



# SUPREME COURT OF NORWAY

On 13 March 2020, the Supreme Court's Appeals Selection Committee with the justices Bull, Ringnes and Arntzen issued in

**HR-2020-553-U (case no. 20-035350STR-HRET), criminal case, appeal against order:**

A (Counsel Ragnhild Cathrine Torgersen)

v.

The Public Prosecution Authority (Counsel Wigdis Hjalmarssen)

the following

## **O R D E R :**

- (1) The case concerns extradition to Poland under the Arrest Warrant Act.
- (2) On 25 February 2020, Glåmdal District Court issued an order with this conclusion:  
**"The conditions for extraditing A, born 00.00.1974, to Poland are met."**
- (3) On 28 February 2020, Eidsivating Court of Appeal issued an order with this conclusion:  
**"The appeal is dismissed."**
- (4) *A* has appealed to the Supreme Court. The appeal challenges the Court of Appeal's application of the law and its procedure. It is contended that extradition to Poland is contrary to the European Convention on Human Rights (ECHR), and that the arrest warrant therefore should have been denied. In any case, the Court of Appeal should have assessed the situation in Poland more closely, and the Court of Appeal should have gathered more information in order to assure itself that the appellant's human rights are respected after extradition.
- (5) *The Public Prosecution Authority* has responded, contending that both the application of the law and the procedure of the Court of Appeal are correct. The case concerns extradition for prosecution of profit-driven crime, and there is no reason to believe that extradition will lead to a violation of the ECHR. There was no reason to gather more information.
- (6) *The Supreme Court's Appeals Selection Committee* notes that its jurisdiction is limited to considering the Court of Appeal's procedure and general interpretation of a statutory provision, see section 388 subsection 1 (2) and (3) of the Criminal Procedure Act, cf. section 14 subsection 3 second sentence of the Arrest Warrant Act. When it comes to the application

of the ECHR and the Constitution, the Committee may also consider the individual application of the law, but not the Court of Appeal's weighing of evidence.

- (7) The appellant contends that extradition to Poland for prosecution there will violate his rights under Article 6 of the ECHR and that the arrest warrant must therefore be denied, see section 8 subsection 2 of the Arrest Order Act. The Appeals Selection Committee notes that in order to assess this, it is necessary to address Polish legislation. When applying section 30-6 (c) of the Dispute Act on the general legal interpretation of a written legal rule, corresponding to section 388 subsection 1 (3) of the Criminal Procedure Act, it is assumed that this does not include the interpretation of foreign law, see Schei et al, The Dispute Act, Commentary 2<sup>nd</sup> edition page 1087. This limitation is explained by the object of the provision being to ensure uniformity of law in Norway. However, the justification for also addressing the Court of Appeal's individual application of the law with regard to the ECHR and the Constitution is the need to avoid violation thereof. In this case, it is the current legal situation in Poland that is held to have the potential for such a violation. It would be difficult for the Supreme Court to fulfil this task if it were to be bound by the Court of Appeal's understanding of this situation. Furthermore, the rules under which the Supreme Court hears these types of cases do not make it more difficult for the Supreme Court than for the Court of Appeal to familiarise itself with foreign legislation.
- (8) The relevant legal basis for refusing extradition in the case at hand is section 8 subsection 2 of the Arrest Warrant Act:

**“An arrest warrant as mentioned in subsection 1 shall also be rejected if extradition would be in violation of the European Convention on Human Rights with amendments or its protocols applicable as Norwegian law.”**

- (9) It is contended that extradition to Poland will amount to a violation of Article 6 (1) of the ECHR, on the right to a fair trial. This right is also protected under Article 95 of the Constitution. In the preparatory works to the Act, Proposition to the Storting 137 LS (2010–2011) page 52, it is stated that “[i]n order to reject an arrest warrant because it violates the ECHR, there must be some concrete basis for concluding that an extradition will amount to such violation”, and that this “may” involve violation of Article 6. This is in accordance with the opinion of the European Court of Human Rights. In *Soering versus The United Kingdom*, judgment 7 July 1989, paragraph 113, the Court stated that extradition would be contrary to Article 6 if the person concerned “risks suffering a flagrant denial of a fair trial in the requesting country”. In *Ahorugeze v. Sweden*, judgment 27 October 2011, the Court specified the content of this criterion in paragraphs 114–116:

**“114. The term “flagrant denial of justice” has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other authorities, Sejdovic v. Italy [GC], no. 56581/00, § 84, ECHR 2006-II).**

**115. It should be noted that, in the twenty-two years since the Soering judgment, the Court has never found that an extradition or expulsion would be in violation of Article 6. This indicates that the “flagrant denial of justice” test is a stringent one. 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.**

**116. In executing this test, the Court considers that the same standard and burden of proof**

should apply as in the examination of extraditions and expulsions under Article 3. Accordingly, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 129, ECHR 2008-...).”

(10) Hence, the situation must be quite bad in the requesting state for extradition to be in violation of Article 6 of the ECHR Article 6. It is not sufficient that there is a risk that the trial in the requesting state does not fully meet the requirements in Article 6 of the ECHR. There must be a genuine risk of a destruction of the very essence of the right to a fair trial.

(11) This has also been the view of the Court of Justice of the European Union (CJEU) when applying the Council Framework Decision 2002/584, which in practice corresponds to the provisions in the Arrest Warrant Act on extradition to EU countries. The Appeals Selection Committee refers to the judgment 25 July 2018 in Case C-216/18 *PPU* paragraph 61. In the next paragraphs, the CJEU points out that the right to have the case adjudicated by independent judges is a fundamental part of the right to a fair trial, and that the judges’ independence may be threatened by systemic or generalised deficiencies in the administration of justice in the country concerned. In the event that such deficiencies in the administration of justice can be established, the CJEU states the following in paragraph 75:

**“If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the 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 breach of his fundamental right 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 to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.”**

(12) Thus, in addition to a general assessment, an individual assessment must also be made of whether there is a genuine risk in the case concerned. Such an assessment must take into account the nature of the violation committed.

(13) The Appeals Selection Committee notes that the Supreme Court has in fact made the same assessment in cases concerning extradition to Poland. Reference is made to the Supreme Court judgment HR-2019-729-U paragraphs 7–8:

**“(7) A’s appeal against the application of the law is also dismissed. According to section 7 of the Extradition Act, an extradition cannot be carried out if it violates fundamental humanitarian interests. The Court of Appeal stated the following in this regard:**

**‘Even though there can be a general reason for concern about the development of the law in Poland, the Court of Appeal agrees with the District Court that in this case, there is no reason to believe that A risks having his fundamental rights violated, including the right to a fair trial, which may prevent extradition.’**

**(8) In the Appeals Selection Committee’s opinion, this is not an expression of an incorrect interpretation of the law. An individual assessment must be made of the facts in the individual case. At the same time, it is unlikely that Poland will provide a fair trial in a case of this nature.”**

(14) This is also the type of assessment made by the Court of Appeal in the case at hand:

**“As the Court of Appeal sees it, nothing suggests that the factors creating general concern for the legal development in Poland entail a genuine risk that A will be deprived of his fundamental rights if he is extradited. The arrest warrant is issued based on ordinary profit-driven crime, and no information exists implying that A’s rights will not be safeguarded in the proceedings against him for these offences.”**

- (15) The question is whether the latest amendments to laws relating to the Polish judiciary have created a situation implying that extradition requests must be denied in accordance with section 8 subsection 2 of the Arrest Warrant Act without a further assessment of the situation in the individual case. In the alternative, the appellant holds that it should at least be up to the prosecution authorities to present additional information suitable to convince the courts that the requested person will have his or her human rights respected.
- (16) The appellant has referred to amendments that entered into force in Poland on 14 February 2020. The Appeals Selection Committee notes that the bill to the Polish National Assembly is commented on in an Urgent Joint Opinion of 16 January 2020 prepared by the *European Commission for Democracy through Law*, the so-called Venice Commission, appointed by the Council of Europe. The Opinion is issued to the Senate of the Polish National Assembly. It states that one of the main purposes of the amendments is to gather all cases on the validity of appointment of judges and appeals based on the lack of independence and impartiality of the judges having adjudicated the case in question, in a new “Extraordinary Chamber” in the Polish Supreme Court, see paragraph 31 et seq. of the Opinion. However, the judges in the Extraordinary Chamber have themselves been appointed in accordance with highly controversial procedures that increase the Government’s influence over the appointment of judges.
- (17) Furthermore, the new rules imply that Polish judges who criticise appointments of judges, or otherwise engage in the political debate, risk disciplinary sanctions, potentially dismissals, see the Opinion’s paragraph 24 et seq. These amendments seem to be a reaction to a ruling of 5 December 2019 by the Chamber of Labour Law and Social Insurance of the Polish Supreme Court, which in turn is based on an interpretive ruling by the CJEU in Joined Cases C-585/18, C-624/18 and C-625/18 A.K, CD and DO. These cases questioned whether the new Disciplinary Chamber of the Polish Supreme Court met European requirements of judicial independence and impartiality, see the Opinion’s paragraphs 13-16. The CJEU could not, due to its limited jurisdiction when issuing preliminary rulings, answer the question directly, but as far as the Appeals Selection Committee understands, the Chamber of Labour Law and Social Insurance found that the Disciplinary Chamber did not meet these requirements.
- (18) The Venice Commission also mentions other amendments: It will be practically impossible to challenge a legal ruling on the ground that the case was allocated to the judge unlawfully, or that the rules on territorial and substantive jurisdiction were breached, see paragraph 41. Furthermore, paragraph 44 mentions that judges may face disciplinary sanctions for violations of overbroad and open-ended definitions, which implies that the disciplinary system can be abused to interfere improperly in judicial roles. Other amendments are also mentioned, relating to the more institutional aspects of the administration of justice.
- (19) The Venice Commission summarises in paragraphs 59 and 60 that the amendments may be seen as further undermining the independence of the Polish judiciary, and Polish judges may face disciplinary proceedings for decisions required under for instance the ECHR.

- (20) The Venice Commission issued its Opinion on the bill as it read before the hearing in the Senate. It appears that the bill was rejected by the Senate, but that it later has been approved by the Sejm, the Second Chamber of the Polish National Assembly. The amendments entered into force on 14 February 2020. A ruling of 17 February 2020 from the Oberlandesgericht in Karlsruhe – Ausl 301 AR 156/19 – presented by the appellant, and which reproduces the amendments, indicates that no significant adjustments were made to the final provisions compared to the bill commented upon by the Venice Commission.
- (21) Hence, there is no doubt that the independence of the Polish judiciary and judges is threatened and subject to even more pressure now than before the amendments.
- (22) However, case law from the European Court of Human Rights requires that there is a genuine risk that the very essence of the right to a fair trial is violated. Even if the judge has been appointed in a politicised process or risks undue pressure or sanctions after having decided the case in his or her best discretion, he or she may still be able to provide a fair trial in cases completely without political overtones or other factors giving reason to doubt his or her ability to act with independence and impartiality. Thus, it is still necessary to make an individual assessment in each case of whether extradition in this case will be in violation of Article 6 of the ECHR.
- (23) The case that is now being considered by the Appeals Selection Committee concerns an extradition request due to four charges of burglary. It has not been submitted that there are circumstances in the case suggesting that the requested person should not receive a fair trial, and it is difficult to imagine what those would be. By way of comparison, in the invoked German case concerning fraud charges, the requested person had made specific submissions that influential Polish citizens had bribed witnesses to make false statements in the case and to have someone beat him up. Therefore, the possibility that the new legal provisions could be abused to institute disciplinary proceedings against the judge in the case because of his weighing of evidence had the result that extradition was denied.
- (24) The appellant has mentioned that, under the system of the Arrest Warrant Act, no information is sent that may enable the requested person to shed light on such circumstances. He denies any knowledge of the cases and can thus not shed light on the alleged aggrieved parties' dealings with the police, the prosecution authority or the judges in the case, or what relationships these persons may have to political authorities. As the Appeals Selection Committee sees it, however, there must still be some concrete basis for concluding that extradition will be contrary to Article 6 of the ECHR, when nothing else in the case at hand gives reason to fear it.
- (25) Against this background, the appeal is dismissed.
- (26) The order is unanimous.

#### CONCLUSION:

The appeal is dismissed.

Arne Ringnes  
(sign.)

Henrik Bull  
(sign.)

Wenche Elizabeth Arntzen  
(sign.)