



Press and Information

Court of Justice of the European Union

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Judgment in Joined Cases C-562/22 PPU  
and C-563/21 PPU *Openbaar Ministerie*  
(Tribunal established by law in the issuing Member State)

## **Refusal to execute a European arrest warrant: the Court of Justice specifies the criteria permitting an executing judicial authority to assess whether there is any risk of breach of the requested person's fundamental right to a fair trial**

Two European arrest warrants ('EAWs')<sup>1</sup> were issued in April 2021 by Polish courts against two Polish nationals for the purposes, respectively, of executing a custodial sentence and of conducting a criminal prosecution. Since the persons concerned are in the Netherlands and did not consent to their surrender, the *Rechtbank Amsterdam* (District Court, Amsterdam, Netherlands) received requests to execute those EAWs.

That court has doubts concerning its obligation to uphold those requests. In that respect, it notes that since 2017 there have been in Poland systemic or generalised deficiencies affecting the right to a fair trial,<sup>2</sup> and in particular the right to a tribunal previously established by law, resulting, inter alia, from the fact that Polish judges are appointed on application of the *Krajowa Rada Sądownictwa* (the Polish National Council of the Judiciary; 'the KRS'). According to the resolution adopted in 2020 by the *Sąd Najwyższy* (Supreme Court, Poland), the KRS, since the entry into force of a law on judicial reform on 17 January 2018, is no longer an independent body.<sup>3</sup> In so far as the judges appointed on application of the KRS may have participated in the criminal proceedings that led to the conviction of one of the persons concerned or may be called upon to hear the criminal case of the other person concerned, the referring court considers that there is a real risk that those persons, if surrendered, would suffer a breach of their right to a tribunal previously established by law.

In those circumstances, that court asks the Court of Justice whether the two-step examination,<sup>4</sup> enshrined by the Court in the context of a surrender on the basis of the EAWs, under the guarantees of independence and impartiality inherent in the fundamental right to a fair trial, is applicable where the guarantee, also inherent in that fundamental right, of a tribunal previously established by law is at issue.

The Court, sitting as the Grand Chamber and ruling under the urgent preliminary ruling procedure, answers in the affirmative and specifies the detailed rules for applying that examination.

### **Findings of the Court**

<sup>1</sup> Within the meaning of Council Framework Decision 2002/584/JHA 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).

<sup>2</sup> Guaranteed in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

<sup>3</sup> The referring court refers also to the judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* [C-791/19](#), paragraphs 108 and 110 (see also [PR No 130/21](#)).

<sup>4</sup> As a first step in that examination, the executing judicial authority must assess whether there is a real risk of breach of the fundamental rights in the light of the general situation of the issuing Member State; as a second step, that authority must determine, specifically and precisely, whether there is a real risk that the requested person's fundamental right will be undermined, having regard to the circumstances of the case. See judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* [C-216/18 PPU](#) (see also [PR No 113/18](#)), and of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* [C-354/20 PPU and C-412/20 PPU](#) (see also [PR No 164/20](#)).

The Court holds that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom an EAW has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, it may refuse that surrender, under Framework Decision 2002/584,<sup>5</sup> only if it finds that, in the particular circumstances of the case, there are substantial grounds for believing that there has been a breach – or, in the event of surrender, there is a real risk of breach – of the fundamental right of the person concerned to a fair trial before an independent and impartial tribunal previously established by law.

In that regard, the Court states that the right to be judged by a tribunal ‘established by law’ encompasses, by its very nature, the judicial appointment procedure. Thus, as a first step in the examination seeking to assess whether there is a real risk of breach of the fundamental right to a fair trial, connected in particular with a failure to comply with the requirement for a tribunal previously established by law, the executing judicial authority must carry out an overall assessment, on the basis of any factor that is objective, reliable, specific and properly updated concerning the operation of the judicial system in the issuing Member State and, in particular the general context of judicial appointment in that Member State. The information contained in a reasoned proposal addressed by the European Commission to the Council on the basis of Article 7(1) TEU, the abovementioned resolution of the Sąd Najwyższy (Supreme Court) and the relevant case-law of the Court<sup>6</sup> and of the European Court of Human Rights<sup>7</sup> are such factors. By contrast, the fact that a body, such as the KRS, which is involved in the judicial appointment procedure, is made up, for the most part, of members representing or chosen by the legislature or the executive, is not sufficient to justify a refusal to surrender.

As a second step in that examination, it is for the person in respect of whom an EAW has been issued to adduce specific evidence to suggest that systemic or generalised deficiencies in the judicial system had a tangible influence on the handling of his or her criminal case or are liable, in the event of surrender, to have such an influence. Such evidence can be supplemented, as appropriate, by information provided by the issuing judicial authority.

In that respect, as regards, first, an EAW issued for the purposes of executing a custodial sentence or detention order, the executing judicial authority must take account of the information relating to the composition of the panel of judges who heard the criminal case or any other circumstance relevant to the assessment of the independence and impartiality of that panel. It is not sufficient, in order to refuse surrender, that one or more judges who participated in those proceedings were appointed on application of a body such as the KRS. The person concerned must, in addition, provide information relating to, inter alia, the procedure for the appointment of the judges concerned and their possible secondment, which would lead to a finding that the composition of that panel of judges was such as to affect that person’s fundamental right to a fair trial. Furthermore, account must be taken of the fact that it may be possible, for the person concerned, to request the recusal of the members of the panel of judges for breach of his or her fundamental right to a fair trial, the fact that that person may exercise that option as well as the outcome of the request for recusal.

Second, where an EAW has been issued for the purposes of conducting a criminal prosecution, the executing judicial authority must take account of the information relating to the personal situation of the person concerned, the nature of the offence for which that person is prosecuted,

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<sup>5</sup> See, to that effect, Article 1(2) and (3) of Framework Decision 2002/584, under which, first, the Member States are to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision and, second, the framework decisions is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.

<sup>6</sup> 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 (see also PR No 145/19), of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* C-824/18 (see also PR No 31/21), of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* C-791/19 (see also PR No 130/21) and of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* C-487/19 (see also PR No 173/21).

<sup>7</sup> ECtHR, 22 July 2021, *Reczkowicz v. Poland*.

the factual context surrounding that EAW or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person. Such information may also relate to statements made by public authorities which could have an influence on the specific case. By contrast, the fact that the identity of the judges who will be called upon eventually to hear the case of the person concerned is not known at the time of the decision on surrender or, when their identity is known, that those judges were appointed on application of a body such as the KRS is not sufficient to refuse that surrender.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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