

AG: Best Interest of Child Must Guide Decision to Execute EAW

Thomas Wahl

News

On 13 July 2023, [Advocate General Tamara Čápetá](#) presented her views as to which extent the best interest of the child is relevant for the execution of a European Arrest Warrant (EAW).

Facts of the case and question referred

In the underlying case ([C-261/22, GN](#)), the Supreme Court of Cassation in Italy has to deal with the question of whether a mother of a young child can be extradited to Belgium where she has to serve a sentence of five years' imprisonment. Italian judicial authorities found that - due to a lack of replies from the part of Belgian authorities - there is no certainty that Belgian law recognised custody arrangements comparable to those in Italy, which protect a mother's right not to be deprived of her relationship with her children and to ensure that children receive the necessary maternal and family assistance. These rights are guaranteed by the Italian Constitution, Art. 3 of the Convention on the Rights of the Child, and Art. 24 of the Charter of Fundamental Rights of the EU.

The Supreme Court of Cassation seeks guidance from the ECJ whether it is entitled to refuse or postpone the execution of an EAW if by such a surrender it risks breaching the fundamental rights of a mother whose surrender is requested as well as the fundamental rights of the minor children living with her.

AG's Opinion and reasoning

According to AG Čápetá, refusal of an EAW on grounds of fundamental rights is only possible if there are systemic or generalised deficiencies in the issuing state (here: Belgium) with regard to ensuring the right to family life of prisoners. Since there are no indications of such systemic and generalised deficiencies, the Italian authorities cannot refuse the execution of the EAW on the ground of a possible breach of the woman's/mother's fundamental rights.

Referring to the ECJ case law in the area of asylum, AG Čápetá found, however, that the decision on the EAW must take account of the fundamental right of the children, i.e., the best interest of the child which is protected in the Charter. There is nothing in the FD EAW that precludes the recognition of this interest and implement it as a refusal ground.

However, before refusing the EAW, the executing authority (here: the Italian courts) must determine the concrete situation of the child and communicate with the issuing authority (on the basis of the mechanism established in Art. 15(2) FD EAW). Refusal is only possible if the executing authority has sufficient

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information that would allow it to be absolutely certain that the execution of the EAW would go against the best interest of the child.

The AG adds that the ECJ must reconcile the aim of ensuring the best interests of the child with the aim of avoiding impunity, one of the main aims of the EAW system. In doing so, she proposes applying Art. 4(6) FD EAW that regulates situations in which persons staying in the executing Member State need not be surrendered if the executing State undertakes the execution of the prison sentence on its territory. Even though this article provides discretion for the executing Member State, it might turn into an obligation if the best interests of the child must be safeguarded, the AG notes. She advocates that Art. 4(6) FD EAW would be the best option for the mother not to leave the country while the relationship with her child can be maintained.

The AG also concludes that temporarily postponing surrender under Art. 23(4) FD EAW is no option in the case at hand.

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