OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 28 June 2018 (1)

**Case C−216/18 PPU**

**Minister for Justice and Equality**
**v**
**LM**
**(Deficiencies in the system of justice)**

(Request for a preliminary ruling from the High Court (Ireland))

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrant — Grounds for refusal to execute — Charter of Fundamental Rights of the European Union — Article 47 — Right to a fair trial — Rule of law — Article 7 TEU — Reasoned proposal of the Commission inviting the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of a value referred to in Article 2 TEU)

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## I. Introduction

1. The present reference for a preliminary ruling falls within the context of the development and reforms of the Polish system of justice (2) which led the European Commission to adopt, on 20 December 2017, a reasoned proposal inviting the Council of the European Union to determine, on the basis of Article 7(1) TEU, that there is a clear risk of a serious breach by the Republic of Poland of one of the values common to the Member States referred to in Article 2 TEU, namely the rule of law (3) ('the Commission's reasoned proposal').

2. If the procedure provided for in Article 7 TEU is taken to its conclusion, that is to say, determination by the European Council of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, it enables certain of the rights which that Member State has pursuant to the Treaties to be suspended. Such a procedure has never before been set in motion, let alone taken to its conclusion. The Commission's reasoned proposal constitutes the first attempt of this kind and, to date, the Council has not adopted the decision which that proposal invited it to.

3. In the present case, LM, the respondent in the main proceedings, is the subject of three arrest warrants issued by Polish courts on the basis of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (4) as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (5) ('the Framework Decision'). He asserts that, on account of the reforms of the Polish system of justice as analysed in the Commission's reasoned proposal, he runs a real risk of not receiving a fair trial in Poland and he submits that that risk precludes his being surrendered by the referring court to the Polish judicial authorities.

4. Under the principle of mutual recognition, the Member States are required to execute any European arrest warrant. (6) The executing judicial authority may refuse to execute such a warrant only in the cases, exhaustively listed, of mandatory non-execution laid down in Article 3 of the Framework Decision or optional non-execution laid down in Articles 4 and 4a of the Framework Decision. (7)

5. Nevertheless, in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198, paragraph 98), the Court held that, where the executing judicial authority finds that there exists, for the individual who is the subject of the European arrest warrant, a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter'), the execution of that warrant must be postponed. In reaching that conclusion, the Court relies, first, upon Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191), where it recognised that, 'in exceptional circumstances', limitations may be imposed on the principles of mutual recognition and mutual trust, and second, upon Article 1(3) of the Framework Decision, according to which that decision 'shall not have the effect of modifying the obligation to respect fundamental rights' as enshrined in particular by the Charter. (8)

6. However, the Court takes care, in the judgment in *Aranyosi and Căldăraru*, to place limits on postponement of the execution of the European arrest warrant by requiring the executing judicial authority to conduct a two-stage examination.

7. First, the executing judicial authority must find that there is a real risk of inhuman or degrading treatment in the issuing Member State on account of 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. (9) In order to find that such deficiencies exist, it must rely on 'information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State', inter alia on 'judgments of international courts, such as judgments of the [European Court of Human Rights], judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN'. (10)

8. Then, the executing judicial authority must ascertain that there are substantial grounds for believing that *the individual concerned* by the European arrest warrant will be exposed to the risk established on the basis of the material referred to in the preceding point. Indeed, 'the mere existence of … deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, … does not necessarily imply that, *in a specific case*, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered'. (11) The executing judicial authority must therefore, on the basis of Article 15(2) of the Framework Decision, request supplementary information from the issuing judicial authority concerning the conditions of detention of the individual concerned. If, on the basis of that information, the executing judicial authority considers that the individual concerned does not run a real risk of inhuman or degrading treatment, it must execute the European arrest warrant. If, conversely, it finds, on the basis of that information, that the individual concerned runs such a risk, it must postpone the execution of that warrant.

9. In the present case, the fundamental right to the breach of which the requested person claims to be exposed in the issuing Member State is not the prohibition on inhuman or degrading treatment at issue in the judgment in *Aranyosi and Căldăraru* but, as I have said, the right to a fair trial. The Court is asked in particular whether the second stage of the examination defined in that judgment is applicable to such a situation. In other words, the Court is asked whether, in order for the executing judicial authority to be required to postpone the execution of a European arrest warrant, it has to find, first, that there are deficiencies in the Polish system of justice amounting to a real risk of breach of the right to a fair trial and, second, that the person concerned is exposed to such a risk, or whether it is sufficient for it to find that there are deficiencies in the Polish system of justice, without having to ascertain that the individual concerned is exposed thereto.

10. The question is of importance, since the referring court indicates that it takes the view, on the basis of the Commission's reasoned proposal and two opinions (12) of the European Commission for

Democracy through Law ('the Venice Commission'), that such deficiencies are established.

## II. Legal context

### *A. EU law*

#### *1. The Charter*

11. Article 47 of the Charter, headed '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.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

#### *2. The Treaty on European Union*

12. As set out in Article 2 TEU:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

13. Article 7 TEU 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 the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.'

### *3. The Framework Decision*

14. Recital 10 of the Framework Decision states:

'The mechanism of the European arrest warrant 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) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.'

15. Article 1 of the Framework Decision, headed '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 of the Treaty on European Union.'

### *B. Irish law*

16. The European Arrest Warrant Act 2003, which implemented the Framework Decision, (13) provides in section 37(1):

'A person shall not be surrendered under this Act if —

(a) his or her surrender would be incompatible with the State's obligations under —

(i) the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms], or

(ii) the Protocols to the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms],

(b) his or her surrender would constitute a contravention of any provision of the Constitution ...'

## III. Facts and main proceedings

17. LM, a Polish national, is the subject of three European arrest warrants issued by the Republic of Poland.

18. The first European arrest warrant was issued (14) on 4 June 2012 by the Sąd Okręgowy w Poznaniu (Regional Court, Poznań, Poland) for the purpose of prosecuting LM for two offences, categorised,

respectively, as ‘illicit production, processing, smuggling of intoxicants, precursors, surrogates or psychotropic substances or trafficking in same’ and ‘participation in an organised criminal group or association whose aim is to commit offences’. According to this arrest warrant, in the period between 2002 and the spring of 2006, LM participated, in Poznań and Włocławek, in an organised criminal group whose aim was, inter alia, trafficking in large amounts of intoxicants. During the same period he is said to have sold at least 50 kg of amphetamine valued at at least 225 000 Polish zlotys (PLN), 200 000 ecstasy pills valued at at least PLN 290 000 and at least 3.5 kg of marijuana valued at at least PLN 47 950.

19. The second European arrest warrant was issued (15) on 1 February 2012 by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) for the purpose of prosecuting LM for two offences, both categorised as ‘illicit trafficking in narcotic drugs and psychotropic substances’. According to this arrest warrant, in the summer of 2007 LM made a delivery in Holland of at least 6 kg of marijuana, and then of at least 5 kg of marijuana. A letter from the issuing judicial authority explains that the marijuana delivered by LM to the other members of the organised criminal group of which he was part was then sold to him for distribution in Poland.

20. The third European arrest warrant was issued (16) on 26 September 2013 by the Sąd Okręgowy w Włocławku (Regional Court, Włocławek, Poland) for the purpose of prosecuting LM for an offence categorised as ‘illicit production, processing, smuggling of intoxicants, precursors, surrogates or psychotropic substances or trafficking therein’. According to this arrest warrant, between July 2006 and November 2007, LM participated, in Włocławek, in the trafficking of at least 30 kg of amphetamine of a value not less than PLN 150 000, of 55 000 ecstasy pills of a value not less than PLN 81 000, and of at least 7.5 kg of marijuana worth not less than PLN 105 250.

21. LM was arrested in Ireland on 5 May 2017. He did not consent to his surrender to the Polish authorities, on the ground, in particular, that, on account of the recent legislative reforms of the Polish system of justice and of the Public Prosecutor’s Office, he runs a real risk of a flagrant denial of justice in Poland, in breach of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’).

22. After delays due, according to the referring court, to legal aid issues, to a change of solicitors and to requests for adjournment in order to adduce fresh evidence and to provide new information about the Polish legislative reforms, the High Court (Ireland) held a hearing on 1 and 2 February 2018. By judgment of 12 March 2018, the High Court held that it was necessary to request a ruling from the Court of Justice on the interpretation of the Framework Decision and invited the parties to the main proceedings to make submissions on the questions which it intended to ask the Court.

23. On 23 March 2018, the High Court held, on the basis of the Commission’s reasoned proposal and of the opinions of the Venice Commission, that the legislative reforms undertaken by the Republic of Poland over the last two years, taken as a whole, breach the common value of the rule of law, referred to in Article 2 TEU. It drew the conclusion that there is a real risk of the respondent in the main proceedings not receiving a fair trial in Poland, because the independence of the judiciary is no longer guaranteed there and compliance with the Polish Constitution is no longer ensured.

24. The High Court raises the issue whether the second stage of the examination defined by the Court of Justice in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198), is applicable where deficiencies in the system of justice exist in the issuing Member State such as to constitute a breach of the rule of law. The High Court is of the view that the second stage of that examination is not applicable. In such a situation, it would be unrealistic to require the individual concerned to establish that those deficiencies have an effect on the proceedings to which he is subject.

25. In addition, the High Court considers that, on account of the systemic nature of the deficiencies at issue, the issuing judicial authority would be able to provide no individual guarantee capable of ruling out the risk run by the individual concerned. It would be unrealistic to require guarantees as to the identity of the prosecutor and of the judges who will hear the case, including any appeal, or as to observance of

rulings of the Constitutional Tribunal finding that a provision which might have an impact on the proceedings at issue is unconstitutional.

26. The High Court therefore stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

‘(1) Notwithstanding the conclusions of the Court of Justice in [the judgment of 5 April 2016,] *Aranyosi and Căldăraru* [(C−404/15 and C−659/15 PPU, EU:C:2016:198)], where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

(2) If the test to be applied requires a specific assessment of the requested person’s real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?’

27. On 12 April 2018, the Court decided to deal with the reference for a preliminary ruling under the urgent procedure, pursuant to Article 107(1) of the Rules of Procedure of the Court of Justice.

28. The Court also decided to invite the Republic of Poland to provide in writing all relevant information concerning the present case, in accordance with Article 109(3) of the Rules of Procedure.

29. Written observations on the questions referred for a preliminary ruling were submitted by the applicant and the respondent in the main proceedings, the Commission and, on the basis of Article 109(3) of the Rules of Procedure of the Court of Justice, the Republic of Poland. Those parties, as well as the Kingdom of Spain, Hungary and the Kingdom of the Netherlands, presented oral argument at the hearing on 1 June 2018.

## IV. Analysis

### *A. Admissibility*

30. The Polish Government contends that the issue is hypothetical as there is no reason justifying, on the basis of the right to a fair trial, the refusal to execute the European arrest warrants at issue. Although it does not expressly submit that the reference for a preliminary ruling is inadmissible, it nevertheless infers that the Court should not give an answer to the referring court’s questions. The Hungarian Government contends that the reference for a preliminary ruling is inadmissible because the issue is hypothetical.

31. In accordance with settled case-law, questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (17)

32. It is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court of Justice by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling. The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. (18)

33. In the present instance, the Court is asked whether, in order for the executing judicial authority to be required to postpone the execution of a European arrest warrant, it is sufficient for it to find that there is a real risk of breach of the right to a fair trial on account of deficiencies in the system of justice of the issuing Member State, or whether it must also ascertain that the requested person will be exposed to such a risk. The Court is also asked what information and guarantees the executing judicial authority must, as the case may be, obtain from the issuing judicial authority in order to discount that risk. LM is the subject of three European arrest warrants issued by Polish courts and the referring court states that in its view the deficiencies affecting the Polish system of justice are such that the rule of law is damaged. Consequently, the surrender of LM to the issuing judicial authority depends on the Court's answer to the questions referred for a preliminary ruling. Accordingly, the questions cannot be regarded as hypothetical.

34. I therefore consider that the request for a preliminary ruling must be declared admissible.

## *B. Substance*

### *1. Preliminary observations*

35. I would point out that it is not for the Court to rule on whether there is a real risk of breach of the right to a fair trial on account of deficiencies in the Polish system of justice, that is to say, on the first stage of the examination defined in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198). It is for *the executing judicial authority* to rule on the existence of such a risk. Indeed, according to paragraph 88 of that judgment, where the executing judicial authority is in possession of evidence of the existence of a real risk of inhuman or degrading treatment in the issuing Member State, it is bound to assess the existence of such a risk.

36. It would be incumbent upon the Court to rule on whether Polish legislation complies with EU law, in particular the provisions of the Charter, only in an action for failure to fulfil obligations. (19) However, in such an action, the Court would find, if appropriate, the *breach* of a rule of EU law, not the *risk* of breach of such a rule.

37. I would also make clear that the view cannot be taken that, as long as the Council has not adopted a decision determining, on the basis of Article 7(1) TEU, that there is a clear risk of a serious breach by the Republic of Poland of the rule of law, the executing judicial authority cannot carry out the assessment referred to in point 35 of this Opinion.

38. First, the assessment which will, as the case may be, be carried out by the Council under Article 7(1) TEU does not have the same object as the assessment carried out by the executing judicial authority in the first stage of the examination defined in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198). Under Article 7(1) TEU, the Council assesses whether there is a clear risk of a serious breach of the values referred to in Article 2 TEU, namely human dignity, freedom, democracy, equality, the rule of law and human rights. By contrast, in the judgment in *Aranyosi and Căldăraru*, the examination by the executing judicial authority concerned the existence of a real risk of breach not of a value common to the Member States but of a fundamental right, the prohibition of inhuman or degrading treatment or punishment.

39. In the present case, the referring court asks the Court of Justice whether, in order for it to be required to postpone the execution of a European arrest warrant, it is sufficient for it to find that 'conditions in the issuing Member State are incompatible *with the fundamental right to a fair trial* because the system of justice itself [of that Member State] is no longer operating under the rule of law. (20) The Court is therefore asked about the consequences of breach of the right to a fair trial, not about the consequences of breach of the value constituted by the rule of law.

40. It is true that, in this instance, it was concerns relating to the independence of judges and to the separation of powers, and thus to the right to a fair trial, that led the Commission to adopt its reasoned proposal. (21) Nonetheless, a risk of breach of the right to a fair trial may exist in the issuing Member State

even if it is not in breach of the rule of law. Accordingly, it cannot, to my mind, be disputed that the two assessments conducted, respectively, by the Council and by the executing judicial authority, as described in point 38 above, do not have the same object.

41. Second, determination by the Council that there is a clear risk of a serious breach of the values referred to in Article 2 TEU does not have the same consequences as the executing judicial authority finding that there is a real risk of breach of a fundamental right.

42. The sole consequence of the Council determining that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU is that the European Council is enabled, where appropriate, to determine, on the basis of Article 7(2) TEU, that there is a serious and persistent breach of those values. It is therefore on the basis of determination of a *breach*, and not of a mere risk of breach, that the Council may, under Article 7(3) TEU, suspend certain of the rights deriving from the application of the EU Treaty and the FEU Treaty to the Member State concerned. It may, in particular, suspend application *of the Framework Decision* in respect of that Member State, as envisaged in recital 10 thereof.

43. On the other hand, the finding that there is just a real *risk* of breach of the prohibition of inhuman or degrading treatment obliges the executing judicial authority to postpone the execution of a European arrest warrant. However, it can suspend only the execution of *the European arrest warrant at issue*. (22)

44. I therefore concur with the Netherlands Government, which asserted at the hearing that the procedure provided for in Article 7 TEU has an entirely different function from the examination carried out by the executing judicial authority in accordance with the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198). The former enables the European Union to intervene in the event of serious and persistent breach by a Member State of the values on which the European Union is founded. The latter enables the executing judicial authority to protect the fundamental rights of the person who is the subject of a European arrest warrant.

45. Third, Article 7(1) TEU does not prescribe the period within which the Council, when it has a reasoned proposal before it, must adopt a decision determining that there is a clear risk of a serious breach of the values referred to in Article 2 TEU. Nor does it provide that, if the Council considers that there is no such risk, it is to adopt a decision to that effect. Accordingly, to hold that, as long as the Council has not adopted a decision on the basis of Article 7(1) TEU, the executing judicial authority cannot determine whether there is a real risk of breach of a fundamental right in the issuing Member State would be tantamount to prohibiting that authority, *for a period that is at the very least indeterminate*, from postponing the execution of a European arrest warrant. I note that in the present instance the Commission's reasoned proposal was adopted on 20 December 2017 and that the Council has not to date adopted any decision on the basis of Article 7(1) TEU. (23)

### *2. The first question referred for a preliminary ruling*

46. By the first question, the referring court asks the Court of Justice whether the second stage of the examination defined in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), is applicable where the issuing Member State breaches the 'fundamental right to a fair trial'. Although the question itself does not indicate the provision upon which the right to a fair trial is founded, the grounds of the request for a preliminary ruling refer to Article 6 of the ECHR.

47. In that regard, I would point out that, whilst, as Article 6(3) TEU states, fundamental rights recognised by the ECHR constitute general principles of EU law and whilst, as Article 52(3) of the Charter provides, the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the latter nonetheless does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law. (24)

48. It is clear from the Explanations relating to the Charter (25) that the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR, relating to the right to a fair trial.

49. Accordingly, only the second paragraph of Article 47 of the Charter should be referred to. (26)

50. The Court is therefore asked whether, in order for the executing judicial authority to be required to postpone the execution of a European arrest warrant, it is sufficient for it to find that there is a real risk (27) of breach of the right to a fair trial, laid down in the second paragraph of Article 47 of the Charter, on account of deficiencies in the system of justice of the issuing Member State, or whether it must also ascertain that the individual concerned by the warrant will be exposed to that risk.

51. In answering that question, I will consider, first of all, whether a real risk of breach not of Article 4 of the Charter, which was at issue in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), but of the second paragraph of Article 47 of the Charter is capable of resulting in the execution of a European arrest warrant being postponed. Since that is, in my view, the case, I will then examine whether any breach of the right to a fair trial is capable of resulting in the execution of such a warrant being postponed, or whether only a particularly serious breach, such as a flagrant denial of justice, must. Finally, I will turn my attention to whether the second stage of the examination defined in the judgment in *Aranyosi and Căldăraru* is applicable to the situation where there is a real risk of flagrant denial of justice on account of deficiencies in the system of justice of the issuing Member State (as a real risk of flagrant denial of justice is, in my view, the relevant test). I can state right away that the second stage of that examination is, to my mind, applicable to such a situation.

***(a) Must a real risk of breach not of Article 4 of the Charter but of the second paragraph of Article 47 result in execution of the European arrest warrant being postponed?***

52. The Minister for Justice and Equality (Ireland) ('the Minister'), the Netherlands Government, the Polish Government (28) and the Commission consider that a risk of breach of the second paragraph of Article 47 of the Charter is capable of giving rise to an obligation to postpone the execution of a European arrest warrant. LM, like the referring court and, it would seem, the Spanish Government, takes this for granted. (29)

53. Given its importance, it seems to me to be necessary to examine this issue.

54. The principle of mutual recognition, which is the 'cornerstone' of judicial cooperation in criminal matters, (30) is itself founded on the principle of mutual trust between the Member States. As the Court held in Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraphs 191 and 192), the principle of mutual trust between the Member States requires, particularly with regard to the area of freedom, security and justice, each of those States, save 'in exceptional circumstances', to consider the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. Accordingly, the Member States may not, save 'in exceptional cases', check whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by EU law.

55. As I have stated above, (31) the Court relied on the possibility of accepting limitations of the principles of mutual recognition and mutual trust 'in exceptional circumstances' and on Article 1(3) of the Framework Decision in order to find, in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), an obligation to postpone execution of the European arrest warrant. Such limitations show that mutual trust does not constitute blind trust. (32)

56. Limitations on the principle of mutual recognition have hitherto been accepted only in the light of the right enshrined in Article 4 of the Charter, in the case of both execution of a European arrest warrant and of transfer, on the basis of Regulation (EU) No 604/2013 of the European Parliament and of the Council, (33) of an applicant for asylum to the Member State responsible for processing his application. (34)

57. Whilst the prohibition of inhuman or degrading treatment, laid down in Article 4 of the Charter, is absolute, (35) the same is not true of the right to a fair trial set out in Article 47 thereof. That right may be subject to limitations. (36)

58. However, this cannot, to my mind, be taken to mean that a risk of breach of Article 47 of the Charter cannot result in the execution of a European arrest warrant being postponed. That is also the position of Advocate General Sharpston. (37)

59. First, there is nothing in the wording of Article 1(3) of the Framework Decision to indicate that when the Member States implement the Framework Decision they are bound to observe only fundamental rights which do not admit of any limitation, such as Article 4 of the Charter.

60. Second, I would point out that the Framework Decision introduced a system of surrender between *judicial* authorities, replacing extradition between Member States which involved action and assessment by government authorities. (38)

61. To my mind, only a decision made at the end of a *judicial* procedure satisfying the requirements of the second paragraph of Article 47 of the Charter can enjoy mutual recognition under the Framework Decision.

62. In the judgment of 9 March 2017, *Pula Parking* (C−551/15, EU:C:2017:193, paragraph 54), which admittedly concerned the interpretation not of the Framework Decision but of Regulation (EU) No 1215/2012 of the European Parliament and of the Council, (39) the Court stated that 'compliance with the principle of mutual trust in the administration of justice in the Member States of the European Union which underlies [the Brussels I bis Regulation] requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered *in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of audi alteram partem*'. (40)

63. Likewise, it seems to me that the mutual recognition of European arrest warrants presupposes that the sentences for the execution of which they have been issued were imposed at the end of judicial proceedings satisfying, in particular, the requirements of independence and impartiality laid down in the second paragraph of Article 47 of the Charter. European arrest warrants issued for the purpose of prosecution must, it seems to me, be subject to the same requirement as those issued for the purpose of executing a sentence. Their execution presupposes that the prosecution will be conducted in the issuing Member State before an independent and impartial judicial authority.

64. That is indeed the position of Advocate General Bobek, who states that, 'in order to be able to participate in the European mutual recognition system (in any field of law — *criminal*, civil or administrative), national courts and tribunals must fulfil all the criteria defining "court or tribunal" in EU law, including whether or not they are independent'. Advocate General Bobek infers from this that, if 'the criminal courts of a Member State are no longer able to guarantee a fair trial', 'the principle of mutual trust no longer [applies]' and 'automatic mutual recognition' is therefore precluded. (41)

65. Consequently, if there is a real risk of the procedure conducted in the issuing Member State not satisfying the requirements of the second paragraph of Article 47 of the Charter, the premiss forming the basis of the obligation in Article 1(2) of the Framework Decision to execute any European arrest warrant is absent. The risk of breach of the second paragraph of Article 47 of the Charter in the issuing Member State is therefore capable of preventing the execution of a European arrest warrant. (42)

66. Third, the European Court of Human Rights prevents the Contracting States from expelling a person where he runs a real risk in the country of destination of being subject not only to treatment contrary to Article 3 of the ECHR, (43) or to the death penalty (44) in breach of Article 2 of the ECHR and Article 1 of Protocol No 13 to the ECHR, (45) but also to a flagrant denial of justice in breach of Article 6 of the ECHR. (46)

67. I consider therefore that a risk of breach of the second paragraph of Article 47 of the Charter is capable of giving rise to an obligation to postpone the execution of a European arrest warrant.

68. However, having regard to the fact that, according to Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 191), limitations on the principle of mutual recognition are allowed only in exceptional circumstances, it must be asked whether the execution of a European arrest warrant has to be postponed once there is a real risk of breach of the second paragraph of Article 47 of the Charter, or whether it has to be postponed only where there is a real risk of a *particularly serious* breach of that provision.

***(b) Must any breach of the second paragraph of Article 47 of the Charter, irrespective of its seriousness, result in execution of the European arrest warrant being postponed?***

*(1) Introduction*

69. It is apparent from the request for a preliminary ruling that under Irish law the executing judicial authority is required not to surrender the individual concerned if there is a real risk that he will be exposed in the issuing Member State to a flagrant denial of justice. (47)

70. The Irish case-law is consistent with that of the European Court of Human Rights. In *Soering v. the United Kingdom*, that court held that 'an issue might exceptionally be raised under Article 6 [of the ECHR] by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial'. (48)

71. Although the referring court does not ask the Court of Justice whether the execution of a European arrest warrant has to be postponed once there is a real risk of breach of the second paragraph of Article 47 of the Charter, or whether it has to be only where there is a real risk of a particularly serious breach of that provision, such as a flagrant denial of justice, it seems to me that it is necessary to address this question. This question flows from the question examined in points 52 to 68 of this Opinion. Moreover, the second question submitted for a preliminary ruling expressly refers to a real risk of a flagrant denial of justice.

*(2) Requirement for a flagrant denial of justice*

72. I take the view that, in order for the execution of a European arrest warrant to have to be postponed, it is not sufficient that there is a real risk of breach of the second paragraph of Article 47 of the Charter in the issuing Member State. There must be a real risk of flagrant denial of justice.

73. First, it has been consistently held that limitations on the principle of mutual trust must be interpreted strictly. (49)

74. As regards the Framework Decision, under Article 1(2) executing judicial authorities are required to execute any European arrest warrant. They may refuse to execute a European arrest warrant only on the grounds listed exhaustively in Articles 3, 4 and 4a thereof. Accordingly, while execution of the European arrest warrant constitutes the rule, refusal to execute such a warrant is intended to be an exception which must, on that basis, be interpreted strictly. (50)

75. Second, as mentioned above, (51) the right to a fair trial may be subject to limitations, provided that they, inter alia, respect the essence of that right, as Article 52(1) of the Charter provides.

76. Accordingly, it seems to me that the executing judicial authority can be required to postpone the execution of a European arrest warrant only if there is a real risk of breach not of the right to a fair trial but of the *essence* of that right.

77. In other words, in the case of an absolute right such as the prohibition of inhuman or degrading treatment, in order for execution to have to be postponed it would be sufficient for there to be a real risk of

breach of that right. On the other hand, in the case of a right that is not absolute, such as the right to a fair trial, execution should be postponed only if the real risk of breach concerns the essence of that right.

78. Third, such a position corresponds to that adopted by the European Court of Human Rights.

79. As mentioned above, (52) the European Court of Human Rights considers that, in order for a Contracting State to be required not to expel or extradite a person, he must risk suffering in the requesting Member State not just a breach of Article 6 of the ECHR, but a 'flagrant denial' of justice or of a fair trial. (53) In the case of the right to a fair trial, that court thus is not satisfied, as it is for the prohibition of inhuman or degrading treatment or punishment, with just a real risk of 'treatment contrary to Article 3 [of the ECHR]'. (54)

80. What, according to the European Court of Human Rights, does a flagrant denial of justice consist of?

81. According to that court, 'a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 [of the ECHR] if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 [of the ECHR] which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article'. (55)

82. According to the European Court of Human Rights, the following may thus constitute a flagrant denial of justice preventing the person concerned from being extradited or expelled: a conviction *in absentia* without the possibility of obtaining a re-examination of the merits of the charge; (56) a trial that is summary in nature and conducted in total disregard of the rights of the defence; (57) detention whose lawfulness is not open to examination by an independent and impartial tribunal; and a deliberate and systematic refusal to allow an individual, in particular an individual detained in a foreign country, to communicate with a lawyer. (58) The European Court of Human Rights also attaches importance to the fact that a civilian has to appear before a court composed, even if only in part, of members of the armed forces who take orders from the executive. (59)

83. To my knowledge, the European Court of Human Rights has concluded on only four occasions that an extradition or expulsion would breach Article 6 of the ECHR. They are the judgment in *Othman (Abu Qatada) v. the United Kingdom*, where the flagrant denial of justice consisted in the admission of evidence obtained by torture; the judgment in *Husayn v. Poland*, where the flagrant denial of justice was formed, in particular, by the applicant's continued detention on the United States military base at Guantanamo Bay for 12 years without being charged; the judgment in *Al Nashiri v. Poland*, which was delivered on the same day as the judgment in *Husayn v. Poland* and over which I wish to linger; and the recent judgment in *Al Nashiri v. Romania*. (60)

84. In *Al Nashiri v. Poland*,(61) the applicant, a Saudi national, had been captured in the United Arab Emirates and transferred to a secret detention centre in Poland, and then to the United States military base at Guantanamo Bay. He was being prosecuted before a military commission on the base at Guantanamo Bay for organising a suicide attack on a United States destroyer and playing a role in an attack on a French oil tanker. The European Court of Human Rights concluded that there was a real risk of flagrant denial of justice in the light of three factors. First, the military commission in question was neither independent nor impartial and could not therefore be regarded as a 'tribunal' within the meaning of Article 6(1) of the ECHR. It had been set up to try 'certain non-citizens in the war against terrorism', did not form part of the United States federal judicial system and was composed exclusively of members of the armed forces. Second, the European Court of Human Rights relied on a judgment of the United States Supreme Court (62) to hold that that commission was not a tribunal 'established by law' within the meaning of Article 6(1) of the ECHR. Third, there was, according to the European Court of Human Rights, a strong probability of evidence obtained by torture being used against the applicant. (63)

85. I propose that the test applied by the European Court of Human Rights be adopted and that it be held that the execution of a European arrest warrant must be postponed only if there is a real risk of flagrant denial of justice in the issuing Member State.

*(3) Establishment of a flagrant denial of justice having regard to independence of the courts*

86. In the case in point, the referring court considers that there is a real risk of LM suffering a flagrant denial of justice in the issuing Member State on account, in particular, of the lack of independence of that Member State's courts.

87. Can the lack of independence of the courts of the issuing Member State be regarded as constituting a flagrant denial of justice?

88. The second paragraph of Article 47 of the Charter provides that everyone is entitled to a hearing by an independent and impartial tribunal.

89. According to settled case-law, the concept of independence has two aspects. The first aspect, which is external, entails the body being protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. (64) Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (65)

90. It cannot, to my mind, be ruled out that lack of independence of the courts of the issuing Member State may, *in principle*, constitute a flagrant denial of justice.

91. Indeed, the Court held in the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C−64/16, EU:C:2018:117, paragraphs 41 and 42), that 'maintaining [the] independence [of national courts and tribunals] is essential' and that 'the guarantee of independence … is inherent in the task of adjudication'. (66) In particular, the existence of guarantees concerning the composition of a court or tribunal is the cornerstone of the right to a fair trial. (67)

92. Also, in the judgments in *Al Nashiri v. Poland* and *Al Nashiri v. Romania*, (68) the European Court of Human Rights concluded that there was a real risk of flagrant denial of justice on the ground, in particular, that the military commission established on the base at Guantanamo Bay was neither independent nor impartial and could not therefore be regarded as a 'tribunal' within the meaning of Article 6(1) of the ECHR. (69)

93. However, the lack of independence and impartiality of a tribunal can be regarded as amounting to a flagrant denial of justice only if it is so serious that it destroys the fairness of the trial. As the European Court of Human Rights observed in the judgment in *Othman (Abu Qatada) v. the United Kingdom*, there is a crucial difference between the admission of evidence obtained by torture, at issue in that judgment, and breaches of Article 6 of the ECHR that are based on defects in the composition of the trial court. (70)

94. Above all, I cannot stress enough that the judgments in *Al Nashiri v. Poland* and *Al Nashiri v. Romania*, (71) which are, to date, the only judgments where the European Court of Human Rights has found a breach of Article 6 of the ECHR on account, inter alia, of the lack of independence and impartiality of the courts of the country of destination, concerned extraordinary courts possessing jurisdiction in respect of terrorism and composed exclusively of members of the armed forces.

95. It is for the referring court to determine, on the basis of those considerations, whether, *in the case in point*, the alleged lack of independence of the Polish courts is so serious that it destroys the fairness of the trial and accordingly amounts to a flagrant denial of justice. As the Court has pointed out in the judgment in *Aranyosi and Căldăraru*, it must, to that end, rely on information which is objective, reliable, specific and properly updated on the conditions prevailing in the issuing Member State, and which demonstrates that there are deficiencies affecting the Polish system of justice. (72) In that regard, the Commission's reasoned proposal can be taken into account, as can the opinions of the Venice Commission, provided that — a matter to which I will return — the referring court informs itself of any changes in the situation in Poland subsequent to those documents.

96. On the assumption that the executing judicial authority finds that there is a real risk of flagrant denial of justice on account of the deficiencies in the system of justice of the issuing Member State, is it required, on the basis of that finding alone, to postpone the execution of the European arrest warrant? Or must it continue the examination and find that *the individual concerned* by that warrant is exposed to such a risk? That is the question which I will now endeavour to answer.

### *(c) Does the executing judicial authority have to find that the individual concerned risks suffering a flagrant denial of justice?*

#### *(1) Introduction and observations of the parties*

97. In the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 91 to 93), the Court, as I have said, held that the executing judicial authority is required to postpone the execution of a European arrest warrant only if it finds, first, that there is a real risk of inhuman or degrading treatment in the issuing Member State by virtue of general conditions of detention in that Member State and, second, that the individual concerned will be exposed to that risk. (73) According to the Court, the existence of deficiencies in the prison system, even if they are generalised, does not necessarily affect *all* places of detention. It cannot therefore be inferred from the mere finding that there are deficiencies in the prison system that *the individual concerned* will be subject to inhuman or degrading treatment.

98. 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. (74)

99. The Minister contends that the second stage of the examination defined in the judgment in *Aranyosi and Căldăraru* is applicable. If it were not, the consequence would be systematic refusal by the Irish judicial authorities to execute European arrest warrants issued by the Republic of Poland. It states, in particular, that a systematic refusal of that kind would not be consistent with recital 10 of the Framework Decision, the constitutional principle of mutual trust or the principle of equality between Member States laid down in Article 4 TEU.

100. LM submits that the second stage of the examination defined in the judgment in *Aranyosi and Căldăraru* cannot be applied to a situation in which the trust that the Member States place in observance by the Republic of Poland of the most fundamental of values, namely the rule of law, has been purely and simply destroyed.

101. The Spanish Government is of the view that the second stage of the examination defined in the judgment in *Aranyosi and Căldăraru* is applicable. The Hungarian Government takes the view that a finding that there are deficiencies in the Polish system of justice can be made only in the context of the procedure provided for in Article 7 TEU and that the first stage of the examination defined in that judgment is accordingly not satisfied. If it were assumed that it is satisfied, the second stage of the examination would, in the Hungarian Government's submission, be applicable. The Netherlands Government contends that the second stage is applicable.

102. According to the Polish Government, there is neither a risk of breach of the rule of law in Poland nor a risk of breach of the right of the individual concerned, LM, to a fair trial. First, the referring court cannot rely on the Commission's reasoned proposal to find a breach of the rule of law in Poland since, in particular, the Polish legislation was amended after the reasoned proposal was adopted. The referring court lacks competence to find a breach of the rule of law by the Republic of Poland, as, under the procedure provided for in Article 7 TEU, such competence lies with the European Council. Nor does the referring court have competence to suspend application of the Framework Decision as, in accordance with recital 10 of the Framework Decision, such competence lies with the Council. Second, the referring court has not established that LM himself would be exposed to a real risk of breach of the right to a fair trial. Indeed, it has, in particular, been unable to indicate even hypothetical reasons why LM would be exposed to a risk of not receiving a fair trial.

103. The Commission contends that the second stage of the examination defined in the judgment in *Aranyosi and Căldăraru* is applicable. The fact that a Member State has been the subject of a reasoned proposal as referred to in Article 7(1) TEU does not mean that the surrender of an individual to that Member State automatically exposes him to a real risk of breach of the right to a fair trial. It cannot be ruled out that, in certain situations, the courts of that Member State are capable of hearing a case with the independence required by the second paragraph of Article 47 of the Charter. Consequently, case-by-case examination is required. In carrying out that individual examination, the executing judicial authority should take account both of the identity of the individual concerned (in particular whether he is a political opponent or belongs to a social or ethnic minority that is discriminated against) and of the nature and circumstances of the offence for which he is sought (in particular whether that offence is political in nature, has been committed in exercise of freedom of expression or freedom of association, or has been the subject of public declarations by representatives of the powers that be). Finally, the referring court should take account of the situation of judges approaching retirement age (for whom staying in office beyond that age is henceforth dependent on a decision in the discretion of the executive) and of the rules relating to judicial advancement.

*(2) Requirement for an individual examination*

104. I take the view that the executing judicial authority is required to postpone the execution of a European arrest warrant only where it finds not only that there is a real risk of flagrant denial of justice on account of deficiencies affecting the system of justice of the issuing Member State but also that the individual concerned will be exposed to that risk.

105. First, I would point out that, according to Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454, paragraph 192), when Member States, by way of exception, check observance of fundamental rights by another Member State, that can only relate to observance of those rights 'in a specific case'.

106. To hold that the executing judicial authority is required to postpone the execution of a European arrest warrant without ascertaining that *the individual concerned* is exposed to the risk of flagrant denial of justice which it considers to result from the deficiencies in the system of justice would, in my view, be incompatible with recital 10 of the Framework Decision, according to which 'implementation [of the mechanism of the European arrest warrant] 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) [TEU]'. Recital 10 prohibits the Member States from suspending application of the Framework Decision in respect of a Member State, except where the European Council has adopted, in respect of that Member State, a decision on the basis of what is now Article 7(2) TEU. (75) It does not, on the other hand, prohibit a Member State from suspending application of the Framework Decision 'in a specific case', that is to say, from postponing the execution of a specific European arrest warrant. I would point out, moreover, that in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198), such a postponement was allowed by the Court without there being such a decision by the European Council.

107. Furthermore, where suspension relates to implementation of the Framework Decision 'in a specific case', there is no breach of the equality between Member States laid down in Article 4(2) TEU.

108. Second, even assuming that there is, in Poland, a real risk of flagrant denial of justice on account of the recent reforms of the system of justice, (76) this cannot be taken to mean that *no* Polish court is capable of hearing *anycasewhatever* in compliance with the second paragraph of Article 47 of the Charter. I fully concur with the Commission's argument 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'.

109. Third, in order to determine whether there is a real risk of treatment contrary to Article 3 of the ECHR, the European Court of Human Rights 'examine[s] the foreseeable consequences of sending the applicant to the destination country, bearing in mind the general situation there *and his personal circumstances*'. (77) According to that court, the fact that there is a general problem concerning observance of human rights in a particular country does not in itself establish that sending the person concerned to that country would be contrary to Article 3 of the ECHR. (78) Likewise, in order to ascertain whether there is a real risk of flagrant denial of justice, it takes account, in practice, not only of the situation in the country of destination, but also of the personal circumstances of the person concerned. (79)

110. For example, as regards Article 3 of the ECHR, in the judgment in *Mo.M. v. France*, the European Court of Human Rights held that sending the applicant back to Chad, which he had fled after being arrested by the Chadian secret services and tortured, would breach Article 3 of the ECHR. The court relied on the reports of local non-governmental organisations and institutional observers, from which it was apparent that a feature of the general situation in Chad was the existence of military prisons run by the secret services. It then examined the applicant's personal situation. It observed in this regard, first, that medical certificates attested that he was tortured in Chad and, second, that he would run the risk of being tortured again if he were sent back there, since he was active, in France, on behalf of an opposition party and he seemed to be the subject of an order to appear issued by the Chadian authorities three years after he had left Chad. (80)

111. In the judgment in *M.G. v. Bulgaria*, the European Court of Human Rights concluded that the applicant, whom the Russian authorities sought in order to bring him before the criminal courts of Ingushetia, one of the republics of the North Caucasus, on suspicion of belonging to the Chechen guerrilla forces, would run a serious and proven risk of being tortured if he were extradited to Russia. The court began by examining the general situation in the North Caucasus and found that that region continued to be an area of armed conflict, marked by extrajudicial executions and by torture and other inhuman or degrading treatment. It then examined the applicant's personal situation and observed that he was the subject of criminal proceedings for, inter alia, involvement in an armed group, preparation of acts of terrorism, and arms and drugs trafficking, that the Russian secret services had seized a large quantity of arms at his home and that he was suspected by the Russian authorities of belonging to an armed jihadist group. It drew the conclusion that he would be particularly exposed to the risk of being tortured if he were detained in a prison in the North Caucasus. (81)

112. As regards Article 6(1) of the ECHR, in the judgment in *Ahorugeze v. Sweden*, the European Court of Human Rights held that the extradition of the applicant, a Rwandan national of Hutu ethnicity, to Rwanda, where he was to stand trial on charges of genocide and crimes against humanity, would not expose him to a real risk of flagrant denial of justice. The court found, on the basis of judgments of the International Criminal Tribunal for Rwanda and information supplied by Netherlands investigators and the Norwegian police, that it was not established that the Rwandan courts were not independent and impartial. In addition, it examined the applicant's personal situation. It found that neither the fact that he had given testimony for the defence before the International Criminal Tribunal for Rwanda, nor the fact that he had been head of the Rwandan Civil Aviation Authority, nor his conviction for destroying other people's property during the 1994 genocide exposed him to a flagrant denial of justice. (82)

*(3) How is it to be shown that the individual concerned runs a real risk of flagrant denial of justice in the issuing Member State?*

113. It seems to me that, as the Commission contends, in order to show that the individual concerned is exposed to the risk of flagrant denial of justice that is at issue, it is necessary to establish that there are particular circumstances relating either to that person or to the offence in respect of which he is being prosecuted or has been convicted which expose him to such a risk. Thus, the Commission suggests, 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. Such suggestions, it seems to me, must be adopted.

114. In this connection, I note that the second sentence of recital 12 of the Framework Decision expressly envisages the possibility of refusing to surrender a person when there are reasons to believe, on the basis of objective elements, that the European arrest warrant to which he is subject has been issued for the purpose of prosecuting or punishing him on the grounds, inter alia, of his political opinions.

115. Regarding the burden of proof, the individual concerned should, in my view, be required to establish that there are substantial grounds for believing that there is a real risk that he will suffer a flagrant denial of justice in the issuing Member State. Such a position corresponds to the position of the European Court of Human Rights, which holds, in addition, that, once such evidence has been adduced, it is for the State in question to dispel any doubts in that regard. (83)

116. In this instance, LM contends that he runs a real risk of suffering a flagrant denial of justice in Poland because the rule of law, 'the essence of which is the right to an effective judicial remedy, which itself can only be secured by the existence of an independent judiciary', is no longer observed there. (84)

117. It is for the referring court to determine whether such contentions establish that LM, if surrendered to the issuing judicial authority, would be exposed to a real risk of flagrant denial of justice resulting from the deficiencies in the Polish system of justice, assuming that such a risk has been created.

118. However, LM never states in what way the recent reforms of the Polish system of justice affect his personal situation. He does not explain in what way the deficiencies in the Polish system of justice, assuming that they are proven, would prevent *his case* from being heard by an independent and impartial tribunal. He merely asserts, in a general manner, that the Polish system of justice does not satisfy the requirements of the rule of law.

119. To my mind, the arguments put forward by LM are thus designed exclusively to establish that there is, on account of deficiencies in the system of justice, a real risk of flagrant denial of justice in Poland, and not to show that he himself will be exposed to such a risk if he is surrendered to the issuing judicial authority. I would recall that, as the European Court of Human Rights has pointed out, the fact that there is a general problem concerning observance of human rights in a particular country (assuming this to be demonstrated) does not in itself establish that sending the person concerned to that country would expose him to a risk of flagrant denial of justice. (85) For example, in the judgment in *Yefimova v. Russia*, the European Court of Human Rights held that, although there were grounds for doubting the independence of the Kazakhstani judiciary, the applicant had shown neither that those doubts amounted to a real risk of flagrant denial of justice *nor that she herself would be exposed to that risk if extradited to Kazakhstan*. (86)

120. LM is being prosecuted for drug trafficking and there is nothing in the case file to suggest that such an offence or LM himself displays particular characteristics resulting in the alleged risk of flagrant denial of justice. When questioned on this point at the hearing, LM's representative did not provide further clarification.

121. Consequently, the answer to the first question should be that Article 1(3) of the Framework Decision must be interpreted as requiring the executing judicial authority to postpone the execution of a European arrest warrant where it finds not only that there is a real risk of flagrant denial of justice on account of the deficiencies in the system of justice of the issuing Member State but also that the person who is the subject of that warrant is exposed to such a risk. In order for a breach of the right to a fair trial enshrined in the second paragraph of Article 47 of the Charter to constitute a flagrant denial of justice, that breach must be so serious that it destroys the essence of the right protected by that provision. In order to determine whether the individual concerned is exposed to the risk of flagrant denial of justice that is at issue, the executing judicial authority must take account of the particular circumstances relating both to that person and to the offence in respect of which he is being prosecuted or has been convicted.

### *3. The second question referred for a preliminary ruling*

122. By the second question, the referring court asks, in essence, whether, where the second stage of the examination defined in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198), is applicable and the executing judicial authority finds that the issuing Member State is in breach of the rule of law on account of deficiencies in the system of justice, the executing judicial authority is required to request from the issuing judicial authority, on the basis of Article 15(2) of the Framework Decision, any necessary supplementary information concerning the conditions under which the trial of the individual concerned will take place. If that is the case, the referring court asks the Court of Justice what guarantees it might obtain from the issuing judicial authority in order to discount the risk that the individual concerned will not receive a fair trial.

123. I would point out that, in the judgment in *Aranyosi and Căldăraru*, the Court held that the executing judicial authority was required to request from the issuing judicial authority, on the basis of Article 15(2) of the Framework Decision, all necessary supplementary information concerning the conditions of detention of the individual concerned. The executing judicial authority is required to postpone the execution of the European arrest warrant only if it considers, in the light of that information, that there is a real risk of the individual concerned being subject to inhuman or degrading treatment. (87)

124. The Minister takes the view that the executing judicial authority is required to request from the issuing judicial authority all the information that it considers necessary. The subject matter of that information can be determined only on a case-by-case basis, in the light of the reason for which the executing judicial authority considers that the individual concerned runs a real risk of not receiving a fair trial. The executing judicial authority cannot be required to show that there are no deficiencies in the Polish system of justice.

125. LM submits that there is no need to reply to the second question referred for a preliminary ruling. It states, however, that in this instance no assurance can be given that is capable of allaying the fears of the executing judicial authority, as the deficiencies at issue are systemic.

126. According to the Spanish Government, Article 15(2) of the Framework Decision enables a solution to be found where the executing judicial authority is hesitating as to the action to be taken. The Hungarian Government submits that, since the executing judicial authority is not empowered to find that there are deficiencies in the Polish system of justice, it cannot request the Republic of Poland to provide it with supplementary information. The Netherlands Government takes the view that the executing judicial authority is required to use the mechanism provided for in Article 15(2) of the Framework Decision. The Polish Government has not submitted any observations on the second question referred for a preliminary ruling.

127. The Commission submits that the executing judicial authority may request supplementary information from the issuing judicial authority. Such a request for information may relate, in particular, to the most recent legislative reforms. However, that information is unquestionably less likely to dispel the doubts of the executing judicial authority than when the information relates, as in the judgment in *Aranyosi and Căldăraru*, to the conditions of detention of the individual concerned.

128. To my mind, where there is a real risk of flagrant denial of justice in the issuing Member State, the executing judicial authority must make use of the power which it is given by Article 15(2) of the Framework Decision to obtain information concerning, first, legislation adopted after the Commission's reasoned proposal and the opinions of the Venice Commission (88) and, second, the particular features relating to the individual concerned and to the nature of the offence that would be liable to expose him to the real risk of flagrant denial of justice identified.

129. It seems to me that it is possible, in particular in a situation where the individual concerned has not shown that he would himself be exposed to the alleged flagrant denial of justice, that such a request for information would serve to enlighten the executing judicial authority.

130. If, in the light of the information obtained on the basis of Article 15(2) of the Framework Decision, the executing judicial authority considers that the person subject to a European arrest warrant does not run a real risk of suffering a flagrant denial of justice in the issuing Member State, it must execute the warrant.

131. If, on the other hand, the executing judicial authority considers in the light of that information that the individual concerned runs a real risk of suffering a flagrant denial of justice in the issuing Member State, the execution of that warrant must be postponed but it cannot be abandoned. (89) In this case, the executing Member State must, in accordance with Article 17(7) of the Framework Decision, inform Eurojust of the delay, giving the reasons for the postponement. If the existence of such a risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end. (90)

132. The answer to the second question should therefore be that, where the executing judicial authority finds that there is a real risk of flagrant denial of justice in the issuing Member State, it is required to request from the issuing judicial authority, on the basis of Article 15(2) of the Framework Decision, all the necessary supplementary information concerning, as the case may be, first, legislative changes subsequent to the details which it possesses for finding that there is a real risk of flagrant denial of justice and, second, the particular features relating to the person who is the subject of the European arrest warrant or to the nature of the offence in respect of which he is being prosecuted or has been convicted.

## V. Conclusion

133. In the light of the foregoing considerations I propose that the Court should answer the questions referred by the High Court (Ireland) as follows:

1. 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 requiring the executing judicial authority to postpone the execution of a European arrest warrant where it finds not only that there is a real risk of flagrant denial of justice on account of the deficiencies in the system of justice of the issuing Member State but also that the person who is the subject of that warrant is exposed to such a risk. In order for a breach of the right to a fair trial enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union to constitute a flagrant denial of justice, that breach must be so serious that it destroys the essence of the right protected by that provision. In order to determine whether the individual concerned is exposed to the risk of flagrant denial of justice that is at issue, the executing judicial authority must take account of the particular circumstances relating both to that person and to the offence in respect of which he is being prosecuted or has been convicted.

2. Where the executing judicial authority finds that there is a real risk of flagrant denial of justice in the issuing Member State, it is required to request from the issuing judicial authority, on the basis of Article 15(2) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, all the necessary supplementary information concerning, as the case may be, first, legislative changes

subsequent to the details which it possesses for finding that there is a real risk of flagrant denial of justice and, second, the particular features relating to the person who is the subject of the European arrest warrant or to the nature of the offence in respect of which he is being prosecuted or has been convicted.

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1 Original language: French.

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2 This concerns, in particular, the appointment of members of the Constitutional Tribunal and failure to publish some of its judgments. It also concerns the new retirement regimes of Supreme Court judges and ordinary court judges, the new extraordinary appeal procedure in the Supreme Court, the dismissal and appointment of presidents of ordinary courts, and the termination of the term of office and procedure for the appointment of judges-members of the National Council of the Judiciary.

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3 Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law of 20 December 2017, COM(2017) 835 final.

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4 OJ 2002 L 190, p. 1.

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5 OJ 2009 L 81, p. 24

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6 See recital 6 and Article 1(2) of the Framework Decision.

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7 Judgments of 16 July 2015, *Lanigan* (C−237/15 PPU, EU:C:2015:474, paragraph 36), and of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198, paragraph 80).

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8 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198, paragraphs 82 to 88).

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9 In *Aranyosi and Căldăraru*, the inhuman or degrading treatment resulted from the conditions of detention in Hungary and Romania.

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10 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198, paragraph 89).

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11 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198, paragraph 93) (emphasis added).

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12 Opinion of the Venice Commission No 904/2017 of 11 December 2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the organisation of Ordinary Courts; and Opinion of the Venice Commission No 892/2017 of 11 December 2017 on the Act on the Public Prosecutor's office, as amended ('the opinions of the Venice Commission'). These documents are available on the Venice Commission's website at the following address: http://www.venice.coe.int/webforms/events/

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13 This footnote is not relevant for the English version of this Opinion.

14 In proceedings 2013/295 EXT.

15 In proceedings 2014/8 EXT.

16 In proceedings 2017/291 EXT.

17 Judgment of 6 September 2016, *Petruhhin* (C−182/15, EU:C:2016:630, paragraph 20).

18 Judgments of 8 September 2010, *Winner Wetten* (C−409/06, EU:C:2010:503, paragraph 38), and of 27 February 2014, *Pohotovosť* (C−470/12, EU:C:2014:101, paragraphs 28 and 29).

19 Such as the action before the Court in Case C−192/18, *Commission* v *Poland*.

20 Emphasis added.

21 See paragraphs 171 to 186 of the explanatory memorandum to the Commission's reasoned proposal.

22 See, in that regard, point 106 of this Opinion.

23 It may be helpful to note that the political context within which this reference for a preliminary ruling falls could, at first sight, suggest that the Court cannot examine it. For example, under the American 'political questions' doctrine, the court must generally refrain from hearing an issue where it considers that it must be left for appraisal by the executive or the legislature. However, the Court does not accept such limits to its review. Moreover, in the present instance, the questions that the Court is asked cannot be regarded as 'political' as the assessment which must be carried out in the first stage of the examination defined in the judgment in *Aranyosi and Căldăraru* differs, as we have seen, from that carried out by the Council under Article 7(1) TEU.

24 Judgments of 15 February 2016, *N.* (C−601/15 PPU, EU:C:2016:84, paragraph 45), and of 6 October 2016, *Paoletti and Others* (C−218/15, EU:C:2016:748, paragraph 21).

25 Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17). According to those explanations, the first paragraph of Article 47 of the Charter corresponds to Article 13 of the ECHR, headed 'Right to an effective remedy'. The third paragraph of Article 47 of the Charter is the counterpart of case-law of the European Court of Human Rights.

26 Judgments of 8 December 2011, *Chalkor* v *Commission* (C−386/10 P, EU:C:2011:815, paragraph 51), and of 6 November 2012, *Otis and Others* (C−199/11, EU:C:2012:684, paragraphs 46 and 47).

27 Indeed, in the judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198), the Court held that the executing judicial authority is required to postpone execution of the European arrest warrant where it finds that there is a real *risk* of inhuman or degrading treatment in the issuing Member State, not a *breach* of the prohibition of such treatment (and that the individual concerned is exposed to such a risk). See, in that regard, point 43 of this Opinion.

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28 According to the written observations of the Polish Government, the fact that the judgment in *Aranyosi and Căldăraru* concerned Article 4 of the Charter 'does not mean that limitations of the principles of mutual recognition and mutual trust cannot be applied on the basis of the protection of other fundamental rights which are not similarly absolute, including the right to a fair trial'.

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29 The Hungarian Government does not address the issue directly.

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30 See recital 6 of the Framework Decision.

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31 See point 5 of this Opinion.

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32 Opinion of Advocate General Bobek in *Ardic* (C−571/17 PPU, EU:C:2017:1013, point 74). See, in that regard, Lenaerts, K., 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', *Common Market Law Review* 2017, No 3, p. 805.

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33 Regulation of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31; 'the Dublin III Regulation').

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34 Where there is a risk of inhuman or degrading treatment in the Member State primarily designated, on the basis of the criteria listed in the Dublin III Regulation, as responsible for examining the asylum application, the applicant for asylum cannot be transferred to that State. The Member State determining the Member State responsible must continue to examine those criteria in order to establish whether another Member State can be designated as responsible. If that proves impossible, it itself becomes the State responsible. See Article 3(2) of the Dublin III Regulation, which is a codification of the judgment of 21 December 2011, *N. S. and Others* (C−411/10 and C−493/10, EU:C:2011:865, paragraph 94). See also judgments of 16 February 2017, *C. K. and Others*(C−578/16 PPU, EU:C:2017:127, paragraph 65); of 26 July 2017, *A.S.*(C−490/16, EU:C:2017:585, paragraph 41); and of 26 July 2017, *Jafari*(C−646/16, EU:C:2017:586, paragraph 101).

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35 Judgments of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198, paragraph 85); of 6 September 2016, *Petruhhin* (C−182/15, EU:C:2016:630, paragraph 56); of 16 February 2017, *C. K. and Others* (C−578/16 PPU, EU:C:2017:127, paragraph 59); and of 24 April 2018, *MP (Subsidiary protection of a person previously a victim of torture*) (C−353/16, EU:C:2018:276, paragraph 36).

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36 It is settled case-law that the right to an effective remedy may be subject to a limitation if, in accordance with Article 52(1) of the Charter, that limitation is provided for by law, it respects the essence of that right and, in observance of the principle of proportionality, it is necessary and genuinely meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgments of 4 June 2013, *ZZ*, C−300/11, EU:C:2013:363, paragraph 51; of 17 September 2014, *Liivimaa Lihaveis*, C−562/12,

EU:C:2014:2229, paragraph 72; of 6 October 2015, *Schrems*, C−362/14, EU:C:2015:650, paragraph 95; of 15 September 2016, *Star Storage and Others*, C−439/14 and C−488/14, EU:C:2016:688, paragraph 49; of 27 September 2017, *Puškár*, C−73/16, EU:C:2017:725, paragraph 62; and of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, C−664/15, EU:C:2017:987, paragraph 90).

37 Opinion of Advocate General Sharpston in *Radu* (C−396/11, EU:C:2012:648, point 97).

38 See recital 5 of the Framework Decision and judgment of 10 November 2016, *Kovalkovas* (C−477/16 PPU, EU:C:2016:861, paragraph 41).

39 Regulation of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1; 'the Brussels I bis Regulation').

40 Emphasis added.

41 Opinion of Advocate General Bobek in *Zdziaszek* (C−271/17 PPU, EU:C:2017:612, point 86 and footnote 16) (emphasis added).

42 In this connection, I note that, in the judgment of 26 April 2018, *Donnellan* (C−34/17, EU:C:2018:282, paragraph 61), the Court held that, since the assistance in the recovery of claims that is established by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1) is described as 'mutual', that 'implies, in particular, that it is for the applicant authority to *create* … the conditions under which the requested authority will be able to grant its assistance' (emphasis added).

43 ECtHR, 4 November 2014, *Tarakhel v. Switzerland* (CE:ECHR:2014:1104JUD002921712, § 93).

44 ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111, §§ 576 to 579).

45 Protocol No 13 to the ECHR, concerning the abolition of the death penalty in all circumstances, signed in Vilnius on 3 May 2002.

46 ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, § 258).

47 The request for a preliminary ruling states that 'the test for determining whether surrender is prohibited on Article 6 ECHR grounds is well settled in national jurisprudence, namely that the individual concerned will be exposed to a real risk of a flagrant denial of justice. In *Minister for Justice, Equality and Law Reform* v *Brennan* [2007] IESC 24 the Supreme Court held that it would take egregious circumstances, "such as a clearly established and fundamental defect in the system of justice of a requesting State", for surrender under the [European Arrest Warrant Act 2003] to be refused on the basis of a breach of Article 6 ECHR rights'.

48 ECtHR, 7 July 1989, *Soering v. the United Kingdom* (CE:ECHR:1989:0707JUD001403888, § 113).

49 Judgment of 26 April 2018, *Donnellan* (C−34/17, EU:C:2018:282, paragraph 50).

50 Judgment of 23 January 2018, *Piotrowski* (C−367/16, EU:C:2018:27, paragraph 48).

51 See point 57 and footnote 36 of this Opinion.

52 See point 70 of this Opinion.

53 ECtHR, 7 July 1989, *Soering v. the United Kingdom* (CE:ECHR:1989:0707JUD001403888, § 113); ECtHR, 2 March 2010, *Al-Saadoon and Mufdhi v. the United Kingdom* (CE:ECHR:2010:0302JUD006149808, § 149); ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, § 258); ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111, §§ 456 and 562 to 564); and decision of the ECtHR of 15 June 2017, *Harkins v. the United Kingdom* (CE:ECHR:2017:0615DEC007153714, § 62).

54 ECtHR, 28 February 2008, *Saadi v. Italy* (CE:ECHR:2008:0228JUD003720106, § 125).

55 ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, § 260), and ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111, § 563).

56 Decision of the ECtHR of 16 October 2001, *Einhorn v. France* (CE:ECHR:2001:1016DEC007155501, §§ 33 and 34). Here, the ECtHR held that there was no flagrant denial of justice because the applicant, whom a Pennsylvanian court had convicted *in absentia* of murder, could be retried on returning to Pennsylvania if he so requested.

57 ECtHR, 8 November 2005, *Bader and Kanbor v. Sweden* (CE:ECHR:2005:1108JUD001328404, § 47). Proceedings in which no oral evidence was taken at the hearing, all the evidence examined was submitted by the prosecutor and neither the accused nor even his defence lawyer was present at the hearing are summary in nature and totally disregard the rights of the defence.

58 Decision of the ECtHR of 20 February 2007, *Al-Moayad v. Germany* (CE:ECHR:2007:0220DEC003586503, §§ 100 to 108). Here, the ECtHR concluded that there was no flagrant denial of justice because the applicant, who was being prosecuted for membership of two terrorist organisations and was the subject of an extradition request by the United States authorities, would not be transferred to one of the detention centres outside the United States, where he would not have had access to a lawyer and would have been tried by a military tribunal or by another extraordinary court.

59 ECtHR, 12 May 2005, *Öcalan v. Turkey* (CE:ECHR:2005:0512JUD004622199, § 112), and ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111, § 562).

60 ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, §§ 263 to 287); ECtHR, 24 July 2014, *Husayn (Abu Zubaydah) v. Poland*

(CE:ECHR:2014:0724JUD000751113, § 559); ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111, §§ 565 to 569); and ECtHR, 31 May 2018, *Al Nashiri v. Romania* (CE:ECHR:2018:0531JUD003323412, §§ 719 to 722).

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61 ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111.

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62 It states in paragraph 567(ii) of its judgment: '[the military commission] did not have legitimacy under US and international law resulting in, as the Supreme Court found, its lacking the "power to proceed" and …, consequently, it was not "established by law" for the purposes of Article 6§1'.

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63 ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111, §§ 565 to 569). There is similar reasoning in paragraphs 719 to 722 of the judgment of the ECtHR of 31 May 2018, *Al Nashiri v. Romania* (CE:ECHR:2018:0531JUD003323412).

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64 Judgments of 19 September 2006, *Wilson* (C−506/04, EU:C:2006:587, paragraphs 51 and 52); of 16 February 2017, *Margarit Panicello* (C−503/15, EU:C:2017:126, paragraphs 37 and 38); and of 14 June 2017, *Online Games and Others* (C−685/15, EU:C:2017:452, paragraphs 60 and 61).

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65 Judgment of 19 September 2006, *Wilson* (C−506/04, EU:C:2006:587, paragraph 53); order of 14 May 2008, *Pilato* (C−109/07, EU:C:2008:274, paragraph 24); and judgment of 31 January 2013, *D. and A.* (C−175/11, EU:C:2013:45, paragraph 97).

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66 See also judgments of 19 September 2006, *Wilson* (C−506/04, EU:C:2006:587, paragraph 49); of 14 June 2017, *Online Games and Others* (C−685/15, EU:C:2017:452, paragraph 60); and of 13 December 2017, *El Hassani* (C−403/16, EU:C:2017:960, paragraph 40).

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67 Judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others* (C−341/06 P and C−342/06 P, EU:C:2008:375, paragraph 46); of 19 February 2009, *Gorostiaga Atxalandabaso* v *Parliament* (C−308/07 P, EU:C:2009:103, paragraph 42); and of 31 January 2018, *Gyarmathy* v *FRA* (T−196/15 P, not published, EU:T:2018:47, paragraph 97).

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68 ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111), and ECtHR, 31 May 2018, *Al Nashiri v. Romania* (CE:ECHR:2018:0531JUD003323412).

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69 See point 84 of this Opinion.

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70 ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, § 265).

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71 ECtHR, 24 July 2014, *Al Nashiri v. Poland* (CE:ECHR:2014:0724JUD002876111), and ECtHR, 31 May 2018, *Al Nashiri v. Romania* (CE:ECHR:2018:0531JUD003323412).

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72 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89). See also judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraph 91).

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73 See also judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 58), and order of 6 September 2017, *Peter Schotthöfer & Florian Steiner* (C-473/15, EU:C:2017:633, paragraphs 24 to 26).

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74 See point 24 of this Opinion.

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75 The Framework Decision was adopted on 13 June 2002, that is to say, before the Treaty of Nice (OJ 2001 C 80, p. 1) entered into force on 1 February 2003. It was Article 1(1) of the Treaty of Nice that inserted paragraph 1 into Article 7. The reference in recital 10 of the Framework Decision to Article 7(1) TEU must therefore be read today as a reference to *paragraph 2* of that article. See, in this connection, point 38 of this Opinion.

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76 A matter which, as stated in points 35 and 95 of this Opinion, it is for the referring court to determine.

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77 ECtHR, 30 October 1991, *Vilvarajah and Others v. the United Kingdom* (E:ECHR:1991:1030JUD001316387, § 108); ECtHR, 28 February 2008, *Saadi v. Italy* (CE:ECHR:2008:0228JUD003720106, § 130); ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, § 187); and ECtHR, 23 March 2016, *F.G. v. Sweden* (CE:ECHR:2016:0323JUD004361111, § 120) (emphasis added).

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78 ECtHR, 28 February 2008, *Saadi v. Italy* (CE:ECHR:2008:0228JUD003720106, § 131); ECtHR, 25 April 2013, *Savriddin Dzhurayev v. Russia* (CE:ECHR:2013:0425JUD007138610, §§ 153 and 169); and ECtHR, 25 March 2014, *M.G. v. Bulgaria* (CE:ECHR:2014:0325JUD005929712, § 79).

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79 ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, §§ 272 and 277 to 279). See also point 112 of this Opinion.

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80 ECtHR, 18 April 2013, *Mo.M. v. France* (CE:ECHR:2013:0418JUD001837210, §§ 38 to 43).

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81 ECtHR, 25 March 2014, *M.G. v. Bulgaria* (CE:ECHR:2014:0325JUD005929712, §§ 87 to 91).

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82 ECtHR, 27 October 2011, *Ahorugeze v. Sweden* (CE:ECHR:2011:1027JUD003707509, §§ 125 to 129).

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83 ECtHR, 27 October 2011, *Ahorugeze v. Sweden* (CE:ECHR:2011:1027JUD003707509, § 116); ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, § 261); and ECtHR, 19 February 2013, *Yefimova v. Russia* (CE:ECHR:2013:0219JUD003978609, § 220).

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84 I would point out that it is apparent from the judgment of the High Court of 12 March 2018, mentioned in point 22 of this Opinion, that LM's solicitor made efforts to obtain evidence relating to the state of the system of justice in Poland. He adduced in particular before the referring court a document from an official Polish body

whose precise identity is not known by that court. According to this document, the Polish courts and tribunals are independent of the other branches of power, supervision of the ordinary courts by the Minister for Justice is purely administrative and the Minister for Justice does not interfere with the independence of judges.

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85 See point 109 of this Opinion. See also ECtHR, 10 February 2011, *Dzhaksybergenov v. Ukraine* (CE:ECHR:2011:0210JUD001234310, §§ 37 and 44).

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86 ECtHR, 19 February 2013, *Yefimova v. Russia* (CE:ECHR:2013:0219JUD003978609, §§ 221 to 225). See also ECtHR, 17 January 2012, *Othman (Abu Qatada) v. the United Kingdom* (CE:ECHR:2012:0117JUD000813909, §§ 284 and 285).

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87 Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C−404/15 and C−659/15 PPU, EU:C:2016:198, paragraphs 95 to 98).

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88 I note, in this connection, that in its written observations the Polish Government criticises the referring court for not having taken account of the legislative reforms subsequent to the adoption of the Commission's reasoned proposal.

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89 Judgments of 16 July 2015, *Lanigan* (C-237/15 PPU, EU:C:2015:474, paragraph 38), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 98).

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