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The Saga of Surrender Continues: Developments of the fundamental rights exception in the Court of Justice's *E.D.L.* case and the Opinion of Advocate-General Capeta in *GN.*

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Safeguarding fundamental rights as an executing authority in surrender procedures concerning a European Arrest Warrant (EAW) has been possible since the rulings of the European Court of Justice (the Court) in *Aranyosi and Caldararu*. The two-step test developed in this case, comprising an abstract test assessing whether a real risk of generalised or systemic deficiencies exists and a concrete test assessing whether this real risk exists for the specific person involved, was further expanded from application in cases regarding potential violations of Article 4 Charter of Fundamental Rights of the EU (the Charter) to application in cases relating to Article 47 of the Charter (right to an effective remedy and to a fair trial), a development starting from *LM.* Recently, Case C-699/12 *E.D.L.* provided a new perspective on this test and potentially paved the way for a new approach to the fundamental rights exception. Additionally, the Opinion of Advocate-General (AG) Ćapeta in *GN* provides an interesting insight in the possible outcome of this case, which could lead to another expansion of the fundamental rights exception. In this blog, these two cases are analysed, starting with *E.D.L.,* followed by a commentary on the Opinion of the AG in *GN*, while discussing their influence on the two-step test, the future of mutual trust and protection of fundamental rights in surrender cases.

From Aranyosi to E.D.L

When looking back at the (quite recent) history of the fundamental rights exceptions developed in the Court's case law, it can be noticed that in earlier cases the Court focused on very specific circumstances at hand while creating a two-step test: problems relating to

detention conditions and the issues concerning the judiciary in Member States such as Poland, Hungary and Romania. Since then, the Court has specified in a number of cases what the scope of inquiry is for the executing authority when applying this test (See for example Case C-327/18 PPU (RO) and Case C-128/18 (Dorobantu)). Recently, the case of *E.D.L.* revealed a new interpretation and expansion of the fundamental rights exception. In this case, the Court seems to avoid the first step of the two-step test when discussing the fundamental rights exception based on Article 4 of the Charter, and instead focuses on the individual context only. It also expands the test by employing it to safeguard rights in situations involving significant health concerns, which demonstrates a new approach to the fundamental rights exception.

The case of *E.D.L* concerned a person residing in Italy, against whom the Municipal Court in Zadar, Croatia issued a European Arrest Warrant for the purposes of criminal prosecution for possession of narcotics in Croatia (paragraph (para. 8). As the person involved provided the Court of Milan with evidence of severe psychiatric problems, the Court ordered a psychiatric assessment. This assessment showed evidence of a psychotic disorder and a significant risk of suicide in the event of imprisonment, leading to the conclusion that the person involved was unsuited for prison life (paras 9 and 10). In many cases in which health concerns are a prominent issue, Article 23 (4) Framework Decision on the EAW (FD EAW) provides a basis for temporary postponement of the surrender and thereby a solution to the issue. In this case, however, this ground was found insufficient. The health issues of the person involved were of a chronic nature, meaning that postponement would not be a suitable solution. The Court thus created a new framework using the possibility to postpone from Article 23 (4) FD EAW in combination with Article 4 of the Charter, in order to cover situations where 'it cannot be ruled out that the surrender of a person who is seriously ill may cause that person to be exposed to a real risk of human or degrading treatment within the meaning of Article 4 of the Charter' (para. 39). Such a risk exists when the person is at risk of imminent death or where there are substantial grounds for believing that he or she would face a real risk of suffering a serious, rapid and irreversible decline in his or her state of health or a significant reduction in life expectancy (para. 41). When such a risk is found, the surrender should be postponed according to Article 23 (4) FD EAW, and the executing judicial authority should request all the necessary information from the issuing judicial authority to ensure that the manner in which the criminal proceedings will be conducted or the conditions of any detention of that person make it possible to rule out the aforementioned risk (para. 47). If the issuing judicial authority is unable to provide such information, the executing authority is to refuse the EAW based on Article 1(3) FD EAW (para. 52). This article is the foundation of the fundamental rights exception and the two-step test from *Aranyosi & Caldararu*, as it states the obligation to respect fundamental rights, including in surrender procedures. The Court

also refers to this case in its argument, thereby explicitly linking the issue at hand with the jurisprudence on fundamental rights exceptions (para. 53).

Two aspects stand out in this case. First, the Court seems to determine an expansion as to which fundamental rights can be a ground for non-execution of the EAW. *E.D.L.* concerns the same right that was recognised in *Aranyosi & Caldararu*, in which the focus was on detention conditions leading to violations of Article 4 of the Charter. Nonetheless, *E.D.L.* can be considered an expansion of rights that must be protected within the scope of Article 4 of the Charter, as it adds the circumstance that serious health concerns could cause a violation of this article. This shows the willingness of the Court to expand the application of the fundamental rights exception when deemed necessary, which is a positive development. In recent years, it has become apparent that, despite the shared obligation for all Member States to adhere to the same fundamental rights standards, their practices are sometimes not in line with these standards (see for example the Dutch life long prison sentence which was not in line with Article 3 ECHR until recently (Murray v. the Netherlands, app. No. 10511/10)). The Court, by establishing this jurisprudence, is instructing Member States not to live in a dream world of blind trust created by the principle of mutual trust. However, although the Court increasingly delineates the boundaries of the principle of mutual trust, this principle remains crucial for the efficient cooperation between Member States to prevent impunity (See Rizcallah p. 2). It is exactly this aspect that creates tension with refusal of surrender based on the fundamental rights exception; what if refusal leads to impunity? How can we prevent this consequence of refusal? If the Court continues to recognise additional fundamental rights that can be subject to non-execution, thereby limiting the concept of mutual trust, there is a risk of undermining both this concept and the overarching objective of cooperation in criminal matters, namely preventing impunity. Nonetheless, by establishing further procedural rules around the refusal of the EAW and the consequences thereof, impunity can be prevented and fundamental rights protection can be balanced with the interest of preventing impunity. This, however, requires further research and further development of case law by the Court.

The second aspect that stands out in *E.D.L.* relates to the fact that the Court seems to solely rely on the second step of the two-step test to determine whether the executing authority can refrain from surrendering the person concerned. In other cases, the Court strictly requires executing authorities to assess both generalised or systemic deficiencies and the concrete real risk for the individual involved (for example in Case C-158/21, Puig Gordi). This comes from the presumption based on mutual trust that individual violations that stand on their own will be addressed by the issuing State, for example by having the opportunity of access to courts and appeal against judicial decisions. In *E.D.L.*, however, the Court's decision displays only the second step, where the potential refusal of surrender

is influenced solely by the concrete circumstances of the person involved (para. 39). It seems that the Court points out a situation in which there is no evidence of systemic or generalised deficiencies, but the violation of the fundamental right would be so severe that surrender still cannot take place. Examining the rationale behind the first step and the framework outlined in *E.D.L.*, one could argue that the first step might be superfluous in specific situations. Forsaking the first step in such specific cases does not, in my opinion, damage the strong mutual trust that still exists between Member States. It provides for an assessment of fundamental rights protection in situations where there is a serious risk for fundamental rights violations, which cannot be prevented in the issuing State, and systemic and generalised deficiencies in the issuing State are not at play (see the proposed adaptation of the test by Rizcallah, p. 14). This shows an approach by the Court that is more in line with reality, which will be discussed further based on the Opinion of AG Ćapeta in the case of *GN*.

Opinion of Advocate-General Ć apeta in the case of GN: from Articles 4 and 47 to Articles 7 and 24 of the Charter

The case of *GN* concerns a Nigerian national, who was residing in Italy and was requested by the Belgian authority for the execution of a sentence of five years imprisonment for human trafficking and facilitation of illegal immigration (para. 4). The requested person was accompanied by her minor son who was living with her. The preliminary questions asked by the Supreme Court of Italy were reformulated by the AG as whether the surrender can be refused (or deferred) when there is a risk of fundamental rights violations of the mother (as the requested person) as well as the minor child living with her (para. 10). These rights can be found in Articles 7 and Article 24 of the Charter. The question directly relates to the framework of the two-step test, and whether this test can be applied in cases relating to Articles 7 and 24 of the Charter. The AG dissects this question into two parts: the rights of the mother as the requested person and the rights of the child. Regarding the rights of the mother, the AG argues that there is no reason not to apply the two-step test in cases relating to the right to family life of persons imprisoned in the issuing State, when the existence of systemic or generalised deficiencies in the protection of this fundamental right can be established (paras 20 and 24). As the right to family life is not an absolute right and must be balanced with the interest of avoiding impunity, the duty on Member States is one of proportionality; the limitation of family life in prisons must be as little as possible (para. 21). Only when proof exists of systemic or generalised deficiencies in the issuing State, the executing authority can further analyse the two-step test and eventually even refuse surrender (para. 32).

The AG also discusses the necessity of the first step of the test, by stating that it would be insufficient to base refusal only on an individual breach of a fundamental right, due to the system of mutual recognition (para. 30). Interestingly, the AG mentions that it would be

impossible for executing authorities to predict individual violations of fundamental rights without the indication of systemic or generalised deficiencies (para. 31). As discussed in the first paragraphs concerning *E.D.L.,* the Court recognises that such violations can be predicted in cases concerning serious health issues, without the necessity of the first step, illustrating a difference in perception between the Court and the AG.

Concerning the rights of the child, Article 24(2) of the Charter appears notably significant, as it mandates public authorities to prioritise the child's best interests as the primary consideration in all actions related to children, including surrender (para. 41). According to the AG, the issue of best interest does not relate to mutual trust, as surrender could still not be in the best interest of a child even when the issuing State provides a high level of protection for children (para. 41). Hence, while the matter of best interest is related to the obligation to protect fundamental rights flowing from Article 1(3) FDEAW, it does not pertain to earlier case law in this respect (para. 40). The AG creates a new framework to analyse the best interest of the child. A concrete and detailed assessment of the individual situation of the child must be undertaken, while taking into account all relevant information that has been collected by the executing authority (para. 59, based on Article 15(2) FD EAW). Ultimately, if the executing authority does not receive sufficient information that would allow it to be absolutely certain that the execution of the EAW would not go against the best interests of the child, it should refuse surrender (para. 71). This proposed assessment appears to go beyond the scope of the two-step test, due to its double negative formulation. If it is not certain that the surrender would not go against the best interest of the child, there is sufficient reason for refusal. If the Court follows the argumentation of the AG, the outcome would be an expansion of the different fundamental rights to which the two-step test can be applied, and a new assessment of the rights of children in the surrender procedure.

Concluding remarks: navigating fundamental rights within surrender procedures

Based on this analysis, it can be concluded that the Court is getting the opportunity to further develop the fundamental rights exception in different ways. The Court not only demonstrates a readiness to acknowledge other fundamental rights that might be infringed upon in the surrender procedure but also exhibits a willingness to modify the two-step test to unforeseen circumstances. Expanding the scope of the two-step test enables the Court to adjust to real-life situations that deviate from the anticipated circumstances that the Court relied on when first formulating this test. It will be very interesting to see which path the Court decides to take in its judgment in *GN.* Hopefully the Court will persist in its trajectory of acknowledging additional fundamental rights at stake in the surrender procedure and allowing deviation from the very strict two-step test by focussing on the real risk of the individual involved, while keeping the importance of mutual trust in sight.