Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 16 December 2021[1]

Joined Cases C-562/21 PPU and C-563/21 PPU

X (C-562/21 PPU)
Y (C-563/21 PPU)
v
Openbaar Ministerie

(requests for a preliminary ruling from Rechtbank Amsterdam (District Court, Amsterdam, Netherlands))

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Police and judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Surrender of the requested persons to the issuing judicial authority – Grounds for refusal to execute – Charter of Fundamental Rights of the European Union – Article 47 – Right of access to an independent and impartial tribunal – Systemic or generalised failings concerning the independence of the issuing judicial authority – Absence of an effective remedy to challenge the validity of the appointment of the judges in the issuing Member State – Serious risk, for the person covered by the European arrest warrant, of a breach of his or her fundamental right to a fair trial – Criteria for verification of independence by the executing judicial authority)

I. Introduction

1. The present requests for a preliminary ruling, made by the rechtbank Amsterdam (District Court, Amsterdam, Netherlands), concern the interpretation of Article 1(3) of Framework Decision 2002/584/JHA,[2] read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and, more particularly, the conditions under which the judicial authority executing a European arrest warrant (EAW) may refuse to surrender the requested person, owing to the risk, in respect of that person, of breach of the right to a fair trial before an independent tribunal in the issuing Member State.[3]

[1] Original language: French.

[2] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

[3] The questions referred for a preliminary ruling raised in the present case are essentially identical to those asked by the Supreme Court (Ireland) in the pending case *Minister for Justice and Equality* (C-480/21), which is not subject to the urgent preliminary ruling procedure.

2. The principal challenge in the present cases is to clarify, in the light of the lessons learnt from the judgments of the Court of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*[4] and of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*,[5] whether and to what extent the existence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State may, in the circumstances of the present cases, result in the executing judicial authority opposing the surrender of the requested person.

3. The background to these cases is the evolution and recent reforms of the Polish judicial system ('the contentious reforms),[6] which led the Court to declare, in essence, that a number of the provisions introduced by the Polish legislature were incompatible with EU law[7] and that the Republic of Poland had failed to fulfil its obligations under EU law in several respects[8] (to which I refer, interchangeably, as 'the case-law on the independence of the Polish judicial system').[9] In that

4 C-216/18 PPU, EU:C:2018:586 ('judgment in *Minister for Justice and Equality*').

5 C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033 ('judgment in *Openbaar Ministerie*').

6 These reforms, affecting the constitutional and ordinary courts, the Krajowej Radzie Sądownictwa (National Judicial Council, Poland; 'the KRS') and the public prosecutor's office, strengthened the influence of the executive and the legislature on the justice system, thereby reducing the independence of the judiciary. I am referring, in particular, to the amendments made in 2018 to the ustawa o Sądzie Najwyższym (Law on the Supreme Court), which gave rise to the judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), and to 2019 amendments to the ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts), to the Law on the Supreme Court, and to the 2017 amendments to the ustawa o Krajowej Radzie Sądownictwa (Law on the KRS), which gave rise to the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime applicable to judges)* (C-791/19, EU:C:2021:596). In addition, the provisions amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws gave rise, in the ongoing infringement proceedings in Case C-204/21, *Commission* v *Poland*, to the order of the Vice-President of the Court of 14 July 2021, *Commission* v *Poland* (C-204/21 R, EU:C:2021:593, 'the order of 14 July 2021'), which ordered the suspension of the application of the national provisions referred to, to the order of the Vice-President of the Court of 6 October 2021, *Poland* v *Commission* (C-204/21 R-RAP, EU:C:2021:834), which dismissed the application seeking that the order of 14 July 2021 be cancelled, and to the order of the Vice-President of the Court of 27 October 2021, *Commission* v *Poland* (C-204/21 R, not published, EU:C:2021:877), which imposed a periodic penalty on the Republic of Poland until such time as that Member State complies with the obligations arising from the order of 14 July 2021 or, if it fails to do so, until the date of delivery of the judgment closing the proceedings in Case C-204/21. The question of the independence of the Polish courts and tribunals is also the subject matter of the ongoing references for a preliminary ruling in Cases C-181/21 (*G*) and C-269/21 (*BC and DC*). For its part, the referring court refers, in particular, to the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the KRS and certain other laws) of 8 December 2017 (Dz. U. de 2018, position 3), which entered into force in 2018, concerning the role of the KRS in the appointment of members of the Polish judiciary, the Sąd Najwyższy (Supreme Court, Poland) having found, in its resolution of 23 January 2020 (BSA I-4110-1/20), that, under the legislation that entered into force in 2018, the KRS was not an independent body but was directly subject to the political authorities.

7 See judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982); of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234); of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Remedies)* (C-824/18, EU:C:2021:153); of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798); and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931).

8 Judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531); of 5 November 2019, *Commission* v *Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:924), and of 15 July 2021, *Commission* v *Poland (Disciplinary regime of judges)* (C-791/19, EU:C:2021:596). A fourth action against the Republic of Poland for failure to fulfil obligations concerning the new disciplinary regime is currently pending Case C-204/21, *Commission* v *Poland*, see orders cited in footnote 6of this Opinion).

9 That situation, moreover, led the European Commission to adopt, on 20 December 2017, a reasoned proposal in accordance with Article 7(1) TEU regarding the rule of law in Poland (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, COM(2017) 835 final), on which the Council has not yet taken a view. More recently, serious concerns were raised by the Commission in its 2021 Report on the Rule of Law in the European Union (COM(2021) 700 final) – Chapter on the situation of the rule of law in Poland, (SWD(2021) 722 final). Moreover, in the context of the Council of Europe, that situation was recently the subject of Resolution 2316 (2020) of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Poland, of 28 January 2020, and of Opinion 977/2020 of the European Commission for Democracy through Law ('the Venice Commission') of 22 June 2020 on amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other Laws (CDL-AD (2020)017). I also note that the General Assembly of the European Networks of Councils for the Judiciary (ENCJ), held in Vilnius (Lithuania) on 28 October 2021, decided to expel the KRS from the ENCJ.

context, the recent judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) of 7 October 2021 (K 3/21) ('the Constitutional Court judgment'), delivered after the orders for reference, poses subsequent challenges for the referring court.[10]

4. In the light of an analysis of the relevant case-law of the Court, I shall specify the conditions under which systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, and in particular interference of the executive in the exercise of judicial power as regards the nomination of judges, risk affecting the individual situation of requested persons once surrendered and may thus lead the executing judicial authority to refusing their surrender.

II. Legal context

A. European Union law

1. The Treaty on the European Union

5. In the words of 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.'

6. Article 7 TEU states:

'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

[10] In that judgment, of which only the operative part is available at present, the Trybunał Konstytucyjny (Constitutional Court) held, essentially, that certain fundamental provisions of EU law (namely the first paragraph of Article 1 TEU, Article 2 TEU, Article 4(3) TEU and the second subparagraph of Article 19(1) TEU), in particular where they affirm the principle of supremacy of EU law, violate certain fundamental provisions of the Polish Constitution and, consequently, anticipated that it did not rule out making use of its jurisdiction and directly reviewing the constitutionality of the judgments of the Court of Justice, as well as finding that they were not applicable in the Polish legal order.

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 [TFEU].'

7. The second subparagraph of Article 19(1) TEU provides:

'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

2. The Charter

8. Article 47 of the Charter, entitled 'Right to an effective remedy and to a fair trial', provides:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

…'

3. Framework Decision 2002/584

9. Recitals 5, 6, 10 and 12 of Framework Decision 2002/584 are worded as follows:

'(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The [EAW] provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.

…

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

…

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [TEU] and reflected in the [Charter], in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom [an EAW] has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these reasons.’

10. In the words of Article 1 of that framework decision, entitled ‘Definition of the European arrest warrant and obligation to execute it’:

‘1. The [EAW] 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 [EAW] on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [TEU].’

11. Articles 3, 4, and 4a of the framework decision list the grounds for mandatory and optional non-execution of the EAW.

12. Article 15 of the same framework decision, entitled ‘Surrender decision’, provides:

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

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

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

B. Netherlands law

13. The Overleveringswet (Law on surrender) of 29 April 2004,[11] as most recently amended by the Law of 17 March 2021,[12] transposes Framework Decision 2002/584 into Netherlands law.

14. Article 1 of the Law on surrender reads as follows:

'For the purposes of this Law, the following definitions shall apply:

…

(g) court: the District Court, Amsterdam;

…'

15. Article 11 of that law provides, in paragraph 1 thereof:

'An [EAW] shall not be executed in cases where, in the court's opinion, there are substantial grounds to believe that, after surrender, the requested person will face a real risk that his or her fundamental rights, as guaranteed by the [Charter], will be violated.'

16. Article 26 of that law provides, in paragraph 1 thereof:

'The court shall examine … the possibility of surrender. …'

17. Article 28 of the same law states:

'1. No later than 14 days after the conclusion of the hearing, the court shall deliver its judgment on the surrender. The judgment shall state the reasons on which it is based.

2. If the court finds … that the surrender cannot be authorised …, it must refuse that surrender in its judgment.

3. In cases other than those provided for in paragraph 2, the court shall authorise surrender in its judgment, unless it considers that the [EAW] should not be executed pursuant to Article 11(1) …'

[11] Stb. 2004, No 195.

[12] Stb. 2021, No 155.

III. The disputes in the main proceedings and the questions referred for a preliminary ruling

A. Case C-562/21 PPU

18. On 6 April 2021, a Polish judicial authority issued an EAW against X, a Polish national, with a view to his arrest and surrender to that jurisdiction to execute a custodial sentence, imposed by a final judgment of 30 June 2020 for extortion and threats of violence.

19. The person concerned was placed in provisional detention pending the decision of the rechtbank Amsterdam (District Court, Amsterdam), the referring court, concerning his surrender, to which he did not consent.

20. That court, examining the request for execution of the EAW, found that there were systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, which entailed a real risk of a breach of the right to an independent tribunal, enshrined in Article 47(2) of the Charter as the essence of the fundamental right to a fair trial.

21. In addition, the said court observed that, while it was possible, for a person whose surrender was requested for the purpose of executing a penalty or a custodial measure, to identify, in the surrender proceedings, which judges of the issuing Member State had taken part in his or her trial, that person could not effectively challenge, following his or her surrender, the validity of the appointment of a judge or the lawfulness of the exercise of his or her judicial functions, pursuant to legislation which entered into force on 14 February 2020. [13]

22. In those circumstances, the rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'What test should an executing judicial authority apply when deciding whether to execute an EAW for the purpose of executing a final custodial sentence or detention order when examining whether, in the issuing Member State, the trial resulting in the conviction was conducted in breach of the right to a tribunal previously established by law, where no effective remedy was available in that Member State for any breach of that right?'

B. Case C-563/21 PPU

23. Polish judicial authorities issued six EAWs against Y, a Polish national, with a view to his arrest and surrender to those jurisdictions. Two EAWs were issued for the purpose of executing custodial sentences and the other four EAWs were issued for the purpose of conducting criminal prosecutions for a number of offences, including fraud. The case referred by the referring court concerns the EAW relating to the latter offence, issued on 7 April 2020.

[13] Namely amendments of the legislation relating to the judiciary, including the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw (Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws) of 20 December 2019 (Dz. U. of 2020, position 190). Under that legislation, the Polish courts are not allowed to examine a plea based on the appointment of a judge or the legality of his or her judicial functions. See, to that effect, Opinion No 977/2020 of the Venice Commission.

24. The person concerned was placed in provisional custody pending the decision of the rechtbank Amsterdam (District Court, Amsterdam), the referring court, concerning his surrender, to which he did not consent.

25. That court, examining the request for execution of the EAW, found, as it did in Case C-562/21 PPU, that there were systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which entailed a real risk of a breach of the right to an independent tribunal, within the meaning of Article 47(2) of the Charter.[14]

26. In addition, that court observed that it was not possible, for a person whose surrender was requested for the purpose of criminal prosecution, to identify, in the surrender proceedings, which judges of the issuing Member State will examine his or her cases following his or her surrender, given that cases are allocated randomly to the judges of a court and that it will therefore be impossible for the person concerned to invoke, in an individual manner, the irregularities committed in the appointment of one or more judges. Moreover, the same court found that a requested person could not effectively challenge, following his or her surrender, the validity of the appointment of a judge or the lawfulness of the performance of his or her judicial functions, pursuant to the law which entered into force on 14 February 2020.[15]

27. In those circumstances, the rechtbank Amsterdam (District Court, Amsterdam) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is it appropriate to apply the test set out in the judgment in [*Minister for Justice and Equality*] and confirmed in the judgment in [*Openbaar Ministerie*] where there is a real risk that the person concerned will stand trial before a court not previously established by law?

(2) Is it appropriate to apply the test set out in the judgment in [*Minister for Justice and Equality*] and affirmed in the judgment in [*Openbaar Ministerie*] where the requested person seeking to challenge his surrender cannot meet that test by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which he will be tried by reason of the manner in which cases are randomly allocated?

(3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the requested person cannot at this point in time establish that the courts before which he will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial, thus requiring the executing judicial authority to refuse the surrender of the requested person?’

IV. The urgent preliminary ruling procedure

28. The First Chamber of the Court decided, on 30 September 2021, to grant the referring court’s request that both of the present cases be dealt with under the urgent preliminary ruling procedure. In that regard, the Court observed, first, that the questions referred concerned the interpretation of a framework decision coming within Title V of Part Three of the FEU Treaty and, second, that the referring court had indicated that X and Y were being detained in the Netherlands pending its decisions on their surrender.

[14] See point 20 of this Opinion.

[15] See footnote 13 of this Opinion.

29. The Court also decided to join the cases for the purposes of the written and oral parts of the procedure and of the judgment, on account of the connection between them.

30. Written observations have been lodged by X, the Openbaar Ministerie (public prosecution service, Netherlands), the Netherlands and Polish Governments as well as the European Commission. The Openbaar Ministerie (public prosecution service), Ireland, the Netherlands and Polish Governments and the Commission submitted oral observations at the hearing on 16 November 2021.

V. Analysis

31. By its questions referred for a preliminary ruling in the two cases, which should be examined together, the referring court asks, in essence, whether, in application of the principles established in the judgments in *Minister for Justice and Equality* and *Openbaar Ministerie*, it is required to refuse the surrender of the requested person in the following situations:

– first, when examining an EAW issued for the purpose of executing a penalty or a definitive custodial measure, where, in the issuing Member State, (i) the right to a tribunal previously established by law was breached during the trial that led to the conviction and (ii) no effective remedy is available for any breach of that right; [16]

– second, when examining an EAW issued for the purpose of criminal prosecution, where (i) there is a real risk that, in the issuing Member State, the requested person will stand trial before a court which was not previously established by law, [17] (ii) that person cannot determine the composition of the courts before which he or she will be tried, owing to the random allocation of cases [18] and (iii) there is no effective remedy to challenge the validity of the appointment of judges. [19]

32. I shall first set out the principles established by Framework Decision 2002/584 and by the relevant case-law (A), before answering the questions referred for a preliminary ruling (B).

A. The principles stemming from Framework Decision 2002/584 and from the relevant case-law

33. I shall set out below the principles enshrined in Framework Decision 2002/584 and established by the case-law as regards the grounds for non-execution of an EAW linked to the risk of breach of the requested person's fundamental rights (1), as well as the conditions under which an irregularity in the appointment of a judge may result in the right of individuals to a fair trial being called in question (2).

[16] The single question in Case C-562/21 PPU.

[17] The first question in Case C-563/21 PPU.

[18] The second question in Case C-563/21 PPU.

[19] The third question in Case C-563/21 PPU.

1. The grounds for non-execution of an EAW linked to the risk of breach of the requested person's fundamental rights

34. As is apparent from recitals 5, 6 and 10 of Framework Decision 2002/584, the introduction of the EAW mechanism, which makes it possible to remove the complexity and potential for delay inherent in extradition procedures, gives concrete form, in the field of criminal law, to the principle of mutual recognition which the European Council has referred to as the 'cornerstone' of judicial cooperation, and is based on a high level of confidence between Member States. [20] The implementation of that mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) TEU, determined by the Council pursuant to Article 7(1) of that Treaty with the consequences set out in paragraph 2 of that article. Recital 12 of that framework decision states, however, that the framework decision respects fundamental rights and observes the principles recognised by Article 6 TFEU and reflected in the Charter. [21]

35. Those two tenets of Framework Decision 2002/584 are reflected in Article 1, which, in paragraph 2 thereof, establishes that Member States are to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision, and, in paragraph 3 thereof, states that that framework decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.

36. It follows that the executing judicial authorities may, in principle, refuse to execute an EAW only on the grounds exhaustively enumerated in Articles 3 to 4a of Framework Decision 2002/584 [22] or, in accordance with the Court's settled case-law, in 'exceptional circumstances' which, owing to their gravity, require that limitations be placed on the principles of mutual recognition and mutual trust between Member States, on which judicial cooperation in criminal matters is based. [23]

37. In order to establish the existence of those exceptional circumstances, which include the breach of certain fundamental rights enshrined in the Charter, the Court introduced, in the judgment in *Aranyosi an Căldăraru*, a two-step examination ('the two-step examination' or 'the examination' [24]):

– in the first step, the executing judicial authority must assess whether there is a real risk that fundamental rights will be breached, in the light of the general situation in the issuing Member State;

[20] The Court's case-law has made clear that the objective of the EAW mechanism is inter alia to combat the impunity of the requested person who is present in a Member State other than that in which he or she has allegedly committed an offence (see judgment in *Openbaar Ministerie*, paragraph 62 and the case-law cited).

[21] The Court has however made clear that, while execution of the EAW constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (see judgments in *Minister for Justice and Equality* (paragraph 41 and the case-law cited), and in *Openbaar Ministerie* (paragraph 37)).

[22] In addition, execution of the EAW may be subject to only one of the conditions exhaustively set out in Article 5 of that framework decision.

[23] See, to that effect, Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014, (EU:C:2014:2454, paragraph 191), and judgment of 5 April 2016, Aranyosi and Căldăraru (C 404/15 and C 659/15 PPU, EU:C:2016:198, paragraph 82, 'judgment in Aranyosi and Căldăraru'). See also Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases L and P (Independence of the issuing judicial authority) (C 354/20 PPU and C 412/20 PPU, EU:C:2020:925, point 39).

[24] See judgment in *Aranyosi and Căldăraru* (paragraphs 88, 89, 92 and 94).

– in the second step, that judicial authority must assess, specifically and precisely, whether there is a real risk that a fundamental right of the requested person will be breached, having regard to the circumstances of the case. [25]

38. Subsequently, those principles, and the two-step examination in particular, have been applied in respect of the situation in which, following the execution of an EAW, there is a risk that the right to a fair trial, enshrined in Article 47 of the Charter, will be breached on account of systemic or generalised deficiencies in the judicial system of the issuing Member State, in this instance Poland, liable to affect judicial independence and thus give rise to a breach of that right.

39. In the judgment in *Minister for Justice and Equality*, which concerned an EAW issued by Polish judicial authorities for the purpose of criminal prosecution, the Court held that, even where, following the first step of the examination, the executing judicial authority has evidence, such as that set out in a reasoned proposal of the European Commission under Article 7(1) TEU, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, indicating that there is a real risk of breach of the essence of the fundamental right to a fair trial, [26] that authority is also required, in the second step, to ascertain, specifically and precisely, whether there are substantial grounds for believing that the person concerned will run such a risk if he or she is surrendered to the issuing Member State. [27] In that regard, the said authority must take account of criteria such as the requested person's personal situation, the nature of the offence for which he or she is being prosecuted and the factual context that form the basis of the EAW ('the relevant criteria'), as well as the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584. [28]

40. In the judgment in *Openbaar Ministerie*, which concerned an EAW issued by Polish judicial authorities for the purpose of criminal prosecution and the execution of a custodial sentence, the Court held that, even where the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which existed at the time of issue of that EAW or which arose after that issue, that authority cannot deny the status of 'issuing judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584 to the court which issued the EAW. [29] Moreover, the Court recalled that, even where it finds the abovementioned existence of systemic or generalised deficiencies, the executing judicial authority cannot refrain from carrying out the second step of the examination. In the context of that second step, it is for that authority to assess whether there are substantial grounds for believing that the person who is the subject of an EAW will run a real risk of breach of his or her fundamental right to a fair hearing if he or she is

[25] In that case, there was a real risk of inhuman or degrading treatment of persons detained in the issuing Member State, in the light of the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter.

[26] More specifically, the lack of independence of the courts of the issuing Member State on account of systemic or generalised deficiencies in that Member State (judgment in *Minister for Justice and Equality* (paragraphs 61 to 67)) would entail a breach of the fundamental right to an independent tribunal and, therefore, of the essence of the fundamental right to a fair trial (paragraph 75).

[27] The Court made clear, in that regard, that it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State, that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected (see judgment in *Minister for Justice and Equality* (paragraph 72), and recital 10 of Framework Decision 2002/584).

[28] See judgment in *Minister for Justice and Equality* (paragraph 79).

[29] The Court made clear that, in the circumstances of that case, the executing judicial authority could not deny the status of issuing judicial authority within the meaning of that provision to all judges or all courts of the issuing Member State, acting, by their nature, entirely independently of the executive, and that the existence of such deficiencies did not necessarily affect every decision that the courts of that Member State might be led to adopt in each particular case (judgment in *Openbaar Ministerie*, paragraphs 41 and 42).

surrendered.[30] In that regard, the Court referred to the relevant criteria, developed in the judgment in *Minister for Justice and Equality*,[31] while making it clear that the said authority may, in the light of the factual context in which the EAW warrant was issued, take into account statements by public authorities which are liable to interfere with the way in which an individual case is handled.[32]

41. In essence, in the judgments cited above, while maintaining the principle of surrender of the requested person, the Court held that the existence of a real risk that that person will, if surrendered to the issuing judicial authority, suffer a breach of his or her fundamental right to an independent tribunal and, therefore, of the essence of his or her fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that EAW, on the basis of Article 1(3) of Framework Decision 2002/584.[33]

42. That assessment, which is reflected in the two-step examination, requires, essentially, a general appraisal of the situation in the issuing Member State, followed by an individual appraisal of the situation of the person concerned, from which it is apparent that he or she is actually exposed to the real risk of breach of the fundamental rights in question.

2. The conditions in which an irregularity in the appointment of a judge may encroach on the right of individuals to a fair trial

43. The referring court observing that the systemic or generalised deficiencies affecting the fundamental right to a tribunal previously established by law in the issuing Member State result mainly from an irregularity in the appointments of the members of the judiciary,[34] it seems opportune to me to mention briefly, below, the principles established by the Court as regards the conditions in which an irregularity in the appointment of a judge may undermine the right of individuals to a fair trial.

44. In the judgment of 26 March 2020, *Review Simpson* v *Council* and *HG* v *Commission*,[35] the Court ruled on the impact of an irregularity in the procedure for appointing a judge to the European Union Civil Service Tribunal and on the right of the parties to a tribunal previously established by law.

45. In that judgment, while having observed that, according to the case-law of the European Court of Human Rights, the right to be judged by a tribunal 'established by law' within the meaning of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, to which the second paragraph of Article 47 of the Charter corresponds,[36] encompasses, by its nature, the process of appointing

[30] See judgment in *Openbaar Ministerie* (paragraph 60).

[31] Judgment in *Minister for Justice and Equality* (paragraph 79). See point 39 of this Opinion.

[32] See judgment in *Openbaar Ministerie* (paragraph 61).

[33] See judgments in *Minister for Justice and Equality* (paragraph 59) and *Openbaar Ministerie* (paragraph 61). I note that, although, in the first of those judgments, the Court held that the situation in question is capable of *permitting* the executing judicial authority to *refrain*, by way of exception, from giving effect to the EAW, in the second judgment, the Court stated that, in that situation, the executing judicial authority *must refrain* from giving effect to the EAW.

[34] The referring court refers to the appointment of judges on a proposal from the KRS, pursuant to the Law amending the Law on the KRS and certain other laws of 8 December 2017.

[35] C-542/18 RX-II and C-543/18 RX-II, 'judgment in *Review Simpson*', EU:C:2020:232.

[36] See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

judges,[37] the Court stated that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly where that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of that judicial system.[38]

46. In that judgment, the Court drew a distinction between, on the one hand, the procedure for the appointment of the judge in question to the Civil Service Tribunal (that is to say, the call for applications), which the General Court of the European Union had found to be irregular, and, on the other hand, the fundamental rules for the appointment of judges to that tribunal (that is to say, the fourth paragraph of Article 257 TFEU and Article 3 of Annex I to the Staff Regulations of the Court of Justice of the European Union) and concluded that the mere breach of the appointment procedure was not sufficient to establish an infringement of a fundamental rule of the procedure for appointing judges to the Civil Service Tribunal that was of such a kind and of such gravity as to create a real risk that the Council had made unjustified use of its powers, undermining the integrity of the outcome of the appointment process and thus giving rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge appointed to the third post, or of the Chamber to which that judge was assigned.[39] Those same principles were applied by the Court in respect of the situation of the Polish judicial system in the judgment of 6 October 2021, *W.Ż. (Supreme Court (Chamber of Extraordinary Control and Public Affairs) – Appointment).*[40]

47. In essence, that case-law teaches us that irregularities in the appointment of certain judges can have repercussions on the actual situation of individuals where they create the risk of interference by the executive with the administration of justice and thus sow doubt, in the minds of the individuals, as to the independence and impartiality of those judges and of the courts and tribunals to which they are assigned. Those teachings prompt me to conclude that, in the context of the second step of the examination in the cases in the main proceedings, it is appropriate to ascertain whether the situation of the requested persons, in the light of the relevant criteria, presents, for the executive, an interest which goes beyond the concrete elements of the presumed offences and which exposes them to the risk that their case will not be dealt with in an impartial manner, as I shall explain below.

[37] Judgment in *Review Simpson* (paragraph 74). See ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, §§ 226 to 228), and ECtHR, 22 July 2021, *Reczkowicz v. Poland* (CE:ECHR:2021:0722JUD004344719, § 218).

[38] Judgment in *Review Simpson* (paragraph 75).

[39] Judgment in *Review Simpson* (paragraph 79).

[40] C-487/19, EU:C:2021:798 (paragraph 130).

B. Consideration of the questions referred

48. The present cases come within a context which is almost identical to that which gave rise to the judgments in *Minister for Justice and Equality* and *Openbaar Ministerie*, and also to that forming the subject matter of the pending Case C-480/21, *Minister for Justice and Equality.*[41] They concern the execution of an EAW issued by Polish judicial authorities for the purpose of criminal prosecution or the execution of a custodial sentence. As I have already observed, by its questions, the referring court asks, in essence, whether and how it must apply the second step of the examination[42] in the particular context of the present case.

1. The first step of the examination

49. As regards, first of all, the first step of the examination, the referring court, without raising any question referred for a preliminary ruling in that regard, finds that there are systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, which existed at the time the EAW was issued, which still persist and which have even worsened over recent years. That court bases that finding primarily on the appointment of judges on a proposal from the KRS pursuant to the Law amending the Law on the National Council of the Judiciary of 8 December 2017[43] as well as on the impossibility, for a surrendered person, to challenge effectively the validity of the appointment of a judge or the lawfulness of the performance of his or her judicial functions pursuant to the legislation which entered into force on 14 February 2020.[44]

50. Without wishing to encroach on the jurisdiction of the referring court and without prejudice to the appraisals which it must carry out with regard to the currency of the analysis and to any developments in the situation at national level,[45] I am able to subscribe, in principle, in the light of the case-law on the independence of the Polish judicial system, to the findings made by that court.[46]

2. The second step of the examination

51. With regard to the second step of the examination, the Court is called upon to clarify the application of the relevant criteria in the case, on the one hand, of the execution of EAWs issued for the purpose of executing a penalty or a custodial sentence and, on the other hand, of the execution of an EAW issued for the purpose of criminal prosecution.[47]

[41] This case also concerns EAWs issued by Polish judicial authorities for the purposes of criminal prosecution and the execution of a custodial sentence. By its reference for a preliminary ruling, the Supreme Court (Ireland) observes, first, that it is impossible for it to identify the composition of the courts before which the requested persons will have to appear, by reason of a system of random allocation of cases, and, second, that the requested persons will not be able to challenge the composition of the court before which they will appear, even if they consider that it is composed irregularly. The referring court therefore wonders whether the systemic or generalised deficiencies in the Polish judicial system are such that, in themselves, they amount to a breach of the essence of the right to a fair trial, which, in essence, would exempt it from the second step of the two-step examination.

[42] See points 37 to 40 of this Opinion.

[43] See footnote 6 of this Opinion.

[44] See footnote 13 of this Opinion.

[45] In that regard, I regret to note that, since the present references for a preliminary ruling were made, the situation has taken a particularly worrying turn, in the light of the Constitutional Court judgment.

[46] Indeed, by that case-law, the Court established that several aspects of the reforms of the Polish judicial system ran counter to the fundamental right to a fair trial owing to the lack of independence of certain courts of that Member State. See, inter alia, judgment of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798).

[47] See point 31 of this Opinion.

52. It is therefore appropriate to examine whether the systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, where they contain or are liable to contain specific deficiencies in the appointment of the judges who convicted the requested person or are supposed to try him or her following his or her surrender, may entail, in the present case, breach of the right of that person to an independent tribunal, guaranteed in the first sentence of the second paragraph of Article 47 of the Charter. If so, the executing judicial authority must refrain, pursuant to Article 1(3) of Framework Decision 2002/584, from giving effect to the EAW, while, otherwise, it must execute that warrant. [48]

53. As regards, on the one hand, the execution of an EAW issued for the purpose of executing a penalty or a custodial measure, the referring court notes that there is a real risk that one or more judges appointed following the contentious reforms [49] participated in the trial of the person subject to such an EAW. That court adds that, while it is actually possible for that person to determine which judges of the executing Member State were involved in his or her trial, he or she cannot effectively challenge the validity of the appointment of a judge or the lawfulness of the performance of that judge's judicial functions, pursuant to a legislative amendment introduced in 2020 as part of the contentious reforms. [50]

54. As regards, on the other hand, the execution of an EAW issued for the purpose of criminal prosecution, the referring court states that a requested person is not in a position to know which judges will examine his or her case following his or her surrender, in view of the random mechanism for allocation of cases to the judges of a court or tribunal, which was also introduced as part of the contentious reforms.

55. I observe that, in those two scenarios, two situations can be envisaged, namely that in which it is possible to rule out the existence of irregularities in the appointment of one or more judges who have dealt with or who are supposed to deal with the requested persons' case (a) and that in which there are irregularities or the real risk of irregularities in such an appointment (b). In the latter situation, which is the subject of the questions referred for a preliminary ruling, it is appropriate to specify whether and to what extent the existence or the risk of such irregularities may lead the executing judicial authority to refuse to execute the EAW. Last, it is in my view useful to provide a few indications of the possible consequences, for the abovementioned examination, of the Constitutional Court judgment, which, although delivered after the present requests for a preliminary ruling, constitutes an element which the referring court will take into account in its assessment (c).

(a) The absence of irregularities in the appointment of the competent national judges

56. The executing judicial authority, on the basis of its verifications and possibly of an exchange of information with the competent authorities of the issuing Member State in application of Article 15(2) of Framework Decision 2002/584, might reach the conclusion that the judicial authority that ordered the penalty or custodial measure against the requested person was not

[48] I note that any refusal to execute an EAW is without prejudice, inter alia, to the possibility that, where the law of the executing Member State so permits, the person who for whom the EAW has been issued is being prosecuted in the executing Member State for the same acts as those on which the EAW is based or that that Member State undertakes to execute the sentence or detention order for which the EAW has been issued. Furthermore, such a possibility is provided for in Article 4(2) and (6) of Framework Decision 2002/584 among the grounds for optional non-execution of the EAW.

[49] The referring court refers, in particular, to the appointment of judges on a proposal from the KRS under the Law amending the Law on the KRS and certain other laws of 8 December 2017.

[50] See point 21 of this Opinion.

composed of judges appointed in accordance with the rules stemming from the contentious reforms,[51] or that there is no specific risk that the person whose surrender is requested for the purpose of criminal prosecution will be tried by a judicial authority composed of judges appointed on the basis of those rules.

57. In such situations, the systemic or generalised deficiencies which affect the judicial system of the issuing Member State should not prevent the person concerned from being surrendered to that Member State, in the absence of other grounds justifying the refusal of that surrender.[52]

(b) The existence or the actual risk of irregularities in the appointment of the competent national judges

58. The executing judicial authority, again on the basis of its verifications and possibly of an exchange of information with the competent authorities of the issuing Member State in application of Article 15(2) of Framework Decision 2002/584, might find that the judicial authority that pronounced the penalty or custodial sentence was indeed composed of one or a number of judges appointed on the basis of the rules stemming from the contentious reforms, or that there is a specific risk that the judges who convicted the requested person or who will examine that person's case following his or her surrender belong to the category of judges appointed in accordance with those rules. Those situations, which are the subject matter of the first and second questions referred for a preliminary ruling in Case C-563/21 PPU, are characterised by doubt, on the part of the executing judicial authority, as to the actual impact of the participation (actual or probable) of the irregularly appointed judges on the respect for the fundamental right of that person to an independent tribunal.

59. It seems to me, however, that, in the light of the Court's case-law examined in points 37 to 41 of this Opinion, this doubt is not in itself sufficient to demonstrate the existence of a real risk of breach of the fundamental right of the requested person to an independent tribunal in the context of the second step of the examination and therefore to justify any refusal on the part of that authority to execute the EAW. Like the systemic or generalised deficiencies of the judicial system of the issuing Member State, the repercussion of those deficiencies on the national proceedings themselves – whether closed or future – in respect of the requested person, while

[51] In that regard, I do not subscribe to the line of argument put forward by X, according to which, even in such a scenario, first, it cannot be ruled out that, at some point after his surrender, disputes or applications connected with the execution of the custodial penalties, such as, for example, applications for a review of the conviction, conditional release, suspension of the penalty or a pardon will be brought before a court, and, second, it is incorrect to proceed on the assumption that there is a final judgment, which he would wish to raise in court. After all, it does not seem to me that the executing judicial authority would be required to examine, generally and hypothetically, the judicial system of the issuing Member State in order to ensure that, in any subsequent stage in the case, the surrendered person will not face a risk that his or her case will not be tried independently.

[52] I should make clear that this conclusion is linked to the question of the effects, in specific cases, of the systemic and generalised deficiencies of the issuing Member State mentioned by the referring court, namely those relating to the lack of independence of the courts and tribunals on the ground of the irregularity in the appointment of some of the judges. It does not concern any of the consequences, in the same cases, of other systemic or generalised deficiencies in the judicial system of the issuing Member State, such as those relating to the disciplinary regime of judges (see judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime of judges)* (C-791/19, EU:C:2021:596)). In such a scenario, should the requested person provide evidence which gives rise to specific doubts as to the effects of the systemic or generalised deficiencies concerning the disciplinary regime of judges on his or her situation, it would be for the executing judicial authority to verify, possibly on the basis of the information provided by the issuing Member State pursuant to Article 15(2) of Framework Decision 2002/584, whether, having regard to the relevant criteria, there are sufficient grounds to consider that the existence or the risk of disciplinary proceedings might have influenced the decision (the conviction or the decision to prosecute) on which the EAW is based. It is not apparent from the requests for a preliminary ruling, however, that that question was raised in the cases in the main proceedings.

encouraging the said authority to exercise increased vigilance when assessing the circumstances surrounding the issue of the EAW,[53] cannot alone relieve that authority of the obligation to examine the relevant criteria.

60. In that regard, I recall that, in its case-law on the independence of the Polish judicial system, the Court has held, in essence, that the Republic of Poland, by the contentious reforms, permitted the executive to intervene decisively in the appointment of judges and in their disciplinary regime. In addition, the Court's case-law examined in point 45 of this Opinion has made it clear that an irregularity in the appointment of the judges entails a breach of the second paragraph of Article 47 of the Charter, particularly where it creates the risk of an interference by the executive with the exercise of judicial power, thereby enabling the executive to exert influence over the judiciary and undermining the separation of powers and thus the independence of the judiciary.[54]

61. I therefore consider that the appraisal of the effects of the systemic or generalised deficiencies on the particular situation of the requested persons must be made by reference to the nature of the deficiencies identified. In the case at hand, having regard to the deficiencies found concerning the interference by the executive with the exercise of judicial power, the question is whether that interference is capable of affecting the handling of the requested persons' cases.

62. It is therefore for the referring court to verify, on the basis of the evidence provided by the requested person and of any information received from the authorities of the Member State which issued the EAW, in application of Article 15(2) of Framework Decision 2002/584, whether the lack of independence of the Polish courts, on account of interference by the executive with the exercise of judicial power, might breach the right of the requested persons to an independent tribunal, in view of the relevant criteria, and also of any developments in the legislative and judicial framework of the issuing Member State.[55]

63. The relevant criteria must therefore be applied, in the case at hand, in the light of any risk of interference by the executive in the cases concerning the requested persons. More specifically, in application of those criteria, first of all, it will be for the referring court to assess whether the *personal situation* of the requested persons is liable to entail a risk that they will be tried on the basis of elements other than those that are relevant to the examination their allegedly wrongful conduct, such as any participation by those persons in politics or their belonging to a category, minority or social status that is particularly exposed to interference by the executive, account being had of the policies pursued by the latter. Next, the referring court will be required to verify whether the *nature of the offences* in respect of which the said persons are prosecuted may entail a

[53] See, as regards the worsening of the systemic or generalised deficiencies, Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases *L and P (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:925, point 76), and judgment in *Openbaar Ministerie* (paragraph 60).

[54] Conversely, the appraisal would have been different had those deficiencies related to a different aspect, such as the rules guaranteeing the competence of the judges appointed or the duration of their term of office (see, to that effect, judgment in *Review Simpson* (paragraphs 77 to 81)).

[55] I am referring, in particular, to the order of 14 July 2021, by which the Republic of Poland was ordered to suspend a number of provisions of national law relating to the independence of the Disciplinary Chamber of the Supreme Court, pending delivery of the judgment that will close the proceedings in Case C-204/21, and also to the order of the Vice-President of the Court of 27 October 2021, *Commission* v *Poland* (C-204/21 R, not published, EU:C:2021:877), by which the Vice-President imposed a periodic penalty payment on the Republic of Poland in order to deter that Member State from delaying bringing its conduct into line with that order. At the hearing, the Republic of Poland's representative stated that the application of the law in question was suspended following the order of the Vice-President of the Court of 14 July 2021, a matter which it is for the referring court to verify.

risk that they will not be tried independently.[56] Last, that court will have to assess whether such a risk may arise from the *factual context* forming the basis of the EAW, having regard to any statements made by the public authorities liable to interfere with the handling to be reserved for an individual case.

64. In addition, in the context of the foregoing analysis, the referring court may also be led to examine whether the legislation of the issuing Member State guarantees the requested persons an effective judicial remedy enabling any irregularity in the appointment of the judge or judges concerned to be invoked (see point 53 of this Opinion), an aspect which is the subject of the single question in Case C-562/21 PPU and the third question in Case C-563/21 PPU.[57]

65. As regards the extent of the analysis which the executing judicial authority must carry out, I consider that it is incumbent on the requested person to provide the referring court with the evidence showing that there is, prima facie, a concrete risk that, in the light of the criteria recalled in point 63 of this Opinion, his or her case may be tried in a manner that is not independent. Even though comprehensive evidence in that respect cannot be required, that demonstration cannot be limited to referring to the generic risk that the systemic or generalised deficiencies in the judicial system of the issuing Member State could have repercussions for his or her case, that assessment still falling under the first step of the examination. To my mind, it is for the requested person, first, to provide information showing that the judges involved or likely to be involved in his or her trial are among the judges appointed in accordance with the contentious reforms or that the issuing judicial authority is itself marred by a lack of independence vis-à-vis the executive and, second, to provide reasons why he or she believes that such a situation is liable to have negative repercussions for his or her own case, having regard to the relevant conditions relating to his or her personal situation, to the nature of the offences in question and to the factual context forming the basis of the EAW.[58] In my view, such evidence will normally be sufficient to lead the executing judicial authority to refuse to surrender that person, unless the issuing judicial authority itself provides assurances or specific commitments concerning the treatment that the requested person will receive following his or her surrender such as to dispel any doubt as to the risks mentioned by that same person.

(c) The consequences of the Constitutional Court judgment

66. The Constitutional Court judgment, although being delivered after the submission of the present requests for a preliminary ruling, constitutes, as a well-known fact, an element which the referring court will have to take into account at the moment of its decision.

67. Even though its grounds are not yet available, it is apparent from the operative part of that judgment that the Trybunał Konstytucyjny (Constitutional Court) calls in question the very applicability of certain fundamental provisions of the EU Treaty in that Member State, as well as

[56] As the offences mentioned by the referring court relate to ordinary crimes – and not, for example, to offences in respect of which the persons concerned might fear interference by the executive – I consider it prima facie unlikely that, in the present case, the nature of those offences might, in itself and without prejudice to a specific appraisal by the referring court, entail a genuine risk that the persons concerned will not be tried in an independent fashion.

[57] The referring court refers, in that regard, to the legislation which entered into force on 14 February 2020 (see point 21 of this Opinion). It is for that court to verify whether the contentious provisions of that legislation will be in force if and when the requested persons are surrendered, in the light of the information provided by the Republic of Poland's representative at the hearing (see footnote 56 of this Opinion).

[58] In that context, it may, in my view, be helpful for the requested person to show that he or she raised that question, so far as possible, before the competent authorities of the issuing Member State, in particular by exhausting the remedies permitted by the law of that Member State, and that he or she has shown diligence, in particular as regards his or her appearance before the competent court or tribunal of that Member State.

the primary role of the Court of Justice in ensuring that in the interpretation and application of the Treaties the law is observed, in accordance with Article 19(1) TEU, including as regards the contentious issue of the independence of judicial bodies, which is one of the of fundamental characteristics of the rule of law guaranteed in Article 2 TEU.[59] Contrary to the assurances provided at the hearing by the Polish Government representative, it appears that the application of EU law by the national courts cannot be subject to any review in the legal situations in which the Trybunał Konstytucyjny (Constitutional Court) considers a particular interpretation to be binding on the basis of the Polish Constitution.

68. At first sight, the said judgment represents the expression of a judicial policy, at the highest constitutional level, aimed at calling into question the sharing of the fundamental principles and values of the Union by that Member State,[60] even though the participation of that same Member State in the Union does not, however, appear to be in question.[61]

69. Admittedly, before drawing any conclusions from the Constitutional Court judgment for the case at hand, the referring court will have to proceed with extreme caution, given that the implications of that judgment will have to be verified, with the help of a careful examination of the reasons on which it is based and the specific arrangements for its implementation,[62] as well as having regard to the fact that the situation in question is in constant flux.[63] In particular, to assert that, de facto, the said judgment now makes it impossible to execute all the EAWs issued by the Member State in question would result in impunity for many criminal offences, infringing the rights of the victims of the offences in question, and would constitute a disavowal of the professional practice of the judges of the Republic of Poland who endeavour to utilise the

[59] See footnote 10 of this Opinion.

[60] In fact, contrary to certain other decisions of the constitutional courts of other Member States, that judgment does not envisage simply reviewing whether the judgments of the Court of Justice are *ultra vires*, but calls into question the specific characteristics relating to the very nature of EU law, the principle of primacy among them (see, inter alia, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 166).

[61] In fact, it seems to me that the Constitutional Court judgment cannot replace a notification within the meaning of Article 50 TEU, in the light of the judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999) (see, in particular, to that effect, Repasi, R., 'Poland's withdrawal from the "Community of Law" is no withdrawal from the EU', 15 October 2021 (https://eulawlive.com), and Curti Gialdino, C., 'In cammino verso la Polexit? Prime considerazioni sulla sentenza del Tribunale costituzionale polacco del 7 ottobre 2021' (https://www.federalismi.it); for the opposite view, see, in particular, Hofmann, H., 'Sealed, Stamped and Delivered. The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy as Notification of Intent to Withdraw under Art. 50 TEU?', in Verfassungsblog, 13 October 2021). Furthermore, the Polish Government seems to deny that it has any intention of withdrawing (see, in particular, 'Letter from Prime Minister Mateusz Morawiecki to the Heads of Governments and the Presidents of the European Council, the European Commission and the European Parliament on relations between national law and European law', of 18 October 2021, available on the Polish Government's website,
https://www.gov.pl/web/primeminister/letter-from-prime-minister-mateusz-morawiecki-to-the-heads-of-governments-and-the-presidents-of-the-european-council-the-european-commission-and-the-european-parliament-on-relations-between-national-law-and-european-law).

[62] I recall, moreover, that the European Court of Human Rights has called into question the very categorisation of the Trybunał Konstytucyjny (Constitutional Court) as a 'tribunal established by law', following the appointment of some of its members (see ECtHR, 7 August 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718), and that the legality of the Constitutional Court judgment is contested by former judges of the same court (see 'Statement of retired judges of the Constitutional Tribunal' of 10 October 2021 (http://themis-sedziowie.eu)).

[63] For example, the Commission has not ruled out the possibility of bringing infringement proceedings before the Court (see Declaration of the President of the European Commission, Ursula von der Leyen, 21/5163, Strasbourg, 8 October 2021). Furthermore, the declaratory nature of the Constitutional Court judgment, by which the Trybunał Konstytucyjny (Constitutional Court) answered questions put by the Government, itself gave rise to highly critical comments regarding the possibility that that judgment is the product of an instrumental initiative of the Government. Certain writers speak of a 'formulaic response' to queries proposed by the Polish Government with the intention of provoking a legal crisis (Atik, J., and Groussot, X., 'Constitutional attack or political feint? – Poland's resort to lawfare in Case K 3/21', https://eulawlive.com/, 18 October 2021).

mechanisms of judicial cooperation provided for by EU law.[64] That in itself could constitute a denial of justice and entail serious consequences, going beyond even the scope of Framework Decision 2002/584 and judicial cooperation in criminal matters.[65]

70. That being so, it seems to me that such an approach is liable to call into question the principle of mutual recognition and judicial cooperation between the courts of the Member States and between those courts and the Court of Justice, which constitute the foundations of the EAW system. In such a situation, I do not see how the high level of mutual trust and mutual recognition on which the EAW system is based could be guaranteed.

71. The interpretation that seems to emerge from the operative part of that judgment is such as to give rise to doubt that an individual, subject to a decision of a Polish judicial authority, can, at the present time, rely on the fundamental principles of EU law to remedy any incompatibilities of the national legislation with EU law, including its constitutional norms. So far as concerns the cases in the main proceedings, the said judgment could, in particular, make it impossible to remedy, by the application of the principles of primacy and the direct application of EU law, the absence of an effective judicial remedy in the national legislation affording protection to individuals, including surrendered persons, against any breaches of their right to a fair trial.[66]

72. Accordingly, the consequences of the Constitutional Court judgment could play a role, not in the absolute but in the analysis of the concrete risks, for the requested persons, once surrendered, of a breach of their right to a fair trial and in particular in so far as that judgment precludes rectification of the absence of a remedy (recusal, appeal, etc.) by which to challenge the irregular appointment of the judges involved in the proceedings to which they will be subject, which it is for the referring court to verify,[67] when those persons provide information in that regard.

73. In such circumstances, I do not rule out that, as long as that situation persists and the requested person demonstrates, first, the existence of a concrete risk of non-impartial treatment view of his or her particular situation, on the basis of the relevant criteria, and, second, the impossibility of asserting the irregular composition of the courts or tribunals with jurisdiction to hear the proceedings to which he or she will be subject, the referring court may be required to refuse to execute the EAWs in question, in spite of the regrettable consequences of that suspension for the objective, specific to the EAW, of combating the impunity of requested persons who are in a Member State other than that in which they have allegedly committed offences. It is for that court to assess the need for such a refusal, in the light of the relevant criteria detailed in points 61 to 64 of this Opinion and of any consequences of the Constitutional Court judgment, as well as having regard to the fact that the situation in question is in constant flux.

[64] See, to that effect, Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases *L and P (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:925 (points 50 to 52)).

[65] I am referring, in particular, to the field of cooperation in civil and commercial matters, for example the recognition and enforcement of judicial decisions through measures implementing the principle of mutual recognition of decisions in civil and commercial matters.

[66] In other words, in such a situation, the national court is normally in a position to disapply any provision contrary to national law and to guarantee the surrendered person the possibility of relying on his or her rights guaranteed by EU law and by the Charter in particular. It is clear, in that case, that the uniform and effective application of the EAW mechanism within the territory of the Union is seriously affected, which leads the executing judicial authorities of other Member States to distrust the independence of the Polish courts and, with increasing frequency, to oppose the execution of the EAWs issued by that Member State.

[67] According to the referring court, that would seem to be the case following the legislation which entered into force on 14 February 2020, which, however, would seem to have been suspended, according to the claims made by the Republic of Poland's representative at the hearing (see footnote 56 of this Opinion), which it is for the referring court to verify.

74. In those circumstances, I propose that the answers to the questions referred be that Article 1(2) and (3) of Council Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person subject to an EAW, issued for the purpose of executing a custodial sentence or conducting a criminal prosecution, has evidence indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed in the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the judiciary of the issuing Member State, that authority must ascertain, specifically and precisely, whether, account being had of that person's personal situation, the nature of the offence for which he or she is being prosecuted and the factual context that form the basis of the EAW and having regard to the information provided by that Member State pursuant to Article 15(2) of that framework decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to the issuing Member State.

75. In that regard, the fact that there is real risk that, following his or her surrender, the person concerned will be tried by a tribunal which has not been previously established by law or that it is not possible to determine the composition of the courts or tribunals before which he or she will be tried, and the absence of an effective remedy to challenge the validity of the appointment of the judges concerned, does not relieve the referring court of the obligation to assess the concrete risk of breach of that person's right to a fair trial by reference to the abovementioned criteria.

76. It is for the referring court, in particular, in the light of those criteria and having regard to the developments in the situation relating to the judicial system of the issuing Member State, to ascertain whether the requested person, once surrendered, will run the risk that his or her right to a fair trial will be affected by an interference by the executive with the competent courts or tribunals, having regard to the absence of any effective judicial remedy by which to challenge the irregular appointment of the judge or judges who have dealt with or who have jurisdiction to deal with that person's case, and to a constitutional judicial practice which, calling in question the primacy of EU law, does not allow that absence to be rectified.

VI. Conclusion

77. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) as follows:

– Article 1(2) and (3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where the executing judicial authority called upon to decide on the surrender of a person subject to a European arrest warrant (EAW), for the purpose of executing a custodial sentence or conducting a criminal prosecution, has evidence indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systemic or generalised deficiencies so far as concerns the independence of the judiciary of the issuing Member State, that authority must ascertain, specifically and precisely, whether, account being had of that person's personal situation, the nature of the offence for which he or she is being prosecuted and the factual context that form the basis of the EAW and having regard to the information provided by that Member State pursuant to Article 15(2) of that

framework decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to the issuing Member State;

– in that regard, the fact that there is real risk that, following his or her surrender, the person concerned will be tried by a tribunal which has not been previously established by law or that it is not possible to determine the composition of the courts or tribunals before which he or she will be tried, and the absence of an effective remedy to challenge the validity of the appointment of the judges concerned, does not relieve the referring court of the obligation to assess the concrete risk of breach of that person's right to a fair trial by reference to the abovementioned criteria;

– it is for the referring court, in particular, in the light of those criteria and having regard to the developments in the situation relating to the judicial system of the issuing Member State, to ascertain whether the requested person, once surrendered, will run the risk that his or her right to a fair trial will be affected by an interference by the executive with the competent courts or tribunals, having regard to the absence of any effective judicial remedy by which to challenge the irregular appointment of the judge or judges who have dealt with or who have jurisdiction to deal with that person's case, and to a constitutional judicial practice which, calling in question the primacy of EU law, does not allow that absence to be rectified.