

Health reasons as grounds to refuse execution of an EAW

Legal opinion by Fair Trials submitted to the Italian Constitutional Court

Case summary

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Fairness, equality, justice

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Facts

In 2019, the Italian authorities issued a European Arrest Warrant (EAW) to request the surrender of D.L.E who has been charged with possession of narcotic substances for the purpose of distribution. The defendant opposed the surrender. Following the submission of medical documentation by the defence, the Court of Appeal in Milan ordered the requested person's medical evaluation. The medical expert found, inter alia, that the requested person suffers from permanent mental health condition and that there was a risk of suicide and that the defendant needed mental health care. The medical expert also found that due to the defendant's condition, it would not be suitable for him to be placed in prison.

Referral to the Italian Constitutional Court

The Court of Appeal in Milan noted that neither Framework Decision 2002/584/JHA on the EAW¹ (EAW Framework Decision) nor the Italian law transposing the EAW Framework Decision provides that a potential violation of the right to health and the right to be provided with adequate medical care can constitute grounds for refusal to execute an EAW. Only a temporary postponement of the execution of an EAW on grounds of health is allowed under the Framework Decision on the EAW. The Court of Appeal questioned the constitutionality of such legislation as it does not allow for a permanent mental health condition to constitute grounds for refusal to execute an EAW. The Court of Appeal referred the question to the Italian Constitutional Court (the Constitutional Court).

Framework Decision 2002/584/JHA on the EAW

The EAW Framework Decision sets out a number of mandatory and optional grounds for refusal to execute an EAW. In particular, Article 3 provides grounds for mandatory non-execution. The judicial authority of an executing state is obliged to refuse execution of an EAW when:

1. the criminal offence in question is covered by amnesty in the executing Member State and that state has jurisdiction to prosecute the offence;
2. the requested person has been convicted for the same acts if, where there has been a sentence, the sentence has already been or is currently being served or can no longer be executed according to the law in the sentencing Member State; or
3. the requested person cannot be held criminally responsible according to the law in the executing state due to their age.

Grounds for optional non-execution of an EAW are set out in Article 4 and they include situations that are essentially similar to those set out in Article 3. For instance, Article 4 allows the executing judicial authority to refuse execution of

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

an EAW due to earlier conviction of the requested person by a third State for the same acts if, where there has been a sentence, the sentence has already been or is currently being served or can no longer be executed according to the law in the sentencing Member State. Further, refusal is allowed where the executing Member State is prosecuting the requested person for the same act as that on which the EAW is based, and where the criminal prosecution or punishment of the requested-person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State.

As noted by the Court of Appeal in Milan, neither of these articles list health reasons of the requested person as a possible ground for refusal to execute the EAW. However, Article 23(4) does allow for temporary postponement of surrender in exceptional circumstances, namely if it risks manifestly endangering the life or health of the requested person.

Fair Trials' *amicus* brief

Fair Trials submitted a legal opinion in the case, arguing that the health of the requested person, specifically the risk of deterioration of their mental health due to poor detention conditions (including the lack of access to mental healthcare) and conditions of the transfer itself, should constitute grounds for refusal to execute an EAW under Article 1(3) of the EAW Framework Decision. This stems from the obligation of Member States and their courts to ensure the protection of human rights as set out under the Charter of Fundamental Rights of the European Union (the Charter). The details of the opinion are outlined below.

The framework decision and mutual trust

According to Article 1(2) of the EAW Framework Decision, Member States are obliged to issue EAWs on the basis of the principle of mutual recognition which means that the EAW is based on a high level of trust between Member States. Its implementation can only be suspended in the event of a serious and persistent breach of the principles set out in Article 6(1) of the Treaty of European Union (TEU). Thus, mutual trust constitutes the very basis of the instrument.

However, Fair Trials argued that this does not remove Member States' obligation to ensure respect for fundamental rights. Mutual trust is not based on shared procedures, but first and foremost on shared values of democracy, rule of law, fundamental rights (including human dignity) and shared responsibility to uphold them. Further, Article 1(3) of the EAW Framework Decision thus states that it does not modify the obligation of Member States to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU, a provision which recognises that the rights and principles set out in the Charter of Fundamental Rights of the European Union (the Charter) have the same legal value as the EU treaties.

Duty to uphold human rights in EAW proceedings

The duty of all national courts in the EU to protect the fundamental rights under EU law is inherent to the EU legal system. Article 53 of the Charter recognises that it complements the protection of human rights afforded by European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other international instruments. Thus, similarly to Article 3 of the ECHR, Article 4 of the Charter provides for an absolute prohibition of torture and inhuman or degrading treatment. This absolute prohibition includes a positive obligation for Member States to prevent any violations of this prohibition. In extradition proceedings, this means that the principle of non-refoulement is applicable wherever there is a real risk that a person will be subject to torture, inhuman or degrading treatment. In other words, Member States must refrain from surrendering a person to an issuing state if by doing so the requested person faces a real risk of being subject to torture or inhuman or degrading treatment. This principle is also referred to in Recital 13 of the EAW Framework Decision and in Article 19(2) of the Charter.

The obligations Member States have under Article 19(2) of the Charter when considering removal, expulsion or extradition applies also to surrender proceedings under an EAW. This is underlined by the European Court of Human Rights (ECtHR), which found in [Ahmad v. the United Kingdom](#)² that the same test should be applied for extradition and other types of removal when assessing whether there is a real risk of treatment in violation of Article 3 of the ECHR.

The Court of Justice of the EU (CJEU) has similarly concluded in [Aranyosi and Căldăraru](#)³ that a real risk of violating the prohibition of inhuman and degrading treatment could serve as a basis for refusal to execute an EAW, despite it not being explicitly mentioned as a ground for non-execution in the EAW Framework Decision. The CJEU explained that Article 4 of the Charter is binding on Member States, and consequently on their courts when they are implementing EU law, which is the case when the issuing judicial authority and the executing judicial authority are applying the provisions of national law transposing the EAW Framework Decision.⁴

Obligation to consider requested person's mental health in surrender proceedings

Mental health of a person is a factor that the ECtHR has consistently considered in its jurisprudence concerning extraditions. In [Aswat v. the United Kingdom](#)⁵, the ECtHR found that detention of a person who is ill may raise issues under

² ECtHR, Babar Ahmad and Others v. the United Kingdom, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012.

³ CJEU, Case C-404/15, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, 5 April 2016.

⁴ CJEU, Case C-404/15, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, 5 April 2016, para. 84.

⁵ ECtHR, Aswat v. the United Kingdom, App. No. 17299/12, 16 April 2013.

Article 3 of the ECHR and that a lack of appropriate medical care could constitute a violation of that provision. Further, the ECtHR concluded that the assessment of the detention conditions for a mentally ill person must include considerations of the medical condition of the prisoner, the adequacy of the medical assistance and care provided in detention and the necessity of maintaining the detention measure in view of the person's state of health. Thus, both the detention conditions in the issuing state and the medical services available there are relevant when determining whether a person's extradition to another state is compatible with the prohibition under Article 3 of the ECHR.

Further, in [Dorobantu](#)⁶, the CJEU clarified that the executing judicial authority is obliged to assess the detention conditions in the issuing state where the affected person will be held, even if the requested person will be held in certain detention facility only on a temporary or transitional basis. Therefore, the negative effect of the transfer itself on a person's mental health and whether it can deteriorate to a level that is incompatible with Article 3 of the ECHR and Article 4 of the Charter must be considered by the executing judicial authority when assessing surrender.

The assessment of whether there is a real risk that a person will be exposed to pain and suffering that is incompatible with Article 3 of the ECHR and Article 4 of the Charter must be independent. It should not depend on the reasons for surrender, nor on the need to uphold the principle of mutual trust. This has been affirmed by the ECtHR who has repeatedly stated that the compatibility of treatment with Article 3 is an assessment independent of the reasons for removal or extradition.⁷ The ECtHR has also determined that a lack of information about the detention conditions or medical care available to a requested person with a serious mental disorder in an issuing state can constitute a reason for non-extradition.⁸

Executing judicial authority's obligation to provide effective judicial protection

The right to an effective remedy before a tribunal, as enshrined under Article 47 of the Charter, has been interpreted by the CJEU as a general principle of EU law stemming from the constitutional traditions common to the Member States. In [Associação Sindical dos Juizes Portugueses](#),⁹ the CJEU confirmed that according to Article 19 TEU, the responsibility of ensuring judicial review in the EU legal order falls both on the CJEU and national courts and tribunals. Thus, Member States are required to provide individuals with remedies that are sufficient to ensure effective judicial protection in the fields covered by EU law and must establish a system of legal remedies and procedures ensuring effective judicial review in those fields.

⁶ CJEU, Case C-128/18, Dumitru-Tudor Dorobantu, 15 October 2019.

⁷ ECtHR, Babar Ahmad and others v. the United Kingdom, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10 April 2012, para. 172.

⁸ ECtHR, Aswat v. the United Kingdom, App. No. 17299/12, 16 April 2013, paras. 56–57.

⁹ CJEU, Case C 64/16, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, 27 February 2018.

Article 47 of the Charter requires the remedy to be effective both in law and in practice. The ECtHR has specified the criteria necessary for a remedy to be effective within the meaning of Article 13 of the ECHR: a mechanism examining a potential violation of fundamental rights must be accessible, prompt and offer minimum guarantees of fairness by ensuring conditions that enable the applicant to challenge a decision that restricts their rights (e.g., equality of arms); and the complaint must be addressed on its substance (merits).¹⁰ A complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 ECHR in particular requires close and rigorous scrutiny.¹¹

The executing judicial authority plays a key role in ensuring that a person who faces a real risk of violation of their rights has access to a judicial body that will assess the merits of the complaint and provide effective judicial protection in EAW proceedings. This stems from the fact that, according to the Framework Decision, the executing judicial authority is the one authorising the execution of an EAW following, what should be, an independent assessment aiming to ensure that the person's rights are effectively protected. Thus, the executing judicial authority must have the right and obligation to determine whether the health condition of the requested person is such that surrender would create a real risk of exposing them to conditions that would result in a significant deterioration of their mental and physical health, capable of constituting a violation of Article 4 of the Charter or Article 3 of the ECHR.

Concluding remarks

Fair Trials' submission was rejected by the Constitutional Court due to a formal requirement of it being submitted in Italian language or with an official translation. Nevertheless, the Constitutional Court decided to refer a question to the CJEU ([Case C-699/21, E.D.L.](#)). The CJEU has previously established that an executing country has the right to refuse surrender if there is a risk of a violation of the fundamental rights of the person concerned due to systemic and generalised deficiencies of the issuing State. In its reference the Constitutional Court considers, inter alia, whether the right to refuse surrender can be extended to apply also to cases where the chronic and indefinite mental health condition of the requested person is likely to worsen significantly in the event of surrender and subsequent detention.

It was also noted by the Constitutional Court of Italy that it is not appropriate to apply the possibility to postpone the surrender in cases such as this one because the permanent nature of the requester person's mental health condition also means that the risk of significant worsening of that condition is also permanent. This would ultimately deprive the surrender order of any

¹⁰ ECtHR, *Çelik and İmret v. Turkey*, App. No. 44093/98, 26 October 2004, para. 59; ECtHR, *Csüllög v. Hungary*, App. No. 30042/08, 7 June 2011, para. 46; ECtHR, *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, para. 387.

¹¹ ECtHR, *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011, para. 387.

useful effect, thus risking preventing the issuing State, depending on the case, from prosecuting or executing the sentence against the person concerned. It would also keep the requested person in a continuous state of uncertainty.

In light of these considerations, the Italian Constitutional Court asks the CJEU whether Article 1(3) of the EAW Framework Decision, read in the light of Articles 3, 4 and 35 of the Charter, require the executing judicial authority to refuse the surrender of a requested person who is suffering from a serious, chronic and potentially irreversible illness that could place them at risk of serious harm to their health if it does not obtain assurances within a reasonable period of time from the issuing judicial authority.

An unofficial translation of the referral by the Constitutional Court can be found [here](#).

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