

(...) This document contains translated segments of verdict ECLI:NL:RBAMS:2021:420.

## **5. The capacity of 'judicial authority' and Article 47 of the Charter of Fundamental Rights of the European Union**

### **5.1 Introduction**

5.1.1 In its interlocutory judgment of 31 July 2020 the Court ruled that there are such structural and/or fundamental defects in the legal system of Poland concerning the independence of the judiciary that the Polish legislation no longer guarantees the independence of the Polish judiciary. In view of the nature and size of the observed defects it concerns systemic defects. This judgement of the court concerns the observed systemic defects and, contrary to what the public prosecutor in court and the Advocate General of the Court of Justice in his findings seem to suggest, the court in no way passed a judgement on individual Polish judges and their attitude towards the executive branch in particular.

5.1.2 As regards the prejudicial questions the court put to the Court of Justice, the court refers to its judgement of 31 July 2020, heading 3, points 20, 27 and 34, and as regards a representation of the answers given by the Court of Justice, the court refers to its judgement of 27 January 2021, points 5.1.4 – 5.1.5.

5.1.3 The court also refers to its considerations in points 5.2 and 5.3.1, second paragraph, of this judgement. The data that show structural and/or fundamental defects concerning the independence of the judiciary in Poland in themselves do not suffice to deny each Polish judge and judicial authority the capacity of "issuing judicial authority" within the meaning of Article 6, paragraph 1, of Council Framework Decision 2002/584/JHA, as follows from point 50 of the judgment.

5.1.4 As regards the question whether there are data available - in addition to the structural and/or fundamental defects concerning the independence of the judiciary of the issuing member state - that might lead to such a disqualification, the court refers to its considerations under point 6.3 below.

5.1.5 It follows from the above that in line with the assessment scheme as laid down in the *Minister for Justice and Equality (Defects in the Judicial System)* judgment, the court still has to assess whether the defects mentioned may have consequences at the level of the judicial authorities who are competent to take cognizance of the proceedings to which the person claimed will be subjected and whether he runs a real risk of having his right to a fair trial infringed in the case of surrender to Poland. In addition, the court should perform a concrete and accurate verification, especially taking into account the personal situation of the person claimed, the nature of the offence and the actual context in which the arrest warrant was issued, such as statements of public authorities which may affect the treatment of the individual case.

When performing the verification, the court should be vigilant, as follows from point 60 of the judgment of the Court of Justice.

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### **5.3 Opinion of the Court**

5.1.1 As considered above, in its referral decision of 31 July 2020 the Court ruled that there are such structural and/or fundamental defects in the legal system of Poland concerning the independence of the judiciary that the Polish legislation no longer guarantees the independence of the Polish judiciary.

5.3.2 In its referral decision the court also ruled that these systemic defects may have a negative effect on all courts and therefore on all judges in Poland.

5.3.3 As the court already ruled in its decision of 27 January 2021, the judgment of the Court of Justice does not give rise to go back on both decisions. On the contrary, the developments in Poland since the referral decision strengthen her conviction that these judgments are correct.

5.3.4 The opinion that the systemic defects may have negative effects for all courts and all judges, entails that these systemic defects may have negative effects for the courts which are competent to take cognizance of the criminal case against the person claimed.

5.3.5 In this connection, the court finds that a disciplinary chamber was set up in Poland and is actually operating, although this is contrary to the interim measure of the Court of Justice, based on which the operation of this disciplinary chamber should have been suspended<sup>1</sup>. In addition, the Polish Supreme Court ruled that this disciplinary chamber is contrary to Article 47 of the Charter and the Polish Constitution, because the disciplinary proceedings for this disciplinary chamber encroach on the position of the judge too much. Furthermore, the court finds that on 14 February 2020 the *Amendments to the act on the system of common courts, the act on the supreme court, the act on the national council of the judiciary and certain other acts*, combined in the so-called 'law on the judiciary of 20 December 2019', came into effect, which also affect the independent position of Polish judges<sup>2</sup>.

In conclusion, the court finds that the *Polish National Council of the Judiciary (hereinafter: KRS) plays an important part in the appointment of judges in Poland and the Polish Supreme Court already ruled that this KRS isn't sufficiently independent with regard to the other government bodies*. These three possibilities, as laid down in Polish law, for the executive and legislature to exert influence on the judiciary in Poland, in the opinion of the court, have a manifest "chilling effect" on Polish judges, viewed in their entirety and interrelationships, and therefore on the court which is competent to take cognizance of the case against the person claimed.

5.3.6 In that connection the court furthermore finds that there is new information available, which shows that the possibilities of the executive and legislature to exert

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1 Court of Justice 8 April 2020, C791/19 R, ECLI:EU:C:2020:277 (*Commission/Poland*)

2 See:

- Amendments to the act on the system of common courts, the act on the supreme court, the act on the national council of the judiciary and certain other acts, Venice Commission, 14 januari 2020;
- Joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common Courts, the Law on the Supreme Court and some other laws, Opinion No. 977 / 2019, 16 januari 2020;
- The "Muzzle Act" takes effect 14 February. Public opinion is focused on the Disciplinary Chamber, but it is the Extraordinary Control and Public Affairs Chamber that will serve to smother oversight of judges recommended by the new National Council of the Judiciary. This chamber will accept all relevant motions and simply leave them unexamined. In addition, any resolutions it passes will be binding on the entire Supreme Court, Rule of Law PL, 12 February 2020.

influence on the judiciary in Poland are also actually used, thereby increasing the pressure on the judiciary in Poland. For instance, there is information available that 14 judges from Kraków are being prosecuted for substantive decisions they took and changes in the KRS occurred which seem to further restrict the independence of the judiciary<sup>3</sup>.

In addition, the European Commission submitted an '*additional reasoned opinion*' on 27 January 2021 in connection with the infringement proceedings it started on 29 April 2020 concerning the new *Law on the judiciary* which came into effect on 14 February 2020. Briefly put, the addition concerns the point of view of the Commission that the fact that *the Disciplinary Chamber of the Supreme Court*, whose independence and impartiality are not guaranteed, takes decisions that directly impact judges and the way in which they exercise their duties, is contrary to EU law. This information in particular confirms the opinion of the court that the observed defects have a "*chilling effect*" on Polish judges and therefore on the court which is competent to take cognizance of the case against the person claimed.

5.3.7 As regards the "*chilling effect*", the answer of the issuing judicial authority to questions put by the court also shows that the criminal case against the person claimed is tried in the first instance by the *Regional Court in Poznań*. Disciplinary proceedings have been conducted against *the Chief Justice of the Regional Court in Poznań*, which were initiated on 24 May 2019. On 7 February 2019 disciplinary proceedings were also initiated against a judge of *the Regional Court in Poznań*. This means that at least two judges (including the president) of the court which is competent in the first instance to take cognizance of the criminal case against the person claimed, were subjected to disciplinary proceedings in the disciplinary chamber referred to above or are still being subjected to such proceedings.

5.3.8 The court furthermore finds that the person claimed is in the picture with other Polish authorities, partly belonging to the executive, than the issuing judicial authority, and with the Polish media, in connection with the publicity around his case, which was referred to the Court of Justice. The court is also in the possession of a document with the signature of the '*national prosecutor*' in Poland, aimed at Polish public prosecutors. The person claimed is not only mentioned by name in the memo, but the nature of the suspicion against him is also mentioned, as well as the case number of the investigation instituted against him in Poland. In addition, this memo states that as a result of the (prejudicial questions put in) the case of the person claimed, the execution by the Netherlands of Polish EAWs in other cases has been suspended. The case of the person claimed also drew the attention of the media and politics in Poland<sup>4</sup>. It follows from all this that in the opinion of the court the person claimed cannot be regarded as a random Polish suspect whose surrender was requested, but that, on the contrary, he has drawn the authorities' special attention, so that said "*chilling effect*" may well have a concrete effect on his proceedings.

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<sup>3</sup> The 'hawks' are taking control in the new NCJ. Preparations for the vetting of judges. Themis, 21 January 2021

<sup>4</sup> For example: District Court in Warsaw judge accuses a Dutch court of obstruction in the European Arrest Warrant cases - Rule of Law, Warsaw court refuses extradition of family seeking asylum to Netherlands (polandin.com), Polish deputy minister questions independence of Dutch judges | Reuters)

5.3.9 In this connection the court also finds it important that feelings in Poland have run high because of the case of the person claimed, especially the prejudicial questions put in his surrender case that concern the Polish rule of law. The court refers to the above-mentioned memo aimed at the Polish Public Prosecution Service. As considered above, this memo not only mentions the name and the criminal case of the person claimed. It also includes that in response to the referral of the case by this court to the Court of Justice, public prosecutors in Poland are ordered to conduct a particularly careful analysis of EAWs issued especially by the Dutch authorities in view of the existence of compulsory conditions for rejection, referring to a judgment of the court in Warsaw which rejected the surrender of Dutch citizens to the Netherlands<sup>5</sup>.

5.3.10 In this connection, it should also be taken into account that, before the Court of Justice, in the presence of the Polish legal representatives, the lawyer made critical comments on behalf of the person claimed about the state of Polish rule of law.

5.3.11 In addition, as mentioned in paragraph 3 above, a number of the questions put by this court have not been answered, or have been answered insufficiently or not clearly by the Polish issuing authority. The question of the court about the operation of the Polish disciplinary chamber after the interim measure of the Court of Justice of 8 April 2020 wasn't answered. The question of the court about the existence and the consequences of a letter of the Polish Ministry of Justice to Polish courts of 13 September 2019 wasn't answered fully and wasn't answered clearly, since the question was whether the issuing judicial authority received this letter and the answer is that the 'reporting judge' handling the case, doesn't know the letter. Consequently, the court doesn't have the kind of answers to the questions mentioned that would contain information that would in whole or in part remove the court's concerns.

5.3.12 Based on all the above-mentioned elements together and considered in their interrelationship, the court finds that there are compelling reasons, based on facts, to assume that the person claimed runs a real risk that his basic right to an independent judiciary in Poland will be violated and that consequently his basic right to a fair trial will in essence be affected.

## **6. Conclusion**

6.1 Now that it has been established under point 5.3.12 regarding the person claimed that he runs a real risk in the case of surrender that his basic right to an independent judiciary in Poland will be violated and that therefore his basic right to a fair trial will in essence be affected, the court should decide, in view of point 78 of the *Minister for Justice and Equality (Defects in the judicial system)* judgment and point 61 of the judgment *Public Prosecution Service (Independence of the issuing judicial authority)*, not to execute the EAW issued against the person claimed based on Article 1, third paragraph, of the Council Framework Decision 2002/584/JHA..

6.2 This means that the court will end the surrender proceedings by dismissing the demand of the Public Prosecutor to handle the EAW.<sup>6</sup>

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<sup>5</sup> For example: District Court in Warsaw judge accuses a Dutch court of obstruction in the European Arrest Warrant cases - Rule of Law

<sup>6</sup> Cf. Amsterdam District Court, 26 January 2017, ECLI:NL:RBAMS:2017:414.

6.3 The foregoing means that answering the question referred to in 5.1.4 above can be left aside.

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