

# ECJ: EAW Must in Principle Also Be Executed against a Mother of Young Children

Thomas Wahl

On 21 December 2023, the ECJ, sitting in for the Grand Chamber, ruled in [Case C-261/22 \(GN\)](#) that the surrender of a person requested by a European Arrest Warrant cannot be refused on the sole ground that she is the mother of young children. Thus, the ECJ reaffirmed its case law on the protection of fundamental rights in the context of Framework Decision 2002/584 on the European arrest warrant (FD EAW).

## Facts of the case and question referred

The case concerns a preliminary ruling request by the Italian Supreme Court of Cassation on the question as to whether Italian authorities can refuse surrender of a mother of young children to Belgium where she has to serve a sentence of five years' imprisonment for offences of trafficking in human beings. 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. The Court of Cassation indicated in this context that a narrow interpretation of Art. 1(2) and (3) FD EAW might not be compatible with Arts. 7 and 24 CFR as well as Art. 8 ECHR (as interpreted by the ECtHR).

## The ECJ's ruling – part I: general principles

In the first part of its ruling, the ECJ called to mind the general principles of the EAW system as established by its previous, meanwhile settled case law. These include:

- The principles of mutual trust and mutual recognition are, in EU law, of fundamental importance;
- When implementing EU law, Member States are required to presume that fundamental rights have been observed by the other Member States;
- Save in exceptional circumstances, there is no check whether another Member State has actually observed the fundamental rights guaranteed by the EU;
- The execution of the EAW constitutes the rule, the refusal to execute is intended to be the exception.

Against this background, the Italian judicial authorities had to presume that the conditions of the mother's detention and of the care of her children in Belgium are appropriate to such a situation.

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## The ECJ's ruling – part II: the obligations for the executing judicial authority

Looking at Art. 1(3) FD EAW, the judges in Luxembourg stress that the executing judicial authority must have regard to the standard of protection of fundamental rights as established in the *Aranyosi/Căldăraru* judgment (→ [eucrim 1/2016, 16](#)). The lack of certainty on the part of the executing authority that detention conditions for the mother of young children in the issuing State are not comparable to those in the executing State cannot allow refusal. Rather, the executing authority must carry out the two-step examination known from the *Aranyosi/Căldăraru* judgment:

- First, the executing judicial authority has available to it information demonstrating that there is a real risk of breach of the requested person's fundamental right to respect for her private and family life enshrined in Art. 7 CFR and of disregard for the best interests of her children, as protected by Art. 24(2) and (3) CFR, on account of systemic or generalised deficiencies in the conditions of detention of mothers of young children and of the care of those children in the issuing Member State;
- Second, there are substantial grounds for believing that, in the light of their personal situation, the persons concerned will run that risk on account of those conditions.

The executing judicial authority can request supplementary information from the issuing judicial authority, which must observe the principle of sincere cooperation. If the latter does not respond in a satisfactory manner, the executing judicial authority must carry out an overall assessment of all the information available to it in the context of the two steps referred above.

As a result, if the criteria of the two-step examination are not met, the requested person must be surrendered.

### Put in focus

The ECJ's Grand Chamber judgment in *GN* may not come to a surprise for observers. Also in constellations other than that in the landmark judgment in *Aranyosi/Căldăraru*, the judges in Luxembourg reiterated their standpoint on the protection of fundamental rights in EAW proceedings (→ ECJ, 31 January 2023, Case C-158/21 (*Puig Gordi and Others*) = [eucrim 1/2023, 41-43](#); ECJ, 22 February 2022, Joined Cases C-562/21 PPU and C-563/21 PPU (*Openbaar Ministerie*) = [eucrim 1/2022, 33-34](#)). This approach results in the two-step assessment of – simply put – abstract and concrete danger of fundamental rights infringements vis-à-vis the requested person in the issuing state.

Nonetheless, the judgment could not discard critics in legal literature that the ECJ's approach is too narrow and refusal of the execution of EAWs for grounds of fundamental rights violations is quasi impossible. This is corroborated by the fact that the Court slightly deviates from the opinion by Advocate General *Tamara Čápetá* in the present case (→ [eucrim 2/2023, 163](#)). Even though AG *Čápetá* also clarified that the two-step examination must be carried out, she emphasised that the best interest of the child must guide the decision on the execution of the EAW. She then tried to reconcile the interests of the persons concerned and the state interest for avoiding impunity by proposing the application of Art. 4(6) FD EAW. This would have given the Italian authorities a backdoor to avoid surrender but to enforce the Belgian judgment in Italy. The ECJ's Grand Chamber does not touch upon Art. 4(6) FD EAW in the final ruling and seems to push the Italian authorities for surrender of the mother of young children to Belgium.

Ultimately, upon closer inspection, the judgement also includes some interesting details. First, the ECJ clarifies that the assessment of a fundamental rights breach under the first and second step of the examination is based on different criteria. Hence, the requirements as established in *Aranyosi/Căldăraru* (see above) must be satisfied successively and cumulatively.

Second, the ECJ emphasises that the executing authority cannot request supplementary information from the issuing authority concerning only the second step if it considers that systemic or generalised deficiencies do not exist in the issuing State.

Third, a real risk of breach of fundamental rights can be excluded by respective assurances provided by the issuing judicial authority.

The significance of the judgment in GN remains to be seen. Has Luxembourg now spoken the last word on the issue of the protection of fundamental rights in the EU's surrender law (Roma locuta causa finita)?

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