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Advocate General's Opinion in Case C-261/22 | GN (Reason for refusal based on the best interest of the child)

Advocate General Ćapeta: the execution of a European Arrest Warrant issued against a mother of small children may be refused when that is in the best interest of the child

Such a refusal is possible only if, after using the communication mechanism, the executing authority does not have sufficient information in order to be absolutely certain that the execution of the EAW would not go against the best interest of the child

A Belgian judicial authority issued a European Arrest Warrant ("EAW") against a woman for the execution of a sentence of five years' imprisonment. A few months later, she was arrested in Bologna, Italy. At the time of the arrest, her minor son lived with her, so the detention was replaced by house arrest to allow the child to be with the mother. The Court of Appeal of Bologna submitted a request for information from the Belgian judicial authority asking about the procedures for execution of a sentence in Belgium for mothers living with minor children. Not having received a reply, it refused the surrender.

The Italian Supreme Court of Cassation, hearing the appeals against the decision refusing the surrender, asked the Court of Justice **if it is possible to refuse or postpone the execution of an EAW if the requested person is a mother who lives with her minor children, when the surrender risks breaching the fundamental right of family life or the best interest of the child.**

In her Opinion, Advocate General Tamara Ćapeta observes that the EAW mechanism rests on the presumption that Member States respect fundamental rights. That presumption can only be brought into question if the executing authority has the knowledge of systemic or generalised deficiencies with ensuring the right to family life of persons imprisoned in the issuing state. **Since in the present case there is no indication about systemic deficiencies in the guarantees of family life of imprisoned persons in Belgium, the Advocate General considers that the executing authority cannot refuse to execute the EAW on the ground of a possible breach of the convicted woman's right to family life.**

The other person (or persons, given that the convicted woman in the meantime gave birth to a second child), whose fundamental rights are at issue in the present case, are the woman's children. The Charter of fundamental rights of the European Union protects the best interest of the child. The children involved in the case are potential collateral victims of the execution of the EAW, so the decision whether to execute an EAW may be affected by the concern for the best interest of the child. However, the possible non-execution of an EAW in order to protect those interests does not arise as a question of mutual trust, but rather as a question of finding the solution, which is in the best interest of a particular child.

According to Advocate General Ćapeta, the EAW Framework Decision does not, in principle, preclude the

refusal to execute an EAW issued against a mother of small children, when that is in the best interest of the child. Such a refusal is possible only if, after determining the concrete situation of the child and after using the communication mechanism of the EAW Framework Decision between the issuing and the executing judicial authority, the latter does not have sufficient information that would allow it to be absolutely certain that the execution of the EAW would not go against the best interest of the child.

The Advocate General adds, for the purposes of avoiding impunity, the facultative reason for non-execution under Article 4(6) of the EAW Framework Decision (allowing the executing Member State not to surrender the person if it undertakes to execute the prison sentence itself) might turn into an obligation for the executing judicial authority for the purpose of safeguarding the best interests of the child. Employing Article 4(6) of the EAW Framework Decision might be the best option if, for whatever reason related to the child at issue, it would be in his or her best interest not to leave the executing Member State, but it would simultaneously be important that he or she maintains frequent contact and a close relationship with his or her mother.

Temporarily postponing the surrender under Article 23(4) of the EAW Framework Decision is, according to the Advocate General, not an option in the case at hand, as it is only possible in respect of the requested person and in the event of the serious humanitarian reasons, for example, where the requested person's life or health would be manifestly endangered.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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