

Is One Step Enough? Serious Illness as a Ground for Non-execution of a European Arrest Warrant

Judgment of the Court of Justice (Grand Chamber) of 18 April 2023, C-699/21, E.D.L. (Ground for Refusal Based on Illness)

Articles 1(3) and 23(4) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, read in the light of Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that:

1. where the executing judicial authority called upon to decide on the surrender of a requested person who is seriously ill in execution of a European arrest warrant concludes that there are substantial and established grounds for believing that that surrender would expose that person to a real risk of a significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health, it must postpone that surrender and ask the issuing judicial authority to provide all information relating to the conditions under which it intends to prosecute or detain that person and to the possibility of adapting those conditions to his or her state of health in order to prevent such a risk from materialising;
2. if, in the light of the information provided by the issuing judicial authority and all the other information available to the executing judicial authority, it appears that that risk cannot be ruled out within a reasonable period of time, the executing judicial authority must refuse to execute the European arrest warrant. On the other hand, if that risk can be ruled out within such a period of time, a new surrender date must be agreed with the issuing judicial authority.

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Commentary

The Council Framework Decision on the European arrest warrant (hereinafter: Framework Decision)¹ was the first concrete measure in the field of European criminal law based on the principle of mutual recognition. It has been the subject of several significant judicial decisions, of which probably the most ground-breaking was the decision in the Aranyosi and Căldăraru joined cases.² This ruling has been widely adopted in doctrine and jurisprudence. Nevertheless, the recent judiciary decision issued by the Court of Justice can significantly change the well-established approach adopted in it.

The case was initiated by the Municipal Court in Zadar, which issued a European arrest warrant (hereinafter: EAW) against E.D.L. Since the requested person submitted medical documentation, the Milan Court of Appeal, which was the executing court in this case, ordered a psychiatric examination, which revealed that E.D.L. suffers from a psychotic disorder requiring treatment. Based on this report, the court held, that the execution of the EAW would halt the possibility of treatment, resulting in a worsening of the general condition and a genuine risk to the health of the person concerned. However, the court noted that the possibility to not execute an EAW is limited only to the grounds for refusal listed exhaustively, and a medical condition is not one of them. In this situation, the executing court brought an action to determine constitutionality before the Italian Constitutional Court, which eventually brought the case to the Court of Justice. The Constitutional Court referred the following question: “Must Article 1(3) of [Framework Decision 2002/584], examined in the light of Articles 3, 4 and 35 of the [Charter], be interpreted as meaning that, where it considers that the surrender of a person suffering from a serious chronic and potentially irreversible disease may expose that person to the risk of suffering serious harm to his or her health, the executing judicial authority must request that the issuing judicial authority provide information [allowing] the existence of such a risk to be ruled out, and must refuse to surrender the person in question if it does not obtain assurances to that effect within a reasonable period of time?”³

The Advocate General concluded in his opinion⁴ that if a requested person is suffering from a serious chronic and potentially irreversible disease that may expose that person to the risk of suffering serious harm to his or her health, the executing body must request the issuing judicial authority to provide information making it possible to rule out the existence of such a risk, and, if necessary, to postpone the surrender of

¹ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1–20.

² Judgment of the Court (Grand Chamber) of 5 April 2016, in Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi (C-404/15), Robert Căldăraru (C-659/15 PPU), EU:C:2016:198.

³ Case C-699/21, Summary of the request for a preliminary ruling, available at: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=252182&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3148821> [accessed: 2023.08.30].

⁴ Opinion of Advocate General Campos Sánchez-Bordona delivered on 1 December 2022, in Case C-699/21, E.D.L., EU:C:2022:955.

that person for as long as that serious risk remains. The starting point of the analysis undertaken by the Advocate General was the case law proving that the risk of inhuman treatment may justify the refusal of surrender under an EAW. Moreover, according to the Advocate General, to make such a conclusion, the requested court is obliged to analogically apply the test introduced by the Aranyosi and Căldăraru joined cases, but in a case like this one, such a test would be limited only to its second part. However, according to the Advocate General, following this path would create a “new” ground for non-execution of the EAW, for reasons related to health, which on top of that, would be mandatory. According to the Advocate General, there is no need to create such a new ground, as a remedy is already possible based on the provisions of the Framework Decision. For these reasons, he proposed to use the measure provided for in article 23(4) of the Framework Decision to postpone the surrender and obtain from the issuing judicial authority explanations regarding the medical treatment available, in line with the medical needs of the requested person.

The Court of Justice indicated in its judgment that the Framework Decision does not provide for the possibility for the executing authorities to refuse to execute an EAW solely on the ground that the person who is the subject of such an arrest warrant suffers from serious and potentially irreversible illness. Nevertheless, the surrender of a person who is seriously ill may in some cases result in a situation in which the person will be exposed to the risk of inhuman treatment. Such a situation may justify the refusal of surrender under an EAW. According to the Court, the assessment of such treatment should be conducted based on an analogically applied two-step test, but in some situations, it can be sufficient to base the assessment only on the second stage of the test. The court shared the position of the Advocate General that based on article 23(4) of the Framework Decision, the executing body may postpone the surrender of the requested person to obtain from the issuing judicial authority explanations regarding the medical treatment available, which provide the possibility of ruling out the risk of inhuman treatment of the requested person. Nevertheless, such a state of affairs cannot be permanent. According to the Court, if the risk of inhuman treatment cannot be ruled out in a reasonable period of time, the executing body is obliged to refuse the execution of the EAW.

The assessment of the given judgment is ambiguous. While one can point to some correct conclusions made in the judgment, some aspects of the judgment deserve criticism.

The conclusion is correct regarding the question of the grounds for non-execution of the EAW. The concerns in this regard stem from Article 1(2) of the Framework Decision, which provides that execution of the EAW constitutes the rule, whereas refusal to execute is intended to be an exception which must be interpreted strictly.⁵ Moreover, in its judgments, the Court has indicated that the principle of mutual recognition expressed in article 1(2) lays down the rule that Member States are required to execute any EAW and that executing judicial authorities may, in principle, refuse

⁵ Judgment of the Court (Fifth Chamber) of 29 April 2021, in Case C-665/20 PPU, X, EU:C:2021:339.

to execute EAW only on the grounds for non-execution exhaustively listed by that Framework Decision.⁶ However, the Explanatory Memorandum for the proposal for a Framework Decision provided that it will not be possible for the judicial authority of a Member State to refuse to execute an EAW on a ground not provided for in the text of the Framework Decision, subject, of course, to the general rules for the protection of fundamental rights, and subject particularly to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union.⁷ In the case at hand, the Court has applied Article 1(3) which provides that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.⁸ According to the aforementioned provision of the Treaty, the Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000.⁹ Thus, the Court has properly applied the provision, claiming that the existence of a risk of infringement of fundamental rights is capable of permitting the executing judicial authority to refrain, exceptionally and following an appropriate examination, from giving effect to an EAW. The court properly indicated that, in such a case, the executing judicial authority cannot, in accordance with Article 1(3) of the Framework Decision, interpreted in the light of Article 4 of the Charter of Fundamental Rights of the European Union, give effect to the EAW. Moreover, this approach is in line with the jurisprudence of the Court of Justice according to which the existence of a risk of infringement of the fundamental rights set out in Articles 4 and 47 of the Charter is capable of permitting the executing judicial authority to refrain, exceptionally and following an appropriate examination, from giving effect to an EAW on the basis of Article 1(3) of that Framework Decision.¹⁰ It is worth adding that each of the grounds for non-execution of the EAW resulting from the case-law of the Court of Justice is treated as stemming from the Framework Decision.¹¹

⁶ Judgment of the Court (Second Chamber) of 1 June 2016, in Case C241/15, *Niculaie Aurel Bob-Dogi*, EU:C:2016:385.

⁷ Explanatory memorandum to the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM/2001/0522 final – CNS 2001/0215, OJ 332 E, 27.11.2001, pp. 305–319.

⁸ Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.

⁹ Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, pp. 1–22.

¹⁰ See Judgment of the Court (Grand Chamber) of 15 October 2019, in Case C128/18, *Dorobantu*, EU:C:2019:857; see also: Judgment of the Court (Grand Chamber) of 22 February 2022, in Joined cases C562/21 PPU and C563/21 PPU, X (C-562/21 PPU), Y (C-563/21 PPU), EU:C:2022:100; see also: Judgment of the Court (Grand Chamber) of 25 July 2018, in case C-216/18 PPU, LM, EU:C:2018:586; see also: Judgment of the Court (First Chamber) of 25 July 2018, in Case C-220/18 PPU, ML, EU:C:2018:589; see also: A. Łazowski, *The sky is not the limit: Mutual Trust and Mutual Recognition après Aranyosi and Căldăraru*, “Croatian Yearbook on European Law and Policy” 2018, Vol. 14, pp. 1–30; see also: Z. Gilbert, *The implementation of the CJEU’s Joined Cases Aranyosi and Căldăraru by the UK and Irish Courts – A real impact on the protection of fundamental rights in surrender proceedings?*, “New Journal of European Criminal Law” 2022, Vol. 13, No. 3, pp. 314–332.

¹¹ Judgment of the Court (Grand Chamber) of 31 January 2023, in Case C158/21, *Puig Gordi and others*, EU:C:2023:57.

However, not all the conclusions of the judgment can be approved of. In the judgment, the Court indicated that if it appears that the risk of a significant reduction in the surrendered person's life expectancy or of a rapid, significant, and irreversible deterioration in this person's state of health cannot be ruled out within a reasonable period of time, the executing judicial authority must refuse to execute the EAW. A similar position has been taken by the Advocate General, who in his opinion indicated that an additional ground for non-execution based on humanitarian reasons connected with the state of health of the surrendered person would have to be mandatory in view of the nature of the fundamental right involved. An assessment of the aforementioned position should start with the observation that the Framework Decision sets out, first, the grounds for mandatory non-execution of the EAW (in Article 3), and second, the grounds for optional non-execution (in Articles 4 and 4a). In the case of the mandatory grounds for non-execution, all Member States are obliged to transpose them into their domestic law, whereas in the case of grounds for optional non-execution Member States are free to transpose them or not.¹² Nevertheless, where the latter are transposed, the Member States may not provide that the judicial authorities are required to automatically refuse to execute any EAW concerned. Those authorities must have a margin of discretion, allowing them to carry out an examination on a case-by-case basis, taking into consideration all the relevant circumstances.¹³ When the state of health is the issue of concern, the situation is quite common in which it is not easy to make a decision about whether the given illness requires special treatment, whether the treatment available in case of imprisonment in the requested state meets the requirements of the treatment required in the given case, and if so, whether the execution of the EAW will expose a requested person to inhuman punishment (that is why the Court agreed to apply analogically to those cases the possibility of postponing the surrender). Of course, there is a range of potential cases in which the decision will be taken easily, e.g. in the cases of people who are paralysed, who require full-time specialised care, etc. Nevertheless, in cases like the one which brought the issue to the Court of Justice, the decision is definitely not an easy one. For such reasons in cases when the state of health is the issue of concern, a decision should be made on a case-by-case basis, taking into account the state of health of the requested person, his or her needs in terms of medical treatment, and the possibilities of the place of detention in terms of the medical treatment it can provide for the requested person. For such reasons, the possibility of non-execution of the EAW in such circumstances should be of an optional nature. Moreover, this approach is justified on the basis of the jurisprudence of the Court of Justice, which in the *Aranyosi and Căldăraru* joined cases indicated that the situation when the requested person, due to the conditions of his/her detention, may be exposed to a real risk of inhuman or degrading treatment

¹² N. Keijzer, E. van Sliedregt, *The European Arrest Warrant in Practice*, Cambridge 2009, p. 147; L. Klimek, *European Arrest Warrant*, Cham–Heidelberg–New York 2015, pp. 159–163.

¹³ Judgment of the Court (Fifth Chamber) of 29 April 2021, in Case C-665/20 PPU, X, EU:C:2021:339; Judgment of the Court (Fifth Chamber) of 29 June 2017, in Case C-579/15, Daniel Adam Popławski, EU:C:2017:503.

within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, provides the possibility (not the obligation) for the executing judicial authority to bring the surrender procedure to an end.¹⁴

Moreover, the aspect regarding the application of the two-step test deserves deeper consideration. In the case analysed here, the Court has indicated that in some circumstances the surrender of a person who is seriously ill may cause that person to be exposed to a real risk of inhuman treatment, either as a result of or, in certain circumstances, regardless of the level of quality of the care available in the issuing Member State. In short, the Court has indicated that in order to assess whether the requested person will be exposed to the risk of inhuman treatment within the meaning of Article 4 of the Charter, the two-step test proposed in the judgment in *Aran-yosi and Căldăraru* should be conducted analogically, but, in some circumstances, it is reasonable to limit the examination only to the second stage of the test. A similar position has been taken by the Advocate General, who indicated that the examination of the first stage is unnecessary and inappropriate. While understanding the reasons presented by the Advocate General in his opinion, one can point out the counter-arguments for the application of the two-step test. First and above all, the need to analyse both stages of the test has been indicated in multiple judicial decisions of the Court of Justice. It has been presented in many cases in which the initial point of consideration was connected with the general systemic malfunctions of the legal systems of the requesting countries. In this regard, the jurisprudence of the Court of Justice is well-established and commonly accepted.¹⁵ However, the case under consideration is of a different nature, as it analyses a situation in which the executing body was provided with information regarding the threat to the fundamental rights of an individual. In other words, the issue under consideration in this case regards the question of whether the executing body, while having information regarding meeting the obligation of the second stage of the two-step test, still needs to examine the fulfilment of the first stage of the test. This issue has also been under examination by the Court of Justice. In those cases, the Court has stated that both of the steps of the test have to be examined and that those steps cannot overlap with one another.¹⁶ Moreover, it seems

¹⁴ G. Anagnostaras, *Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Caldăraru*, "Common Market Law Review" 2016, Vol. 53, Issue 6, pp. 1675–1704; K. Bovend'Eerd, *The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?*, "Utrecht Journal of International and European Law" 2016, Vol. 32, No. 83, p. 112; R. Barbosa, V. Glerum, H. Kijlstra, A. Klip, Ch. Peristeridou, *Improving the European Arrest Warrant*, The Hague 2023, pp. 201–223.

¹⁵ M. Luchtman, S. Tosza, *How to deal with rule of law-concerns in surrender procedures?* [in:] M. Luchtman, K. Ligeti, S. Tosza, *Of swords and shields: Due process and crime control in times of globalization – liber amicorum prof. dr. J.A.E. Vervaele*, The Hague 2023, pp. 453–461.

¹⁶ Judgment of the Court (Grand Chamber) of 31 January 2023, in Case C-158/21, *Puig Gordi and others*, EU:C:2023:57; see also Judgment of the Court (Grand Chamber) of 17 December 2020, in joined cases C-354/20 PPU and C-412/20 PPU, L (C-354/20 PPU), P (C-412/20 PPU), EU:C:2020:1033; see also Sz. Gáspár-Szilágyi, *Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant*, "European Journal of Crime, Criminal Law and Criminal Justice" 2016, Vol. 23, Issue 2–3, pp. 197–219.

to be inadvisable to manipulate the system introduced by the judicial decision in the Aranyosi and Căldăraru joined cases, which has been widely applied by the Member States.¹⁷ Keeping the first stage of the test will provide the possibility to examine whether it will be possible for the requested person to get proper medical treatment in the requested country. This piece of information plays an important role in the assessment of whether the requested person will face inhuman treatment as a result of the execution of the warrant. As has been indicated in the previous part of this commentary, in the most severe cases, in which the medical care available in case of imprisonment is not able to provide the proper highly specialised medical treatment, giving an answer to the first step of the examination will be easy. For those cases, the result of the application of the test in both variants – application of the two-step test, and if the test is limited to just the second stage – will probably lead to the same conclusion and will oppose the execution of the warrant based on the conclusion that the requested person will be exposed to the risk of inhuman treatment within the meaning of Article 4 of the Charter. However, the answer to this question in cases like the one which brought the case to the Court of Justice will definitely not be an easy one. In such cases, limitation of the test to just its second stage, thus examination of just the individual situation without examination of the system of medical care available in the relevant detention places, may ultimately provide the possibility of broadening the scope of possibilities for non-execution of the EAW. One should keep in mind that the ultimate aim of the mechanism introduced by the Framework Decision is the effective execution of requests. For this reason, the execution of the warrant was supposed to be the rule, whereas non-execution was supposed to be an exception, which was provided for in extraordinary cases.¹⁸ Hence, maintenance of the test in its original, two-step version is a reasonable approach, so as not overly to extend the possibility for non-execution of the EAW, and as a result strike at the heart of the system introduced by the Framework Decision.

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Summary

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Is One Step Enough? Serious Illness as a Ground for Non-execution of a European Arrest Warrant

The subject of the commentary is the judgment of the Court of Justice regarding the possibility of non-execution of a European Arrest Warrant regarding a person suffering serious, chronic, and potentially irreversible illness. Since the Framework Decision on the European arrest warrant does not provide the ground for the non-execution of the warrant based on the threat to the health of the person concerned, the referring court was in doubt, whether such a premise can justify the non-execution of the warrant. The main legal problem dealt with in the commentary was the consideration of whether in such a case the executing judicial authority may refuse to execute such a warrant, and, if so, on what legal basis.

Keywords: Aranyosi and Căldăraru joined cases, Court of Justice of the European Union, European Arrest Warrant, Framework Decision, two-step test.

Streszczenie

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Czy jeden etap jest wystarczający? Poważna choroba jako podstawa odmowy wykonania Europejskiego Nakazu Aresztowania

Przedmiotem glosy jest orzeczenie Trybunału Sprawiedliwości Unii Europejskiej dotyczące odmowy wykonania Europejskiego Nakazu Aresztowania w stosunku do osoby cierpiącej na poważną, przewlekłą i potencjalnie nieodwracalną chorobę. Ponieważ decyzja ramowa w sprawie Europejskiego Nakazu Aresztowania nie przewiduje przesłanki odmowy wykonania nakazu z powołaniem się na zagrożenie dla stanu zdrowia osoby przekazywanej, sąd odsyłający

powziął wątpliwość co do możliwości odmowy wykonania nakazu z powołaniem się na wyżej wspomnianą przesłankę. Głównym problemem prawnym glosy było ustalenie, czy w zaistniałej sytuacji sąd wykonujący może odmówić wykonania takiego wniosku, a w razie pozytywnej odpowiedzi na tak postawione pytanie, jaka powinna być podstawa takiej odmowy.

Słowa kluczowe: sprawy połączone Aranyosi i Căldăraru, Trybunał Sprawiedliwości Unii Europejskiej, Europejski Nakaz Aresztowania, decyzja ramowa, test dwustopniowy.