

ECJ: EAW Requires Equal Treatment of Third-Country Nationals

Thomas Wahl



News

On 6 June 2023, the ECJ delivered an important judgment on the protection of third-country nationals within the regime of the European Arrest Warrant. At the centre was the interpretation of Art. 4(6) of the Framework Decision on the European Arrest Warrant (FD EAW). According to this provision, Member States can confer their judicial authorities the option of refusing to execute an EAW issued for the purposes of executing a custodial sentence or detention order if the requested person is staying in, or is a national or a resident of the executing Member State. The judges in Luxembourg held that the Italian legislation that transposed this provision, but only wishes to apply it to Italian nationals and nationals of other EU Member States (and not to third-country nationals) is incompatible with Union law.

Facts and background of the case

The case (C-700/21, *O.G.*) was referred by the Italian Constitutional Court which has to decide on the constitutionality of the Italian national law transposing Art. 4(6) FD EAW. In the concrete case, Italian courts were prevented from refusing the execution of an EAW against a Moldovan (i.e., third-country) national who was sentenced in Romania, even though the person is an Italian resident with stable family and professional life in Italy. The Italian Constitutional Court has doubts as to whether the absolute and automatic exclusion of third-country nationals from benefiting from the FD EAW's optional refusal ground is consistent with Union law. In addition, the court asked about the criteria and conditions demonstrating a sufficient integration in the executing State.

ECJ on the discriminatory nature of the Italian legislation

The ECJ, sitting in for the Grand Chamber, first concedes that Art. 4(6) FD EAW confers Member States a margin of discretion. However, if Member States choose to transpose this ground for refusal, this discretion has limits. The transposition must, *inter alia*, comply with the principle of equality in Art. 20 of the Charter of Fundamental Rights of the EU, which requires that similar situations must not be treated differently and that different situations must not be treated in the same manner, unless such different treatment is objectively justified. The requirement that situations must be comparable, for the purpose of determining whether there is a breach of the principle of equality before the law, must be assessed in the light, in particular, of the subject matter and purpose of the act that makes the distinction in question, taking into account the principles and objectives of the field to which the act relates.

The ECJ sees no reason why (socially integrated) third-country nationals would not be in a comparable situation than Italian and EU Member State nationals. This follows mainly from the wording of Art. 4(6) FD

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EAW, which makes no distinction with regard to nationality, and the objective, i.e., increasing the requested person's chances of reintegrating into society.

Therefore, the Italian law excluding third-country nationals from the scope of the refusal ground, even where those third-country nationals are staying or resident in the territory of the executing Member State and without account being taken of their degree of integration within the society of that Member State, is not in line with Art. 20 of the Charter.

The judges in Luxembourg clarified, however, that Member States can lay down the condition that the person concerned has stayed continuously in that State for a minimum period of time. Furthermore, they stressed that Art. 4(6) FD EAW has three requirements:

- Determination whether a person, who is not an own national of the executing country, "is staying or resident" in that State;
- There is a legitimate interest to justify that the custodial sentence or detention order of the issuing State is enforced on the territory of the executing Member State;
- The executing Member State enforces the foreign sentence/detention order in accordance with its domestic law.

[ECJ on assessment of sufficient connection to the executing Member State](#)

The ECJ stated that, in order to assess whether it is appropriate to refuse to execute the EAW issued against a third-country national who is staying or resident in the territory of the executing Member State, the executing judicial authority must make an overall assessment of all of the specific elements characterising the situation of the requested person. These elements must be capable of showing that there are connections between that person and the executing Member State that may lead to the conclusion that the person concerned is sufficiently integrated into that State. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State as well as the nature, duration and conditions of his or her stay in that Member State.

[Put in focus](#)

By its judgment of 6 June 2023, the ECJ first clarified that legislation of EU Member States transposing the Framework Decision on the European Arrest Warrant must respect the Union's fundamental rights enshrined in the Charter (here: principle of equality before the law). Persons staying or being a resident of the executing Member State are protected from being extradited under the condition that the sentence at issue is executed by the that Member State. Discretion for the judicial authorities in the executing Member State is limited to the examination of a "legitimate interest" of enforcing the sentence or detention order of the issuing State. The ECJ also clarified that the elements of this assessment also apply to the assessment determining whether the requested person "is staying" in the executing Member State.

Second, the ECJ made clear that the European Arrest Warrant does not only pursue the aim of law enforcement, but also the aim of social rehabilitation of an individual. In this context, the EAW coincides with Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

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