

# DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

## **STRIKING A BALANCE: CJEU EMBRACES ITALIAN CONSTITUTIONAL COURT'S ADVOCACY FOR FUNDAMENTAL RIGHTS IN EAW CASES – JUDGMENTS C-699/21 AND C-700/21**

*Posted on 27 Luglio 2023 by [Filippo Venturi](#)*

In the judgments concerning cases C-699/21 and C-700/21, the Grand Chamber of the Court of Justice of the European Union (CJEU) answers to the questions raised by the Italian Constitutional Court in [decisions 216 and 217 of 2021](#).

The two proceedings regard the Framework Decision 2002/584 on European Arrest Warrant (EAW) and, in particular, its compatibility with the fundamental rights recognized by both the Italian Constitution and the Charter of the Fundamental Rights of the European Union (CFREU).

In its decisions, the Italian Constitutional Court recognized certain instances of incompatibility between the EAW discipline, as transposed into Italian law, and the fundamental rights of suspected or sentenced individuals. However, acknowledging the significance of these issues for EU law (since the EAW matter is completely harmonised), and in order to uphold the primacy, unity, and effectiveness of EU law, the Court decided to request a preliminary ruling from the CJEU.

With the two judgments under consideration, the CJEU accepts the solutions suggested by the referring Court and acknowledges that the

EAW discipline, as transposed into Italian law, may affect the fundamental rights of sentenced individuals.

In both sentences, the CJEU emphasizes the principle of mutual trust (particularly of mutual recognition in criminal matters) as well as the objective of combating impunity for the requested person. However, the Luxembourg Court also stresses the importance of the duty to protect her fundamental rights. According to the CJEU, the latter obligation may justify refusing the surrender of the requested person in cases where executing the EAW would infringe her fundamental rights, even beyond the grounds for non-execution specified in the Framework Decision. Indeed, Article 1(3) of the Framework Decision already establishes the general principle according to which the EAW discipline does not modify the obligation to respect fundamental rights and principles as enshrined in Article 6 TEU.

More specifically, in the [first judgment](#) (18 April 2023) the CJEU addresses the situation of a person suffering from a serious chronic and potentially irreversible illness that poses a risk of serious harm to her health if surrendered. The Framework Decision does not include such a ground for refusing the execution of the EAW because – on the basis of the principle of mutual trust – there is a presumption that the care and treatment provided in the Member States for the management of such illness will be adequate. However, Article 23(4) already establishes that the surrender may be temporarily postponed if there are substantial grounds for believing that it would endanger the requested person's life or health. Therefore, the executing judicial authority may already postpone the execution of an EAW if there is a risk of a serious harm to health.

According to the CJEU, this discretion should be exercised in accordance with Article 4 CFREU, which prohibits, *inter alia*, inhuman and degrading treatment (§38). This prohibition would be violated if the surrender of a seriously ill person would cause her imminent death or a serious, rapid and irreversible decline in her state of health or a significant reduction in life expectancy. Therefore, and in line with the approach taken in [Aranyosi and Căldăraru](#), Article 23(4) of the Framework Decision should be interpreted as requiring a dialogue procedure in which the executing judicial authority must request the issuing judicial authority to provide it

with all the information necessary to ensure that the manner in which the EAW will be executed rules out the aforementioned risks. If such safeguards are provided, the EAW must be executed. Otherwise, in accordance with Article 1(3) of the Framework Decision interpreted in light of Article 4 CFREU, the executing judicial authority cannot give effect to the EAW. In this way, as the Advocate General Manuel Campos Sánchez-Bordona suggested in his opinion, the CJEU does not create a new rule but fulfils the positive requirement laid down in Article 1(3) through the remedy provided by Article 23(4) of the Framework Decision.

The reasoning of the CJEU is clearly in line with that already developed by the Italian Constitutional Court, which referred to Article 4 of the CFREU and proposed an extension of the dialogue procedure established in the *Aranyosi and Căldăraru* judgment. The Italian Constitutional Court also emphasized the right to health (Articles 3 and 35 of the CFREU). However, according to the CJEU, the prohibition of inhuman and degrading treatment is deemed sufficient to protect the requested person (§54).

The [second judgment](#) (6 June 2023) concerns an EAW issued against a citizen of a third country who, however, lawfully has residence or abode in the territory of a Member State. The problem is that the Italian legislation transposing the Framework Decision absolutely precludes the executing judicial authorities from refusing to surrender third-country nationals irrespective of the links those individuals have with Italian territory. Therefore, the ground for optional non-execution of the EAW provided by Article 4(6) of the Framework Decision – which refers to the case where the requested person is staying in, or is a national or a resident of the executing Member State, and that State undertakes to execute the sentence or detention order in accordance with its domestic law – can be invoked for EU citizens but not for third-country nationals.

Recalling the [Wolzenburg](#) decision, the CJEU acknowledges that Member States, while implementing Article 4(6) of the Framework Decision, may restrict, in a manner consistent with the principle of mutual recognition, the situations in which they can refuse to surrender a person falling within its scope. However, this discretion is constrained by the need to uphold the fundamental rights of the requested person, particularly the principle

of equality before the law as enshrined in Article 20 of the CFREU (§40). This principle, that applies also to third-country nationals, requires that similar situations should not be treated differently and that different situations should not be treated in the same manner, unless there is an objective justification for such different treatment.

According to the CJEU, the situation of a third-country national who is the subject of an EAW and is staying or residing in the executing Member State may not necessarily be different from that of a national of that Member State or another Member State. Instead, “it must be held that those persons may be in a comparable situation for the purpose of applying the ground of optional non-execution provided for in that provision, when they are integrated to a certain extent in the executing Member State” (§50). Therefore, legislation such as the Italian law (Article 18 of Law N. 69/2005), which absolutely and automatically excludes third-country nationals from the benefit of the ground for optional non-execution of an EAW provided in Article 4(6) of the Framework Decision, violates the principle of equality before the law enshrined in Article 20 of the CFREU.

However, it is permissible for the transposing Member State to impose the condition that the non-execution is subject to the third-country national having stayed or resided continuously in that Member State for a minimum period of time. This condition does not exceed what is necessary to ensure that the requested person is integrated to a certain extent in the executing Member State. Indeed, the CJEU clarifies that the objective of Article 4(6) of the Framework Decision is to increase the requested person’s chances of reintegrating into society when the sentence imposed on her expires (§49). Therefore, national law cannot deprive the executing judicial authority of the necessary discretion to decide whether or not to refuse the execution of the EAW when the requested person, who is not a national of the executing Member State, is staying or residing in that Member State within the meaning of Article 4(6) of the Framework Decision.

Having clarified that the ground for optional non-execution of the EAW provided by Article 4(6) of the Framework Decision may also be applied to

a third-country national, the CJEU proceeds to address the second question, regarding the criteria and conditions to determine whether the links are significant enough to justify the refusal of surrender. The Court refers to the elements mentioned in recital 9 of the Framework Decision 2008/909, which shares the same objective as Article 4(6): namely, facilitating the social rehabilitation of the sentenced person. Those elements “include, in essence, the attachment of that person to the executing Member State, and whether that Member State is the centre of his or her family life and his or her interests, taking into account, *inter alia*, his or her family, linguistic, cultural, social or economic links to that State” (§62). The CJEU recognizes that these elements should also be considered by the executing judicial authority to determine whether the third-country national is staying or residing in the executing Member State.

In this decision as well, the CJEU acknowledges many of the arguments put forth by the Italian Constitutional Court. Indeed, the CJEU references the Wolzenburg judgment and the Framework Decision 2008/909, also highlighting the importance of the social rehabilitation of the sentenced person for Article 4(6) of the Framework Decision. Nevertheless, the CJEU does not make explicit reference to the right to family life (in line with the opinion of Advocate General Manuel Campos Sánchez-Bordona), despite the emphasis placed on its significance by the Italian Constitutional Court. Nonetheless, it should be noted that familial connections are acknowledged by the CJEU as a decisive factor in determining whether there is a legitimate interest to justify enforcing the sentence imposed in the issuing Member State on the territory of the executing Member State. To conclude, in cases C-699/21 and C-700/21, the CJEU embraces the peace pipe presented by the Italian Constitutional Court to heal the institutional wounds arising from the [Taricco](#) affair (see also [M.A.S.](#)). By utilizing the preliminary reference procedure as a means of dialogue, the CJEU cooperates with the Italian Constitutional Court in order to enhance the safeguarding of fundamental rights for all individuals, including both EU citizens and third-country nationals, within the framework of the European multilevel penal legal system, as already done in the [LM](#) judgment. Therefore, these two judgments once again demonstrate - if

there ever was a need - that the dialogue between the CJEU and Member States' Supreme Courts serves as a mechanism to ensure the compatibility of EU "criminal" law with the fundamental rights of individuals under suspicion.