

Resisting Surrender on Grounds of Health: Moving beyond the Systemic Deficiencies Requirement in the Area of the European Arrest Warrant?

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Case C-699/21, *E.D.L.*

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INTRODUCTION

Based on the principles of mutual trust and mutual recognition, the Framework Decision on the European Arrest Warrant often gives rise to conflicts between these principles and the fundamental rights of individuals.¹ The Court of Justice of the European Union (the Court) has forcefully underlined on many occasions the cardinal importance of those principles for the institutional balance and the autonomy of EU law, noting that they allow an area without internal borders to be created and maintained.² As a result, member states are not simply prohibited

¹Council Framework Decision 2009/299/JHA of 26 February 2009, OJ 2009 L 81/24.

²On the judicial emergence and application of these principles see S. Prechal, 'Mutual Trust before the Court of Justice of the European Union', 2 *European Papers* (2017) p. 75. See also E. Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Faces of Evolution and the Uncharged Territory beyond Blind Trust', 55 *CML Rev* (2018) p. 489. On the relationship between the application of the principle of mutual trust and the protection of

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from making the fulfilment of their mutual recognition obligations conditional on the observance of their own constitutional standards of protection of fundamental rights. They are also not allowed in principle to ascertain whether another member state has observed in a particular case the fundamental rights of individuals as protected by EU law.³

That initially led the Court to adopt a very restrictive approach as to the circumstances in which an executing judicial authority may refrain from giving effect to a valid European Arrest Warrant, stressing that this can only take place on the basis of the mandatory and optional grounds for refusal specifically enumerated in the Framework Decision.⁴ Later on, it adopted a more nuanced position on the matter and in essence interpreted that Framework Decision as containing a fundamental rights clause that can only be activated in very exceptional circumstances.⁵ In order, therefore, to rebut the presumption of fundamental rights compliance that the European Arrest Warrant mechanism is based upon, the executing judicial authority is called upon to carry out a two-step assessment. It must establish in the first place the existence of systemic deficiencies in the issuing member state that adversely affect the fundamental right at stake, as protected by the provisions of EU law. Following that, it must ascertain that those systemic problems pose in the specific circumstances of the case a real risk of breach of that right for the requested person.

That case law was initially introduced in relation to the absolute prohibition of inhuman and degrading treatment, as regards in particular the assessment of the prison conditions in the issuing member state.⁶ Later on, it was extended

fundamental rights *see* E. Gill-Pedro and X. Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights', 35 *Nordic Journal of Human Rights* (2017) p. 258.

³ECJ (FC) 18 December 2014, *Opinion 2/13*, ECLI:EU:C:2014:2454, paras. 191-192. *See* for a recent confirmation ECJ (GC) 31 January 2023, Case C-158/21, *Puig Gordi and Others*, ECLI:EU:C:2023:57, paras. 93-94.

⁴Art. 3 and 4 of the Framework Decision. This approach was adopted in ECJ (GC) 11 February 2013, Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107. *See* indicatively on that case N. De Boer, 'Addressing Rights Divergences under the Charter', 50 *CML Rev* (2013) p. 1083; M. De Visser, 'Dealing with Divergences in Fundamental Rights Standards', 20 *Maastricht Journal of European and Comparative Law* (2013) p. 576; A.T. Pérez, 'Melloni in Three Acts: From Dialogue to Monologue', 10 *EuConst* (2014) p. 308; A. Pliakos and G. Anagnostaras, 'Fundamental Rights and the New Battle over Legal and Judicial Supremacy', 34 *Yearbook of European Law* (2015) p. 97.

⁵Art. 1(3) of the Framework Decision.

⁶Art. 4 Charter. That case law was introduced in ECJ (GC) 5 April 2016, Joined Cases C-404/15 PPU and C-659/15, *Pál Aranyosi and PPU Robert Căldăraru*, ECLI:EU:C:2016:198. *See* on that case G. Anagnostaras, 'Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant', 53 *CML Rev* (2016) p. 1675; M. Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: *Solange-III* and *Aranyosi*', 12 *EuConst* (2016) p. 549. *See also* in this respect ECJ 25 July 2018, Case C-220/18 PPU, *ML v Generalstaatsanwaltschaft*

to the fundamental right to a fair trial and the core requirements of judicial independence and of a tribunal previously established by law.⁷ In that latter area, the Court has clarified that the two steps of the applicable test cannot overlap with one another because they involve an analysis of information obtained on the basis of different criteria. Consequently, even the aggravation of the systemic problems affecting judicial independence in the issuing member state cannot relieve the national executing authority from its obligation to also carry out an individualised risk assessment that focuses specifically on the concrete situation of the requested person.⁸ Conversely, it is not permissible to refuse surrender on the ground of an individual risk of infringement of the right to an independent and impartial tribunal previously established by law in the absence of evidence attesting the existence of systemic problems in the operation of the judicial system of the issuing member state capable of affecting the person concerned.⁹

Despite the continuous reliance of the Court on the cumulative performance of both steps of the applicable test, one could nevertheless argue that at least in some circumstances the existence of a real risk of breach of a fundamental right needs by its nature to be ascertained solely by reference to the individual situation of the requested person regardless of the existence of systemic problems in the issuing member state. That is also in line with the relevant case law of the European Court of Human Rights, which clearly accepts that a fundamental rights violation under the European Convention on Human Rights may be based on the individual circumstances of the requested person even in the absence of structural shortcomings in the issuing member state.¹⁰

Bremen, ECLI:EU:C:2018:589 and ECJ (GC) 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu*, ECLI:EU:C:2019:857.

⁷Art. 47 Charter. That case law was introduced in ECJ (GC) 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality v LM*, ECLI:EU:C:2018:586. See on that case T. Konstantinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: *LM*', 56 *CML Rev* (2019) p. 743; M. Krajewski, 'Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges', 14 *EuConst* (2018) p. 792; P. Bárd and W. Van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*', 9 *New Journal of European Criminal Law* (2018) p. 353.

⁸ECJ (GC) 17 December 2020, Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P*, ECLI:EU:C:2020:1033, paras. 33-69. See on that case A. Frackowiak-Adamska, 'Trust until it is Too Late: Mutual Recognition of Judgments and Limitations of Judicial Independence in a Member State: *L and P*', 59 *CML Rev* (2022) p. 113. That has been confirmed also as regards alleged violations of the requirement of a tribunal previously established by law in ECJ (GC) 22 February 2023, Joined Cases C-562/21 PPU and C-563/21 PPU, X, Y, ECLI:EU:C:2022:100, paras. 50-81. See on that case G. Anagnostaras, 'Trust Must Go On! The "*Celmer*" Test Redefined: Openbaar Ministerie', 47 *European Law Review* (2022) p. 837.

⁹*Puig Gordi and Others*, *supra* n. 3, paras. 109-111.

¹⁰See for example ECtHR 9 July 2019, No. 8351/17, *Romeo Castaño v Belgium*, para. 86. A similar approach has been adopted also in the asylum area. See especially in this regard ECtHR (GC) 14 November 2014, No. 29217/12, *Tarakbel v Switzerland*, paras. 116-122. Furthermore, on

That there can indeed be exceptions to the obligation to perform automatically and mechanically both steps of the normally applicable test is well exemplified by the recent preliminary ruling in *E.D.L.*¹¹ In that case, the Court was given the opportunity to clarify the consequences that a serious chronic and potentially irreversible illness may have on the obligation to execute a valid European Arrest Warrant and to explain the assessment that needs to be made by the national executing authority if it concludes that the surrender of the requested person is likely to expose the latter to the risk of suffering serious harm to their general state of health. Aligning in essence its case law to the one already developed in the area of asylum policy and in extradition proceedings involving the removal of illegally staying third-country nationals, the Court concluded that a national judicial authority is required to refuse the execution of a European Arrest Warrant if the surrender of a person that is seriously ill gives rise to a real risk of inhuman and degrading treatment that cannot be ruled out within a reasonable period of time.¹² Albeit rather implicitly, the Court accepted, therefore, that in such circumstances the systemic deficiencies requirement is not usually relevant and that in most cases the assessment of the executing judicial authority must be based exclusively on the state of health of the requested person and the health-related consequences that are likely to arise in case of surrender to the issuing member state.

However, it will be argued that the legal reasoning employed by the Court – and especially its reluctance to introduce a new ground for non-execution based directly on the right to health as protected under Article 35 of the Charter – attests that its preliminary ruling should not be interpreted as providing a general authorisation to institute fundamental rights complaints based on any individual circumstances of the requested persons. After giving some necessary information about the legal and factual background of the case and the content of the preliminary ruling of the Court, this case note explains, therefore, the measure of protection provided to seriously ill persons in the area of European criminal law and the implications that the preliminary ruling entails as regards their prospects of successfully resisting the execution of a European Arrest Warrant. It attempts then to ascertain the circumstances in which it is permissible to refuse surrender on the basis of an individual risk of breach of a fundamental right even outside the context of life and health concerns. Needless to say, of course, that all this analysis

several occasions the ECtHR has warned against the automatic and mechanical application of the principle of mutual recognition to the detriment of fundamental rights. See for example ECtHR (GC) 23 May 2016, No. 17502/07, *Avotiņš v Latvia*, para. 116.

¹¹ECJ (GC) 18 April 2023, Case C-699/21, *E.D.L.*, ECLI:EU:C:2023:295.

¹²ECJ 16 February 2017, Case C-578/16 PPU, *C.K. and Others v Republika Slovenija*, ECLI:EU:C:2017:127, paras. 74-89 (asylum law); ECJ (GC) 22 November 2022, Case C-69/21, *X v Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:913, paras. 55-66 (extradition proceedings).

is also relevant for the other principal area governed by the application of the principle of mutual trust, namely that of the Common European Asylum Policy.

LEGAL AND FACTUAL BACKGROUND

The case concerned a European Arrest Warrant issued by the competent Croatian authorities for the purposes of conducting a criminal prosecution on suspicion of possession of narcotics for distribution and sale. The requested person resided in Italy and objected to his surrender, producing several medical documents attesting to the existence of serious psychiatric problems requiring medical treatment and psychotherapy and giving rise to a significant risk of suicide in the event of imprisonment. The executing judicial authority considered that the execution of the European Arrest Warrant would interrupt the medical treatment of the requested person and lead to a deterioration in his general state of health that could be exceptionally serious. It noted though that the national legislation implementing the provisions of the Framework Decision does not provide that health reasons may constitute a ground for refusing surrender, despite the fact that the right to health is protected by the Constitution.¹³ In these circumstances, it referred the case to the Italian Constitutional Court in order for the latter to rule on the constitutionality of the national implementing legislation.

The Constitutional Court stressed in its preliminary reference that it is not permissible to make the implementation of EU law in areas of full harmonisation conditional on compliance with purely national standards of fundamental rights protection. It noted that it would be manifestly contrary to the core principles of EU law to interpret national law as granting the executing judicial authority the competence to refuse to surrender the person concerned on the basis of national grounds for non-execution.¹⁴ Firmly basing, therefore, its reference on the provisions and principles of EU law, the Constitutional Court requested clarification on the possibility of extending by analogy the case law introduced in situations involving the existence of systemic flaws in the protection of fundamental rights to cases in which the medical condition of the person concerned is likely to deteriorate significantly in the event of surrender. More specifically, it asked whether in such circumstances Article 1(3) of the Framework Decision (hereinafter referred to as the fundamental rights clause) must be interpreted in the light of the Charter as imposing on the executing judicial authority the obligation to request the issuing national authority to provide information allowing the existence of such a risk to be ruled out. It also asked whether the executing judicial authority is required to refuse the surrender of a

¹³Arts. 2 and 32 of the Italian Constitution.

¹⁴Summary of the request for a preliminary ruling, paras. 18-22.

person suffering from a serious chronic and potentially irreversible illness, if it does not obtain adequate assurances within a reasonable period of time that the execution of the European arrest warrant will not expose that person to the risk of suffering serious harm to their health.

THE PRELIMINARY RULING OF THE COURT OF JUSTICE

The Court started by recalling that it was not prevented from providing all the elements of interpretation of EU law that may be of assistance in the adjudication of the case referred for a preliminary ruling, even though the referring constitutional court had limited its request to the interpretation of the fundamental rights clause of the Framework Decision.¹⁵ It reiterated then the importance of the principles of mutual trust and mutual recognition in the area of judicial cooperation in criminal matters and noted that the refusal to execute a European Arrest Warrant was intended to be an exception that must be interpreted strictly.¹⁶

The Court then underlined that the Framework Decision did not provide that an executing judicial authority is entitled to refuse surrender solely on the ground that the person concerned suffers from a serious, chronic and potentially irreversible illness. That is because there is a presumption stemming from the application of the principle of mutual trust that the health care and treatment provided in the member states for the management of such illnesses will be adequate, both in prisons and in the context of alternative arrangements for making that person available to the judicial authorities of the issuing member state.¹⁷

The Court immediately noted, though, that under Article 23(4) of the Framework Decision (hereinafter referred to as the humanitarian clause) the executing judicial authorities are authorised to postpone surrender in certain exceptional circumstances, relating *inter alia* to the existence of a manifest risk for the life and health of the requested person. Hence, surrender may be temporarily suspended if there are substantial reasons for believing, on the basis of objective material such as medical certificates and expert reports, that the execution of the European Arrest Warrant manifestly risks endangering the health of the person concerned.¹⁸

The preliminary ruling stressed then that the discretion conferred on the executing judicial authorities to postpone surrender under the humanitarian clause must be nevertheless exercised in accordance with the absolute prohibition

¹⁵*E.D.L.*, *supra* n. 11, para. 29.

¹⁶*Ibid.*, paras. 30-34.

¹⁷*Ibid.*, para. 35.

¹⁸*Ibid.*, paras. 36-37.

of inhuman and degrading treatment enshrined in Article 4 of the Charter.¹⁹ It cannot be completely ruled out that the surrender of a seriously ill person may cause that person to be exposed to a real risk of such a prohibited treatment, sometimes as a result of the level of health care available in the issuing member state but sometimes even regardless of the quality of the health care services provided in that country.²⁰ However, the ill-treatment that is likely to be suffered by the person concerned must reach a minimum level of severity exceeding the unavoidable level of suffering inherent in any imprisonment. That is the case in three situations. First, if the surrender of the seriously ill person would place the latter in a risk of imminent death. Second, if there are substantial reasons for believing that surrender would expose the requested person that is seriously ill to a real risk of a significant reduction in their life expectancy. Third, if there are substantial reasons for believing that this person would face in the event of surrender a real risk of a deterioration in their state of health that is not only serious but also rapid and irreversible.²¹ In such circumstances, the executing judicial authority is required, in accordance with Article 4 of the Charter, to exercise its power under the humanitarian clause by deciding to postpone the surrender.²²

The Court explained the obligations imposed on an executing judicial authority, once it has decided to temporarily suspend the surrender of the person concerned on the basis of the humanitarian clause. It noted that this clause should not be interpreted in such a way as to call into question the effectiveness of the system of judicial cooperation between the member states, of which the European Arrest Warrant constitutes one of the essential elements. That is particularly the case given that the objective of the mechanism of the European Arrest Warrant is also to combat the impunity of a requested person who is present in a territory other than the one in which they are suspected of having committed an offence.²³ In order to ensure that the operation of the European Arrest Warrant is not brought to a standstill, the issuing and the executing judicial authorities are required, therefore, under the principle of sincere cooperation to foster mutual trust by making full use of all the instruments provided for in the Framework Decision.²⁴ Consequently, if an executing judicial authority decides by way of exception to postpone temporarily the surrender of the requested person on the basis of the humanitarian clause, it is obliged to ask the issuing national authorities to provide it with all the information that is necessary in order to rule

¹⁹Ibid., para. 38.

²⁰Ibid., para. 39.

²¹Ibid., paras. 40–41.

²²Ibid., para. 42.

²³Ibid., paras. 43–44.

²⁴Ibid., paras. 45–46.

out the risk that has led to the temporary postponement of the surrender.²⁵ If sufficient assurances are indeed obtained to the effect that the serious illness suffered by the requested person will be subject to appropriate treatment and care in the issuing member state, it follows from the humanitarian clause that the European Arrest Warrant must be executed. The executing judicial authority is obliged then to inform the issuing national authority immediately and agree on a new surrender date.²⁶

However, in some exceptional circumstances the information received by the executing authority may not allow it to rule out within a reasonable period of time the risk that has led to the temporary suspension of the surrender.²⁷ In such an eventuality, it would be contrary both to the wording and the general scheme of the humanitarian clause for an executing authority to be able to suspend surrender for an indefinite period of time, keeping the person concerned to any coercive measures adopted against them even though there is no realistic prospect of completing the surrender procedure. Regard must also be had in that case to the fundamental rights clause of the Framework Decision, under which the existence of a real risk of infringement of the absolute prohibition of inhuman and degrading treatment is capable of permitting the executing judicial authority to refrain exceptionally from the execution of a European Arrest Warrant.²⁸ Hence, in these circumstances the interpretation of the fundamental rights clause in the light of Article 4 of the Charter does not allow the executing authority to give effect to the European Arrest Warrant.²⁹

A SERIOUS THREAT TO HEALTH RESULTING FROM SURRENDER: A NOVEL APPROACH

In the cases decided thus far in the area of the European Arrest Warrant involving alleged violations of fundamental rights, the Court had relied on the fundamental rights clause of the Framework Decision, examined in the light of the relevant provisions of the Charter and the principle of sincere cooperation, in order to impose on the executing judicial authorities three positive and closely interconnected obligations, once they have previously established, in the first step of their assessment, the existence of systemic flaws in the protection of those rights in the issuing member state. The first such obligation is to contact the

²⁵Ibid., para. 47.

²⁶Ibid., paras. 48-49.

²⁷Ibid., para. 50.

²⁸Art. 1(3) of the Framework Decision.

²⁹*E.D.L.*, *supra* n. 11, paras. 51-53.

competent national authorities of the issuing member state and to seek as a matter of urgency any information that they consider necessary in order to rule out the risk that the requested person would be exposed in the event of surrender to violation of their fundamental rights as a result of the systemic deficiencies affecting the general level of protection of those rights in the requesting member state.³⁰ The second obligation is to suspend temporarily the surrender of the person concerned until they obtain the additional information that allows them to rule out the existence of such a risk.³¹ The third obligation is to refuse to give effect to the European Arrest Warrant in those exceptional cases where the existence of that risk cannot be discontinued within a reasonable time.³²

In its preliminary request, the referring Constitutional Court proposed to extend this construction to cases where the surrender of the requested person is likely to create a serious risk to their health. It referred therefore to the fundamental rights clause of the Framework Decision examined in the light of the absolute prohibition of inhuman and degrading treatment, the right to the integrity of the person and the right to health care as enshrined in the Charter.³³ The Constitutional Court stressed that health is undoubtedly a fundamental right protected under EU law that must also be recognised in full for those accused of committing a criminal offence.³⁴ It also suggested that allowing reliance on that right in the area of the European Arrest Warrant and imposing an obligation of judicial dialogue between the competent national authorities of the member states concerned that aims to rule out the risk of its violation would reconcile the need to protect the fundamental rights of a person that is seriously ill with the interest of prosecuting suspected offenders and the objective of combatting impunity.³⁵ Although this is not explicitly mentioned in the preliminary reference, the Constitutional Court also seems to insinuate that such a solution would amount

³⁰This obligation is imposed by reference to Art. 15(2) of the Framework Decision, as interpreted in the light of the principle of sincere cooperation of Art. 4(3) TEU. On the content of this duty of sincere cooperation and the obligations that it imposes on the executing and the issuing authority see particularly *X, Y*, *supra* n. 8, paras. 47-49 and 84-85 and *ML*, *supra* n. 6, paras. 79-86. On the importance of sincere cooperation for giving effect to the principle of mutual trust see L. Mancano, 'You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant and Judicial Independence', 58 *CML Rev* (2021) p. 683 at p. 690-691.

³¹See particularly *Aranyosi and Căldăraru*, *supra* n. 6, para. 98. In the cases that followed, little attention has been paid to this obligation but the analysis has rather centred on the obligation to cooperate and to ascertain the need to refuse surrender.

³²*Dorobantu*, *supra* n. 6, paras. 82-84; *Puig Gordi and Others*, *supra* n. 3, paras. 72 and 96.

³³Arts. 4, 3 and 35 Charter respectively.

³⁴Summary of the request for a preliminary ruling, para. 31.

³⁵*Ibid.*, paras. 33-35.

to a harmonious protection of the fundamental rights of the requested person under both EU law and national constitutional law.³⁶

However, the preliminary reference adopts a novel approach and brings into play for the very first time the humanitarian clause of the Framework Decision. This provision allows the surrender of the person concerned to be postponed for serious humanitarian reasons, *inter alia*, if there are grounds for believing that this would manifestly endanger the health of that person. It is interesting to note that both the referring court and most of the parties intervening in the proceedings had argued that reliance on this article seems to be unsuitable in case of chronic illnesses because it is clear from its very wording that it is meant to address situations of a purely temporary nature.³⁷ On the contrary, a chronic illness is likely to last indefinitely and this would oblige the executing judicial authority to postpone surrender for an equally indeterminate time. This would place the requested person in a situation of continuous legal uncertainty and would deprive the European Arrest Warrant of any practical effect, preventing the issuing member state from prosecuting the person concerned and enforcing the sentence against them.

Despite these reservations, the preliminary ruling considered that reliance on the humanitarian clause must be the primary option for the executing judicial authority every time the requested person alleges the existence of serious health issues. The Court created in this respect three consecutive levels of assessment as regards the examination that needs to be carried out by the competent national authority. In the first place, the executing judicial authority must examine whether the medical condition of the requested person is such that allows the surrender to be temporarily postponed for serious humanitarian reasons.³⁸ However, it is only where extremely severe health problems give rise to a real risk of violation of the absolute prohibition of inhuman and degrading treatment that this authority is actually obliged to suspend surrender and to seek supplementary information that might ultimately lead it to the conclusion that it is necessary to refuse exceptionally the execution of the European Arrest Warrant.³⁹ Thus, the protection of health is not introduced as an autonomous ground for refusing the surrender of seriously ill persons but the examination of health-related concerns takes

³⁶See also in this respect the Opinion of AG Campos Sánchez-Bordona in Case C-699/21, *E.D.L.*, ECLI:EU:C:2022:955, para. 23.

³⁷Summary of the request for a preliminary ruling, paras. 13-13. See also the submissions of the Croatian and the Netherlands Governments and the Commission.

³⁸*E.D.L.*, *supra* n. 11, paras. 36-37 (decision on the need to postpone surrender on a discretionary basis).

³⁹*Ibid.*, paras 38-42 (obligation to postpone surrender) and 43-53 (exchange of information and decision on the need to terminate surrender).

place in the context of the humanitarian clause contained in the Framework Decision and the absolute prohibition of inhuman and degrading treatment enshrined in the Charter.

Bringing serious chronic illnesses under the scope of the humanitarian clause: the optional suspension of surrender

The executing authority must first ascertain whether it is authorised under the humanitarian clause to temporarily suspend surrender because there are serious reasons for believing that the execution of the European Arrest Warrant manifestly risks endangering the health of the person concerned. In such a case, the suspension is optional and not obligatory for the executing authority.⁴⁰

The preliminary ruling seems to accept that this scenario also covers serious chronic illnesses that manifestly imperil the health of the requested person. It is true that the Court is not very explicit in this respect but refers generally to a condition of that person that may exist before the date of the expected surrender.⁴¹ However, the preliminary ruling notes that the Framework Decision does not provide that an executing judicial authority may refuse surrender solely on the ground that the person concerned suffers from a chronic and potentially irreversible illness and refers immediately after to the humanitarian clause and the possibility of suspending surrender for reasons that relate, *inter alia*, to the health of that person being manifestly endangered.⁴² That suggests that this possibility exists also as regards severe enduring illnesses.

Although the notion of a manifest risk to health is inherently vague and open to interpretation, it is nevertheless apparent that the benchmark has been set rather high by the EU legislature and that less severe health risks do not allow the executing judicial authority to consider the possibility of suspending surrender. The Court did not provide any clarification as to the health risks that fall below that threshold, despite the apparent importance that the specification of this severity requirement has for the protection of seriously ill persons. However, it is clear from its preliminary ruling that even the existence of such a manifest health risk cannot lead in itself to the imposition of the obligation to postpone surrender and does not authorise the national executing authority to refuse to give effect to a European Arrest Warrant. That is probably also the reason why the Court did not impose in such circumstances an obligation on the executing judicial authority to seek additional information from the competent authorities of the issuing member state concerning the manner in which the criminal proceedings will take

⁴⁰Ibid., paras. 36-37.

⁴¹Ibid., para. 37.

⁴²Ibid., paras. 35-36.

place and the conditions under which the requested person will serve their sentence.⁴³ That is because the ultimate aim of this exchange of information is to establish the need to refuse in exceptional circumstances the execution of a valid European Arrest Warrant on the basis of a real risk of violation of the fundamental rights of the person concerned. Nevertheless, that option is not available to the executing authority on the sole ground that surrender would manifestly endanger the health of the requested person. Arguably, therefore, the Court considers that it suffices in such circumstances to rely on the more relaxed and informal communication mechanism provided by the humanitarian clause.⁴⁴

Reinterpreting the humanitarian clause under the provisions of the Charter: the introduction of a new mandatory ground for postponement

In addition though to the health risks that meet the severity threshold to be considered manifestly serious, *E.D.L.* also refers to a particular subcategory of health-related risks that are so particularly serious and potentially life threatening as to amount eventually to a real risk of inhuman and degrading treatment for the requested person under Article 4 of the Charter.⁴⁵ In these circumstances, the need to give effect to the absolute prohibition of inhuman and degrading treatment makes it obligatory for the executing judicial authority to postpone surrender.⁴⁶ In other words, the leeway that the latter authority enjoys under the humanitarian clause to temporarily suspend surrender turns into an obligation in order to serve the standard of protection of fundamental rights imposed by the Charter.⁴⁷

There are several interesting observations that can be made with regard to this. The first is that the preliminary ruling aligns in essence the protection provided to the requested persons that are seriously ill to the one already available under

⁴³*Ibid.*, para. 47.

⁴⁴It is submitted though that the principal aim of this mechanism is to arrange a new date for the surrender once the reasons that have led to its postponement cease to exist.

⁴⁵*E.D.L.*, *supra* n. 11, paras. 38–41. The Court applies in this respect the relevant standards of protection under Art. 3 of the ECHR. *See* for example X, *supra* n. 12, paras. 63–66. It has been argued though that in some instances that protection is actually lower than the one required under the ECHR. *See* in this respect D. Gines Martin, 'In Limbo: Divergent Conceptualisations of Ill-treatment by European Courts and the Creation of Non-removable Migrants', 6 *European Papers* (2021) p. 1173.

⁴⁶*E.D.L.*, *supra* n. 11, para. 42

⁴⁷In her Opinion in ECJ Case C-261/22, *G.N.*, para. 95, AG Ćapeta proposed a similar construction as regards Art. 4(6) of the Framework Decision when it comes to protecting the best interests of the child under Art. 24 of the Charter. She argued that in such circumstances the option provided by this article to the executing judicial authority to carry out the custodial sentence of the requested person in the executing member state turns into an obligation if it is concluded that it is in the best interest of the children of the person concerned not to leave that member state.

asylum law and in extradition proceedings involving illegally staying third-country nationals.⁴⁸ In both those areas, the Court has interpreted the Charter in the light of the relevant case law under the European Convention on Human Rights to allow the transfer of persons suffering from serious physical and mental illnesses solely under circumstances that rule out the existence of a real risk of inhuman and degrading treatment.⁴⁹ The protection provided in this respect covers not only the capacity of the person to travel and the medical consequences that are likely to arise during and immediately after transfer but also any serious and permanent consequences that may ensue progressively after the completion of their removal as a result of their state of health and the medical care available in the receiving country.⁵⁰

The next point that needs to be made is that, as regards in particular chronic and potentially irreversible illnesses, it is very challenging to think of cases in which surrender would manifestly risk imperiling the health of the person concerned without coming at the same time under any of the three situations in which the health-related risk is elevated to a risk of inhuman and degrading treatment. As a result, it is hard to imagine that an executing judicial authority will be able, but not also obliged, to postpone the surrender of a person suffering from such a serious chronic illness. One could assume, therefore, that as regards severe enduring illnesses, reliance on the humanitarian clause will usually not be made for its original intended purpose but rather under the new role that has been assigned to it by the *E.D.L.* preliminary ruling, that is to operate as the legal basis for the introduction of a new mandatory reason for postponement. Arguably then, optional postponement under the humanitarian clause will continue to be relevant principally for temporary illnesses, provided of course that the surrender of the requested person at the originally arranged date manifestly risks endangering their health. Needless to say that even in such circumstances the leeway recognised to the national executing authority to order surrender must be

⁴⁸*C.K. and Others*, *supra* n. 12, paras. 74-89 (asylum law). For more on this preliminary ruling see Š. Imamovic and E. Muir, 'The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?', 2 *European Papers* (2017) p. 719. See also *X*, *supra* n. 12, paras. 55-66 (extradition proceedings). For more on this preliminary ruling see A. Pahladsingh, 'Serious Illness of a Third Country National and Medical Treatment and the Options for the Member States: Removal or Legal Stay?', *EU Law Live*, 12 December 2022, <https://eulawlive.com/op-ed-serious-illness-of-a-third-country-national-and-medical-treatment-and-the-options-for-the-member-states-removal-or-legal-stay-by-aniel-pahladsingh/>, visited 8 January 2024.

⁴⁹ECtHR (GC) 13 December 2016, No. 41738/10, *Paposhvili v Belgium*, para. 183. For more on this case see A. Den Exter, 'Strasbourg Medical Expulsion Rulings: Beyond the Deathbed Requirement', 27 *European Journal of Health Law* (2019) p. 115. See also V. Stoyanova, 'How Exceptional Must "Very Exceptional" Be? Non-refoulement, Socio-economic Deprivation and *Paposhvili v. Belgium*', 29 *International Journal of Refugee Law* (2017) p. 580.

⁵⁰*C.K. and Others*, *supra* n. 12, para. 76; *X*, *supra* n. 12, paras. 72-74 and 77-82.

exercised in a manner that respects the fundamental rights of the person concerned.

The last point that needs to be made concerns the reasons why the Court chose to base this new obligatory ground for postponement on the humanitarian clause rather than the fundamental rights clause of the Framework Decision, as the situation has been in all its previous case law. The obvious explanation is that it is preferable to reinterpret an existing legal basis that refers specifically to the protection of health even at the risk of straining its intended operation rather than to use a generic legal basis that reiterates the obligation to respect the fundamental rights and legal principles as protected under EU law.⁵¹ One could still wonder, though, whether the Court would have introduced this new mandatory ground for suspension even in the absence of the humanitarian clause, given that health-related risks arise in many cases because of the specific situation of the person concerned and their individual needs for medical care rather than because of the general circumstances and conditions that exist at any country level. It can reasonably be expected that it would have, basing it directly on the fundamental rights clause of the Framework Decision and linking it again to the requirements stemming from the absolute prohibition of inhuman and degrading treatment. The fact remains that the existence of the humanitarian clause allowed it to avoid answering that question in a manner that could be interpreted as providing the green light to bringing fundamental rights claims based on any individual circumstance of the requested person. Under this interpretation, the reliance on the humanitarian clause also serves the argument that only exceptionally is it possible to postpone surrender if the risk of a fundamental rights violation stems from a situation that is specific to the person concerned and not from systemic and generalised conditions attributed to a given member state. That point will be further elaborated later on in this article.

Bringing into play the fundamental rights clause: the introduction of a new ground for refusal

Once a national executing authority has ordered the temporary suspension of the surrender on the basis of the humanitarian clause, it is then under an obligation to initiate a dialogue and to engage in an exchange of information with the competent authorities of the issuing member state.⁵² This obligation aims to preserve the effectiveness of the European Arrest Warrant mechanism and to serve

⁵¹See also in this respect the Opinion of AG Campos Sánchez-Bordona in *E.D.L.*, *supra* n. 11, paras. 72-78.

⁵²*E.D.L.*, *supra* n. 11, paras. 43-49.

its principal objective of combatting impunity.⁵³ Certainly, these effectiveness requirements are not mentioned as balancing factors that may affect the obligation of the executing authority to suspend surrender in case of a real risk of inhuman and degrading treatment for the requested person that is seriously ill.⁵⁴ Nor is it implied that an absolute fundamental right must be balanced against the requirements of the protection of the rights and freedoms of others and especially of the victims of the crime, having also regard to the nature and the severity of the criminal offence at stake.⁵⁵ After all, the Court has made it perfectly clear in relation to the examination of the prison conditions in the issuing member state that the existence of a risk of inhuman and degrading treatment cannot be balanced against any considerations relating to the efficacy of judicial cooperation in criminal matters and to the core principles of mutual trust and mutual recognition.⁵⁶ However, the national authorities concerned are obliged to exchange information in a spirit of sincere cooperation in order to complete the surrender of the requested person that is seriously ill as soon as appropriate assurances have been provided that the risks leading to its temporary suspension have been ruled out.⁵⁷

One could think, for example, that these assurances may relate to the existence of legal instruments that allow the imprisonment of the seriously ill person to be replaced by less severe coercive measures that permit the provision of proper

⁵³That objective has been referred on several occasions in the case law. See for example X, Y, *supra* n. 8, para. 62 and *Puig Gordi and Others*, *supra* n. 3, para. 141.

⁵⁴That is also in line with the previous case law in this area. The reference to the objective of combating impunity has been made thus far: to impose on the executing authority the obligation to also perform an individualised assessment where systemic flaws exist that affect the right to an independent and impartial tribunal previously established by law (*L and P*, *supra* n. 8, paras. 62-64 and *X, Y*, *supra* n. 8, paras. 60-62); to support the issuing of a new European Arrest Warrant in the event that the reasons preventing the execution of the previous one have been ruled out (*Puig Gordi and Others*, *supra* n. 3, para. 141); to circumscribe the obligation of the executing authority to seek additional information (*Dorobantu*, *supra* n. 6, paras. 65-67).

⁵⁵Reference to the victims of the crime was made for the first time in *X, Y*, *supra* n. 8, paras. 60-61 to underline the duty of cooperation imposed on the executing authority and the need to provide a sufficient factual basis for its finding that there exists a real risk of violation of the right to a fair trial if the person concerned is surrendered to the issuing member state. See in this respect Anagnostaras, *supra* n. 8, p. 849-850. More recently, a similar reference has been made in *Puig Gordi and Others*, *supra* n. 3, para. 118 to support the conclusion that it is necessary to rely on the existence of effective legal remedies in the issuing member state, enabling a review of the jurisdiction of the court called upon to try the requested person. This novel operation of fundamental rights as a sword that facilitates surrender is based on *Romeo Castaño*, *supra* n. 10, paras. 83-92. For more on this case see S. Top and P. De Hert, 'Castaño Avoids a Clash between the ECtHR and the CJEU, but Erodes Soering. Thinking Human Rights Transnationally', 12 *New Journal of European Criminal Law* (2021) p. 52.

⁵⁶*Dorobantu*, *supra* n. 6, paras. 82-84.

⁵⁷*E.D.L.*, *supra* n. 11, para. 48.

medical care, especially in cases where the European Arrest Warrant has been issued for the purpose of conducting a criminal prosecution. Also, the existence of appropriate infrastructure that allows the continuation of the same therapeutic treatment that the person concerned had started in the executing member state, even in the event of imprisonment. The preliminary ruling clearly suggests that normally it should be expected that the requesting member state will be in a position to provide these assurances. However, one could imagine that in isolated cases the person concerned may require very specialised medical assistance that is not available in the issuing member state.⁵⁸ In other cases, the risk may arise from the travel itself, regardless of the quality of the medical care that the requested person will receive following surrender.⁵⁹ As regards in particular mental illnesses, the consequences that the very act of surrender and the change of environment may have on the person concerned may be very hard to measure and to effectively address.

In those exceptional situations in which the exchange of information between the competent national authorities does not make it possible to rule out, within a reasonable period of time, that the surrender of the person that is seriously ill will not subject the latter to a real risk of inhuman and degrading treatment, the executing authority is precluded from giving effect to the European Arrest Warrant.⁶⁰ Thus, in these exceptional circumstances the ground for mandatory postponement originally introduced on the basis of the extended interpretation of the humanitarian clause turns into a new ground for non-execution. The principal legal basis for the introduction of this new ground for refusal is the fundamental rights clause of the Framework Decision. Contrary though to the previous case law in the area, this latter clause does not operate in a completely autonomous manner but is rather brought into play only after the reliance on the humanitarian clause has made it possible in the first place to temporarily postpone the surrender of the requested person. *E.D.L.* notes in this respect that the humanitarian clause does not provide the authorisation to suspend surrender for an indefinite period of time, as this would adversely affect both the effectiveness of the mechanism of judicial cooperation in criminal matters and the legal interests of the requested person.⁶¹ It is only then that it finally refers to the operation of fundamental rights clause, recalling that this is capable of permitting the executing authority to

⁵⁸See by analogy ECJ (GC) 18 December 2014, Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*, ECLI:EU:C:2014:2453, paras. 46-48. Also see ECJ 5 June 2014, Case C-255/13, *I v Health Service Executive*, ECLI:EU:C:2014:1291, paras. 56-57.

⁵⁹See for example *C.K. and Others*, *supra* n. 12, paras. 73-75.

⁶⁰*E.D.L.*, *supra* n. 11, paras. 50-53.

⁶¹*Ibid.*, para. 51.

refrain – exceptionally and following an appropriate assessment – from giving effect to a European Arrest Warrant.⁶²

Hence, the combined application of the humanitarian clause (which provides the authorisation to temporarily postpone surrender) and the fundamental rights clause (which comes into play once the suspension of the surrender has been ordered on the basis of the humanitarian clause) may eventually authorise the executing authority to refuse surrender. That authority is required, of course, to offer a sufficient factual basis for its refusal and to substantiate in an appropriate manner that the seriously ill person will indeed run a real risk of breach of their fundamental rights if the European Arrest Warrant is executed.⁶³ In any case though, that refusal must be based on the existence of a real risk of violation of the prohibition of inhuman and degrading treatment rather than of the right to health as an autonomous fundamental right protected by the Charter.⁶⁴ In fact, *E.D.L.* leaves extremely little room for consideration of possible situations in which this latter right may be relied upon in the area of the European Arrest Warrant. If the surrender manifestly endangers the health of the requested person without that risk reaching the severity threshold required in order to be elevated to a real risk of inhuman and degrading treatment, the Court makes applicable the humanitarian clause as it stands. An obligatory ground for postponement that may eventually turn into a mandatory ground for non-execution is introduced on the basis of an expansive understanding of the humanitarian clause and the combined application of the fundamental rights clause of the Framework Decision, but only under their interpretation in the light of the absolute prohibition of inhuman and degrading treatment enshrined in the Charter. There is absolutely no mention in the entire preliminary ruling of the right to health as a self-standing fundamental right capable of imposing restrictions on the operation of the European Arrest Warrant mechanism.

⁶²*Ibid.*, para. 52.

⁶³See to this end *Romeo Castaño*, *supra* n. 10, paras. 90-92. In that case, reliance was made on the procedural limb of the right to life under the ECHR in order to impose on the executing member state a positive obligation of cooperation with the judicial authorities of the issuing member state. See also ECtHR 25 March 2021, Nos. 40324/16 and 12623/17, *Bivolaru and Moldovan v France*, paras. 105-106 and 117. For more on this case see L. Mancano, 'Judicial Cooperation, Detention Conditions and Equivalent Protection. Another Chapter in the EU-ECHR Relationship: *Bivolaru and Moldovan v. France*', 56 *Revista General de Derecho Europeo* (2022) p. 207.

⁶⁴On the existence and scope of that right see especially H. Suorsa, 'Creating a European Health Union in Times of COVID-19: A Trajectory Towards a Fundamental Right to Health Care?', in P. Czech at al. (eds.), *European Yearbook on Human Rights 2021* (Intesentia 2021) p. 137.

DEPARTING FROM THE SYSTEMIC DEFICIENCIES REQUIREMENT: LOOKING BEYOND THE AREA OF HEALTH-RELATED RISKS

E.D.L. is the second case decided on the basis of the existence of an individual risk of violation of fundamental rights in an area governed by the core principle of mutual trust. The first such occasion was in the *C.K.* preliminary ruling, in the area of European asylum law.⁶⁵ The application of mutual trust in the area of the Common European Asylum Policy means in practice that all member states are obliged in principle to consider that the member state responsible to examine the asylum request and to ascertain the need to provide international protection to the asylum seeker will fully respect the fundamental rights of that person.⁶⁶ Following though the seminal preliminary ruling in *N.S.*, it has been clarified that the competent national authorities are not allowed to transfer an applicant for international protection to the member state normally responsible if there exist systemic flaws in the asylum procedure and the reception conditions of asylum seekers in that member state that amount to substantial grounds for believing that the person concerned would face there a real risk of suffering inhuman and degrading treatment contrary to the requirements of the Charter.⁶⁷ That prohibition was later codified also in the provisions of the Dublin III Regulation.⁶⁸ However, the question soon arose whether the need to protect the fundamental rights of asylum seekers imposes additional exceptions to the operation of the principle of mutual trust going beyond those resulting from the legislative implementation of the *N.S.* case law.

That question was answered in the affirmative in *C.K.*⁶⁹ In that case, the applicant invoked the existence of very serious medical problems of a psychiatric nature that could potentially lead to very severe and permanent consequences in

⁶⁵*C.K. and Others*, *supra* n. 12. The basic legal instrument applicable in this area is Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L180/31 (Dublin III).

⁶⁶See for example ECJ 19 March 2019, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Bashar Ibrahim and Others v Bundesrepublik Deutschland*, ECLI:EU:C:2019:219, para. 85.

⁶⁷ECJ 21 December 2011, Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner*, ECLI:EU:C:2011:865. For more on this preliminary ruling see G. Mellon, 'The Charter of Fundamental Rights and the Dublin Convention: An Analysis of *N.S. v. Secretary of State for the Home Department*', 18 *European Public Law* (2012) p. 655; J. Buckley, '*N.S. v. Secretary of State for the Home Department*', *European Human Rights Law Review* (2012) p. 208.

⁶⁸Art. 19 of Dublin III, *supra* n. 65.

⁶⁹*C.K. and Others*, *supra* n. 12.

the event of her transfer to the member state normally responsible, regardless of the quality of the reception and care that she would be afforded in that country. The *C.K.* preliminary ruling concluded that it is not only the existence of systemic problems in the member state responsible that is capable of affecting the obligation to transfer an asylum seeker to that member state.⁷⁰ It was stressed that the competent national authorities of the transferring member state are obliged to eliminate any serious uncertainties concerning the impact of the transfer on the state of health of the person concerned, taking into consideration not only the consequences of physically transporting that person but also all the significant and permanent consequences that might arise as a result of the transfer.⁷¹ If the adoption of appropriate precautions is not sufficient to ensure that the transfer will not result in a real risk of a significant and permanent worsening of the state of health of the applicant for international protection amounting to a violation of the prohibition of inhuman and degrading treatment, it is for the national authorities of the transferring member state to suspend the execution of the transfer for as long as the person concerned remains unfit for transfer.⁷² If the state of health of the asylum seeker is not expected to improve in the short term, the requesting member state may choose to carry out its own examination of the application of the asylum seeker.⁷³ The same is the case if the suspension of the transfer procedure for a long period would risk worsening the medical condition of the person concerned.⁷⁴

Both *E.D.L.* and *C.K.* concerned a health-related risk. The question that arises, therefore, is whether exceptions to the systemic deficiencies requirement and to the application of the two-step test can be accepted even in cases that are not related to the protection of health.

Individual risks of fundamental rights violations: The scope of application of the principle of mutual trust

As regards that question, it is necessary to examine once again the reliance on the humanitarian clause made by the Court in the preliminary ruling in *E.D.L.* Its implication could be that in the absence of systemic problems affecting the general level of protection of the fundamental right concerned at the country level, it is necessary to invoke a specific legislative provision that allows provisional action to be taken in order to counteract an individual risk of violation of that right. Only if such a provision exists is it possible to reinterpret its content in the

⁷⁰Ibid., paras. 91-95.

⁷¹Ibid., paras. 73-76.

⁷²Ibid., paras. 77-85.

⁷³On the basis of the discretionary clause of Art. 17(1) of Dublin III, *supra* n. 65.

⁷⁴*C.K. and Others*, *supra* n. 12, para. 88.

light of the Charter and to impose on the competent national authorities an obligation to postpone the execution of the contested measure. And it is only following such a temporary suspension that it is possible to consider the need to refuse to give effect to that measure, in the event that a real risk of violation of the fundamental right at stake cannot be ruled out within a reasonable period of time.

Although appealing at first reading, such an interpretation of the preliminary ruling is not correct. If that were the case, the Court should have followed a similar approach also in its asylum case law. The relevant EU legislation contains a provision that refers to the postponement of the transfer for physical reasons such as the ill health of the asylum seeker, even though its operation is confined to the imposition of an obligation on the national authorities concerned to inform the member state responsible for this temporary suspension.⁷⁵ However, the Court has not made any reference to this provision in the *C.K.* ruling nor has it implied at any point that the application of the Charter for the protection of an asylum seeker who is severely ill is made conditional on the existence of specific legislation that allows the transfer to be postponed for serious health reasons. On the contrary, it has noted that the Charter imposes on the national authorities of the transferring member state the obligation to take account in these exceptional circumstances of the individual situation of the person concerned.⁷⁶

In order to provide a more comprehensive answer, it is also necessary to look closer at the operation and intended scope of application of the principle of mutual trust. The presumption of fundamental rights compliance introduced by this principle means that any individual violations of the Charter provisions that may occur in a given member state will normally be addressed and remedied in that very country by using the legal and other institutional mechanisms available there.⁷⁷ It is exactly on the basis of the understanding that these mechanisms will indeed be sufficient to protect those rights to the level required by the Charter that the competent national authorities proceed to the surrender of the requested person to the issuing member state and the transfer of the applicant for international protection to the member state responsible to examine the asylum request in the areas of judicial cooperation in

⁷⁵Art. 9 of Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2013 L222/3.

⁷⁶*C.K. and Others*, *supra* n. 12, para. 95.

⁷⁷See for example ECJ 13 January 2021, Case C-414/20 PPU, *Criminal Proceedings against MM*, ECLI:EU:C:2021:4, para. 61; ECJ 17 December 2020, Case C-416/20 PPU, *TR v Generalstaatsanwaltschaft Hamburg*, ECLI:EU:C:2020:1042, para. 55. See also the conclusions of AG Ćapeta in *G.N.*, *supra* n. 47, paras. 29-30.

criminal matters and asylum law respectively. That this is indeed so is very well exemplified by the preliminary ruling in the *Puig Gordi* case.⁷⁸

In that latter case, the requested persons alleged in essence the existence of a real risk of infringement of their right to an independent and impartial tribunal previously established by law. The preliminary ruling concluded though that if the issuing member state provides for effective legal remedies enabling a review of the jurisdiction of the court called upon to try the person concerned, the risk that this person may be tried by a court lacking jurisdiction can in principle be ruled out by the exercise of those remedies. It was also noted that there is no valid reason for a national executing authority to question the existence and effectiveness of those remedies, in the absence of evidence exhibiting that there are systemic flaws in the operation of the judicial system of the issuing member state. There is therefore a rebuttable presumption of effective legal remedies in that latter member state, based on the operation of the principle of mutual trust.⁷⁹

There are nevertheless instances in which the risk of violation of a fundamental right cannot be addressed by relying on the institutional mechanisms available in another member state, regardless of their efficacy. That is because that risk arises from the particular circumstances of the person concerned that remain specific to them in all situations, irrespective of the general level of protection of fundamental rights in any member state. The need to preserve the principle of mutual trust does not come into play in these cases, at least not in its original intended purpose. On the contrary, one could possibly contend that it constitutes a violation of this principle to surrender a requested person and to transfer an asylum seeker in circumstances that are likely to give rise to an individual risk of breach of their fundamental rights because of the specific situation of the person concerned. Only that this time the violation is attributed to the member state that allows that risk to materialise.⁸⁰

Health-related risks clearly fall into this category. Certainly, it is not inconceivable that in some instances the risk for the person who is seriously ill may arise because of the health system of the member state concerned, its inadequate hospitalisation facilities and the general conditions of medical care that are made available to patients

⁷⁸*Puig Gordi and Others*, *supra* n. 3. See on this preliminary ruling J. Solanes Mullor, '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*', 30 *Maastricht Journal of European and Comparative Law* (2023) p. 201. See also L. Mancano, 'Refusal of Execution of a European Arrest Warrant in the Absence of Systemic Deficiencies? The Court of Justice Develops the Exceptional Circumstances doctrine in *Puig Gordi*', *EU Law Live*, 14 March 2023, <https://eulawlive.com/op-ed-refusal-of-execution-of-an-european-arrest-warrant-in-the-absence-of-systemic-deficiencies-the-court-of-justice-develops-the-exceptional-circumstances-doctrine-in-puig-gordi/>, visited 8 January 2024.

⁷⁹*Ibid.*, paras. 112-115.

⁸⁰See also in this respect *C.K. and Others*, *supra* n. 12, para. 95.

in that country.⁸¹ However, in many cases the risk arises from the illness itself and may be intensified if the person is moved to another member state regardless of the quality of the medical assistance that they will receive there. In these circumstances, the refusal to execute the measure concerned cannot be interpreted as a violation of the principle of mutual trust. As a result, there is no need to rebut its application by looking for the existence of systemic flaws at country level.

The situation becomes much less clear cut as regards other types of risks of fundamental rights violations. Consider, for example, the right to respect for private and family life.⁸² The person concerned may invoke a risk of violation of that right because of the existence of long-established family and social ties and parental responsibilities in the country of their residence. It is certainly true that in order to have a bearing on the outcome of the case, those risks must be of such a nature as to affect the very essence of that relative fundamental right.⁸³ It must further be established that the limitations imposed by the contested measure on the exercise of this right infringe the principle of proportionality, having regard also to the general interest objectives that they pursue.⁸⁴ The question remains, though, whether it makes sense to adhere in these circumstances to the performance of the two-step test claiming the need to protect the principle of mutual trust, rather than to proceed directly to an individualised legal assessment based on the specific situation of the person concerned.

A case that is currently pending before the Court also brings to the stage the protection of the best interests of the child and their potential impact on the obligation to execute a European Arrest Warrant.⁸⁵ The Advocate General of the

⁸¹Consider for example the critical situation in the medical system of some member states at the outbreak of the coronavirus pandemic.

⁸²Art. 7 Charter.

⁸³As has been clarified in relation to the right to a fair trial in *LM*, *supra* n. 7, paras. 59-78. See, on the notion of the essence of fundamental rights, T. Tridimas and G. Gentile, 'The Essence of Rights: An Unreliable Boundary?', 20 *German Law Journal* (2019) p. 794; M. Brkan, 'The Essence of Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning', 20 *German Law Journal* (2019) p. 864; M. Dawson at al., 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' 20 *German Law Journal* (2019) p. 763; K. Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights', 20 *German Law Journal* (2019) p. 779.

⁸⁴According to Art. 52(1) Charter. That is because the right to respect for private and family life is a non-absolute fundamental right.

⁸⁵Art. 24(2) Charter. On the nature and practical application of this right see E. Frasca and J.Y. Carlier, 'The Best Interests of the Child in ECJ Asylum and Migration Case Law: Towards a Safeguard Principle for the Genuine Enjoyment of the Substance of Children's Rights?', 60 *CML Rev* (2023) p. 345; L. Lonardo, 'The Best Interests of the Child in the Case Law of the Court of Justice of the European Union', 29 *Maastricht Journal of European and Comparative Law* (2022) p. 596. As regards the application of that right under the ECHR see J. Collinson, 'Making the Best

case has noted that in such circumstances the problem does not arise as a question of mutual trust but rather requires an individual assessment of the concrete situation of the child at issue.⁸⁶ Even if there are no systemic flaws in the treatment the issuing member state provides to parents of small children and in the prison conditions of those persons, the Charter requires that a primary consideration should always be the best interests of the child concerned. As a result, a possible refusal to give effect to a European Arrest Warrant concerning the parent of a small child does not imply mistrust as to the ability of the issuing member state to protect effectively the fundamental rights of individuals. It is rather explained by reference to the specific situation of that person and the best interests of their child.

It is nevertheless interesting that the same Advocate General has also proposed to maintain the traditional two-step approach as regards the right to family life of the person concerned.⁸⁷ She underlines in her Opinion that it is the responsibility of the issuing member state to resolve any individual violations of that right, including by ensuring access to its national courts.⁸⁸ The implication seems to be that it is normally objectively possible to remedy any breaches of fundamental rights that may occur after the completion of the surrender procedure and even to prevent such infringements from taking place, by resorting to the use of effective institutional and legal mechanisms. Consequently, it would seem to question both the capacity and the readiness of the issuing member state to provide these mechanisms if the national executing authority were allowed to examine directly the individual situation of the person concerned without first looking for objective and reliable evidence attesting the existence of systemic problems in that member state. In other words, the circumvention in such circumstances of the first tier of the normally applicable test would amount to a violation of the principle of mutual trust and would also infringe the allocation of competences and responsibilities between the issuing and the executing member state.

It appears, therefore, that the bypassing of the systemic deficiencies requirement is possible only in very exceptional circumstances and provided that it cannot be interpreted as questioning without the existence of evidence the ability of the member state concerned to effectively protect the fundamental rights of individuals at the general country level. Far from indicating a departure from the approach that has been inaugurated since the *Aranyosi* case law, the preliminary ruling in *E.D.L.* should rather be understood as an illustrative example of such an exceptional circumstance that is closely related to the

Interests of the Child a Substantive Human Right at the Centre of National Level Expulsion Decisions', 38 *Netherlands Quarterly of Human Rights* (2020) p. 169.

⁸⁶Opinion of AG Ćapeta in *G.N.*, *supra* n. 47, paras. 40-43.

⁸⁷*Ibid.*, paras. 22-28.

⁸⁸*Ibid.*, paras. 29-31.

fact that risks to life and health are indeed often linked to the illness itself and do not arise because of the general level of protection of those rights in any member state.

CONCLUSION

The preliminary ruling in *E.D.L.* is both interesting and important. Relying on a constructive interpretation in the light of the Charter of a humanitarian clause that had not attracted any attention until then, the Court created a new mandatory ground for postponement that may eventually lead to the obligation to refuse the execution of a European Arrest Warrant where the surrender of the person that is seriously ill is likely to give rise to a real risk of inhuman and degrading treatment. The preliminary ruling aligns in this respect the level of protection provided to requested persons suffering from serious chronic illnesses to the one already available to the persons concerned in the area of the Common European Asylum Policy and in extradition proceedings involving third-country nationals. However, the legal reasoning employed by the Court and the severity threshold that needs to be met in order to refuse surrender leave very little room for an autonomous reliance on the right to health as a self-standing fundamental right protected by the Charter. Hence, the case law continues to place very little attention on the existence of this right and its exact scope of application.⁸⁹ That is despite the fact that such a right is expressly recognised in most national constitutions.⁹⁰ The end result is that it is only in very exceptional circumstances that the existence of a health-related risk will be able to affect the measure of the obligations imposed on the competent national authorities under EU law.

Beyond the scope of application of the humanitarian clause, the ruling suggests that the search for systemic deficiencies is neither relevant nor appropriate in those exceptional instances in which the risk of violation of the fundamental right at issue stems from individual circumstances that are truly specific to the person concerned and is therefore likely to emerge regardless of the efficacy of the general level of protection of that right in any member state. In such an event, it does not imply mistrust against a member state to concentrate directly on the individual situation of the person concerned without first attempting to establish the existence of systemic problems under the first tier of the normally applicable test. That is because the core principle of mutual

⁸⁹See in this respect C. Lugarre, 'A Right to Health in the European Union?', *Opinio Juris*, <http://opiniojuris.org/2023/06/13/a-right-to-health-in-the-european-union/>, visited 8 January 2024.

⁹⁰E.D. Kinney and B.A. Clark, 'Provisions for Health and Health Care in the Constitutions of the Countries of the World', 37 *Cornell International Law Journal* (2004) p. 285.

trust and the presumption of fundamental rights compliance that this introduces do not normally come into play in such a case. That is undoubtedly a welcome development that brings the relevant case law of the Court closer to that under the European Convention on Human Rights and therefore facilitates its reception at national level.⁹¹

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⁹¹See for example *Romeo Castaño*, *supra* n. 10, para. 86; *Tarakhel*, *supra* n. 10, paras. 116-122.