

IN THE SHERIFF COURT OF LoTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 37

R91/15

DECISION OF SHERIFF FRANK R CROWE

UNDER THE EXTRADITION ACT 2003

In the case of

THE CIRCUIT COURT OF WARSZAWA-PRAGA

against

PATRYK MICHAL MACIEJEC whose domicile of citation has been specified as an address
in Edinburgh

**Act: Richardson QC, Jajdelski, Crosbie; Solicitor for the Lord Advocate on behalf of the
Polish Authorities**

Alt: Claire Mitchell; good + Stewart

Edinburgh 25 April 2019

Introduction

[1] This is one of 2 "test cases"(the other being Kamil Charyszyn E10/18) which it was agreed would be dealt with to hear evidence and determine Article 6 challenges which were lodged in Polish extradition proceedings in the wake of concerns which were raised about new laws and procedures brought in by the Polish Government following their general election victory in 2015. This case was selected as it involves a number of different offences, some of the charges are at the accusation stage, while there are multiple conviction cases with the prospect of the requested person serving consecutive sentences.

[2] By the summer of 2018 and in the wake of "grave concerns" previously expressed in the report of 11 December 2017 by the Venice Commission, the body responsible for monitoring the rule of law for the European Union, that political changes in Poland put "at

serious risk the independence of all parts of the Polish Judiciary", *The Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland* published by the European Commission on 20 December 2017 ("the Reasoned Proposal") and the decision by Mrs Justice Donnelly in the High Court of Ireland in *Minister of Justice & Equality v Celmer* [2018] IEHC 119 (Celmer No 1) which resulted in a reference to the Grand Chamber of the Court of Justice of the European Union on 25 July 2018, discussions took place among parties how to deal with this and all other Polish cases which may be affected by these developments.

Chronology

[3] Mr Maciejec faced a provisional arrest warrant and 3 conviction warrants within the European Arrest Warrant (EAW). The accusation matter (Case 1.1 in section C of the EAW) arises from the District Court in Otwock and a warrant issued on 5 April 2013 (File No II K 86/12) and involves an allegation of driving a lorry on 29 December 2011 while disqualified, having been banned from driving on 29 August 2011.

[4] Case 1.3.1 concerns a charge of housebreaking committed on the night of 23/24 May 2009 in the company of a minor whereby a shop was broken into and goods worth PLN 12,000 (£2,400) were stolen. This is case No Ko 557/12 (also known as II K 649/09) where Mr Maciejec was convicted on 1 April 2010 and a warrant was issued on 25 May 2010. A sentence of 1 year 5 months and 25 days' imprisonment remains outstanding.

[5] Case 1.3.2. involved 17 charges of theft from a Polish telecommunications company, while in the course of employment, at various premises in Otwock while acting with another or others. The charges date from 17 June to 14 August 2010 and involve large quantities of electrical cable worth PLN 16,596.82 (approximately £3,300). In addition there is another

charge of theft of power tools dating from 28 or 29 June 2010, the goods totalling PLN 3,000 (roughly £600). Finally there is a charge of driving an estate car on 16 August 2010 with excess alcohol 72 microgrammes in 100 millilitres of his breath. Conviction on all matters was pronounced at the District Court in Otwock on 29 August 2011 and on 5 October 2012 execution of the sentence of 2 years' imprisonment was ordered, with conditional suspension of its execution (Case Ko 754/12).

[6] Case 1.3.3 is another charge of driving with excess alcohol. This offence occurred on 4 January 2011 where Mr Maciejec drove a car while there was 85 microgrammes of alcohol in 100 millilitres of his breath. Conviction occurred on 6 February 2012 at Otwock District Court and on 22 February 2013 a warrant was issued to serve the sentence of 1 year's imprisonment, with conditional suspension on its execution (Case Ko 44/13).

[7] The EAW was signed by Circuit Court judge Piotr Goclowski in Warsaw on 23 April 2015 and certified by the UK National Crime Agency on 14 May 2016.

[8] Mr Maciejec was arrested on the EAW and first appeared at Edinburgh Sheriff Court on 4 August 2015 and remanded in custody until 3 September 2015 when he was granted bail. Matters were delayed initially as Mr Maciejec had a domestic case for which trial had been set for 29 April 2016. Bail was revoked on 4 April 2016 following application being made by the Lord Advocate as Mr Maciejec had not been signing on twice a week at Corstorphine Police Station in terms of his bail order. Bail was however granted on 7 April 2016 when the case called for a further Preliminary Hearing. However at the next hearing on 2 June 2016 Mr Maciejec failed to appear and a warrant was granted which was extant until he was arrested on 2 October 2017. Mr Maciejec was bailed on 30 November 2017 and has been at liberty since. He claimed at the time he had panicked about these proceedings and failed to appear.

[9] In response to questions about the passage of time, the Lord Advocate requested a chronology from the Polish authorities and a letter dated 27 October 2017 from the Circuit Court in Warsaw was lodged with the proceedings on 30 November 2017. The letter indicated all 3 sentences of imprisonment which were imposed were initially suspended for Mr Maciejec's supervision by the court's probation officer (see Production No 6).

[10] A further letter was received from the Polish Court dated 31 January 2018 (Crown Production No 7) which confirmed that Mr Maciejec had paid PLN 300 compensation on one of the cases (II K 45/11) although it is not clear from the EAW which charge this relates to - no further compensation had been paid and the Court saw no reasons justifying the withdrawal or modification of the EAW.

[11] At a Full Hearing fixed for the case which called on 15 March 2018 before my colleague Sheriff N Ross, the solicitor for Mr Maciejec lodged an unopposed application for a Reference to the European Court of Justice and the hearing was adjourned to a later date. This does not appear to have been acted upon in light of events in other jurisdictions.

[12] I began to manage this case at a Full Hearing which called on 6 September 2018 - a case and argument (Production No 8) was tendered on Mr Maciejec's behalf setting out Article 6 and 8 challenges and suggesting this Court required to follow the procedure set out in *Criminal Proceedings against LM* [2019] 1 WLR 1004; Grand Chamber 14 April, 1 and 28 June + 25 July 2018 (*LM* case) with reference to the "two stage" test set out in *Criminal Proceedings in Aranyosi & Căldăraru* [2016] QB 921; Grand Chamber 15 February, 3 March and 5 April 2016 (*Aranyosi*). A 3 day full hearing was envisaged and it was indicated that it might take 8 weeks to secure legal aid sanction to obtain witnesses who could give evidence about the situation in Poland at first hand.

[13] At this hearing the Crown tabled a Note of Submissions (Production No 9) setting out the Lord Advocate's position on behalf of the Republic of Poland that in light of the *LM* case and the *Reasoned Proposal* it would be best to identify a small group of test cases from a list of 33 outstanding Polish EAWs at this time and this case was identified as being the oldest and most suitable as it contained elements of accusation, conviction and multiple sentences of imprisonment.

[14] There are now at present 48 outstanding cases awaiting this decision. By contrast in England at an earlier stage in 2018 Polish extradition cases were referred to the Court of Appeal where other challenges had been dealt with and only Article 6 issues remained. A sample of cases were dealt with in *Lis, Lange and Chmielewski v the Regional Court in Warsaw, Zielona Gora Circuit Court and the Regional Court in Radom, Poland* [2018] EWHC 2848 (Admin) on 31 October 2018 (*Lis v Poland*). These proceedings which had been initiated in the wake of *Celmer no 1* were themselves delayed to await the decision in the *LM* case but the decision was not further delayed to await further information in the *Rechtbank* case (see para 16 below). The *Lis* case has been the subject of further proceedings (*Lis & Lange v Regional Court in Warsaw and Zielona Gora Circuit Court, Poland (No 2)* [2019] EWHC 674 (Admin)) and may be dealt with at some stage by the UK Supreme Court.

[15] It was agreed by parties on 6 September 2018 that I should adjourn the case to a Preliminary Hearing on 8 November to set a timetable for further procedure. At that diet I was advised that on 19 October 2019 the Vice-President of the European Court had made an interim order against the Republic of Poland in relation to a law passed on the Supreme Court in Poland lowering the judicial retirement age from 70 to 65. (This was finalised on 15 November).

[16] The *Lis v Poland* decision was not yet readily available and the decision in a Dutch case decided on 4 October 2018 at the Rechtbank/District Court in Amsterdam was not available in an English translation (RK No 18/3804) but I was advised the court had requested further information from the Polish Authorities in light of the two stage process set out in the *LM* case about staffing changes and changes of procedure in the ordinary courts, rules regarding case allocation, judicial disciplinary proceedings, procedures available to the requested person to challenge and details of the extraordinary appellate procedures which had been introduced. The Crown opposed following this route in every outstanding case and I agreed the test cases should proceed as soon as possible in an attempt to clarify as many issues as possible which might determine the other cases one way or another. It was clear that matters were at a critical stage between the Republic of Poland and the EC. If the Council was to make a determination in accordance with Article 7(1) of the Treaty there could be no further argument.

[17] At this hearing a Contempt of Court Order was made in terms of section 4(2) of the Contempt of Court Act 1981 restricting publication by prohibiting publication of the terms of discussions in the test cases until 18 March 2019 (Production No 11). It was agreed that a further Preliminary Hearing would take place on 10 January 2019 to ascertain the preparation of parties and what stage the European Commission case v Poland had reached. A Full Hearing was set for 18 March and successive days in that week. Meanwhile a Joint Case and Argument was lodged by the parties in the 2 "test" cases reflecting developments which had taken place in other jurisdictions (Production No 10).

[18] In the interim I resolved that other Polish extradition cases should proceed to Full Hearings wherever possible to deal with non-Article 6 issues (as had been done in England & Wales). In the event two Requested Persons were discharged on other grounds and 3

cases remain part-heard to consider Article 6 challenges, other grounds having been dismissed. They await a decision in this and the other test case before their Hearings can be concluded.

[19] At the hearing on 10 January 2019 it was recognised events elsewhere had led to dynamic changes in the test case arguments. Following the Interim Order issued by the Vice-President of the ECJ on 19 October 2018 some Polish judges who had been dismissed had returned to work and new Polish laws tackling some of the EC criticisms had been promulgated and passed on 31 December 2018 but it was too early to gauge the effect of these changes. From a UK perspective it was not clear what would occur if Brexit took place on 29 March 2019 and whether existing EAW requests would be honoured. (See The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 SI 2019 No 742).

[20] A Notional Hearing was fixed for 7 February 2019 to allow parties to finalise issues at the Full Hearing. On that date it was confirmed there would be no new challenges raised and final outline submissions and defence expert Professor Pech's report were being made available to the Crown in order that the Polish authorities might have sight of the issues raised and advise the Lord Advocate of their position. Final submissions for the Defence would be lodged by 4 March 2019.

[21] In light of these considerations and practical ones to secure live links for evidence to be taken by CCTV a final Preliminary Hearing took place on 14 March 2019 when parties were able to agree most of the evidence thus enabling witnesses and most of the submissions to be heard the following week. What had been overlooked was to seek formal permission from the Polish Courts to take evidence from their nationals in these proceedings. The necessary applications were made although late and I determined it would be best to proceed with the Full Hearing. Needless to say the Polish Courts later expressed

their displeasure at this apparent discourtesy and I apologise for this, but I trust they will appreciate this court was endeavouring to make progress with a log-jam of cases from their jurisdiction which had built up over the previous 9 months (see Production No 16).

[22] Arrangements were made to record and transcribe the evidence given by the expert witnesses in order that this could be made available to parties in future Polish Article 6 cases in the way deployed in *Her Majesty's Advocate representing the Republic of Lithuania v Evaldas Ivoškevičius* Edinburgh 14 January 2019, by my colleague Sheriff N McFadyen in relation to Lithuanian prison conditions.

The Full Hearing

[23] Parties had determined it would be best to start by way of making opening statements to set the scene as much of the background and the material which had been produced in a large volume by the defence (Production No 14) was not in dispute; many of the documents were official ones. In the event this proved to be useful. Ms Mitchell expanded upon the Final Outline Submissions (Production No 12) and Mr Richardson for the Lord Advocate spoke to a Proposed Statement of Issues (Production No 13) which proved to be a helpful route map. The provenance of the defence documents 1-17 contained in Production No 14 was agreed by Joint Minute (Production No 15).

[24] It was agreed that the offences were extradition offences either in terms of section 64(3) of the Extradition Act 2003 in respect of the accusation offence at section E2 1.1 of the EAW or under section 65(3) of the 2003 Act for all the other charges. I answered the question posed in section 10 in the affirmative and moved to section 11 of the Act. Challenges were raised in relation to passage of time under section 11(1)(c) and section 14, section 20 - trial in absence and sections 21 & 21A - Convention rights.

The Defence Evidence

[25] Mr Maciejec said that he left Poland 7 years ago in 2011. He had lived with his parents at the address specified in the EAW at section A11 namely 05-420 Józefów, ul. Zapolskiej 5A, Otwock, which is part of Warsaw but moved to his own flat 2 weeks before he left the country. He said he was encouraged to go as he had had problems at work and wanted to get away from bad friends. He moved to Edinburgh where he had family and after living in Corstorphine and Wester Hailes had been at the bail address for several years. Initially he joined his mother, grandfather and a brother then his father moved here about 3 years ago. He has a partner and their baby is due in the next few months.

[26] When he lived in Poland he worked in car parks and on arrival in Scotland took employment as a car valetter but now worked part-time as a car mechanic. Regarding case E1.1 (Court No II K 86/12) he said he was stopped by the police when driving the lorry but was not identified as being a disqualified driver at the time. He said that his first case had not concluded at that time. He simply received a fixed penalty as he did not have the proper category on his licence to drive articulated lorries but was undergoing a course at the time. He found out about the charge in 2012 when his solicitor told him on the telephone. He had used a few solicitors and could not remember which one it was.

[27] Mr Maciejec explained that case E1.3.1 (Court No II K 649/09; II K 649) involved a charge of housebreaking at a convenience store where the stolen goods were worth £2,200 - £2,500. He recalled receiving 18 months' imprisonment and was ordered to pay compensation amounting to 100% of the value of the stolen goods. He said he had paid the money last year after being arrested (sometime after 2 October 2017). His mother had paid the money to a female solicitor in Poland called Judwiga.

[28] As regards case E1.3.2 (Court Ref No Ko 754/12; II K 1192/10) Mr Maciejec thought he had been present at this trial as he was conveyed to court from custody. (He may be mistaken on this point as case 1.3.1 shows that he had spent 3 days in custody.) Mr Maciejec believes he was at the trial but failed to appear for sentence when he recollected receiving a sentence of 1 year's imprisonment suspended for a year. He thought the value of the stolen items was PLN 45,000 and he and 2 others were convicted and he was ordered to pay PLN 20,000 so was charged about £4-5,000. Mr Maciejec said that this money was with his solicitor in Poland and was due to be paid soon. He considered that he had paid about £10,000 in compensation in total but did not produce any vouching to support this. He said that he had paid a fine for a drink/driving case at the time he was remanded. He disclosed in evidence that he had outstanding cases in Scotland. These were later abandoned by the Crown to comply with section 22(2) of the Extradition Act 2003. He said he had no background of political involvement.

[29] In cross-examination Mr Maciejec said after he left Poland in 2011 he received a phonecall from his Polish lawyer in 2012. He contended that in each case the prison sentence was suspended as he had pled guilty each time; non-payment of the fine led to it being "unsuspended". He had co-operated with his Social Worker.

[30] In relation to case 1.3.2 (Court Nos. (Ko 754.12;II K 1192/10) which involved 19 offences, his social worker came to see him every other week until Mr Maciejec left for Scotland as he did not have to co-operate. Probation was in relation to case 1:3:1 only. He said that he did not see a probation officer after that and disagreed with the court record. He also said that probation was not conditional on committing another offence but committing the same type of offence on a later occasion but he only knew that from reading the EAW and said that it wasn't clear to him at the time. He no longer had a passport or an identity

card - his documents had been stolen from his car and he had not sought replacements nor had he returned to Poland in the interim.

[31] The next witness to give evidence was Ms Malgorzata Szuleka, a Polish lawyer who graduated in 2010 and since then has been employed at the Helsinki Foundation for Human Rights. This is a privately funded body which looks at the application of Human Rights in Poland. For the last 4 years she has looked after defendants' cases but assists in producing reports for the Foundation which cover the rule of law and the separation of powers. She is in training to become a member of the bar and hopes to qualify in 2021. Ms Szuleka co-authored the Report (Production No 14 - document 11) published in February 2019 and interviewed about half of the judges and prosecutors in respect of whom disciplinary proceedings had been taken.

[32] Ms Szuleka said there had been numerous changes in the law in this context in Poland since 2015 which had all been part of an orchestrated plan. The new Government had dismissed the President and Vice-President of the Supreme Court and had made new appointments. A new Disciplinary Chamber of the Supreme Court had been formed and this had been more active in seeking to discipline judges. The Minister of Justice also acts as Prosecutor General and appoints Commissioners to investigate cases. The new system breached the Polish Constitution of 2 April 1997 by restricting freedom of speech, freedom of association and prohibited judges from having dual citizenship.

[33] A new code of Ethics was adopted by the National Council of the Judiciary (NCJ) in January 2017. Breaches of this code would result in disciplinary proceedings. Various cases are referred to in the Report at pages 6-9 in relation to judges and prosecutors many of whom were said to be involved in criticising Government policy. As a result of these initiatives many judges felt under pressure from the media, particularly from a television

programme which "stigmatised and exaggerated every case of judicial misconduct" and criticism from politicians who accused them of being corrupt (see Production No 14 - Document 11 page 9). The witness's research on the pressure felt by judges was still ongoing.

[34] Some of the disciplinary cases were said to be ridiculous such as the cases against 2 judges who had taken part in a moot court at a music festival where they had worn gowns and chains of office. After investigation by the disciplinary officer no further proceedings were taken on a complaint about their "lack of awareness of violating the law and judicial ethics" (see page 7 of the report). A complaint was still continuing against one of the judges for delay due to having 172 judgments outstanding. It was suggested by the witness that in some cases seemingly plausible complaints were made to undermine the work judges had carried out through their association criticising the changes and the lack of resources. Other judges although not affected by complaints nevertheless felt a "climate of fear" persisted which it was suggested might encourage them simply to toe the line. No more than 20 candidates applied to become members of the NJC of which 15 were appointed by the *Sejm*.

[35] Ms Szuleka also co-authored another report by the Helsinki Foundation entitled "It Starts with the Personnel" published in April 2018 (Production No 14 - Document 13) which dealt with the replacement of common court presidents and vice-presidents i.e. judges at local first instance level. This followed upon the publication of proposals by the Ministry of Justice to carry out a 10 point plan to reform the justice system (see page 3). One of the planned goals of the reforms was a so-called democratisation of the method of appointing NJC members to make it "free from the corporate interests of the judicial community." One of the problems diagnosed was that "the choice of NJC members was in practice determined by the judicial elite". Bills were then passed by the *Sejm*, the lower chamber of the Polish

Parliament regarding the appointment of Assessors (trainee judges) and increasing the influence of the Ministry of Justice on appointments in the lower courts.

[36] Ms Szuleka said that despite criticisms in the Polish Government White Paper about the ineffectiveness of Polish Courts (see Production No 14 - Document 3 para 6 page 10) almost every person interviewed in the Helsinki Foundation Personnel study pointed to inefficiency due to an insufficiency of judges caused by a freeze on appointments, the reduction in the judicial retirement age and organisational and efficiency problems within the Ministry of Justice. About 150 court presidents and vice-presidents were removed from office although in many cases there were no specific criteria. In some instances the reasons given were due to the ineffectiveness of the civil or criminal departments at a local court. Replacement judges were appointed as presidents and vice-presidents without going through any transparent process and some lacked the skills and experience necessary to do the job. One candidate who had previously been rejected many times for judicial appointment was suddenly appointed under the new regime.

[37] The witness's criticisms were that judicial appointments were made on a political basis, there was no effective mechanism to protect the independence of judges and the new disciplinary system created a "climate of fear". She thought this would lead to judges becoming state bureaucrats. At page 26 of her Report (Document No 13) in the section entitled "The Common Court System Law Amendments and the right to a fair trial" one interviewee is quoted as saying "I see the future of the justice system in shades of black. The community is being shaken up, authority will lose importance, we'll lose our moral compass and conformist attitudes will be very onerous for our community."

[38] Ms Szuleka concluded at pages 27 and 28 of the Report that

- Changes made to the law were not supported by a "sufficiently rigorous analysis of the situation in the justice system".
- Court proceedings could be concluded faster if the Ministry of Justice decided to end the freeze on judicial positions.
- The process of dismissing presidents and vice-presidents of courts was not supported by a holistic analysis of the situation in the courts.
- The process of making new appointments to replace senior judicial personnel was conducted in a non-transparent way and based on irrelevant criteria.
- The amendments to the common courts broadened the opportunity for politicians to influence courts.
- These amendments would also affect the protection of judicial independence as the majority of guarantees had been removed and the protection of judicial independence depends primarily on the judges themselves.
- The amendments may violate the right to fair trial, although in the majority of cases "citizens may not sense any change in the way courts function the mechanisms of influencing courts and judges may be used in political cases or in those that arouse public interest."
- The changes made to the law will be perceptible for a long term in the functioning of the justice system.
- The report made various recommendations for the Government and the European Commission to improve matters.

[39] In cross examination the witness conceded that she had not visited the Circuit Court in Warszawa-Praga where Mr Maciejec would be sent if extradited. When asked how representative the sample of interviewees had been in her report she accepted her

methodology was to follow up complaints and interview personnel who had been the subject of complaints. She had reached out to judges and prosecutors who had been mentioned in press reports or dismissed. The "snowball method" was used whereby persons who had been interviewed "told of other individuals who might be interested in participating" (see para 4 of the Personnel Report (see Production No 14 - Document No 13). Out of a sample of 10 persons 4 said the situation was bad, 3 said it had worsened but the rest made no comment. The witness also accepted things may have changed since the research was carried out between August 2017 and February 2018. None of the disciplinary cases referred to were from the Warszawa-Praga court.

[40] The next witness was Katarzyna Dabrowska, a law student in part-time training, who had studied in Amsterdam but had 6 years' experience as a defence lawyer in Poland, the last 4 of which had involved extradition cases. She was a senior associate in the firm of Pietrzak Sidor & Wspólnicy based in Warsaw and like the other expert witnesses adopted her report in full (Production No 14 - Document 15). She explained the content of the Polish Criminal Code and the workings of the criminal justice system and courts. In explaining the roles in the local court of the President and Vice-President, it was made clear they do not allocate cases but oversee decisions and ensure a measure of uniformity. Persons extradited to Poland, if they require further court procedure, will be dealt with by a judge other than the one who signed the EAW. If further court procedure requires to be taken in a conviction case it will go back to the original judge who was allocated the case for trial at the outset.

[41] It did not appear from section 4 at page 10 of the witness's report that an extraordinary right of appeal by the prosecutor would apply in Mr Maciejec's case as decisions had been made by the court in all of the sentence cases more than 5 years ago. The law relating to assessors of apprentice judges is fully covered at pages 11-14 of the report but

was not argued in this case as no assessors are currently employed at the Warszawa-Praga court.

[42] In relation to the changes to the law of the Ordinary Courts Organisation the witness said at page 15 the Minister of Justice can control disciplinary proceedings against ordinary court judges through the appointment of disciplinary officers and judges.

[43] In section B of the report at pages 16 & 17 of the Report Ms Dabrowska was critical of the personal involvement of the Minister of Justice in the appointment of a Supreme Court judge and the conflict of interest in being both Minister of Justice and General Public Prosecutor. She concludes Polish judges do not have an independent body representing them so as not to infringe upon their independence.

[44] At page 15 of her Report, the witness was critical of the number and nature of disciplinary procedures - the pressure placed upon judges and how hearings are open to the public. At page 22 Ms Dabrowska explained the personnel in the court at Warszawa-Praga and how there are at present 19 vacancies. The President of that court had however been appointed following the retirement of his predecessor. This change had occurred in March 2017 before the new regime. The Vice-Presidents of the court had been appointed later in the year after the retirement of the previous incumbents. The witness conceded that she had never felt the need to object to a judge dealing with a particular case on the basis that he or she would not be likely to deal with the case fairly.

[45] Professor Laurent Pech then gave evidence. He has an impressive list of qualifications and has made a particular study of the rule of law for the last 20 years. His report is to be found in Production No 14 - Document 16. He listed 7 issues of concern in this context in relation to the Polish judicial system:-

- Lack of Effective Constitutional Review.

- Attempted change made to the retirement regime of the current Supreme Court judges.
- Changes made to the structure of the Supreme Court.
- Changes made to the disciplinary regime for judges.
- Changes made to the retirement regime of current ordinary court judges and the arbitrary dismissal of ordinary court presidents.
- Changes to the NCJ which resulted in its suspension from the European Network of Councils for the Judiciary in 2018.
- The new disciplinary regime at work and an overview of cases as at February 2019.

[46] The professor explained how the new Government took over control of the Polish Constitutional Tribunal in December 2016 in plain violation of the Constitution and appointed a new President without a valid legal basis and made 3 unlawful appointments to the court. These moves attracted criticism from the EC who recommended changes restoring the Tribunal's independence and legitimacy and as guarantor of the Polish Constitution. The professor concluded that the Constitutional Tribunal's judgments since December 2016 could "no longer be considered as providing effective constitutional review". 7 of the 15 members of the Tribunal published a letter in 2018 declaring that the body had ceased to function under the leadership of its current unlawfully appointed President and Vice-President.

[47] Under the second heading above Professor Pech described how the First President of the Supreme Court had his term of office prematurely terminated and a new President was appointed. The EC launched an infringement procedure on 2 July 2018 regarding the law on the Supreme Court as these moves had undermined "the principle of judicial independence, including the irremovability of judges." The EC simultaneously brought an application for

interim relief and on 19 October 2018 the Vice-President of the European Court of Justice ordered Poland to immediately suspend the application of provisions relating to the lowering of the retirement age for Supreme Court judges to 65. However on 22 October 2018 the President of the Supreme Court ordered all judges affected by this ruling back to work. The Professor said a decision on the law was expected from the ECJ in May or June of 2019. He concluded that the Polish authorities were complying with EC strictures but doing so reluctantly. The Polish President violated one of the EC's rule of law recommendations to stop verbal attacks on judges when he stated that when "significant people in the judiciary...overtly violate the effective law and constitutional provisions and disregard the binding legislation, then we are dealing with anarchy by the representatives of the judiciary."

[48] Professor Pech also quoted the Polish Prime Minister who publicly slandered judges when he justified his government's "judicial reforms" as necessary to deal with widespread corruption in the Polish judiciary on the basis of data which happened not to exist. He also referred to the decision of the President of the criminal chamber of the Supreme Court taking early retirement due to changes which will "inevitably lead to serious disruption of the work of the Criminal Chamber, chaos, and a mounting case backlog." The official communiqué referred to replacement appointees as "persons," rather than judges which may lead to questions as to the lawfulness of their positions.

[49] As regards the third point raised by Professor Pech, he noted serious concerns raised by the Venice Commission about the changes made to the membership and structure of the Supreme Court where some aspects of the reform have "a striking resemblance with the institutions which existed in the Soviet Union and its satellites." The reforms created a Disciplinary Chamber and an Extraordinary Control and Public Affairs Chamber. The

Professor said these bodies were not proper courts and at page 8 of his Report quoted a judge from the Disciplinary Chamber that Polish judges who referred questions to the ECJ regarding the "judicial reforms" are guilty of treason, if not in a legal sense, at least in a moral and political sense.

[50] The professor's fourth heading dealt with the new judicial disciplinary regime. He said there were roughly 10,000 judges in Poland and about 2/3 of those belonged to one of five judicial associations. Those associations issued a statement on 15 September 2018 criticising the fact that prosecutors had become more active seeking statements from judges about their participation in public debate and attempting to intimidate judges which actions created a "chilling effect" amongst its members. Disciplinary officers investigated allegations against judges who participated in public debates or provided public statements about the reforms and preliminary disciplinary investigations took place where judges referred requests for a preliminary ruling to the ECJ. Some disciplinary cases were taken over by the new officers when the previous system had determined the judges had not committed any disciplinary offence. A case about the lawfulness of these procedures has been referred to the ECJ who heard argument in mid-March 2019 with a decision expected in May or June 2019.

[51] Professor Pech's fifth area of criticism related to changes in the judicial retirement regime. In December 2017 the EC recommended this legislative change be addressed. During the period 12 August 2017 to 12 February 2018 over 70 court presidents and 70 vice-presidents were dismissed during a 6 month transitional regime. While some legislative changes were made in light of EC criticisms the powers to arbitrarily dismiss court presidents and vice-presidents remain.

[52] In relation to the sixth issue about changes made to the NCJ and its suspension from the European Network of Councils for the Judiciary, no amendments have been made to address the EC's 4th recommendation for change in December 2017. 15 new members of the NCJ were elected on 6 March 2018 by the lower house of the Polish parliament. Judicial members of the NCJ are no longer elected by the judges themselves. On 23 November 2018 the regional administrative court ruled that the names of judges supporting candidates to the NCJ who were elected by the *Sejm* should be disclosed to the public but so far this has not been done. Judges in Gdańsk and Krakow refused to provide nominations for the NCJ lest it legitimise the NCJ which had been altered in violation of the Polish constitution. The EC considered the politicisation of the NCJ undermined judicial independence and did not comply with European standards that judge-members of such Councils be elected by their peers. On 17 September 2018 the Polish NCJ was suspended from the ENCJ joining the Turkish NCJ as the only two national councils for the judiciary suffering this fate.

[53] Professor Pech's final point was in regard to the arbitrary nature of the new disciplinary regime for judges. A Polish judge who is subject to disciplinary proceedings has sought a ruling from the ECJ to review the compatibility of Poland's new disciplinary system with EU law. This case (C-558/18) is still outstanding and a decision is awaited. As well as the Helsinki Foundation Report referred to above Amnesty International has criticised the new system in a report entitled "Poland: The judges who defend the rule of law". A report by the Polish think-tank FOR suggested that despite EC pressure nothing has changed and has led to "multiple arbitrary disciplinary proceedings with the aim of intimidating judges who have proved too independent in the eyes of the current authorities".

[54] In cross examination Professor Pech conceded that he did not speak Polish and had been unable to read the FOR report and could only quote it second hand from academic and journalistic sources. He could not say what the position on the ground in the court of Warszawa-Praga was like. At page 17 of his report he accepted that the quotation about there being "thousands" of disciplinary proceedings against Polish judges came from an unnamed source in an article and may have been hyperbole. He considered the situation in Poland was far worse than when UK Supreme Court judges were branded "Enemies of the State" following their ruling in *R (On the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[55] The last witness called on behalf of Mr Maciejec was Michal Wawrykiewicz, a Polish lawyer based in Warsaw, with over 25 years' experience. Since July 2017 he has been part of the Free Courts movement which has rendered assistance to persons in conflict with new legislation which challenged judicial independence. He acted for several judges. His report (Production No 14 - Document 17) took the form of answering 76 questions posed by lawyers acting for the two Requested Persons in the "test cases."

[56] The witness had appeared in the ECJ earlier in the week of 18 March 2019 when this extradition hearing took place and had to consider whether a Polish chamber of last instance met the requirements of EU law. 23 of the 25 Judges sitting in the new chamber of the Supreme Court had been appointed by politicians. The ECJ may report its decision in this preliminary reference (Case C-585/18) sometime after 23 May 2019 but no exact date is available at present. About 90% of the witness's professional time nowadays involves judicial cases and only a small part of his time involves dealing with everyday court cases.

[57] As part of his work in his law firm and through the Free Courts movement he meets many judges and prosecutors. 12 organisations working in this field, including Free Courts,

Amnesty International and the Helsinki Foundation are part of this collective called KOS which published a report in 2019 entitled "A Country that punishes - Pressure and Repression of Polish judges and prosecutors" (see Production No 14 - Document 12). He accepted that he could only speak to the judges who got in touch with him but spoke of the "chilling effect" the new disciplinary proceedings had on all judges including those who had not been active in their criticism of the new regime. If a judge became the subject of a complaint about something said in public, disciplinary officers would look through the judge's file to see if other charges could be tabled. Some of the complaints seemed silly such as wearing a T shirt with a picture of the Polish Constitution on it or making a funny tweet on Twitter. At page 6 of his report (Document 17) he stated:-

"There is no guarantee that a judge selected to hear the case will impartially determine the case. A judge's resistance to intimidation in circumstances of a systematic threat to judicial impartiality depends upon the individual characteristics of a judge."

[58] The witness said that the NCJ was mostly a Parliamentary body as 15 of its members had been appointed by Parliament and 1 by the President of the Republic. 25 judges can nominate a candidate but the list is chosen by politicians and to that extent the list is not transparent. The Polish President has considerable power and influence over the judges, either directly or through intermediaries. The KOS report at para 3 stated that the Disciplinary Chamber of the Supreme Court is largely autonomous, has its own budget and does not report to the First President of the Supreme Court. At para 4 the report continued ;

"The objective of the changes was to subordinate the system of penalising judges for disciplinary reasons to the executive, and therefore to obtain the ability to influence judges and their decisions, as well as to obtain tools for investigating and removing uncomfortable judges from the profession."

The KOS report listed various cases where judges were disciplined, put under pressure or subject to pre-investigation of alleged complaints. A number arose where there was a

political dimension to cases involving relatives of a politician in the ruling party or a political opponent.

[59] Mr Wawrykiewicz said that the MoJ appointed disciplinary prosecutors and judges to the Disciplinary Supreme Courts. Judges selected for this role are paid 40% more than other similar ranking judges. The Minister can insist on a complaint continuing even where the Court is minded to conclude its considerations of the matter.

[60] In cross examination the witness said that he had come to court in this case as an expert witness on Polish law. While he was involved in a case against the Polish Government which was at the ECJ, a member of the Free Courts movement he gave his evidence to the best of his abilities as an officer of the court. He explained in relation to page 9 of his report (Document 17) question 20 that when a Requested Person is returned to Poland under an EAW to serve a custodial sentence he is not brought before the court as criminal proceedings are closed, but goes straight to prison. There are no judicial decisions in this process other than crediting any period of remand served abroad.

[61] At page 19 of his Report in relation to question 19 about the Retirement of Judges, the witness said that previously a judge who wished to stay on beyond the statutory age 60 for women and 70 for men simply could notify the Minister of Justice of his or her willingness to continue and this request was granted on proof of a medical note confirming fitness to perform the duties of a judge was granted. Under the new regime consent to continue in judicial service is issued by the NCJ having regard to the "reasonable use of the personnel of the Ordinary Courts and the need resulting from the workloads of particular courts". The witness suggested this consent to continue in judicial office is "based on unclear criteria."

[62] The witness confirmed that the Polish Constitutional Tribunal had complied with rulings of the ECJ. There is a Tribunal of State which is a special criminal court for

politicians. The witness confirmed his answer at page 28 Question 42 that there was no evidence of suggestions from politicians that judges were corrupt. He also stated that the Prime Minister was not responsible for governing the country but the leader of the ruling party. Other than the examples given on page 29 Question 43 there was no evidence of politicians making statements about the sentencing of offenders.

Submissions on behalf of Mr Maciejec

[63] Ms Mitchell said that while an application for a Reference to the ECJ had been lodged and granted at the time by Sheriff Ross standing the decision in *LM* it was now withdrawn. The EAW in this case had been signed on 23 April 2015 which was well before the changes in the law and judicial personnel. It was accepted that in relation to case 1.3.2 Mr Maciejec had not appeared at the Hearing. He could not recall whether he was told of the decision *in absentia*. He could recall a conditional suspension being imposed in several cases and no jail time was served. Mr Maciejec's position was that he had paid compensation in case 1:3:3 and indeed that compensation had been made in all cases. In one case the complaining company refused to take compensation as the company had been taken over.

[64] While the Helsinki Foundation pool of judges interviewed was not a representative sample it did record the views of those judges and prosecutors who had co-operated. That information was backed up by the other expert witnesses in particular Professor Pech, the Venice Commission, the *Reasoned Proposal* and the *LM*, case. Ms Mitchell conceded that it was not possible to challenge an EAW on the basis of Article 6 when the conviction warrant contained a single charge and sentence. In Mr Maciejec's case he has several sentences listed in the EAW and could apply to the court to have the sentences run concurrently rather than

consecutively or make application to the court for early release after serving half of the sentence - these applications would involve the element of judicial discretion.

[65] She also conceded that she could not take the point about assessors, judges in training as none were in place in the Warszawa-Praga Court. There was no evidence to suggest that the President and Vice President there had been appointed under the new appointments regime. Similarly there could be no challenge under passage of time as progress with the EAW had been fairly rapid in comparison to other Polish cases. The offences ran from 2009 to 2011 and the EAW was dated April 2015 once the authorities realised Mr Maciejec was no longer living in Poland.

[66] A fair system of criminal justice had to be independent of political interference and required to have the appearance and hallmarks of impartiality. She questioned whether the lower courts were effective in dealing with Mr Maciejec's cases when a climate of fear existed among Polish judges following upon radical new laws which had been introduced without proper consultation or based upon evidence.

[67] I was invited to await the decision in the ECJ case about the Polish Judicial system and whether it was independent or not. In Mr Wawrykiewicz's report at pages 33 to 36 and in his evidence, however, there was nothing to suggest that judges in the court at Warszawa-Praga were not trying cases fairly.

[68] While in the cases of *Lis & Lange v Poland* [2018] EWHC 2828 (Admin) and *Lis v Poland (No.2)* (27/3/19) Article 6 arguments had been rejected there was a possibility the case would be going to the Supreme Court. If this was so it may be better to await the outcome of these proceedings. (See however the remarks made by Lord Justice Bean in *Gorzewski v Court of Swidnica* [2019] EWHC 279 at para 24 suggesting this course was unlikely.) In the meantime the evidence adduced indicated that there had been a breakdown in the rule of

law and I was urged not to return Mr Maciejec as it would be contrary to his Convention Rights in terms of Article 6.

Submissions on Behalf of the Lord Advocate

[69] Mr Richardson focussed upon the Statement of Issues (Production No 13) which was derived from the decision in the *LM* case now reported at [2019] 1 WLR 1004. He accepted the evidence was such that the court required to make an assessment that there were substantial grounds for believing that the Requested Persons in the two test cases will run a real risk of the breach of the essence of a fundamental right to a fair trial - *LM* paras 68 & 69.

[70] The second step to consider was the required standard of breach of Article 47 of the EU Treaty - “a real risk of breach of the essence of the fundamental right to a fair trial” or a “real risk of being exposed to a flagrant denial of justice” *LM* paras 68 to 73.

[71] The third element to consider was whether the issues raised in the cases as regards the independence of Poland’s courts were liable to have an impact at the level of courts with jurisdiction over the proceedings which the Requested Persons would be subject to if extradited - *LM* para 74.

[72] Would the Requested Person run a real risk of his right to an independent tribunal and a fair trial having regard to his personal situation, the nature of the offences involved and the factual context forming the basis of the EAW - *LM* para 75.

[73] The final point being whether the court in light of its preliminary assessment requires supplementary information from the issuing judicial authority - *LM* para 76.

[74] Mr Richardson accepted that the Reasoned Proposal highlighted information about systemic problems but changes were made following upon the publication of a Government White Paper. The Article 7 process had not been completed by the EC and so the executing

judicial authority cannot refuse to execute the EAW without carrying out an assessment about the case before it - *LM 72*; see also *Lis & Lange v Poland* at para 25.

[75] As regards the test of flagrant denial or real risk, in *Lis & Lange v Poland* the Court stated at para 63 that there was “no sensible distinction to be made between a breach of the essence of a right to a fair trial and the flagrant denial [of justice] test”. See also *Al-Moyad v Germany* (2007) 44 EHRR 257 at para 101. Further detail of the elements of this concept are given in *Othman (Abu Qatada v UK)* (2012) 55 EHRR1 paras 258-261 and quoted in *The Minister For Justice & Equality v Celmer (No 5)* [210] IEHC 639 at para 13. At para 68 Ms Justice Donnelly concluded that the “flagrancy test has a high threshold. The threshold 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.”

[76] These questions only arose in the context of accusation cases. Mr Maciejec’s case raised no issues regarding assessors or the retirement regime affecting the court at Warszawa-Praga. The only live issue was in relation to the disciplinary procedures but none of the examples quoted mentioned that court and the lawyers who gave evidence could not say there was an unfairness displayed in casework by the judges.

[77] While motions can be made in conviction cases for early release from prison or to consolidate consecutive sentences these were separate proceedings. If there was a dispute as to whether Mr Maciejec had or had not paid compensation this was a factual matter which may require to be decided and did not involve an exercise of discretion. In the Free Courts Report (Production No 14 Document 17) at page 10 question 22 Mr Wawrykiewicz explained that early release may be sought from the court under the criteria set forth in Articles 78-80 of the Polish Criminal Code. (See also *Gorzewski v Court of Swidnica, Poland* [2019] EWHC 279 (Admin) at para 25).

[78] Mr Richardson stated that Article 6/Article 47 fair trial issues did not arise after determination of the charge and any sentence passed. Execution of the sentence is not a judicial process. *Lis & Lange v Poland (No 2)* paras 19-22 specifically addressed the problem where a Requested Person is extradited on some of the offences and a cumulative sentence requires to be disaggregated but saw no difficulty in this process taking place under the mutual trust extradition scheme.

[79] The extraordinary right of appeal of the prosecutor did not seem to be a factor given the age of the cases. See the Free Courts Report at page 11 question 23 and Ms Dabrowska's Report at page 10. There was no evidence which emerged that Mr Maciejec could not receive a fair trial if returned to the Requesting Court. While there had been difficulties and problems with the new regime it appeared that at the local court level judges continued to deal with individual accused persons in a fair way. There was no suggestion the offences had a political element or that Mr Maciejec might be of particular interest to the government.

Decision

[80] While criticisms of the Polish Judicial system have emerged since the change of Government and the promotion of new laws which attracted the attention of the Venice Commission, the *Reasoned Proposal* from the EC and critical reports from the Helsinki Foundation, KOS and Amnesty International, the *LM* case requires further information specific to the particular case that a fair trial would not be possible, as long as Article 7 procedures are not brought into effect.

[81] Professor Pech was a good academic witness but being an outsider, looking in on the Polish system he could only gather from second hand sources and could not say what might happen in a particular court. To that end Ms Dabrowska and Mr Wawrykiewicz were the

more helpful witnesses who could say what the situation was like in the Requesting Court. While they were critical of the changes in the law and its structure they could not point to an instance of seeing an unfair trial.

[82] While criticisms of these witnesses might be raised as to their impartiality in the event Mr Richardson did not challenge their admissibility and while initially concerned that Mr Wawrykiewicz was involved in a current case at the ECJ against the Polish Authorities he took no objection and found that the witnesses' answers about the local courts assisted the Lord Advocate's position. Mr Wawrykiewicz was a particularly impressive witness and gave his answers frankly as one would expect from an officer of the court.

[83] Mr Maciejec could put no reason forward why his cases would attract special attention. There was no political element to the charges or the involvement of some high ranking person which might skew the process as was suggested by some examples in the experts' reports. No specific issues were raised regarding the Warszawa-Praga court which might threaten the right to a fair trial.

[84] In other respects I did not find Mr Maciejec's evidence impressive. He was clearly a fugitive who left Poland very soon after a court ruling against him in December 2011. He said that he did not have a good memory, could not remember details, clearly became mixed up with the various cases he had been involved in (see para [27] above). I did not believe his contention that he was unaware of his trial and simply absconded when the nature and number of his cases reached the stage where a prison sentence loomed. He claimed to have paid all of the compensation involved. It is a regular occurrence that when Polish EAWs involved financial crimes these are withdrawn when restitution is made. It would appear that Mr Maciejec either left paying compensation too late or has not paid it as he claims.

[85] In considering his personal circumstances in terms of *Polish Judicial Authority v Celinski* [2016] 1 WLR 551, Mr Maciejec was in employment and supporting a partner who was due to give birth to a child in a few months. Several of his family lived nearby. As against this quite apart from the public interest being in favour of extradition and that the UK should not be a safe haven for fugitives, the offences were serious and numerous and amounted to a course of conduct over a period of 5 years. It would appear that Mr Maciejec had come to the attention of the authorities since arriving in Scotland and had delayed the proceedings by failing to appear at a diet on 2 June 2016 and had not returned to court until 2 October 2017 when he was arrested.

[86] For these reasons I am satisfied there are no bars to extradition in terms of section 11(4) of the 2003 Act and move to section 20 of the Act. I found that Mr Maciejec deliberately absented himself from his trial and proceeded to section 21A of the Act. I was satisfied it was proportionate to consider extradition on the accusation offence and in considering all charges under section 21 decided that Mr Maciejec's extradition would be compatible with his Convention Rights for the reasons I have given above and accordingly make an order under section 21 of the Extradition Act 2003 ordering his remand to be extradited to Poland within 10 days of this date. It should be noted that Mr Maciejec as at today's date has spent 89 days in custody (4/8/15 to 3/9/15 and 2/10/17 to 30/11/17).

Postscript

[87] I have taken longer on this case than perhaps ordinarily I would but I am conscious that over 40 cases remain outstanding where Article 6 is among the grounds of challenge or perhaps the sole ground. Having had the benefit of full submissions from parties in the "test" cases and the benefit of evidence from a variety of witnesses who have expertise in the

rule of law and the criticisms made of the Polish system in recent years, I take this opportunity to indicate the issues which have been focussed in these proceedings.

[88] Conviction cases. Where a single charge sentence is involved the extraditee will go straight to jail and has no right to a trial process. Application can be made to the court for early release but this procedure does not amount to a trial.

[89] Multiple convictions. Separate sentences are normally served consecutively.

Application can be made from prison to have the sentences consolidated (see *Gorzewski v Court of Swidnica Poland* [2019] EWHC 279 (Admin) para 25). Similarly when one or more charges is deemed not to be an extradition offence and falls from a series of charges where a *cumulo* sentence has been imposed a disaggregation hearing at the requesting court will take place where it is assumed a lower sentence will be imposed - see *Lis & Lange v Poland (No 2)* [2019] EWHC 674 at paras 19-22.

[90] Accusation cases. While criticisms of the Polish system remain the EC have stopped short of the procedures they adopted following the *Reasoned Proposal* dated 20 December 2017. The EC simultaneously brought an application for interim relief and on 19 October 2018 the Vice-President of the European Court of Justice ordered Poland to immediately suspend the application of provisions relating to the lowering of the retirement age of Supreme Court judges. These measures were acted upon so that Article 7 procedures under the EU Treaty have not been taken against Poland. To establish a case that a Requested Person is exposed to the risk of flagrant denial of justice that is at issue, it is necessary to establish that there are particular circumstances relating either to that person or to the offence in respect of which he is being prosecuted or has been convicted which expose him to such a risk. Thus the ECJ suggests, inter alia, that it should be ascertained whether the person who is the subject of the EAW is a political opponent or whether he is a member of a

social or ethnic group that is discriminated against. The ECJ also suggests that it should be examined, *inter alia*, whether the offence for which the individual concerned is being prosecuted is political or whether the powers that be have made public declarations concerning that offence or its punishment *Criminal Proceedings against LM* [2019] 1 WLR 1004.

[91] In *Lis, Lange & Chmielewski v Poland* [2018]EWCA 2848 (Admin) the Lord Chief

Justice said in delivering the judgment of the court at para 66:-

“There should be no need for expert evidence of a general nature to be adduced in Polish extradition cases pending the resolution of the Article 7 TEU process. The relevant matters are sufficiently explored in materials available in the public domain and, in particular, in those generated in that process.”