

# EAWs: is Poland on a final warning?

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considers how changes to the judiciary in Poland could affect Britain's post-Brexit extradition relationship with the EU



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## IN BRIEF

► Considers whether the mutual trust and confidence between judicial authorities within Europe which underpins the entire Extradition Arrest Warrant system is under threat.

The recent Irish High Court case of *Minister for Justice and Equality v Artur Celmer* 2017 EXT 291 (handed down on 12 March 2018) could have serious consequences for Poland's membership of the European Arrest Warrant (EAW) system. This is important for the UK because more people are extradited from England and Wales via Polish-issued EAWs than any other (source: National Crime Agency).

In the case of *Celmer*, Donnelly J was referred to the profound concerns that the European Commission and the European Council have regarding the current Polish government's interference with the judiciary. Such is the level of concern that the European Commission has sent a 'Reasoned Proposal' to the European Council under Art 7 of the Treaty of the European Union ('the Treaty of Amsterdam'). This is unprecedented. Within this Reasoned Proposal the Commission essentially raises concerns that the Polish executive's interference with the Polish judiciary amounts to a 'systemic threat to the rule of law'.

This has led Donnelly J to adjourn the EAW extradition proceedings in the case of *Celmer* and make a specific referral to the Court of Justice of the European Union (CJEU) to answer the following questions:

Is the *Aranyosi* and *Caldararu* test, which relies upon principles of mutual trust and mutual recognition, the correct test to apply

where the High Court—as an executing judicial authority under the Framework Decision—has found that the common value of the rule of law set out in Article 2 TEU has been breached in Poland?

If the test to be applied is whether the requested person is at real risk of a flagrant denial of justice, does the High Court, as an executing judicial authority, have to revert to the issuing judicial authority for any further necessary information about the trial that this requested person will face, where the High Court has found that there is a systemic breach to the rule of law in Poland?

These questions revolve around the mutual trust and confidence between judicial authorities within Europe which underpins the entire EAW system. The judgment of the CJEU in *Celmer* is expected in the next few months but the Irish reference is already having an impact on extradition cases in the High Court of England and Wales: On 14 March 2018, William Davis J adjourned the extradition appeal in the case of *Lis v Poland* (unreported) in order for the appellant to argue a new Article 6 of the European Convention of Human Rights ground based on the CJEU referral in the case of *Celmer*. The case of *Lis* will now be a test case and will next come before a Divisional Court (Irwin LJ and Ouseley J) on 13 June 2018. All High Court extradition appeals involving Polish accusation EAWs are, it seems, now being adjourned to await the outcome of *Lis* (certainly that was the stated practice of Nicola Davies J when the case of *Dudek v Poland* (unreported) (another Polish accusation EAW appeal) came before the High Court on 22 March and was so adjourned by Nicola Davies J.

It is important to note that this case will only affect accusation EAWs. Knowles J rejected an argument in the case of *Wisniewski v Poland* (unreported) (listed for renewal of permission on 21 March 2018) that the *Celmer* case could also be applied to Polish conviction EAWs. His Lordship granted permission to appeal in that case on the grounds of Article 8 only (the conviction being 20 years old) and refused permission on the *Celmer*-inspired Article 6 ground. Of course, this makes perfectly logical sense: the systemic threat to the rule of law in Poland has only *recently* come about and can only really be said to potentially impact on the fairness of future and not past trials in Poland.

As I understand it, in the case of *Lis*, the appellant is likely to argue that either (a) the appeal ought to be upheld on the basis of the Article 6 risk of a 'flagrant denial of justice' given the well documented 'systemic threat to the rule of law' in Poland, or (perhaps more realistically) (b) the High Court here ought to make a similar referral to the CJEU for clarification on the issue.

In all likelihood, Irwin LJ will consider whether the changes to the judiciary in Poland really do generate a risk of a 'flagrant denial of justice' contrary to Article 6, in *all* future criminal trials in Poland or just in *certain* cases (see extensive discussion on exactly this point in the *Celmer* judgment).

If the former, then of course the impact may well be limited, and it is likely that for policy considerations, the High Court may well be disinclined to reach a conclusion that would prevent any future extraditions to Poland. Such a conclusion would in practice be almost unthinkable but then again, prior to it happening, so would a conclusion by the European Commission that Poland's judicial re-arrangements pose a 'systemic threat to the rule of law' there.

Another key dimension of all this is likely to be Brexit. Although the court will not expressly be considering this as it is all still uncertain, in terms of any new, post-EAW, extradition arrangements, the timing of Brexit could hardly be worse.

The judgment in *Lis* may well have profound implications in terms of whether future Polish extradition requests will go through and this may well have consequences on whether a pan-EU post-EAW UK/EU extradition arrangement can be made within the time-frame required.

It seems that with the upcoming CJEU case and the stand-off between the European Commission and Poland, the entire EAW system may be in jeopardy in relation to Poland in any event.

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