SUPREME COURT OF NORWAY

O R D E R

issued on 29 April 2022 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Aage Thor Falkanger
Justice Knut H. Kallerud
Justice Ingvald Falch
Justice Erik Thyness

HR-2022-863-A, (case no. 21-154386STR-HRET)
Appeal against Court of Appeal's order 21 October 2021

A	(Counsel Nils Christian Nordhus)
v.	
The Public Prosecution Authority	(Counsel Petter Sødal)

(1) Justice **Falch:**

Issues and background

(2) The case concerns a request for a person's surrender to Poland under a European arrest warrant. The issue is whether the surrender will in breach of Article 8 of the European Convention on Human Rights (ECHR), see section 8 subsection 2 of the Arrest Warrant Act.

(3) On 21 April 2010, the district court in Gorzów Wlkp. in Poland issued a European arrest warrant against A. He has been a Norwegian national since 1993, after having emigrated from Poland. In the arrest warrant, it is stated that he is a Polish national.

(4) According to the arrest warrant, the court requests A's arrest and surrender to Poland for prosecution there. The basis for the arrest warrant is a suspicion of nine counts of serious drug crime. In short, A is suspected in the period 2004–2006 of having participated in and led an organised criminal group that imported or attempted to import amphetamine to Norway from Poland. In aggregate, he is suspected of dealings with around 580 kilos of amphetamine.

(5) A was sought for arrest on 20 February 2020 through the Schengen information system. Only then did Norwegian authorities become aware of the arrest warrant. On 18 August 2020, A was arrested by the Norwegian police in connection with the investigation of another drug case, and he has since been in custody on remand. His arrest is thus unrelated to the Polish arrest warrant.

(6) On 17 December 2020, the Norwegian police requested a court order declaring that the conditions for his surrender to Poland are met. On 12 January 2021, Drammen District Court returned the case to the police for investigation of whether the basis for the arrest warrant includes offences of which A was convicted by Borgarting Court of Appeal on 13 April 2007. He was sentenced to four years of imprisonment for having stored around three kilos of amphetamine in Norway. The sentence has been executed.

(7) The police filed the request for surrender once more on 16 May 2021. Buskerud District Court accepted the request by an order on 8 October 2021.

(8) On 21 October 2021, after A's appeal, Borgarting Court of Appeal ruled as follows:

> "The conditions for surrendering A, born 00.00.1957, to Poland are met."

(9) A has appealed to the Supreme Court, asserting several grounds for appeal. On 10 November 2021, the Supreme Court's Appeals Selection Committee decided to refer the appeal as far as it concerned the application of the law under section 8 subsection 2 of the Arrest Warrant Act, to the Supreme Court sitting as a division of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act. The appeal was otherwise dismissed.

(10) The association of Polish judges, Iustitia, has submitted a statement to the Supreme Court. The statement has been distributed to the parties in analogy to section 15-8 of the Dispute Act.

(11) After the Court of Appeal's order, the case has been referred to in Polish media, and some new sources of law have emerged. Apart from that, and within the scope of what the Supreme Court is to hear, the case is similar to that in the Court of Appeal.

(12) The appellant – *A* – contends that the conditions for surrender to Poland are not met, alternatively that the Court of Appeal's order must be set aside. He contends that Norway will breach Article 6 (1) of the ECHR if he is surrendered. In Poland, he will not receive a fair trial by an independent tribunal established by law.

(13) *The Public Prosecution Authority* contends that the appeal must be dismissed. It argues that even if the general judicial system in Poland is flawed, A runs no real risk of violation of his rights .

My opinion

The Supreme Court's jurisdiction

(14) Because this is a second-tier appeal against an order, the Supreme Court's jurisdiction is limited to the Court of Appeal's procedure and general interpretation of the law, see section 388 subsection 1 (2) 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 Supreme Court may also review the Court of Appeal's application of the law, but not the Court of Appeal's findings of fact. The Supreme Court may nonetheless base its ruling on established facts and clear and undisputed factual circumstances, see Rt-2003-593 paragraph 38.

(15) In assessing whether surrender to Poland for prosecution there will violate A's rights under Article 6 of the ECHR, it is necessary to address the legislation and judicial system in Poland. The mentioned limited jurisdiction does not prevent the Supreme Court from doing so, see the ruling HR-2020-553-U paragraph 7.

The Arrest Warrant Act – background and overview

(16) The Arrest Warrant Act implements among others the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway of 28 June 2006. The Agreement, which entered into force on 1 November 2019, is a *Parallel Agreement* to the Council Framework Decision of 13 June 2002 on the European arrest warrant, and has virtually the same wording.

(17) The Parallel Agreement sets out in its Preamble that it builds on mutual confidence in the legal systems of the Contractual Parties and on "the ability of all Contracting Parties to guarantee a fair trial". For the Framework Decision's part, the European Court of Justice (ECJ) has, in its Grand Chamber judgment of 22 February 2022 in joined Cases C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie*, to which I will return, stressed in paragraph 43 that the principle of mutual recognition "constitutes the 'cornerstone' of judicial cooperation in criminal matters'. The same must apply under the Parallel Agreement.

(18) The Parallel Agreement builds on the general rule that further defined arrest warrants from one Contracting Party must be relied on by the other Contracting Party. In this manner, the previously applicable systems for surrender of suspects and convicts are simplified and made more efficient.

(19) Article 37 of the Parallel Agreement sets out the objective of "as uniform an application and interpretation as possible" of the Agreement. Uniform case law will ensure equal treatment of suspects and convicts and prevent that the Contracting Parties are subject to different burdens. Requested persons will thus not benefit from staying in some Member States rather than in others.

(20) For that reason, Article 37 instructs the Contracting Parties to "keep under constant review" the case law of the ECJ and of the competent courts of Norway and Iceland. This means that ECJ case law relevant for the interpretation of the framework decision will also be relevant for the interpretation of the Parallel Agreement, and thereby also for the interpretation of the corresponding rules in the Arrest Warrant Act. In my view, the principle of a uniform application of the law – the objective of homogeneity – stresses the importance of this case law in Norwegian courts. The same is assumed for the relevance of the Lugano Convention, see HR-2017-1297-A paragraph 37 with further references. The Lugano Convention is also a Parallel Agreement with the EU among others.

(21) Here, it should also be noted that section 10 of the Preamble to the EU's Framework Decision sets out that the EU Council pursuant to the rules in Article 7 of the Treaty on the European Union (TEU) may suspend the implementation of the Framework Decision only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6 of the TEU. Such a suspension of Poland has not been adopted.

(22) Section 1 of the *Arrest Warrant Act* sets out that persons who are sought by means of an arrest warrant and who are staying in Norway, "must" be arrested and surrendered to the state that has issued the arrest warrant. This reflects the general rule that the arrest warrants of other Contracting State must be relied on. The rules also apply to arrest warrants for Norwegian nationals, see section 10 subsection 1.

(23) According to section 5, the arrest warrant must comply with certain requirements regarding content. Section 6 requires that the criminal case has a certain degree of seriousness, and according to section 7, surrender may normally not take place if the action that gave rise to the arrest warrant is not punishable in Norway.

(24) Section 8 contains mandatory grounds for refusal, which means cases in which the arrest warrant "must" be refused. Sections 9 to 11 contain additional grounds for refusal, including some that are not mandatory.

(25) In the mentioned Grand Chamber judgment *Openbaar Ministerie* paragraph 44, the ECJ emphasises that exceptions from the general rule on execution of arrest warrants "must be interpreted strictly". The same must apply to the interpretation of the grounds for refusal in the Arrest Warrant Act.

Section 8 subsection 2 of the Arrest Warrant Act

(26) Section 8 subsection 2 of the Arrest Warrant Act reads:

> "An arrest warrant as mentioned in the first subsection must also be refused if surrender would be in breach of the European Human Rights Convention with amendments and the additional protocols that constitute Norwegian law."

(27) The provision originates from Article 1 (3) of the Parallel Agreement, setting out that the Agreement "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in the [ECHR]", or, when a EU Member State is responsible for the execution, the principles in Article 6 of the TEU. Article 6 TEU refers to the Charter of Fundamental Rights of the European Union. The same rule as that in the Parallel Agreement is set out in Article 1 (3) of the EU's Framework Decision, with the limitation that the latter only refers to Article 6 TEU.

(28) A contends that his surrender to Poland will violate his right under Article 6 (1) of the ECHR. The provision sets out that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in the determination for instance of a criminal charge. The wording is the same in Article 47 subsection 2 of the EU Charter, and in Norway, this right is also protected in Article 92 of the Constitution.

(29) It is therefore clear that surrender for prosecution or execution of an arrest warrant that will violate or has violated Article 6 (1) of the ECHR may be a ground of refusal. The preparatory works to the Arrest Warrant Act also mentions Article 6 in this context, see Proposition to the Odelsting 137 LS (2010–2011) page 52.

(30) The plenary of the European Court of Human Rights (ECtHR) established in a judgment of 7 July 1989 *Soering v. the United Kingdom* paragraph 113 that an issue might exceptionally be raised under Article 6 (1) if the requested person "has suffered or risks suffering a flagrant denial of a fair trial in the requesting country". The further implications of this are outlined in subsequent ECtHR case law, in particular judgment of 27 October 2011 *Ahorugeze v, Swedeb* paragraphs 114–116. In the Supreme Court ruling HR-2020-553-U paragraph 10, the ECtHR case law is summarised as follows:

> "In other words, it takes a lot for surrender to amount to a breach of Article 6 of the ECHR. The mere risk that the trial in the requesting country does not fully satisfy the requirements in Article 6 of the ECHR does not suffice. There must be a real risk of breach of the core of the right to a fair trial."

(31) ECJ case law clarifies the interpretation of the EU's framework decision in the cases where such grounds for refusal are asserted. As mentioned, this case law does not build directly on Article 6 of the ECHR, but on the parallel rule in the EU's Charter. However, the mentioned ECJ Grand Chamber judgment *Openbaar Ministerie* sets out in paragraph 56 that the ECJ's case law has "developed in the light of" that of the ECtHR under Article 6 of the ECHR.

(32) The way I read the ECJ's case law in this particular area, it sheds light and elaborates on – but does not limit – the obligations imposed by the ECtHR on the Convention States under Article 6 of the ECHR. Hence, there is reason to rely on the ECJ's case law also in the

interpretation of section 8 subsection 2 of the Arrest Warrant Act, cf. Article 6 of the ECHR. The previously mentioned objective of homogeneity is applicable also here.

(33) In the said Grand Chamber judgment, the ECJ establishes that the examination in cases such as the one at hand must be carried out in two steps. The *first step* is formulated as follows in paragraph 67, cf. also paragraph 81 and the conclusion:

> "As a first step in that examination, the executing judicial authority must make a general assessment of whether there is a real risk of breach of the fundamental right to a fair trial, connected in particular with a lack of independence of the courts of the issuing Member State or a failure to comply with the requirement for a tribunal established by law…"

(34) First, a general examination must be carried out of the judicial system of the issuing state. The question is whether due to systemic or generalised deficiencies there is a real risk of breach of the right to a fair trial. A key factor is whether the courts in the relevant state are independent and established by law.

(35) In the *second step,* the question is which relevance the systemic or generalised deficiencies possibly established in the first step have for the ruling in the individual case. This assessment will differ to some extent depending on whether a person is requested for prosecution or for execution of sentence. In the first-mentioned cases – of which our case is an example – the second step is formulated as follows in paragraph 101 of the Grand Chamber ruling, cf. also the conclusion:

> "If, following an overall assessment, the executing judicial authority finds that there are substantial grounds for believing that the person concerned, if surrendered, runs a real risk of breach of his or her fundamental right to a fair trial before an independent and impartial tribunal previously established by law, that authority must refrain, under Article 1(3) of Framework Decision 2002/584, from executing the European arrest warrant concerned. Otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) of that framework decision …"

(36) The arrest warrant can thus not be executed if the requested person runs a *real risk* of breach of his or her right to a fair trial. The risk assessment must be based on substantial grounds.

(37) To determine whether the first step is fulfilled, I will start by examining the legislation and judicial system in Poland. Then, I will evaluate the significance of the situation in Poland for A's case.

First step – the judicial situation in Poland

(38) After the Law and Justice Party – in Polish abbreviated to PiS – won the elections in Poland in 2015, a number of reforms have been carried out in the country's judicial system. These reforms have reduced the courts' independence from the executive and legislative powers. They are well documented, including by several bodies established by the Council of Europe and in the EU. For me, it is sufficient to point out certain key changes of relevance for the hearing of criminal cases. These changes are not disputed.

(39) By an amendment of January 2016, the roles of Minister of Justice and Prosecutor General were joined. As head of the prosecution authority, the Minister of Justice is free, at his own

discretion, to intervene in any criminal case, and to react against the country's prosecutors, for instance by imposing disciplinary sanctions. A report from the Parliamentary Assembly of the Council of Europe of 6 January 2020, Doc 15025, paragraph 53 sets out that this power in the hands of a politician "pose a real risk for abuse". The report also refers to trustworthy information indicating that "such abuse did indeed happen".

(40) By an amendment of July 2017, the Minister of Justice's influence over the *ordinary courts* increased. He was then empowered, for a period of six months, to dismiss and appoint court presidents and their deputies at his discretion. Many presidents and deputies were replaced during this period. In a judgment of 29 June 2021 *Broda and Bojara v. Poland*, the ECtHR found that two judges having been dismissed as deputies had been deprived of their right to a fair trial protected in Article 6 of the ECHR.

(41) By an amendment of December 2017, the *National Council of the Judiciary* – in Polish abbreviated to KRS – was reformed. The Council is a constitutional body tasked with safeguarding the courts' and the judges' independence and to nominate candidates for appointment to judicial office for every level and type of court. The Council has 25 members, and the power to elect the 15 judicial members was, through the amendment, transferred to the National Assembly. These members had previously been elected by various judicial bodies. The terms of office of existing members were terminated, and new members were elected.

(42) Poland's Supreme Court established in a judgment of 5 December 2019 paragraph 88 in *A.K. v. KRS* that the disputed decision by the National Council of the Judiciary had to be set aside because the council is not an impartial body independent of the legislative and executive powers. In a resolution of 23 January 2020, Poland's Supreme Court stated that appointing judges based on the Council's nominations is contrary to both the Polish constitution and Article 6 of the ECHR. The ECtHR established in its Grand Chamber judgment of 15 March 2022 *Grzęda v. Poland* that the applicant, whose term of office in the Council had been terminated, had been deprived of his right to a fair trial under Article 6 of the ECHR.

(43) In December 2017, an act was also adopted that modified the *organisation of the Supreme Court*. Two new chambers were introduced: the Disciplinary Chamber and the Chamber of Extraordinary Review, whose competence in practice place them above the ordinary chambers of the Supreme Court. The new chambers were composed of both lay judges and professional judges. The lay judges are appointed by the National Assembly, and the professional judges are elected by the President of Poland on the recommendation of the new Council of the Judiciary.

(44) The ECtHR stated in its judgment of 22 July 2021 *Reczkowicz v. Poland* that the Disciplinary Chamber is not a tribunal established by law, thus finding a violation of Article 6 (1) of the ECHR. Poland's Supreme Court concluded the same in the mentioned judgment from 2019 paragraph 79. In the ECtHR judgment of 8 November 2021 *Dolińska-Ficek and Ozimek v. Poland*, this was found to be the case also for the Chamber of Extraordinary Review.

(45) By amendments in December 2017 and December 2019, the rules on *disciplinary measures towards judges* were modified. The following is now considered disciplinary misconduct in accordance with section 107 (1) of the Polish Courts of Justice Act:

> "A judge is disciplinarily responsible for official (disciplinary) misconduct for:

1) an obvious and gross offence against the provisions of the law;
2) acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary;
3) actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland;
4) public activities that are incompatible with the principle of judicial independence and the impartiality of judges;
5) an infringement of the dignity of the office;"

(46) The provision is vaguely formulated, allows for subjective interpretations and the risk of abuse is therefore high. The Parliamentary Assembly of the Council of Europe states in paragraph 100 of the mentioned report from 2020 that, in the last year and a half, 1 174 disciplinary investigations were started against judges and prosecutors. In paragraph 99, it is emphasised that such proceedings have not only been started against judges who have been critical about the judicial reforms; their judicial decisions have also been investigated:

> "Even more disturbingly, disciplinary proceedings have been started against judges for decisions they have taken when adjudicating cases. Of particular concern in that context are the disciplinary proceedings started for 'judicial excess' against judges, including seven Supreme Court judges, who used their statutory right to request a preliminary ruling of the Court of Justice of the European Union on the compliance of provisions on disciplinary liability of judges with EU legislation. Regrettably, the list of such cases is extensive as demonstrated by several well documented reports."

(47) The Minister of Justice's role in the disciplinary proceedings has increased considerably. Not only does he control the prosecution service, he also controls the court presidents of whom, as mentioned, he has replaced several. The Venice Commission, an advisory body of administrative issues under the Council of Europe, expresses in its statement of 16 January 2020 (Opinion No. 977/2020) paragraph 45 that the Minister of Justice through various rules and systems "has a virtually unrestrained power to dismiss court presidents".

(48) The court presidents have in turn been given certain loosely formulated powers to appoint and dismiss judges in their respective courts, to assign and remove cases as they see fit, and to start investigations against judges. The court presidents are obliged to submit an annual report of activities to the Minister of Justice. Based on these report, the Minister may reduce the judge's salary by up to 50 percent for a certain period. And the other way around, if the Minister is pleased with the report, he may increase the salary.

(49) The ECJ has heard a number of cases concerning the Polish disciplinary system against judges and found that several rules are incompatible with EU law, see particularly Cases C-791/19 and C-204/21. In an interim ruling of 27 October 2021 in Case C-204/21 *R*, Poland was ordered to pay a penalty of EUR 1 000 000 per day until Poland complies with a previous ruling under the same case number.

(50) Already in 2015, the National Assembly started replacing judges in the *Constitutional Court*. The rules of the Court were significantly changed. Among other things, the Prime Minister was authorised to refuse publication of the court's judgments, with the result that the judgments might not be binding. The development is further described in the ECtHR judgment of 7 May 2021 *Xero Flor w Polsce sp. z o.o. v. Poland*. Here, a violation of Article 6 of the ECHR was found, as the Constitutional Court is no longer a tribunal established by law.

(51) In several rulings from 2020 and 2021, the Constitutional Court has ruled that Article 6 of the ECHR and corresponding EU rules – to the extent applied in the mentioned judgments by the ECtHR and the ECJ – are incompatible with the Polish Constitution and therefore not applicable in Poland. According to the ECJ, this "challenges the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments" of the ECtHR and the ECJ relating to the structure of Poland's judicial system. The quote is taken from paragraph 80 of the mentioned Grand Chamber judgment *Openbaar Ministerie*.

(52) Many of the changes in Poland that I have presented are of serious concern in themselves and contrary to Article 6 (1) of the ECHR. Overall, it depicts a plan whose objective has been – and the effect is – to bring the judiciary under the control of the executive and the legislature. The Parliamentary Assembly of the Council of Europe expresses the following in paragraph 94 of the mentioned report from 2020:

> "While individual aspects of the different acts and policies discussed are already of serious concern, when taken cumulatively these acts 'bring the judiciary under direct control of the parliamentary majority and the President of the Republic – contrary to the very principle of separation of powers.' The acts also open the justice system to political abuse and endanger the rule of law in the country."

(53) For these reasons, the Polish judicial system undoubtedly suffers from *systemic and generalised deficiencies*. At a general level, these deficiencies create in my view a *real risk* of violations of the very core of the fundamental right to a fair trial. As the situation stands, Polish courts cannot be considered independent, including because many judges in the ordinary courts have not been appointed according to appropriate procedures. More important in our context , however, is the risk that the pervasive disciplinary system, in practice led by the Minister of Justice and directed at all judges in the country, prevents the judges from acting independently and impartially in each case.

(54) This implies that the conditions in *the first step* of the test formulated by ECJ are clearly met.

The second step – the individual assessment of A's case

(55) It is set out in the ECJ's Grand Chamber judgment *Openbaar Ministerie* that my conclusion so far is not sufficient to refuse the request for surrender of A to Poland. The question is now, in the second step, whether there are "substantial grounds for believing" that A, in his case, "runs a real risk of breach" of his fundamental right to a fair trial under Article 6 of the ECHR.

(56) The factors to rely on in this regard are set out in paragraph 97 and in the conclusion of the said judgment: First, one must rely on any information presented by the requested person relating to his *personal situation*. Secondly, one must rely on the *nature of the offence* for which he is prosecuted. Thirdly, one must rely on the factual context in which the *arrest warrant* was issued, including any statements issued by Polish authorities in that regard, see paragraph 98. Finally, one must rely on any other information available relevant for assessing the independence and impartiality of the judges who make up the panels likely to decide his case.

(57) This implies that a general risk that the requested person's case will be heard by a judge whose appointment is contrary to Article 6 of the ECHR is not sufficient. Nor can it be required that that the requesting country identify the court or the judges called upon to hear the case, see the Grand Chamber judgment paragraphs 93–97.

(58) It appears from the arrest warrant that A is charged with serious drug offences, involving export of large amounts of amphetamine from Poland. The arrest order was issued in 2010, long before the reforms of the Polish judicial system were implemented. As the charge is worded, the case seems primarily to raise evidentiary issues – and only to a limited degree, if any, such legal issues as have been prominent and controversial arising from the mentioned judicial reforms.

(59) *Firstly*, A refers to the seriousness of the charges against him – they involve dealings with more than half a tonne of amphetamine, and he is also suspected of participation in organised crime. This, he claims, will make him particularly exposed in a hearing in Polish courts.

(60) The Court of Appeal has emphasised the case's lack of "political overtones". I agree that if such a criterion is met, it is generally not acceptable to surrender a requested person for prosecution in Poland. However, I find that the criterion is too narrow to filter out the arrest warrants that must be refused under section 8 subsection 2 of the Arrest Warrant Act. As I have described the systemic and generalised deficiencies in the Polish judicial system, arrest warrants would have to be refused also due to other characteristics of the suspected offence. If the case affects public interests, including evidentiary or legal issues, which must be considered significant for the executive, the majority of the legislature and/or the prosecution authority, there may be reason to refuse the arrest warrant. This applies in particular to cases where persons with political influence may be suspected of having a form of self-interest in the outcome.

(61) I cannot see the relevance of the fact alone that the arrest warrant concerns a large drug case. Although I do not completely rule out that the case will draw attention from the other state powers, this particular aspect of the case is not a sufficiently substantial and documented ground for assuming that A runs a real risk of not receiving a fair trial.

(62) *Secondly*, A mentions that the case has become old. The offences for which he suspected were committed 16–18 years ago, and the arrest warrant was written 12 years ago. He therefore contends that his case has not been decided within a reasonable time, see Articles 6 (1) and 13 of the ECHR. In the light of the Constitutional Court's declaration that Article 6 in many contexts is inapplicable in Poland, he claims that this is a serious and documented reason to assume that he will not receive a fair trial.

(63) In the hearing in the Supreme Court, it has not been clarified whether this part of Article 6 is applicable in A's case. Among other things, it is not clarified when A became aware of the charges against him. I also note that Norway did not surrender its own nationals to other countries before the relevant parts of the Arrest Warrant Act entered into force in November 2019. However, I cannot see under the circumstances that the presented systemic and generalised deficiencies in the Polish judicial system give reason to believe that Polish courts will not observe this part of Article 6 of the ECHR.

(64) *Thirdly*, A contends that Polish authorities have expressed towards Norwegian authorities that that he will be prosecuted in Poland, although parts of the suspicion against him might already

have been finally decided in Norway by Borgarting Court of Appeal's judgment of 13 April 2007. In a presented email of 16 April 2021, the Polish police seem to have answered "no" to the question whether the police will waive charges in the arrest warrant turning out to be overlapping with the Norwegian judgment.

(65) The Court of Appeal examined the contention and found no "evidence" that the Polish basis for suspicion overlaps with the basis stated in the Norwegian judgment. Hence, there is no risk of double prosecution, see section 8 subsection 1 (c) of the Arrest Warrant Act. On this point, A's appeal has been dismissed by the Supreme Court's Appeals Selection Committee. In its discussion of A's contention under section 8 subsection 2, the Court of Appeal states:

> "With the result at which the Court of Appeal has arrived in its assessment of whether section 8 subsection 1 (c) of the Arrest Warrant Act prevents surrender, it is hard to see that this is still a relevant issue. Such a statement from the Polish police is in any case not sufficient to establish that A will not receive a fair trial in Poland for the acts covered by the arrest warrant."

(66) I support this assessment.

(67) *Fourthly*, A contends that his case has drawn public attention in Poland, which also puts him at risk of not receiving a fair trial. He claims that he has been duly identified by Polish media in several internet articles, setting out that he, during the Supreme Court hearing, has expressed mistrust in the Polish judicial system. The respondent – the Public Prosecution Authority – has not disputed these factual circumstances.

(68) I agree that the articles may appear to express that A is publicly criticising the Polish rule of law, and the statements are thus an attack on the reputation of the Polish authorities. However, no information has been presented to the Supreme Court directly indicating that such statements from the person charged, made as part of his defence against the execution of an arrest warrant, will affect him in a subsequent trial. However, in the light of the serious systemic and generalised deficiencies in the Polish judicial system that I have presented, this factor cannot be completely ignored.

(69) In the *overall assessment*, there is reason first to emphasise that the systemic and generalised deficiencies in the Polish judicial system are so extensive and pervasive that a *relatively small amount* of individual circumstances are needed for an arrest warrant to be refused under section 8 subsection 2 of the Arrest Warrant Act, see Article 6 (1) of the ECHR. In this regard, I also mention that the association of Polish judges Iustitia sums up its written submission to the Supreme Court as follows:

> "In light of the circumstances described above there are serious doubts as to the guarantee of fair trial before an independent court in Poland now, even in common crimes cases appearing to be such cases."

(70) I therefore find that it cannot be ruled out that arrest warrants also in more ordinary cases must sometimes be refused. However, it must be acknowledged that it is highly difficult to assess in advance – and at a distance – whether an individual case gives sufficient indications that the requested person will not receive a fair trial if surrendered. As new information on the situation in Poland will emerge, the present assessments may have to be adjusted.

(71) In this individual case, I believe that the evidence that A will not receive a fair trial is overall too weak for the appeal to succeed. The fact that he is charged with serious drug offences, together with the fact that he has publicly criticised Polish authorities during the hearing in Norway does not, in my view, create a sufficiently real risk that his fundamental right to a fair trial will be violated in Poland.

Conclusion

(72) There are currently such systemic and generalised deficiencies in the Polish judicial system that there is a real risk of breach of the very core of the fundamental right to a fair trial in Article 6 (1) of the ECHR (the first step of the assessment). Norwegian courts must therefore refuse an arrest warrant for prosecution in Poland if there are substantial grounds for believing that, in case of surrender, there is a real risk of breach of this fundamental right (the second step of the assessment), see section 8 subsection 2 of the Arrest Warrant Act.

(73) Due to the significance of the mentioned systemic and generalised deficiencies in the judicial system in Poland, relatively little concrete evidence is required before the conditions for surrender are not met. For A's part, however, the evidence is too weak. The fact that he is charged in a serious drug case, together with his public criticism of Polish authorities during the hearing of his case in Norway, cannot be considered sufficient

(74) Section 8 subsection 2 of the Arrest Warrant Act therefore does not prevent A's surrender to Poland. This means that the appeal must be dismissed.

(75) I vote for this

O R D E R :

The appeal is dismissed.

(76) Justice **Falkanger:** I agree with Justice Falch in all material respects and with his conclusion.

(77) Justice **Kallerud:** Likewise.

(78) Justice **Thyness:** Likewise.

(79) Chief Justice **Øie:** Likewise.

(80) Following the voting, the Supreme Court issued this

O R D E R :

The appeal is dismissed.