Warsaw, 25th October 2023

WRITTEN COMMENTS
BY
THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
Knihinicki v. Norway
(Application no. 36356/22)

EXECUTIVE SUMMARY

- Since 2015 the HFHR observes the greatest rollback in human rights protection in Poland after the fall of communism. As never before, the law has served primarily to expand political power at the expense of the judiciary, independent institutions and civil rights and freedoms
- Polish Constitutional Tribunal, once one of the most important elements of the Polish democratic system based on the RoL, in recent years became not even significantly vulnerable to political influence, but essentially dependent on the political will of the ruling majority
- The test established in the *LM* case should be recognized as a positive step regarding the acknowledgment that a lack of judicial independence may ultimately lead to a refusal to execute an EAW. However, proposed model effectively shifts too much of a burden on national courts. Courts' practice unfortunately shows that a test is essentially unworkable. In the HFHR's opinion, in order to realistically guarantee protection of requested person's right to a fair trial in the context of the RoL crisis, further procedural adaptations are required.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights (hereinafter: HFHR or Foundation), pursuant to the leave granted by the President of the Section, regarding which the Vice-President of the Section has subsequently agreed to grant the extension on 5 October 2023 to leave the comments till 26 October 2023.

2. The case of *Knihinicki v. Norway* concerns surrender (extradition) of the applicant from Norway to Poland on the basis of a European arrest warrant (hereinafter: EAW) issued in 2010, after the applicant was arrested in Norway in 2020. The HFHR would like to focus on the issue of proper and accurate assessment of the admissibility of surrendering (extraditing) individuals on the basis of the EAW in the context of threats to the rule of law (hereinafter: RoL).

3. The written comments are devised in three parts. In the first part, we outline biggest threats to the RoL in Poland. Secondly, we outline views of the doctrine on the test established by the Court of Justice of the European Union (hereinafter: CJEU) in case no. C-216/18 LM [1] as well as put forward an analysis of the manner in which the abovementioned test functions in practice so far. Finally, we present Foundation's recommendations concerning the need to formulate more accurate rules of surrendering (extraditing) individuals on the basis of the EAW in the context of threats to the RoL

II. THREATS TO THE RoL IN POLAND

4. Since 2015 the HFHR observes the greatest rollback in human rights protection in Poland after the fall of communism. The ruling majority, despite the lack of a sufficient number of votes to amend the Constitution, has introduced a number of changes to the

[1] Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3541102.

state system, thereby putting at risk the protection of the rule of law and the principle of tripartite governance. By aligning legislation with political objectives, the rule of law, which is at the heart of democratic systems, has been replaced by rule using the law[2].

5. The Foundation is aware that this Court has investigated the crisis of the RoL in Poland when ruling in several of recent cases such as e.g. *Xero Flor v. Poland*[3], *Reczkowicz v. Poland*[4], *Broda and Bojara v. Poland*[5] or *Żurek v. Poland*[6]. Nevertheless, the HFHR would like to briefly outline the most significant threats to the RoL in the context of the criminal proceedings. The Foundation would like to stress however, that presented below is only a selection of issues, not an exhaustive list.

II.1. ATTACKS ON THE JUDICIARY

The Constitutional Tribunal

6. Before the Parliamentary elections of October 2015, Constitutional Tribunal played a vital role in Polish democratic system based on the rule of law, by adjudicating, on the one hand, on the abstract compliance of laws with the Constitution, and on the other hand by examining individual constitutional complaints. According to the Polish Constitution, the decisions of the Tribunal are binding and final[7]. Actions concerning the Constitutional Tribunal were essentially amongst the first steps taken by the ruling majority immediately after the abovementioned elections (amendment to the law on the Constitutional Tribunal was adopted during the first session of the Sejm after the elections). In the HFHR's opinion, the dispute over the shape and functioning of the Constitutional Tribunal initiated the most serious democratic crisis in Poland after 1989.

7. The amendments to the law on the Constitutional Tribunal adopted by the new ruling majority in November and December of 2015, as well as in 2016 were, in the HFHR's opinion, intended to take control over the Tribunal. They were widely criticized by *inter alia* the Polish Ombudsman and the National Council of the Judiciary (hereinafter: NCJ). The most significant issues concerned the attempts to allow the three persons elected by the Sejm of the 8th term to the already legally appointed judicial positions to adjudicate, as well as the sole manner in which the amendments were adopted. The Constitutional Tribunal in several judgments ruled many of the newly adopted provisions unconstitutional[8]. Sadly, newly elected authorities continuously disregarded Tribunal's decisions. For example, in the case of the Tribunal's judgment of the 9 March 2016, the Prime Minister refused to publish the judgement of the Constitutional Tribunal and to recognize its binding force. Those, as well as series of subsequent actions undertaken by the new ruling majority, were widely criticized by the various international bodies[9].

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[2] See e.g. HFHR's report 'Ruled by Law. Threats to the Protection of Human Rights in Poland in 2015-2019.'; available at: https://archiwum.hfhr.pl/wp-content/uploads/2020/01/EN-Rz%C4%85dy-prawem-web-FIN.pdf.

[3] Application no. 4907/18.

[4] Application no. 43447/19.

[5] Applications nos. 26691/18 and 27367/18.

[6] Application no. 39650/18.

[7] Article 190 of the Constitution of the Republic of Poland.

[8] See Judgement of the Constitutional Tribunal of 3rd December, 2015, K 34/15, Journal of Laws from 2015; Judgement of the Constitutional Tribunal of 9th March, 2016, K 47/15;

[9] See Venice Commission, Opinion on the Act on the Constitutional Tribunal Adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October, 2016); UN Special Rapporteur on the Independence of Judges and Lawyers report of 5 April 2018, Report available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/084/27/PDF/G1808427.pdf?OpenElement; PACE Res. 2316 (2020); ECtHR Judment of 7 May 2021 in *Xero Flor v. Poland*.

9. As a result, Polish Constitutional Tribunal, once one of the most important elements of the Polish democratic system based on the RoL, in recent years became not even significantly vulnerable to political influence, but essentially dependent on the political will of the ruling majority. Its effectiveness significantly decreased, while at the same time the rulings Tribunal did produce in matters of public interest, in the HFHR's opinion, often corresponded to the expectations of the currently ruling political majority. Such rulings concerned such important matters as e.g. law on assemblies[10], the act on NCJ (see more below), refusal to provide services based on freedom of conscience and religion by a service provider[11] or reproductive rights[12] and resulted, in the Foundation's opinion, in significant erosion of the RoL, several violations of the rules established by the Polish constitution, as well as shrinking of the civic space.

National Council of the Judiciary

10. One of the most important changes made in the justice system by the ruling majority was the one concerning the National Council of the Judiciary. The National Council of the Judiciary is the body responsible for guarding the independence of courts and judicial independence. It is also responsible for appointing new judges.

11. In December 2017, the Polish Parliament adopted the Act Amending the Act on the NCJ[13], which transferred power to elect 15 judicial members of the NCJ from assemblies of judges to the Sejm. Moreover, the mandate of NCJ members elected before the entry into force of this act was *ex lege* terminated, when new members of NCJ were elected in March 2018[14]. In result, the NCJ became composed mainly of politically appointed members, which, especially in the context of ongoing RoL crisis in Poland, greatly undermined the independent status of the judiciary. It had quickly became clear that the concerns whether the role of guardian of judicial independence could be ensured by judges elected by the Sejm were justified *inter alia* when the "new" NCJ failed to react to politically motivated disciplinary proceedings against judges (see more below). What is more, as reported by the press, some members of the NCJ were purported to have participated in slander campaigns against other judges, including the First President of the Supreme Court at that time, Judge Małgorzata Gersfdorf[15].

12. Despite numerous objections as to the constitutionality of the abovementioned changes, expressed by legal scholars, Polish Ombudsman and members of civic society, as well as well as the concerns raised, among others, by the European Commission in its Reasoned Proposal adopted under the Article 7(1) TEU procedure relating to the rule of law in Poland[16], on 25 March 2019, upon request of the NCJ itself, the Constitutional Tribunal declared that the new procedure of appointment of the NCJ's judges-members complies with the Constitution[17]. As a result, the NCJ, the composition of which was constituted mostly by Parliament, operates to this day. Overall, since 2018 it has appointed about 2500 judges. Without a doubt, the participation of these people in the

[10] See Judgement of the Constitutional Tribunal of 16th March, 2017, Kp 1/17.
[11] Judgement of the Constitutional Tribunal of 26th June, 2019, K 16/17.
[12] Judgement of the Constitutional Tribunal of 22nd October, 2020, K 1/20.
[13] Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000003/O/D20180003.pdf
[14] See more on this issue in *Grzęda v. Poland* (Application no. 43572/18).
[15] Magdalena Gałczyńska, Troll Farm in the Ministry of Justice, part 3. Judges organise a hate campaign against the Supreme Court President, available at: https://wiadomosci.onet.pl/ tylko-w-onecie/farma-trolli-w-ministerstwie-sprawiedliwosci-cz-3-sedziowie-organizuja-hejt-przeciwko/jg5lhx7 (accessed: 23.10.2023).
[16] See paragraphs 137-145 of the Reasoned Proposal, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0835
[17] Judgement of the Constitutional Tribunal of 25 March 2019, K 12/18.

process of adjudication, due to formal defects in the formation of the "new" NCJ, may have an impact on exercising the right to have the case heard by a court established in accordance with law. Issue of the status of newly appointed judges is very complex, and in future the necessity to regulate their legal situation will undoubtedly be a big challenge for the legislator.

Disciplinary proceedings against judges of common courts in Poland

13. In Poland, the disciplinary liability of judges of common courts, i.e. judges of district, regional courts or courts of appeal, as well as the system of disciplinary courts, is subject to detailed regulation primarily under the 2001 Act – the Law on the System of Common Courts (hereinafter: LSCC). Since its entry into force, the LSCC has been amended several times, with the most momentous changes concerning the disciplinary regime having been introduced in 2017, 2020 and 2022. One of the most controversial amendments (of 2020) due to its repressive nature has become commonly known as the "Muzzle law"[18]. It is widely perceived that its purpose was to introduce a chilling effect among judges involved in defending the rule of law in Poland who, for example, refused to hear cases in panels with judges appointed by the new NCJ or referred questions concerning the judiciary for a preliminary ruling of the Court of Justice of the European Union. The newly introduced types of disciplinary offences involved: (1) an act or omission which may prevent or significantly impede the functioning of a judicial authority; (2) actions questioning the existence of the official relationship of a judge, the validity of a judicial appointment, or the constitutional mandate of an organ of the Republic of Poland; (3) public activities incompatible with the principle of independence of the courts and judges. It must be noted however that the amendment of July 2022 introduced a new provision of the LSCC, according to which the submission of a request for a preliminary ruling referred to in Article 267 of the Treaty on the Functioning of the European Union to the Court of Justice of the European Union is not a disciplinary offence.

14. The structure of the disciplinary justice system for common court judges was modified with the entry into force of the new Supreme Court Act[19], which became effective on 3 April 2018. The new law provided, inter alia, for the creation of a new chamber of the Supreme Court, the Disciplinary Chamber, which assumed jurisdiction over disciplinary cases of judges and members of other legal professions. The Disciplinary Chamber assumed first-instance jurisdiction in cases involving, for example, disciplinary offences which also contain the elements of intentional offences prosecuted by public indictment and in the case of disciplinary offences introduced by the Muzzle Law involving the questioning of another judge's official relationship, the validity of another judge's appointment or the constitutional mandate of an authority of the Republic of Poland. Above all, however, the Disciplinary Chamber was awarded the exclusive competence in dealing with disciplinary cases as the court of second instance. The new chamber was formed entirely from persons appointed with the participation of the "new NCJ", which led to many legal concerns regarding the status of the judges appointed by the NCJ and the legality of the Chamber's operation. Furthermore, among other things, because of the far-reaching organizational distinctiveness of the Disciplinary Chamber within the Supreme Court, it was pointed out that the Chamber had the character of an extraordinary court, the functioning of which legally is only permitted under the Constitution in times

[18] Act of 20 December 2019 amending the Act – the Law on the System of Common Courts, the Act on the Supreme Court and certain other acts

[19] Act of 8 December 2017 on the Supreme Court.

of war[20]. Eventually, in the face of a growing body of jurisprudence from national and international courts[21] a law abolishing the Disciplinary Chamber of the Supreme Court came into force. However, the new chamber (Chamber of Professional Responsibility) is as defective as its predecessor, owing to the procedure and the involvement of the new NCJ (six CPR members was appointed by the NCJ).

15. The HFHR's monitoring report[22] dedicated to the subject described above concluded *inter alia* that disciplinary proceedings underway after 2018 in Poland do not guarantee fair trial standards with regard to the right to a court. What's more the practice of applying the rules on disciplinary proceedings indicates that some of these proceedings are launched in politically motivated cases. This is clearly visible when e.g. looking at the judges whose rights were violated – as assessed by this Court – through attacks conducted on them by the Polish authorities due to their beliefs. Disciplinary proceedings were launched e.g. against Judge Juszczyszyn and Judge Żurek.

II.2. EFFORTS TO TAKE CONTROL OVER THE PROSECUTION

16. Undoubtedly, prosecutors' independence is a necessary condition for the effective performance of their responsibilities – that is upholding the rule of law and prosecuting crimes. International law recognizes that the independence of prosecutors is one of the guarantees of the right to a fair and impartial trial[23]. Therefore, it is of great significance that similarly to actions taken against judiciary independence, the new Prosecution Service Act[24] became one of the first laws adopted by the new Sejm convened after the elections of October 2015.

17. The changes introduced in 2016 by the abovementioned act *inter alia* reunited the positions of the Minister of Justice and the Prosecutor General, expanded Prosecutor General's authority over prosecutors and changed the system of the prosecution service as well as effectively led to the abolition of its independence. The new Prosecution Service Act enabled the leadership of the prosecution service to exercise top-down control over selected investigations. Furthermore, it provided the Prosecutor General, an active politician, with the power to intervene directly in preliminary proceedings.

18. As a result of the changes described above, the Foundation observed that since 2016, the political involvement of the prosecution service has significantly increased. This has manifested itself *inter alia* in procedural decisions taken by prosecutors which arouse public interest due to the persons or spheres of public life to which they relate. In particular, the prosecution service refused to initiate criminal proceedings or discontinued proceedings in certain cases (e.g. those concerning politicians of the ruling majority). At the same time, in certain other cases, prosecutor's offices brought charges or filed indictments for purely political (or publicity) purposes. Therefore, the HFHR believes that it is reasonable to suspect that certain proceedings conducted by prosecutor's offices were strictly controlled "from the above". It needs to be added however, that recently some of the powers of the Prosecutor General were effectively

[20] See e.g. W. Wróbel, "Izba Dyscyplinarna jako sąd wyjątkowy w rozumieniu art. 175 ust. 2 Konstytucji RP", (2019) 1–2 Palestra.
[21] See CJEU, judgment of 19 November 2019 (Grand Chamber), Joined Cases C-585/18, C-624/18 and C-625/18; CJEU, judgment of 15 July 2021 (Grand Chamber), Case C-791/19; ECtHR, Reczkowicz v. Poland, no. 43447/19, 22 July 2021.
[22] Available at: https://hfhr.pl/upload/2023/02/report-disciplinary-proceedings-against-judges-of-common-courts-in-poland.pdf
[23] See Opinion No.9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors.
[24] Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000177/U/D20160177Lj.pdf

ceded on to the National Prosecutor (e.g. power to give direct instructions to the prosecutors) due to the amendment[25] that came into force in September 2023[26].

III. TEST ESTABLISHED BY THE CJEU IN CASE NO. C-216/18 LM – ITS USE AND VIEWS OF THE DOCTRINE

20. In case no. C-216/118 LM, the Court of Justice of the EU (hereinafter: the CJEU) presented its guidelines as to which requirements Union law poses for the test to deny surrender on the grounds of possible fair trial infringements in the requesting State. As was accurately noticed by Professors S. Biernat and P. Filipek in their assessment of the judgment issued in the abovementioned case[27], the so called "LM test" is essentially an evolution of the two-step test first introduced in the *Aranyosi and Căldăraru* case [28]. The "LM test" consists of three steps – three levels at which, in CJEU's opinion, fair trial guarantees should be considered. First, general test, remains the same as in the *Aranyosi and Căldăraru* case and should be used to determine whether there is a real risk that the fundamental right to a fair trial may be breached on account of systemic or generalized deficiencies concerning the judiciary , such as to compromise judicial independence in the Member State that issued the arrest warrant[29]. The CJEU's attempt to adapt the original test in order to establish more accurate process of verifying the conditions for the execution of the EAW can be found at the intermediate stage – between a general and the individual risk assessment. At this level the executing court should determine to what extent systemic or generalized deficiencies in judicial independence, that were identified under the general test, may affect the courts which have jurisdiction over the proceedings for which the individual person was requested by the warrant[30]. Finally, the third test in the CJEU mechanism is the individualized test in relations to the specific case and the individual person being prosecuted, which aims to answer the question, whether there is a real risk of a breach of the fundamental right to a fair trial of the person subjected to the arrest warrant. In addition, the CJEU further establishes the necessity of a dialogue between the executing State and the issuing State, as set out in *Aranyosi and Căldăraru*. Pursuant to Article 15(2) of the Framework Decision on EAW[31], the executing judicial authority must request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk. The issuing authority should particularly have the task to provide any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing State, material which may rule out the existence of that risk for the individual concerned[32].

22. The test proposed in the case no. C-216/118 LM was received by the doctrine as a certain improvement of the test established in *Aranyosi and Căldăraru*. However, the

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[25] Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20230001860/O/D20231860.pdf

[26] Nevertheless, this move was largely seen by the experts as intended to guarantee Mr Ziobro political influence over the prosecution service in case of the Law and Jutstice's defeat in oncoming elections, as the National Prosecutor can be dismissed only by the President (President Duda term is coming to an end in August 2025)

[27] See S. Biernat, P. Filipek, *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM*, 2021.

[28] See CJEU judgment in joined cases nos. C-404/15 and C-659/15 of 5 April 2016; available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015CJ0404

[29] See C-216/118 LM, paragraph 68.

[30] See C-216/118 LM, paragraph 74.

[31] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF

[32] See C-216/118 LM, paragraphs 76 and 77 .

experts were also quick to point out that on the other hand in its proposal CJEU effectively sidestepped a substantive review of judicial independence in Poland, leaving the task to the national court[33]. Ruling in the LM made it apparent that the right and the duty to play an active role in safeguarding the proper standard of judicial independence in the European legal area should be considered as a decentralized responsibility lying with all EU courts, including national judiciaries, which is definitely a positive recognition. However, on the other hand, as highlighted by the Professor P. Bárd and W. van Ballegooij: "The Court's insistence that *Aranyosi* includes the requirement that the executing authority acquire supplementary information from the issuing judicial authority (paragraphs 76-77), and that the two courts should engage in a 'dialogue', presupposes that a captured court will admit its lack of independence. Such a self-criticism is highly unlikely, not only because the issuing court would destroy its own reputation, but also because it would thereby criticize the issuing state's executive, i.e. the branch of government upon which it is dependent"[34]. In this regard, Profesors Biernat and Filipek had on the one hand recognized that the "mechanism of horizontal judicial dialogue between executing and issuing authorities has some potential to permit the gathering and verification of information on the Member State which issued the EAW, and to clarify doubts related to fair trial guarantees in that State"[35], however, on the other hand they also did not hesitate to point out that "it is a deficient instrument which is not fully capable of examining judicial independence and threats to the rule of law"[36]. There seems to be a consensus among the doctrine when it comes to recognition of such two aspects of the LM test. The experts applaud the fact that the "CJEU in *LM* reached the long overdue clarification that human rights can and must play a role in surrender proceedings, thereby acknowledging that the EAW is not a black box that must be automatically recognized"[37]. However, doctrine also admits inherent limitations and substantial inadequacy of the model of supplementary questions to assess judicial independence and decide on the execution of the EAW in relation to fair trial standards, as the adequacy and credibility of an essentially self-assessment of the judicial authorities independence, which is later shared with foreign authorities, may be at least disputed. It is reasonable to admit, as acknowledged by Professors Biernat and Filipek, that realistically "such a procedure does not seem to be able to lead to a satisfactory result in many or perhaps in most cases"[38]. At the same time, the CJEU in the LM case reserved the task of suspending mutual trust exclusively to the European Council[39], which in effect means that the Court precluded the possibility of having the EAW regime suspended vis-à-vis a state that violates Article 2 of

[33] See e.g. M. Wendel, *Afraid of Their Own Courage? Some Preliminary Reflections on LM***,** available at: https://verfassungsblog.de/afraid-of-their-own-courage-some-preliminary-reflections-on-lm/

[34] See P. Bárd and W. van Ballegooij *The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU*, available at: https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/

[35] See S. Biernat, P. Filipek, *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM*, 2021.

[36] *Ibidem.*

[37] T. Wahl, *Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe.* available at: https://eucrim.eu/articles/refusal-of-european-arrest-warrants-due-to-fair-trial-infringements/#docx-to-html-fn56

[38] See S. Biernat, P. Filipek, *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM*, 2021.

[39] See C-216/118 LM, paragraphs 71 and 72.

the Treaty on European Union values[40]. Therefore, having considered all of the above, the HFHR believes that the assessment of the LM test was best summed up by the P. Bard and W. van Ballegooij[41] – the Court's acknowledgment that a lack of judicial independence may ultimately lead to a refusal to execute an EAW is a welcomed step forward but the Court also takes us two steps back in upholding the rule of law by effectively shifting too much of a burden on national courts. Aforementioned scholars accurately added further that: "If these courts do not or are unable to take up that responsibility, it will result in both impunity for Member States violating the rule of law as well as the proliferation of violations of individual rights. Second, with its large hurdles the modified two-step *Aranyosi* test is likely to be applied by some executing judicial authorities, but not by others. This will lead to the fragmentation of EU law and discriminatory treatment among EU citizens and residents."

The implementation of the "LM test" by the national courts

23. In some jurisdictions the *LM* case has seemingly not experienced much attention in court cases, whereas, in other jurisdictions, arguments like those in *LM* were often put forward, and courts delivered several follow-up decisions. The Foundation was able to examine several of such decisions issued by the national courts of various Member States. Brief analysis of those rulings is presented below.

24. The HFHR was able to analyze four decisions issued by the Rechtbank Amsterdam (the central court instance that decides on the execution of all incoming EAWs in the Netherlands) between the July 2021 and December 2022[42]. In all four of these cases the court at hand acted consistently. On every occasion the court stated that it has previously determined that, due to structural or fundamental flaws in the Polish legal order, there is a general real risk in Poland of violation of the fundamental right to a fair trial before an independent and impartial court previously established by law. What is significant however, in all four cases the court required from the defendant to substantiate that the fair trial infringement would concretely affect his/her case. On every occasion the court effectively refused to assume the realization of a concrete danger of fair trial infringements towards the requested person once he/she is surrendered to Poland. No attempts were made to acquire supplementary information from the issuing judicial authority. In one of the cases, RK no. 16/6147, the counselor has even asked the court to postpone the hearing of the case, pending clarity about the judges who will hear the criminal case of the requested person in Poland, while pointing out that without this information, it is not possible to demonstrate that in the individual case of the requested person there is a real risk of violation of Article 47 of the Charter. However, the Court refused, remaining that is up to the requested person against whom an EAW has been issued to provide concrete data showing that the structural or fundamental defects referred to above could have a concrete influence on the handling of his criminal case. Consequently, in all four cases the requested person was extradited which shows that the threshold of the test, in practice of the Rechtbank Amsterdam, is nearly not achievable. However, it is worth pointing out that according to the data available in the Rechtspraak data base, in at least two of the examined cases – RK nos. 17/7305 and 21/5753 – the

[40] See P. Bárd and W. van Ballegooij *The CJEU in the Celmer case: One Step Forward, Two Steps Back for Up-holding the Rule of Law Within the EU*, available at: https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/

[41] *Ibidem.*

[42] RK nos.: 21/5753; 16/6147; 17/7305; 17/5908.

court took into consideration the nature of the offence and the factual context as important elements of the *LM* test.

25. In the case of Mr Celmer (LM)[43], the Irish High Court had requested that the issuing judicial authorities in Poland comment on a series of questions, including the general rule of law situation in Poland and the potential effect of the situation on the trial of Mr. Celmer if he was to be surrendered. Mr Celmer also submitted evidence by way of an expert report from three lawyers in Poland. On the basis of the evidence provided, the Irish High Court was satisfied that there was evidence of systemic and generalized breaches: there is a real risk connected with a lack of independence of the courts of Poland on account of systemic or generalized deficiencies there of the fundamental right to a fair trial being breached. The Irish High Court was also satisfied that these deficiencies apply to the court level before which Mr Celmer would be tried if surrendered. In particular, one of the two Polish judges gave evidence of individual cases where judges have been summoned for disciplinary proceedings arising from politically controversial rulings. Nevertheless, The Irish High Court considered that the CJEU ruling required it to make a more individualized assessment, and that the burden of proof was on Mr Celmer in this respect. This meant that after "passing" the general and intermediate levels of the "LM test" Mr Celmer failed the last, individual assessment. This may lead to conclusion that the threshold of the test for the requested person is virtually impossible to pass.

26. The the British courts (UK at that time was still a member state) High Court of Justice of England and Wales in the extradition proceedings of *Lis, Lange and Chmielewski*[44] and SC Edinburgh in *Maciejec* case[45] in both cases found the existence of an abstract risk of serious breach of judicial independence in Poland. Nevertheless, in line with the *LM* ruling, the courts considered that such finding is not enough to suspend the EAW system in a general way; instead, it is necessary to carry out the second stage of the *LM* test and examine the specific impact of the said generalized deficiencies on the applicants' right to a fair trial. In this regard, both courts relied on proof presented by the requested persons (e.g. legal professionals – witnesses) and in both cases did not conclude that the recognized general deficiencies impacted right to a fair trial of those persons.

27. Extremely different approach was taken by the Karlsruhe Higher Regional Court in its decision in case no. Ausl 301 AR 156/19. However, the courts actions were at least partially motivated by similar recognition that the "LM test" is to stringent and virtually unworkable[46]. The Karlsruhe Higher Regional Court decided to deny extradition of a Polish national because of possible infringements of the right to a fair trial in Poland. The HRC of Karlsruhe justified its decision by asserting that there is a high likelihood that the extradition of the prosecuted person to Poland for the purpose of criminal prosecution will be inadmissible, at least for the time being, due to the current developments in Poland in the context of the judicial reform brought about by the recent "muzzle law". This was the first time a German court refused to release a Polish citizen to the Polish authorities as mandated by a EAW due to a real risk of fair trial infringement of the individual concerned following the adoption of illegitimate amendments to the Polish judiciary, in particular the so-called Muzzle Law. The Higher Regional Court of Karlsruhe decided to suspend the execution of the EAW, while – what is significant – setting aside the LM test

[43] See http://www.europeanrights.eu/public/sentenze/Irlanda-19novembre2018-High_Court.pdf
[44] Available at: https://www.judiciary.uk/wp-content/uploads/2018/11/lis-judgment-2011101.pdf
[45] Available at: https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2019scedin37.pdf?sfvrsn=c8c90fd2_0
[46] See more e.g. https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/

of an individualized real risk of fair trial infringement with its particularly high threshold and it demanded more information about the current situation in Poland.

IV. RECOMMENDATIONS CONCERNING RULES OF EXTRADITING INDIVIDUALS

28. The HFHR, believes that taking into the consideration the trend in this Court's judgments in cases such as e.g. *Dolińska-Ficek and Ozimek v. Poland*[47] and *Advance Pharma sp. z o.o. v. Poland*[48], as well as the views of the Polish legal doctrine, there is one clear issue concerning RoL in Poland against which law could possibly safeguard persons extradited to Poland on the basis of EWA – namely against adjudication by persons appointed by the "new" NCJ in court proceedings.

29. The law is not unfamiliar with cases of certain countries requiring particular assurances before surrendering a requested person to the issuing country. For example, in all but exceptional cases, section seven of Canada's Charter of Rights and Freedoms requires the Canadian minister of justice to seek assurances from a country requesting extradition that the death penalty will not be sought or, if sought, will not be imposed[49].

30. The HFHR proposes adopting similar assurances, which would guarantee that a person appointed by the so called "new" NCJ (or any other body burdened with similar defectiveness resulting in breach of the principle of tripartite governance) would not be adjudicating in requested person case. When conducting the *LM* test, this requirement could possibly replace the final stage of extremely strict individualized test and still offer a substantial protection of the right to a fair trial of a person being extradited. The Foundation believes that such guarantees should be formally safeguarded by procedural provisions granting disqualification of such judge from adjudicating in a case of requested person.

V. CONCLUSIONS

25. Since 2015 the HFHR definitely observes the greatest rollback in human rights protection in Poland after the fall of communism. As never before, the law has served primarily to expand political power at the expense of the judiciary, independent institutions and civil rights and freedoms.

26. The test established in the *LM* case should be recognized as a positive step regarding the acknowledgment that a lack of judicial independence may ultimately lead to a refusal to execute an EAW. However, proposed model effectively shifts too much of a burden on national courts. Courts' practice unfortunately shows that a test is essentially unworkable. In the HFHR's opinion, in order to realistically guarantee protection of requested person's right to a fair trial in the context of the RoL crisis further procedural adaptations are required.

On behalf of the Helsinki Foundation for Human Rights,

Piotr Kładoczny, ph.D.

Vice-president of the Board

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[47] Applications nos. 49868/19 and 57511/19.

[48] Application no. 1469/20.

[49] See R. Harvie and H. Foster, *Shocks and Balances: United States v. Burns, Fine-Tuning Canadian Extradition Law and the Future of the Death Penalty*; Gonzaga Law Review; available at: https://blogs.gonzaga.edu/gulawreview/files/2011/02/HarvieFoster.pdf