CJEU Upholds Restrictive Fundamental Rights Jurisprudence on the EAW in Catalan Surrender Cases

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Thomas Wahl

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the Study of Crime, Security and Law

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On 31 January 2023, the CJEU, sitting in for the Grand Chamber, published an important decision on the possible refusal of European Arrest Warrants (EAWs) due to fundamental rights concerns voiced in the executing state. The background of the case (C-158/21 – *Puig Gordi and Others*) are refusals by Belgian courts to surrender Catalan politicians who fled to Belgium after the illegal independence referendum in Catalonia in 2017. Belgian judges have been of the opinion that there was no legal basis according to which the Supreme Court in Madrid (*Tribunal Supremo*) was expressly authorised to decide and declined the execution of the EAWs due to the risk that the right to be tried by a tribunal previously established by law (Art. 47(2) CFR, Art. 6(1) ECHR) would be violated. Hence, in essence, the EAWs were refused because of a breach of the defendants' right to a fair trial.

Reference for preliminary ruling and AG's opinion

The Spanish Supreme Court posed a series of questions to Luxembourg essentially asking whether the decisions by the Belgian courts were right. In addition, it asked how it can proceed with the cases, in particular whether it can maintain the existing EAWs or issue new ones after refusal of the execution of the EAWs on the grounds given. For more information on the preliminary ruling → eucrim 3/2022, 195-197.

In its opinion of 14 July 2022, Advocate General (AG) *Richard de la Tour* took the view that a judicial authority could not justify the non-execution of an EAW on the grounds of a possible violation of the requested person's right to a fair trial, unless systemic or generalised deficiencies in the judicial system of the issuing Member State were shown. (→ eucrim 3/2022, 195-197).

The CJEU's judgment

The CJEU follows the AG's argumentation. In essence, it decided that Belgian courts are not authorised to refuse the execution of an EAW by invoking a ground for refusal – in this specific case, the formal requirement of jurisdiction – which only arises from the law of the executing Member State. A refusal to execute EAWs is, however, (potentially) possible in the case of an obvious lack of jurisdiction in connection with a real danger of restrictions of fundamental rights and under the condition of systemic or generalised deficiencies affecting the judicial system of the issuing Member State. In more detail, the Court's argumentation was as follows:

CJEU on admissibility of the reference

First, the CJEU clarified that the reference for preliminary ruling by the Spanish Supreme Court (the issuing authority) was admissible. Accordingly, the case should not be judged differently from the constellation in *AY* (Case C-268/17 → eucrim 2/2018, 105-106), where the issuing authority had been given the entitlement to let answer questions relating to the execution of EAWs by the executing authority. The judges in Luxembourg mainly argue that the referring court as the issuing authority has to decide on the maintenance or withdrawal of EAWs that may lead to the arrest of the fugitives and the observance of fundamental rights falls primarily within the responsibility of the issuing Member State.

CJEU on non-execution grounds beyond FD EAW

As regards the merits of the case, the CJEU reiterated in the first place its settled case law on the main parameters of the EAW system, in short:

- Framework Decision (FD) 2002/584 on the European Arrest Warrant established a simplified and effective surrender system; its basis is the high level of trust between the Member States;
- To that end, it follows that execution of the EAW constitutes the rule, whereas the refusal to execute is the exception;
- The principle of mutual recognition works with the assumption that the EAW is issued by a "judicial authority";
- The executing judicial authority must not give effect to an EAW if the minimum requirements on validity (including those laid down in Art. 8 FD) are not met;
- The executing authority must or may refuse to execute an EAW only on the grounds set out in Arts. 3, 4, and 4a FD;
- On the basis of Art. 1(3) FD, the executing authority can refrain exceptionally and following an appropriate examination if a risk of infringement of fundamental rights set out in Arts. 4 and 47 CFR exists.

In this context, the CJEU emphasises that refusal grounds in the FD have a strictly limited scope and a refusal can only be allowed in exceptional cases. Therefore, Member States cannot add other refusal grounds, because this would undermine the uniform application of the FD EAW. However, the judges in Luxembourg accept fundamental rights clauses in the implementation laws of the Member States (such as Art. 4(5) of the Belgian *loi du 19 décembre 2003 relative au mandat d'arrêt européen*) as long as they are interpreted in accordance with the respective CJEU case law on Art. 1(3) FD.

CJEU on refusal due to the concept of "judicial authority"

In the second place, the CJEU clarified that its recent case law on the concept of "judicial authority" within the meaning of Art. 6(1) FD EAW (Joined Cases C-508/18 and C-82/19 PPU, *OG and PI* → eucrim 1/2019, 31-33) entitles the executing authority to examine that the EAW has indeed been issued by a "judicial authority", but not that the issuing judicial authority has, in the light o f the legal rules of the issuing Member States, jursidicion to issue an EAW. A distinct interpretation would confer the executing authority a general review function which would run counter the principle of mutual recognition.

CJEU on conditions to refuse due to fundamental rights infringements

In the third place, the CJEU answers the central question on the conditions under which the executing judicial authority (here: the Belgian courts) may refuse to execute the EAW on the ground of an alleged infringement of the defendants' fundamental rights in the issuing country. The CJEU calls to mind its case law on fundamental rights checks in EAW proceedings. It particularly emphasises that the EAW mechanism is

founded on the premiss that the criminal courts of the Member States, which will conduct the criminal procedure, are assumed to meet the requirements inherent in the fundamental right to a fair trial enshrined in Art. 47 CFR. Since the right is of cardinal importance, it can be safeguarded by the executing authorities, however, if the existence of a real risk is detected that the requested person, if surrendered to the issuing judicial authority, (will) suffer a breach of that fundamental right. To this end, it follows from the CJEU's case law that the executing judicial authority must carry out a two-step examination as follows:

- Determination of a real risk of infringement of the right at issue, on account of systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which the person concerned belongs;
- Specific and precise verification whether – in the light of the concerned person's personal situation, the nature of the offence and the factual context – there are substantial grounds for believing that that person will run such a risk in the event of being surrendered to that Member State.

Subsequently, the judges in Luxembourg provide several clarifications on how the two-step examination should be carried out. Regarding the first step, they clarify that the determination of said deficiencies require an *overall assessment* of the operation of the judicial system of the issuing Member State in the light of the requirement for a tribunal established by law. These deficiencies are established if it is apparent that the defendants are generally deprived in the issuing Member State of an effective legal remedy that enables the review of the jurisdictional questions at issue either by an examination of the jurisdiction by the criminal court conducting the procedure or by another court.

Regarding the second step, it is clarified that the existence of a concrete risk can be established only if, in the light of the rules on jurisdiction and judicial procedure applicable in the issuing Member State, the court that will likely be called upon to hear the proceedings *manifestly* lacks jurisdiction.

In addition, the CJEU makes clear that the analyses pursuant to the two steps involves different criteria so that there is no overlap. As a result, the executing authority cannot refuse the EAW without having carried out both steps of the examination.

The judges in Luxembourg indicate that they do not see the first step to be fulfilled in the present case. In particular, given that the legal system of Spain provides for legal remedies enabling a review of the jursidcition of the *Tribunal Supremo* called to try the defendants, the risk of the breach of the fundamental right to be tried by a tribunal not established by law, can, in principle, be ruled out.

CJEU on loyal cooperation

In the fourth place, the CJEU reiterates its case law that fundamental rights examinations by the executing judicial authority in the EAW scheme must be procdurally accompanied by a dialogue between the executing judicial authorities and the issuing ones. This follows from the principle of sincere cooperation and aims to avoid a standstill of the operation of the surrender system in the EU. As a consequence, Art. 15(2) FD EAW precludes the executing judicial authority from refusing to execute an EAW on the ground of a lack of jurisdiction of the trial court without having first requested that the issuing judicial authority provide supplementary information.

CJEU on successive EAWs

Lastly, the Court rules that it is possible to issue several successive EAWs for a requested person with a view to obtaining his/her surrender by a Member State after the execution of a first EAW concerning that person

has been refused by that State. However, the execution of a new EAW must not result in an infringement of the fundamental rights of that person and the issuing of the new EAW must be proportionate.

Put in focus

The judgment in *Puig Gordi and Others* is another landmark decision by the CJEU in the row of the controversial question to which extent the EU's surrender system enables objections against (potential) fundamental rights infringements by/in the issuing state. This question is also discussed under the heading "*ordre public* exception" in EAW cases. The CJEU makes repeating references to its decisions in *Openbaar Ministerie I and II* (judgment of 17 December 2020 in Joined Cases C-354/20 PPU and C-412/20 PPU → eucrim 4/2020, 290-291 and judgment of 22 February 2022, Joined Cases C-562/21 PPU and C-563/21 PPU → eucrim 1/2022, 33-34). In these decisions, the CJEU applied its case law on the interpretation of the EAW's fundamental rights clause inchoately regulated in Art. 1(3) FD 2002/584, which was first developed in relation of insufficient detention conditions (Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru* → eucrim 1/2016, p. 16), to fair trial interventions following the judicial reforms in Poland affecting EU's rule-of-law standards. By the *Puig Gordi* judgment, the CJEU now answers the open question left over after *Openbaar Ministerie I and II* as to how cases should be handled in which systemic or generalised deficiencies in the issuing state (such as bad prison conditions or attacks on the independence and impartiality of the judiciary) are not obvious at first sight.

The CJEU now makes unequivocally clear that its previous case law applies to all objections that certain fundamental rights standards are not maintained in the issuing EU Member State. It repeats its stance that a refusal for fundamental rights reasons can only be applied in exceptional cases. It emphasises in this context at several points in the judgment that a more lenient approach would affect the effective functioning of judicial cooperation between the EU Member States, thus recurring to the concept of "*effet utile*". Nonetheless, the judgment will not end criticism by scholars that this approach is too narrow and one-sided giving priority to effectiveness of cooperation over the individual's protection. This is corroborated by the CJEU's introduction of the element of a *manifest* lack of jurisdiction which can justify a refusal for fair trial reasons.

The criticism voiced by the author over AG *de la Tour's* opinion in the *Puig Gordi* case (→ eucrim 3/2022, 197) must be maintained also after the final Court decision. In particular, the question remains of whether the CJEU's approach runs counter the "flagrant denial of justice" jurisprudence of the ECtHR in extradition cases. It is quite certain that a successful intervention of the person concerned with arguments of fundamental rights protection in the European Arrest Warrant system is extremely difficult, if not impossible.

At least, the CJEU answered the question that fundamental rights clauses or clauses of a European ordre public, which many EU countries have introduced into their national laws implementing Art. 1(3) FD EAW, are valid. This was also controversially discussed between proponents of a restrictive interpretation of refusal grounds (allowed only in the situations stipulated in Art 3, 4, and 4a FD) and their more protection-friendly opponents. Nevertheless, the Luxembourg judges impose a crucial restriction: The national laws must be interpreted in conformity with its case law on Art. 1(3) FD EAW, i.e. strict application of the two-step examination procedure as well as required dialogue between the executing and issuing judicial authorities.

Against the described background of the very restrictive approach to EAW matters, it remains to be seen whether national supreme / constitutional courts and the ECtHR will walk along with the colleagues at Kirchberg.

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