THE HIGH COURT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Record Nos. 2013/295 EXT, 2014/8 EXT & 2017/291 EXT

Between:

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

and

ARTUR CELMER

Respondent

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

LEGAL SUBMISSIONS OF THE AMICUS CURIAE

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1 INTRODUCTION

1.1 By motion returnable to the 12th of September, 2018, heard on the 1st of October, 2018, the Irish Human Rights and Equality Commission [hereinafter "the Commission"] sought liberty to intervene as *amicus curiae* in the within proceedings. At the time of making the application and preparing initial draft written submissions, the Commission had not had sight of the submissions of the other parties in respect of the current stage of proceedings and accordingly identified a range of issues based on the judgments in the case and matters which it was considered might be usefully addressed in further submissions from the Commission.

1.2 In granting liberty to the Commission to intervene by order on the 2nd of October, 2018, the Court identified the specific areas upon which the Commission might seek to assist the Court in submissions regarding the tools for assessing evidence in light of the inquisitorial rule of the Court in European Arrest Warrant proceedings and the ***Aranyosi*/*LM*** two part test including:

- the standard of proof;
- the burden of proof and the shifting of the burden of proof;
- the nature of the evidential assessment required, and
- evidential standards to identify fair trial infringements.

1.3 Consequent upon the direction of the Court as to the issues which it wished the Commission to address, the Commission has substantially revised its draft written submissions removing all material which did not relate to the evidential issues identified by the Court in its judgment granting liberty to intervene but also expanding its submissions significantly by reference to the specific elements identified by the Court.

1.4 There is no doubt that European Arrest Warrant proceedings, being linked to the criminal justice system of another State and involving immediate restrictions on liberty and potentially grave consequences in the long term, but without any finding in this State of guilt or innocence, or often even of any wrongdoing, present a distinct and special situation as regards the assessment of evidence. The European Arrest Warrant itself is the first evidence presented to the Court, and following the arrest of the requested person, evidence may be adduced in opposition to surrender, disputing past events and/or contending that matters are likely to take a certain turn following surrender.

1.5 There are certain apparent similarities with international protection and immigration law, in that the Court will often be called upon to assess both what has already happened and what might happen in future in a jurisdiction from which the Court is at a far remove, however, European Arrest Warrant proceedings are different in that they are underpinned by the weighty public interest that people charged with offences face trial, and that crimes do not go unpunished.[1]

[1] O'Donnell J., giving judgment for the Supreme Court in ***MJE v. JAT (No.2)*** [2016] IESC 17, described the situation as follows: *"4 An important starting point, in my view, is that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial.*

Furthermore, these proceedings operate on the basis of mutual recognition, the mutual trust on which it is based and the presumptions that go with it.[2]

1.6 Given the difficulties which accompany an obligation to assess events, past and future, in another jurisdiction, it seems appropriate that the Court's role in European Arrest Warrant proceedings is inquisitorial in nature. Having regard to the *sui generis* nature of such proceedings in general, and to the particularly unusual situation which the Court is faced with in the present case, which necessitates the assessment of evidence from a wide range of sources, and calls for a prognosis as to how perceived deficiencies on a macro level might or might not trickle down to the planned trials of the Respondent, the Commission seeks in these submissions to be of assistance to the Court as regards the appropriate standards and tools for the assessment of evidence.

1.7 The factual and procedural history of this case has been set in detail in the previous judgments of this Court and of the Court of Justice herein, and it is not proposed to repeat this here save insofar as is necessary.

2 THE STANDARD OF PROOF

2.1 In assessing evidence related to alleged *past* violations of the European Convention on Human Rights ("ECHR"), the European Court of Human Rights ("ECtHR") had traditionally adopted a

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That is a fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes, in other member states or in states with whom Ireland has entered into an extradition agreement, are brought to trial also. There is an important and weighty interest in ensuring that Ireland honours its treaty obligations, and if anything, a greater interest and value in ensuring performance of those obligations entailed by membership of the European Union. All agreements are based on broad reciprocity and there is, therefore, a further interest and benefit in securing the return to Ireland for trial of persons accused of crimes, or the return of sentenced offenders. There is also a corresponding public interest in avoiding one country becoming, even involuntarily, a haven for persons seeking to evade trial in other countries. There is no option in this jurisdiction for a court, in most cases, to direct a trial of the offence here (whatever the practical difficulties involved). This means that the decision to refuse to surrender in individual cases will provide a form of limited immunity to a person so long as they remain in this jurisdiction."

[2] The principle of mutual trust was described by the Court of Justice as follows in its Opinion on the Accession of the EU to the ECHR (Opinion 2/13 of the Court of Justice (Full Court) - 18th December 2014):
"167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.
168. This legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected."

"beyond reasonable doubt" standard, [3] however, this has never equated to the same standard in domestic proceedings but has developed an autonomous meaning for the purpose of the ECHR. Following a comprehensive review of the case-law of both the ECtHR and the Inter American Court of Human Rights (the "Inter American Court") case law in his dissenting opinion in ***Croatia v. Serbia*** (on the application of the Genocide Convention)[4], Judge Cançado Trindade concludes:

> *"international human rights tribunals have not pursued a stringent and high threshold of proof in cases of grave violations of human rights given the difficulties experienced in the production of evidence, they have resorted to factual presumptions and inferences, and have proceeded to the reversal of the burden of proof. The IACtHR has done so since the beginning of its jurisprudence, and the ECHR has been doing so in more recent years. They both conduct the free evaluation of evidence. The standard of proof they uphold is surely much less demanding than the corresponding one ("beyond a reasonable doubt") in domestic criminal law. This is so, with all the more reason, when the cases lodged with them disclose a pattern of widespread and systematic gross violations of human rights, and they feel obliged to resort, even more forcefully, to presumptions and inferences, to the ultimate benefit of the individual victims in search of justice".*[5]

2.2 The development of the standard of proof in ECHR case law is evidenced in ***Ireland v. United Kingdom***[6] where the ECtHR stated that:

> *"…[t]o assess [the] evidence, the Court adopts the standard of proof 'beyond a reasonable doubt' but adds that such proof may follow from the coexistence of*

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[3]This was first adopted in the *Denmark, Norway, Sweden and the Netherlands v. Greece, ECHR, Commission Report, 1969, at para 30*. Also see Ugur Erdal – "Burden and standard of proof in proceedings under the European Convention" [2001] E.L. Rev. HR68 for a summary of the development of the approach of the assessment of evidence by the European Court of Human Rights.

[4] *Croatia v. Serbia*, Judgment of the International Court of Justice on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, see pages 72 – 79 of judgment regarding the Courts consideration on the standard and burden of proof and the method of proof, at https://www.icj-cij.org/files/case-related/118/118-20150203 JUD-01-00-EN.pdf - last accessed on 9 October 2018

[5]*See Croatia v. Serbia (2015)* dissenting Judgment of Judge Cancado Trindade at para 122, p. 247. Judge Cancado Trindade refers in support of his conclusions to the writing of jurists M. O'Boyle and N. Brady, "Investigatory Powers of the European Court of Human Rights", 4 European Human Rights Law Review (2013), pp. 378-391, at https://www.icj-cij.org/files/case related/118/118-20150203-JUD-01-05-EN.pdf - last accessed on 9 October 2018.

[6] Application 5310/71, judgment of 18 January 1978, at paras. 160-161.

sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact…" [7]

2.3 In the Grand Chamber in ***Nachova and others v. Bulgaria***[8], the ECtHR demonstrated a shift toward less rigid approach to the standard of proof, and explained in more detail what it meant in using the term "*beyond reasonable doubt*", stating that this notion is not simply the transplantation of any similar notion from national legal orders, in that the ECtHR has no preconceived notion on or procedural barriers to the admissibility of evidence:

> *"According to its established case-law, proof may follow from the co-existence of sufficiently strong, clear and concordant inferences of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention rights at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights." [9]*

2.4 In 2009 in ***Varnava & Others v. Turkey***[10] the ECtHR moved even further toward a more flexible approach to the standard of proof and shifting of the burden to the respondent state. In this case, the ECtHR expressly found that even if one starts from proof "*beyond a reasonable doubt*", flexibility is required and the test should not be applied rigidly and may require mitigation. For instance, where the information about the occurrence at issue is wholly or in part within the exclusive control of the respondent state a strong presumption of fact will arise in respect of injuries and the burden of proof will shift to the state authorities to provide a satisfactory and convincing explanation. The ECtHR held that the same applies where the information lies within the exclusive knowledge of the State of all that has happened. The relevant extracts from the judgment are reproduced hereafter:

> *"182. In response to the respondent Government's argument about the burden of proof, the Court would concur that the standard of proof generally applicable in individual applications is that of beyond reasonable doubt - though this also applies*

[7] *Supra*, at para 160.
[8] Application Nos. 43577/98 and 43579/98, Judgment of 6 July 2005.
[9] *Supra* at para 147.
[10] Application No. 16064/90, judgment of18 September 2009.

equally in inter-State cases (see the Ireland v. the United Kingdom , 18 January 1978, pp. 64-65, § 161, Series A no. 25). The burden of proof may be easier to satisfy in practical terms in the inter-State context where the facts of many incidents and numerous events may be taken into account. But, even in individual cases, the Court's case-law has identified situations in which the rigour of this rule may be mitigated.

183. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (loc. cit.). Thus, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries, death or disappearances occurring during such detention. The burden of proof may then be regarded as resting on the authorities to provide a satisfactory and convincing explanation (Salman v. Turkey [GC], no. 21896/93, § 100, ECHR 2000-VII; Akdeniz and Others v. Turkey ,no. 23954/94, §§ 85-89, 31 May 2000)..." [11]

2.5 Turning to the approach of other international courts the documents underpinning the Inter American Court do not expressly state the standard of proof that is required.[12] However, the Court has stated an approach in jurisprudence set out as follows in ***Velásquez-Rodríguez v. Honduras***[13]:

"127. The Court must determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment (Cfr. Corfu Channel, Merits, Judgment, I.C.J. Reports 1949; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, paras. 29-30 and 59-60).

[11] *Supra*, at paras 183 and 184.
[12] *See* generally Alberto Bovino "Evidential Issues before the Inter-American Court of Human Rights" - Sur, Rev. int. direitos human. vol.2 no.3 São Paulo Dec. 2005
[13] Judgment of the Inter American Court, of 29 July 1988.

128. The standards of proof are less formal in an international legal proceeding than in a domestic one. The latter recognize different burdens of proof, depending upon the nature, character and seriousness of the case.

129. The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner."

2.6 It is also worth considering the methodology gauged by other international quasi-judicial mechanisms in terms of how they approach the standard of proof. In this regard, there has been some consideration of the correct standard of proof for UN Fact Finding Missions and Inquiries conducted under the UN Mandate. Although these are quasi-judicial, as opposed to formal judicial bodies and as such have generally applied a lower standard of proof, some of the considerations for gauging the correct standard depending on the specific factual context and human right at issues are worthy of consideration, and as such the varying nature of the standard depending on the specific case. The UN Office of the High Commissioner on Human Rights has published some helpful guidance in this regard. Of note is the *Manual on Human Rights Monitoring*[14] ("the Manual"). Chapter 13 specifically considers Human Rights Reporting and sets out the standard of proof for quasi-judicial bodies and mechanism as follows at page 9 of the chapter:

"Generally, human rights violations reported in public reports should meet the threshold of reasonable grounds to believe that such violation occurred. This means that there must be corroborated facts or information which would satisfy an objective observer that the violation is likely to have occurred. More serious or controversial allegations may require HROs [Human Rights Officers] to apply a higher standard of proof regarding the precisions with which the facts are reported or to cross-check information with more independent sources."

2.7 The research report carried out by the Geneva Academy of International Humanitarian Law and

[14] Accessible at https://www.ohchr.org/Documents/Publications/Chapter13-MHRM.pdf, last accessed on 9 October 2018.

Human Rights, entitled "*Standards of Proof in International Humanitarian and Human Rights Fact Finding and Inquiry Missions"*[15] provides some further guidance regarding the difficulties in applying one rigid standard of proof:

> *"While the balance of probabilities standard appears to be an appropriate guiding standard (which would certainly benefit from further discussion with leading experts), it would be superficial to say that this standard is necessarily appropriate in all circumstances. FFMs [Fact Finding Missions] undoubtedly need to address many issues and factors that will require them to reflect on the appropriateness of a balance of probabilities standard. In particular, they might need to apply a lower or higher standard of proof in order to fulfil certain mandated activities or manage specific circumstances associated with their mission."*[16]

2.8 Special approaches to evidence adopted in other areas of protection law are informative. In refugee and asylum law, applicants for protection bear a primary burden in relation to the facts upon which their claims are based but this becomes a shared burden in terms of putting material before the decision maker and the applicant benefits from "*the benefit of the doubt*" in the approach taken to the assessment of the evidence.[17] The principle of the benefit of the doubt reflects the recognition of the considerable difficulties that applicants face in obtaining and providing evidence to support their claim. The principle of the benefit of the doubt recognizes that, notwithstanding the genuine efforts of an applicant, and indeed the determining authority, to gather evidence pertaining to the material facts asserted by the applicant, there may still be some doubt surrounding (some of) the facts alleged by the applicant. The need for the principle is reinforced by recognition of the fact that an applicant's life and/or integrity may be put at grave risk if international protection is wrongfully declined. The decision of O'Regan J. in ***ON v. MJE***[18] sets out the Irish position when considering past events in the context of international protection law. ***ON*** establishes the correct standard of proof with regard to past and current facts regarding an international protection claim (which has been relied in other cases since then) as follows:

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[15]Stephen Wilkinson, "Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions" at https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf, last accessed on 9 October 2018.
[16] *Supra* at page 51.
[17]*See* UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, accessible at http://www.refworld.org/docid/3ae6b3338.html, last accessed on 9 October 2018.
[18] [2017] IEHC 13.

"(...) the principle of equivalence and the principle of effectiveness are both safeguarded by the application of the standard of proof – being the balance of probabilities – coupled with, where appropriate, the benefit of the doubt".

2.9 It can be noted that Keane J., in the case of ***NN v. MJE***[19], indicated that he did not necessarily agree with the conclusions of O'Regan J. in ***ON*** on the relevant standard of proof in respect of past events, but took the view that he should nonetheless apply that decision as a matter of precedent.

2.10 Given that much of the relevant evidence in the present case as to past events relates to the passing of legislation and to other widely reported matters in Poland, further discussion of the standard of proof to be applied in this context in respect of past events does not appear merited. The Commission does not understand there to be a dispute as regards any particular past event, although the consequences of the recent legislative developments and Executive actions in Poland are hotly contested.

2.11 In relation to the standard of proof to be applied to future events, the following comments of Keane J. in the case of ***NN***, referred to above, are relevant to note, where he in turn refers to the UK Supreme Court's comments on the various standards of proof in relation to future events:

"33. It is worth interposing here to note that, in MA (Somalia) v Secretary of State [2011] 2 All E.R. 65 at 70, the U.K. Supreme Court (per Lord Dyson SCJ) has expressed the view that there is no practical difference between the 'reasonable likelihood' standard applied to risk of future persecution in Sivakumaran and the 'substantial grounds' standard for believing a person faces a 'real risk' of torture or inhuman or degrading treatment contrary to Article 3 of the European Convention on Human Rights; Vilvarajah v UK (1991) 14 EHRR 248 (para 103)."

2.12 Although, as discussed above, the ECtHR applies a flexible "*beyond reasonable doubt*" standard when assessing past events, it applies a different standard of proof in relation to allegations of prospective violations of the ECHR, such as in deportation and extradition cases. It

[19] [2017] IEHC 99.

can be noted in this regard that, in the area of international protection law, a different standard of is applied when considering past events (the balance of probabilities, coupled with the benefit of the doubt) than when assessing future risk (the less stringent "reasonable degree of likelihood).[20]

2.13 Evaluation of future risk can be broadly described as an assessment, based on the conclusions drawn from the evidence, of what may happen if the applicant were to be returned to his/her country of origin. It therefore differs essentially from an assessment of facts and circumstances, concerned with the establishment of the past and present circumstances of the applicant. The different standard in respect of prospective violations was described by the Grand Chamber of the ECtHR in ***Saadi v. Italy:***[21]

> *"128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained proprio motu (seeH.L.R. v. France , cited above, § 37, and Hilal v. the United Kingdom , no. 45276/99, § 60, ECHR 2001-II). In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one (see Chahal , cited above, § 96).*
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> *129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (seeN. v. Finland , no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.*
>
> *130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see Vilvarajah and Others ,cited above, § 108 in fine).*
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> *131. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from*

[20] See the discussions of the case of ON v MJE [2017] IEHC 13 below.
[21] Application no. 37201/06, Grand Chamber Judgment of 28th February 2008.

independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department (see, for example, Chahal , cited above, §§ 99-100; Müslim v. Turkey , no.o53566/99, § 67, 26 April 2005; Said v. the Netherlands , no. 2345/02, § 54, 5 July 2005; and Al-Moayad v. Germany (dec.), no.o35865/03, §§ 65-66, 20 February 2007). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see Vilvarajah and Others , cited above, § 111, and Fatgan Katani and Others v. Germany (dec.), no. 67679/01, 31 May 2001) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see Mamatkulov and Askarov , cited above, § 73, andMüslim , cited above, § 68).

132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, mutatis mutandis , Salah Sheekh , cited above, §§ 138-149)."(Emphasis added) [22]

2.15 In the more recent case of ***Paposhvili v. Belgium,***[23] the Grand Chamber of the ECtHR examined the situation of the proposed deportation of the seriously ill applicant and referred to the speculative nature of forecasting future events:

"186. In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see Saadi , cited above, § 129, and F.G. v. Sweden , cited above, § 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of

[22] *Supra* at paras 128-132.
[23] Application no. 41738/10, Grand Chamber, 13th December 2016.

their claim that they would be exposed to proscribed treatment (see, in particular, Trabelsi v. Belgium , no. 140/10 , § 130, ECHR 2014 (extracts)).” (Emphasis added)[24]

2.16 ***Saadi*** and ***Paposhvili*** were cases concerning an anticipated violation of Article 3 of the ECHR. More relevant to the present case is the corresponding situation in relation to anticipated violations of Article 6 of the ECHR as was set out in ***Othman (Abu Qatada) v. United Kingdom***[25]***:***

“258. It is established in the Court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country. That principle was first set out in Soering v. the United Kingdom, 7 July 1989, § 113, Series A no. 161 and has been subsequently confirmed by the Court in a number of cases (see, inter alia ,Mamatkulov and Askarov , cited above, §§ 90 and 91;Al-Saadoon and Mufdhi v. the United Kingdom , no. 61498/08, § 149, ECHR 2010 ...).

259. In the Court's case-law, the term 'flagrant denial of justice' has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (Sejdovic v. Italy [GC], no. 56581/00, § 84, ECHR 2006 II;Stoichkov , cited above, § 56, Drozd and Janousek cited above, § 110). Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

- conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge (Einhorn , cited above, § 33; Sejdovic , cited above, § 84; Stoichkov , cited above, § 56);

- a trial which is summary in nature and conducted with a total disregard for the rights of the defence (Bader and Kanbor ,cited above, § 47);

[24] *Supra* at para 186.
[25] Application No. 8139/09, judgment of 17 January, 2012.

- detention without any access to an independent and impartial tribunal to have the legality the detention reviewed (Al-Moayad , cited above, § 101);

- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (ibid.).

260. It is noteworthy that, in the twenty-two years since the Soering judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that 'flagrant denial of justice' is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

261. In assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see, mutatis mutandis, Saadi v. Italy , cited above § 129)." (Emphasis added)[26]

2.17 As regards the concept of "flagrancy" in this context, in its Decision on admissibility in the case of ***Al-Moayad v. Germany***[27] the ECtHR stated as follows:

"101. In the Court's view, the right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society (see, among many others, Soering, cited above, p. 45, § 113). Even the legitimate aim of protecting the community as a whole from serious threats it faces by international terrorism cannot justify measures which extinguish the very essence of a fair trial as guaranteed

[26] *Supra* at paras 258-261.
[27] Application no. 35865/03, Decision on Admissibility, 20th February 2007

by Article 6 (see, mutatis mutandis, Heaney and McGuinness v. Ireland, no. 34720/97, §§ 57-58, ECHR 2000-XII; and Papon v. France, no. 54210/00, § 98, ECHR 2002-VII). A flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release (see, a fortiori and among many other authorities, Papon, cited above, § 90)."

2.18 It would seem that, if detention without access to an independent impartial tribunal *"undoubtedly"* amounts to a flagrant denial of a fair trial, then, *a fortiori*, trial by a tribunal that is not independent and impartial must also amount to a flagrant denial of a fair trial, such that where there are substantial grounds for believing that there is a real risk of being subjected to such a trial if surrendered pursuant to a European Arrest Warrant, such surrender would contravene Article 6 of the ECHR (and so would be precluded by s.37(1)(a) of the European Arrest Warrant Act 2003). This is consistent with the comments of the Court of Justice in its judgment in the present case, where it stated at paragraph 48:

"In that regard, it must be pointed out that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded."

2.19 The proposition that trial by a court which is not independent and impartial would amount to a flagrant denial of justice does not appear to be disputed by the Minister, by the Polish Government in their observations to the Court of Justice, or by the Polish issuing judicial authorities. This is perhaps unsurprising, given the prominence and emphasis given to the right to be heard by "an independent and impartial tribunal" by both Article 47 of the Charter of Fundamental Rights and Article 6(1) of the ECHR.[28]

[28] However, it is interesting to note the comments of a Divisional High Court of England and Wales in ***Government of Rwanda v. Nteziryayo*** [2017] EWHC 1912 (Admin) to the effect that a lack of independence in a judge can be mitigated with the result that trial before that judge would not amount to a "flagrant" breach of fair trial rights:
"97. The second point is that we cannot accept that prejudice or bias in a tribunal or judiciary, no doubt almost always arising from political or other pressure, can never amount to a flagrant denial of justice. That would seem to

3 THE BURDEN OF PROOF AND THE SHIFTING OF THE BURDEN OF PROOF

3.1 In ***MJE v. Sliczynski***[29], Murray CJ., giving judgment for the Surpreme Court, made the following comments in relation to the *sui generis* and inquisitorial nature of European Arrest Warrant proceedings:

> *"As regards the onus of proof, Counsel for the appellant properly acknowledged that extradition proceedings are neither strictly criminal nor civil in nature but the ordinary rules of evidence apply. It was submitted, citing Minister for Justice, Equality & Law Reform -v- Abinbola [2006 IEHC 325] which in turn relied on R (Levin) -v- Governor of Brixton Prison 1997 AC that while not strictly criminal proceedings, in extradition matters criminal procedure and rules of evidence should apply. Suffice it to say that the latter case, the United Kingdom case, referred to a particular form of extradition proceedings in the context of arrangements for extradition between the United Kingdom and the United States which involved a wholly different procedure for extradition than that which arises under the system of surrender provided for in the Act of 2003 as amended. Section 10 of the Act of 2003 provides "Where a Judicial Authority in an issuing State duly issues a European Arrest Warrant in respect of a person …that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision be arrested and surrendered to the issuing State." For the purpose of making an Order pursuant to s. 10 the trial Judge has to be satisfied that the requirements of the Act, and where specified, the Framework Decision, have been complied with. Once so satisfied he or she is bound to make the Order for surrender.*

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us an unwise proposition, bound eventually to be confounded by a bad case. What can be said, reflecting the thinking of Lord Phillips in RB (Algeria), is that where proper procedure, arrangements for witnesses, and representation are all available, it may often be that the effects of a lack of independence on the part of the tribunal will be sufficiently mitigated by such other adequate features of trial, so that incursion on fair trial process will fall short of a "flagrant denial" of justice. For the great part, all these aspects of trial will have to be weighed together and an overview reached.

98. The necessary risk will not be established by merely formal badges of lack of independence (military tribunals, judges without security of tenure, a judiciary without some form of inspectorate, a judiciary with a weak or mixed reputation with the public): the risk required must comprise a risk of real substance, a risk of a truly serious denial of justice. Anything short of that would represent an unwarranted export of European Convention standards to States not subject to the Convention."

[29] [2008] IESC 73.

As I pointed out in Attorney General -v- Park (Unreported) Supreme Court 6th December 2004 which concerned extradition under the Act of 1965, as amended, "The burden of proof of facts which may rest on the applicant in these proceedings is not that of a criminal trial. I hasten to add that the learned High Court Judge did not approach this matter on such a basis and it is just that I consider it appropriate at this point to distinguish between extradition proceedings and other forms of proceedings, criminal and civil. An extradition proceeding pursuant to the relevant Acts has its own special features which in a certain sense makes it sui generis." Later in the judgment it was stated "The role of the requested State, indeed its duty, is to give effect to a lawful request from a requesting State once it is determined that the request fulfils the criteria laid down by the relevant legislation .... The responsibility for bringing a person named in a warrant before the High Court clearly rests with authorities in the State. Once that is done the task in determining whether all legal requirements for the making of an Order pursuant to s. 47 are fulfilled rests with the High Court Judge. That is an inherently inquisitorial function." It seems to me that the same considerations apply to applications for surrender pursuant to the Act of 2003 and indeed s. 20 of the Act, as cited above, highlights the inquisitorial dimension of the proceedings. The rules of evidence which apply are not those of a criminal trial. In carrying out its function as aforesaid the Court ensures that no one in this jurisdiction shall be surrendered pursuant to the Act unless the Court is satisfied that all criteria laid down by the Act and, where specified, in the Framework Decision, have been satisfied and that there is no other lawful bar to the making of the Order.

I also agree with Macken J., that the reference by the learned trial Judge in this case at one point to the heavy onus on the appellant was a reference to the fact that he was in a position to produce evidence accessible to him or peculiar to his own knowledge if he sought to challenge the evidence upon which he, the trial Judge, was otherwise entitled to conclude that the appellant had fled Poland within the meaning of the section. Accordingly these grounds of appeal fail."

3.2 In his Court of Appeal judgment in ***MJE v. Palonka***[30], Peart J. also referred to the *Park* case concerning extradition proceedings, and went on to comment as follows:

[30][2016] IECA 69

> *"33. Applications under the European Arrest Warrant Act, 2003, as amended, are no different in nature. They are sui generis and inquisitorial in nature as opposed to adversarial. The executing judicial authority must be satisfied that the requirements of the Act are fulfilled by the warrant which has been forwarded by the issuing judicial authority, and it does this independently of the parties to the application, albeit with the assistance of submissions made by one or both parties. In such circumstances, it is hard to see how the onus can be placed upon a respondent to raise a matter in relation to non-compliance with the requirements of the Act before the Court would be obliged to consider for itself whether the requirements of the Act have been met."*

3.3 In the present proceedings, the Court might be seen as being half way through the two-step test set out by the Court of Justice in its judgment herein (subject to perhaps carrying out an updated assessment on the first step at the time of deciding on surrender). The burden on the Respondent in the first step and the possibility of rebuttal is well established, and has been discussed in detail elsewhere.[31] An important question at this (second) stage of the proceedings appears to be: is there a burden on the Respondent to point to evidence showing substantial grounds for believing that there is a real risk that he would suffer a flagrant denial of justice if surrendered, or is there a burden on the Minister, as the Applicant for the surrender Order, to point to evidence which discounts the existence of such a risk?[32]

3.4 In ***Velásquez-Rodríguez v. Honduras***, the Inter American Court[33] found that the burden of proof can shift to the respondent state, where systemic human rights abuses have been established and the practice can be linked to the individual:

> *"... 123. Because the Commission is accusing the Government of the disappearance of Manfredo Velásquez, it, in principle, should bear the burden of proving the facts underlying its petition.*

[31]For instance, see the discussion of the ***Rettinger*** and ***Aranyosi*** cases by Donnelly J. at paragraphs 59 to 62 of her judgment in ***MJE v. McLaughlin*** [2017] IEHC 598.

[32]As noted above, the Inter-American Court in ***Velásquez-Rodríguez v. Honduras*** found that the burden of proof can shift to the respondent state, where systemic human rights abuses have been established.

[33] The Inter American Court has also considered the shifting of the burden of proof in circumstances where accessing evidence was a difficulty where the relevant party was removed from the jurisdiction that was the subject of the complaint. Some examples from the Inter American Court include ***Yamtam v. Nicuagua*** (Judgment of 23 June 2005) where the Court warned that there may be cases where the applicant is faced with the impossibility to produce evidence "which can only be obtained with the cooperation of the respondent state" and those cases where inferences where drawn from systematic patterns of grave human rights violations, see - *Juan Humbeto Sánchez v. Hondouras* (7 June 2003) and *Almociacid Arellano and others v. Chile* (Judgment of 26 September 2006, at para 103-104).

124. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared.

125. The Government did not object to the Commission's approach. Nevertheless, it argued that neither the existence of a practice of disappearances in Honduras nor the participation of Honduran officials in the alleged disappearance of Manfredo Velásquez had been proven.

126. The Court finds no reason to consider the Commission's argument inadmissible. If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this."

3.5 In the context of this inquisitorial and *sui generis* procedure, perhaps reference to a "*burden of proof"* is unhelpful – as noted by Donnelly J. at paragraph 60 of her judgment in ***MJE v. McLaughlin***[34]

"*The CJEU [in Aranyosi] does not refer explicitly to a burden on the respondent but refers to the executing judicial authority being in possession of evidence of a real risk. If there is a difference between the [Rettinger and Aranyosi] judgments, and the Court is not convinced there is, it may reflect a difference in procedure between common law systems and some civil law systems where in the former the parties to proceedings place evidence before the Court. The question is what has been established by the evidence available, regardless of its source or the manner in which it was obtained".*

3.6 Where it has already been established by this Court that *"there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of*

[34] [2017] IEHC 598.

law", this might be seen as calling for an evidential response from the Minister, the issuing State and/or the issuing judicial authorities (it can be noted that same has now been provided from each of the three issuing judicial authorities). On the other hand, does the *"specific and precise"* assessment in the second step necessarily require some further evidence, beyond what was available in the first step?

3.7 What would be the situation if neither the Respondent nor the Minister (and by extension the issuing judicial authorities and the Polish central authority) adduced any further evidence following the first step? In posing this hypothetical question, one is arguably led to the conclusion that there is a burden of proof on neither party at this stage of the process. It is not the case that, if there is no further evidence put before the Court following the completion of the first step, surrender either must be ordered or must be refused. The obligation on this Court to *"seek all necessary supplementary information from the issuing Member State's judicial authority as to the protections for the individual concerned"*, referred to at paragraph 23 of the judgment of the Court of Justice in the present case, does not seem to imply that, in the absence of any supplementary information, surrender must be refused.

3.8 Having said that, there are recent comments from the High Court of England and Wales which seem to indicate an approach that there is a burden of proof on the requesting State in the second step of the ***Aranyosi*** test. In ***Owda v. Court of Appeals Thessaloniki***[35], Burnett LJ quoted from ***Aranyosi*** and stated:

> *"6. The language of "discounting the existence of a real risk" in paragraph 103 means no more than that to avoid a refusal of extradition, a judicial authority that has received a request for further information envisaged in paragraph 95, must provide sufficient information to support a determination that substantial grounds for believing there is a real risk do not exist."*

3.9 Similarly, at paragraph 8 of his judgment in ***Georgiev v. Regional Prosecutor's Office, Shuman, Bulgaria***[36], a case involving an allegation of an anticipated violation of Article 3 of the ECHR in Bulgaria, Hickinbottom LJ. commented as follows in his summary of the law in the area:

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35 [2017] EWHC 1174 (Admin).
36 [2018] EWHC 359 (Admin).

> *"iv) If such grounds are established, then the legal burden shifts to the requesting state, which is required to show that there is no real risk of a violation: as it has been said, the burden upon the requesting state is "to discount the existence of a real risk" (Aranyosi at [103]) or "to dispel any doubts about it" (Saadi at [129]). Requiring a party to dispel any doubts as to a particular risk undoubtedly imposes a very heavy burden, although I am unconvinced that it is necessary or appropriate to put it formally in terms of the criminal standard of proof."*

3.10 It seems logical that the burden of proof would shift to the issuing State in the second step of the ***Aranyosi*/*LM*** where the first step included either a finding that the particular individual would be at risk or, that there is a systemic failure which applies to the Respondent in common with every other person appearing before the courts in Poland. In such circumstances it would appear appropriate for the issuing State to persuade the Court that these findings do not have the result of placing the respondent, because of his particular circumstances, at risk.

3.11 Irrespective of the position the Court takes as to whether there is a burden to be discharged by the parties in the second step of the two-step test and where it lies, it is relevant to note that there may well be circumstances where the provision of certain evidence is within the power of one side only, and where there may be consequences for failure to provide such evidence.

3.12 The case of ***XX v. Hungary***[37], concerned allegations by a person detained on remand of violations of Article 5(1), (3) and (4) of the ECHR, *inter alia* on the basis of a lack of access to his case file. The ECtHR stated as follows:

> *"51. In the present case, the Court notes the Government's submission according to which – in the absence of a subsequent civil action, in which the disputed issues could be clarified – they were not in a position to form a view on the adequacy of the information provided to the applicant concerning his continued detention. In this connection, the Court would refer to its above finding (see paragraph 47 above) that the non-introduction of the civil action suggested by the Government must be seen as immaterial in the circumstances.*

[37] Application No. 43888/08, 19th March 2013.

Furthermore, the Court observes that the applicant has been consistently asserting, both before the domestic authorities and the Court, that he had been granted no access to the relevant elements of the file and that the domestic courts rejected his related complaints without refuting the allegation about the denial of access (see paragraph 10 above). It also notes (see paragraph 17 above) that such an access is guaranteed by the Code of Criminal Procedure, unless it interferes with the interests of the investigation.

However, there is no element in the case file or the parties' submissions indicating that the applicant could indeed exercise this right (cf. Lamy v. Belgium, loc. cit.; Lietzow v. Germany, no. 24479/94, § 47, ECHR 2001-I; Svipsta v. Latvia, no. 66820/01, § 138, ECHR 2006-III (extracts)).

52. In these circumstances, the Court cannot but conclude that the Government have failed to provide evidence that the requisite access was indeed made available to the applicant, the burden of proof being incumbent on the Government in this connection." (Emphasis added)

3.13 This approach appears to be something akin to the *"peculiar knowledge"* principle known in this jurisdiction, and which was described as follows by McDermott J. in ***Jordan v. Minister for Children and Youth Affairs***[38]:

"65. The shifting of the onus of proof to a defendant in civil or criminal proceedings, may be prescribed by statute or arise under common law because it would be unfair to require a plaintiff to prove something beyond his or her capacity but which is "peculiarly within the range of the defendants capacity of proof", a concept which embraces facts "peculiarly within their knowledge" (see Rothwell v. Motor Insurers Bureau of Ireland[2003] 1 I.R. 268 at pp. 275-6, per Hardiman J. and Hanrahan v. Merck Sharp & Dohme[1988] ILRM 629 at p. 634 per Henchy J.)."

3.14 For the avoidance of doubt – the Commission is not submitting that there are or are not circumstances in the present case which call for the application of this principle, but rather

[38] [2013] IEHC 625.

wishes to draw the Court's attention to the principle.

3.15 Also, it is of some note the ECtHR has drawn adverse inferences or provided for the reversal of the burden of proof, from the non-cooperation of a party. In the case of ***Tas v Turkey***, the ECtHR drew *"very strong inferences from the lack of any documentary evidence relating to where [the applicant's son] was detained and the inability of the Government to provide a satisfactory and plausible explanation to what happened to him"*.[39] The adverse inference was sufficient to tip the scales in favour of the applicant.

3.16 Insofar as the Court identified approaches to evidence in other areas of civil litigation as an area upon which it sought assistance to inform the Court's approach in this case to the assessment of evidence, and for completeness, the Commission refers the Court to the reversal of the burden of proof which derives from European law in the assessment of equality and discrimination cases and which is reflected in the provisions of our domestic equality legislation (see section 38 Equality Act, 2004). Under the European Directives:

> *"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."* Art 8(1) 2000/43; Art 10(1) 2000/78 & 2006/54 19(1).

Provision is also made for the drawing of inferences from a failure to respond, or also the provision of an unsatisfactory response (Section 23 of Equal Status Act, 2000 and section 76 Employment Equality Act, 1998).

3.17 Like the Court in these proceedings, the Workplace Relations Commission is engaged in an inquisitorial function under the Equality Acts. Of course, the particular approach in equality and discrimination cases has a statutory underpinning which is lacking in respect of broader human rights cases. Nonetheless, a reversal of the burden of proof and the drawing of inferences which

[39] Application No 24396/94, judgment of 14 November 2000, at para 60.

is reflected in statutory provisions in this specific area well reflects the flexible approach to assessing human rights violations which has emerged through the case-law on regional and international human rights protection already seen in these submissions and is instructive as to the type of approach which it is open to the Court to take on the basis of principles applicable to bodies discharging an inquisitorial function in the area of suspected human rights violations.

4 THE NATURE OF THE EVIDENTIAL ASSESSMENT REQUIRED

4.7 The nature of evidential assessment required varies depending on the stage of the proceedings. In terms of specifically assessing the evidence in a matter concerning the right to a fair trial, the UN has published two documents which may provide guidance to the Court when assessing the matters before it, namely, *Manual on Human Rights Monitoring*[40] *(the "Manual")* and *Human Rights Indicators: A Guide to Measurement and Implementation*[41] *(the "Guide").* At Part C of the Manual the authors identify *"points for observation"* for a Human Rights Officer when carrying out their investigation. Specifically, in relation to the right to an independent and impartial tribunal, the Manual states:

> *"The tribunal must be independent, impartial and free from improper influence. There are no exceptions to this requirement. There must be a separation of powers between the judiciary and the executive or legislature (with functions clearly distinguished). The executive must not exercise control over or direct the judiciary with regard to the determination of cases before it, or in relation to the allocation of cases to individual judges. Nor may any political or religious body exert undue influence on a tribunal or on its decisions. Decisions by tribunals may not be revised by any institution other than a superior judicial tribunal."*

The Manual goes on to list indicators of independence.

Similarly, at page 10, the Manual sets out "*points for observation*" regarding the right to be presumed innocent;

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[40] UNOHCHR, revised 2011, Chapter 22 at https://www.ohchr.org/Documents/Publications/MonitoringChapter22.pdf,

[41] At https://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf , last accessed on 9 October 2018.

> *"Anyone charged with a criminal offence should be presumed innocent until proven guilty according to law. The burden of proving the charge/s is imposed on the prosecution. No guilt can be presumed until the charge/s has/have been proved beyond reasonable doubt."*

The Manual then identifies indicators of the existence or otherwise of a presumption of innocence.

4.8 For its part, the Guid identifies quantitative and qualitative indicators to measure the implementation of international human rights norms and principles. The Guide provides concrete examples of indicators identified for a number of human rights, including the right to a fair trial[42]. In terms of this case, the headings *"Public hearing by competent and independent courts"* and *"Presumption of innocence and guarantees in the determination of criminal charges"* and their correlating indicators are most relevant.

4.9 It is accepted that a court involved in fact finding of the nature involved here is entitled to rely on reputable material from official sources. As the Court knows in respect of the exercise already conducted in respect of fact finding as to whether the right to a fair trial is in jeopardy in Poland, a body of material exists internationally as to the types of factors which inform a decision as to whether the right is in jeopardy. The main analytical question concerning the ECtHR in the case of ***Georgia v. Russia***[43] was about the probative force of reports by international (international) non-governmental and governmental organizations at proceedings in front of international courts. The ECtHR stated as regards the assessment of evidence:

> *"93. In assessing evidence the Court has adopted the standard of proof "beyond reasonable doubt" laid down by it in two inter-State cases (see Ireland v. the United Kingdom, 18 January 1978, § 161, Series A no. 25, and Cyprus v. Turkey [GC], no. 25781/94, § 113, ECHR 2001-IV) and which has since become part of its established case-law (see, inter alia, Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, § 26, ECHR 2004-VII, and Davydov and Others v. Ukraine, nos. 17674/02 and 39081/02, § 158, 1 July 2010).*

[42] *Supra* at page 98, Table 11.
[43] Application no. 13255/07, Grand Chamber Judgment of 3 July 2014.

94. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard in criminal cases. The Court's role is to rule not on guilt under criminal law or on civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the High Contracting Parties of their engagements to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see, inter alia, Nachova and Others v. Bulgaria [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII, and Mathew v. the Netherlands, no. 24919/03, § 156, ECHR 2005-IX).

95. In establishing the existence of an administrative practice, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned, but will rather study all the material before it, from whatever source it originates (see Ireland v. the United Kingdom and Cyprus v. Turkey, cited above, ibid.). In addition, the conduct of the parties in relation to the Court's efforts to obtain evidence may constitute an element to be taken into account (see Ireland v. the United Kingdom; Ilaşcu and Others; and Davydov and Others, cited above, ibid.)."

4.10 The ECtHR was satisfied to give certain international reports the value of unquestionable evidence. The ECtHR reiterated:

"138. However, the Court would reiterate that, being "master of its own procedure and its own rules, it has complete freedom in assessing not only the admissibility and

relevance but also the probative value of each item of evidence before it" (see Ireland *v. the United Kingdom, cited above, § 210 in fine). It has often attached importance to the information contained in recent reports from independent international human-rights-protection associations or governmental sources (see, mutatis mutandis, Saadi v. Italy [GC], no. 37201/06, § 131, ECHR 2008; NA. v. the United Kingdom, no. 25904/07, § 119, 17 July 2008; M.S.S. v. Belgium and Greece [GC], no. 30696/09, §§ 227 and 255, ECHR 2011; and Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, § 118, ECHR 2012). In order to assess the reliability of these reports, the relevant criteria are the authority and reputation of their authors, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and whether they are corroborated by other sources (see, mutatis mutandis, Saadi, cited above, § 143; NA., cited above, § 120; and Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, § 230, 28 June 2011)."*

The doctrinal meaning of the judgment for present purposes may be that rule-based reasoning of the type typically applied to the assessment of evidence domestically is not suitable for inter-state cases.

4.11 Where the Court has already made findings on the basis of the material available to it that there are systemic failings in Poland such that a real risk of a breach of fair trial rights is demonstrated and the Court must now assess individual impact, the nature of the evidential assessment required must be different. It is suggested that the nature of the evidential assessment required in a case of this nature develops from the role of the Court at this stage of the proceedings. The role of the Court, having established systemic failings and embarking on an individual assessment of risk in a particular case, is not to punish the State which is guilty of human rights violations but to protect the respondent as a potential future victim of such violations. The Inter American Court addressed the particular role of that Court in assessing evidence and the weight to be given to certain evidence in the ***Velásquez*** case referred to above as follows:

"130. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with

the facts.

131. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.

132. Since the Court is an international tribunal, it has its own specialized procedures. All the elements of domestic legal procedures are therefore not automatically applicable.

133. The above principle is generally valid in international proceedings, but is particularly applicable in human rights cases.

134. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.
135. In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.

136. The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State."

137. Since the Government only offered some documentary evidence in support of its preliminary objections, but none on the merits, the Court must reach its decision without the valuable assistance of a more active participation by Honduras, which might otherwise have resulted in a more adequate presentation of its case.

138. The manner in which the Government conducted its defense would have sufficed to prove many of the Commission's allegations by virtue of the principle that the

silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law. This result would not hold under criminal law, which does not apply in the instant case (supra 134 and 135). The Court tried to compensate for this procedural principle by admitting all the evidence offered, even if it was untimely, and by ordering the presentation of additional evidence. This was done, of course, without prejudice to its discretion to consider the silence or inaction of Honduras or to its duty to evaluate the evidence as a whole."

4.12 It bears note that the principle of the benefit of the doubt established in international refugee law is not explicitly mentioned in the Qualification Directive[44]. However, Article 4 (5) Qualification Directive sets out an approach to the assessment of evidence however, that reflects an approach which applies the benefit of the doubt and states:

" Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;
(b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
(e) the general credibility of the applicant has been established"

4.13 Much has also been written in the area of asylum law in relation to the assessment of

[44] Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

credibility. In that context the UNHCR recommends that the credibility assessment must be based on the entirety of the available relevant evidence as submitted by the applicant and gathered by the determining authority by its own means, in light of identified credibility indicators. This means it should be based on the applicant's statements and any documentary or other evidence submitted by the applicant and gathered by the determining authority. The UNHCR has identified the following key steps in the credibility assessment;[45]

> *"In cooperation with the applicant, gather the information to substantiate the application. Determine the material facts f the application taking into account the applicant's past and present experiences or fear of ill treatment, torture, persecution, harm, or other serious human rights violations, as well as the wider legal, institutional, political, social, religious, cultural context of his or her country of origin or place of habitual residence, the human rights situation, the level of violence, and available state protection.*
>
> *Assess the credibility of each material fact. Each material fact should be assessed, taking into account the applicant's statements and all other evidence that bears on the fact, through the lens of the five credibility indicators identified in Chapter 5, taking into account the applicant's individual and contextual circumstances and the reasonableness of his or her explanations with regards to potentially adverse credibility findings: a. Sufficiency of detail and specificity; b. Internal consistency; c. Consistency with information provided by any family members and/or other witnesses; d. Consistency with available specific and general information, including country of origin information (COI); and e. Plausibility*
>
> *Determine which material facts can be: (a) accepted as credible, (b) rejected as not credible, and (c) those material facts for which an element of doubt remains. Facts are accepted when they are sufficiently detailed, internally consistent, consistent with other evidence (provided by the family and/or COI), and plausible, whether or not they are supported by further documentary evidence. The benefit of the doubt does not need to be considered or applied in relation to these facts.*
>
> *For those material facts regarding which an element of doubt remains, consider whether the benefit of the doubt should be applied with respect to the facts in question.*

[45] *Beyond Proof - Credibility Assessment in EU Asylum Systems*, UNHCR, (2013) at page 245 at http://www.unhcr.org/en-ie/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html, last accessed on 9 October 2018.

On the basis of the entire information at hand, decide: (a) to accept the remaining facts as credible; or (b) to reject the remaining facts as not credible.
Finally, state in the written decision all the material facts that have been accepted as credible and will inform the assessment of the well-founded fear of persecution and the real risk of serious harm, and all the material facts that have been rejected as not credible, as well as the reasons underpinning these findings of facts.."

4.14 The task of the asylum judge has been considered in a paper for the International Association of Refugee Law Judges entitled "*Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive: Judicial criteria and standards*"[46] which summarizes the role as follows;[47]

"to decide whether the claimant is entitled to recognition as a person in need of international protection –
- as at the date of the hearing –
- by reference to the relevant provisions of the QD governing recognition of refugee and subsidiary protection status –
- on the totality of the evidence before the court –
- including that obtained by the court of its own volition –
- considered and assessed objectively –
- so as to establish whether –
- if then immediately returned to his country of origin –
- there is a well-founded fear of the claimant being persecuted (Article 13 refugee status recognition) or –
- if not recognised as a refugee pursuant to Article 13 of the QD –
- whether, if so returned, substantial grounds have been shown for believing there is –
- a real risk that the claimant will suffer serious harm as defined in the QD

[46] Paper prepared by Allan Mackey and John Barnes for the International Association of Refugee Law Judges (IARLJ) in its role as a partner in the "Credo Project", January-December 2012, at pages 25-26.
[47] *See* also IARLJ, Due Process Standards for the Use of Country of Origin Information (COI) in Administrative and Judicial Procedures, 10th World Conference, 2014 which identifies 25 standards concerning COI-related issues at all stages of the overall examination process and IARLJ, A Structured Approach to the Decision Making Process in Refugee and other International Protection Claims Including: A Flowchart using Established Judicial Criteria and Guidance, The IARLJ International Judicial Guidance for the Assessment of Credibility, The IARLJ, Judicial Checklist for COI, June 2016.

(Article 18 subsidiary protection status recognition)."

4.15 Accordingly, on the basis of all the foregoing, the Commission submits that the Court is entitled to rely on documentary evidence and material from reputable sources which is not proved in evidence in accordance with the normal domestic rules of evidence and it is entitled to draw inferences from a failure to provide certain information. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts. The approach adopted by the International Court of Justice in the ***Corfu Channel case*** is arguably supportive of this approach. In this case that Court found;

> *"…the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to the same conclusion"*[48]

4.16 Thus the Court is obliged to adopt a reasoned and rational approach to considering the material relied upon as evidence of risk of breach on the facts of the particular case coming before the Court. To borrow from the language of Judge Concado Trindade in his dissenting judgment in **Croatia v. Serbia** (referred to above), in the determination of facts in cases of this kind (pertaining to grave breaches of fundamental rights):

> "*the Court is entitled to remain particularly aware of the primacy of concern with fundamental rights inherent to human beings over concern with State susceptibilities. After all, the raison d'humanité prevails over the raison d'Etat*."[49]

The judgment of the Court of Justice in this case has the effect of confirming the primacy to this

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[49] Paragraph 507.
[49] Paragraph 507.

core principle which applies in the specific context of mutual respect and recognition which underpins EU relations where systematic abuses of human rights have been found to exist in a Member State.

4.17 Adapting the approach in asylum law set out above to the present context the Court might approach the evidence as follows:

- to decide whether the respondent is a person at risk of human rights violations in Poland–
- as at the date of the hearing –
- by reference to the relevant provisions of the international human rights standards (including rights protected under European law) specifically the right to a fair trial –
- on the totality of the evidence before the court –
- including that obtained by the court of its own volition –
- considered and assessed objectively –
- so as to establish whether –
- if then returned to his country of origin –
- there is a well-founded fear of / or substantial grounds have been shown for believing that the respondent would be subjected to fundamental human rights violations.

5 EVIDENTIAL STANDARDS TO IDENTIFY FAIR TRIAL INFRINGEMENTS

5.1 In European Arrest Warrant cases involving an anticipated breach of Article 3 of the ECHR due to prison conditions in the requesting State, it is possible for evidence to be produced which shows the likelihood of the requested person being detained in a particular prison if surrendered to the requesting State. Accordingly, even where it is established that there are serious general and systemic problems with the prison system in a requesting State, the executing judicial authority may be satisfied on the evidence before it that the requested person is likely to be detained in a prison which is not affected by those problems, and where the requested person accordingly will not be at risk of a breach of rights.

5.2 The situation is different in a case such as the present one, where there is an anticipated breach of Article 6(1) of the ECHR (and Article 47 of the Charter) due to a perceived absence of an independent and impartial judiciary in the requesting State, particularly where, as here, the finding of a lack of independence and impartiality is based on the general legislative framework

rather than on specific incidents of corruption and improper Executive influence.

5.3 It is perhaps unrealistic to expect that the central authority in the requesting State, or the issuing judicial authority, would give an assurance in the manner of "yes, the judiciary is subject to improper Executive influence in a general sense, but the particular judges who will be dealing with the requested person's trial and appeal are in fact independent and impartial". In the absence of any evidence of, for example, a specific instance where a judge took an action adverse to a defendant in a criminal trial because of undue pressure from the Executive, it seems at first difficult to assess the issue of a lack of independence and impartiality on anything other than a general and systemic level, so that either all criminal defendants in the system are at risk of an unfair trial on this basis, or none of them are. However, in taking such an approach, the Court would risk becoming stuck at the first step of the two-step test set out by the Court of Justice in ***Aranyosi*** and in its judgment in the present case.

5.4 Given the obligation to carry out a specific and precise analysis, a better approach would be to examine whether there is anything about the requested person's circumstances which reduce the risk or would put him or her at increased risk of being adversely affected by the general and systemic deficiencies related to the lack of independence of the judiciary.

5.5 By way of analogy, the Court might find some assistance in the *"sliding scale"* approach provided for by the Court of Justice in its judgment in ***Elgafaji***[50] in respect of subsidiary protection on *"indiscriminate violence"* grounds under Article 15(1)(c) of the Qualification Directive. In that case the Court of Justice gave the following guidance:

> *"32. In that regard, it must be noted that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.*
>
> *33. By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more*

[50] Case C-465/07, at http://curia.europa.eu/juris/document/document.jsf?docid=76788&doclang=EN last accessed on 9 October 2018.

general risk of harm.

34. Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.

35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.

36. *That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.*

37. While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word 'normally' – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.

3.8. The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive,

as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.

39. In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection."

5.7 This principle was referred to as *"the sliding scale"* by the Court of Appeal of England and Wales in ***HF (Iraq) v. SSHD***[51] where the Court of Appeal interpreted the judgment in ***Elgafaji*** as follows:

> *"The court held that it is not necessary for a person to be specifically targeted by reason of factors peculiar to his particular circumstances in order to claim humanitarian protection. It is enough that he will by his presence in the relevant country face a real risk of being subject to a serious threat of harm because of indiscriminate or random violence. However, where a person can show that he is at risk of being specifically targeted because of factors particular to his personal circumstances, this will lower the level of indiscriminate violence necessary to attract humanitarian protection. The Tribunal in HM2 referred to this as the 'sliding scale'."*

5.8 If the Court were to apply such an approach by way of analogy in the present case, it might for instance find that the level of improper Executive influence in judicial matters in Poland is so high that a requested person facing trial in Poland need not point to any special circumstances in their case which puts them at an increased risk of an unfair trial, over and above the general risk to all accused persons in the Polish system. In applying this approach the person should not be returned unless the requesting State can establish to the Court's

[51] [2013] EWCA Civ 1276, accessible at http://www.refworld.org/cases,GBR_CA_CIV,527111d24.html, last accessed on 9 October 2018.

satisfaction that the risk does not arise in the Respondent's case for reasons specific to his case. Alternatively, the Court might take the view that the level of improper Executive influence, although to be condemned and although contrary to the rule of law, is not at such a level that all accused persons are to be seen as at risk of an unfair trial, without showing something more.

5.9 It could perhaps be argued that applying this sliding scale approach in the present context would be inconsistent with the judgment of the Court of Justice in this case, insofar as that judgment might be interpreted as requiring that in every case special circumstances making the requested person particularly susceptible to the general and systemic breach of the principle of the independence of the judiciary must be established before surrender could be refused. However, it is submitted that the two step test laid out by the Court of Justice in this case must allow for situations where the executing judicial authority finds a general and systemic problem so serious that it must be seen as affecting *every* person who is subject to that criminal justice system as an accused. The requirement to *"assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk"*, does not appear to rule out the possibility that every person subject to the defective system in question will run a risk of a breach of the fundamental right to a fair trial by an independent court.

5.10 The Commission wishes to emphasise that it is not submitting that the seriousness of the general and systemic breach which has been found by the Court in the present case either should or should not be seen as being at such a level that surrender for prosecution in Poland should be refused in every case. The Commission rather wishes to point out that this is a possibility, and that taking this approach, in the respectful view of the Commission, would not constitute the type of automatic refusal forbidden by the Court of Justice at paragraph 72 of its judgment in the present case. It might be viewed as the finding in the first step being so grave that the outcome of the specific and precise assessment in the second step is the same in every case, absent particular circumstances in an individual case demonstrated by the requesting State as addressing this risk in the individual case.

5.11 Because of the nature of a general and systemic lack of independence and impartiality in the judiciary a causal link between a framework allowing for improper influence by the Executive and an action by a judge in a trial which has already taken place may not be apparent. It would

also be difficult to draw a causal link between such a framework and a potential action in a trial which has not yet taken place. There are many variables that might arise, such as which judge or judges might conduct the trial (and if necessary, the appeal) and which legal issues might arise upon which the judge would have an opportunity to make rulings of significance (with the finding as to guilt presumably coming under this heading).

5.12. Although it was in a very different context, the difficulty in drawing such a causal link in the present case might be seen as in some limited way similar to the difficulty which faced the Supreme Court in the case of ***Jordan v. Minister for Children and Youth Affairs***[52], where the Supreme Court was called on to assess whether an established improper action on behalf of the relevant Minister (by publishing misleading information in advance of the referendum) had a "material effect on the outcome of the referendum", which was the statutory test. This test was explained by O'Donnell J. in his judgment as follows:

> *"85 Accordingly, I would hold that "material effect on the outcome of a referendum" involves establishing that it is reasonably possible that the irregularity or interference identified affected the result. Because of the inherent flexibility of this test, it may be useful to add that the object of this test is to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum."*

5.13 In her judgment in the same case, Denham CJ. had the following to say in relation to the test:

> *"123. The test to be applied by a court is an objective test, an objective consideration of the facts, whether a reasonable person would have a reasonable apprehension that the matter raised by an applicant materially affected the result of a referendum as a whole, so that they could not trust the referendum result.*
>
> *124.This test is similar to that determined in Bula Limited v. Tara Mines Ltd (No. 6) [2000] 4 I.R. 412. At p. 441 I described the test as:-*
>
> *'The submissions in relation to the test to be applied roved worldwide. However, there*

[52] [2015] IESC 33 (Supreme Court).

is no need to go further than this jurisdiction where it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test – it invokes the apprehension of the reasonable person.'

125. Applying the objective reasonable person test, it does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test, it invokes the apprehension of the reasonable person. The reasonable person would have a reasonable knowledge of the referendum process."

5.14 It must be repeated that this was of course in a very different context to the present case. Having said that, it does seem potentially useful to look at the test in ***Jordan*** in the context of the present case, because in that case it was necessary to establish whether something very general (the publication of misleading information to the public at large) had a material effect on something very specific (the manner in which roughly 2% of the electorate had voted, which would have changed the outcome of the referendum). In the present case, for discussion purposes leaving aside the comments of the Deputy Justice Minister, the Court is called on to establish whether something very general (the systemic possibilities for interference by the Executive in the workings of the judiciary) might affect something very specific (the trials of the Respondent). It seems reasonable to ask whether the new framework perceived as allowing for interference with the independence of the judiciary might have a "*material effect*" on the outcome of the trial(s). In assessing this, taking some guidance by way of analogy from the ***Jordan*** case, the Court can accept that the material effect is something which can never be proven definitively, and has flexibility in identifying the point at which a reasonable person (in the future) *"would be in doubt about, and no longer trust"* the outcome of the trial(s) of the Respondent.

5.15 Something which would be less appropriate to borrow from ***Jordan*** would be the onus of proof, which in that context was at all times on the petitioner challenging the referendum result, and the standard of proof, which was the balance of probabilities. The consequences for the petitioner of the referendum result standing obviously bears absolutely no comparison to the consequences for the Respondent of an unfair trial, and so at this point the analogy truly breaks

down.

5.16 At paragraph 51 of its written observations to the Court of Justice, the Polish government sought to dismiss the perceived lack of independence of the Polish judiciary as theoretical and unrealistic in the following terms:

> *"51 The Irish court has not provided the slightest explanation as to precisely how the accused LM might be exposed to risks in the event of his being surrendered to Poland. Does that court take the view that the Minister for Justice would apply pressure on the president of the competent court so that that president would in turn exert pressure on the judges hearing the case to deprive the accused LM of his rights of defence? Passing over the extreme absurdity of such a digression, the powers of the Minister for Justice are limited to administrative issues and organising the work of the judiciary: he does not, however, have any influence either on the composition of a court (this is decided by lot, something which does not appear to have been noticed by the Irish court), the conduct of the proceedings (which is managed exclusively by the presiding member, excluding the president of the court or the head of the criminal division), or the content of the judgment (which is to be reviewed exclusively by a higher court)."*

5.17 The manner of the argument advanced by Poland raises an interesting question, of whether a theoretical lack of independence is sufficient to constitute a breach of the right to an independent court or tribunal, even where there is functional, *de facto* independence. Put another way – must it be established by way of evidence that the framework perceived as allowing for improper Executive interference has *in fact* led to improper Executive interference? This is perhaps at the heart of what the Court must decide in determining whether there is a personal risk in this case. This issue arose recently in the Irish European Arrest Warrant case of ***MJE v. Dunauskis***[53], in which the requested person is resisting his surrender to Germany *inter alia* on the basis that the Public Prosecutor who issued the European Arrest Warrant is not sufficiently independent of the Executive, as in theory the Minister for Justice in Schleswig Holstein may give a direction to the Chief Public Prosecutor, who in turn can give a direction to the Public Prosecutor issuing the European Arrest Warrant. Birmingham J., giving judgment for the Court of Appeal, dismissed this objection, relying on the decision of the House of Lords in

[53] [2017] IECA 266.

Assange v. Swedish Prosecution Authority (Nos 1 and 2)[54] and commenting as follows:

> *"8...At para. 153 of his judgment in Assange , Lord Dyson commented:*
>
> *'I am inclined to think that the essential characteristic of an issuing judicial authority are that it should be functionally (but not necessarily institutionally) independent of the Executive. As we have seen, the fundamental objective of the Framework Decision was to replace a political process with a non-political process. This could only be achieved if the new "judicialised" system was operated by persons who de facto operated independently of the Executive …'*
>
> *9. I find Lord Dyson's reference to functional independence and operating de facto independent helpful. I am quite satisfied that the German system is functionally independent and that the Lubeck Prosecutor is de facto independent of political control. I would reject any suggestion that the entirely theoretical possibility of political direction robs German Prosecutors of their status as judicial authorities as that term is understood in the Framework Decision."*

5.18 However, the respondent in ***Dunauskis*** was granted leave to appeal by the Supreme Court, and the Supreme Court on the 31st July 2018 made a reference to the Court of Justice in the case[55] (and in the linked case of ***MJE v. Lisauskas***[56]), *inter alia* in relation to the independence point. The Supreme Court in its Order of Reference has referred to the judgment of the Court of Justice in the present case, and appears to have tentatively taken a different view to that of Birmingham J., as it has stated:

> *"5.3 The Supreme Court has noted in particular what has been stated by the Court of Justice in Poltorak that a judicial authority must be an authority that is independent of the executive. This stems from the well established separation of powers between the legislature, executive and judiciary. The Supreme Court has further noted the Court's consideration of independence of courts in Case C-216/18 PPU LM at paras 63-64. The institutional structure of the Public Prosecutor's Office in Germany*

[54] [2012] UKSC 22.
[55] [2018] IESC 43.
[56] [2018] IESC 42.

appears to be such that the Lübeck Public Prosecutor is institutionally subject ultimately albeit indirectly to a direction or instruction of the executive. The Supreme Court doubts that the principles stated by the Court of Justice in Poltorak and the other decisions can be met by such a public prosecutor or that independence can be determined by reason of the absence of any direction or instruction given by the executive in relation to the particular EAW issued in this case." (Emphasis added)

5.19 It should be noted that the question of independence arises in the ***Dunauskis*** case not in a fair trial context, but in the context of how independent of the Executive a public prosecutor needs to be in order to be seen as a valid judicial authority for the purpose of issuing European Arrest Warrants. It is open to question whether a different standard of independence might be required in a fair trial context. If it is the case that even a theoretical lack of independence is unacceptable, then arguably it should not be difficult for any person whose surrender is sought for prosecution in Poland to show that they are directly affected by the breach of the rule of law regarding the independence of the judiciary such that their surrender should be refused.

5.20 Also relevant on this point is the judgment of the Grand Chamber of the ECtHR in ***Morice v. France***[57], where the ECtHR commented as follows:

"75. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see Micallef, *cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see* Kyprianou, *cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see* Pullar v. the United Kingdom, *10 June 1996, § 32, Reports of Judgments and Decisions 1996-III).*

76. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her

[57] Application no. 29369/10, Grand Chamber Judgment of 23 April 2015.

impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see Micallef, *cited above, § 96).*

77. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings (ibid., § 97). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see Pullar, *cited above, § 38).*

78. In this connection even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done" *(see* De Cubber, *cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see* Castillo Algar v. Spain, *28 October 1998, § 45, Reports 1998-VIII, and* Micallef, *cited above, § 98)."*

6 CONCLUSION

6.1 In light of its non-partisan role as *amicus curiae*, the Commission wishes to emphasise that it sees its role as being of assistance to the Court rather than as contending for a particular outcome on the particular facts of this case, and the Commission remains available to provide such further assistance as the Court may request.

Siobhan Phelan SC
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9th October 2018

On behalf of the Irish Human Rights and Equality Commission, acting as Amicus Curiae

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