The AG Opinion in the Celmer Case: Why the Test for the Appearance of Independence is Needed

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1. What Kind of a Test? With How Many Prongs?

In their latest post on this blog, Petra Bárd and Wouter van Ballegooij commented on the AG Tanchev Opinion delivered in the Case C-216/18 PPU, *Minister for Justice and Equality v LM*. The preliminary reference from the Irish High Court concerns the possibility to surrender a crime suspect to Poland despite the controversial judicial reforms in this country. The authors claim that the legal problem in the case at hand should be framed – contrary to what AG Tanchev proposed – as a rule of law and not a fundamental rights issue. They suggest that the Court of Justice follow rather its approach from *Associação Sindical dos Juízes Portugueses* and assess the Polish judicial system in light of the requirements of judicial independence.

Instead, AG Tanchev opted for a different, "fundamental rights" approach from *Aranyosi and Căldăraru*. He agreed that the potential breach of the right to fair trial can be the basis to postpone the execution of the European Arrest Warrant. He opined however that the executing judicial authority should engage in a two-stage examination to find not only that (1) there are systemic deficiencies in the issuing judicial system but also (2) that the person concerned is actually exposed to such a risk because she is a political opponent. This approach causes multiple problems, some of which are discussed by the authors mentioned above with which I fully concur. Judicial systems of EU Member States should be constructed in a way to exclude any interferences in the judicial decision-making. To require of the accused to prove that such interferences may occur for whatever reasons (e.g. because the executive thinks that drug traffickers or those who bring their cases before the Court of Justice should be punished in an exceptionally severe way) is to introduce an impossible burden of proof.

In this post, I focus on what I believe is the most important question in the *Celmer* case: what kind of a test for the rule of law/fair trial, and with how many prongs? I argue that the rule of law/fair trial test that the Court should apply is the test for the appearance of independence, known from the practice of the ECtHR. I also argue that the Court should not leave the application of this test to the referring court but carry it out by itself.

2. Why pushing for Aranyosi and Căldăraru test?

AG Tanchev did not propose a reformulation of the questions referred and accepted the way in which the main legal problem had been framed – i.e. as a mutatis mutandis application of *Aranyosi and Căldăraru* test. This framing directed the reasoning and efforts of AG Tanchev on the adjustment of that test. He focused on the maximum limitation of exceptions to mutual trust on fundamental rights grounds in order to secure the effectiveness of mutual recognition system. But he underestimated the difference between the fundamental right at issue in *Aranyosi and Căldăraru* – i.e. the protection from inhuman and degrading treatment while being in prison – and the one in *Celmer* – i.e. the right to a fair trial. The prison conditions may vary in a State and prisoners may be transferred from one prison to another. That is why systemic problems with prison conditions do not necessarily mean that the prisoner will be subjected to degrading treatment. Hence, the *Aranyosi and Căldăraru* test has a second "concrete" prong. The executing judicial authority must find that the very individual against sought by means of the EAW is likely to experience degrading treatment.

On the contrary, the controversial judicial reforms affect all Polish judges to a comparable extent. In a nutshell, these measures enhance the powers of the Minister of Justice to oversee the functioning of common courts. As concerns likely effects of these measures on concrete judicial decisions, the Court should take a closer look to the new system of disciplinary proceedings for judges. The Minister can effectively initiate disciplinary proceedings against any judge, appoint an accuser and even issue binding instructions to latter. He also selects judges who serve in disciplinary courts. Moreover, the new Council of Judiciary – elected by the parliamentary majority and not judges themselves – will now decide on the membership of the Disciplinary Chamber of the Supreme Court. Importantly, the content of a judicial decision containing a "manifest breach of law" may also amount to a disciplinary offence. Although this is not a new measure, the possibility to punish or dismiss a judge for the content of her decisions is no more subject to strong procedural guarantees, in particular regarding the independence of disciplinary courts. Moreover, M. Matczak reported on this blog (see the Facts 6 and 7) about the judgment after which the Deputy Minister of Justice was publicly considering disciplinary proceedings for criminal judges who refused to accept the fruits of a poisonous tree, relying directly on the Polish Constitution and the ECHR. The new structure of disciplinary courts and proceedings may create at last a "freezing effect" on all Polish judges. It "encourages" them to follow in their decision-making the preferences of the executive.

In what way should this be considered by the Court? I believe that instead of adjusting the *Aranyosi and Căldăraru* test, the Court of Justice should perform a test for the appearance of independence.

3. The Appearance (of Independence) Matter

The appearance of independence test is applied by the ECtHR. The idea for this test is summarised in the legal maxime: "justice must not only be done, it must also be seen to be done". In the Case 22678/93, Incal, the ECtHR held:

> *"Even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (...). In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (...)." (para 71).*

Arguably, this approach has also been endorsed by the Court of Justice in the Case C-175/11, *H. & D. v Refugee Applications Commissioner*. In this case, the Court was called to assess the independence of the Refugee Appeals Tribunal. The applicants in the main proceedings submitted that the Tribunal was not independent, as organisational links exist between the Tribunal and the Minister of Justice. The Court held that:

> *"[the] guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it." (para. 97)*

The point is to verify whether the parties to judicial proceedings and members of the public have any objectively justified grounds to doubt the independence of the court (for another example of the application of this test, see Case 42856/06, *Kinský v the Chech Republic*, in particular paras. 95-97). The test is underpinned by the idea that no one is able to penetrate the mental sphere of a judge to get to know and evaluate the real motives of her decisions, and whether she was truly independent and impartial. The best we can do is to create an institutional and procedural setting in which the only interest of judges lies in deciding cases to the best of their abilities. Such a setting must be understandable to citizens and provide them with

strong grounds to believe in judicial independence, the core building block of judicial legitimacy. With judicial independence we associate the highest achievable level of objectivity. If the courts of EU Member States are all protected by appropriate legal arrangements from undue interferences from the legislative and the executive, the parties to judicial proceedings and the EU citizenry in general have reasonable grounds to believe that judicial decisions are as objective as possible. Hence, they are likely to treat them as binding sources of legitimate authority. The lack of appearance of judicial independence result in the lack of mutual trust between the EU Member States.

The test that the Court should apply in *Celmer* boils down to the following questions. Does a reasonable observer or a party to proceedings before the Polish courts – being aware of the recently introduced measures regarding, among others, the Minister of Justice's powers to initiate and coordinate disciplinary proceedings against judges – have objectively justified grounds to doubt that her or his case will be decided exclusively on the basis of the court's best understanding of applicable law? Or does she or he have reasonable grounds to suspect that the court's decision may be influenced by some factors external to law, for instance political preferences of the legislative or executive, even without the latter's direct interferences, just due to the 'freezing effect'?

3. A Hot Potato

AG Tanchev suggested that the Court should leave the final decision on the possibility of a fair trial in Poland to the referring court. On the contrary, I believe that the appearance of justice test should be carried out by the Court of Justice itself. Due to the differences between the judicial systems of EU Member States, an application of the appearance of justice test will necessarily result in clarifications regarding the EU standards of judicial independence. Each time the test is applied, new elements of the EU standards of judicial independence emerge. At the same time, certain legal arrangements are prohibited to all EU Member States and the scope of admissible interferences into the judicial branch by political branches is narrowed down. In other words, an application of the test implies the new interpretation of EU law. The latter is an exclusive task and responsibility of the Court of Justice. It would be different only if the application of the test required some case-specific and not only systemic considerations. But alas for the Court of Justice, the appearance of independence test should have only one prong – there should be no dividing line between the systemic and case-specific considerations. To require the person concerned to prove that the court of the issuing Member State hearing her case after the execution of the EAW will lack independence – where we already know of serious systemic deficiencies of this State's judicial system in terms of its independence – is to charge this person with an impossible burden of proof.

At this point, it becomes clear that proceedings under Article 7 TEU and proceedings before the Court of Justice in the Celmer case indeed do have the same or at least very similar subject-matter, contrary to what AG Tanchev stated (para. 40 et seq.). But in no way does it mean that the Court could usurp powers conferred by Article 7 TEU upon the European Council and the Council. The questions referred by the Irish High Court are a normal consequence of the recognition in the EU legal order of fundamental rights, including the right to a fair trial. Even though the Court may be called to assess the independence of Polish courts, the Celmer judgment in will impose obligations of the Irish High Court, under the EAW Framework Decision and Article 47 of the Charter. Moreover, that the Court may be called to assess the independence of the Polish judicial system as a whole stems from the nature of the right to a fair trial and the controversial legal framework which affects all Polish judges to a comparable extent. Again, in no way is the Court's task and competence in Celmer incompatible with Article 7 TEU.

The *Celmer* case is one in which the function of the Court of Justice as the constitutional and rule of law court of the EU is clearly visible. I hope that the Court of Justice will properly acknowledge this case's distinctiveness.

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