

The High Court

Record No. 2013 EXT 295

Record No. 2014 EXT 8

Record No. 2017 EXT 291

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

And

ARTUR CELMER

RESPONDENT

AFFIDAVIT OF RALPH BUNCHE

I, **RALPH BUNCHE**, Regional Director of Fair Trials Europe, Rue de la Pépinière 10A, 1000, Brussels, Belgium, aged eighteen years and upwards hereby **MAKE OATH** and say as follows:

1. I, Ralph Bunche, Regional Director of Fair Trials Europe ("**Fair Trials**"), a registered public foundation in Belgium (No 0552.688.677), submit this affidavit in support of Fair Trials' motion for permission from the High Court on behalf of Fair Trials to intervene as Amicus Curiae in the case between *The Minister for Justice and Equality* and *Artur Celmer* in the above entitled proceedings. This case raises issues of significant public importance likely to affect a great number of persons in Ireland and across the rest of the European Union ("**EU**"). Permission to intervene is requested in order to assist the High Court on questions to be referred to the Court of Justice of the European Union ("**CJEU**") related to the application of European law related to the right to a fair trial to the EU Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.
2. Fair Trials is a non-governmental organisation based in London, Brussels and Washington DC that works for fair trials according to internationally recognised

standards of justice.¹ Fair Trials pursues its mission by helping people to understand and exercise their fair trial rights; by addressing the root causes of injustice through its legal and policy work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights. Fair Trials' network activities include coordination of the Legal Experts Advisory Panel ("LEAP") – a pan-EU network of criminal justice and human rights experts, currently bringing together representatives from 110 law firms, 26 civil society organizations, and 20 universities from across all 28 EU Member States.²

Fair Trials' capacity and expertise as a prospective Amicus Curiae

3. Fair Trials has long advocated for improved protection of human rights in the context of cross-border judicial cooperation systems such as the European Arrest Warrant ("EAW"). It has contributed to the development of reform proposals in Brussels; provided training activities for lawyers, prosecutors and judges working on cross-border cases; provided a forum for the exchange of significant judicial decisions on judicial cooperation between EU Member States; contributed expertise to national court cases on extradition in the United Kingdom, Sweden, the Czech Republic and Belgium; and recently served as an Amicus Curiae on questions related to the EAW before the European Court of Human Rights in *Prisacaru v Belgium and Romania* (Application No 8339/15). The latter intervention, filed in February 2018, deals with the application of ECHR standards to the EAW and details responses of national courts to the *Aranyosi and Caldaru* judgment.³
4. In addition, Fair Trials has over the past two years undertaken a major project monitoring the situation of persons surrendered between EU Member States under EAWs. This project is designed to gauge the effectiveness of protection

¹ The Fair Trials Group comprises: Fair Trials International, a registered charity (No 1134586) and registered with limited liability (No 7135273) in England and Wales, 5 Castle Road, London NW1 8PR, UK; Fair Trials Europe, a registered public foundation in Belgium (No 0552.688.677), Rue de la Pépinière 10A, 1000, Brussels, Belgium; and Fair Trials Americas a registered 501(c)(3) public charity in the United States of America (No DLN17053243307017), 1110 Vermont Ave NW, Suite 500, Washington, D.C. 20005 U.S.A.

² The LEAP network is part-funded by a grant from the European Commission and includes members from Poland. In October 2016, Fair Trials took a position in support of members of the LEAP network in Poland on the constitutional issues arising in Poland which can be accessed at <https://www.fairtrials.org/fair-trials-signs-joint-letter-to-polish-authorities-on-constitutional-crisis/>. In order to maintain its neutral position in the context of its proposed intervention, Fair Trials has not engaged with its Polish LEAP members in relation to this case and is not seeking to make submissions or provide the Court with materials on the rule of law in Poland.

³ Our intervention in the case can be accessed at <https://www.fairtrials.org/wp-content/uploads/2018/03/Fair-Trials-Prisacaru-Intervention1-final-clean.pdf>.

in issuing Member States of surrendered person's rights in criminal proceedings after surrender pursuant to an EAW. The project particularly focuses on post-surrender treatment in Lithuania, Poland, Romania and Spain and has included an assessment of the manner in which Member State courts are applying the recent case-law of the Court of Justice of the EU ("CJEU"), in particular as it relates to risk assessments to be made by executing courts on the fundamental rights implications of surrenders pursuant to the CJEU's *Aranyosi and Caldaru* judgment in Joined Cases C-404/15 and C-695/15 PPU.

5. Fair Trials is also an expert on the right to a fair trial as applied across Europe. Regarding Article 6 of the European Convention on Human Rights ("ECHR"). Fair Trials has made multiple interventions on Article 6 ECHR in the European Court of Human Rights ("ECtHR"), offering a comparative perspective on procedural rights issues in recent cases including *Ibrahim and Ors v United Kingdom* (Application No 50541/08), *Ciorny v Slovakia* (Application No 6177/10), *AT v Luxembourg* (Application No 30460/13)), *Beuze v. Belgium* (Application No 71409/10).
6. Moreover, through its coordination of the LEAP network, Fair Trials has been at the forefront of the development and implementation of EU fair trials standards established in Chapter VI of the EU Charter on Fundamental Rights ("EU Charter"), including procedural fair trial rights within the EU. In 2016, Fair Trials published a report on "Defence Rights in Europe: The road ahead", highlighting its role in the development of the Roadmap Directives adopted by the EU. Fair Trials is regularly contributing expert comparative advice and opinion to inform the work of the EU institutions on the rights enshrined in Chapter VI of the EU Charter and promote the implementation of the Roadmap Directives across the EU.
7. Fair Trials proposes to draw upon its expertise on (i) the principle of mutual recognition in EU law and in particular the EAW; (ii) EU law and ECHR standards related to extradition, the right to a fair trial, judicial independence and the rule of law; and (iii) the practical application of these standards across Europe to provide assistance to the Court in determining the questions to be referred to the CJEU in this case.

Scope of the proposed intervention

8. The present case provides an important opportunity to clarify the fundamental rights grounds on which a court may delay executing an EAW context and

raises the issue of the interpretation of the right to a fair trial in the context of EU law instruments of cross-border judicial cooperation.

9. Should Fair Trials be granted leave, it would seek to assist the Court by supplying the following:
 - a. Presentation of the relevant EU law, as interpreted by the CJEU, regarding aspects of the right to an effective remedy and fair trial, including judicial independence, encompassed in Article 47 of the EU Charter.
 - b. Presentation of the relevant EU law, as interpreted by the CJEU, regarding the operation of the EAW, the delineated grounds for delay in executing or non-execution of an EAW, and application of the principle of effective judicial protection of individual rights through Article 1(3) of the EAW Framework Decision;
 - c. Analysis of the EU law standards presented and suggestions of specific questions which could be referred to the CJEU related to the grounds for non-execution of EAWs in light of risks to the right to a fair trial, including judicial independence.
10. Due to Fair Trials' extensive experience in judicial cooperation in criminal matters, I believe that Fair Trials is well placed to assist the Court with these matters.⁴
11. While I fully appreciate that this Honourable Court might refuse to grant the application, given the urgency of this case as expressed by this Honourable Court, I propose to set out very briefly the issues Fair Trials sees as arising in the context of the draft questions currently being considered for reference. In this regard, I fully appreciate that should this Honourable Court decline to join Fair Trials to the case, the following may not be considered of any relevance or assistance to the Court.
 - a. It is our opinion based on our knowledge of the CJEU's efforts to develop the jurisprudence around EU criminal law that the CJEU is more likely to

⁴ Moreover, by granting Fair Trials leave to intervene as a third-party in this case, the Court will also ensure that Fair Trials' expertise on these matters can also benefit the CJEU. Pursuant to Article 96(1)(a) of the CJEU's Rules of Procedure third parties other than EU Institutions and States are authorized to submit observations to the CJEU only if they are parties to the main proceedings. See Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013, p.65) and on 19 July 2016 (OJ L 217, 12.8.2016, p.69).

seize itself of the matter that this Court will be putting before it if the questions referred are given a significant grounding in EU law.

- b. The recent judgment of the CJEU in *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (C-64/16), which relates to questions of judicial independence in Portugal, establishes the principle of “effective judicial protection of individual rights under EU law” referred to in Article 19(1) TEU as an obligation of all Member State courts. Moreover, the CJEU expressly states in that judgment that this principle is enshrined in Article 47 of the Charter (the right to an effective remedy and fair trial).
- c. It is our opinion that this principle, when read in conjunction with the obligation under Article 1(3) of the EAW Framework Decision, obliging Member State courts to respect fundamental rights in the application of the EAW Framework Decision, may require a fair trials risk assessment by courts in executing Member States that is different from the two tests suggested by the Court in its draft referral questions.
- d. In light of these EU law standards and this recent case, this gives rise to the possibility that the appropriate test relating to risks of fair trial violations, including judicial independence, may be different from both the CJEU’s *Aranyosi and Căldăraru* test relating to torture and inhuman treatment;⁵ and the ECtHR “flagrant denial” standard referred to in this Court’s second question.⁶
- e. Thus, we would suggest that the Court might rephrase its questions to place them more firmly in an EU law context along the lines of the following draft questions:
 - i. *Does the principle of “effective judicial protection of individual rights under EU law” referred to in Article 19(1) TEU and defined by the Court in Associação Sindical dos Juizes Portugueses (C-64/16), read in conjunction with the obligation to uphold respect for fundamental rights in Article 1(3) of the EAW Framework Decision, require a court in an executing Member State to assess the risks to the rights enshrined in Article 47 of the Charter (right to an effective remedy and fair trial) in the issuing Member State*

⁵ The right to be free from torture and ill-treatment is an absolute, non-derogable right, the possible violation of which gives rise to an express bar to extradition pursuant to Article 19(2) of the Charter. See also Recital 13 of the EAW Framework Decision.

⁶ In this regard we would refer to the Advocate General Sharpston’s opinion in *Radu* (C-396/11).

and to delay execution of the EAW in the event that such a risk is established?

ii. *To what extent should this assessment and the process for requesting and exchanging additional information after a risk has been assessed follow the process established by the Court in the joined cases of Aranyosi and Caldaru (C-404/15 and C-659/15)?*

12. Should the court grant Fair Trials leave to intervene, we would be able to elaborate upon these points above in short order. As amicus curiae, Fair Trials will not address the specific facts of this case.⁷ Fair Trials has instructed local solicitors, Sheehan and Partners to assist with preparation of the submissions should leave be granted and is fully aware that should Fair Trials be granted the within application, that Sheehan and Partners and Counsel instructed on their behalf, will bear a particular responsibility in terms of bringing all relevant materials to the attention of the Court, even if those materials are adverse to any position adopted by Fair Trials.

Costs of the proceedings

13. Fair Trials undertakes to cover all of its own costs incurred and will not seek to impose costs upon any of the other parties. The intervention will be short and concise and will avoid prolonging any hearings, especially in view of the fact that Mr. Celmer is currently in custody since his arrest on 5 May 2017.

14. The Court is welcome to contact Fair Trials at the charity's Brussels address above, or through its solicitors in Dublin Sheehan and Partners should it need any further details about this intervention.

⁷ Solicitor for the respondent, Mr. Ciaran Mulholland, is known to Fair Trials, having sought a quote from Mr. Mulholland for a news piece published on our website about this case. We confirm that both the decision to seek leave to intervene in this case and the content of the prospective intervention are entirely independent of Mr. Mulholland and his client, in line with our charitable purpose. This news piece is available at <https://www.fairtrials.org/irish-court-rejects-surrender-to-poland-citing-threats-to-judicial-independence/>. Moreover, as discussed in footnote 2, *supra*, while in October 2016 Fair Trials took a position on the constitutional issues arising in Poland our interest in intervene in this case and the scope of our intervention is limited to assisting in determining the appropriate application of European standards on the right to a fair trial to the EAW

SWORN by the said **Ralph Bunche** at Rue de la Pépinière 10A, Brussels, Belgium on March 20, 2018 before me, Laure Baudrihay-Gérard, a Practising Solicitor and I know the Deponent.

Practising Solicitor

Deponent

Filed herein this day of
Solicitors for Fair Trials.

2018 by Sheehan and Partners,