Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 12 November 2020[1]

Joined Cases C-354/20 PPU and C-412/20 PPU

L. and P.,
intervener:
Openbaar Ministerie

(Requests for a preliminary ruling
from the rechtbank Amsterdam (District Court, Amsterdam, Netherlands))

(Reference for a preliminary ruling – Urgent preliminary-ruling procedure – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Surrender of the arrested person to the issuing judicial authority – Charter of Fundamental Rights of the European Union – Article 47 – Right of access to an independent and impartial tribunal – Systemic or generalised deficiencies as regards the independence of the issuing Member State's judiciary)

1. The Court of Justice has previously ruled on when a judicial authority executing a European arrest warrant ('EAW') under Framework Decision 2002/584/JHA[2] is entitled to suspend the surrender of the requested person, where there is evidence of a real risk that that person's fundamental rights will be breached.

2. Sitting as the Grand Chamber, the Court agreed that the breaches of fundamental rights capable of justifying refusal to surrender a requested person included breach of the right to a fair trial (Article 47 of the Charter of Fundamental Rights of the European Union; 'the Charter'). That could occur where systemic or generalised deficiencies concerning the independence of the issuing Member State's judicial bodies undermined that fundamental right.[3]

3. To reach that finding, the Court adopted in the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)* the same method as it had previously used in relation to systemic or generalised deficiencies, affecting not the independence of judicial bodies but conditions in prisons, which were potentially detrimental to the dignity of the person whose surrender was being decided upon in the context of an EAW.[4]

4. According to that method, a judicial authority executing an EAW must determine, specifically and precisely, whether, in addition to systemic and generalised deficiencies affecting the independence of the courts of the issuing State, there are substantial grounds for believing that the requested person will, if surrendered, be exposed to the risk of suffering a breach of the right conferred on him by Article 47 of the Charter.

1 Original language: Spanish.

2 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the Framework Decision').

3 Judgment of 25 July 2018, *Minister for Justice and Equality* (C-216/18 PPU, EU:C:2018:586); 'judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*'.

4 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198; 'judgment in *Aranyosi and Căldăraru*').

5. The rechtbank Amsterdam (District Court, Amsterdam, Netherlands) asks whether, in the light of a worsening of the generalised deficiencies in the Polish justice system since the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, it is entitled to refuse the surrender requested by a Polish court without the need to examine in detail the specific circumstances pertaining to the EAW.

6. For the reasons I shall set out below, I shall propose that the Court confirm the case-law laid down in the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*. I agree, therefore, with the position taken in this case by the Openbaar Ministerie (public prosecution service, Netherlands), the Belgian and Irish Governments and the Commission. [5]

I. Legislative framework

A. EU law

1. Treaty on European Union

7. Article 7 provides:

‘1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

…’

5 The Polish Government disagrees with the main premiss of the reasoning set out in the order for reference but argues that the answers to the questions submitted therein can simply be inferred from the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*.

2. Charter of Fundamental Rights of the European Union

8. Article 47 ('Right to an effective remedy and to a fair trial') provides:

'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.

…'

3. Framework Decision 2002/584/JHA

9. Recital 10 is worded as follows:

'The mechanism of the [EAW] is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [TEU], determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.'

10. Article 1 ('Definition of the European arrest warrant and obligation to execute it') provides:

'1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. 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 [TEU].'

11. Article 6 ('Determination of the competent judicial authorities') states:

'1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.'

12. Articles 3, 4 and 4a set out the grounds for mandatory and optional non-execution of the EAW.

13. Article 15 ('Surrender decision') provides:

'1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.'

B. National law

14. The Framework Decision was transposed into Netherlands law by the Wet tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie) [6] of 29 April 2004, [7] as amended by the Law of 22 February 2017. [8]

II. Proceedings and questions referred for a preliminary ruling

A. Case C-354/20 PPU

15. On 7 February 2020, the officier van justitie (public prosecutor, Netherlands) requested the referring court to execute an EAW, issued on 31 August 2015 by the Sąd Rejonowy w Poznaniu (District Court, Poznań, Poland), for the detention and surrender of a Polish national who is neither domiciled nor resident in the Netherlands, for the purposes of conducting a criminal prosecution in respect of drugs trafficking and possession of a false identity document.

16. On 24 March 2020, the rechtbank Amsterdam (District Court, Amsterdam) stayed the preliminary stage of the proceedings so that the requested person and the public prosecution service could make submissions concerning the most recent events in Poland in relation to the rule of law, and also concerning any possible consequences which those events may have for the surrender of the requested person, pursuant to the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*.

17. On 12 June 2020, after those submissions had been lodged, the rechtbank Amsterdam (District Court, Amsterdam) asked the public prosecution service to put certain questions to the issuing court. That court replied to the questions submitted with the exception of those intended for the Sąd Najwyższy (Supreme Court, Poland), in respect of which it asked the referring court to contact the Sąd Najwyższy (Supreme Court) directly for answers.

18. The public prosecution service forwarded the questions that concerned it to the Sąd Najwyższy (Supreme Court) but received no reply.

6 Law implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union.

7 Stb. 2004, 195.

8 Stb. 2017, 82.

19. Against that background, the rechtbank Amsterdam (District Court, Amsterdam) has referred the following questions to the Court of Justice:

'(1) Do Framework Decision 2002/584/JHA, the second paragraph of Article 19(1) TEU and/or the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing an EAW issued by a court where the national legislation of the issuing Member State has been amended after that EAW was issued such that the court no longer meets the requirements of effective or actual judicial protection since that legislation no longer guarantees the independence of that court?

(2) Do Framework Decision 2002/584/JHA and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing an EAW when it has established that there is a real risk in the issuing Member State of breach of the fundamental right to an independent tribunal for any suspected person – and thus also for the requested person – irrespective of which courts of that Member State have jurisdiction over the proceedings to which the requested person will be subject and irrespective of the requested person's personal situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the EAW, where that real risk is connected with the fact that the courts of the issuing Member State are no longer independent on account of systemic and generalised deficiencies?

(3) Do Framework Decision 2002/584/JHA and the second paragraph of Article 47 of the Charter indeed preclude the executing judicial authority from executing an EAW when it has established that:

– there is a real risk in the issuing Member State of breach of the fundamental right to a fair trial for any suspected person, where that risk is connected with systemic and generalised deficiencies relating to the independence of that Member State's judiciary,

– those systemic and generalised deficiencies are therefore not only liable to have negative consequences, but actually do have such consequences for the courts of that Member State with jurisdiction over the proceedings to which the requested person will be subject, and

– there are therefore serious and factual grounds to believe that the requested person runs a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial,

even if, aside from those systemic and generalised deficiencies, the requested person has not expressed any specific concerns, and even if the requested person's personal situation, the nature of the offences for which he is being prosecuted and the context that forms the basis of the EAW, aside from those systemic and generalised deficiencies, do not give rise to fears that the executive and/or legislature will exert concrete pressure on or influence his trial?'

B. Case C-412/20 PPU

20. On 23 June 2020, the officier van justitie (public prosecutor, Netherlands) asked the referring court to execute an EAW, issued on 26 May 2015 by the Sąd okręgowy w Sieradzu (Regional Court, Sieradz, Poland), for the detention and surrender of a person who had been given a custodial sentence by another Polish court. [9]

9 Specifically, so that that person could serve the remaining seven months of a custodial sentence of one year, imposed by judgment of 18 July 2019 of the Sąd rejonowy w Wieluniu (District Court, Wielun, Poland), for offences of threatening behaviour and violence.

21. On 17 August 2020, the requested person asked that court to await the Court of Justice's reply to the reference for a preliminary ruling in Case C-354/20 PPU, and this was not opposed by the public prosecution service.

22. Following a hearing held on 20 August 2020, the rechtbank Amsterdam (District Court, Amsterdam) decided to add a question to those referred for a preliminary ruling in Case C-354/20 PPU; that question is worded as follows:

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

III. Procedure before the Court of Justice

23. The requests for a preliminary ruling were received at the Registry of the Court on 31 July 2020 (Case C-354/20 PPU) and 3 September 2020 (Case C-412/20 PPU).

24. The Court agreed to deal with the references for a preliminary ruling under the urgent procedure and joined the two cases.

25. Written observations were lodged by the representatives of the requested persons, the public prosecution service, the Netherlands and Polish Governments, and the Commission. All those parties attended the hearing, held on 12 October 2020, in which the Belgian and Irish Governments also participated.

IV. Analysis

A. Preliminary considerations

1. Applicable provision of the Framework Decision

26. The operative parts and grounds of the orders for reference refer to the Framework Decision in general without specifying the article of which an interpretation is sought.

27. However, as in the case which led to the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, it can be deduced from those orders for reference that the referring court is referring to the rule laid down in Article 1(3) of the Framework Decision.

2. Justification for the references for a preliminary ruling

28. In the order in Case C-354/20 PPU, the rechtbank Amsterdam (District Court, Amsterdam) states that it cannot find any reasons to refuse to execute the EAW on any of the grounds referred to in Articles 3 to 5 of the Framework Decision.[10] Although the order for reference in Case C-412/20 PPU does not contain a similar observation, it must be assumed that the same applies.

10 Paragraph 4 of the order for reference in Case C-354/20 PPU.

29. However, the referring court takes the view that 'the recent legislative developments in the Republic of Poland concerning the independence of the Polish judiciary'[11] could constitute a sufficient ground to refuse to execute the EAW. The referring court asks whether those legislative reforms themselves affect the execution of the EAW, due to the risk that the requested person's right to a fair trial before an independent and impartial tribunal, guaranteed by Article 47 of the Charter, may be breached.

30. As the order for reference in Case C-354/20 PPU explains, prior to those reforms and after judgment was given in *Minister for Justice and Equality (Deficiencies in the system of justice)*, the referring court assumed that in Poland there was a real risk that that right would be breached on account of systemic or generalised deficiencies affecting the independence of the judiciary in that Member State.

31. Based on that assumption, the rechtbank Amsterdam (District Court, Amsterdam) routinely examined EAWs issued by Polish judicial bodies from the twofold perspective laid down in the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*. Using that method, it would determine: (a) whether such deficiencies could have an effect on courts with jurisdiction to hear the proceedings to which the requested person would be subject; and (b) if the answer was yes, whether there were substantial grounds for believing that that person would be exposed to a real risk that his right to an independent tribunal would be breached.

32. According to the referring court, that course of action may no longer be relevant in the light of the statutory amendments adopted in Poland in recent months. Those amendments mean that the systemic and generalised deficiencies affecting the independence of the Polish courts are such that no accused person appearing before those courts is guaranteed the right to an independent tribunal, whatever his personal situation, the nature of the offence for which he is being prosecuted, or the facts which led to the EAW.

33. Against that new background, the possibility arises of refusing to execute the EAW without the need to examine specifically whether the systemic deficiencies have negative consequences for the *particular* courts which must try the requested person and whether that person, on account of his personal situation, faces a real risk that his right to a fair trial will be breached.[12]

34. The order for reference in Case C-412/20 PPU points out in addition that, unlike in Case C-354/20 PPU, the EAW: (a) was issued for the purpose of giving effect to a custodial sentence; and (b) was issued on 26 May 2020, in other words, after the events whose occurrence demonstrates increased pressure on the independence of Polish judicial bodies.

B. Substance

35. The questions from the referring court which are most important from a general point of view are those concerning the possibility of refusal to execute an EAW where there are no independent courts in the issuing Member State as a result of systemic or generalised deficiencies affecting the independence of those courts (second question in Case C-354/20 PPU and single question in case C-412/20 PPU).

11 Loc. ult. cit.

12 That view is the same as the view proposed by the High Court, Ireland in Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, but the Court of Justice did not adopt it. Advocate General Tanchev, in his Opinion in that case (EU:C:2018:517), stated that 'the referring court takes the view that, in a situation where the deficiencies in the system of justice of the issuing Member State are particularly serious, that is to say, where that Member State no longer observes the rule of law, it must refuse surrender without having to ascertain that the individual concerned will be exposed to such a risk' (point 98).

36. If that generalised situation exists, it will be necessary to determine next whether it is possible to refuse to execute an EAW even if 'the requested person has not expressed any specific concerns, and even if the requested person's personal situation, the nature of the offences for which he is being prosecuted and the context that forms the basis of the EAW … do not give rise to fears that the executive and/or legislature will exert concrete pressure on or influence his trial' (third question in Case C-354/20 PPU).

37. The answers to those questions must be supplemented by a determination of the relevant time for establishing whether the court which issued the EAW is independent (first question in Case C-354/20 PPU and single question in Case C-412/20 PPU).

38. In my view, the second and third questions in Case C-354/20 PPU must, quite logically, be answered before the first question: only after it has been accepted that a judicial authority may refuse to execute an EAW on account of the systemic or generalised deficiencies affecting the independence of the judiciary in the issuing Member State does it make sense to consider whether that refusal applies also to EAWs issued before or after such deficiencies have reached the point described by the referring court.

1. Impact on the execution of an EAW of systemic or generalised deficiencies relating to the independence of the courts in the issuing Member State

39. The Court has accepted that, in addition to the cases expressly referred to in the Framework Decision (Articles 3 to 5), execution of an EAW may also be refused 'in exceptional circumstances' which, on account of their seriousness, necessitate the limitation of the principles of mutual recognition and mutual trust between Member States on which judicial cooperation in criminal matters is founded.

40. Included among those 'exceptional circumstances' are circumstances which may entail the risk that the requested person will be subject to inhuman or degrading treatment, within the meaning of Article 4 of the Charter.[13] Also included are circumstances which demonstrate a real risk of infringement of that person's right to an independent tribunal and, therefore, of his right to a fair trial, recognised by the second paragraph of Article 47 of the Charter.[14]

41. In both situations – which are the two on which the Court has ruled so far – the 'exceptional circumstances' require confirmation of the existence of 'systemic or generalised deficiencies' in the issuing Member State, as regards either the independence of its courts or the situation of some groups of people or of certain places of detention.

42. The determination of whether 'exceptional circumstances' of that kind exist falls to the executing judicial authority, which must have for those purposes 'objective, reliable, specific and properly updated evidence'[15] demonstrating the existence of such systemic or generalised deficiencies.

43. As concerns such evidence, the Court has referred, inter alia, to 'material … set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial … on account of systemic or generalised deficiencies so far as concerns the independence of the … judiciary'.[16]

13 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 104), 'judgment in *Aranyosi and Căldăraru*'.

14 Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 59.

15 Judgment in *Aranyosi and Căldăraru*, paragraph 104.

16 Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 79.

44. Where 'exceptional circumstances' of that nature exist, the Court has held that the executing judicial authority may bring to an end the surrender procedure established by the Framework Decision. This is, therefore, an *exceptional* response in the context of the Framework Decision which, I repeat, does not lay down any grounds for non-execution other than those in Articles 3 to 5. Accordingly, EU law responds to the *exceptional nature* of the circumstances identified in a Member State in terms which are also *exceptional*.[17]

45. That *exceptional response* has its limits, which are subject to compliance with certain conditions. Its *exceptional nature* does not go so far as to require the automatic non-execution of every EAW issued by the judicial authority of a Member State affected by systemic or generalised deficiencies. The response of EU law, although serious, is more restrained, since it results in an obligation on the part of the executing judicial authority to determine whether, in the circumstances of the case on which it is required to decide, those deficiencies are likely to result in the real and actual breach of the requested person's fundamental rights.

46. Where the systemic or generalised deficiencies concern the independence of the judiciary, the executing judicial authority, after finding that those deficiencies entail a real risk of infringement of the right to fair trial, must, '*as a second step*, assess *specifically and precisely* whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk'.[18]

47. Ultimately, the possibility of refusing to execute an EAW on grounds other than those laid down in Articles 3 to 5 of the Framework Decision requires a rigorous examination, to be carried out by the executing judicial authority, which is divided into two stages:

– – In the first stage, the executing authority must assess whether there is a real risk of infringement of fundamental rights, in the light of the general situation in the requesting Member State.

– – In the second stage, if that risk is established, the executing authority must assess 'specifically and precisely' whether, having regard to the circumstances of the case, the requested person will run the risk that his fundamental rights will be breached.

48. What the national court is now asking is whether, on account of the increased systemic or generalised deficiencies in the issuing Member State, it may forego the second stage of that two-part examination.

49. If that is the case, there would be no need for the executing judicial authority to examine the circumstances of the case: it would simply be able to bring the surrender procedure to an end if the deficiencies are of such a magnitude that they equate to the *absence* in the issuing Member State of a judicial authority worthy of that name.

17 According to the Court, that exceptional response is based 'first, on Article 1(3) of Framework Decision 2002/584, which provides that the framework decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU and, second, on the absolute nature of the fundamental right guaranteed by Article 4 of the Charter' (judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 45). In accordance with the same judgment, there is in addition to those bases the second paragraph of Article 47 of the Charter, since it recognises the right to an independent tribunal and, therefore, the right to a fair trial (judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 59).

18 Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 68; italics added.

50. No matter how thought-provoking the solution proposed by the referring court may be,[19] it is not compatible with that already provided by the Court. Moreover, as the Commission points out in its written observations, refusal[20] to execute *every* EAW issued by a Member State would in all likelihood result in numerous criminal offences going unpunished.[21]

51. The Netherlands Government also refers to the duty to prevent impunity. In addition, at the hearing, the Belgian Government pointed out that the solution proposed by the referring court could undermine the rights of victims of the crimes for which a requested person who is the subject of an EAW is sought.[22]

52. From a different perspective, acceptance of the referring court's position could be construed as discrediting the professional work of *all* judges in the Republic of Poland, who, in matters as difficult as those connected with criminal law, strive to use the judicial cooperation mechanisms laid down in the Framework Decision. Added to the risk to their independence from the systemic and generalised deficiencies referred to above would be the impossibility of participating as issuing or executing authorities in those intra-European cooperation mechanisms.

53. In the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, the Court recognised that a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU could constitute, together with other material, a sufficient basis for establishing whether there were systemic or generalised deficiencies in that Member State with regard to the independence of its courts.[23]

54. Although the deficiencies which existed at that time were severe, the Court ruled out the possibility that the executing judicial authority could automatically and indiscriminately refuse to execute any EAW issued by the courts of the Republic of Poland.

55. The reason is that a global solution of that kind is reserved for when the European Council formally *determines* that an issuing Member State has breached the values referred to in Article 2 TEU.

56. In the words of the Court, 'it is apparent from recital 10 of Framework Decision 2002/584 that implementation of the [EAW] mechanism *may be suspended only* in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, *determined by the European Council* pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU'.[24]

19 Its attractiveness cannot, however, conceal a certain radicalness. In Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, the Commission's position on that point, as transcribed by Advocate General Tanchev in his Opinion (EU:C:2018:517), was that 'despite findings showing serious risks to the rule of law in the issuing Member State …, it cannot be excluded that there may be contexts where the capacity for courts to conduct a trial with the independence necessary to ensure respect for the fundamental right guaranteed by [the second paragraph of Article 47] of the Charter is preserved' (point 108). The Commission confirms that position, using different words, in paragraph 27 of its written observations in Case C-354/20 PPU.

20 In the order for reference in Case C-354/20 PPU, the referring court acknowledges that affirmative answers to its questions would mean that 'the flow of surrenders to Poland would be suspended de facto until such time as Polish law once again guarantees the independence of issuing courts' (paragraph 19).

21 Paragraph 30 of its written observations. The public prosecution service also points out that that generalised refusal could render the entire surrender system in the EU unworkable (final paragraph of its written observations).

22 The Belgian Government cited the judgment of the European Court of Human Rights (ECtHR) of 9 July 2019, *Romeo Castaño v. Belgium* (CE:ECHR:2019:0709JUD000835117), concerning breach of the right guaranteed by Article 2 of the European Convention on Human Rights (ECHR) in situations in which States fail to fulfil their duty to cooperate with one another using the EAW mechanism in order to bring the alleged perpetrator of a murder and other offences before the courts.

23 Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 69.

24 Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 70.

57. I agree with the referring court that, while the situation obtaining at the time when judgment was given in *Minister for Justice and Equality (Deficiencies in the system of justice)* was concerning, the subsequent data appear to point to the worsening of that situation. [25]

58. In addition to the legislative reforms mentioned in the order for reference in Case C-354/20 PPU, the Court's most recent judgments, to which that order also refers, [26] make clear that the systemic or generalised deficiencies discernible in relation the independence of courts in the Republic of Poland are liable to threaten the fundamental rights of persons coming under their jurisdiction.

59. In any event, it is for the referring court to determine, using the sources available to it, whether there has been an increase in the systemic and generalised deficiencies which, in 2018, led the Court to agree, exceptionally and subject to certain conditions, that an executing authority could refuse to execute an EAW on grounds other than those expressly referred to in the Framework Decision.

60. Even though the threat to the independence of Polish courts may have worsened in those terms, it is not possible simply to suspend, automatically and indiscriminately, the application of the Framework Decision in respect of any EAWs issued by those courts.

61. That extreme approach does not depend on the quantity and importance of the evidence supporting a finding that there is a real risk of infringement of the accused person's rights but on the *nature* of the body with responsibility for making that finding and acting on it.

62. In accordance with the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, once systemic or generalised deficiencies have been confirmed in the issuing Member State, a judicial authority executing an EAW is entitled to refuse surrender of the requested person, if, having regard to that person's personal situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the EAW, it concludes that that person may actually suffer a breach of the fundamental right he is guaranteed by Article 47 of the Charter. [27]

63. In that situation, the executing court would be applying the Framework Decision in the way in which, according to the Court's case-law, it must be interpreted in order to balance the EAW mechanism with respect for the fundamental rights of the EU.

64. That interpretation maintains the principle of surrender, albeit amended, on an exceptional basis, by the refusal of surrender where, in the light of the particular circumstances of the case, there is a real risk of infringement of the requested person's rights.

65. On the other hand, an automatic refusal to execute all EAWs, once the seriousness of the systemic or generalised deficiencies identified in the issuing Member State has been established, amounts to the simple disapplication of the Framework Decision itself.

25 In its report of September 2020 on the situation regarding the rule of law in the EU, the Commission notes that, in Poland, 'the reforms, impacting the Constitutional Tribunal, the Supreme Court, ordinary courts, the National Council for the Judiciary and the prosecution service, have increased the influence of the executive and legislative powers over the justice system and therefore weakened judicial independence'. Commission Staff Working Document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Poland (SWD(2020) 320 final).

26 Inter alia, judgments of 19 November 2019, *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court) (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234). In addition, order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277).

27 In his Opinion in Case C-216/18, *Minister for Justice and Equality (Deficiencies in the system of Justice)* (EU:C:2018:517, point 113), Advocate General Tanchev was in favour of adopting the proposal of the Commission, which had suggested, 'inter alia, that it should be ascertained whether the person who is the subject of the European arrest warrant is a political opponent or whether he is a member of a social or ethnic group that is discriminated against. The Commission also suggests that it should be examined, inter alia, whether the offence for which the individual concerned is being prosecuted is political in nature or whether the powers that be have made public declarations concerning that offence or its punishment'. Connotations of that kind do not appear to exist in relation to the EAWs at issue here.

66. As I have already stressed, recital 10 of the Framework Decision and the case-law of the Court do not allow for the simple refusal to give effect to EAWs in those circumstances. To get to that point would require a specific legal act: a determination by the European Council, under Article 7(2) TEU, that the issuing Member State is in serious and persistent breach of the values of the rule of law referred to in Article 2 TEU.

67. While a finding of systemic or generalised deficiencies may justify a refusal to execute an EAW in a particular case, only a formal determination by the European Council of a serious and persistent breach of the values referred to in Article 2 TEU can justify the indiscriminate disapplication of the Framework Decision and, therefore, the non-execution of all EAWS issued by the courts of the Member State concerned.

68. Each of those two scenarios unfolds on a different conceptual front.

69. In the first (decision of the executing judicial authority), the deficiencies result in a *risk* whose extent must be ascertained in the particular case; hence the need for the executing court to take account of the specific circumstances of the case on which it must decide.

70. In the second (action by the European Council), it is no longer possible to refer to a risk but rather to a flagrant *breach* of the values laid down in Article 2 TEU, leading to the general disapplication of the Framework Decision.

71. It is not simply that one situation involves a *risk of infringement* of rights and the other a *breach* of the principles set out in Article 2 TUE. More specifically, the first situation concerns *systemic or generalised deficiencies* identified in a system for guaranteeing rights which, on account of those deficiencies, does not operate in the manner required by the legal system. The second situation, on the other hand, involves the actual disappearance of the conditions under which a legal system is able to protect the principles of the rule of law referred to in Article 2 TEU.

72. The systemic or generalised deficiencies which can be identified in relation to the independence of Polish courts do not, in my view, deprive those courts of their nature as courts. They continue to be courts,[28] even though the independence of the judiciary, taken to mean a group of courts which exercise jurisdiction, is threatened by governmental structures (or, also, by the anomalous performance of disciplinary functions). A finding that there are such deficiencies, as serious as they may be, cannot deprive the courts of that status.[29]

28 Otherwise, the repercussions could possibly extend to other areas of judicial activity, such as those relating to cooperation in civil matters or the right to make references for a preliminary ruling (Article 267 TFEU), which is reserved to courts or tribunals in the strict sense.

29 Accordingly, it is not appropriate to apply the case-law laid down by the Court in connection with the judicial nature of a public prosecutor's office for the purposes of issuing an EAW. For example, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456). The lack of independence of a public prosecutor's office which may receive instructions under national law does not reflect a *systemic or generalised deficiency* in its institutional system and is instead an essential feature of that system which disqualifies it from issuing an EAW but not from acting as a public prosecutor's office. However, a generalised lack of independence of the courts of a Member State can only be the result of a deficiency in the system of justice, since the EU does not allow the inclusion of States which do not have independent courts.

73. Admittedly, the magnitude of those systemic or generalised deficiencies may be such that serious doubts regarding respect for the fundamental rights in the issuing Member State are inevitable. That could occur if the disciplinary rules for Polish judges were used, to the detriment of their independence, as a permanent threat for making them submit to the executive, either by entrusting their application to bodies, including courts, which are not invested with the proper guarantees,[30] or by using the disciplinary procedure to punish completely legitimate actions by the judiciary.[31]

74. Nonetheless, the executing court's jurisdiction is confined strictly to the EAW on which it must give a decision and its view on any systemic or generalised deficiencies must relate to their possible impact on that EAW. Therefore, the executing court's decision may only relate to the execution of the EAW concerned.

75. On the other hand, the assessment of whether there has been respect for the values referred to in Article 2 TEU applies to the general situation in the Member State concerned and falls exclusively within the remit of the European Council, whose formal finding that that provision has been breached therefore concerns the application of the Framework Decision as a whole in relation to that Member State.

76. In the light of increased systemic or generalised deficiencies, and in the absence of a formal determination by the European Council, the rechtbank Amsterdam (District Court, Amsterdam) must, therefore, be even more rigorous in its examination of the circumstances pertaining to the EAW which it has been requested to execute,[32] but it is not exempt from the duty to carry out that examination in particular.

77. In that connection, it is important to make clear that the information requested from the issuing judicial authority under Article 15(2) of the Framework Decision does not only have to be information which is necessary for the purposes of conducting that particular examination but must also be limited to information which the issuing authority is reasonably in a position to provide.[33]

78. Accordingly, and in line with the case-law laid down in the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, as long as the European Council has not formally established a serious and persistent breach in the issuing Member State of the principles referred to in Article 2 TEU, 'the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to [an EAW] … only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there

30 In the judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 171), the Court held that it was for the referring court to determine whether, following the entry into force, on 3 April 2018, of the ustawa o Sądzie Najwyższym (Law on the Supreme Court), the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) could be classified as independent and impartial, for which purpose it was necessary to examine whether 'the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law'. In the order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277), the Court suspended the application of a number of provisions of Polish law constituting the basis for the jurisdiction of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) to hear disciplinary proceedings concerning judges.

31 In the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234), the Court, before which it was claimed that disciplinary proceedings had been brought against Polish judges who had referred questions for a preliminary ruling, held that 'provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot … be permitted' (paragraph 58).

32 In particular, as I have already observed, it must have regard to the requested person's personal situation, the nature of the offence for which he is being prosecuted and the factual context on the basis of which the EAW was issued (judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 75).

33 Two of the questions sent to the issuing judicial authority in Case C-354/20 PPU could have been addressed to the Sąd Najwyższy (Supreme Court). See point 17 of this Opinion.

are substantial grounds for believing that the person in respect of whom that [EAW] has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial'. [34]

79. It can be inferred from the orders for reference that the referring court can find no reason to refuse surrender of the two requested persons in these proceedings on any of the grounds referred to in the Framework Decision. Furthermore, in the light of their personal circumstances, the nature of the offences for which they are being prosecuted and the context that forms the basis of the EAWs, the referring court rules out the risk of improper interference in their prosecution.

80. That being the case, any worsening of the systemic or generalised deficiencies in the system of independence of the Polish courts does not entitle the referring court to refuse automatically to execute the EAWs at issue.

2. The relevant time for the purposes of assessing whether the authority issuing an EAW is an independent judicial body

81. If, as I argue, the executing court is not entitled to bring the surrender proceedings to an end after determining that there are serious systemic or generalised deficiencies with regard to the independence of the issuing Member State's courts, without examining any real and actual effect of those deficiencies on the circumstances pertaining to each EAW in particular, I believe that it is irrelevant whether those deficiencies had worsened before or after the EAW was issued.

82. Regardless of whether those deficiencies had worsened before or after the EAW was issued, the overriding consideration is whether the issuing judicial body (which has to rule on the requested person's fate following his surrender) retains its independence to give judgment on that person's situation free from external interference, threats or pressure.

83. As far as the authority seeking the surrender of the requested person is concerned, the judicial nature of the procedure laid down in the Framework Decision does not end with the issue of the EAW.

84. It is apparent from Article 15 of the Framework Decision that it must be possible at all times for the executing judicial authority to liaise with a *judicial* interlocutor in the issuing Member State, to enable it to give a decision on surrender based on sufficient and reliable information supplied directly by the issuing judicial authority.

85. Given that the surrender procedure has a serious impact on liberty, [35] it may be necessary to gather additional information which will enable the executing judicial authority to establish what exactly the facts which form the basis of the EAW are and, in particular, what circumstances the requested person will find himself in following his surrender.

34 Judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, paragraph 73. The Netherlands Government submits that that approach reflects that of the ECtHR, which paid special attention to the analysis of the specific circumstances in order to determine whether there was a concrete risk that a lack of independence would lead to a flagrant denial of justice (judgments of 17 January 2012, *Othman (Abu Qatada) v. United Kingdom* (CE:ECHR:2012:0117JUD000813909, §§ 258 to 262), and of 9 July 2019, *Kislov v. Russia*, (CE:ECHR:2019:0709JUD000359810, § 109). Advocate General Tanchev also referred to that case-law in his Opinion in Case C-216/18 (EU:C:2018:517, point 109), observing that 'in order to ascertain whether there is a real risk of flagrant denial of justice, [the ECtHR] takes account, in practice, not only of the situation in the country of destination, but also of the personal circumstances of the person concerned', citing the judgment of the ECtHR of 17 January 2012, *Othman (Abu Qatada) v. United Kingdom* (CE:ECHR:2012:0117JUD000813909, §§ 272 and 277 to 279).

35 Which may involve the deprivation of liberty for up to 120 days, as I noted in my Opinion in *OG (Public Prosecutor's Office in Lübeck) and PI (Public Prosecutor's Office in Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:337, point 58).

86. The high level of confidence on which the executing judicial authority must rely when deciding whether surrender is appropriate can only be provided by an issuing authority which has not in the meantime lost its status as an independent court.

87. Therefore, the executing judicial authority must examine whether, in the circumstances pertaining to each particular EAW submitted to it, the requested person's right to a fair trial is liable to be seriously and effectively undermined. And, I repeat, it must do so both where the deficiencies were already systemic or generalised when the EAW was issued and where those deficiencies arose later and still exist at the time of any surrender of the requested person.

88. In the first situation, the executing court may legitimately harbour doubts as to whether the issue of the EAW was lawful. In the second situation, the executing court may have doubts relating to the treatment that the requested person is likely to receive following surrender to the issuing judicial body.

89. What is important in both situations is that the executing court assesses the extent to which one or other factor is liable to constitute a real risk to the requested person's rights if his surrender takes place.

90. It is true, however, that the *specific* risk of infringement of Article 47 of the Charter, on the ground of lack of independence of the issuing judicial authority, is considerably reduced if that judicial authority was independent when it issued the EAW, even though (in theory) it may have ceased to be afterwards.

91. Likewise, that risk is diminished if the EAW is issued for the purposes of executing a custodial sentence which was imposed on the requested person at a time when the independence of the sentencing criminal court was not in doubt.

V. Conclusion

92. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the rechtbank Amsterdam (District Court, Amsterdam, Netherlands):

Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that:

In the absence of a formal determination by the European Council, under Article 7(2) TEU, of a serious and persistent breach by the issuing Member State of the values referred to in Article 2 TEU, the executing Member State may refuse to execute a European arrest warrant only after establishing specifically and precisely that, having regard to the requested person's situation, the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the European arrest warrant, there are substantial grounds for believing that that person will, if surrendered, run a real risk that his fundamental right to a fair trial, guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, will be breached.

That risk may exist both where the systemic or generalised deficiencies had already arisen when the European arrest warrant was issued and where those deficiencies arose later and still exist at the time of any surrender of the requested person.