonably be interpreted as an acceptance that matters concerning the regularity of the appointment of judges were very much "in the mix" when the CJEU delivered its decision in both LM and L and P."*

9. Second, Binchy J. observed that it was not open to the court to refuse surrender of a party on the basis of general and systemic deficiencies in the requesting Member State alone. No evidence was proffered by either of the appellants that the court they will appear before will be comprised of judges appointed contrary to law even though they were appointed pursuant to the new laws. Binchy J. held, taking this argument at its height, the furthest the appellants' cases could be put is that there was a possibility that, if they were surrendered, they would be before a court not established in accordance with the law, which was not sufficient to refuse surrender (See *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45). Binchy J. distinguished the facts of this case from *Ástráðsson v. Iceland*. Crucially in *Ástráðsson*, there was no dispute between the parties that the appointment under challenge was not in accordance with domestic law. No suggestion was raised on behalf of the appellants in this case that judges were appointed other than in accordance with domestic Polish law. Moreover, Binchy J. noted that the ECtHR held in *Ástráðsson* that it does not follow from a finding that a court is independent and impartial in executing its function that the judge or judges sitting on the

court were appointed in accordance with law. He observed at paragraph 126 in *Orlowski* that the corollary must also be true: *"…the fact that legislative changes in Poland have given rise to serious concerns about the independence or impartiality of the courts in Poland generally, does not mean that all courts, or any particular court, have been established contrary to law."* Consequently, the High Court ordered the surrender of both Mr. Orlowski and Mr. Lyszkiewicz to Poland.

Grant of Leave

10. On 17th February 2021, the first and second-named appellants applied for a Certificate to Appeal to the Court of Appeal from the decision of Binchy J. Both were refused. In the circumstances, both appellants applied for a leap-frog appeal to this Court. Both appellants were granted leave to appeal (*Orlowski v. Minister for Justice and Equality* [2021] IESCDET 28; *Lyszkiewicz v. Minister for Justice and Equality* [2021] IESCDET 48). This Court considered that the cases raised issues of general public importance, as to the contention that the courts in Poland which would consider their cases on surrender may not be constituted in accordance with law in the manner referred to by the Court of Justice in *AB and others (Appointment of judges to the Supreme Court-Actions)* (Case C-824/18) ECLI:EU: C:2021:153.

11. In light of this, the first and second-named appellants submit that it will be necessary to refer a number of questions to the CJEU for determination.

The Legal Framework

12. At this stage, it would be helpful to set out various provisions which the parties refer to in their submissions.

EU Law

13. Article 2 TEU provides:

> *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

Article 19(1) TEU states:

> *"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*
>
> *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."*

Article 47 of the Charter states:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

The ECHR

14. Article 6(1) of the ECHR states:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Article 13 of the ECHR states:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Issues

15. The appellants' central argument is that the decision in *LM*, which set out a two-step approach as to whether a rule of law objection to surrender should succeed, does not apply to the facts of this case, on the basis that it was concerned only with questions of independence of the judiciary, which they say is a distinct consideration from whether a court is one that is established by law. They make the point that if the court in Poland is not established in accordance with law, then, the requested person will have no effective remedy. In this case, the concern relates not to independence but the legality of the court. Therefore, they say that it is only if the court is established in accordance with law that the question of independence of the court arises. The appellants say that there is a real risk that any court before which they will appear will not be established by law by virtue of the new laws in Poland and other changes brought in since 2015, contrary to the requirements under Article 47 of the Charter and Arts. 6 and 13 of the ECHR. In those circumstances, they will have no effective remedy as required by the ECHR and the Charter. The appellants say that the decision in *LM* concerned questions pertaining to independence, whereas in this case, there is an identifiable, fundamental right i.e. the right to an effective remedy, which has been removed from the appellants as a result of recent legislative changes in Poland. The appellants argue that this distinction is significant, as the right to an effective remedy is less subjective than the question of independence and therefore less referable to factors personal to the requested person.

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

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

Aranyosi and *LM*). Accordingly, it is contended that dispensing with the second stage of the test would undermine the very objective of the EAW system.

Error in relation to Evidence

18. The appellants say that the trial judge erred in his finding that there was no evidence to suggest that any of the judges appointed pursuant to the changes in legislation in Poland dating back to 2015 have been appointed other than in accordance with domestic Polish law. They say that it is incorrect to say that there was no evidence in this regard and cite the guidance of McKechnie J. in *Attorney General v. Davis* [2018] 2 I.R. 357 in relation to assessing the facts on appeal. The respondent contests this suggestion and argues that it is an unfair criticism in circumstances where the evidence proffered by the appellants, in particular, the Resolution of the Supreme Court of Poland dated 23rd January 2020, is itself a matter of controversy.

The Right to an Effective Remedy

19. The appellants say that the principle of "effective judicial protection" at issue in Article 19(1) TEU has a relationship with Arts. 6 and 13 ECHR and Art. 47 of the Charter so that while the organisation of justice is a matter in which Member States have competence, Member States must comply with EU law, including Article 19(1) TEU. The appellants cite *European Commission v. Poland (Independence of the ordinary courts)* Case C-192/18 ECLI:EU: C:2019:924 as authority for this proposition. The appellants also argue that the CJEU have recognised that Art. 47 includes the right to invoke a breach of the right to a fair trial and that Courts must be able to scrutinise irregularities in the appointment of judges, and to this end they rely on *HG & Simpson* Joined Cases C-542/18 RX-II and C-543/18 RX-II ECLI:EU:C:2020:232. The appellants say that the decision in *Simpson* provides a mandate for domestic Member State courts to review any irregularity in relation to the appointment of judges in order to satisfy compliance with Art. 47. The appellants further rely on *Ástráðsson* v. Iceland in maintaining that, even when a review mechanism is provided, the quality of the review is of importance. In that case, the ECtHR found that the review of the irregularities in appointment was deficient in that it failed to consider the question of whether the court was *established by law*. The respondent argues that the right to an effective remedy can only arise where there is first established some other right or entitlement which the claimant alleges has been breached or is likely to be breached having regard to the specifics of this case and which therefore requires a remedy. The ECtHR has confirmed on a number of occasions that the right to an effective remedy has no independent existence. It merely complements the other effective clauses of the Convention and its protocols. Similarly, the CJEU has held in relation to the right to an effective remedy set out in the first paragraph of Article 47 that *"… the recognition of that right, in a given case, presupposes, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law."* (*A.B.* Case C-824/18 at para. 88). The respondent argues that there is no basis in principle, and none in domestic case law or that of the CJEU the ECtHR, to suggest that the right to an effective remedy has some elevated status such that generalised deficiencies in the remedies available in a requesting State would result automatically in a refusal to surrender.

Tribunal or Court Established by Law

20. The appellants say that the establishment of a court or tribunal in accordance with law is an uncontroversial component of the rule of law and has been recognised as such by the Strasbourg Court and the Court of Justice. They submit that the case law demonstrates that the rule of law entails, inter alia, the process of appointing judges in a proper manner. They rely on *Ástráðsson v. Iceland* and *L and P* in arguing that a consideration of whether a court is one "established by law" is a distinct question from whether the court is impartial or independent in its exercise following that establishment, and therefore, different considerations apply to it. Thus, it is pointed out that, at para. 285, the Grand Chamber in that case said:

> *"Moreover, the question whether the irregularities at issue had any actual implications for A.E.'s independence or impartiality, this being at the centre of the Supreme Court's examination of the applicant's case, did not as such have a direct bearing on the assessment of his separate complaint under the "tribunal established by law" requirement, as already noted in paragraph 280 above."*

In that case, having conducted the three step test outlined in that case, the Grand Chamber found that there was a breach of the right to a tribunal established by law due to the fact that the appointment procedure of the judge that heard the case was vitiated by grave irregularities impairing the very essence of the right at issue.

21. Fundamentally, the appellants submit that a consideration of whether a court is established in accordance with law precedes any consideration of independence; in other words, the first step is the question of whether the court concerned is one established by law. Essentially it is contended that the question of whether the court before which the appellants will stand trial is established by law is a separate complaint to that determined by the CJEU in *LM* and confirmed recently in *L and P*. If it does not meet the criteria of Article 6 ECHR and Article 47 of the Charter, the examination of the Court comes to an end as there is nothing further to examine. In other words, if the court is not established by law then the question of independence or impartiality does not arise. In those circumstances it is contended that the High Court does not have to consider the personal situation, the nature of the offence in question and the factual context in which the relevant warrant was issued as such matters are external to the primary question of establishment. In these circumstances, the appellants contend that a reference to the CJEU is necessary to determine the applicable test. The respondent says that the distinction between independence and establishment is artificial where both the right to be heard in front of a tribunal established by law, and the right to be heard by an independent and impartial court, are different aspects of the same right pursuant to Article 47 of the Charter and that to apply two different tests to two parts of the same right would be contrived. It is said that this distinction has never been noticed by any court in the past. The right to an independent tribunal and one established by law are part of the same fundamental right. That this is so has been recognised in the past. (*HG & Simpson*). Further, it was observed that the CJEU has explained that the objective of the requirement that tribunals be established by law "is to guarantee the independence of

judicial power with respect of the executive" (*FV v. Council of the European Union*, Case T-639/16P). The respondent argues that the discussion of the distinction between independence and establishment in *Ástráðsson* needs to be contextualised. While the Court made a distinction between impartiality and independence in that case, bearing in mind that it was common case that the appointment of a judge to the Icelandic court of appeal was irregular under domestic law, the ECtHR went on to examine whether the irregularity had any impact on the applicant. The Court in that case at paragraph 285 held:

> *"In the Court's opinion, the requisite "proximity" between the irregularities at issue and the applicant's case was attained when, and only when, the irregularly appointed judge, A.E., sat on the bench of the Court of Appeal which heard his case."*

22. Thus, the respondent says that the applicant in that case could only complain about a breach of his rights under Article 6 because he could show that there was an irregularity in the appointment of one of the judges who dealt with his case. In other words, he could show that the irregularity affected his individual case. The respondent reiterated the point that the appellants have led no cogent evidence to suggest that any of the judges before whom they are likely to appear have been appointed other than in accordance with domestic Polish law. Accordingly, the respondent says that in order to succeed, the appellants must show that the establishment right is radically different to the right to independent tribunal or indeed any other right. There is nothing in the case law to ground such a proposition.

23. Finally, reference should be made to further case law of the CJEU which the appellants say support their contention as to a distinction between issues relating to generalised deficiencies in judicial independence and issues concerning the establishment and constitution of courts. In this context, reference was made to the judgement of the court in *L and P* commenting on its earlier decision in *OG and PI*, C-508/18 where it was said at para. 48:

> *"The Court thus held that the public prosecutors' offices at issue in the cases which gave rise to that judgment did not satisfy the requirement of independence inherent in the concept of 'issuing judicial authority'… not on the basis of material indicating the existence of systemic or generalised deficiencies concerning the independence of the judiciary of the Member State to which those public prosecutors belonged, but on account of statutory rules and an institutional framework, adopted by that Member State by virtue of its procedural autonomy, which made those public prosecutors' offices legally subordinate to the executive and thus exposed them to the risk of being subject to directions or instructions in a specific case from the executive in connection with the adoption of a decision to issue a European arrest warrant."*

24. The point was made that in this case the objection to surrender is grounded on statutory rules of the issuing state as in *OG and PI*. The appellants point out that there are

generalised deficiencies concerning the independence of the judiciary in Poland. They provide the background to the objection to surrender. But it is emphasised that the objection to surrender in this case is made on the basis that recent specific legislative changes have the effect of removing the fundamental right of the appellants to challenge the appointment and composition of the institution to which they will be surrendered. Accordingly, it is submitted that the institution to which they will be surrendered is not a court established by law. The respondent takes issue with that interpretation of *L and P* and point out that the CJEU held in that case that it could not be inferred from its previous judgement in *OG and PI* that systemic or generalised deficiencies concerning the independence of the issuing member State's judiciary, however serious, are sufficient *per se* to enable an executing judicial authority to consider that all the courts of that Member State do not therefore come within the concept of an "issuing judicial authority" within the meaning of Article 6 (1) of the Framework Decision. (*L and P*, at paras. 49, 50).

The Evidence before the High Court

25. In order to put the issues in this case in context, it is necessary to consider the evidence before the High Court from Ms. Dąbrowska, a Polish lawyer, who provided a number of reports on behalf of the appellants. Reliance was also placed on a number of documents put before the High Court, including an opinion on the new laws delivered by the Polish Commissioner for Human Rights, reports from the Organisation for Security & Co-operation in Europe (the OSCE), and a report of the Venice Commission of the 30th December, 2019. In her reports, Ms. Dąbrowska referred to the resolution of the Supreme Court of Poland of the 23rd January, 2020, and in her second report, in particular, she highlighted the conflict between that court and the Constitutional Tribunal of Poland on the new laws. The Supreme Court in its resolution stated, *inter alia*, at para. 2, as follows:

> *"A court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of a common court or a military court on application of the National Council for the Judiciary formed in accordance with the Act of December 2017 amending the Act on the National Council for the Judiciary and certain other Acts … if the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of Article 45(1) of the Constitution of the Republic of Poland, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms."*

26. Ms. Dąbrowska agreed with the proposition put to her on behalf of the appellants that the effect of the resolution was that due to the method of appointment the current National Council of the Judiciary cannot ensure that a person appointed a judge by the President on the recommendation of the NCJ is validly appointed in accordance with law. However, the Constitutional Tribunal ruled on the 20th April, 2020, *inter alia*, that the Supreme Court exceeded its authority in making the resolution of the 23rd January, 2020. In the course of its resolution, at para. 57, the Supreme Court had expressed the view that:

"This Resolution of the Supreme Court has been issued due to doubts arising in particular with respect to the special procedure of nominating candidates for the office of a judge under the Act of 8 December 2017 amending the Act on the National Council for the Judiciary. As a result of that Act, the National Council for the Judiciary is no longer independent. If the constitutional standard is restored and the defect of the judicial appointment procedure is eliminated, the circumstances necessitating review of the criteria of court appointment under Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure in order to ensure enforcement of the requirements under Article 47 of the Charter may longer prevail. This Resolution does not concern systemic issues of the judiciary as a safeguard of effective legal protection in areas covered by Union law …".

27. However, as we have seen, there is a conflict between the Supreme Court and the Constitutional Tribunal, and as Ms. Dąbrowska noted "*it is impossible to define how this judgment should be treated. The doctrine indicates that the actions of the Constitutional Tribunal are devoid of legal force, because they interfere with the implementation of EU law in Poland and as such must be ignored by the organs of the judiciary. The practice, however, is unknown at the moment*". Further, Ms. Dąbrowska agreed with the proposition drawn from reports of bodies such as the Venice Commission and the report of the Polish Commissioner for Human Rights and the OSCE that it would appear from the new Articles that they preclude the right to challenge a court and thereby raise issues under Article 6 and 13 of the ECHR, and Article 47 of the Charter. Having said that, as Binchy J. noted in para. 106 of his judgment in *Orlowski*, she further stated that she has no knowledge of any irregularities in the appointment of judges to the common courts, apart from the fact that changes have occurred in the composition of the National Council for the Judiciary, the body which nominates judges for appointment, although she noted reports of three judges who were removed from a delegation to a court. As he observed, Ms. Dąbrowska also stated that "*no intentional interference has been proven so far*" in the random process involving the selection of judges to hear individual cases. Nevertheless, she also noted that, according to press releases, the Minister for Justice had removed from office 66 presidents, and 63 vice presidents of common courts.

28. At this point, it might be helpful to refer briefly to the report of the Commissioner for Human Rights in Poland of the 7th January, 2020, in the course of the legislative process in relation to the new laws. In his report he commented in the introduction as follows:

"In the opinion of the Commissioner for Human Rights, the Act directly violates a number of principles protected by the Constitution …

The Commissioner for Human Rights' assessment of the adopted Act is unambiguously negative as he considers the Act to violate the Constitution and the founding principles of the Polish legal order, to be in conflict with Poland's obligations towards the European Union, and to compromise the protection guaranteed by the European Convention on Human Rights. The entry into force of

the Act, in the form adopted by the Sejm, will call into question the legal dimension of Poland's participation in the European Union and the Council of Europe, will subject Polish courts and Polish judges to ultimate political control by the legislative and executive authorities and, most importantly, will drastically reduce the level of judicial protection of individual rights."

29. His conclusion, in para. 13 of his report, was equally stark. He said that:

> *"An analysis of the content of its provisions leads to an unequivocal conclusion that the real purpose of the regulation is not, in fact, to "organize systemic issues related to the status of a justice of the Supreme Court, ordinary, military, and administrative courts, as well as judicial self-government bodies and court authorities", as it is declared in the explanatory memorandum of the bill, but solving the immediate obstacles that have appeared in the jurisprudence of the Polish and European courts on the basis of the existing regulations and that prevent or hinder the implementation of political intentions which are contrary to the Constitution of the Republic of Poland, the European Convention on Human Rights and the law of the European Union."*

He added:

> *"Particular concerns … relate to the consequences for the protection of civic rights that would result from the Act's entry into force in the wording adopted by the Sejm. Preventing implementation of the judgment of the Court of Justice of 19 November 2019 will in fact constitute a refusal to carry out in loyalty the obligations arising from membership of the European Union … including, in particular, a refusal to ensure effective judicial protection of citizens' rights stemming from Article 19(1)(2) of the Treaty on the Functioning of the European Union and Article 47 of the Charter of Fundamental Rights of the EU. At the same time, it will constitute a blatant violation of the Constitution of the Republic of Poland due to the disregard of its provisions which assume respect for international law, by which the Republic of Poland has chosen to be bound."*

30. It is also worth referring briefly to some observations of the OSCE through its Office for Democratic Institutions and Human Rights. In an opinion dated the 14th January, 2020 on the new laws they observed, at paras. 32 and 33, as follows:

> *"The intended effect of these provisions appears to be that if individual (sic.) appointed by the President as a judge takes the oath of office, he/she acquires the status of judge that is conclusive and legally unassailable, even in case of doubts about the legality of the selection process that led to the appointment. This may also mean that an appointment could not be contested any longer after the appointment by the President even for a judge who would not meet the legal criteria, which are imposed by law on the NCJ for the selection of individuals to become judges.*

It is worth reiterating ODIHR's concerns regarding the new election modalities of the judicial members of the NCJ, particularly with respect to the actual and perceived independence of the Council."

31. In this context, it is also worth noting the views of the Polish Commissioner for Human Rights who commented that the absence of an ability to challenge an appointment would result in "*legal chaos*", which "*compromises the correctness of all court proceedings*". He went on to say:

> *"If courts, according to the amendments provided for in the adopted Act, are to refrain from examining whether the bodies referred to in Article 42a of the LSOC are duly empowered, consideration should be given to the fact that courts will, e.g. not be empowered to determine, neither by penal or civil procedure, the correctness of the composition of courts, or to verify whether court panels included any judges who should have been excluded. As a result, courts will not be capable of making any findings in this area. Therefore, the Act's provision in question brings up a legal chaos that is dangerous for a democratic state and compromises the correctness of all court proceedings."*

32. Again, the Venice Commission has commented on the new laws, and in particular the question of whether the Chamber of Extraordinary Control & Public Affairs should have the ability/power to assess the independence of judges or courts, including itself and the Disciplinary Chamber. They commented on Article 55(4) and expressed the view that it was contrary to Article 6(1) of the ECHR and Article 47 of the Charter, saying, at para. 41, as follows:

> *"In addition, new Article 55 (4) is contrary to the principle of a lawful judge (enshrined in to Article 6(1) of the ECHR and Article 47 of the Charter): it will be henceforth impossible to challenge a judge on the ground that the case has been allocated to him/her unlawfully and/or arbitrarily, or that the rules on territorial and substantive jurisdiction were breached. This provision may lead to abusive redistribution of cases to "loyal" judges. Such arbitrary allocation of cases is further facilitated by new provisions on the distribution of work-load in the courts which would increase the discretion of the court presidents (see, for example, new Article 22a, and new Article 37e, paragraph 2), and the new rule de facto permitting allocation of cases to a judge from another district court (see new Article 77, paragraph 9a, which permits to delegate a judge of the district court to another court "simultaneously with performing duties in his official place" of work, i.e. in the district where this judge normally works)."*

33. A number of further quotations from the bodies referred to, and from Ms. Dąbrowska, are of assistance in emphasising the severity of the impact of the changes brought about by the new laws. Ms. Dąbrowska, having referred to concerns expressed by the Venice Commission in relation to the allocation of cases, commented:

"The abovementioned concerns of the Venice Commission are ones of many arising after the changes giving the Minister of Justice the power to appoint and dismiss presidents of the common courts at his discretion. As mentioned in the report of 9th July 2020, in 2017 - 2018 the Minister of Justice replaced over a hundred court presidents and vice presidents. Due to the regulations mentioned in the initial report, and quoted in your question, the presidents of the courts may have a possible impact on the Random Case Assignment System and its settings."

Further, in relation to the power of the Minister of Justice to delegate a judge, she observed as follows:

"The Minister of Justice may also delegate a judge, with his consent, to perform duties of a judge – therefore also to adjudicate, inter alia, in another equivalent or lower court, and in particularly justified cases also in a higher court, for a specified period (not longer than 2 years) or for an indefinite period. The Minister of Justice may also dismiss a judge from a delegation. In the case of delegating for an indefinite period, the delegation of a judge can be cancelled without notice."

She went on to observe that delegating judges is a common practice in almost every court.

34. Further, in this context, it is worth noting the point made by the Polish Commissioner for Human Rights, who said that:

"The real purpose of the Act and of the definition in question [definition of judge] is to legalize the legal status of persons who have been appointed as judges, even if their appointment was in gross violation of the law."

He went on to express the view that the new laws would have a profound effect in Poland, saying, at page 4 of his opinion:

"The entry into force of the Act, in the form adopted by the Sejm, will call into question the legal dimension of Poland's participation in the European Union and the Council of Europe, will subject Polish courts and Polish judges to ultimate political control by the legislative and executive authorities and, most importantly, will drastically reduce the level of judicial protection of individuals' rights."

35. It cannot be gainsaid that the changes brought about by the new laws are far-reaching and concerning, particularly in the light of the deficiencies in the Polish system previously identified and recognised in cases such as *Celmer/LM*.

Further Information

36. Given the concerns that have arisen, the trial judge in this case directed that further information be sought from the issuing judicial authorities pursuant to the provisions of s. 20 of the Act of 2003. A series of questions were posed and, for convenience, I shall refer to those in relation to Mr. Orlowski only. Mr. Orlowski is due to be tried before the Zamość IJA and Lublin IJA. In answers furnished by letters dated the 3rd and 6th

November, 2020, both courts have confirmed that the legislative changes apply to the courts both of first instance and the appeal court before which Mr. Orlowski could appear. Further, both courts have confirmed that it is possible for disciplinary proceedings to be taken in respect of a judge dealing with the case of Mr. Orlowski, because of decisions taken in the case, but it was said only if the decisions are taken with gross and obvious violation of the provisions in force. Finally, in the more detailed answer provided by the court in Lublin to the question as to whether or not it would be possible for an accused person, who has concerns about the appointment and/or impartiality before whom the person may stand trial, to challenge and/or request that judge to recuse him or herself was raised. It would be helpful to set out the answer in full:

> *"In response to question 6 I would like to inform you that a prosecuted person (the accused in criminal investigation) in case he/she undermines the independence of the adjudicating court has a possibility to file a motion to exclude the judge. Pursuant to art 41 (2) of the Code of Penal Procedure a motion for the disqualification of a judge, filed pursuant to (1) after the judicial examination has been commenced, shall not be heard, save for cases in which the grounds for disqualification have arisen or did not become known to the party concerned until after the commencement of the examination. Save for the case described in (2) the decision on disqualification shall be made by the court before which the proceedings are pending; the judge concerned shall not participate in the panel which is to pass the decision on this disqualification.*
>
> *There is no appeal against this court's rejection of the motion of the accused which was filed in this mode.*
>
> *In the appeal proceedings the appellant of the judgment of the first instance may however point out that a violation of the provisions of substantive law has occurred according to art 438(1) of the Code of Penal Procedure… if it could affect the content of the decision. The exception from the discussed mode was stipulated in article 26 paragraph 2 of the Act of 8th December 2017 on Supreme Court (Journal of Laws.2019.825). In accordance with that provision Supreme Court Chamber of Control and Public Affairs of the Supreme Court deals with examining motions or statements concerning disqualification of a judge or name of the court before which the proceedings are commenced, including allegation of the lack of independence of the court or a lack of impartiality of the judge. The court examining the case shall immediately forward the motion to the President of the Supreme Chamber of Control and Public Affairs in order to initiate the proceedings in accordance with the principles set out in separate provisions. Forwarding the motion to the President of the Supreme Chamber of Control and Public Affairs does not stop the course of the ongoing proceedings. Pursuant to article 26 paragraph 3 of the quoted Act, the motion mentioned in paragraph 2 will not be heard if it relates to establishing or assessment of the legality of the appointment of the judge or his legitimacy to perform tasks concerning justice system."*

Thus it is clear that no motion can be heard relating to the legality of the appointment of a judge.

37. The trial judge in the High Court, having received those responses, observed, at para. 105 of his judgment, as follows:

> *"It is not in dispute that in these proceedings, the respondent has not put forward any evidence as to how any of the generalised or systemic deficiencies in the rule of law in Poland, regardless as to when those deficiencies first arose, should cause the Court to be concerned that there are substantial grounds for believing that, having regard to his personal situation, and the nature of the offences with which he is charged, he will run a real risk of a breach of the fundamental right to a fair trial. The respondent has not sworn any affidavit in opposition to this application, to say how it is that he considers his trial will be affected by the new laws or the earlier legislative changes in Poland which have been found to constitute deficiencies in the rule of law."*

38. He then went on to make some observations in relation to the evidence of Ms. Dąbrowska, and to the fact that she was not in a position to provide any information in relation to disciplinary proceedings that have been taken against a judge where Mr. Orlowski might be tried but there was some information in relation to disciplinary proceedings against unnamed judges in relation to the area in which Mr. Lyszkiewicz is to be tried. However, that was the limit of her knowledge.

39. For completeness, I would like to refer this stage to a passage from the Resolution of the Supreme Court of Poland referred to previously. At paragraph 59 of the resolution the Supreme Court stated:

> *"The current instability of the Polish judiciary originates from the changes to the court system over the past years, which are in breach of the standards laid down in the Constitution, the EU Treaty, the Charter of Fundamental Rights, and the European Convention of Human Rights. The leitmotif of the change was to subordinate judges and courts to political authorities and to replace judges of different courts, including the Supreme Court. That affected the appointment procedure of judges and the bodies participating in the procedure, as well as the system for the promotion and disciplining of judges. In particular, a manifestly unconstitutional attempt was made to remove some judges of the Supreme Court and to terminate the mandate of the First President of the Supreme Court, contesting the legitimacy of the Supreme Court. The systemic changes caused doubts about the adjudicating legitimacy of judges appointed to the office in the new procedures. The political motivation of the changes jeopardised the objective conditions necessary for courts and judges to be perceived as impartial and independent.*
>
> *The Supreme Court considers that the politicisation of courts and their subordination to the parliamentary majority in breach of constitutional procedures*

establishes a permanent system where the legitimacy of individual judges and their judgements may be challenged with every new political authority. That notwithstanding, the politicisation of courts departs from the criteria of independence and impartiality of courts required under Union law and international law, in particular Article 47 of the Charter and Article 6(1) ECHR. That, in turn, causes uncertainty about the recognition of judgments of Polish courts in the Union space of freedom, justice and security. Even now courts in certain EU Member States refuse to co-operate, invoking violation of the standards, and challenge judgments of Polish courts."

Discussion

40. The CJEU in *LM* pointed out that it was only in exceptional cases, where a person has established substantial grounds to the effect that they will run a real risk of breach of the fundamental right to an independent tribunal, and of the essence of the fundamental right to a fair trial, that the executing state can refuse to execute the European Arrest Warrant in relation to that individual. The CJEU in that case emphasised the requirement to carry out a specific and precise assessment of the particular case. It was only after such an assessment was carried out that a decision could be taken to refuse to execute the European Arrest Warrant. It was pointed out in that case that the function in relation to suspending the effect of the Framework Decision was one for the European Council. (See, in that context, paragraph 72 of its judgment).

41. The CJEU in the more recent case of *L and P* took a similar line. In that case, reference to the CJEU was made by a Dutch court in relation to recent developments in the light of which it had doubts as to the independence of the judiciary in Poland. The CJEU at paragraph14 cited the basis for those doubts, including a number of judgments of the CJEU in cases such as *AK and others (Independence of the Disciplinary Chamber of the Supreme Court),* 19th November, 2019, (C-585/18, C-624/18 and C-625/18), and of the 26th March, 2020 in the case of *Miasto Łowicz and Prokurator Generalny* (C-558/18, and C-563/18), a judgment of the Supreme Court of Poland of the 5th December, 2019, the action for failure to fulfil obligations brought by the European Commission against Poland, *Commission v. Poland* (C-791/19), the adoption of the new laws which led the Commission to initiate infringement proceedings on the 29th April, 2020, and the holding of a hearing on the 9th June, 2020 concerning the lifting of the criminal immunity of a Polish judge, and the delivery of a judgment on the same date according to information received by the referring court. Once again in that case, the CJEU emphasised the importance of the principles of mutual trust and mutual recognition underpinning the Framework Decision. (See para. 40). At paragraph 42, the court said:

> *"Indeed, the existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case".*

42. The court then went on to say, at paragraphs 58 and 59, as follows:

"58. The Court has thus held that it is only if the European Council were to adopt a decision, such as that envisaged in the preceding paragraph, and the Council were then to suspend Framework Decision 2002/584 in respect of the Member State concerned that the 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 or her fundamental right to a fair trial will be affected. (judgment of 25 July 2018, Minister for Justice & Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586 paragraph 72).

59. To accept that systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, however serious they may be, give rise to the presumption that, with regard to the person in respect of whom a European arrest warrant has been issued, there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial if he or she is surrendered to that Member State – which would justify the non-execution of that arrest warrant – would lead to an automatic refusal to execute any arrest warrant issued by that Member State and therefore to a de facto suspension of the implementation of the European arrest warrant mechanism in relation to that Member State, whereas the European Council and the Council have not adopted the decisions envisaged in the preceding paragraph."

43. The court in that case, therefore, concluded at paragraph 69 as follows:

"In the light of all the foregoing considerations, the answer to the questions referred is that Article 6(1) and Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued is to be surrendered, has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the Member State that issues that arrest warrant which existed at the time of issue of that warrant or which arose after that issue, that authority cannot deny the status of 'issuing judicial authority' to the court which issued that arrest warrant and cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled."

44. The trial judge, insofar as the question arose as to whether or not it was possible to challenge the composition of a trial court, accepted the views of Ms. Dąbrowska and also relied on the replies to the request for additional information to conclude that it was not

so possible. Nevertheless, he did not accept the argument that the decisions in *LM* and *L and* P did not embrace matters concerning the appointment of judges or the right to a trial before a tribunal established by law (See para. 120 of the judgement). He was of the view that "doubtful appointments" had been "in the mix" when the CJEU delivered its judgement is in those cases. He went on to conclude at para. 121 of *Orlowski* that:

> *"That being so, I find it difficult to comprehend the argument that a person such as the respondent, who wishes to raise objection to his surrender to Poland on this ground, does not have to meet the test that has in effect been pronounced twice by the CJEU in L.M. and L and P, and applied in this jurisdiction by both the High Court in Celmer (No. 5) and, on appeal, in the Supreme Court. For this reason alone, this objection must be rejected, but there are also other reasons to reject the same."*

45. It is therefore necessary to consider whether the trial judge was correct in reaching that view. It is undoubtedly the case that the appointment of judges was "in the mix" when the question of independence and impartiality of judges was being considered in *LM* and *L and P*. Equally, as pointed out by the trial judge, it was noted in *L and P* that the adoption of the new laws led the European Commission to initiate infringement proceedings against Poland on the 29th April 2020 in respect of the new laws. But does that mean that the two-step test has to be complied with as the trial judge concluded?

46. It seems to me that in order to answer that question, it is necessary to consider two matters, one, the effect of an invalid appointment and two, the absence of an effective remedy by which to challenge an invalid appointment.

47. The underlying argument of the appellants relies on the provisions of Art 6(1) of the ECHR to the effect that everyone is entitled to a hearing before "an independent and impartial tribunal established by law." Reliance was placed by the appellants on the decision of the ECtHR in the case of *Ástráðsson v. Iceland* (Application No. 26374/18, 1st December, 2020). In that case, the ECtHR was considering a complaint by the applicant that an appeal court which confirmed his conviction in respect of motor offences was not a tribunal established by law given irregularities in relation to the appointment of one of the members of the court. The ECtHR made the following observations at para. 240:

> *"A finding that a court is not "tribunal established by law" may, evidently, have considerable ramifications for the principles of legal certainty and irremovability of judges, principles which must be carefully observed having regard to the important purposes they serve. That said, upholding those principles at all costs, and at the expense of the requirements of "a tribunal established by law", may in certain circumstances inflict even further harm on the rule of law and public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine whether there is a pressing need - of a substantial and compelling character - justifying the departure from the principle of legal certainty and the force of res judicata … and the principle of irremovability of judges, as relevant, in the particular circumstances of the case."*

48. The ECtHR then went on to develop a threshold test for the assessment as to whether irregularities in a given judicial appointment process were of such gravity as to amount to a breach of Article 6(1), namely, whether there was 1) a manifest breach, 2) of a fundamental rule of the appointment procedure and 3) whether allegations were effectively reviewed and redressed by the domestic courts in a Convention-compliant manner. In dealing with the 3rd step of the test, the Court said:

"248. Thirdly, the Court considers that the review conducted by national courts, if any, as to the legal consequences - in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself.

249. The Court finds it noteworthy to emphasise that if, as argued by the Government (see paragraphs 176 and 184 above), the national courts' findings were considered to be fully dispositive of the assessment under the "tribunal established by law" requirement regardless of the nature, scope and quality of the review conducted by those courts—that is, if the Court was not entitled to assess for itself whether the consequences of the breach of the domestic judicial appointment rules were such as to violate Article 6¬—, then this autonomous Convention right would be devoid of any real protection in the present context."

The court went on to say at paragraph 250 that:

"the principle of subsidiarity imposes a shared responsibility between the States Parties and the Court, and that national authorities and courts must interpret and apply the domestic law in a manner that gives full effect to the Convention… It therefore follows that while it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, it falls ultimately on the Court to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention…"

49. The ECtHR in that case, having applied the three-step test, concluded that there had been a breach of Article 6 (1) of the Convention.

50. Reference was also made in the course of argument to the case of *FV v. Council of the European Union* Case T-639/16 P where it was stated at paras. 68 and 69 as follows:

"68. The principle of the lawful judge, the objective of which is to guarantee the independence of judicial power with respect to the executive, stems from that requirement, which must be interpreted as meaning that the composition of the court and its jurisdiction must be regulated beforehand by legal provisions….

69. In that context, it should be recalled that, under the first sentence of Article 52(3) of the Charter of Fundamental Rights, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human

Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), their meaning and scope are to be the same as those laid down by that convention."

51. Thus, both under the provisions of Article 6(1) and Article 47, one important aspect of the requirement that courts must be independent and impartial concerns the composition of the court and the regulation of appointments to a court. The respondent has sought to distinguish the decision of the ECtHR on the basis that the complainant in *Ástráðsson* could only complain about a breach of his rights under Article 6 because there had been an irregularity in the appointment of one of the judges who dealt with his criminal cases, that is to say, he could show that the irregularity affected his individual case. This was contrasted with the case of the appellants as they have led no cogent evidence to suggest that any of the judges before whom they are liable to appear have been appointed other than in accordance with domestic Polish law.

52. There is no doubt that the appellants cannot say at this point in time that there is an irregularity in the appointment of the judge or judges who will hear their respective cases in the sense that it is a feature of the system of allocation of judges as explained previously that the judges dealing with their respective cases will be drawn at random. Thus, it appears that the appellants cannot identify the judges likely to deal with their cases and can only rely on the systemic issues as to appointment of judges and not on a specific complaint as to the validity of the appointment of the specific judges likely to hear their cases.

53. For completeness, I should refer also to the case of *HG & Simpson* Joined cases C-542/18 RX II and C-543/18 RXII in which it was said:

"55. However, it follows from the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, guaranteed by Article 47 of the Charter, that everyone must, in principle, have the possibility of invoking an infringement of that right. Accordingly the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure at issue could lead to an infringement of that fundamental right.

…

57. In that regard, it must be emphasised that the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the courts

own motion (see, to that effect, judgement of 1 July 2008, Chronopost and La Poste v UFEX and others, C-341/06P... paragraphs 46 and 48)."

The Court continued at para. 75:

"It follows from the case-law cited in paragraph 71 and 73 of the present judgement that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system."

This case emphasises the importance of the appointment procedure for judges as part of the right to have an independent and impartial tribunal established by law.

Effective remedy

54. The point that arises under this heading is that even if the appellants were in a position to identify the judges assigned to preside over their cases and therefore could identify any deficiency in the appointment of such judges, there is nothing they can do about that having regards to the provisions of the new laws and Article 26(3) in particular. It is not necessary to reiterate everything that has been about the effect of the new laws in this regard. Suffice it to say that the appellants, on return to Poland, if they are in a position to demonstrate that any judge assigned to deal with their cases has not been validly appointed, are left completely without a remedy. Clearly, in such circumstances, the position of the appellants would appear to fall foul of the test outlined in the *Ástráðsson* case referred to above.

Decision

55. The systemic deficiencies apparent in the rule of law in Poland previously identified in this jurisdiction in the *Celmer* case in its various iterations and in the jurisprudence of the CJEU in cases such as *LM* and more recently in *L and P* are now even more troubling and of deeper concern following the introduction of the new laws. The Supreme Court of Poland in its Resolution of the 23rd January 2020 has said that a Court formation "is unduly appointed" where the court formation includes a person appointed to the office of a judge of a common court (and other courts) on application of the National Council for the Judiciary formed in accordance with the Act of 8th December 2017 and certain other Acts, if the defective appointment causes, under specific circumstances, a breach of the standards of independence within the meaning of the Constitution of Poland, Article 47 of the Charter and Article 6 (1) of the EHCR.(See Resolution No. 2). It is hard to imagine a more severe condemnation of the system of appointment of judges from a country's Supreme Court.

56. It is noteworthy that as previously referred to, severe criticism of the new laws has been voiced by the Polish Commissioner on Human Rights, the OCSE and the Venice Commission. It is not necessary to repeat the criticisms of the new laws previously referred to. This Court also has regard to the proceedings brought by the European Commission against Poland regarding disciplinary proceedings concerning judges. (See Press Release No. 47/20 of the CJEU.) This Court is also mindful of the infringement procedure commenced by the European Commission against Poland as a result of the new laws. (See the Press Release of the 29th April 2020.)

57. It would be useful at this point to refer to a passage from the judgement of this Court in *Celmer v. The Minister for Justice and Equality* [2019] IESC 80 where O'Donnell J. observed at paragraph 81 as follows:

> *"It should be said that the test posited in the judgement of the C.J.E.U. is not one that is easy to apply. Normally, it might be said that where systemic deficiencies of any kind are identified, it becomes unnecessary to identify the possibility of those deficiencies taking effect in an individual case. This is particularly so where the value concerns one that is essential to the functioning of the system of mutual trust. Indeed, it was this difficulty that led the trial judge to make the reference to the C.J.E.U. in the first place. It may also be questioned, at least in the abstract, whether once such systemic deficiencies have been found there is then room or need for further inquiry. It is not, however, for the national court to interrogate the logic of the reasoning of the C.J.E.U. This is a difficult and unprecedented situation where the C.J.E.U. has set out the steps to be taken by the national court. It is unmistakable that the national court is required to conduct the second step of the Aranyosi and Căldăraru analysis. It is also inescapable in the logic of the judgement of the C.J.E.U. that it is possible that there should be systemic deficiencies apparent at the level of the court before the individual is to be tried and, yet, for it to be determined that surrender should not be refused because it has not been established that those deficiencies will operate at the level of the individual case, having regard to the person charged, the offence with which he is charged, and the factual context which forms the basis of the European arrest warrant (para. 75 of the LM judgement).*
>
> *82. There are, perhaps, good reasons why this should be so. The problem posed for the European Union by systemic changes in the Member State, apparently inconsistent with fundamental values of the Union, is one which may require a co-operative and coherent response from all the institutions of the Union. The national court faced with a request for surrender is a court of the Union, but it is not intended to have the primary role in the enforcement of the fundamental values of the European Union in another Member State. Refusal of surrender under the Framework Decision by one Member State can only be one part of the response of the European Union to issues concerning the rule of law in another Member State and why the national court may be required to focus precisely on the particular circumstances concerning*

the individual surrender is sought and the offences for which they are sought to be tried."

58. O'Donnell J. went on to say at para. 85:

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

59. The changes that have occurred in Poland concerning the rule of law are, as previously observed, even more troubling and grave than they were at the time when *LM* was decided by the CJEU. It now appears that there are significant issues with regard to the validity of the appointment process for judges in Poland. It is impossible for the appellants in this case to identify the judges before whom they are to be tried because of the manner in which cases are randomly allocated. Even if they could identify the judges and establish that the judges were not validly appointed and thus not part of a Court established by law, it is clear that there is no possibility of challenging the validity of the composition of the court allocated to try them by reason of the provisions of the new laws and, in particular, Article 26(3) thereof. That being so, the question must arise as to whether the systemic deficiencies in the Polish system are such that they, by themselves, amount to a sufficient breach of the essence of the right to a fair trial, requiring the executing authority, in this case, Ireland, to refuse surrender.

60. The answer to that question is not, in the view of this Court, *acte clair* and in the circumstances, this Court proposes to request a ruling from the CJEU as follows:

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

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

(3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the appellants cannot at this point in time establish that the courts before which they

will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial requiring the executing state to refuse the surrender of the appellants?

61. This Court invites the parties to make submissions on the final version of the questions to be submitted to the CJEU by the 29th July 2021. It should be emphasised that the finalisation of the text of the reference, including the questions to be referred, is ultimately a matter for the Court. Having considered any observations which may be received within the timeframe referred to, the Court will finalise the terms of the reference document and submit it to the CJEU.