

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

SUBMISSIONS OF PROPOSED AMICUS CURIAE - FAIR TRIALS EUROPE

Background

1. On 12 March 2018, in *the above entitled proceedings*, this Honourable Court gave judgment regarding the surrender by Ireland of a Polish national to Poland pursuant to the 2002 Framework Decision on the European Arrest Warrant of 13 June 2002 ("**EAW Framework Decision**"). This Honourable Court decided to refer questions of law to the CJEU and adjourned the hearing until the week commencing 19 March, when she proposed to formulate and refer the questions to the CJEU.
2. By way of background, the EAW Framework Decision lists in Article 3 and Article 4 respectively the mandatory and discretionary grounds for non-execution of an EAW, which do not expressly refer to fundamental rights or rule of law risks. The EAW Framework Decision was amended by the Framework Decision 2009/299/JHA of 26 February 2009 which introduced a new Article 4a on trials in absentia. Article 4a introduces a new discretionary ground for non-execution if the person did not appear in person at the trial resulting in the decision and was not duly notified, an element of the right to a fair trial.
3. This Honourable Court found that the rule of law in Poland had been systematically damaged on the basis of (i) the Reasoned Proposal of the European Commission in accordance with Article 7(1) of the Treaty on European Union ("**TEU**") regarding the rule of law in Poland dated 20 December 2017 and (ii) the Opinions from the European Commission for Democracy through Law ("**Venice Commission**"). These findings raise the question as to whether, in the context of a finding by an executing judicial authority

that the issuing Member State has breached the common values of rule of law and democracy, a requested person should be surrendered pursuant to an EAW?

The Court's proposed questions for the CJEU

4. In paragraph 145 of her judgement, this Honourable Court suggested the following two questions, pointing towards two possible grounds for non-execution:
 - a. "Is the *Aranyosi and Caldararu* test, which relies upon principles of mutual trust and mutual recognition, the correct test to apply where the High Court, as an executing judicial authority under the Framework Decision, has found that the common value of the rule of law set out in Article 2 TEU has been breached in Poland?"
 - b. "If the test to be applied is whether the requested person is at real risk of a flagrant denial of justice, does the High Court, as an executing judicial authority, have to revert to the issuing judicial authority for any further necessary information about the trial that this requested person will face, where the High Court has found that there is a systemic breach to the rule of law in Poland?"
5. The first question addresses the scope of the test established by the CJEU in the Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* of 5 April 2016 by asking the CJEU whether the test is also applicable in circumstances where there is evidence that the rule of law in the issuing Member State has breached Article 2 TEU.¹ The second proposed question appears to foresee the possibility that the CJEU finds that the *Aranyosi and Căldăraru* test does not apply, and therefore queries whether the correct test is, in fact, the "flagrant denial" of fair trial standard determined by the European Court of Human Rights ("**ECtHR**"). For reference, in the context of Article 6 of the European Convention for the Protection of Human Rights ("**ECHR**"), the ECtHR has held that the obligation to transfer will be affected only "exceptionally" and where the person in question "has suffered or risks suffering a flagrant denial" of his rights to a fair trial.
6. In our view, as a result of developments in EU law related to the right to a fair trial, there is a possibility that neither of these tests may in fact be applicable to cases involving transfers of persons within the EU where there are risks in the receiving Member State to the right to a fair trial as enshrined in Article 47 of the EU Charter of Fundamental Rights ("**EU Charter**").

¹ Article 2 TEU provides that: "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".

The *Aranyosi and Caldăraru* test

7. In *Aranyosi and Căldăraru* the CJEU ruled that a court in the executing EU Member State should not – despite the EU law presumption of mutual trust – execute an EAW where the court finds that there is a sufficient level of risk that transfer will result in detention in the issuing Member State in conditions that would constitute inhuman or degrading treatment pursuant to Article 4 of the EU Charter (Article 3 of the ECHR). This judgment establishes an obligation on courts in the executing Member States to assess whether there is evidence of a systemic violation of EU Charter Article 4 rights (Article 3 ECHR) because of prison conditions in the issuing Member State. If such a violation exists, there is a further obligation to determine whether there is a risk that those conditions would apply to the individual subject to the EAW, for example because the particular prison or part of the prison that the person will be held in has those concerning conditions. If the court does not find that this systemic risk will impact the individual in question, then the court has a duty to execute the EAW. If the court, however, does find that there is a risk to the individual, the court has an obligation to seek further clarification from the issuing Member States and to delay execution of the EAW until the court is satisfied that the risk is no longer present.²
8. In our view, the CJEU may decide not to extend this test to cover the risk of violation of the right to a fair trial, including judicial independence, as enshrined in Article 47 of the EU Charter rights both because of differences in the substance of the right at issue and in the form of the test needed to assess a violation of the right.

A. Differences in the substance of the rights at issue

9. With regards to the substance of the rights at issue, in the present circumstances, this Honourable Court has dismissed the argument presented by the Respondent in relation to Article 4 EU Charter (Article 3 ECHR)³ and only retained the potential implications of Poland's legislative changes on the respondent's right to a fair trial. There are critical differences between the protection of these rights in the EU Charter and in the EAW Framework Decision that may indicate that the CJEU would not apply the *Aranyosi and Căldăraru*.

² Further information on the judgement and EU Member State courts responses to it can be found in Fair Trials' Amicus Curiae intervention before the ECtHR in *Prisăcaru v. Belgium and Romania* (App. No 8339/15) available at <https://www.fairtrials.org/wp-content/uploads/2018/03/Fair-Trials-Prisăcaru-Intervention1-final-clean.pdf>. Of note, in the case related specifically to Mr. Aranyosi, who was sought for the purposes of a criminal prosecution rather than to serve a sentence, there was a follow-on question referred to the CJEU asking whether the court in the Executing Member State must only assess the risk of violations in the facility that the subject of the EAW will initially be held, or whether the court must also assess the risks in any subsequent facility that the subject may be held in, for example in any facility where the subject might serve a sentence if subsequently convicted. The CJEU ultimately did not rule on this issue because the EAW was subsequently withdrawn. See *Aranyosi* C-496/16 Order of the Court (Third Chamber) of 15 November 2017.

³ Paragraphs 38-40.

10. Article 4 of the EU Charter provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” As the CJEU noted in paragraph 86 of the *Aranyosi and Căldăraru* judgment “that prohibition is absolute in that it is closely linked to respect for human dignity, the subject of Article 1 of the Charter.” Moreover, Article 19(2) of the EU Charter provides that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” This absolute bar to extradition is reflected in Recital 13 of the EAW Framework Decision, which similarly provides that “[n]o person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”
11. The rights at issue in this case are enshrined in Article 47 of the EU Charter (Right to and effective remedy and to a fair trial), which provides that: *“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. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”*
12. In contrast to the Article 4 EU Charter rights, there is no corresponding absolute bar to extradition similar to that found in Article 19 of the EU Charter. The EAW Framework Decision also does not make an express reference to such a prohibition. While the CJEU’s *Aranyosi and Căldăraru* judgment does not make reference to the prohibition on extradition contained in the EU Charter, it is possible that the CJEU may choose to distinguish the *Aranyosi and Căldăraru* test from the test applicable in this case as a result of this different level of protection contained in the EU Charter and the Recitals to the EAW Framework Decision.

B. Potential differences in the form of the test that might be applied

13. The CJEU may also distinguish the *Aranyosi and Căldăraru* test from the test applicable to risks of violations of Article 47 of the EU Charter because of the form of the test necessary to find a risk in such cases. As outlined above, the *Aranyosi and Căldăraru* test requires determination of systemic problems in prison conditions in Issuing Member States and a subsequent determination of whether those systemic problems are in existence in the facility in which the subject of the EAW will be held. As the CJEU outlined in paragraph 93 of the *Aranyosi and Căldăraru* judgment:

The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual

concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.

14. This reflects the fact that problems with prison conditions in any one EU Member State may not be uniform across all facilities and that a surrendered person may, in fact, be held in conditions that do not amount of violations of Article 4 of the EU Charter depending on where exactly the person will be held.
15. In our opinion, it is possible that the CJEU may not consider this second step analysis to be required in the context of all potential violations of Article 47 of the EU Charter. Article 51 of the EU Charter provides that the provisions of the EU Charter “are addressed to . . . the Member States . . . when they are implementing Union law.” Fair trial rights in criminal proceedings are now enshrined into EU law through a series of Directives covering rights such as rights to interpretation and translation, right to information, access to a lawyer and legal aid, and the presumption of innocence enacted pursuant to the *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* (2009/C 295/01). As a result, Member State courts are now called upon to implement EU law during domestic criminal proceedings, and pursuant to Article 47 of the EU Charter an effective remedy before an impartial and independent tribunal is required to protect these rights.
16. In these circumstances, the CJEU may find that the second stage of the *Aranyosi and Căldăraru* test – the individual impact assessment – is not applicable, where the court in the executing Member State has found a concern with the national tribunal that is ultimately responsible for enforcing EU Charter rights, particularly in light of the fact that individuals do not have direct recourse to the CJEU to enforce those rights.

The “*flagrant denial*” test

17. It is also possible, in our view, that the CJEU may determine that the second test related to the “flagrant denial” of fair trials standard established by the ECtHR, is not suitably robust in order to properly apply EU law. Of particular note is the fact this test was considered inappropriate under EU law by Advocate General Sharpston in her opinion in *Radu* (Case C-396/11). Advocate General Sharpston criticised the “flagrant denial” test as follows:

“I do not feel that I can recommend to this Court that it accept the test that the breach in question should be ‘flagrant’. Such a concept appears to me to be too nebulous to be interpreted consistently throughout the Union. It has been suggested that the breach must be so fundamental as to amount to a complete denial or nullification of the right to a fair trial.

“However, such a test – assuming always that it can be clearly understood – seems to me unduly stringent. Construed in one way, it would require that every aspect of the

trial process be unfair. But a trial that is only partly fair cannot be guaranteed to ensure that justice is done...

“Second – as regards the standard of proof – it is not right, in my view, to require that a potential breach be established ‘beyond reasonable doubt’. Such a standard may be appropriate, and is used in certain jurisdictions, in determining the onus to be imposed on the prosecution services in criminal trials. It ensures that the risk of an accused person being wrongfully convicted is minimised so far as it is ever possible to do so. But it does not seem to me to have a role to play here. Furthermore, there is a risk that the onus it imposes on the person concerned, who may well be impecunious and forced to rely on State assistance in seeking to defend his rights, will be impossible in practice to satisfy.”⁴

18. As the *Radu* case was decided on other grounds, the CJEU did not fully seize itself of this issue. However, in our view, recent case law of the CJEU on fair trial rights in the context of *in absentia* judgments may indicate that the CJEU is willing to take up Advocate General Sharpston’s points on this issue. In this respect we note the contrast between the judgement of 26 February 2013 in *Stefano Melloni v. Ministerio Fiscal* (Case C-399/11) and C-108/16 PPU of *Pawel Dworzecki* of 24 May 2016 in relation to the interpretation of Article 4a(1) of the EAW Framework Decision.

19. In *Melloni*, the CJEU considered whether Article 4a(1) of the EAW Framework Decision is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the EU Charter and from the rights of the defence guaranteed under Article 48(2) of the EU Charter. In this judgment, the CJEU was satisfied that there was no violation of the right to a fair trial, even where the accused did not appear in person, *“if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.”*⁵ Moreover, the CJEU refused to allow a Member State to avail itself of Article 53 of the EU Charter *“to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.”*⁶

20. However in the subsequent *Dworzecki* case, which also related to Article 4a(1)(i) of Framework Decision 2002/584, the CJEU based itself upon the right to a fair trial in order to require more certainty as to the effectiveness of any notification provided in view of ensuring that the person could exercise his rights of defence: *“the right to a fair trial*

⁴ Paragraphs 82 and 83.

⁵ Paragraph 49.

⁶ Paragraph 63.

*enjoyed by a person summoned to appear before a criminal court thus requires that he has been informed in such a way as to allow him to organise his defence effectively. Article 4a(1)(a)(i) of Framework Decision 2002/584 is designed to achieve that objective, but does not constitute an exhaustive list of the means that can be used to that end. In fact, in addition to a summons in person, the conditions set out in that provision are satisfied if the person concerned was actually given official information of the date and place fixed for his trial by 'other means'."*⁷

21. The CJEU has therefore recognised specific aspects of the right to a fair trial in the context of the EAW, specifically in the trial in absentia provisions, independently from the ECHR jurisprudence and has permitted denial of execution of an EAW on those grounds. This case law raises the issue of the extent to which violations of the right to a fair trial are valid considerations under the EAW, assuming that the application of the right to a fair trial is not limited to Article 4a(1) of the Framework Decision.⁸

Proposed question for preliminary reference

22. In light of the above, we would like to submit to the Court that this case offers an opportunity to ask the CJEU to develop *another* test for national courts of the executing Member State to apply in circumstances where the issuing Member State is in breach of Article 2 TEU. In order to develop such a test, we need, in our view, to pose another question that does not tie the CJEU either to its *Aryanosi* test nor the ECtHR's "flagrant denial" test. For reference, Article 52(3) of the EU Charter provides that it is open to EU law to provide more extensive protection than that laid down by the ECHR. In our view, to get to the heart of the issue and engage the CJEU, we would need to focus on EU law itself, most especially in the context of the EAW which is described as the "cornerstone of judicial cooperation" in Recital 6 of the EAW Framework Decision.
23. However, the CJEU does not have competence to interpret the EU Charter on its own, independently from an EU act. Under Article 51(1) of the EU Charter, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. A legal "hook" to the EU Charter can be found in Article 1(3) of the EAW Framework Decision which expressly states that: "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union." As such, Article 1(3) of EAW FD expressly states that Member States must continue to uphold fundamental rights in the application of the EAW.
24. For reference, Article 6 TEU recognises that the rights and principles set out in the EU Charter have the same legal value as the EU treaties. In this respect, we can rely upon the recent CJEU judgment of 28 February 2018 in *Associação Sindical dos Juizes*

⁷ Paragraph 43.

⁸ Moreover, the recent enactment of EU law Directives covering aspects of the burden of proof and the rights to access a lawyer and legal aid, may indicate that the "beyond a reasonable doubt standard" criticized by Advocate General Sharpston is also not fit for purpose under EU law.

Portugueses (C-64/16) which interprets Article 47 of the EU Charter as requiring that: “The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see, to that effect, judgments of 13 March 2007, *Unibet*, C 432/05, EU:C:2007:163, paragraph 37, and of 22 December 2010, *DEB*, C 279/09, EU:C:2010:811, paragraphs 29 to 33).” (paragraph 35). The CJEU refers to Article 19(1) TEU as an obligation of all Member State courts.

25. Further, the CJEU explains that the: “mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU” (paragraph 30), which includes democracy and the rule of law. The CJEU confirmed, in paragraph 32, that: “Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals”. It follows that “the Member States are therefore obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law (see, to that effect, *Opinion 1/09* (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 68). In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields” (paragraph 34).
26. The CJEU has clearly established a principle of “effective judicial protection of individual rights under EU law” through which courts must ensure an effective remedy and a fair trial when rights are violated, referring directly to Article 47 of the Charter on the right to an effective remedy and to a fair trial. 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). The issue for this Honourable Court is whether it must uphold this obligation in the context of the EAW even if this means not executing a warrant outside any of the expressly stated grounds for non-execution on the basis of evidence that Poland, through its legislative reforms, can no longer guarantee the effective judicial protection of individual rights under the EU Charter.
27. As EU law is quite specific on this point, there is no need to rely upon the ECHR for the standard on which to determine whether or not to execute an EAW. As outlined above, 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.

28. Our proposed questions to the CJEU are, therefore, along the following lines:

“(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 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)*?”

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