

**Germany, Higher Regional Court, First Criminal Division, Ausl 301 AR 156/19, superior instance, 17/02/2020, denial of extradition of Polish national**

Member State

 Germany

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Topic

Trust - Independence

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Deciding Court Original Language

OLG Karlsruhe, 1. Strafsenat

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Deciding Court English translation

Superior State Court, First Criminal Division

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Registration N

Ausl 301 AR 156/19

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Date Decision

17/02/2020

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ECLI (if available)

DE:OLGKARL:2020:0217.AUSL301AR156.19.00

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National Follow Up Of (when relevant)

Not Applicable.

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## EU legal sources and CJEU jurisprudence

### Primary Law:

- Articles 2 and 7§2 TEU
- Article 47 CFR

### CJEU judgments in:

- *LM* (ECLI:EU:C:2018:586)
- *Commission v Poland* [Independence of Ordinary Courts] (ECLI:EU:C:2019:924)
- *A.K. and Others* [Independence of the Disciplinary Chamber of the Supreme Court] (ECLI:EU:C:2019:982)
- *Aranyosi und C?ld?raru* (ECLI:EU:C:2016:198)

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## ECtHR Jurisprudence

Not Applicable.

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## Subject Matter

Denial of extradition of a Polish national because of possible infringements of the right to a fair trial in Poland. The HRC of Karlsruhe justified its decision by asserting that there is a high likelihood that the extradition of the prosecuted person to Poland for the purpose of criminal prosecution will be inadmissible, at least for the time being, due to the current developments in Poland in the context of the judicial reform brought about by the recent “muzzle law”.

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## Legal issue(s)

### Fair Trial (Rule of law)

For the first time a German court refused to release a Polish citizen to the Polish authorities as mandated by a EAW due to a real risk of fair trial infringement of the individual concerned following the adoption of illegitimate amendments to the Polish judiciary, in particular the so-called Muzzle Law. The HRC of Karlsruhe decided to suspend the execution of the EAW, setting aside the *LM* test of an individualized real risk of fair trial infringement with its particularly high threshold and it demanded more information about the current situation in Poland.

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## Request for expedited/PPU procedures

Not Applicable.

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## Interim Relief

Not Applicable.

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## National Law Sources

German Law:

- Arts 1, 107, 72 The Act of July 27, 2001 on the Constitution of Ordinary Courts (Journal of Laws of 2019 item 52, 55, 60, 125, 1465 and 1495) as amended
- Art. 3 Act on the National Judicial Council and the Act on the Constitution of Administrative Courts

Jurisprudence:

- OLG Karlsruhe 07.01.2019, Ausl 301 AR 95/18
- OLG Düsseldorf, 14.06.2019, 4 AR 38/19
- OLG Celle, 25.03.1998, Ausl 3 ARS 3/98

Polish Law:

- Art. 10 Polish Constitution
  - The so called "Muzzle Law"
  - Law of 27.07.2001 on the constitution of ordinary courts
  - Law of 08.12.2017 on the Supreme Court
  - Act of 28.01.2016 on the Public Prosecutor's Office
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## Facts of the case

The applicant is a Polish national against whom an extradition arrest warrant was issued. He has been in extradition custody since his arrest on December 4, 2019, on the basis of the EAW issued by the District Court in Poland on January 11, 2016, for the purpose of criminal prosecution.

In the EAW the defendant is accused of committing diverse criminal offences, he agreed to a simplified extradition procedure at his judicial hearing on 04.12.2019 before the Local Court in Germany and he denied all the charges brought against him by the Polish judicial authorities. He further specified his objections in a letter to the HRC dated December 19, 2019, stating that, among other things, two influential Polish nationals had bribed witnesses into making false statements, additionally beating him up. He has now been living with his partner in Germany for three years.

On December 6, 2019, the Karlsruhe Prosecutor General's Office filed an application to declare the extradition of the prosecuted person to Poland admissible and, at the same time, ruled that it did not intend to challenge the approval. In a written statement dated January 16, 2020, the

defendant's legal counsel commented on this and argued that the resocialization of the prosecuted person would be more likely in the German penal system than in the Polish penal system. He also requested a suspension of the extradition warrant issued by the Court on December 2, 2019. With regard to this submission, on 20.01.2019 the Karlsruhe General Prosecutor's Office supplemented its resolution of 06.12.2019 and announced that it now intends to provide its extradition approval with a reservation regarding return. In its decision of January 27, 2020, the Senate rejected the application of the prosecuted person for the revocation or suspension

of the extradition warrant of the first of December 2019, and declared the extradition detention to continue.

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### Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court suspended the application of the EAW and refused to extradite the Polish national due to the high probability that a violation of the right to a fair trial would occur following the “judicial reform” implemented in Poland, thereby ordering the immediate release of the prosecuted individual and determining that further clarification of the facts is required.

On the basis of Art.47 of the EU Charter and different CJEU cases such as *LM* and *A.K. and Others*, the Karlsruhe court conducted a two-stage test to assess whether, in the specific case under consideration, a person sent back to Poland will be guaranteed a fair trial in accordance with the established standards. When firstly assessing the presence of a threat to the rule of law in Poland, the HRC relied on previous judgements of domestic German courts to affirm that a real risk of a violation of the fundamental right to a fair trial in Poland is indeed present. It went on, explaining that in a second step it would have to examine specifically and precisely whether there were serious and factual grounds for believing that the requested person *in casu* would be exposed to such a danger. The HRC underlined however, that in the two abovementioned individual cases, the courts confirmed the abstract danger to the right to an independent tribunal and thus to the right to a fair trial in Poland, as a consequence of which the first requirement of the *LM* test was considered fulfilled, but they negated the effects of such a danger on the person to be transferred.

After assessing the salient points of the translated version of the Muzzle Law, which mandates that every judge shall be subject to disciplinary sanctions up to dismissal if they e.g. “obviously and grossly disregard legal regulations” or “substantially impede the functioning of an organ of justice” or “question the effectiveness of the appointment of a judge or the constitutional mandate of an organ of the Republic of Poland”, the Court proceeded with the substantive part of its reasoning. *In casu*, the prosecuted person, through his legal counsel, objected to his extradition to Poland on the grounds of the existence of systemic deficiencies that are likely to impair the independence of the judiciary in the issuing Member State and thus the essence of his fundamental right to a fair trial.

Therefore, the HRC, also in light of *LM §60* and taking into consideration *Aranyosi and Căldăraru* is entitled and obliged to examine, whether there is a real risk that the person concerned will suffer a breach of the said fundamental right.

In this respect, in the view of the Court, there is a need not only for further supplementary information on the status of the proceedings by the issuing judicial authority, but also more detailed information on the sanctions threatened against judges and public prosecutors as part of the judicial reform, which only the Ministry of Justice of the Republic of Poland is in a position to provide.

For these reasons, the HRC requested the issuing judicial authority to provide additional information. This included information on the individual case and more specifically information regarding the court having jurisdiction in case of an indictment, the names of the judges sitting on the panel, how long the judges appointed to make decisions have been in office, whether the panel include judges who were only appointed to their office as a result of the current judicial reform regulations or whether some judges had been forced to retire or were transferred on that basis.

Furthermore, the HRC wanted to know whether, in the event of a conviction of the prosecuted person for the offences set forth in the EAW issued by the Polish district court there is any possibility of an appeal and if so, what kind of appeal it is and what form it takes, adding the question of whether, in the event of an appeal, which court would be called upon to decide on it. It continued by asking whether since the entry into force of the Act of 12.07.2017 amending the Act on the Structure of Ordinary Jurisdiction or on the basis of other regulations issued since then, disciplinary proceedings have been instituted against judges of the court called upon to render a decision, as well as at the appellate court(s), for decisions rendered in the course of pending criminal proceedings. Should these questions be answered in the affirmative, the HRC is requested to provide the facts underlying the disciplinary proceedings.

The HRC then turned its questions to the Polish Ministry of Justice and requested them to provide information on whether it is in principle legally possible under Polish law, as a result of the "judicial reform" that criminal court decisions on the assessment of evidence, in particular on the credibility of witnesses, can lead to the initiation of disciplinary proceedings. The German Court asked if the Ministry would please explain in more detail the legal requirements in this regard and the procedural rules, thereby providing the HRC with a current version of the law.

Lastly, it asked whether it is possible to provide a binding assurance under international law that in the present proceedings no disciplinary proceedings will be instituted against judges in connection with the decisions of the panel(s) called upon to decide on the merits of the case.

After resolving the *LM* dilemma by sending a catalogue of questions on the independence of the Polish judiciary, the HRC concluded that its own extradition detention order had to be annulled because at present there is a high probability that the extradition of the individual to Poland for the purpose of prosecution due to the current developments in Poland in the context of the "judicial reform" will prove to be inadmissible, at least for the time being. In this respect, added the HRC, there are factual indications that, in the event of his extradition, the prosecuted person would be exposed to a real risk of his or her right to a fair trial being violated so that with regard to the individual, the prerequisites for extradition to Poland for criminal prosecution are not met given that the current factual and legal situation would no longer be given.

Finally, the court acknowledged that it is indeed true that *in casu* there is no concern that the adjudicating body will find itself in conflict with general political guidelines or social views, however the adjudicating body called upon to make a decision would also have to decide, as claimed by the prosecuted person in the present case, on the influence of allegedly influential persons on the determination of the truth in criminal proceedings.

However, if Polish criminal judges were to face disciplinary sanctions in criminal proceedings solely on the basis of their evaluation of evidence, they would not be independent, so that it would no longer be possible to speak of a fair trial. Thus, the Muzzle Law in connection with the lack of independence of the disciplinary chambers, leads to serious doubts about the future independence of the Polish judiciary. In conclusion, the HRC established that at present, the Senate does not assume with sufficient probability that the answers of the Polish judicial authorities to the supplementary information requested by the Senate alone could allow for a different legal assessment; rather, further developments in Poland and the case law of the ECJ should also be awaited. However, in view of the publicly available information, it cannot be assumed at present that the Polish government will abandon its plans for judicial reform.

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### Relation of the case to the EU Charter

The EU Charter was invoked as the relevant parameter for the right to an effective remedy and as the standard for the fundamental right to a fair trial. Indeed, the HRC evaluated the compatibility of the national system of disciplinary liability and the Muzzle Law with EU law in light of Article 47 of the Charter. In doing so, the HRC elaborated on Articles 47 CFR and related rule of law considerations.

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### Relation between the EU Charter and ECHR

The HRC relied only on Art.47 of the Charter to substantiate its decision to suspend the extradition and it did not base its reasoning on the ECHR.

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### Use of Judicial Interaction technique(s)

The HRC interpreted the rules of the Polish judicial reform in light of Article 47 CFR and found it to be non-compliant with EU law, thereby relying on the CJEU's jurisprudence, without waiting for the answers of the Polish authorities.

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The HRC of Karlsruhe made reference to previous domestic judgement to firstly assess whether there is a threat to the rule of law in Poland. Reaching the conclusion that this threat is present, reference was made to previous judgments by courts in Karlsruhe (OLG Karlsruhe, 07.01.2019, Ausl 301 AR 95/18) and Düsseldorf (OLG Düsseldorf, 14.06.2019, 4 AR 38/19), in which the courts, when examining whether Polish nationals should be sent back to Poland under the EAW procedures, reached the same conclusion. Therefore, there was internal horizontal judicial interaction.

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#### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The HRC of Karlsruhe engages with an assessment of the CJEU's judgements.

Quoting *LM*, the court made reference to one of its decisions and asserted that the requirement of judicial independence is part of the essence of the fundamental right to a fair trial and that the existence of an effective judicial review is inherent in a state governed by the rule of law, which is why courts and judges serving on the adjudicative body must be independent and shall be able to provide effective judicial protection that cannot be influenced by political or third parties. With regard to Poland, the Court assumed, on the basis of the information available at that time, that the changes made there as part of the reform of the judiciary are certainly capable of impairing the independence of the judiciary and thus of affecting the essence of the fundamental right of every prosecuted person to a fair trial, but it could not be established, on the basis of the available evidence that, in the event of his/her surrender, the prosecuted person would be subjected to unfair proceedings according to these standards. Relying on *A.K. and Others*, the HRC highlighted that the CJEU not only declared the mandatory retirement of judges in Poland to be contrary to EU law, but also, and more importantly, ruled on 19.11.2019 (C 585/18) that the referring Supreme Court in Poland must ascertain for itself whether the newly created disciplinary chamber is independent. If this is not the case, there is, *inter alia*, a lack of an effective remedy guaranteed by Article 47 of the Charter. On 05.12.2019, the Polish Supreme Court has now determined that the Disciplinary Chamber does not meet the requirements of EU law for judicial independence and is therefore not an independent court within the meaning of EU law and national law.

The court continued, acknowledging that even if it is not yet able to make a conclusive assessment of the legal situation in the event of the extradition of the prosecuted person, it would nevertheless give the prosecuted person and the Karlsruhe General Prosecutor's Office the opportunity to make

additional further statements. The German court had the so-called “Muzzle Law” translated and went through the legislation point by point in light of the existing legal background. The latter includes *LM*, in which the CJEU affirmed that the mere initiation of infringement proceedings against Poland by the Commission does not entitle to refuse extradition to Poland as long as the European Council, in accordance with Art. 7§2 TEU, does not find a serious and persistent breach of the principles set out in Art. 2 TEU, such as the rule of law. However, the infringement of the fundamental right of the person concerned to an independent court and thus the violation of their fundamental right to a fair trial within the meaning of Article 47 (2) of the Charter are exceptional circumstances that can justify the refusal of extradition..

After outlining the two-step test developed in the CJEU's jurisprudence, the HRC emphasized that the CJEU ruled in its judgment of the 5<sup>th</sup> of November 2019 that the mandatory retirement of judges in Poland is unlawful under EU law and that additionally in *A.K. and Others* the Luxembourg Court ruled that Art. 47 CFR and Art. 9(1) of Council Directive 2000/78 must be interpreted as precluding that disputes concerning the application of European Union law may fall within the exclusive jurisdiction of a body which is not an independent and impartial tribunal within the meaning of Article 47 of the Charter. That is the case where the objective conditions under which the body was set up, its characteristics and the way in which its members were appointed, are such as to give rise to justifiable doubts on the part of the individuals as to the impartiality of that body to external factors. This relates in particular to direct or indirect influence by the legislature and the executive, and as to its neutrality with regard to the conflicting interests which may result in that institution not giving the impression of being independent and impartial, which may affect the trust that the judiciary must create in a democratic society among those subject to the law. However, it was for the referring court, taking into account all the substantial evidence available to it, to determine whether this was the case of an institution such as the Disciplinary Chamber of the Supreme Court. Subsequently, on 05.12.2019, the Polish Supreme Court stated, that the Disciplinary Chamber does not meet the requirements of EU law regarding judicial independence and therefore does not constitute an independent court within the meaning of EU law and national law.

Finally, when affirming that it is entitled and obliged to examine whether a real risk that the person concerned will suffer a breach of the said fundamental right is present, the HRC of Karlsruhe made reference to the CJEU's ruling *Aranyosi and C?ld?raru*.

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Strategic use of judicial interaction technique (purpose aimed by the national court)



The HRC heavily relied on the CJEU's jurisprudence involving complaints by the European Commission against the Polish government for lowering the retirement age for judges of the Supreme Court and ordinary courts, in which the Luxembourg Court found a breach of EU law, to support the decision to suspend the execution of the EAW. The purpose was to dispel any doubt and make clear that the threat of a real risk of a breach of the right to a fair trial in Poland is concrete, since the legislative amendments introduced in Poland regarding disciplinary proceedings against judges, in conjunction with the lack of independence of disciplinary courts, justify doubts about the independence of the judiciary in Poland.

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### Impact on Legislation / Policy

No impact on national legislation/policy.

However, it is interesting to note that Germany's Federal Constitutional Court took the stance in its 2015 "identity control decision" (see: Federal Constitutional Court, Order of 15 December 2015, press release available at

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html> ) that German courts are obliged to refuse the execution of an EAW if there are sufficient grounds to believe that the essential fundamental rights' guarantees embodied in Art. 1 (human dignity) and Art. 20 (rule of law) of the German Constitution are not ensured in the issuing (requesting) EU Member State. This approach differs in various aspects to the one taken by the CJEU a bit later in *Aranyosi & C?ld?raru* and thus the judges at the German Higher Regional Courts must reconcile these two different sets of obligations, the ones put forward by the highest court of their own jurisdiction in Karlsruhe and the ones mandated by the leading court in Luxembourg when interpreting EU law. This triggered the question of whether the threshold for refusing EAWs on the grounds of fundamental rights violations (ordre public "à la façon allemande") is lower and better satisfiable than the thresholds established by the CJEU in *Aranyosi & C?ld?raru* and *LM*, respectively.

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### Notes on the national implementation of the preliminary ruling by the referring court

Not applicable.

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### Impact on national case law from the same Member State or other Member States

In order to substantiate its reasoning that fair trial and rule of law concerns impeded the execution of the EAW, the Court relied not only on the Charter and the case law of the CJEU but also on its own jurisprudence:

- OLG Karlsruhe 07.01.2019, Ausl 301 AR 95/18
  - OLG Düsseldorf, 14.06.2019, 4 AR 38/19
  - OLG Celle, 25.03.1998, Ausl 3 ARS 3/98
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## Connected national caselaw / templates

See the judgment of the Higher Regional Court of Karlsruhe of the 27/11/2020, Ausl 301 AR 104/19 in which the same Court decided not to extradite a Polish-German citizen accused of forging invoices and defrauding a VAT refund to Poland on the basis of the EAW. There, the HRC of Karlsruhe indicated that, in light of the status of the judicial reform and the continuing procedures between EU institutions and the Polish government to respect the EU's core rule of law value of an independent judiciary, non-extradition to Poland is principally to be assumed for the moment, unless a different result can be reached after a comprehensive investigation of the facts *in casu*.

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(Link to) full text

<https://www.juris.de/perma?d=KORE205462020>

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