



**THE SUPREME COURT**

Supreme Court Record No.: S:AP:IE:2018:000181

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

**IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003**

**Between:**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**Applicant/Respondent**

**and**

**ARTUR CELMER**

**Respondent/Appellant**

**and**

**THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

**Amicus Curiae**

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**LEGAL SUBMISSIONS OF THE AMICUS CURIAE**

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## A. INTRODUCTION

1. The Irish Human Rights and Equality Commission (hereafter “the Commission”), in its role as *amicus curiae*, seeks to focus on the *ratio* of the judgment of the Court of Justice of the European Union (hereafter the “CJEU”) in the *Minister for Justice and Equality v. LM*<sup>1</sup> (hereafter “*LM*”). In particular, the Commission addresses whether, where a plea is raised in a European Arrest Warrant (“EAW”) that there is a risk of a breach of the right to an independent and impartial tribunal, there is greater or, different, protection afforded by Article 47(2) of the Charter of Fundamental Rights of the European Union (hereafter “the Charter”) than there is in respect of similar rights provided for by Article 6(1) of the European Convention on Human Rights (hereafter “the ECHR”). This is an issue which it is considered arises within the confines of the specific question certified for appeal by the Learned High Court Judge<sup>2</sup>. Accordingly, additional issues arising concerning the scope of the appeal do not form part of the Commission's submissions herein<sup>3</sup>.
2. The Charter and the ECHR have evolved and apply to two very different legal frameworks. Thus, the Commission suggests that an acknowledged correspondence by the CJEU in its judgment in *LM* between the right to a fair trial in Article 6(1) of the ECHR with Article 47(2) of the Charter, does not necessarily mean (as the Learned High Court Judge appears to have concluded<sup>4</sup>) that the CJEU accepts that the provisions should be interpreted as having the same legal effect.
3. The Learned High Court Judge’s interpretation of the legal threshold as set out in *LM* derives from the “*flagrancy test*” as developed by the European Court of Human Rights (hereafter “the ECtHR”). In this respect the Learned High Court Judge interpreted *LM* as meaning that even where there is an established absence of judicial independence in the Courts before which Mr.

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<sup>1</sup> ECLI:EU:C:2018:586, Case C-216/18, 25 July 2018.

<sup>2</sup> Donnelly J certified an appeal, in the present case pursuant to section 16(11) of the European Arrest Warrant Act 2003 on 28 November 2018, *The Minister for Justice and Equality v Artur Celmer* (No.6) [2018] IEHC 687 at paragraph 37.

<sup>3</sup> It appears from the submissions of the Appellant, filed on the 12<sup>th</sup> April 2019, that the Appellant challenges the surrender Order of the High Court on a number of grounds, not necessarily limited to the issues arising from the appeal question certified by the High Court, and the Commission understands that the Minister may take issue with the scope of the appeal proposed by the Appellant.

<sup>4</sup> See *the Minister for Justice and Equality v Celmer* (No. 5) [2018] IEHC 639 (hereafter “*Celmer*”) at paragraph 22. This position thereafter forms the basis for the approach the Learned High Court Judge takes in carrying out the second stage assessment (precise and specific assessment of the risks for the individual) in *Celmer* mandated by *LM*.

Celmer will be tried, this is not a breach of the essence of his rights protected under Article 47(2) that would preclude his return to Poland, because other elements of fair trial rights are present. However, it does not seem to the Commission that such proposition flows inexorably or, clearly from the reasoning of the CJEU in its ruling in *LM*.

4. The Commission are put on enquiry as to whether the conclusion reached by the Learned High Court Judge could have been the position of the CJEU. The Commission submits that this position is inconsistent with the terms of the decision in *LM* and the lengths to which the CJEU went to set out in detail how judicial independence and the rule of law provide the basis for mutual trust and co-operation between EU Member States. Given the prominence accorded to these factors in *LM*, it is reasonable to conclude that they have the potential to be significant in determining the scope and ambit of the protection of the right to an independent trial in EU law, specifically in the EAW context, in comparison with the corresponding right protected under the ECHR. This is because the features of the EU legal landscape identified with such great care in *LM* are not present, or at least not present in the same way, for Member States of the Council of Europe adhering to the ECHR. Accordingly, there are apparent differences between the scope and field of application of the Charter in respect of EU functions and the ECHR within the Member States of the Council of Europe. Hence, the Commission considers that a real issue arises as to whether it can be correct to conclude that there is no difference in the protection afforded by Article 6(1) of the ECHR and Article 47(2) of the Charter.

## **B. PRIMACY OF EU LAW**

5. The surrender of an individual pursuant to an EAW is a matter governed by EU law, that has been given effect by domestic law. In this respect, the *European Arrest Warrant Act 2003* gives effect to Council Framework Decision 2002/584/JHA (hereafter “the Framework Decisions”). Recital (6) of the Framework Decision describes the EAW system as “*the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation*”. Article 51(1) of the Charter provides that it applies where Member States are implementing EU law. Accordingly, the Charter can be invoked by respondents in EAW proceedings.<sup>5</sup>

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<sup>5</sup>See for example paragraph 69 of the judgment of O'Donnell J. in *MJE v. Balmer [2017] 3 IR 562*, where he stated: “Furthermore, the fair trial guaranteed by Article 47 of the Charter of the European Union might be considered to extend to the process both in the executing state and in the trial state”, and paragraph 84 of the judgment of the CJEU in *Aranyosi*

6. The primacy of EU law is well settled, and was most recently confirmed by the CJEU in *The Minister for Justice and Equality, Commissioner of An Garda Síochána v. Workplace Relations Commission*.<sup>6</sup> In this case the CJEU reaffirmed the primacy of EU law stating that national courts must, when applying provisions of EU law, give full effect to those provisions, and if necessary dis-apply national law where it conflicts with EU law.<sup>7</sup> Accordingly, for the purposes of the present case, it is submitted that the primary consideration for this Court is the CJEU judgment in *LM*, which sets out the test to be applied in establishing whether the breach of Article 47(2) could prohibit surrender under an EAW (at paragraphs 47-60); and the appropriate standard and burden of proof and method of assessment required when applying said test (at paragraphs 61-78).
7. The status of the Charter in the context of EAW proceedings can be contrasted with that of the ECHR. The ECHR, and the caselaw of the ECtHR, which interprets it, has provided very significant guidance to Irish courts in a broad range of areas, and the *European Convention on Human Rights Act 2003* (hereafter “the 2003 Act”) makes specific provision for the role of the ECHR in Irish law. However, as has been stressed on a number of occasions, the effect of the ECHR and of the jurisprudence of the ECtHR is necessarily limited, and it certainly does not have the same status as EU law and the caselaw of the CJEU. In *DPP v. Donnelly*<sup>8</sup>, O’Donnell J. made the following comments in the Court of Criminal Appeal:

*“22...As this Court and other superior courts have made clear on a number of occasions, the European Convention on Human Rights is not part of Irish law by its own force. As Murray C J. observed at p.252-253 in J. McD. V. P. L. [2010] 2 I.R. 199, the E.C.H.R. becomes part of domestic law only in accordance with the terms of the European Convention of Human Rights Act:*

*'The role of the Convention as an interpretative tool in the interpretation of where our*

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*& Caldaru* ECLI:EU:C:2016:198 (C-404/15 and C-659/15 PPU): “*In that regard, it must be stated that compliance with Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, is binding, as is stated in Article 51(1) of the Charter, on the Member States and, consequently, on their courts, where they are implementing EU law, which is the case when the issuing judicial authority and the executing judicial authority are applying the provisions of national law adopted to transpose the Framework Decision*” (emphasis added).

<sup>6</sup> ECLI:EU:C:2018:979, Case C-378/17, 4<sup>th</sup> December 2018.

<sup>7</sup> At paragraph 50.

<sup>8</sup> [2012] IECCA 78, at paragraph 22.



*law stands from a statute, not the Convention itself, and can only be used within the ambit of the Act of 2003.'*

*It is always a threshold question therefore as to how the Act applies in any case. As J. McD. v. P.L. makes perfectly clear, it is a fallacy - even if a common one - to regard the provisions of the Convention as equivalent to directly effective provisions of European Union law."*

### **C. THE RELATIONSHIP BETWEEN THE CHARTER AND THE ECHR**

8. Whilst, it is submitted, that the Charter is the primary source of rights in an EAW context,<sup>9</sup> it is not the case that where the Charter applies, the ECHR and jurisprudence of the ECtHR should be ignored. The ECHR and its interpretation by the ECtHR has greatly informed the development of EU law and indeed is expressly referred to at Article 52(3) of the Charter:

*"3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." (Emphasis added)*

9. The CJEU discussed the relationship between EU law and the ECHR as follows in its judgment in *Schindler Holding Ltd and Others v European Commission*<sup>10</sup>:

*"32 Furthermore, whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law*

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<sup>9</sup> As this discussion concerns the potential differences in protection provided by Article 47(2) of the Charter and Article 6(1) of the ECHR, the Commission has not focussed on the corresponding protection provided by the Constitution.

<sup>10</sup> ECLI:EU:C:2013:522, Case C-501/11 P, 18th July 2013, at paragraph 32.

(see Case C-571/10 Kamberaj [2012] ECR, paragraph 62, and Case C-617/10 Åkerberg Fransson [2013] ECR, paragraph 44).”

10. Notwithstanding the significant influence of the ECHR on EU law, in light of the last sentence of Article 52(3) of the Charter (underlined above), it is submitted that there can be no presumption that a right provided for by the Charter is coterminous in its scope and effect with the corresponding right provided by the ECHR.
11. There is no doubt that there is a strong connection between fair trial rights provided for by Article 6(1) of the ECHR and by Article 47(2) of the Charter, however they do not share the same field of application, and in cases where the Charter applies, Article 47(2) has primacy.<sup>11</sup> In the context of Article 47(2) of the Charter and Article 6(1) of the ECHR, it is clear that the scope of *application* of the protection provided by the Charter is greater than that provided by the ECHR. In this regard, unlike Article 6(1), Article 47(2) is not limited to the context of the determination of civil rights and obligations or of any criminal charge.<sup>12</sup> Moreover, it is set out below that there is a rational basis, in light of the CJEU judgment in *LM*, that the scope of the *substance* of the protection provided by Article 47(2) of the Charter, is also greater than that provided by Article 6(1) of the ECHR

#### **D. THE CORRECT LEGAL TEST: “A FLAGRANT DENIAL OF JUSTICE” OR ARTICLE 52(1) OF THE CHARTER: “RESPECT FOR THE ESSENCE OF THE RIGHT”**

12. In an extradition/extraterritorial context, a significant limitation has been placed on the protection provided by Article 6(1) of the ECHR, with a high threshold of substantial grounds for believing there to be a real risk of a “*flagrant denial of justice*” required before Article 6(1)

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<sup>11</sup> In *Europese Gemeenschap v Otis NV and Others* (ECLI:EU:C:2012:684, Case C-199/11, 6 November 2012, the CJEU commented at paragraph 47: “Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47 (Case C-386/10 P Chalkor v. Commission [2011] ECR I-13085, paragraph 51)”. Furthermore, it is the Commission’s submission that the fact that Article 47 secures in EU law the protection afforded by Article 6(1) does not equate to a finding that Article 47(2) of the Charter provides no additional protection beyond Article 6(1) of the ECHR.

<sup>12</sup>See further the discussion of Article 47 in the Opinion of Advocate General Wathelet in *Berlioz Investment Fund SA v Directeur de l’administration des Contributions directes*, ECLI:EU:C:2017:2, Case C-682/15, 10 January 2017. See also the Text of Explanatory Note on Article 47 which states, that unlike Article 6(1) which is confined to the determination of civil rights and obligations or any criminal charge against him, Union law is not so confined and that this “*is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, ‘Les Verts’ v European Parliament (judgment of 23 April 1986, [1986] ECR 1339)*”.

will operate to prevent extradition. This phrase has its origins in *Soering v. UK*<sup>13</sup>, and in *Othman (Abu Qatada) v. United Kingdom*,<sup>14</sup> the ECtHR stressed that the “*flagrant denial of justice*” test is a stringent one:

“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.”

13. The ECtHR’s publication *Guide on Article 6 of the European Convention of Human Rights – Right to a Fair Trial (Criminal Limb)*<sup>15</sup>, shows some of the reasoning behind the differing effect of Article 6 of the ECHR in an extradition context when compared with a domestic context:

“VII. Extra-territorial effect of Article 6

510. The Convention does not require the Contracting Parties to impose its standards on third States or territories (*Drozdz and Janousek v. France and Spain*, § 110). As a rule, the Contracting Parties are not obliged to verify whether a trial to be held in a third State following extradition, for example, would be compatible with all the requirements of Article 6.

Flagrant denial of justice

511. According to the Court’s case-law, however, an issue might exceptionally arise under Article 6 as a result of an extradition or expulsion decision in circumstances where the individual would risk suffering a *flagrant denial of a fair trial*, i.e. a *flagrant denial of justice*, in the requesting country.”

<sup>13</sup> Application No. 14038/88, 7 July 1989, at paragraph 113.

<sup>14</sup> Application No. 8139/09, 17 January 2012, at paragraph 260.

<sup>15</sup> Updated 31 December 2018, at paragraphs 510 – 511, accessible at: [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_criminal\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf).

14. Accordingly, it would appear that the “*flagrancy test*” developed by ECHR case-law is based on the fact the ECHR has territorial limitations. These limitations arise from Article 1 of the ECHR which states; “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” (emphasis added) As such the “*flagrancy test*” is limited by the extraterritorial application of the ECHR and by the fact that there are very significant variations between legal systems the world over and third party countries cannot be held to ECHR standards. This fact is explicitly recognised in ***Orobator r v. Governor of HMP Holloway & Anor*** [2010] EWHC 58 (relied on by the Minister during the High Court proceedings) when the Courts states:

*“Regrettably, there are many states throughout the world where judges are less independent and less impartial than they are in the UK and other democratic societies which are fully committed to the rule of law. But even where the judiciary are not fully independent and impartial, it is possible for a trial to take place which does not involve the complete nullification or destruction of the very essence of the right guaranteed by Art. 6.”*

15. Also, the Irish constitutional position is akin to the position under the ECHR. In the EAW case of ***MJE v. Balmer***,<sup>16</sup> O'Donnell J. discussed the applicability of Irish constitutional fair trial principles in an extraterritorial context:

*“[43] In my view, these are the reasons why it can be said that the Irish Constitution does not, in general, apply abroad. It also explains why the Brennan test applies to surrender. Irish constitutional law (and therefore s.37(1)(b) of the EAW Act) distinguishes between events occurring abroad and those occurring here, not merely because they do occur abroad, and therefore, are observed rather than controlled by Irish law: it is also, and more importantly, because, particularly in the field of criminal law, they are controlled by the law of a foreign sovereign state. In this case, the execution of a sentence lawfully imposed, the trial of an offence contrary to law, and the enactment of laws providing for definitions of offences, punishments and administration of sentences, are all fundamental and central attributes of*

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<sup>16</sup>[2017] 3 IR 562, at paragraphs 43 – 44.

*sovereignty....[44]...This is why, in my view, it is correct to speak of s.37 of the EAW Act as applying only to matters of 'egregious' breach of fundamental principles of the Constitution or when something is so proximate a consequence of the court's order and so offensive to the Constitution as to require a refusal of surrender or return."*

16. While neither the ECHR nor the Constitution requires the imposition of these standards on third party States, the same cannot be said for EU law. The EU system functions on the basis that there are required minimum standards that will be enforced throughout the EU in the field of application of EU law. In this respect, it bears emphasis that, by contrast, no equivalent limitation on the territorial impact of the Charter is established. Indeed, in an EAW context it would not make sense to limit the effect of Charter rights simply on the basis that borders may be crossed, as when viewed in a certain way, there is in fact no extraterritorial element.<sup>17</sup>
17. The Charter has direct effect throughout the territory of the European Union, but crucially, only where EU law is being implemented. This latter condition means that Article 47(2) does not seek to micromanage the system of trial in any particular Member State, and it allows for an autonomous meaning under EU law to be given to the phrase "*fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*".
18. Differing constitutional and legislative provisions governing criminal trials exist throughout the Member States. The Irish constitutional right to a jury trial is often given as an example of a right the absence of which in the requesting state will not lead to a refusal of surrender. Where a person is present in a Member State and is being tried there, (generally speaking) EU law is not being implemented, and Article 47(2) will therefore not apply. Apart from mutual legal assistance procedures, which generally do not involve deprivation of liberty in the requested state, the only context in which a court of one Member State will have the opportunity to take a view on the criminal justice system of another Member State is when considering whether to surrender a person to a requesting Member State pursuant to a European Arrest Warrant.
19. In *LM*, the CJEU does not adopt the "*flagrant denial of justice*" language of the ECtHR, despite the Learned High Court Judge using that language in her questions to the CJEU in seeking to

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<sup>17</sup>Although the Framework Decision makes provision for onward extradition to third countries, this does not arise in the present case, and for the purposes of the present discussion only surrender between Member States is considered.



interpret section 37 of the 2003 Act. Insofar as a limitation might be seen as being imposed, the CJEU in *LM* uses the language of the “*essence*” of the right being breached. Under the heading “*Scope of guaranteed rights*”, Article 52(1) of the Charter provides as follows:

*“1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”* (emphasis added)

20. As discussed further below, the CJEU in *LM* found that the right to an independent tribunal forms part of the essence of the right to a fair trial. Also, it is recalled that in *LM*, the Advocate General’s opinion provides guidance with regard to the source of the word “*essence*” in respect of EU law by reference to Article 52(1). At paragraph 76 the Advocate General refers to Article 52(1) of the Charter which allows for limitations to be placed on rights, but that such limitations must be in accordance with the law and “respect the *essence* of those rights and freedom”. Although, and in contrast to the CJEU, he continues by applying the “*flagrancy test*”, Article 52(1) is certainly identified in the terms of his Opinion as the source of the word “*essence*” in context of *LM*, rather than the Article 6 case-law.

21. In *Mindo Srl v. the European Commission*<sup>18</sup>, the CJEU discussed limitations on the exercise of a right under Article 6(1) of the ECHR and Article 47 of the Charter (in that case the right of access to a court), and the reference to avoiding the impairment of the essence of the right appears relevant to considerations in the present case:

*“97 As regards, second, the applicant’s argument that its interest in bringing proceedings results from its fundamental right of access to a court, which it derives from Article 6 of the ECHR, affirmed by Article 47 of the Charter of Fundamental Rights, it should be borne in mind, first of all, that the interest in bringing proceedings is an essential and fundamental prerequisite for any legal proceedings (see paragraph 80 above). Moreover, it should be noted that the ‘right to a court’, of which the right of access to a court is one aspect, is not absolute and is subject to implicit limitations, in*

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<sup>18</sup>ECLI:EU:T:2011:561, Case Case T-19/06.



*particular as regards the conditions of admissibility of an action. Those limitations must not however restrict a litigant's access in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, to that effect and by analogy, order in Case C-73/10 P Internationale Fruchtimport Gesellschaft Weichert v Commission [2010] ECR I-0000, paragraph 53)...*

99 *While the requirement of an interest in bringing proceedings may appear to be a limitation on the right to a court, that condition clearly does not constitute an impairment to the very essence of that right, since the requirement that the applicant has, at the time the action is brought and until the final judgment, an interest in bringing proceedings against a measure allegedly adversely affecting him pursues a legitimate aim which is ultimately to prevent, in the interest of the proper administration of justice, the Courts of the European Union from having to deal with purely hypothetical questions, the answer to which is not capable of giving rise to legal consequences or, as in the present case, of procuring an advantage for the applicant.”*

22. It can be noted that the “essence” terminology is also used by the European Court of Human Rights as in ***Waite and Kennedy v. Germany***<sup>19</sup>

*“59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see the Osman judgment cited above, p. 3169, § 147, and the recapitulation of the relevant*

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<sup>19</sup> Application No. 26083/94, 18 February 1999, at paragraph 59.

*principles in the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65).*”

23. Therefore, in light of the above observations and the primacy of EU law in these proceeding, it is suggested that it is more appropriate in the EAW context (and consistent with *LM*) to apply the Article 52(1) meaning of “*essence*” rather than the “*flagrancy test*” which is based on a very different concept. If this is indeed the meaning, then it would appear that restricting protection of the right to an independent and impartial tribunal to circumstances where other aspects of the right to fair trial are also shown to be breached would not be permitted by Article 52(1) of the Charter, as such a limitation would not respect the essence of the right to a fair trial, namely the right to an independent and impartial tribunal, as interpreted by the CJEU in *LM*. The judgment in *LM*, in its terms, is clearly based on the fact that the Framework Decision is founded on the principle that decisions relating to EAWs are attended by all the guarantees appropriate for judicial decisions including the guarantee of independence. The CJEU expressly states:

*“the high level of trust between Members States on which the European arrest warrant mechanism is based is thus founded on the premis[e] that the criminal courts of the other Member States ...meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts”.*

24. Based on this consideration the CJEU concludes as follows:-

*“it must, accordingly, be held that the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect that European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584”.*

25. It would have been open to the CJEU to adopt the language of the ECHR in requiring a “*flagrant denial*” of a fair trial (a la *Soering*) in the same terms that the High Court put the question to the CJEU. However, it chose not to, preferring to adopt a test predicated on

establishing a breach of the essence of the right, having in the course of its judgment identified the right to an independent tribunal as being “*of the essence of his fundamental right to a fair trial.*”

26. The respective approaches of the ECtHR (in deciding when a breach of Article 6 of the ECHR will operate to preclude surrender) and of the CJEU (when deciding a breach Article 47(2) within the field of application of EU law) share a common feature insofar as both provisions are considered to protect the right to a fair trial. However, it is clear from *LM*, that the CJEU sees the right to an independent tribunal as the essence of the right to a fair trial guaranteed under Article 47(2), whereas the ECtHR has found that a lack of independence and impartiality on its own will not necessarily amount to a flagrant denial of justice but the circumstances must be found to be so serious as to destroy the fairness of the trial itself (see *Al Nashiri v. Poland*<sup>20</sup> and *Al Nashiri v. Romania*<sup>21</sup>).

27. The position of the CJEU, as set out in *LM*, does not create a requirement on the party who is the subject of the warrant to demonstrate that the lack of independence is “*so serious that it destroys the fairness of the trial*”. Instead, the legal test as set out in *LM* is informed by the distinctive perspective and normative framework of the EU, which specifically concerns the right to an independent tribunal itself. In this respect it is of note that it does not appear to extend to fair trial rights generally (such as those referred to under Article 47(1), (3), 48 or even those additional elements to Article 47(2) itself, *viz.* the right to a fair and public hearing within a reasonable time and the right to legal aid)

#### **D. GREATER PROTECTION FROM THE CHARTER THAN FROM THE ECHR**

28. Arguably, a consequence of the approach discussed above, where limitations cannot be placed on the exercise of fair trial rights if the right to an independent and impartial tribunal is concerned, is that Article 47(2) of the Charter must be seen as affording greater protection to the right to an independent and impartial tribunal than Article 6(1) of the ECHR, in the specific context of consideration of an EAW request. It is submitted that there is nothing wrong in principle with this. As addressed in this submission, although the rights guaranteed under

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<sup>20</sup> Application No. 28761/11, 24 July 2014, at paragraph 563.

<sup>21</sup> Application No. 33234/12, 31 May 2018, at paragraph 717.

Article 6(1) of the ECHR are similar to those guaranteed under Article 47(2), this does not mean that they are the same.

29. As noted above, the second sentence of Article 52(3) of the Charter specifically envisages a situation where the Charter gives more extensive protection than the ECHR in respect of a particular right. It is important to point out that the CJEU has endorsed the view that the ECHR must be a floor to Charter rights (Joined cases *Volker and Schecke* (C-92/09 and C-93/09)). Furthermore, different Advocates General of the CJEU have addressed the second sentence of Article 52(3) on several occasions and have interpreted Article 52(3) to mean that the Charter rights can afford greater protection, than the comparable ECHR rights.<sup>22</sup>

#### E. THE *RATIO* OF *LM* – JUDICIAL INDEPENDENCE AS THE BEDROCK OF EU LAW

30. As referenced above it is submitted that the *ratio* of *LM* indicates that the *substance* of Article 47(2) of the Charter in the context of EU law, cannot simply be equated to Article 6(1) of the ECHR. A significant feature of the judgment in *LM* is the indication that the requirement of judicial independence arises not only in the context of the right granted by Article 47(2) of the Charter but is crucial to the operation of the rule of law within the EU. The CJEU held that without judicial independence, all of the other rights granted by EU law cannot be protected. The CJEU stated as follows at paragraphs 48 and 49:

*“48 In that regard, it must be pointed out that the requirement of judicial independence*

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<sup>22</sup>See for example, *Solvay SA v European Commission* (Advocate General Kokott) ECLI:EU:C:2011:257, Case C-110/10 P, 14 April 2011, at paragraph 101, *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu* (Advocate General Sharpston) ECLI:EU:C:2012:648, Case C-396/11, 18 October 2012, at paragraph 80 and *Criminal proceedings against Stefano Melloni* (Advocate General Bot) ECLI:EU:C:2012:600, Case C-399/11, 2 October 2012, at paragraph 74. In the context of whether the Charter provides greater fair trial rights protection than the ECHR in an extradition situation, it should be noted that the CJEU in its judgment in *Radu* did not adopt the following approach recommended by Advocate General Sharpston in her Opinion in that case, at paragraphs 82-83 (which was unsuccessfully relied on by the applicants in Lis): “82...I take issue, however, with the case-law of the Court of Human Rights in two respects. First, I do not feel that I can recommend to this Court that it accept the test that the breach in question should be ‘flagrant’. Such a concept appears to me to be too nebulous to be interpreted consistently throughout the Union. It has been suggested that the breach must be so fundamental as to amount to a complete denial or nullification of the right to a fair trial. (54) 83. However, such a test – assuming always that it can be clearly understood – seems to me unduly stringent. Construed in one way, it would require that every aspect of the trial process be unfair. But a trial that is only partly fair cannot be guaranteed to ensure that justice is done. I suggest that the appropriate criterion should rather be that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy its fairness. (55)” The differing approaches by the Advocate General and the CJEU in *Radu* were noted by Edwards J. at page 48 of his judgment in *MJELR v. RPG* [2013] IEHC 54. However, *Radu* of course pre-dated *LM*.

*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.*

*49 Indeed, the European Union is a union based on the rule of law in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act (judgment of 27 February 2018, Associação Sindical dos Juizes Portugueses, C-64/16, EU:C:2018:117, paragraph 31 and the case-law cited).”*

31. It is submitted that the CJEU views the legal order of the EU as being built on the bedrock of judicial independence. Judicial independence, viewed in this way, is a concept that transcends fair trial rights and that has a central function in the operation of the EU. The CJEU in *LM* at paragraphs 59 and 78 of its judgment refer to “*a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial*” (emphasis added). Variations of this language are found throughout the judgment.<sup>23</sup>
32. It is apparent from the wording of the judgment that a breach of the essence of the fundamental right to a trial would be a necessary consequence of a breach of the fundamental right to an independent tribunal. The CJEU found at paragraph 48 that “*the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial*”. Although this perhaps implies that there are other requirements which also form part of the essence of the right to a fair trial, it is submitted that it does not follow from this that one can remove this core part of the essence of the right without leaving the right without its essence. The splitting of the essence of something into different parts is conceptually difficult. However, it is respectfully submitted that logically, if a breach of the right to an independent tribunal necessarily causes a breach of the essence of the right to a fair trial, then the test is satisfied where it can be shown that there are substantial grounds for believing that the requested person will run a risk of a breach of the right to an independent tribunal.
33. It is therefore respectfully submitted that the approach taken by the learned High Court judge

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<sup>23</sup> At paragraphs 48, 59, 60, 63, 68, 72,73, 75 and 78.

in her judgment herein of the 19<sup>th</sup> November 2018 (ordering the surrender of the Appellant) is problematic. Having found there to be “*systemic and generalised deficiencies in the independence of the courts*” in Poland, Donnelly J. went to conclude as follows:

“105. All the other indices of fair trial rights in Poland remain intact. The nature of the systemic deficiencies in this case, which on the respondent’s own evidence amounts to a risk that an individual judge will not grant him his rights to a fair trial or that there will be indirect pressure on individual judges not to respect his right to a fair trial, are not in themselves sufficient to demonstrate that there is a breach of the essence of his fundamental right to a fair trial.”<sup>24</sup> (emphasis added)

34. In circumstances where the real *ratio* of the judgment of the CJEU in **LM** is to situate judicial independence at the heart of or essential to the fair trial rights guaranteed under Article 47(2) of the Charter, the departure of the CJEU from the language of “*flagrancy*” and its focus instead on the language of “*the essence of the right*” is more readily understood as pertaining to the nature of the right protected as opposed to the evidential standard required to establish breach. From the foregoing it is respectfully submitted that, as a matter of logic, it must follow that, if there is an absence of judicial independence, then the essence of the Article 47(2) right has been breached or, compromised and surrender is prohibited. It bears emphasis in this regard that the CJEU judgment in **LM** is not considering fair trial rights generally but is specifically considering the right to an independent tribunal. In this respect the CJEU, consistently references “*essence*” to describe the importance of right to an independent tribunal as being the essence of the fundamental right to a fair trial. This is referenced no less than nine times in the **LM** judgments.<sup>25</sup>

35. Based on the foregoing, if judicial independence is absent, it is difficult to see what real benefit a presumption of innocence or, a right to be heard can give. Accordingly, the presence of all of the other fair trial rights cannot be sufficient to validate a trial by a court which is not independent, having regard to the emphasis placed in **LM** on the right to an independent tribunal as being the essence of the fundamental right to a fair trial.

36. The High Court in the present proceedings found that trial by a court that is not independent

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<sup>24</sup> *Supra* fn. 4, at paragraph 104.

<sup>25</sup> At paragraphs 48, 59, 60, 63, 68, 72,73, 75 and 78.



does not in itself amount to a flagrant breach of the right to a fair trial, even where it is established that the respondent is personally at risk of the breach of his individual right to an independent court, because something more than the breach of the respondent's right to an independent court was required to meet the exacting test as to when surrender would be refused. However, the Commission respectfully submits that it is difficult to reconcile this approach with the guidance of the CJEU in *LM* to the effect that (a) the right to a trial before an independent court forms part of the essence of the right to a fair trial and (b) the existence of substantial grounds for believing there to be a real risk of a breach of the essence of the right to a fair trial precludes surrender. After all, the two-part evidential test identified by the CJEU as applied in *LM* is predicated on the premise that the assessment must have regard to the standard of protection afforded to Article 47(2). In this context the CJEU expressly sets out the core indicators for the independence of the judiciary (at paragraphs 62-67) and states that, under the two part test identified in *LM*, once the Court makes a finding that there is a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic and generalised deficiencies concerning the judiciary it must, as a second step assess, "specifically and precisely" whether, the requested person will run that risk. In respect of the second step in *LM*, the CJEU provides further guidance as to how the Court should carry out this assessment as follows;

*"In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's court, to which the material available to it attests are liable to have impact at the level of the State's court with jurisdiction over the proceeding to which the requested person will be subject.*

*If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of his fundamental rights to an independent tribunal and therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as the nature of the offence for which he is being prosecuted and the factual context that form the basis of the*

*European arrest warrant.*<sup>26</sup>

37. It is respectfully submitted that to satisfy the second stage of the two-stage test in *LM*, the Appellant is not necessarily required to establish that elements of his fair trial rights, in addition to the independence of the judiciary, are compromised such that there is a flagrant breach of his fair trial rights because of the cumulative nature of the breach of component elements of that right. Rather, it is submitted that the Appellant must show that the systemic issues identified in relation to the lack of independence of the judiciary present a real risk of affecting him personally. After all, the CJEU could not have made it clearer that it considers that the right to an independent trial is “*of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47.*”<sup>27</sup> It being the essence of the right, its breach once established as a real risk in the individual case, would appear logically to be sufficient to preclude surrender in the field of operation of EU law.

#### F. RECENT CASELAW

38. The Commission notes that there have been some relevant developments since the surrender of the Appellant was ordered by the High Court on the 19<sup>th</sup> November 2018.

39. The judgment of a Divisional High Court of England and Wales in *Lis, Lange and Chimielewski v Poland (No 1)*<sup>28</sup> was considered by Donnelly J. in her judgment in the High Court herein. It can be noted that there has been a further judgment delivered recently in the same proceedings, *Pawel Lis v Regional Court in Warsaw, Poland*,<sup>29</sup> where Lord Justice Irwin found as follows:

*“14 For myself I do not exclude the possibility that in an appropriate case, the evidence presented could establish a risk of a flagrant breach of Article 6 in respect of all suspects brought before a given court. I simply reject the proposition that the evidence does so here. Ms Malcolm QC for the Respondent makes the same point briefly and clearly. Indeed, it seems to me, that the evidence before us points in the opposite*

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<sup>26</sup> At paragraphs 74 - 75.

<sup>27</sup> At paragraph 59.

<sup>28</sup>[2018] EWHC 2848 (Admin).

<sup>29</sup>[2019] EWHC 674 (Admin) at paragraph 14.

*direction. The critical disputes between the judiciary and the Government, says Judge Gaciarek, have not affected the standards of justice for criminal defendants.”*

40. The Commission respectfully agrees with the proposition that a systemic and generalised deficiency in the independence of the courts of a requesting State can, if sufficiently serious, be enough to prohibit the surrender of all requested persons who are sought for prosecution before those courts. This is not to say that an individualised assessment, specific and precise, would not have to be carried out in each case. The judgment of the CJEU in *LM* makes clear that this would still be necessary. However, it may be that this individualised assessment would give the same result in every case affected for as long as the identified generalised and systemic lack of judicial independence persists.

41. On the 30<sup>th</sup> April 2019, Advocate General Sánchez-Bordona delivered his Opinion in the joined cases of *The Minister for Justice and Equality v O.G. and P.I.*,<sup>30</sup> preliminary references from the Irish courts which concerned *inter alia* the question of whether public prosecutors in two of the German *Länder* who had issued the EAWs were sufficiently independent of the executive so as to be capable of being judicial authorities for the purposes of Article 6(1) of the Framework Decision. It is submitted that the following comments of the Advocate General in relation to the nature of independence are relevant in the context of the present case:

*“24. Independence is indeed the institutional feature characteristic of judicial authority in a State governed by the rule of law. It is a quality conferred on (and required by) courts so that they may adequately perform the specific function conferred on them, exclusively, by the State, in accordance with the principle of the separation of powers. It is an instrumental quality, secondary to the function which it serves, but essential to the existence of a genuine rule of law.”*

42. Also relevant is the even more recent judgment of the CJEU in *European Commission v. Republic of Poland*<sup>31</sup>, which involved the effect of a lack of independence in the judiciary of a Member State on the ability of that Member State to (in the words of Article 19(1) TEU) *“provide remedies sufficient to ensure effective legal protection in the fields covered by Union*

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<sup>30</sup> ECLI:EU:C:2019:337 Joined Cases C-508/18 and C-82/19 PPU, 30 April 2019.

<sup>31</sup> Case C-619/18, ECLI:EU:C:2019:531 – Grand Chamber, 24<sup>th</sup> Jun 2019

law”.

43. Although it is a matter for this Court to assess the up to date situation of the judiciary in Poland at the time it gives judgment herein, it is relevant that both the High Court and now also the CJEU (in *Commission v. Poland*) have made findings that the recent legislative changes affecting the judiciary in Poland constituted a breach of the rule of law. In *Commission v. Poland*, the problem envisaged was a risk of a lack of independence when giving effect to EU law for the purposes of the second sentence of Article 19(1) TEU. In the present case, the problem envisaged by the High Court was a lack of independence when trying a person who is available for trial only because of the implementation of EU law (i.e. through the execution of an EAW).
44. Paragraphs 43 to 58 of the judgment of the CJEU in *Commission v. Poland* place the requirement for independence in a peculiarly EU law context. It is of note that at paragraph 58 the CJEU expressly source this position from its judgment in *LM*:

*“That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to an effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and the values common to the Member States set out in Article 2 of the TEU, in particular the value of the rule of law, will be safeguarded (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, paragraphs 48 and 63).”*

Emphasis added

45. In this way the CJEU relies on its previous judgment in this case to emphasise that the concept of mutual trust depends on adherence to the rule of law throughout the EU. The Commission would observe that the concept of “flagrancy” does not assist where there is an established breach of the rule of law. Instead, the question that must be addressed is what level of trust can now be reposed in the independence of the judiciary in Poland? The Commission respectfully takes the view that it would be inappropriate to simply import the concept of “flagrancy” from the caselaw of the ECtHR and apply it to a situation where the independence of the judiciary is clearly the bedrock of the law of the EU.

46. The CJEU ruling in *Commission v. Poland* also makes clear that the independence of the judiciary forms part of the essence of the right to a fair trial. At paragraph 57 of *Commission v. Poland*, the CJEU describes the need to maintain the independence of the Polish Supreme Court as “essential”. The CJEU had used the same term at paragraph 55 of its judgment in *LM* to describe the need to maintain the independence of both issuing and executing judicial authorities “in the context of the European arrest warrant mechanism”. Further, at paragraph 58 the CJEU hold that a court’s independence, which is “inherent in the task of adjudication” forms part of the “essence of the right to effective judicial protection and the fundamental right to a fair trial”. It is of note that this is taken directly from *LM* (at paragraph 63). Taking the plain meaning of the language, it is difficult to see how the absence of something “essential” can be compensated for by the presence of other factors. However, this is effectively the approach taken by Donnelly J. at paragraph 105 of her judgment ordering surrender in the present case<sup>32</sup>, where, in circumstances where in the first stage of the test she had found an absence of independence on the part of the Polish judiciary amounting to a breach of the rule of law, she relied in the second stage of the test on the fact that “[a]ll the other indices of fair trial rights in Poland remain intact” to find that surrender could nonetheless be ordered.

## G. CONCLUSION

47. The Commission understands *LM* to be authority for the proposition that an established absence of judicial independence in the court that will try the respondent in the event of his surrender, *albeit* a systemic absence of judicial independence but one which places the respondent personally and individually at real risk, means that the essence of the Article 47(2) right has been breached/compromised and surrender is prohibited.

48. The Commission contends that the *LM* judgment clearly identifies the independence of the courts as the essence of the right to a fair trial in a manner which it is considered is capable of according more protection to the right to an independent tribunal under Article 47(2) than can be asserted on the basis of the Article 6(1) jurisprudence. However, it is accepted that the Learned Trial Judge does not share this view. The Learned Trial Judge’s decision is predicated

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<sup>32</sup> *MJE v. Celmer (No.5)* [2018] IEHC 639

on a view, which appears to be that the protection afforded by Charter rights is equivalent to the protection afforded by ECHR. Further, the Learned Trial Judge considers that if the CJEU had intended to depart from this well-established caselaw it would have said so. In this respect and notwithstanding the Commission's view that the CJEU set out a clear and considered legal test in *LM*, it is accepted that the CJEU does not expressly address the central question of whether Article 47(2) affords greater or, different, protection to the right to an independent tribunal than available under Article 6(1) of the ECHR. Thus, if this Court considers the potential difference in the two identified standards have a bearing on its decision in this appeal and, if there exists a doubt as to which standard applies, this would warrant this Court considering whether clarification is required from the CJEU by way of further preliminary reference.

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

**Siobhan Phelan SC**  
**Anthony Hanrahan BL**  
**Sinead Fitzpatrick, Solicitor**  
3<sup>rd</sup> May 2019  
(revised on 2<sup>nd</sup> July 2019)

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

*Word Count:* 9,0003