

## THE TWO-STEP TEST: CJEU'S DEVELOPING APPROACH TO PROTECTION OF FUNDAMENTAL RIGHTS WITHIN THE EUROPEAN ARREST WARRANT SYSTEM

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**Abstract:** *The two-step test formulated by the CJEU has been an essential tool for protection of fundamental rights within the European Arrest Warrant system. In the span of 11 months, the CJEU published three landmark cases – Puig Gordi, E.D.L. and GN, in which it elaborated on the intricacies of the two-step test and protection of fundamental rights. The Court clarified that the two phases of this examination should be applied only consecutively and cumulatively and, unexpectedly, provided a new tool of protection of fundamental rights in E.D.L. This article aims to assess the potential impact of these cases on the two-step test doctrine.*

**Keywords:** *European Arrest Warrant, Two-step test, Fundamental rights*

### INTRODUCTION

#### I. THE ORIGINS AND CHALLENGES TO THE TWO-STEP TEST

Since the establishment of the European Arrest Warrant (“EAW”) system, the need for adequate protection of fundamental rights was evident. Nevertheless, the level of protection of the surrendered person’s rights has been subject to criticism and deemed inadequate by some.<sup>1</sup> Functioning of the EAW system is based on principles of mutual trust<sup>2</sup> and mutual recognition,<sup>3</sup> which allow an automaticity of its recognition and efficiency of the surrender proceedings.<sup>4</sup> One of the elements stemming from the principle of mutual trust is the strict limitation of reasons allowing national courts to refuse to execute an EAW.<sup>5</sup> Notably, fun-

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<sup>1</sup> FICHERA, Massimo. EU fundamental rights and the European Arrest Warrant. In: Sionaidh Douglas-Scott - Nicholas Hatzis (eds.). *Research Handbook on EU Law and Human Rights*. Cheltenham: Edward Elgar Publishing, 2017, p. 423. In: *Elgaronline* [online]. [2025-01-28]. Available at: <<https://doi.org/10.4337/9781782546405.00030>>.

<sup>2</sup> Point 10 of the Preamble of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States states: “*The mechanism of the European arrest warrant is based on a high level of confidence between Member States.*” Also confirmed by constant case law of the Court (ex. Joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, para 76, Case C-699/21, E.D.L., EU:C:2023:295, para 32).

<sup>3</sup> Point 6 of the Preamble of the Framework Decision states: “The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the cornerstone of judicial cooperation.” Also confirmed by constant case law of the Court (ex. Case C-699/21, E.D.L., EU:C:2023:295, para 33).

<sup>4</sup> The Court refers to the link between the “simplified and effective system for the surrender” and high level of trust between the Member States in for example: Joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, para 76, Case C-699/21, E.D.L., EU:C:2023:295, para 32.

<sup>5</sup> FLETCHER, Maria, Robin LÖÖF, GILMORE, William C. *EU Criminal Law and Justice*. Northampton: Edward Elgar, 2008, pp. 112–113. Also confirmed by constant case law of the Court (Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, para 41, Case C-699/21, E.D.L., EU:C:2023:295, para 34).

damental rights are not included in the exhaustive list of grounds for refusal, which can be found in the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (“the Framework Decision”).<sup>6</sup>

To remedy this lack of protection of fundamental rights, the Court of Justice of the EU (“the CJEU” or “the Court”) formulated a two-step test, sometimes referred to by the name of the judgment in which it was formulated – *Aranyosi and Căldăraru*.<sup>7</sup> Firstly, a systemic deficiency in the protection of fundamental rights must be established. Secondly, a link to the concerned person’s rights must exist. By establishing the two-step test, the Court accepted a limitation on mutual trust in order to safeguard fundamental rights, and it thereby balanced these two values.<sup>8</sup>

The *Aranyosi and Căldăraru* doctrine was created in the context of conditions in prisons and the prohibition of torture and inhuman or degrading treatment but was later applied to other areas of fundamental rights.<sup>9</sup> In its eight years of existence, the *Aranyosi* approach has been criticized and challenged by national courts for not providing sufficient protection of fundamental rights. These challenges arose mainly in the context of the claimed lack of independence of Polish judges.<sup>10</sup> The core of these criticisms has been directed to the second step, as establishing a clear risk to the individual’s fundamental rights has consistently posed difficulties.

Protection of fundamental rights and the two-step test have given rise to rich case-law of the Court. Its last key pieces – cases *Puig Gordi*,<sup>11</sup> *E.D.L.*<sup>12</sup> and *GN*<sup>13</sup> – have clarified some elements of its functioning, but also lead to the question: What is the future of the two-step test?

## II. PUIG GORDI: NO STEP WITHOUT THE FIRST STEP

Judgment *Puig Gordi* carries the name of a Catalan politician who was prosecuted after the 2017 Catalan independence referendum, which marks the beginning of the procedural background of this case.<sup>14</sup> EAWs issued by Spanish courts against Catalan poli-

<sup>6</sup> Art. 3, Art. 4, and Art. 4a of the Framework Decision.

<sup>7</sup> Joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198.

<sup>8</sup> MEULEN VAN DER, Lucia. Another Exception To The Rule: The E.D.L. Case On EAW Surrenders Of Seriously Ill Persons. *Common market law review*. 2024, Vol. 61, No. 1, p. 225. In: *Kluwer Law Online* [online]. [2025-01-28]. Available at: <<https://doi.org/10.54648/COLA2024008>>.

<sup>9</sup> In 2018 the Court applied the two-step test for the first time to right to a fair trial as guaranteed by Art. 47 of the EU Charter of Fundamental Rights („the Charter“), Case C-216/18 PPU, Minister for Justice and Equality (Deficiencies in the System of Justice), EU:C:2018:586).

<sup>10</sup> Joined cases C-354/20 PPU and C-412/20 PPU, Openbaar Ministerie (Indépendance de l’autorité judiciaire d’émission), EU:C:2020:1033), Joined cases C-562/21 PPU and C-563/21 PPU, Openbaar Ministerie (Tribunal établi par la loi dans l’État membre d’émission), EU:C:2022:100, sometimes referred to as the “X and Y” case).

<sup>11</sup> Case C-158/21, *Puig Gordi*, EU:C:2023:57.

<sup>12</sup> Case C-699/21, *E.D.L.*, EU:C:2023:295.

<sup>13</sup> Case C-261/22, *GN*, EU:C:2023:1017.

<sup>14</sup> SOLANES MULLOR, Joan. Be careful what you ask for: The European Court of Justice’s EAW jurisprudence meets the Catalan secession crisis and the European rule of law crisis in *Puig Gordi* and others, C-158/21, EU:C:2023:57. *Maastricht journal of European and comparative law*. 2023, Vol. 30, No. 2, p. 204. In: *Sage Journals* [online]. [2025-01-28]. Available at: <<https://doi.org/10.1177/1023263X231191904>>.

ticians have led to various surrender proceedings across the EU,<sup>15</sup> some requiring intervention of the Court.<sup>16</sup> *Puig Gordi* is, for now, the last piece of the puzzle in this area, in which the Court further refined and explored the two-step doctrine.

The preliminary proceedings followed a particularly complex procedure at the national level,<sup>17</sup> which resulted in doubts about the jurisdiction of the issuing court - the Spanish Supreme Court. For this reason, the executing Belgian court refused to surrender Mr. Puig Gordi.<sup>18</sup> Consequently, the Spanish Supreme Court submitted a request for a preliminary ruling. It sought clarification from the Court on whether a refusal to execute an EAW could be justified by an alleged lack of jurisdiction of the issuing authority.<sup>19</sup>

In its elaborated judgment, the Court clarified ambiguities about the two-step test. The CJEU did not accept the argumentation of the Belgian court, according to which the Spanish Supreme Court lacked jurisdiction and thus did not fulfill the criteria to be deemed a “judicial authority”<sup>20</sup> under the Framework Decision, one of the conditions of validity of the EAW. The Court stated that the executing court cannot verify the jurisdiction, or lack of, of the issuing court and refuse to execute an EAW on these grounds.<sup>21</sup>

Lack of jurisdiction could, however, lead to a refusal based on the protection of rights enshrined in Art. 47 of the Charter of Fundamental Rights of the European Union (“the Charter”). The right to a fair trial protected by Art. 47 includes being tried by a tribunal previously established by law, which includes questions of jurisdiction. To assess the threat to fundamental rights, the executing court must apply the two-step test.<sup>22</sup> If there is no national remedy that would allow for a review procedure of the jurisdiction in the issuing state, executing courts must conclude, that the first step is fulfilled.<sup>23</sup>

When replying to a different question, the Court established that without the first step, surrender cannot be refused,<sup>24</sup> and thus specified the application of the two-step test. Such an approach implies that even if the executing court had tangible proof that the surrender of a person would lead to endangering of his or her rights, such evidence alone would be insufficient to warrant a refusal. Systemic issues would have to exist as well. How could the Court allow for the surrender to take place, when it could lead to a breach of the fundamental rights of the individual? In the Court’s eyes, it will not. As it explains, if there are no systemic deficiencies in the national judicial system, if remedies and review

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<sup>15</sup> *Ibid*, p. 205.

<sup>16</sup> The Court has dealt with question of immunity of certain Catalan politicians, who were elected to the European Parliament, in preliminary proceedings (Case C-502/19, Junqueras Vies, EU:C:2019:1115) and also review of legality proceedings (Case T-272/21, Puigdemont i Casamajó and Others v Parliament, EU:T:2023:373), which are still pending before the Court (Proceedings on appeal, C-572/23, Puigdemont i Casamajó and Others v Parliament).

<sup>17</sup> See – SOLANES MULLOR, Joan. *Be careful what you ask for: The European Court of Justice’s EAW jurisprudence meets the Catalan secession crisis and the European rule of law crisis in Puig Gordi and others*, C-158/21, EU:C:2023:57.

<sup>18</sup> Puig Gordi para 14.

<sup>19</sup> Puig Gordi para 22.

<sup>20</sup> Puig Gordi para 14.

<sup>21</sup> Puig Gordi para 89.

<sup>22</sup> Puig Gordi para 101.

<sup>23</sup> Puig Gordi para 103.

<sup>24</sup> Puig Gordi para 111.

procedures regarding the jurisdiction of a court are guaranteed by national legislation, the risk to the person's right can be, in principle, ruled out.<sup>25</sup>

From the point of view of protection of fundamental rights *Puig Gordi* brings contradictions. On one hand the Court extended the protection of fundamental rights by applying the two-step test to a situation of potential lack of jurisdiction, but, on the other hand, it also made the test more challenging to pass. Insisting on the first step to be always fulfilled can block the possibility of a refusal, even if the EAW was issued by a court that lacked jurisdiction. Additionally, the Court closed the door on the protection of fundamental rights applied by the Belgian court. By doing so, the Court underlined the importance of the *Aranyosi* test, when national courts balance fundamental rights against mutual trust and decide on the surrender of the person. While *Puig Gordi* may be perceived as limiting in terms of safeguarding fundamental rights within the EAW system, a new ground for their protection came less than three months later in *E.D.L.*<sup>26</sup>

### III. E.D.L.: DEPARTURE FROM THE TWO-STEP DOCTRINE?

#### III.1 Facts and Preliminary Questions

The proceedings in *E.D.L.* started before an Italian court, which was deciding whether to surrender Mr. E.D.L. to Croatia or not.<sup>27</sup> As part of his defense, Mr. E.D.L. brought forward the issue of his health. Due to his various psychiatric issues, incarceration would pose a significant risk of suicide to him, he was thus found unfit for prison life.<sup>28</sup> The Italian court found that his surrender would seriously harm his health, but Italian law did not permit a refusal for this reason.<sup>29</sup> As a result, the executing court asked for guidance from the Italian Constitutional Court,<sup>30</sup> which decided to issue a request for preliminary proceedings.<sup>31</sup>

As advocate general Campos Sánchez-Bordona put it in his opinion, the core of the legal questions the Court was asked, was whether the reasons for non-surrender, as listed in the Framework Decision,<sup>32</sup> should be supplemented by a new ground based on the rights enshrined in Art. 3, 4 and 35 of the Charter<sup>33</sup> and whether the *Aranyosi* doctrine should be extended to situations where surrender would lead to a serious risk to the person's health.<sup>34</sup> As the preliminary questions concerned a possibility of non-surrender based on protection of fundamental rights, the Court had an occasion to re-visit the two-step test. It did not, however, seize this opportunity.

<sup>25</sup> *Puig Gordi* para 112.

<sup>26</sup> *Puig Gordi* was published on 31<sup>st</sup> January 2023 and *E.D.L.* on 18<sup>th</sup> April 2023, so less than three months passed between their publication. Considering the length of both proceedings and the fact that they overlapped, it is possible that the Court's conclusions in *E.D.L.* were formulated even earlier.

<sup>27</sup> *E.D.L.* para 8.

<sup>28</sup> *E.D.L.* para 9, 10.

<sup>29</sup> *E.D.L.* para 11.

<sup>30</sup> *E.D.L.* para 12.

<sup>31</sup> *E.D.L.* para 12.

<sup>32</sup> Art. 3, Art. 4, Art. 4a of the Framework Decision.

<sup>33</sup> The titles of the relevant provisions of the Charter are: Art. 3 Right to the integrity of the person, Art. 4 Prohibition of torture and inhuman or degrading treatment or punishment, Art. 35 Health care.

<sup>34</sup> Opinion of advocate general Campos Sánchez-Bordona, Case C-699/21, *E.D.L.*, EU:C:2022:955, para 2, 3.

### III.2 Legal Reasoning and Conclusions of the Court

Similar cases have existed on a national level for a significant amount of time,<sup>35</sup> but the Court did not have an opportunity to address them yet. After setting out conclusions of key relevant case law,<sup>36</sup> the Court turns its attention to Art. 23 of the Framework Decision, which proves essential for its reasoning. This provision sets out strict time limits for surrender, its paragraph 4, however, calls for the surrender to be postponed for serious humanitarian reasons, for example if there is a risk of endangering the person's health.<sup>37</sup> What needs to be underlined, is that Art. 23 explicitly mentions only a temporary suspension. The Court, nevertheless, went far beyond the text and in a cascade of three scenarios formulated circumstances, under which the EAW could be postponed and even non-executed due to a threat to the person's health.

Firstly, the Court sets out a possibility of a temporary postponement in cases where there are substantial grounds to believe the person would be subject to a risk to his health.<sup>38</sup> Secondly, in cases of a seriously ill person whose life expectancy or health could deteriorate in case of a surrender, postponement of a surrender becomes obligatory.<sup>39</sup> The executing court must ask for additional information and if the conditions can be adapted in a way to eliminate the risk to the person's health or life, the surrender takes place.<sup>40</sup> This leads to a logical question - what if the risk continues to exist? In this third situation, the surrender must be refused.<sup>41</sup>

The Court argues that otherwise the requested person could be subjected to the EAW indefinitely without any realistic possibility of his or her surrender, which would be contrary to the text of Art. 23(4) of the Framework Decision as it provides only for a "temporary" postponement.<sup>42</sup> The second reason, according to the Court, is the protection of fundamental rights enshrined in Art. 1(3) of the Framework Decision. Based on this provision executing judicial authorities may refrain from executing an EAW.<sup>43</sup> Moreover, when surrendering a person with long-term health issues poses a serious health risk that cannot be mitigated within a reasonable time, the EAW cannot be enforced.<sup>44</sup> In other words, if the danger to health persists, execution of the EAW must be refused based on Art. 1(3) of the Framework Decision. When relying on Art. 1(3) of the Framework Decision, the Court refers to *Aranyosi and Căldăraru*<sup>45</sup> in which the CJEU allowed a refusal to execute an EAW based on this provision for the first time.<sup>46</sup> This reference creates a certain paradox, as by relying on *Aranyosi and Căldăraru*, in which the two-step test was created, the Court chooses to circumvent it.

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<sup>35</sup> See: MEULEN VAN DER, Lucia *Another Exception To The Rule: The E.D.L. Case On EAW Surrenders Of Seriously Ill Persons*, p. 227.

<sup>36</sup> E.D.L. para 30-35.

<sup>37</sup> Art. 23(4) of the Framework Decision.

<sup>38</sup> E.D.L. para 37.

<sup>39</sup> E.D.L. para 42.

<sup>40</sup> E.D.L. para 46, 47, 48.

<sup>41</sup> E.D.L. para 53.

<sup>42</sup> E.D.L. para 51.

<sup>43</sup> E.D.L. para 52.

<sup>44</sup> E.D.L. Para 53.

<sup>45</sup> E.D.L. para 53.

<sup>46</sup> *Aranyosi and Căldăraru* para 83, 104.

### III.3 The Two-Step test and Its Absence in E.D.L.

What is remarkable in *E.D.L.*, is how the Court not only creates a new ground for refusal, but also how it does not, unlike the advocate general,<sup>47</sup> explicitly address the two-step doctrine. It does, however, state that due to mutual trust there is a presumption of adequate level of care in prisons across all Member States even for persons with serious, chronic, and potentially irreversible medical conditions.<sup>48</sup> It further adds that surrendering a seriously ill person can result in a risk of inhuman or degrading treatment regardless of the quality of health care in the issuing Member State.<sup>49</sup>

The Court does so by applying, by analogy, *C. K. and Others*,<sup>50</sup> in which it dealt with a similar issue in the context of asylum proceedings. In the *E.D.L.* proceedings this analogy was brought forward by the Italian Constitutional Court, which used *C. K. and Others* to support its argument that a surrender should not take place.<sup>51</sup>

Although the Court emphasized the significance of the first step in *Puig Gordi*, it now no longer insists on its application with brief justification, calling the future of the two-step doctrine into question.

### III.4 The Future of EAW after E.D.L.: Anticipated Developments

*E.D.L.* is undoubtedly a landmark case, as it establishes a new ground for refusal to surrender which extends beyond the letter of the Framework Decision. It is, without a doubt, a step towards a higher protection of fundamental rights within the EAW system. Refusing to surrender a person whose life would be endangered by it can have a life-changing impact in the truest sense of the word. While the Court disregarded the two-step test in its argumentation and neither addressed nor applied it, *E.D.L.* should not be seen as an end to this doctrine.

First, in *E.D.L.* the Court relied on Art. 23(4) of the Framework Decision, and even though the term “serious humanitarian reasons” could allow for a broader interpretation, the CJEU’s reasoning relies on the specifics of the state of health of a person. Some point out the individual nature of the issue. They argue that the question is not whether a healthcare system of a Member State can provide sufficient care, which would be a question of mutual trust, it is instead if the health of a person is compatible with incarceration.<sup>52</sup>

In addition, Art. 23 of the Framework Decision addresses time limits of the surrender itself, so it should only be applied when the executing court decides to surrender the requested person. Consequently, Art. 23 of the Framework Decision and the *E.D.L.*

<sup>47</sup> In his opinion, advocate general Campos Sánchez-Bordona refers to Aranyosi and Căldăraru already in the second paragraph of his analysis and then later addresses explicitly the “two-stage examination” in para 35 and following.

<sup>48</sup> *E.D.L.* para 35.

<sup>49</sup> *E.D.L.* para 39.

<sup>50</sup> Case C-578/16 PPU, CK and Others, EU:C:2017:127.

<sup>51</sup> Request for a preliminary ruling in *E.D.L.*, para 32.

<sup>52</sup> GROSSIO Lorenzo, ROSI Margherita, The Ultimate (but not the Only) Remedy for Securing Fundamental Rights in the EAW System? Some Reflections on Puig Gordi and E. D. L. *European papers*. 2023. Vol. 8, No. 2, p. 556. In: *European Papers* [online]. [2025-01-28]. Available at: <<https://doi.org/10.15166/2499-8249/674>>.

exception should be invoked only if grounds for refusal enshrined in Art. 3, 4 and 4a of the Framework Decision cannot be applied and the two-step test is not fulfilled. In other words, if there are no systemic issues or deficiencies that would lead to a risk to the health of an individual and surrender cannot be refused on the basis of the two-step test, the *E.D.L.* approach provides a safety net to refuse a surrender in cases where the risk is solely individual.

Finally, in *E.D.L.*, the CJEU addressed protection of an absolute right, which requires a higher level of protection and allows for fewer limitations. While this was also the case in *Aranyosi and Căldăraru* and the two-step test was later applied to other rights,<sup>53</sup> it is still an element to be taken in consideration.

The Court's decision in *E.D.L.* undoubtedly marks an important moment in the development of the EAW system, as the Court formulates a new ground for refusal. However, we cannot draw a conclusion from *E.D.L.* that the second step will be left behind. What further supports the prediction that *E.D.L.* will more likely prove itself to be a supplement to the two-step doctrine, and not a sign of its end, are the CJEU's findings in *GN*.

## IV. GN: THE COURT'S REAFFIRMATION OF THE FIRST STEP

### IV.1 Facts and Questions Asked

The surprising new conclusions of the Court in *E.D.L.* gave space to many questions regarding the future of the *Aranyosi and Căldăraru* test. Some of them were answered only a few months later in *GN*. In this case, the CJEU had another opportunity to address the balance between protecting fundamental rights and upholding the principles of mutual trust and mutual recognition, this time in the context of safeguarding the best interests of a child.

The EAW in question was issued in Belgium for the purpose of enforcing a custodial sentence against Mrs. GN.<sup>54</sup> After her arrest in Italy, the executing Italian court sent a request for additional information to the issuing Belgian court. One of the questions was tied to the conditions of mothers with small children in Belgian prisons, as Mrs. GN was a mother of a small child and pregnant.<sup>55</sup> The Belgian court replied that it did not have the requested information at its disposition. Subsequently, the Italian court ordered an immediate release of Mrs. GN, as it was not certain that Belgian legislation would provide the same level of protection of rights of the mother to care and be with her children, as well as ensuring the appropriate level of care for the children.<sup>56</sup> The Court was consequently asked whether the Framework Decision allows to refuse to execute an EAW due to the requesting person being a mother caring for small children, and if not, whether such surrender was compatible with the protection of fundamental rights. The referring court referred namely to respect for private and family life and the right of a child to maintain a relationship and contact with his or her parents, as protected by Art. 7 and

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<sup>53</sup> Namely right to a fair trial enshrined in Art. 47 of the EU Charter of Fundamental Rights.

<sup>54</sup> GN para 15.

<sup>55</sup> GN para 16, 17.

<sup>56</sup> GN para 19.

Art. 24(3) of the Charter, as well as standards of protection of the best interest of the child as required by the ECtHR.<sup>57</sup>

## IV.2 The Court's Reasoning and Conclusions to be Drawn from GN

The Court's solution to the issue is the application of the two-step test. After resuming general remarks regarding the EAW system,<sup>58</sup> it simply states that being a mother of young children is not listed as a ground for refusal in the Framework Decision and that due to mutual trust, there is a presumption that conditions of detention in all Member States will be appropriate to deal with such situation.<sup>59</sup> It extends the *Aranyosi and Căldăraru* doctrine to the rights protected by Art. 7 and 24(2) of the Charter and adds that they should be assessed against an EU standard, not a national one. It adds that a "lack of certainty" of protection of rights cannot be sufficient to refuse a surrender.<sup>60,61</sup> The Court further formulates the two-step test in the context of the protection of family life and the best interest of the child.<sup>62</sup> It also addresses in more detail the mechanism of asking for supplementary information,<sup>63</sup> as that was one of the problematic elements of the proceedings on the national level.

*GN* also provides some answers to questions stemming from *E.D.L.* In *GN*, the CJEU unequivocally stated that the two steps cannot overlap and must be executed successively.<sup>64</sup> By doing so, it dispels any uncertainty about the abolition of the test or its parts. The Court also applies this principle to the mechanism of supplementary information, stating that if the executing institution deems the first step incomplete, it cannot request information relevant only to the second step.<sup>65</sup>

*GN* also clarified the scope of the Art. 23(4) Framework Decision exception created in *E.D.L.* The Court refused to apply it under these circumstances and further underlined that postponing the surrender must be temporary, exceptional, and for serious humanitarian reasons and is impracticable for a considerable period.<sup>66</sup> Overall, the CJEU's approach suggests the narrow nature of the *E.D.L.* exception in the future.

In *E.D.L.* the Court explained how lack of systemic issues precludes the second step from being fulfilled, as legal remedies provide a solution to a possible lack of jurisdiction. Remarkably, in *GN* the "remedy logic" of *E.D.L.* cannot apply or is at least not explained by the Court. This suggests that if there are no broad systemic issues within a Member State, the two-step test cannot be fulfilled and surrender refused, as potential breaches of rights of an individual would not justify such limitation of mutual trust. In *GN* the Court applied its approach in the context of Art. 7 and 24(2) of the Charter and gave no indication of taking a different path in the future in the context of other fundamental rights.

<sup>57</sup> GN para 24.

<sup>58</sup> GN para 33-33.

<sup>59</sup> GN para 38.

<sup>60</sup> GN para 44.

<sup>61</sup> By this statement it essentially declares the steps taken by the executing Italian court incompatible with EU law.

<sup>62</sup> GN para 45, 47-48.

<sup>63</sup> GN para 49-54.

<sup>64</sup> GN para 46.

<sup>65</sup> GN para 50.

<sup>66</sup> GN para 56.



### IV.3 Issues Left Unaddressed in GN

As advocate general Tamara Čapeta pointed out, there is a clear distinction that differentiates *GN* from previous case law. As it is the right to family life and the best interest of a child that are at stake, the executing court weighs not only the rights of the surrendered person but also the rights of the child.<sup>67</sup> While it may seem obvious, the protection of a child brings clear distinctions. The advocate general underlined the importance of the best interest of the child and argued that protection of their rights does not arise as a question of mutual trust, as their best interest requires attention even if the level of protection of children of mothers in prison is high.<sup>68</sup> She concluded that the two-step test should not be applied.<sup>69</sup>

While the Court reached a different conclusion and insisted on applying the *Aranyosi* doctrine, it is an element that should logically be taken into consideration even when applying the two-step test. Criminal proceedings bring an element of restriction of rights of the suspected or sentenced person because of the committed crime. The child, however, bares no responsibility for the criminal activity and limitation of his or her rights is thus less justified than limitation of rights of the surrendered parent. It would be reasonable to expect this factor to be considered and for the test applied in the context of EAWs affecting children to reflect this consideration. The Court, however, did not address this element.

Another piece of the legal puzzle of *GN* is Art. 4(6) of the Framework Decision. This provision was not included in the request for preliminary proceedings and consequently not addressed by the CJEU. It could, nevertheless, provide a solution for situations similar to *GN*. Article 4(6) of the Framework Decision offers an optional ground for refusal if the requested person is staying in, is a national of, or is a resident of the executing Member State.<sup>70</sup> The executing court may refuse the surrender if it will undertake to execute the sentence under its laws. The judgment does not provide sufficient factual details to determine with certainty if all recognition conditions would be met in *GN*. Nevertheless, this solution would in general dispel the Italian court's original concerns, as the mother could serve her sentence in Italy.

Some argue that *GN* ends the uncertainties surrounding the shape and role of the two-step test, as it is the only method for balancing fundamental rights protection and mutual trust, and *GN* solidifies its structure.<sup>71</sup> Although the future can never be predicted without a doubt, *GN* demonstrates the Court's commitment to the two-step examination and shows no sign of leaving it behind.

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<sup>67</sup> Opinion of advocate general Čapeta, Case C-261/22, *GN*, EU:C:2023:582, para 34.

<sup>68</sup> *GN* Opinion of AG Čapeta para 41.

<sup>69</sup> *GN* Opinion of AG Čapeta para 43.

<sup>70</sup> This ground for refusal aims only at EAWs issued for the purposes of execution of a custodial sentence or detention order, which corresponds to facts in *GN*. In cases of EAWs issued for the purpose of criminal prosecution the situation is comparable, as the executing court can ask for guarantees that the person will be returned to the executing country to serve the custodial sentence there (Art. 5(3) of the Framework Decision).

<sup>71</sup> See – MONTALDO, Stefano. The European Arrest Warrant and the protection of the best interests of the child: The Court's last word on the limits of mutual recognition and the evolving obligations of national judicial authorities. *Maastricht Journal of European and Comparative Law*. In: *Sage Journals* [online]. [2025-01-28]. Available at: <<https://doi.org/10.1177/1023263X241259311>>.

## CONCLUSION

The three recent landmark cases provided clarity on certain elements of the functioning of the EAW system yet sparked questions about its future. *Puig Gordi* brings clarifications to the procedure of the two-step test, i.e., the necessity of sequential and cumulative application of the steps. Its conclusions are reaffirmed even more explicitly in *GN*. In *Puig Gordi* the Court emphasized the need to prove the existence of systemic failures in protecting fundamental rights. By doing so, the Court acknowledged that in the absence of such systemic risks, breaches of rights of individuals in specific situations could be addressed at the national level through procedural remedies. In *GN*, however, such justification is not apparent. Consequently, the same approach can seemingly be applied to all areas of fundamental rights, and the test becomes stricter. The Court gives prevalence to mutual trust over higher protection of fundamental rights and does not give any indication of planning to change its approach in the future.

The third recent case that stands out – *E.D.L.* – should be seen as a separate stage of protection of fundamental rights. The *E.D.L.* exception allows for the threat to an individual's health to result in a refusal of surrender, as CJEU does not insist on establishing the existence of systemic or widespread deficiencies. While it may seem as the Court letting go of the first step, *E.D.L.* should not be seen as a variation or a development of the two-step test for multiple reasons. The first reason is that the Court itself does not discuss the two-stage approach. Additionally, the CJEU relies on a specific provision of the Framework Decision which should be applied after the executing court decides to execute the EAW. Art. 23(4) of the Framework Decision also addresses humanitarian reasons, which the Court seems to interpret narrowly. Finally, the Court's commitment to the two-step test and its form was reaffirmed in *GN*.

Overall, the discussed judgments confirm that the two-step test will play a significant role in the future of protection of fundamental rights in the EAW system. They also demonstrate the Court's ability to establish, if need be, new solutions for the protection of rights, as it did in *E.D.L.*