


UK, High Court of Justice of England and Wales, extradition proceedings of Lis, Lange and Chmielewski, [2018] EWHC 2848 (Admin), 31 October 2018, application of the ECJ judgment in C-216/18, Celmar

Member State

 United Kingdom

Topic

Mutual Trust, Rule of law (fair trial), EAW

Deciding Court Original Language

High Court of Justice of England and Wales

Deciding Court English translation

High Court of Justice of England and Wales (EWHC)

Registration N

[2018] EWHC 2848 (Admin)

Date Decision

31 October 2018

National Follow Up Of (when relevant)

Lis & Lange v Regional Court in Warsaw and Zielona Gora Circuit Court, Poland (No 2) [2019] EWHC 674 (Admin)

EU legal sources and CJEU jurisprudence

- Article 2 TEU

- Article 7 TEU
- Article 47 CFR
- Articles 1(3) and 6 Framework Decision 2002/584/JHA
- Commission's reasoned proposal under Article 7(1) TEU of 20/12/2017

CJEU cases:

- Judgment in *Celmar*, C-216/18
-

ECtHR Jurisprudence

Article 6 ECHR

Subject Matter

Applications for permission to appeal by three applicants who were subject to EAW issued against them by the Polish judicial authorities. Referring to the Poland's justice reforms which significantly affected the Polish judicial independence, the applicants submitted that their surrender to Poland would entail a breach of their right to a fair trial. The EWHC granted applicants permission to appeal but it found that the applicants' situation was unlikely to fulfil the exceptional circumstances requirement, defined by the CJEU in the *LM* judgment, to exclude the execution of EAWs.

Legal issue(s)

Rule of law (fair trial)

Violation of the fundamental right a fair trial granted by Article 47 of the Charter of a person subject to an EAW issued by Poland because of the rule of law deficiencies in that Member State.

Request for expedited/PPU procedures

No

Interim Relief

No

National Law Sources

Sections 2, 10, 17, 21, 21B, 54, 56, 58, 64, 65, and 187 of the Extradition Act 2003

Facts of the case

The three applicants, who were subject to EAWs issued against them by the Polish judicial authorities, applied for permission for appeal before the EWHC. The first and third applicants (Pawel Lis and Piotr Pawel Chmielewski) were sought to face trial for fraud offences before the Regional Court of Warsaw and the District Court in Radom, respectively. The second applicant (Dariusz Lange) was sought to serve a sentence of imprisonment.

The applicants made two pleas. Firstly, they submitted that the Polish judicial reforms have such a compromising impact on the independence of the judicial system that their surrender would expose them to a real risk of breach of their right to a fair trial. They argued that in Poland the lack of judicial independence reaches the standard of “flagrant denial” of that right which, according to the case-law of the ECtHR on Article 6 of the ECHR, is the threshold preventing surrender. In any case, the applicants maintained that, if the EWHC concluded that the Polish reforms did not entail a flagrant violation of the right to a fair trial, the EU law does not require such a test; the applicants relied on the opinion of Advocate General Sharpston in *Radu* (C-396/11); she suggested that a risk of violation of Articles 47 and 48 of the Charter occurs where the deficiencies in the trial process are “such as fundamentally to destroy its fairness” (para. 83). According to the applicants, this requirement was fulfilled in the specific case.

Secondly, they contended that the lack of independence of the Polish judiciary implies that courts and tribunals in Poland can no longer be recognised as “judicial authorities”, within the meaning of Article 6 of Framework Decision. According to the applicants, the circumstance that the EAWs were issued against them before the adoption of the Polish Law on Ordinary Courts Organisation is immaterial, because Polish courts are no longer judicial authorities with whom the UK courts can be involved in mutual cooperation and mutual recognition.

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

The EWHC rejected the applicants’ argument according to which Polish courts and tribunals can no longer be qualified as judicial authorities, within the meaning of Framework decision. The EWHC found that such an argument is contrary to the CJEU judgment in *LM*. As a matter of fact, the *LM* test and the conclusion that a general suspension from the EAW mechanism can only follow from the conclusion of the Article 7 TEU procedures are inconsistent with the argument that no Polish court can be regarded as a judicial authority under Framework decision.

As regards the fair trial standards, the EWHC rejected the applicants’ argument by referring to the *LM* judgment. After pointing out that in *LM* judgment the CJEU frequently mentioned the risk of a violation of the “essence” of the right to a fair trial and did not make any distinction between that concept and the notion of “flagrant denial of justice”, the EWHC maintained that no “sensible distinction” can be made between a breach of the essence of the right to a fair trial and the flagrancy test.

As for the submissions against surrender, the EWHC found the existence of an abstract risk of serious breach of judicial independence in Poland. Nevertheless, in line with the *LM* ruling, the EWHC stressed that such finding is not enough to suspend the EAW system in a general way; instead, it is necessary to carry out the second stage of the *LM* test and examine the specific

impact of the said generalised deficiencies on the applicants' right to a fair trial. In that regard, the EWHC found that the lack of political connotation of the applicants' criminal allegations makes it difficult to demonstrate the existence of an individualised risk of an unfair trial.

While being sceptical that further information can show the existence of such an individualised risk, the EWHC found that the applicants must have the opportunity to appeal and demonstrate that the second stage of the *LM* test was fulfilled.

Relation of the case to the EU Charter

The EWHC referred to Article 47 of the Charter and relied on the application given to it in *LM*.

Relation between the EU Charter and ECHR

The applicants submitted that the Charter provides a higher level of protection than the ECHR because, under the EU law, the refusal of surrender does not require the flagrant denial test, which was elaborated by the ECtHR in its case-law on Article 6 (*Soering v United Kingdom*, ECLI:CE:ECHR:1989:0707JUD001403888; *Othman v United Kingdom*, ECLI:CE:ECHR:2012:0117JUD000813909). The EWHC specified that there is no "sensible distinction" between the "flagrant denial test", applied by the ECtHR, and the notion of the risk of a breach of the essence of the right to a fair trial to which the CJEU referred in *LM*.

Use of Judicial Interaction technique(s)

The EWHC summarised the main points of the CJEU judgments in *LM*. In line with that judgment, it affirmed that the EAW system can be suspended only after the Article 7 TEU procedures are concluded. It follows that, if the executing authority finds the existence of a real risk of violation of the right to a fair trial, it must determine whether, in the specific circumstances of the case, there are substantial grounds for believing that the surrender of the requested person will expose him/her to such a risk.

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

Not applicable

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

The EWHC widely summarised the CJEU judgment in *LM* and referred to the two-stage test defined by the CJEU on that occasion.

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

Against the background of the two-stage test defined by the CJEU in *LM*, the EWHC found that since there is sufficient concern about the lack of independence of the Polish judicial system, the applicants must have the permission to appeal and to submit their reasons to prove that there are substantial grounds for believing that their surrender would expose them to a real risk of a violation of their right to a fair trial. Nevertheless, the EWHC affirmed that the existence of such a risk is unlikely to be demonstrated in the applicants' case.

Impact on Legislation / Policy

No impact on national legislation/policy

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

Not applicable

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

Although the case is not a direct follow up of the *LM* judgment, it directly applied the test elaborated by the CJEU on that occasion. It is interesting to note that the EWHC found that the lack of political dimension of the applicants' criminal allegations is symptomatic of the absence of a real risk of violation of the right to a fair trial in the specific circumstances of the case.

(Link to) full text

<https://www.judiciary.uk/wp-content/uploads/2018/11/lis-judgment-2011101.pdf>
